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## The Threat of Contemporary Piracy and the Role of the International Community

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### ABSTRACT

The criminal phenomenon of piracy has resurfaced as a major threat to international trade and maritime security and to the freedom of the seas, particularly considering that the relevant acts occur not only on high seas but increasingly on territorial waters. An international conference on this issue was organized by the Institute for International Affairs (IAI), in cooperation with the International Institute of Humanitarian Law (IIHL), and held in Rome at the Center for Higher Defence Studies on 28 November 2013. Eminent speakers delivered wide-ranging and thought-provoking presentations on several important questions, including the geo-political implications of piracy and role of navies, the armed personnel on board commercial ships, maritime piracy and international relations, the prosecution of pirates, the policy of ship-owners, the relation between smart defence and maritime security, the legal and humanitarian problems on insuring piracy risk, the costs of piracy, the role of NATO in the fight against piracy.

*Piracy | Somalia | International law | Maritime security | PSCs | Italian military policy | NATO*

keywords

## The Threat of Contemporary Piracy and the Role of the International Community

edited by Chiara Altafin\*

The Istituto Affari Internazionali (IAI), in cooperation with the International Institute of Humanitarian Law (IIHL), organized an international conference on "The Threat of Contemporary Piracy and the Role of the International Community", under the scientific supervision of Prof. Natalino Ronzitti.<sup>1</sup> The conference was held in Rome at the Center for Higher Defence Studies (CASD) on 28 November 2013 and brought together representatives of military institutions and international organizations, renowned experts, public and private stakeholders, specialists and academics.

It was articulated in three sessions. The first session focused mainly on the role of navies, the armed personnel on board commercial ships, the question of piracy and international relations. The second session examined the significant issues of prosecuting pirates, the policy of ship-owners, the relation between smart defence and maritime security. The third session provided for an analysis on a number of additional topics, namely the legal and humanitarian problems on insuring piracy risk, the costs of piracy, the role of NATO in the fight against piracy. Comprehensive and thought-provoking presentations were delivered by eminent speakers.<sup>2</sup>

The conference was introduced by Admiral Rinaldo Veri<sup>3</sup> and Prof. Fausto Pocar,<sup>4</sup> presenting a general outlook of the current legal framework; concluding remarks were made by Prof. Ronzitti, who also chaired the first session; Ettore Greco<sup>5</sup>

<sup>1</sup> Natalino Ronzitti is Scientific Advisor at the Istituto Affari Internazionali (IAI), Rome.

<sup>2</sup> The names of the speakers are mentioned infra in connection with the topics they dealt with in their presentations.

<sup>3</sup> Rinaldo Veri is President of the Center for Higher Defence Studies (Centro alti studi per la difesa - CASD), Rome.

<sup>4</sup> Fausto Pocar is President of the International Institute of Humanitarian Law, Sanremo.

<sup>5</sup> Ettore Greco is Director of the Istituto Affari Internazionali, Rome.

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Report of the international conference on "The Threat of Contemporary Piracy and the Role of the International Community", organized in Rome on 28 November 2013 by the Istituto Affari Internazionali (IAI) in cooperation with the International Institute of Humanitarian Law (IIHL).

chaired the second session, while Fabio Caffio<sup>6</sup> chaired the third one. The final general debate was chaired by Prof. Pocar.

What follows is a summary of the main issues and points debated during the conference confirming the evolving dimensions of contemporary piracy in the current maritime security framework.

### Introduction

The criminal phenomenon of piracy has resurfaced as a major threat to international trade and maritime security and to the freedom of the seas. In this vein, some monitoring issues on piracy were primarily addressed by Admiral Veri, who set the scene of the conference.<sup>7</sup>

As shown by a recent report of the International Maritime Bureau, at present maritime piracy is at its lowest third-quarter level since 2006, despite threats of continuing violent attacks off the East and West coasts of Africa.<sup>8</sup> As Admiral Veri highlighted, the drop in piracy off the coasts of Somalia, with only ten attacks up to October 2013, was due to several successful naval missions, including the most important ones, the NATO Operation Ocean Shield and the EU Operation Atalanta respectively. Nonetheless, such decline relies on the adoption of preventive measures on board a growing number of commercial vessels, including the use of private security armed guards. Besides, a relative improvement in the political stability of Somalia has played a role in reducing the support on the ground to Somali-based piracy networks as well as favouring stricter international control on grey financial transactions.

However, it was emphasized that experts agreed on considering the strong reduction of Somali piracy as an important but also fragile success. Since 1991 the history of Somali piracy has been characterized by a strong volatility of the phenomenon, where it basically disappeared in some years while in others it again skyrocketed. The persistence of the threat is still alive though. Only an impressive amount of

<sup>6</sup> Fabio Caffio is Vice Admiral of the Italian Navy (ret.).

<sup>7</sup> He primarily referred to two important training courses on fighting the threat of piracy, which were organized by CASD in Venice in 2011 and in Brussels in 2012 in the framework of the European Security and Defence College; in the same vein, a research paper on the economics and costs of piracy in the Gulf of Aden commissioned in 2012 by the Military Center for Strategic Studies was cited.

<sup>8</sup> According to the ICC-IMB 2013 annual report, 264 piracy incidents occurred in 2013, down from 233 in 2012; also hostage-taking has fallen noticeably, with 304 people taken hostage in 2013, compared with 585 in 2012; in 2013 pirates hijacked 12 vessels, fired at 22, and boarded at 202, while a further 28 attacks were thwarted. Totally, 304 crew were taken hostage and 36 kidnapped. One seafarer was killed, 21 were injured, and one is reported missing. See ICC International Maritime Bureau, *Piracy and armed robbery against ships – Report for the period 1 January-31 December 2013*, available at [http://www.ship.sh/attachment/files/2013\\_Annual\\_IMB\\_Piracy\\_Report.pdf](http://www.ship.sh/attachment/files/2013_Annual_IMB_Piracy_Report.pdf).

