

Somali Pirates as Agents of Change in International Law-making and Organisation

*Douglas Guilfoyle**

1 Introduction

Somali piracy is a highly adaptive business activity that can only be understood in context. The present article aims to provide an analysis of the phenomenon and in particular its impact on international law-making and organisation. The relevant developments have moved fast enough that there is already a significant history of international co-operation in response to Somali piracy. The contention of this article is that the most important impact of Somali pirates as agents of change has *not* been on the substantive law of piracy but through generating new models of co-operation and soft-law. This has been evident in a range of shifts: the move from a military approach to law enforcement operations; from unilateral enforcement to international authorisation and then to transnational co-ordination; a shift from reliance on formal organisations to informal co-ordinating bodies; and from maritime operations in the Gulf of Aden to various land-based operations, most notably including law and prison reform. The use of soft-law in particular is most evident in the shipping industry's response to piracy.

The present article thus proceeds by first offering an extended account of the history of Somali piracy and its context. This is vital for two reasons: first, one must appreciate that Somali piracy is not a static phenomenon; and second, understanding how Somali piracy is shaped by its context cautions us against concluding that Somali-style piracy may 'spread' to other regions. The article then turns to the rise of international counter-piracy operations and counter-piracy co-operation. Here we see a rapid shift from a largely 'military paradigm' response (unilateral actions and Security Council authorised missions) to a

* Reader in Law, Faculty of Laws, University College London. E-mail: <d.guilfoyle@ucl.ac.uk>.

'law enforcement response'. The latter in particular requires transnational co-ordination, which soon moves out of formal international organisations to a range of informal co-ordinating bodies. Finally, we can see how a response that commenced as, in effect, containment of piracy through maritime patrols becoming increasingly engaged in operations ashore, though usually in the form of engagement with criminal justice sector reform rather than military strikes on pirate bases.¹ Some tentative conclusions are then offered about the effectiveness of current efforts.

2 Somali piracy: understanding the business model and its evolution

Somali piracy is often presented, typically by pirates themselves, as being a justified response to illegal fishing and toxic waste dumping in Somali waters by foreign vessels.² In truth, "there were pirate attacks as early as in 1991, which targeted cargo ships, vessels not related to illegal fishing".³ From the very onset of Somali governmental collapse in 1991, local piracy had an element of opportunism unrelated to whether the vessels seized were engaged in illegal activity. There may have been an early period of piracy in the mid-1990s to early 2000s which encompassed self-styled volunteer coast guards "targeting fishing vessels accused of fishing illegally in Somali territorial waters" and holding them to ransom⁴ (or simply 'fining' them⁵); but in this early and sporadic phase the vessels taken included "an equal representation of fishing vessels, commercial traders or private yachts".⁶ There is, therefore, little evidence of a clear-cut transition from 'coast guard' to 'criminal' forms of piracy.

¹ Though these occur: Y. Bayoumy, 'EU helicopters strike Somali pirate base on land', *Reuters*, 15 May 2012, available at <<http://www.reuters.com>> [last accessed 22 August 2012].

² UN International Expert Group on Piracy off the Somali Coast, 'Piracy off the Somali Coast: Final Report' (2008), at 27, available at <<http://www.asil.org/files/SomaliaPiracyIntlExpertsreportconsolidated1.pdf>> [last accessed 21 August 2012]. Cf. L. Ploch *et al.*, 'Piracy off the Horn of Africa' (Congressional Research Service, 2011), at 9, available at <<http://www.fas.org>> [last accessed 21 August 2012].

³ S. J. Hansen, 'Piracy in the greater Gulf of Aden: Myths, Misconception and Remedies' (Norwegian Institute for Urban and Regional Research, 2009), at 20, available at <<http://dev02.imbera.no/nibr/filer/2009-29-ny.pdf>> [last accessed 28 October 2012].

⁴ UN Expert Report, *supra* note 2, at 19.

⁵ R. Marchal, 'Somali Piracy: The Local Contexts of an International Obsession', (2011) 2 *Humanity* 31, at 37, 39-40. Compare CRS Report, *supra* note 2, at 5.

⁶ UN Expert Report, *supra* note 2, at 18.

Further, most pirates are not displaced fishermen but members of “nomadic, land based clans” who “generally have little or no knowledge of the sea”.⁷ Certainly, illegal fishing has occurred and represents a vast potential economic loss to Somalia.⁸ However, fishing has in practice never been a large part of the Somali economy,⁹ and the most demonstrable economic damage to local communities dependent on fishing resulted from the destruction caused by the 2004 tsunami.¹⁰ Maritime toxic waste dumping is, as one would expect, a hard crime to prove. It certainly seems documented that various Somali warlords entered into contracts with European companies to allow the latter to bury dangerous waste on land or coastal sites within Somalia.¹¹ UN missions in 1992, 1997, 1998 and 2005, however, found no evidence of the widely-reported barrels of toxic waste allegedly dumped at sea and subsequently washed up along the Somali shore.¹² Indeed, the 2005 UN mission “visited three key populated coastal locations” where “toxic waste hazards” were allegedly freshly uncovered by the 2004 tsunami; no such waste was found.¹³ Evidence of illegal oily waste discharge by passing vessels is, however, firmly established.¹⁴ Ultimately, the truth or falsehood of these claims is irrelevant. “Pirates are seen [by many Somalis] as genuine nationalists who fight the looting of national assets and fine foreign vessels *recurrently* accused of depriving Somalis of their national wealth”.¹⁵ This fits a (generally entirely justifiable) local narrative in which Somalis see Somalia as the victim of successive waves of foreign intervention

⁷ *Ibid.*, at 17-18.

⁸ ‘Report of the Secretary-General on the protection of Somali natural resources and waters’, UN Doc. S/2011/661 (2011), para 18.

⁹ The UN Food and Agriculture Organization estimates that fishing represented, pre-war, no more than 2-3% of GDP: UNFAO, ‘Fishery Country Profile: The Somali Republic’ (2005), available at <http://www.fao.org/index_en.htm> [last accessed 21 August 2012].

¹⁰ G. Tello, ‘Fisheries Tsunami Emergency Programme: Somalia, End of Mission Report’ (UNFAO, 2005), at 10, available at <www.fao.org/index_en.htm> [last accessed 21 August 2012].

¹¹ D. MacKenzie, ‘Toxic waste adds to Somalia’s woes’, *New Scientist*, 19 September 1992, at 5; T. Kington, ‘From cocaine to plutonium: mafia clan accused of trafficking nuclear waste’, *The Guardian*, 9 October 2007, available at <<http://www.guardian.co.uk>> [last accessed 21 August 2012]. Compare Natural Resources Report, *supra* note 8, at paras 46-7 (dumping in Africa generally).

¹² Natural Resources Report, *supra* note 8, at paras 51-4.

¹³ See UN Environment Programme, ‘The State of the Environment in Somalia: A Desk Study’ (2005), at 33, available at <<http://postconflict.unep.ch/publications.php?prog=none>> [last accessed 21 August 2012].

¹⁴ Natural Resources Report, *supra* note 8, para 52.

¹⁵ Marchal, *supra* note 5, at 38 (emphasis added).

and exploitation.¹⁶

That said, we can discern a number of shifts over time in Somali piracy. First, Somali piracy dating from 1991 through to the early-2000s saw few vessels captured and ransomed each year. These “relatively rare incidences ... were viewed somewhat sensationally” by the media, but were not seen as a major international problem.¹⁷ This conclusion is supported by the fact that Somali piracy was not seriously raised in the International Maritime Organization (IMO) and UN Security Council until 2006-7, and even then the international response only really commenced with the *Le Ponant* episode in April 2008 (discussed below).¹⁸

The boom in Somali hostage-taking piracy from approximately 2003-4 onwards resulted from a combination of factors: the rise of an efficient business model; a collapse in government and policing in Puntland, the region of Somalia where most piracy is based; and a shift towards the use of mother ships. One must also bear in mind the strategic geographic position of Somalia in relation to some of the world’s busiest shipping routes and the significant financial incentives for front-line or foot-soldier pirates. Getting anything done in Somalia usually requires, in the absence of effective centralised authority, the support of clans.¹⁹ Hansen identifies as an important factor in the piracy boom the emergence of a new piracy cartel in the Hobyo-Harardhere area. The Hobyo-Harardhere cartel was established by Mohamed Abdi Hassan ‘Afweyne’ who was able to assemble an efficient, profit-oriented piracy enterprise and who “managed to transcend [ordinary] clan [allegiances], by actively recruiting the best pirates for his group”.²⁰ The impact of this ‘entrepreneurial’ approach to piracy is returned to below. Another enabling condition for piracy was provided by the financial collapse of the regional government of Puntland, which stopped paying its police in April 2008.²¹ The Puntland government had always only had a relatively weak capacity to repress piracy; now it effectively had none. Finally, the most successful adaptation of Somali piracy has been in

¹⁶ Hansen, *supra* note 3, at 11-2. Hansen also notes frequent clashes between Somalis over rights to use certain local fishing grounds. Cf. Marchal, *supra* note 5, at 39-40; House of Commons Foreign Affairs Committee, ‘Piracy off the coast of Somalia’ (2012), at Ev 30, available at <<http://www.parliament.uk>> [last accessed 27 February 2012].

¹⁷ UN Expert Report, *supra* note 2, at 18.

¹⁸ See generally A. Panossian, ‘L’Affaire du Ponant et le renouveau de la lute internationale contre la piraterie’, (2008) 112 *RGDIP* 661, 661-7; D. Guilfoyle, ‘Counter-Piracy Law Enforcement and Human Rights’, (2010) 59 *ICLQ* 141, at 145-6.

¹⁹ Hansen, *supra* note 3, at 26.

²⁰ *Ibid.*, at 23-4. On clan structure, see *ibid.*, at 25.

²¹ *Ibid.*, at 32-3.

the use of mother ships, a practice which has evolved over time. At least as late as May 2007 it was thought any vessel sailing 200 nm or more from Somalia would be safe from attack.²² Somali pirates, however, were able to considerably extend their range through first using skiffs to hijack local (often Yemeni) fishing dhows and then using these larger dhows to tow the skiffs much further out to sea in order to attack merchant shipping. Mother ships, often indistinguishable from genuine fishing vessels and often with hostages still aboard, were in use in this basic manner no later than 2007.²³

At the time of writing, in August 2012, Somali piracy has increased its range still further. The basic tactic remains the same: hijack fishing vessels, and redeploy these as “mother ships, in order to capture larger merchant vessels”.²⁴ However, now these larger merchant vessels may, in turn, not only be held for ransom but also used as mother ships themselves. This provides pirates with not only the ability to attack multiple further merchant vessels but also new supplies, increased range and endurance (especially in terms of staying at sea in poor weather). This new ability to ride out bad weather and await days with a calmer sea state means that pirates can now operate in the monsoon season, a time of year which had previously seen a decline in attacks.²⁵ This shift in tactics also means that pirates can now “almost always deploy[] with hostages on board”, making military intervention difficult.²⁶ Pirates have thus progressively refined and developed the use of mother ships to significantly expand their capabilities. Pirate attacks now range as far as 1800 nm out from the Somali coast.²⁷ This so-called ‘balloon effect’ is in large part of consequence of naval success in securing the Internationally Recommended Transit Corridor, discussed below.

The range of pirates is yet further increased by the psychology of the front-line pirates themselves. For example, if one had a vessel capable of holding supplies for 30 days then:

A prudent mariner would steam for nine days and have 10 days loiter time, at which point [as a pirate] he would hope to get lucky and catch a ship; he would give himself one day’s fudge factor and

²² See ‘Call to arms to tackle Somalia piracy threat; International shipping community must act to end violent attacks’, *Lloyd’s List*, 16 January 2008, at 15.

²³ UN Expert Report, *supra* note 2, at 19.

²⁴ M. Hijmans, ‘Threats of the Sea’, (2011) 67(11) *The World Today* 22, at 22.

²⁵ *Ibid.*, at 22.

²⁶ *Ibid.*, at 23.

²⁷ *Ibid.*, at 22.

10 days to get back. Somalis do not do that: they steam for 30 days until they run out of everything, at which point, in desperation ... they will go for anything.²⁸

An enabling condition for these tactics is the culture of physical bravery among young Somali men. Having grown up in a strife-torn country the calculus of risks involved to them must look very different than it might to those of us sitting in the west. The share of the profits made by front-line pirates is not large,²⁹ but it represents enormous wealth compared to other available opportunities. Somali pirates may thus be understood as 'irrational rational actors'. They are willing to take extraordinary risks, but once that willingness is taken into account, their tactics represent an entirely sensible business strategy.

At the same time, the violence of pirate attacks on merchant vessels and their violence in the treatment of hostages has increased noticeably over 2011.³⁰ The former may be partially attributable to ship-board defences: even the adoption of passive or non-lethal defences by merchant shipping may prompt pirates to use greater violence in an effort to force a vessel to stop and allow boarding. Theories as to the cause of increased violence (there are even allegations of torture³¹) against captured hostages vary. Some consider it an effort to increase pressure in ransom negotiations; others suggest that the 'outsourcing' by pirates of the physical care and custody of hostages to other gangs may result in their immediate captors having less concern for their welfare and more for keeping costs down.³² Still others suggest that a greater percentage of pirates are coming from having spent time fighting in Somalia and so are more accustomed to using violence.³³

Despite its success to date, a new difficulty for the pirate business model may be emerging. It may be that piracy has become geared around expectations

²⁸ House of Commons Report, *supra* note 16, at Ev 16-7.

²⁹ Gettleman suggests that in one case involving a record US \$10 million ransom payment, the front-line Somali 'gunmen' involved received a \$150,000 share but after advances and expenses were deducted by pirate bosses earned only \$20,000: J. Gettleman, 'Money in Piracy Attracts More Somalis', *The New York Times*, 9 November 2010, available at <<http://www.nytimes.com>> [last accessed 21 August 2012].

³⁰ E.g. W. Ross, 'US deaths show growing pirate violence in hijackings', *BBC News*, 23 February 2011, available at <<http://www.bbc.co.uk/news>> [last accessed 21 August 2012].

³¹ The term must be understood colloquially. Other than in the context of a war crime or crime against humanity, torture as a legal term requires the involvement or acquiescence of a government agent.

³² On outsourcing, see Hansen, *supra* note 3, at 36.

³³ Ross, *supra* note 30.

of a level of return the insurance market will no longer bear in practice. For example, if pirates assume on capturing a merchant vessel they face a ransom negotiation period of no more than 60-120 days, and a ransom payment of at least USD 3 to 4 million, they will make arrangements accordingly.³⁴ This will inform how much is promised to investors, how many guards they are willing to hire to watch over hostages, and how much credit they are willing to take from local businesses (who effectively under-write the costs of feeding hostages and guards). During the ransom negotiation the pirate business effectively runs on credit. If, however, the pirates are forced to settle for less than anticipated, they may actually run into trouble meeting their commitments to investors or creditors. Indeed, pirates may themselves default on creditors in order to maintain a profit.³⁵ Why have pirates in some cases been forced to settle for radically lower sums? Arguably, as more vessels transiting the Gulf of Aden adopt recommended safety measures (see the discussion of Best Management Practices, below) and/or armed guards, the result is that those vessels taking least precaution for their own safety are more likely to be taken by pirates. In turn, these 'low-cost' shipping operators who could not or would not bear the costs of implementing better security are also those least likely to have extensive insurance. Increasingly, perhaps, the vessels that make easiest prey for pirates are those least likely to be profitable. This, however, remains speculation. To date, piracy has proved sufficiently lucrative to sustain a variety of business models.