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international public and private countermeasures has quizzed the phenomenon and forced the pirates' financial support to move the resources elsewhere or to other illicit activities such as human trafficking or arms trafficking. While the sustainability in the long-term of the costs related to such contrast could become an emerging issue, now the future of piracy in Somalia appears pretty much linked to the ongoing process of political domestic stabilization and the success of the efforts of the African Union and the international community in rebuilding a minimum rule of law inside the country.

Conversely, persistence in the levels of arms robberies and piracy in Eastern Asia as well as a growing intensity of piracy in West Africa's Gulf of Guinea are registered for the time being. According to Admiral Veri, the latter, which extends from Cape Lopez, Gabon, to Cape Palmas, Liberia, represents indeed another rising hotspot for international maritime security, although differently from the Horn of Africa, as the vessels are attacked and seized more for immediate looting of cargos rather than for the kidnapping of the crew and then negotiating their ransom. In this vein, he emphasized that analysts' discussion on the evolutionary trends of piracy in the Gulf of Guinea consider only a few of them predicting a replica of the situation similar to that in the Gulf of Aden in the years 2008-2012 with such a scenario, so suggesting the appropriateness of a constant focus on the evolving dimensions of contemporary piracy.

Although piracy has come to the frequent attention of the international community in recent times, it is not a new phenomenon or trend. In this regard, the international legal framework in which issues on piracy arise relies on rules that codify international customary law and are reflected in the United Nations Convention on the Law of the Sea (UNCLOS) of 10 December 1982, which repeat those contained in the Geneva Convention on the High Seas of 20 April 1958.<sup>9</sup> In particular, under Article 101 of UNCLOS piracy is defined as an illegal act of violence or detention, or an act of depredation, committed for private ends by the crew or passengers of a private ship and directed against another ship or aircraft or against persons or property on board, but which has to take place on the high seas or in a place outside the jurisdiction of any State.

As Prof. Pocar underlined, the basic reason for regarding piracy as an international crime is the protection of one of the most significant principles of the Law of the Sea, namely the freedom of the seas and particularly the freedom of navigation of commercial ships, which applies both to the high seas and the territorial waters. However, the traditional legal notion of piracy is restricted to acts perpetrated on the high seas, and this is in observance of the principles of state territorial sovereignty and state jurisdiction. Indeed, the territorial waters fall under the jurisdiction of the coastal State, which is therefore required to ensure the freedom of navigation

<sup>9</sup> See Articles 100-107 and 110 of the United Nations *Convention on the Law of the Sea* (UNCLOS) of 10 December 1982, [http://www.un.org/Depts/los/convention\\_agreements/convention\\_overview\\_convention.htm](http://www.un.org/Depts/los/convention_agreements/convention_overview_convention.htm).

and to adopt measures that prevent and repress acts of the kind mentioned above against private ships.

Conversely, the recent phenomenon of piracy has shown that the relevant acts take place in the territorial waters to a large extent, and not only on high seas, concerning areas where the coastal State is not in a position to protect the freedom of navigation in its territorial sea. However, according to Prof. Pocar, the traditional notion of piracy has not been modified by the United Nations Security Council (SC) resolutions adopted up to now on this matter.<sup>10</sup> It seems to accept the navigation on the high seas, but nevertheless addresses the problems arising in territorial waters and allows actions by States therein, without necessarily changing that traditional notion (in the sense that SC resolutions normally do not speak of piracy rather refer to robbery in territorial waters, though the acts are actually the same).

Accordingly, it was underlined that, in considering the legal environment in which this phenomenon occurs, it is important to question the evolution of the notion of piracy. In particular, the basic issue that arises is whether we are addressing the current phenomenon as piracy or, instead, whether we are adopting a different notion that would imply the consent of the coastal State. In this vein, for Prof. Pocar, if it remains a universal crime as it is on the high seas probably the consent of the coastal State is not necessary; on the contrary, if the notion changes then that consent might become relevant. However, in making the rules of international law concerning piracy on the high seas applicable also to territorial waters, the Security Council resolutions have been very careful not to touch on the question of consent, rather authorizing the pursuit of a foreign ship from the high seas into the territorial waters (namely, the other way around in respect of what is provided under the UNCLOS).

### 1. The geo-political implications of piracy and the role of navies

A comprehensive overview of the role of navies to contrast maritime piracy was drawn by Admiral Filippo Maria Foffi,<sup>11</sup> who highlighted the international efforts in the field, shedding light on the purely military aspects of the fight against piracy, also extending the analysis to the perception of the phenomenon by navies in reaffirming the principle of freedom of navigation on the high seas as well as the consequent role of safeguarding the economic interests of the territorial sea.

<sup>10</sup> See, on piracy off the coasts of Somalia, S/RES/1814 (2008) of 15 May 2008; S/RES/1816 (2008) of 2 June 2008; S/RES/1846 (2008) of 2 December 2008; S/RES/1851 (2008) of 18 December 2008; S/RES/1897 (2009) of 3 November 2009; S/RES/1950 (2010) of 23 November 2010; S/RES/2020 (2011) of 22 November 2011; S/RES/2077 (2012) of 21 November 2012. See, on piracy in the Gulf of Guinea, S/RES/2018 (2011) of 31 October 2011. All UNSC resolutions are available at <http://www.un.org/en/sc/documents/resolutions>.