There is no single universal structure or even single type of organisation behind the present Somali piracy industry. Notably, "[t]he 2008 boom led to the fragmentation of piracy, and groups became smaller and more varied", although they seem typically recruited based on pre-existing "family or village ties".³⁶ Hansen outlines three basic models:

- "the first one involves a responsible group structure within which an investor functions as leader, carrying all costs, but also taking most of the ransom";
- "[t]he second ... has a shareholder structure in which the pirates themselves invest to meet the current running expenses of the group"; and

³⁴ R. Young Pelton, 'Pirates Fight Over MV Blida Ransom', *Somalia Report*, 7 November 2011, available at <<http://www.somaliareport.com>> [last accessed 21 August 2012].

³⁵ *Ibid.*

³⁶ Hansen, *supra* note 3, at 34.

- the third “has a shareholder structure in which a leader gathers shares from local investors and hires a crew (often on commission)”, commission in this context meaning “no prey, no pay”.³⁷

The latter model most notoriously resulted in the ‘pirate stock exchange’ of Haradheere.³⁸ Under this model, ordinary Somalis could make modest contributions of money or weapons to a particular pirate mission and would take a share in the ransom paid in the event of a successful hijacking. Despite this evident decentralisation, there are still suggestions that a significant part of Somali piracy is ultimately controlled by a “relatively small number” of bosses and financiers, whose, “identities ..., locations [often within Somalia] and political connections are widely known”.³⁹ Thus:

Naval forces estimate that there are about 50 main pirate leaders, around 300 leaders of pirate attack groups, and around 2,500 ‘foot soldiers’. It is believed that financing is provided by around 10 to 20 individuals. In addition, there is a large number of armed individuals guarding captured ships, and numerous [English-speaking] ransom negotiators.⁴⁰

On any approach, the basic Somali piracy business model has a number of enabling factors and constraints which are indigenous to Somalia. The role of an ample supply of potential recruits and a culture of physical bravery has already been noted. Most importantly, the Somali business model requires a kind of highly-ordered lawlessness: the absence of effective central government repression is needed to undertake piracy, but a degree of relative stability is needed for it to be profitable.⁴¹ That is, functioning markets are required to finance missions and supply hostages/pirates, and an effective informal banking sector is needed to deal with the large quantities of physical cash generated by ransoms. In this sense, the combination of clan networks and weak government in Puntland appear to provide the requisite degree of stability in the absence of

³⁷ *Ibid.*, at 35-6.

³⁸ M. Ahmed, ‘Somali sea gangs lure investors at pirate lair’, *Reuters*, 1 December 2009, available at <<http://www.reuters.com>> [last accessed 21 August 2012].

³⁹ ‘Report of the Secretary-General on the modalities for the establishment of specialized Somali anti-piracy courts’, UN Doc. S/2011/360 (2011), para 64.

⁴⁰ *Ibid.*, Annex I, at para 3. Estimates vary as to the number of translators/negotiators.

⁴¹ See in particular S. Percy & A. Shortland, ‘The Business of Piracy in Somalia’ (Deutsches Institut für Wirtschaftsforschung, 2011), especially at 13-4, available at <<http://www.diw.de/en>> [last accessed 8 August 2012].

effective policing.⁴² In this context, the start-up costs to forming a 'pirate action group' are relatively low, though not negligible:

a 15-foot pirate skiff costs between USD 1000 and 2000 and supplies have to be bought. Skiffs are seldom rented, many attacks involve more than two boats and the investor has to provide food and supplies for the expedition, perhaps some USD 100 a day for a sizable group.⁴³

The risks, however, are higher than many realise. Physically, it seems likely that more pirates are lost at sea than killed in naval encounters.⁴⁴ Financially, returns are generally either nil or very high. If a pirate action group comes back empty-handed, or not at all, the investment is lost. A further enabling condition in Somalia is obviously the extraordinary length of its coastline; 3,300 kilometres,⁴⁵ facing onto a vital and busy route for world shipping. However, the collapse of the central government and general economy places a constraint on Somali piracy. Somali pirates can only ransom crews and cannot evolve to the early 2000s South-East Asian model of piracy where crews might be set adrift so the vessel and its cargo could be sold,⁴⁶ due to the lack of functional ports in Somalia.

Overall, one major theme is discernible in the evolution of Somali piracy. A key driver of change has been improvements in security.⁴⁷ Indeed, the expansion of the area of pirate operations and the escalation in pirate violence off Somalia may be seen as perverse consequences of efforts to suppress or mitigate piracy. These efforts are discussed further below, but in essence improved security in the Gulf of Aden provided by naval forces has displaced piracy elsewhere in the Indian Ocean, while improved ship-board security

⁴² On the risk of local economies becoming piracy-dependent see J. Lang, 'Report of the Special Adviser to the Secretary-General on Legal Issues Related to Piracy off the Coast of Somalia', UN Doc. S/2011/30 (2011), at para 16.

⁴³ Hansen, *supra* note 3, at 14.

⁴⁴ On some estimates up to 30% of Somali pirates are lost at sea: J. Goldstein, 'F.B.I.'s Man on the Pirate Beat, Seeking Confessions', *The New York Times*, 21 August 2011, available at <<http://www.nytimes.com>> [last accessed 21 August 2012].

⁴⁵ Lang Report, *supra* note 42, para 40.

⁴⁶ D. Guilfoyle, *Shipping Interdiction and the Law of the Sea* (Cambridge University Press, 2009), at 52-3; P. Mukundan, 'Piracy and Armed Attacks against Vessels Today', (2004) 10 *Journal of International Maritime Law* 308, at 308-15.

⁴⁷ N. Hopkins & C. Chonghaile, 'Somali pirates take more risks and rethink tactics', *The Guardian*, 21 February 2012, available at <<http://www.guardian.co.uk>> [last accessed 21 August 2012].

(brought about largely by industry self-regulation) may have contributed to an escalation in pirate violence. The important point to capture is that Somali piracy is not a static model, but a moving target.

The threat to the shipping community remains, however, low in terms of absolute risk. Only about 1.5 ships in every thousand transits are hijacked;⁴⁸ further, while the absolute number of Somali pirate attacks on vessels increased through most of 2011, (other than a sharp drop at year's end), the success rate of such attacks has been falling. In the first nine months of 2011 attempted hijackings were successful in 12% of cases, down from 28% the previous year.⁴⁹ This may, of course, simply encourage pirate gangs to make more attacks in an effort to secure a profitable vessel, but the operating costs of such a strategy (food, fuel, etc) may drive smaller pirate operations out of business.⁵⁰

3 International counter-piracy in the Gulf of Aden: the shift from military operations to transnational corporation

3.1 Introduction

Until late 2007, Somali piracy drew relatively little international concern. In 2007-8, however, the *Le Ponant* episode prompted both a French military intervention in Somalia and soon after a—in some ways quite traditional—Security Council Resolution authorising the use of force. A wide range of naval deployments off Somalia followed.

A striking feature of subsequent developments has been the rapidity of change. Very quickly the limitations of a military strategy to contain or deter piracy became apparent and a shift from a 'military' to 'law enforcement' paradigm followed. Even more noteworthy is the range of co-operative mechanisms that followed, almost all of which have been informal, decentralised and located outside the major international institutions such as the IMO and UN. The change has not occurred exclusively in the public realm; the shipping industry has also been a notable contributor to the growth of relevant soft law.