<sup>11</sup> Filippo Maria Foffi is Commander in Chief of the Italian Fleet.

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In view of globalization and the increased interdependence of people and goods on earth, freedom of navigation on the high seas and free access to the sea lines of communication constitute a basic principle embraced by all nations, whose populations live in great majority (around 90%) within 200 kilometres of the coastline.<sup>12</sup> Seaboard trading has increased over the last half century and it stands at over 90% of the global economic traffic, of which 95% pass through key check points, including the Suez Canal and the Strait of Babel Mandeb, the Strait of Hormuz, the Strait of Gibraltar, the Bosphorus Strait, the Strait of Malacca, and Singapore and Panama Canals. Although representing only one percent of the world sea-surface, the Mediterranean Sea plays a critical role in this global maritime traffic net, since twenty percent of the sea trade passes through this battled basin, connecting Europe, Asia and Africa.

One of the challenges presently faced by the global security environment related to maritime domain remains maritime piracy, as it has resurfaced in recent years as a modern transnational threat with unique features. Firstly, it is the oldest crime against the entire society; this firm belief has become increasingly rooted in history and has led the response to piracy to be universally recognized by international law as an indisputable collective need. Piracy is a crime that requires the presence of a number of factors such as a permissive political environment, weakness of the local States, cultural acceptability, and the opportunity for reward in order to flourish. Even though it is intrinsically dangerous, piracy remains a profitable activity and worth the risk for thousands of unemployed people living in desperately poor and often instable countries.

Since 2008, piracy has increasingly become an unprecedented threat in the waters around the Horn of Africa, where Somalia, a country with over 3,000 kilometres of coastline (the second longest coastline of the African continent), has lacked a central government able to control most of the Somali territory since 1991.

However, this kind of criminal activity is not exclusive to the Horn of Africa, but it has become a significant challenge in South-East Asia and it is spreading out with different features in West Africa. On 16 October 2013, the International Maritime Bureau released a report focusing its attention on the Gulf of Guinea region, particularly in Nigeria where extremely violent groups (well-equipped and better coordinated than those operating in the Horn of Africa) are used to attack oil and gas tankers.

The Indian Ocean, the Arabian Sea, the Horn of Africa, and the Gulf of Guinea are indeed high strategic arena for those States whose economies are strongly

<sup>12</sup> The UNCLOS codifies the legal rules governing the freedom of navigation principle: under Article 90, "Every State, whether coastal or land-locked, has the right to sail ships flying its flag on the high seas"; under Article 87, "Freedom of the high seas is exercised under the conditions laid down by this Convention and by other rules of international law" and "These freedoms shall be exercised by all States with due regard for the interests of other States in their exercise of the freedom of the high seas".

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interlinked with these zones, as in the case of Italy and the European Union. They constitute a fundamental portion of the geopolitical concept of the “wider Mediterranean”; Italian political, economic and social interests are at stake.

The Gulf of Aden and the Somali Basin are crossed by over twenty-five thousand ships, of which six thousand are strictly linked to national interests and fifteen hundred are Italian flagged ships. Conversely, the Indian Ocean is a high route where two-thirds of global oil trade, half of the whole container traffic, and one third of the so-called “balled goods” traffic, are transiting daily. Moreover, in recent years the amount of goods transported by sea has significantly increased from six million tons in 2001 to almost ten billion tons in 2012. In this regard, the international community is well aware of the consequences the threat of piracy may have on the Mediterranean, as many stakeholders may prefer to divert maritime trade traffic to the Cape of Good Hope, circumnavigating Africa and cutting off the Mediterranean from the great economic flow. As an immediate consequence the law has included piracy among “war risks” charging much higher insurance costs than in the case of the usual maritime peril.

According to Admiral Foffi, piracy is an alarming phenomenon that may have several consequences in the medium-long term if not tackled opportunely. It is exactly the enormous potential risk of economic shock of small criminal groups threatening one of the most primary trade routes that has drawn an expansive international commitment to countering piracy off the coast of Somalia.

Since piracy takes place on the high seas, often very far from the shore, combating acts of piracy has required more than the typical police-prosecution cooperation, which is prevalent in land-based ordinary law crimes, such as robbery or theft. For this reason, supported by a responsive role within the United Nations, navies have been called to play a pivotal role in fighting piracy. In the extraordinary maritime naval deployment in the Horn of Africa region, which sees three international task forces (NATO, EU, and a coalition led by the United States) and nine independent national counter-piracy missions (China, India, Iran, Japan, the Republic of Korea, Malaysia, Oman, Russia, and Yemen), navies as front-line entities have been able to treat the symptoms rather than defeating the threat.

After more than five years of effort and thanks to the constant commitment of navies at sea, the international community has been able to mitigate the rise of piracy in the Horn of Africa region, but it has failed to change the dynamics that allow piracy to boom in that region.

Although criminal piracy activities at sea are *de facto* the effects of this phenomenon, root causes of which still reside in the Somali territory, the “no-boots-on-the-ground policy” adopted by the international community, still under harsh scrutiny, has identified the sea as the only possible dimension where all counter-piracy operations are based (“on the sea” and “from the sea” to the land), thus strengthening the “sea-based” concept. For this reason, navies continue to represent the most appropriate way to ensure a credible presence of the international community in

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this wide strategic arena that covers about 2,5 million square miles, an area which is 50% larger than the territory of the European Union.

Due to their flexible and polyvalent capacities, navies continue a “no-stop” commitment job at sea through a wide range of activities (diplomatic, representative, reactive, offensive measures), from deterrence, direct and indirect protection of merchant ships, and, from the sea to the land, to confidence-building measures as well as direct attacks against pirate logistics ashore without collateral damages.

Over the last five years, pirates have been able to change dynamics and tactics, moving their actions from the Gulf of Aden to the Somali Basin, pushing further East to the Arabian Sea, India and Maldives, far south of Mozambique. The ability to rapidly counteract navy attacks adopted by NATO, EU and task force coalition clearly prove that the piracy phenomenon is better organized and structured than initially assessed.

According to Admiral Foffi, extensive surveillance coverage of the area as well as intensive intelligence information sharing among all the actors involved is necessary. Then, better coordination among national operational centres, military and civilian, to achieve an effective integrated surveillance could be beneficial to prevent and deter pirate attacks. In this regard, the commitment of the Italian Navy in the field of information gathering and sharing is at the foundation of Italian Integrated Maritime Surveillance Policy, which is pursued through an interagency approach at national and international level. The interagency centre (*Dispositivo interministeriale integrato di sorveglianza marittima* - DIISM) is the practical application of such concept at national level, getting together all national maritime agency actors under the leadership of the Prime Minister and his Cabinet. At the international level, the Virtual-Regional Maritime Traffic Centre (V-RMTC) is a successful and ambitious Italian project that started in 2004 and allows the exchanging of information among thirty-three navies operating throughout the globe, from Brazil to Singapore.

However, Admiral Foffi stressed that the extent of the area of operations, the uneasy meteorological conditions, the peculiarities of the threat as well as the need for an adequate coordination among all operating assets and entities require appropriate tools to be used for estimating autonomy in performing surveillance capabilities, special forces, marine boarding teams, air and unmanned aerial vehicle (UAV) assets, and overall ships able to intervene quickly.

In view of these aspects, most Western navies, including the Italian one, have undergone a deep modernization process favouring a more flexible and balanced naval instruments. Already consolidated navy action at sea is appropriately emphasized by diplomatic action on land through the so-called “key leader engagements” in order to acquire confidence and influence local leaders to improve awareness and to help develop constant surveillance capabilities, also through programs on maritime capacity building. As Admiral Foffi suggested, this action could be contextualized within the navy historical role of naval diplomacy, which

had seen in the past navies operating in synergy with foreign affairs departments.

The recent protection of ships through preventive/reactive measures (e.g. the Best Management Practice and the autonomous Vessel Protection Detachments) has resulted in effective self-defence measures to mitigate the problem in the short-term period; Admiral Foffi considered them as complementary measures within the comprehensive effort.

Additional remarks were elaborated from a pure maritime perspective. As stated by Grotius<sup>13</sup> five centuries ago, the freedom of international seas is a prerequisite for any wellbeing and economic growth, it is a freedom directly interlinked with maritime security, thus it cannot be achieved without a considerable presence of navies at sea.

According to Admiral Foffi, far from resulting in stop-market habits, the considerable presence of navies on the high seas is a must in the long-term strategic vision. Indeed, short-term protection of single ships throughout the market of private or military teams cannot be compared with the long-term navy presence. Piracy itself is just one of the symptoms, a bad symptom, but what is really at stake is the overall use of a free and secure international sea. In this vein, emphasis was placed on the fact that "safe sea in the short-term risks becoming a no man's land in the long run": a place where everybody is free to fire with or without the legal cover is not a safe place. On the contrary, enforcing the principle of a free and secure international space where the use of force is a navy prerogative is less economic in the short-term but surely more effective and cheaper in the long run.

Furthermore, the added value of navies was specifically addressed. Navies have collectively the role of guaranteeing good order at sea whatever and wherever needed. Consequently, they exercise the role of "security provider" by creating preconditions for a secure use of the sea. Besides, they act as "economic capacity enabler": by achieving effective maritime security, navies have a pivotal role in contributing to the reconstruction and development of fundamental economic bases such as commerce, fishing, legal exploitation, and marine resources and tourism. In sum, their role is complex, faceted, and interdisciplinary.

As Admiral Foffi concluded, while the international community may be engaged in the long-term institution-building of the Somali territory, thus addressing the root causes of piracy, the navies' contribution in effective maritime security, their concrete maritime capacity building and confidence building, and their information gathering cannot be underestimated. In fact, this cooperative effort to restore good order at sea may be viewed as enhancing the Somali capacity to create adequate living conditions for the future. Overall, this entails a reaffirmation

<sup>13</sup> Hugo Grotius, *Mare Liberum*, English transl.: *The Freedom of the Seas, Or, The Right Which Belongs to the Dutch to Take Part in the East Indian Trade*, translated with a revision of the latin text of 1633 by Ralph Van Deman Magoffin, New York, Oxford University Press, 1916.

of the principle that wherever needed the international community stands ready to defend the vital global interest of the freedom of the sea.

## 2. Armed personnel on board commercial ships

Despite the essential function of navies in maintaining law and order at sea, the role of armed personnel on board commercial ships has been a traditional and controversial subject. In focusing specifically on this issue, Baldwin De Vidts<sup>14</sup> firstly articulated some general observations having some impact on the applicable legal framework.

As regards the several national and multinational counter-piracy missions currently patrolling the areas under threat, it was noticed that such a military presence of naval forces, along with the classical description of pirates as *hostes humani generis* and the wording of the UN Security Council resolutions authorizing the use of “all necessary means” at sea and on land to suppress piracy, has raised the question of whether we are at war with pirates and whether the laws of armed conflict has any role to play in combating and suppressing piracy. The negative answer relies on the fact that there is no war with pirates.<sup>15</sup> In principle, the fight against piracy is a law-enforcement operation, and the applicable rules are those of police powers. Pirates are not in any relevant legal sense engaged in an armed conflict; they are not combatants, they are criminals. All governments involved in counter-piracy operations accept this view. This approach seems to underpin the conclusions of a set of agreements between the EU and *inter alia*, Kenya, Seychelles and Mauritius, which allows extrajudicial transfers of captured pirates for criminal investigations and prosecutions. The UN Security Council has also endorsed this approach, considering the UN Montego Bay Convention as the governing law.