⁴⁸ Hijmans, *supra* note 24, at 24.

⁴⁹ 'As world piracy hits a new high, more ships are escaping Somali pirates, says IMB report', *ICC Commercial Crime Services*, 18 October 2011, available at <<http://www.icc-ccs.org/news>> [last accessed 21 August 2012].

⁵⁰ Young Pelton, *supra* note 34.

3.2 Early Concerns: Institutional and Unilateral Responses

IMO statistics show a steep rise in attempted and successful high seas pirate attacks off East Africa after 2004. Taking the figures for attempted and successful attacks together shows that: in 2004, the East African region accounted for nine out of 97 reported incidents worldwide of violence, robbery or hijack against ships on the high seas; in 2005, the figure was 26 out of 65 incidents; in 2006, 18 out of 60 incidents; and in 2007, East Africa accounted for 33 out of 88 incidents.⁵¹ The real figures may well be higher, given the historic under-reporting of attempted piracy.⁵² In November 2007, the IMO requested that Somalia's Transitional Federal Government (TFG) and the Security Council take urgent action regarding piracy.⁵³ The TFG gave consent to such measures on 27 February 2008. The only action taken to that date by the Security Council had been in protection of World Food Programme convoys.⁵⁴ The spur to wider action came when in April 2008 crew and passengers aboard the French yacht *Le Ponant*, including 22 French nationals, were taken hostage by pirates in international waters off Somalia.⁵⁵ The hostages were released within a week, following payment of a ransom; however, French commandoes (with TFG permission) captured the pirates on their return to shore and the pirates were taken to Paris for trial.⁵⁶ The same month, France co-sponsored what became Security Council Resolution 1816.⁵⁷

⁵¹ Guilfoyle, *supra* note 46, at 49-50. See also the IMO Annual Reports on Acts of Piracy and Armed Robbery against Ships, available at <<http://www.imo.org/OurWork/Security/SecDocs/Pages/Maritime-Security.aspx>> [last accessed 27 October 2012].

⁵² Guilfoyle, *supra* note 46, at 46 and 51.

⁵³ IMO Res A.1002(25), 29 November 2007, para 6.

⁵⁴ See SC Res 1772, 20 August 2007, para 18; and later SC Res 1801, 20 February 2008, para 12. Cf. SC Res 1814, 15 May 2008, para 11.

⁵⁵ Panossian, *supra* note 18.

⁵⁶ *Ibid.*

⁵⁷ 'UN urged to tackle Somali pirates', *BBC News*, 28 April 2008, available at <<http://www.bbc.co.uk/news>> [last accessed 21 August 2012]; SC Res 1816, 2 June 2008.

3.3 The First ‘Use of Force’ UN Security Council Resolutions and ‘Deter and Disrupt Patrols’: June 2008

Resolution 1816, the first of the major counter-piracy resolutions, was a classic UN authorisation of the use of force: it authorised entry into Somalia’s territorial waters (by states co-operating with the TFG) and the use there of all “necessary means to repress acts of piracy and armed robbery” (paragraph 7); while on the high seas it urged states “to be vigilant to acts of piracy” and to “render assistance to vessels threatened by or under attack by pirates or armed robbers, in accordance with relevant international law” (paragraphs 2 and 3). While certainly contemplating state co-operation in “the investigation and prosecution of persons responsible for acts of piracy and armed robbery off the coast of Somalia” (in paragraph 11), it is fair to say that Resolution 1816 was more a general mandate to conduct ‘deter and disrupt’ patrols⁵⁸ than a clarion call for pirate prosecutions. Though it clearly did not invoke the laws of war, Resolution 1816 was more phrased in terms of UN-authorised military intervention within a state’s territorial jurisdiction (here, the territorial sea) rather than law-enforcement co-operation. It was also presented on its face as being a measure which was exceptional, temporary and (to some states) worrying. This is most clearly expressed in paragraph 9, the rather dramatic savings clause in which the Security Council:

Affirms that the authorization provided in this resolution applies only with respect to the situation in Somalia and shall not affect the rights or obligations or responsibilities of member states under international law, including any rights or obligations under [UN Convention on the Law of the Sea (UNCLOS)], with respect to any other situation, and underscores in particular that it shall not be considered as establishing customary international law, and affirms further that this authorization has been provided only following receipt of ... the consent of the TFG.

The point was thus clearly made that piracy was not itself a threat to international peace and security warranting Security Council action; rather, Somali

⁵⁸ On ‘deter and disrupt’ or ‘catch and release’ as a counter-piracy tactic see Guilfoyle, *supra* note 18, at 141.

piracy was an extension of the situation in Somalia itself.⁵⁹ States like Indonesia (which has long suffered piracy problems of its own) clearly had a number of concerns about the potential impact of the Resolution including: its potential to serve as a precedent justifying similar action in other regions in the future; its potential to destabilise the balance of rights and interests underlying the UNCLOS regime; and (somewhat bizarrely) its potential to create customary international law.⁶⁰ Perhaps in response to such concerns the measures adopted in Resolution 1816 involved both TFG consent and were initially authorised only for a period of six months (paragraph 7). Nothing, of course, is as permanent as a temporary solution, and this temporary measure has been renewed for a series of twelve-month spans without being allowed to lapse ever since.⁶¹

Nonetheless, the Resolution was clearly part of the spur to a variety of counter-piracy missions, in particular the Combined Task Force 151 (CTF-151), NATO and EU Naval Force (EU NAVFOR) operations. CTF-151 is an offshoot of military operations in Afghanistan, as part of which “U.S. Naval Forces Central Command (NAVCENT) commands ... [a group of] Combined Maritime Forces ... operating in the ... [region]”.⁶² In January 2009, the CMF command “established Combined Task Force 151 (CTF-151), with the sole mission of conducting anti-piracy operations in the Gulf of Aden and the waters off the Somali coast in the Indian Ocean. ... The list of countries participating in CTF-151 [at any time] is fluid and consists of personnel and approximately two dozen ships from 25 countries”.⁶³ This had been preceded in the period August 2008 to January 2009 by a different CMF taskforce (CTF-150) which had had a maritime operations mandate including, but not limited to, counter-piracy. NATO has also conducted a series of counter-piracy missions in the region, giving it a more-or-less continuous presence in the Gulf of Aden since October 2008.⁶⁴ The present and longest-running operation, Operation Ocean Shield, commenced in August 2009 and involved five vessels as at April 2011.⁶⁵ The

⁵⁹ UN Department of Public Information, ‘Security Council Condemns Acts of Piracy, Armed Robbery Off Somalia’s Coast’ (2008), comments of South Africa, available at <<http://www.un.org/News/Press>> [last accessed 21 August 2012].

⁶⁰ *Ibid.*, comments of Indonesia. See further T. Treves, ‘Piracy, Law of the Sea, and Use of Force: Developments off the Coast of Somalia’, (2009) 20 *EJIL* 399.

⁶¹ See SC Res 1846, 2 December 2008, para 10; SC Res 1897, 30 November 2009, para 7; SC Res 2020, 22 November 2011, para 9.

⁶² CRS Report, *supra* note 2, at 25.

⁶³ *Ibid.*

⁶⁴ *Ibid.*, at 26 on Operations Allied Provider (October–December 2008) and Allied Protector (March–June 2009).

⁶⁵ *Ibid.*, at 26–7.

EU NAVFOR mission, Operation Atalanta, was established in December 2008. One should note that the EU NAVFOR is not a permanent body and has no wider mission than Operation Atalanta.⁶⁶ While “[m]ore than twenty vessels and aircraft take part in Atalanta”⁶⁷ the actual number of assets deployed at any one time may be closer to ten to sixteen.⁶⁸ Numerous individual states, most notably Russia, India, China and South Korea, have also deployed independent naval missions to conduct counter-piracy missions off the coast of Somalia.