Besides, Dr De Vidts underlined that international law regulated all the authority needed at least for warships to engage in counter-piracy operations and defined the rule on the use of force in those operations. Conversely, an increased debate took place about the possibility of arming private personnel on merchant ships and consequently the use of arms in self-defence, which is authorized as an inherent individual right.

While arming sailors and arming merchant ships has been commonplace for centuries, this has faded because of the ship owner’s concerns about liability,

<sup>14</sup> Baldwin De Vidts is Vice President of the International Institute of Humanitarian Law (IIHL), Sanremo.

<sup>15</sup> As mentioned by the Appeal Chamber of the ICTY, in the Tadić case, “an armed conflict exists whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State”. See International Criminal Tribunal for the former Yugoslavia (ICTY), *Prosecutor v. Duško Tadić, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction* (IT-94-1-A), 2 October 1995, par. 70, <http://www.icty.org/x/cases/tadic/acdec/en/51002.htm>.

responsibility, accountability as connected to the safety and security of the crew and of the ship. Relevant delicate questions generally raised in this regard included: what is the applicable legal framework regarding the possession and the use of weapons by crew members having different nationalities on board commercial vessels subject to the regulations of the flag State? Who will authorize the opening of the gun locker? Who will take command responsively with regard to captured of pirates or the killing of pirates? What will be the scope of the concept of self-defence or private defence as a countermeasure to defend oneself, one's property or the well-being of another, or the property of another from harm and deadly threat?

In considering the use of force in time of danger and imminent threat as a legal justification within the concept of self-defence, Dr De Vidts stressed that relevant interpretation and implementation vary widely in different national jurisdictions. The right to self-defence is a fundamental human right; combined with the principle of the State's monopoly of legitimate use of force, it entails that those authorized by the State to defend the law (law-enforcement personnel) are charged with the use of the necessary force to protect such right. The right to self-defence is limited to situations where the immediate threat of violence cannot be prevented by those authorized to do so in practice because no law-enforcement officer would be present at that moment. In this respect, according to Dr De Vidts, it could be said that there is a reluctance to allow weapons on board: arming a crew means that appropriate combat-training has to be organized, but pirates' higher budgets would allow them to buy and use larger weapons and weapons assistance than the ship-owners in any maritime arms race. Therefore, besides all the legal concerns and challenges, there is the basic question of determining whether the law is making the ships and the crew safer; it is an open question, but the answer seems that arming the crew is not the solution.

The counter-piracy strategy, besides primarily trying to secure maritime areas affected by piracy attacks, has gradually raised the question about affording proper means on board commercial ships in order to protect them. In this regard, the possibility of armed personnel at the service of private military and security companies (PMSCs) has meant that private contractors might protect commercial ships despite the understanding that State coast guards and State naval forces should remain the main provider of security at sea.

Scepticism about the use of PMSCs has been expressed in the International Maritime Organization (IMO) *Best Management Practices* to deter piracy in the Gulf of Aden and off the coast of Somalia,<sup>16</sup> but it has gradually changed into a considerable acceptance of PMSCs, in view that national legislations have been developed and improved in order to establish a proper legal framework for such a presence and

<sup>16</sup> See, e.g., IMO circulars MSC.1/Circ.1332 of 16 June 2009 and MSC.1/Circ.1337 of 4 August 2010. For the latest revised version of IMO *Best Management Practices* (BMP4) see MSC. 1/Circ.1339 of 14 September 2011. All IMO circulars are available in the IMO website: <http://www.imo.org/OurWork/Circulars/Pages/IMODOCS.aspx>.

possible action.

At the beginning, the use of PMSCs was at the discretion of the company, but not really recommended. This was also the case with the International Association of Independent Tanker Owners (INTERTANKO), the International Chamber of Shipping (ICS), the Baltic International Maritime Council (BIMCO), and the ICC International Maritime Bureau (IMB). The positive trend of acceptance led to the IMO regulation of the use of private armed contractors on board merchant ships.<sup>17</sup> In the same vein, the IMO revised the interim guidance to ship-owners, ship operators and shipmasters on the use of privately contracted armed security personnel onboard ships in the High Risk Area.<sup>18</sup> However, it is understood that IMO does not intend to endorse or to institutionalize the use of PMSCs.

The approach taken by BIMCO, the largest of the international shipping associations, has been a pragmatic one, questioning the preference for the use of arms and Vessels Protection Detachments (VPDs) system as provided by governments. In particular, since VPDs solves the number of legal issues (e.g. the use of weapons, position of weapons, liability), taking PMSCs on board has been deemed as an operation, arguing that it remains an operational decision to be made by the companies' members. In this vein, PMSCs should be seen as a temporary measure lasting until the State has entirely fulfilled its obligation to protect commercial ships and taken different appropriate tools against the perpetrated acts of piracy.

Nonetheless, as stressed by Dr De Vidts, the knowledge that a merchant ship has highly sophisticated arms on board could endanger security and cause an over-reaction by pirates when attacking the ship. In any case, it was underlined that PMSCs do not have standard weapons on board, they use single types of arms (e.g. shot guns with a range not extending three or four hundred meters) or they use specialized weapons; this is based on the approach that PMSCs should with all means avoid fighting, but try to deter attacks through appropriate pre-emptive actions demonstrating the willingness to defend the ship and the crew.

A number of like-States (both coastal States and port States) restrict the types of weapons that can be carried on board. According to Dr De Vidts, based on available information it seems that PMSCs equip their personnel with weapons having a range of twenty-two / twelve hundred meters (e.g. machine guns, snipers); this covers a broad range of possible actions to be taken and earlier or more graduated response.

<sup>17</sup> See MSC.1/Circ.1405 and MSC.1/Circ. 1406 of 23 May 2011.

<sup>18</sup> See MSC.1/Circ.1405/Rev.2 of 25 May 2012, to be read in conjunction with the interim recommendations set out in MSC.1/Circ.1443 of 19 June 2012; MSC.1/Circ.1406/Rev.2 of 25 May 2012 on "Revised interim recommendations for flag States regarding the use of privately contracted armed security personnel on board ships in the High Risk Area"; and MSC.1/Circ.1408/Rev.1 of 6 July 2012 on "Revised interim recommendations for port and coastal States regarding the use of privately contracted armed security personnel on board ships in the High Risk Area".

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The expanding use of PMSCs has triggered legal reforms in order to create a proper legal framework. However, several legal challenges are posed by procurement issues, legal restrictions regarding arms on board (concerning embarkation or disembarkation of weapons, the carriage of weapons, on board management of arms, on board management of security protection related items by PMSCs), and also in respect of armed personnel and the conditions under which such weaponry has to be stored in containers and reportedly used. The type and quantity of arms, ammunitions, maintenance equipment, communication equipment, etc., can all raise a number of delicate legal questions. As underlined by Dr De Vidts, all that information *per se* is almost unavailable, and it will not be communicated in order to avoid potential security risks.

The legal requirements are defined normally in domestic law (e.g. regulations concerning carrying weapons, provisions on import/export of weapons, national legislation about the functioning of PMSCs, and the obligations under which such personnel has to operate). This means that we are dealing with panoply of domestic legislations, and following circumstances may apply cumulatively but also subsequently. The route of the ship will also determine the legislation that could become applicable. However, Dr De Vidts underlined some basic principles that would apply. Firstly, in accordance with Article 91 of UNCLOS, ships have the nationality of the State whose flag they are entitled to fly. Thus, the ships and the arms on board ships navigating in international waters on the high seas will be primarily governed by the law of the flag State. Secondly, under Article 94 of UNCLOS, the nationality of the State indicates which State is permitted and obliged to exercise jurisdiction under international law, and *in casu* it prescribes rules that have to be respected and rules that have to be enforced. Thus, on the high seas the law of the flag State will regulate issues related to arms in the merchant ship using PMSCs. As already noted by Dr De Vidts, however, flag State law on procurement, movement, carriage, and on board management of arms, differs enormously from open, permissive rules to rather very restrictive ones; companies have been stimulated even to flag out for legal uncertainty.

Additional issues may arise in this context. In particular, it was noted that, besides the flag State, other regulations may also become applicable as imposed by the State where the company has its registration (e.g. this legislation is applicable in Swiss law). If navigation through territorial waters of that State involves ports of a foreign State coastal and port State law complies. Besides, the difference between flag State law and the law of coastal State has to be considered. Another point concerns to what extent the PMSCs have an impact on innocent passengers of a merchant ship to/through the waters of a coastal State (the Suez Canal has a special regime). Domestic criminal law remains the main source.

In case of attacks, Dr De Vidts emphasized that the degree of imminence of an attack that is required, or the legality of preventive self-defence between jurisdictions can also differ. Unless PMSCs personnel act as *de facto* law enforcement officials, the UN basic principles on the use of force and firearms by law enforcement officials are not directly applicable. It was stressed that PMSCs and its personnel hired by

private companies and present on board merchant ships remain private persons using force in self-defence or in the defence of others; they do not qualify as *de facto* state agents or organs bound by the UN basic principles statement. States could deploy them as for VPDs if they considered them as State agents.

Moreover, the relationship between the master of the ship and the PMSCs personnel was shortly highlighted. As to command and control procedures, a basic question that arose concerned who could take decisions to use force and to take advantage of arms. According to Dr De Vidts, the master of the ship has the ultimate responsibility and liability for the safety and security of the ship, and of the crew; he retains overriding authority on board even if PMSCs are on board. Conversely, the VPDs system entails the use of small teams of law-enforcement officials embarked on board commercial ships to protect them from pirate attacks. They are fundamentally different from PMSCs personnel, because VPDs teams comprise uniform officials acting in their capacities of military or law enforcement agents. Thus, this is a completely different framework, where the situation regarding carrying weapons and the applicable discipline are more transparent than in the case of PMSCs.

Two main conclusions were outlined by Dr De Vidts. Firstly, the crew's entitlement to self-protection is extremely important, as is self-protection by PMSCs, and self-protection by law enforcement officers or by the military. Secondly, it would be a good idea to arm the crew of a ship, either through the use of PMSCs, or by the use of VPDs with the different options including the use of the military or the use of law enforcement officers.<sup>19</sup> In any case, it remains the duty of States and the international community to protect and safeguard free navigation so that there is no threat *vis-à-vis* free navigation and *vis-à-vis* all of us.

It is worth noting that, in the context of the final general debate, the issue of the use of VPDs and Privately Contracted Armed Security Personnel (PCASP) on board commercial vessels sailing in unsafe waters was discussed with particular consideration of current Italian legislation. Article 5 of Law No. 130 of 2 August 2011<sup>20</sup> admits the possibility of embarking military teams as well as contractors on board merchant vessels flying the Italian flag and sailing in waters designated as

<sup>19</sup> In this regard, some States offer more options: in France there is the *Gendarmerie*, in The Netherlands the *Koninklijke Marechaussee*, in Italy *Carabinieri*.