3.4 Co-operative Mechanisms: Early Evolution

This proliferation of missions required some efforts at co-ordination. As I have noted elsewhere:

[I]n August 2008 ... [the US-led CMF] established ‘a maritime security patrol area [‘MPSA’] in international waters off the Somali coast’. The MPSA is a defined area within the Gulf of Aden, providing a common system of reference which allows naval forces in the Gulf to ‘de-conflict’ their activities. Running through the MPSA is an internationally [recommended] transit corridor (the ‘IRTC’), [also] established in August 2008 by the United Kingdom Maritime Trade Organization. As of 1 February 2009, information for mariners using the IRTC is available through a secure website administered by the Maritime Security Centre (Horn of Africa), itself part of the EU counter-piracy mission Operation Atalanta.⁶⁹

Deconfliction is the military term for a process aiming at creating mutual awareness among the various missions of each other’s activities, with the aim of avoiding duplication of effort; it is a term deliberately used to avoid any suggestion that there is some unitary command or central authoritative co-ordinator. It has since been given a more substantive dimension in the Shared Awareness and Deconfliction meetings discussed below. These early efforts have been highly successful. Ships that register with the Maritime

⁶⁶ F. Naert, *International Law Aspects of the EU’s Security and Defence Policy: With a Particular Focus on the Law of Armed Conflict and Human Rights* (Intersentia, 2010), at 179-92.

⁶⁷ House of Lords European Union Committee, ‘Combating Somali Piracy: the EU’s Naval Operation Atalanta’ (2010), at 8, available at <<http://www.publications.parliament.uk/pa/ld200910/ldselect/ldcom/103/103.pdf>> [last accessed 21 August 2012].

⁶⁸ House of Commons Report, *supra* note 16, at Ev 13.

⁶⁹ Guilfoyle, *supra* note 18, at 151.

Security Centre (Horn of Africa) (MSC-HOA)⁷⁰ and which use the IRTC are made much easier to protect. This is in part because the IRTC is ‘picketed’ with vessels such that any vessel attacked should be capable of being reached within half an hour.⁷¹ Perhaps more effective is the potential to direct vessels registered with MSC-HOA to adjust speed and heading such that they may transit in groups. The group transit system is based on the observation that pirate attacks at night are rare and have a zero success rate.⁷² Vessels are thus grouped to transit the most vulnerable areas at night and to depart at dusk from and arrive at dawn in areas with a military presence. The net result is that there have been no merchant vessels captured in the IRTC since September 2010.⁷³

Overall, the flavour of early efforts in counter-piracy off Somalia to late 2008 was that of a military response. While there was no suggestion that pirates were combatants,⁷⁴ little thought or priority was given to the idea that navies would actively seek to arrest pirates for trial. Indeed, in some cases, even thinking about the possibility at the level of national governments seemed to have prompted a sense that the issues involved were too complicated, or cut across too many national agencies, or would raise awkward questions about the applicable legal regime aboard warships (for example, the extent of extra-territorial human rights obligations and how to implement them).⁷⁵ Events, however, soon proved that the problem could not be contained within an exclusively military mandate.

⁷⁰ Similar registration/information services are provided by the UK Maritime Trade Organisation and the US Navy’s Maritime Liaison Office, irrespective of a vessel’s nationality.

⁷¹ House of Commons Report, *supra* note 16, at Ev 14-5.

⁷² See, e.g., EU NAVFOR, ‘Gulf of Aden Internationally Recommended Transit Corridor & Group Transit Explanation’ (2009), available at <[http://www.intertanko.com/upload/IRTC%20%20GT%20Explanation%20-%20March%202009%20\(2\).pdf](http://www.intertanko.com/upload/IRTC%20%20GT%20Explanation%20-%20March%202009%20(2).pdf)> [last accessed 21 August 2012].

⁷³ House of Commons Report, *supra* note 16, at Ev 14-5, n 2.

⁷⁴ On whether pirates could be combatants under international humanitarian law see E. Kontorovich, ‘“A Guantánamo on the Sea”: The Difficulty of Prosecuting Pirates and Terrorists’, (2010) 98 *California Law Review* 243; D. Guilfoyle, ‘The Laws of War and the Fight against Somali Piracy: Combatants or Criminals?’, (2010) 11 *Melbourne Journal of International Law* 141.

⁷⁵ See, e.g., ‘World Scrambles to Deal with Pirate Threat’, *Spiegel Online*, 24 November 2008, available at <<http://www.spiegel.de>> [last accessed 21 August 2012]. Cf. K. Westcott, ‘Pirates in the Dock’, *BBC News*, 21 May 2009, available at <<http://www.bbc.co.uk/news>> [last accessed 21 August 2012].

3.5 The Shift Towards Law Enforcement

One well-reported example of the limits of conducting counter-piracy as a military operation occurred on 11 November 2008, when boarding craft from the *HMS Cumberland* subdued a suspected pirate vessel. Onboard, royal marines discovered Yemeni fisherman being held by Somali pirates: the mother ship they had boarded was a hijacked vessel with its crew held hostage. If the fishermen were set free with their craft, then something would have to be done with the pirates. The answer initially hit upon was their transfer to regional states for trial, Kenya in particular. This was not without precedent. In 2006 a group of ten pirates intercepted by the *USS Churchill* had been transferred to Kenya for trial.⁷⁶

By the end of 2008 a shift towards a law-enforcement paradigm was underway. The shift was most decisively apparent in UN Security Council Resolution 1851 of 16 December 2008, in which the emphasis on investigation and prosecution and the strengthening of criminal justice mechanisms is readily apparent. The Resolution:

- called on all states with the capacity to do so to co-operate in combating Somali piracy through “deploying naval vessels and military aircraft”;
- granted a power of summary “seizure and disposition of boats, vessels, arms and other related equipment used in the commission of piracy and armed robbery at sea off the coast of Somalia, or for which there are reasonable grounds for suspecting such use”;
- invited “all States and regional organizations fighting piracy off the coast of Somalia to conclude special agreements or arrangements with countries willing to take custody of pirates in order to embark law enforcement officials (‘shipriders’) from the latter countries, in particular countries in the region, to facilitate the investigation and prosecution of persons detained as a result of operations conducted under this resolution”;
- encouraged “all states and regional organizations fighting piracy ... off the coast of Somalia ... to [act to] increase regional capacity ... to effectively investigate and prosecute piracy and armed robbery at sea offences” with the assistance of the UN Office on Drugs and Crime (UNODC); and

⁷⁶ J. Kraska, *Contemporary Maritime Piracy: International Law, Strategy, and Diplomacy at Sea* (Praeger, 2011), at 179.

- encouraged “all States and regional organizations fighting piracy and armed robbery at sea off the coast of Somalia to establish an international cooperation mechanism to act as a common point of contact between and among states, regional and international organizations on all aspects of combating [Somali] piracy”.⁷⁷

Each of these points is worth further consideration. As to the first point, as noted above, a significant expansion in navy deployments was already underway by this time. The grant of a power of summary disposal of suspected pirate equipment plugged a possible gap in the UNCLOS regime (which refers only to the power of *courts* to dispose of property in piracy cases).⁷⁸ The use of ship-riders is a potentially useful idea, but one which has not been implemented to date.⁷⁹ (The principal difficulties being whether the regional partner states are willing, have legislation allowing their police to operate outside their territory, and have personnel to spare.) Regional capacity building has occurred in a number of ways. In a relatively early development a number of regional coastal states, in an IMO-sponsored process, began negotiating a memorandum of understanding (MOU) on counter-piracy, resulting in a draft MOU in April 2008.⁸⁰ This was then adopted as the so-called Djibouti Code of Conduct in January 2009.⁸¹ The Djibouti Code aims at promoting co-operation, information sharing and capacity development to better allow regional states to combat piracy themselves. Its achievements to date have included support for reform of national piracy laws.⁸² Djibouti Code information sharing centres in Tanzania, Kenya and Yemen, became active in 2011⁸³ and an agreement on their use was concluded in November

⁷⁷ SC Res 1851, 16 December 2008, at paras 2-5.

⁷⁸ 1982 United Nations Convention on the Law of the Sea, 1833 UNTS 396, Art 105.

⁷⁹ D. Guilfoyle, ‘Combating Piracy: Executive Measures on High Seas’, (2010) 53 *Japanese Yearbook of International Law* 149, at 171-2. On ship-riders more generally, see Guilfoyle, *supra* note 46, at 72-3, 89-94, 119-20, 196-7, 209-11.

⁸⁰ D. Guilfoyle, ‘Piracy Off Somalia: UN Security Council Resolution 1816 and IMO Regional Counter-Piracy Efforts’, (2008) 57 *ICLQ* 690, at 697-9.

⁸¹ 2009 Code of Conduct concerning the Repression of Piracy and Armed Robbery against Ships in the Western Indian Ocean and the Gulf of Aden, available at <<http://www.fco.gov.uk/resources/en/pdf/pdf9/piracy-djibouti-meeting>> [last accessed 21 August 2012].

⁸² J. A. Roach, ‘Countering Piracy off Somalia: International Law and International Institutions’, (2010) 104 *AJIL* 397, at 410-1; CRS Report, *supra* note 2, at 23-4.

⁸³ IMO, ‘Status of the Implementation of the Djibouti Code of Conduct’ (2011), at 2, available at <<http://www.imo.org/OurWork/Pages/Home.aspx>> [last accessed 27 February 2012].

2011.⁸⁴ This is a potentially significant step towards institutional arrangements along the lines of the 2005 Regional Cooperation Agreement on Combating Piracy and Armed Robbery against Ships in Asia (a pioneer of the information sharing centre model).⁸⁵ More significantly, perhaps, the UNODC has proven highly effective in criminal justice capacity-building in the region. It has provided translators, judicial and prosecutorial training, refurbished prisons and court-houses, assisted with legislative reform and drafted prisoner transfer and evidence collection guidance, as well as undertaken various projects within Somalia itself.⁸⁶ The final point highlighted above is the call to establish an 'international co-operation mechanism'. This took the form of the Contact Group on Piracy off the Coast of Somalia (CGPCS), discussed below.

3.6 Co-operative Mechanisms: a Second Phase

Two co-operative mechanisms in particular are worth brief discussion here: the CGPCS set up in response to UN Security Council Resolution 1851 and the Shared Awareness and Deconfliction (SHADE) process established around the various Gulf of Aden counter-piracy missions. It is convenient to begin with SHADE. At its simplest, SHADE is a series of meetings held in Bahrain since December 2008:⁸⁷

It is a staff-level group of officers who meet regularly (approximately once every six weeks) to ensure that the naval forces conducting counterpiracy operations are effectively coordinating their efforts. ... At these meetings tactical and operational coordination is discussed and agreements are made for a certain period

⁸⁴ IMO, 'Piracy centres expand information network' (2011), available at <<http://www.imo.org/MediaCentre/PressBriefings/Pages/Home.aspx>> [last accessed 27 February 2012].

⁸⁵ (2005) 44 ILM 829. See further Guilfoyle, *supra* note 46, at 57-61; M. Hayashi, 'Introductory Note', (2005) 44 ILM 826.

⁸⁶ A. Cole, 'Prosecuting Piracy: Challenges for the Police and the Courts', in *Conference on Global Challenge, Regional Responses: Forging a Common Approach to Maritime Piracy* (Dubai School of Government, 2011), 107, at 108-10, available at <http://counterpiracy.ae/briefing_papers/Forging%20a%20Common%20Approach%20to%20Maritime%20Piracy.pdf> [last accessed 21 August 2012]. More information is available at <<http://www.unodc.org/piracy>> [last accessed 21 August 2012].

⁸⁷ R. Geiß & A. Petrig, *Piracy and Armed Robbery at Sea: The Legal Framework for Counter-Piracy Operations in Somalia and the Gulf of Aden* (Oxford University Press, 2011), at 27-8.

of time with regard to the division of tasks, optimizing the use of available assets and coordination of the geographic presence.⁸⁸

It is not an organisation *per se* and has no formal decision-making authority; nonetheless it has been highly effective. The plethora of multinational and national missions involved in counter-piracy may appear inefficient absent some unified command structure. Nonetheless, the SHADE process has allowed “the forces engaged in the counter-piracy effort ... [to] work and co-operate very closely” on a pragmatic, “tactical, day-by-day level”.⁸⁹ Industry representatives also attend SHADE meetings and it has been credited with improving communications between industry and the military.⁹⁰

The CGPCS was established on 14 January 2009. The need for some new forum to co-ordinate counter-piracy outside the UN or IMO auspices may not be readily apparent. However, all existing organisations had, in effect, over or under-inclusive mandates or expertise in only pieces of the problem. The IMO, for example, has a great deal of relevant expertise as regards the commercial shipping industry but no experience of military deployments. Thus the CGPCS is:

not a UN or an IMO body. It is voluntary cooperation among states and organizations engaged in or with an interest in counter-piracy off the coast of Somalia. The participants thus share a clear common goal and the work of the CGPCS has therefore been characterized with much specific and practical progress in a very short period of time. At its first meeting the CGPCS established four working groups on[:] operational matters and capacity building (WG1—chaired by the United Kingdom), legal issues (WG2—chaired by Denmark), cooperation with industry (WG3—chaired by the USA) and communication (WG4—chaired by Egypt).⁹¹

A fifth working group has since been established to examine financial flows. The working groups meet several times a year and consist of participants representing governments, international organisations and industry groups.

⁸⁸ K. Homan & S. Kamerling, ‘Operational Challenges to Counterpiracy Operations off the Coast of Somalia’, in B. van Ginkel & F. van der Putten (eds), *The International Response to Somali Piracy: Challenges and Opportunities* (Martinus Nijhoff Publishers, 2010), 65, at 85.

⁸⁹ House of Commons Report, *supra* note 16, at Ev 13.

⁹⁰ Geiß & Petrig, *supra* note 87, at 28; Homan & Kamerling, *supra* note 88, at 85.

⁹¹ T. Winkler, ‘Foreword’, in van Ginkel & van der Putten, *supra* note 88, vii, at viii (Ambassador Winkler is the Chairman of WG2).

Like SHADE, they serve principally as a forum for sharing information and experience and, to a certain extent, for co-ordinating efforts. That said, like SHADE, they also lack formal decision-making authority. Their secretariat is provided by the government chairing the group and the make-up of the meetings can change significantly over time. SHADE and the CGPCS working groups are more a co-operative forum than a standard-setting body. Again, this might not seem a recipe for efficiency or effectiveness.