<sup>20</sup> See Law No. 130 of 2 August 2011, Conversion into Law of the Law Decree No. 107 of 12 July 2011, concerning Extension of Time of Interventions for Development Cooperation, Support of Peace and Stabilization Processes, Participation of Armed and Police Forces in International Missions and Provisions for Implementing UNSC Resolutions 1970 (2011) and 1973 (2011). Urgent Measures against Piracy [*Legge 2 agosto 2011, n. 130, Conversione in legge, con modificazioni, del decreto-legge 12 luglio 2011, n. 107, recante proroga degli interventi di cooperazione allo sviluppo e a sostegno dei processi di pace e di stabilizzazione, nonché delle missioni internazionali delle forze armate e di polizia e disposizioni per l'attuazione delle Risoluzioni 1970 (2011) e 1973 (2011) adottate dal Consiglio di Sicurezza. Misure urgenti antipirateria.*] Entered into force on 6 August 2011. Text (only in Italian): <http://www.normattiva.it/uri-res/N2Ls?urn:nir:stato:legge:2011;130>.

High Risk Areas<sup>21</sup> of piracy by the Ministry of Defence.<sup>22</sup> This dual solution chosen by the Italian Parliament entails that the ship-owners can request protection, in a specific part of these High Risk Areas, on the part of: VPDs ("*Nuclei militari di protezione*"), comprising the Navy personnel or personnel from the other armed forces but under the control of the Italian Navy and whose activities must be carried out in conformity with the directives and rules of engagement of the Ministry of Defence, whereas the commander of each VPD has the exclusive responsibility for military activity carried out against piracy,<sup>23</sup> or, alternatively, on the part of the PCASP ("*guardie giurate*"), who can be employed when the VPDs cannot be provided and the ship applies the IMO *Best Management Practices*.<sup>24</sup>

As far as the question of the two separate chain of command is specifically concerned, as Prof. Ronzitti highlighted, the military team aboard the merchant ship is subject to the law of the Ministry of Affairs and the orders of the Italian Joint Operations Headquarters (Ministry of Defence), while the private security personnel is under the authority of the civilian master of the ship. In case of incidents, the decisions are taken by the head of the military team, for instance in order to implement the right of self-defence, considering also that VPDs are State officials enjoying functional immunity. Of course, the content of the law of self-defence can vary from one legal order to another. Under current Italian law, the law

<sup>21</sup> High Risk Area (HRA) is bounded by Suez and the Strait of Hormuz to the north, and 10° S and 78° E. In this area, extra-costs of insurance are applied due to the higher risk, and seafarers have an extra-salary. Besides, the adoption of best practice protection in the HRA (i.e. by VPD and PCASP) has been suggested by IMO as well as by Security Council resolutions.

<sup>22</sup> The HRA designation occurs following consultations with the Ministry for Transportation and the Ministry of Foreign Affairs taking into account the relevant reports of the International Maritime Organization. The Italian Ministry of Defence Decree No. 217 of 1 September 2011 has established these areas. Text (only in Italian): <http://www.marina.difesa.it/attivita/operativa/nmp/Documents/Decreto%20Ministero%20Difesa%20%201%20settembre%202011%20-%20aree%20a%20rischio%20pirateria.pdf>.

<sup>23</sup> See Protocol of 11 October 2011 between the Ministry of Defence and the Italian Shipowners' Association for boarding on Italian merchant ships Vessels Protection Detachment (VPD) in order to fight piracy [*Protocollo di intesa dell'11 ottobre 2011 tra Ministero della Difesa e Confederazione Italiana Armatori (Confitarma) per l'imbarco di nuclei militari di protezione per il contrasto alla pirateria*]. Text (only in Italian): *Protocollo*, [http://www.marina.difesa.it/attivita/operativa/nmp/Documents/A\\_101011\\_Protocollo\\_Difesa\\_CONFITARMA\\_UG.pdf](http://www.marina.difesa.it/attivita/operativa/nmp/Documents/A_101011_Protocollo_Difesa_CONFITARMA_UG.pdf); *Allegato*: [http://www.marina.difesa.it/attivita/operativa/nmp/Documents/B\\_101011\\_Convenzione\\_Difesa\\_CONFITARMA\\_UG.pdf](http://www.marina.difesa.it/attivita/operativa/nmp/Documents/B_101011_Convenzione_Difesa_CONFITARMA_UG.pdf).

<sup>24</sup> Two additional conditions are required for the PCASPs: firstly, they must be authorized in accordance with Articles 133 and 134 of the consolidated text of the laws on public security (Royal Decree No. 773 of 18 June 1931) and then be granted the license by the Minister of the Interior to possess weapons and the Prefect's approval to carry out the service; secondly, they must have passed theoretical and practical courses as established by decree of the Minister of the Interior (Decree No. 154 of 15 September 2009, implementation of Art.18 of Law Decree No. 144 of 27 July 2005, converted to Law No. 155 of 31 July 2005). In December 2012 the Minister of the Interior, the Minister of Defence and the Minister of the Infrastructures approved a decree concerning all the aspects about the use of PCASPs: see Decree No. 266 of 28 December 2012. Text (only in Italian): <http://gazzette.comune.jesi.an.it/2013/75/1.htm>. This decree was detailed in a circular approved by the Minister of the Interior in October 2013 (*Circolare antipirateria*). Text (only in Italian): <http://www.poliziadistato.it/articolo/31177>. Recently, for the first time, PCASPs have been embarked on two merchant vessels.