Nonetheless both are clearly ‘institutions’ in the broader sense of looking beyond formal organisations to other “‘rules, norms, and decision-making procedures’ that shape expectations, interests, and behavior”.⁹² Both mechanisms clearly fall within Scott and Trubek’s concept of ‘new governance’ institutions which: “accept[] the possibility of coordinated diversity” among legal systems; use “machinery that brings actors from various levels of government ... together” and industry to generate “open-ended standards, flexible and revisable guidelines, and other forms of ‘soft law’”; all of which may be “designed more to support and coordinate” policy rather “than to create uniformity”.⁹³ Essentially, new governance eschews top down ‘command and control’ regulation and favours instead experimentation and sharing of best practice, the informal alignment of expectations, and loose horizontal co-operation. Such transnational governance networks have certain advantages. They can act and adapt quickly and can be a valuable way of sharing experience and promoting open-ended deliberation regarding a common problem.⁹⁴ They may allow a range of possible solutions to be explored at the national level before identifying and disseminating best practice. They may even bring national authorities or capabilities together in a manner that delivers unexpected efficiencies. Such measures have certainly helped focus available political will, explore the possible options and assisted different states and agencies to co-ordinate their efforts.⁹⁵ This has led to successes in terms of facilitating co-operation in piracy prosecutions. In particular, prosecutions of pirates captured by foreign navies are now being conducted by Kenya, Mauritius, Seychelles and Tanzania with inter-

⁹² M. Finnemore & S. J. Toope, ‘Alternatives to “Legalization”’: Richer Views of Law and Politics’, in B. A. Simmons & R. H. Steinberg (eds), *International Law and International Relations* (Cambridge University Press, 2007), 188, at 191.

⁹³ J. Scott & D. M. Trubek, ‘Mind the Gap: Law and New Approaches to Governance in the European Union’, (2002) 8 *European Law Journal* 1, at 6.

⁹⁴ *Ibid.*

⁹⁵ See for example references to work by the CGPCS working groups on sharing and coordinating law-enforcement intelligence through INTERPOL: ‘Piracy and Armed Robbery Against Ships: Contact Group on Piracy off the Coast of Somalia, Report of Working Group 3’, IMO Doc. MSC 90/INF.4 (2012), Annex, at para 3.2.

national assistance.⁹⁶ Trust funds have also been established under the CGPCS and the Djibouti Code to support counter-piracy projects (including some UN-ODC projects mentioned above) and have had some impact in terms of assisting judicial and prosecutorial capacity-building in the region (discussed further below).⁹⁷ One of the most effective examples, however, of such co-operative action through a loose network of international actors is provided by the shipping industry and IMO collaboration on 'Best Management Practices' for securing individual vessels from pirate attack.

3.7 The Industry Response to Somali Piracy: a Move to Self-Protection

The initial position of much of the shipping industry to Somali piracy was that this was a governmental problem requiring 'robust' military measures to suppress it. Further, while trust funds have been established under the CGPCS and the Djibouti Code to support counter-piracy projects, industry has been slow to contribute to them. The usual explanation is that one does not ordinarily expect victims of crime to bear the costs of policing when they are already taxpayers. There was even reluctance in some quarters initially to using the IRTC. While responsible elements of the industry now do use the IRTC, anything up to 25% of vessel transits through the Gulf of Aden still do not.⁹⁸

The shipping industry as a whole, however, appears to have rapidly accepted that the most effective way to secure vessels from pirate attack is to secure the vessels themselves. In collaboration with the IMO, a series of Best Management Practice (BMP) documents have been issued.⁹⁹ These specify the range of (largely passive or non-lethal) measures vessels should take to protect themselves from pirate attack if they are transiting the 'high risk area' off Somalia, and compliance demonstrably improves an attacked vessel's chances of eluding capture.¹⁰⁰ Further, being BMP-compliant attracts lower insurance premiums,¹⁰¹ effectively making it a kind of industry-policed soft-law. Nonetheless, there are still reports of a significant fraction of vessels

⁹⁶ 'Report of the Secretary-General on Somalia', UN Doc. S/2012/283 (2012), at para 51.

⁹⁷ *Ibid.*

⁹⁸ House of Lords Report, *supra* note 67, Annex of Minutes of Evidence, at 45.

⁹⁹ At time of writing, the current version was BMP4, available at <<http://www.gard.no/web/docs/BMP4.pdf>> [last accessed 21 August 2012].

¹⁰⁰ House of Commons Report, *supra* note 16, at 19-20, 22.

¹⁰¹ *Ibid.*, at Ev 3-4.

not complying with BMP—and unsurprisingly, such vessels appear more likely to be taken by pirates (as discussed above).¹⁰²

In this context, there has been significant discussion about whether individual vessels should have *armed* protection. The two basic possible models are, obviously, private or state-sponsored provision. The former is now commonly referred to as Privately Contracted Armed Security Personnel (PCASP)¹⁰³ and the latter as Vessel Protection Detachments (VPDs). In 2009, some shipping industry figures described the attitude of their sector as “resolutely oppose[d]”¹⁰⁴ to the use of PCASPs due to the risk of violence escalating and legal liability. As the IMO has put it:

It should also be borne in mind that shooting at suspected pirates may impose a legal risk for the master, shipowner or company, such as collateral damages. In some jurisdictions, killing a national may have unforeseen consequences even for a person who believes he or she has acted in self defence. Also the differing customs or security requirements for the carriage and importation of firearms should be considered, as taking a small handgun into the territory of some countries may be considered an offence.¹⁰⁵

The clear preference of industry was for VPDs, typically paid for by the flag state.¹⁰⁶ Other than questions of cost, VPDs also benefit from sovereign immunity. Sovereign immunity, it is presumed, would greatly simplify the

¹⁰² *Ibid.*, at Ev 15, Ev 63.

¹⁰³ See ‘Interim Guidance to Shipowners, Ship Operators, and Shipmasters on the use of Privately Contracted Armed Security Personnel on Board Ships in the High Risk Area’, IMO Doc. MSC.1/Circ.1405 (2011) and ‘Interim Recommendations for Flag States Regarding the use of Privately Contracted Armed Security Personnel on Board Ships in the High Risk Area’, IMO Doc. MSC.1/Circ.1406 (2011).

¹⁰⁴ See, e.g., ‘Statement on International Piracy by Giles Noakes Chief Maritime Security Officer of BIMCO before the United States House of Representatives Committee on Transportation and Infrastructure, Subcommittee on Coast Guard and Maritime Transportation’ (2009), available at <<http://www.marad.dot.gov>> [last accessed 21 August 2012].

¹⁰⁵ ‘Piracy and Armed Robbery Against Ships: Guidance to Shipowners and Ship Operators, Shipmasters and Crews on Preventing and Suppressing Acts of Piracy and Armed Robbery Against Ships’, IMO Doc. MSC.1/Circ.1334 (2009), para 61; see now ‘Report of the Maritime Safety Committee on its Ninetieth Session’, IMO Doc. MSC 90/28 (2012), para 20.11.5.

¹⁰⁶ House of Commons Report, *supra* note 16, at 20 (noting France, Spain, Israel and Italy already provide VPDs and other States are contemplating it). See also Recommendation 3 (‘the Government should engage with the shipping industry to explore options for the industry to pay for vessel protection detachments of British naval or military personnel on board commercial shipping’): *ibid.*, at 5.

potential legal situation arising in the event of fatal shootings of foreign nationals.¹⁰⁷ However, only a handful of governments have been willing to bear these costs.¹⁰⁸ There thus appears to have been a cautious shift in government, industry, military and IMO opinion in favour of ships being allowed to take greater “responsibility for their own protection by hiring” PCASP.¹⁰⁹ In particular, those in industry who once opposed PCASP have now taken a lead in drafting contracts for their use.¹¹⁰ Irrespective of whether PCASP are considered desirable, they are clearly here to stay and national ‘hard law’ frameworks are increasingly changing to accommodate their existence.¹¹¹

4 Assessment

4.1 The Challenges of Asymmetric Organised Crime

Any assessment of the effectiveness of the international response to Somali piracy has to take into account a number of constraints and challenges. First, Somali piracy has proven itself to be highly agile and adaptive. As it is highly decentralised, physically dangerous and highly profitable, it is a criminal activity with excellent incentives to experiment, adapt and learn. Its low start-up costs, multiple business structures and large potential labour pool also make it more flexible than state agencies and ordinary commercial organisations. Promisingly, the international response, as discussed in this article, has become more flexible, decentralised and horizontal. This may suggest that counter-piracy increasingly has some measure of the adaptability of

¹⁰⁷ Whether this is clearly the case is open to doubt. See Guilfoyle, *supra* note 46, at 299-323 and the debate over India’s denial of immunity to Italian VPD members who shot Indian fishermen: D. Guilfoyle, ‘Shooting fishermen mistaken for pirates: jurisdiction, immunity and State responsibility’, *EJIL:Talk!*, 2 March 2012, available at <<http://www.ejiltalk.org>> [last accessed 22 August 2012].

¹⁰⁸ Though the number may be increasing: House of Commons Report, *supra* note 16, at 20.

¹⁰⁹ *Ibid.*, at 22.

¹¹⁰ E.g. ‘Denmark: BIMCO Creates Standard Contract for Armed Guards’, *Naval Today*, 22 November 2011, available at <<http://www.navaltoday.com>> [last accessed 21 August 2012] (quoting G. Noakes, *supra* note 104).

¹¹¹ On recent developments at the IMO see ‘Report of the Maritime Safety Committee on its Ninetieth Session’, IMO Doc. MSC 90/28 (2012), at paras 20.1-20.34; and ‘Guidance for private maritime security companies and passenger ship recommendations agreed by IMO’s Maritime Safety Committee’, IMO Doc. MSC 90/WP.6 (2012); for UK guidance see Department of Transport, ‘Interim Guidance to UK Flagged Shipping on the Use of Armed Guards to Defend Against the Threat of Piracy in Exceptional Circumstances’ (2011), available at <<http://www.dft.gov.uk/publications>> [last accessed 21 August 2012].

piracy itself. Nonetheless, state action to counter Somali piracy remains limited by factors including: limited resources to support regional prosecution efforts or economic development in Somalia;¹¹² finite military resources; necessary adherence to the rule of law; and the lack of any 'kinetic solution' to Somali piracy, it not being a problem that can be solved with firepower.¹¹³ In this context the key issues to consider are: the rate of prosecution for Somali pirates, and the factors that may inhibit prosecution;¹¹⁴ the role and effectiveness of international organisations and networks involved (and whether they lack strategic vision);¹¹⁵ and the use the international community is making of the finite resources available to tackle the problem. Given a growing literature addressing the other the issues, only the latter point will be addressed briefly here.

4.2 The Reality of Scarce Resources

The international community has finite resources with which to combat Somali piracy, despite its high cost to the international economy as a whole.¹¹⁶ Co-ordination is clearly required to best use available resources. This truism extends beyond military patrolling. Sometimes, however, modest resources can be used or leveraged to create a disproportionate impact. For example, one early concern in prosecuting piracy cases in Kenya was severe prison overcrowding. This created human rights concerns for states transferring suspects to Kenya and problems for Kenya in terms of its capacity to receive suspects. An expensive solution would have been to embark on a prison-building scheme. Instead, the UNODC looked at series of measures targeted at one prison (Shimo La Tewa). For example, a UNODC-supported review of those being held on remand identified 517 prisoners for immediate release who had already served

¹¹² House of Commons Report, *supra* note 16, at 65 and the figures at 65-6.

¹¹³ 'Navy head cool on Somalia strikes', *BBC News*, 13 December 2008, available at <<http://www.bbc.co.uk/news>> [last accessed 21 August 2012].

¹¹⁴ Compare E. Kontorovich & S. Art, 'An Empirical Examination of Universal Jurisdiction for Piracy', (2010) 104 *AJIL* 436; D. Guilfoyle, 'Prosecuting Somali Pirates: A Critical Evaluation of the Options', (2012) 10 *Journal of International Criminal Justice* 767.

¹¹⁵ Somewhat sceptically, see A. Murdoch, 'Recent Legal Issues and Problems Relating to Acts of Piracy off Somalia', in C. R. Symmons (ed), *Selected Contemporary Issues in the Law of the Sea* (Martinus Nijhoff Publishers, 2011), 139, at 144-5.

¹¹⁶ 'The Economic Cost of Maritime Piracy' (One Earth Future, 2010), available at <<http://oceansbeyondpiracy.org>> [last accessed 21 August 2012].

time equivalent to the maximum sentence they might receive at trial.¹¹⁷ This process obviously required resources, but less than a new building. Similarly, the IMO Djibouti Code implementation unit is trying less to create complete new infrastructure systems to support maritime situational awareness (e.g. chains of radar and radio stations) than to plug gaps in existing networks and, where they exist, to integrate parallel infrastructure controlled by different state agencies.¹¹⁸ Finally, there is also the capacity for win-win solutions. Funding regional prosecutions of piracy trials may also *de facto* be a form of rule of law development assistance. Court and prison facilities improved to deal with piracy cases have lasting benefits beyond piracy trials, and local prosecutors may receive training and mentoring from internationally seconded staff funded by donor states. These are all causes for optimism. Co-ordination, leverage and looking for win-wins, of course, will only take us so far.

Obviously, the best solution to Somali piracy is a functional Somali state, justice system and economy. The resources the international community stands prepared to put into Somali reconstruction are, however, “extremely limited”.¹¹⁹ However, the reality of counter-piracy operations has been that states have had to deal—given the TFG’s limited effective authority—with the relatively stable territorial entities of Somaliland and Puntland. There is significant interest in seeing prisons constructed in these territories under UN oversight so pirates convicted elsewhere in the region could be transferred home to serve their sentences.¹²⁰ (Thus relieving a burden on other prison systems which may translate to a greater willingness to prosecute.¹²¹) Such grass-roots engagement with Somaliland, Puntland and especially clan networks is likely the only way of gaining any traction in Somalia. Realistically, the clans are the (competing) seat(s) of effective power in Somali and engagement with them is the thing most likely to pay dividends. The UNODC is beginning to attempt such community outreach,¹²² but these are all experiments in untested waters.

¹¹⁷ UN Office on Drugs and Crime, ‘Counter-Piracy Programme: Support to the Trial and Related Treatment of Piracy Suspects: Issue 5’ (2011), at 5, available at <<http://www.unodc.org>> [last accessed 21 August 2012].

¹¹⁸ IMO, *supra* note 83.

¹¹⁹ House of Commons Report, *supra* note 16, at 65.

¹²⁰ Modalities Report, *supra* note 39, paras 28-31. The Seychelles has entered a series of such agreements with the TFG and the regional governments of Somalia. See Report of the Secretary-General, *supra* note 96, para 50.

¹²¹ Modalities Report, *supra* note 39, para 28.

¹²² See, e.g., W. Miller, ‘Counter-Piracy Programme: Somalia Beyond Piracy’ (UNODC, 2011), available at <http://piracy-europe.com/uploads/files/1169/Wayne_Miller.pdf> [last accessed 21 August 2012]; compare Report of Working Group 3, *supra* note 95, at para 3.2

5 Conclusion

Everyone acknowledges that Somali piracy is a maritime problem with its roots ashore and that the international response must address both aspects. The real risk, of course, is that while talking about the need for a 'two track' response, all the available resources and political will is diverted into dealing with the immediate high-seas problem. If this occurs, we can only hope to reach a kind of equilibrium: using available resources to cobble together a series of measures that reduces piracy to an 'acceptable' level (in the eyes of markets and politicians, if not seafarers). What we have to hope is that the present series of greater and smaller experiments can identify the components of a successful wider counter-piracy strategy with both short and long-term goals that can be meaningfully co-ordinated. This may, however, require a wider strategic vision than is presently evident.¹²³

(similar efforts of the CGPCS).

¹²³ Murdoch, *supra* note 115.