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of self-defence as applied to VPDs is wider than the law of self-defence as applied to PCASP, because while under the latter self-defence is allowed to meet a threat to life but not to recover property, the law as applied to VPDs allows employing self-defence in order to protect the ship.<sup>25</sup>

In respect of other countries that do not have any legislation on this issue, Italy seems to be at the forefront and should be taken as an example according to Mr Soula. Indeed, a problematic aspect of the probable diminishing of military presence in the future could be the generalized use of PCASP by the industry without having legal instruments in this regard. While today some countries like the Netherlands only want the use of VPDs and they do not recognize PCASP, many others authorize the use of PCASP without passing or implementing any laws.

It is worth underlining that another point raised during the final general debate concerned the importance of training private armed guards and seafarers for the prevention, contrast and protection against piracy. In particular, it was noticed that the *Best Management Practices* for protection against piracy (BMP 4) highlight this issue<sup>26</sup> and that IMO MSC.1/Circ.1405/Rev.2 called the coastal States for "shipboard familiarization training" of armed private guards before they embark on board commercial vessels.<sup>27</sup> As to the Italian situation, it was stressed that no mandatory training exists for seafarers, except for the 2010 Manila amendments to the STCW Convention and Code, which entered into force in January 2012 introducing extensive training and certification requirements,<sup>28</sup> then, no courses exist for maritime security armed guards. In this vein, the role of the international community to press States to implement such courses as mandatory was critically highlighted.

As to the training of armed guards, a representative of the shipping industry emphasized that this remained a temporary measure until piracy was definitely defeated and GUARDCOM (the standard contract for the employment of security guards on vessels) provided some guidance on this score, and that voluntary high standards for guards had been developed (e.g. IMO MSC.1/Circ.1403 of 23 May 2011). As to the training of seafarers, it was noticed that IMO circular 1405 makes

<sup>25</sup> For a detailed examination of Law n. 130 of 2011, see Fabio Caffio and Natalino Ronzitti, "La pirateria: che fare per sconfiggerla?", in *Approfondimenti dell'Osservatorio di politica internazionale*, No. 44 (December 2011, updated April 2012), particularly at 7-9, [http://www.iai.it/pdf/Oss\\_Polinternazionale/pi\\_a\\_0044.pdf](http://www.iai.it/pdf/Oss_Polinternazionale/pi_a_0044.pdf).

<sup>26</sup> According to point 4.6 of IMO BMP 4, "The majority of piracy attacks have been repelled by ship's crew who have planned and trained in advance of the passage and applied the BMPs contained within this booklet".

<sup>27</sup> See MSC.1/Circ.1405/Rev.2 of 25 May 2012 on "Revised Interim Guidance to Shipowners, Ship Operations and Shipmasters on the Use of Privately Contracted Armed Security Personnel on board ships in the high risk area". Text available in the IMO website: <http://www.imo.org/OurWork/Circulars/Pages/IMODOCS.aspx>.

<sup>28</sup> International Convention on Standards of Training, Certification and Watchkeeping for Fishing Vessel Personnel (STCW-F), adopted on 7 July 1995 and entered into force on 29 September 2012, <http://www.imo.org/ourwork/humanelement/pages/stcw-f-convention.aspx>.

clear that it is the responsibility of the flag State, which should develop ways to implement it, because bad training would result in more risks of captured vessels.

### 3. Piracy and international relations

An additional perspective of analysis arose by questioning the fact that maritime piracy could be considered as a “real” threat in international relations, as in the case of terrorism. Christian Bueger<sup>29</sup> gave a comprehensive and indirect answer to this issue. Considering the history of the return of piracy since the 1990s, he asked if piracy was a threat. Arguing that piracy caused more than just one problem, he looked at the effects of piracy as well as drawing some lessons from Somali piracy for the future of maritime security governance.

Counter-piracy in the 1980s relied on private guards on board, unorganized activities using weapons differing from the common ones used today, where the navies are the main actors in charge of counter-piracy.

Looking at relevant contemporary history, piracy for the first time became a major issue, debated as a local safety problem, especially within the shipping community, and the first publications on piracy appeared. In the 1990s East Asian piracy reached a different level of sophistication including disappearance of ships; it started to be seen as a regional threat requiring inter-State coordination; it also became linked to larger concerns such as terrorism, environmental as well as energy security, and corruption. In the 2000s, largely from 2005, particularly in view of Somali piracy, it has become a global issue, and its internationalization is quite evident in the Security Council resolutions as well as in the coordination mechanisms for example, Shared Awareness and Deconfliction (SHADE). Again, piracy has been connected to several other issues such as State failure or proliferation; besides, piracy has clearly become a naval problem to be solved by a military response. Overall, the main question arising from that historical evolution is whether we can go back the way we came, so considering piracy as a local issue rather than an international threat that requires a military response. This seemed the crucial question to be addressed in order to contextualize piracy and consider what kind of problem it actually was.

Indeed, according to Dr Bueger, piracy should be deemed as constituting more than one problem, implying several different consequences. In reconstructing how piracy was dealt with by different professional communities but also by common people, five types of counter-piracy were identified. If considered as a threat then piracy represented a threat to freedom of the sea as well as to local populations, thus requiring extraordinary military response. From a legal perspective, if it is considered as a crime then piracy requires law enforcement operations. From

<sup>29</sup> Christian Bueger is Lecturer at the Cardiff University.

the industry perspective, if it is considered as a cost factor in the operations of international shipping then piracy induces significant industry responses. From a development perspective, if it is considered as a symptom then piracy becomes a secondary problem as the true one is structuring its root causes. From a humanitarian perspective, if it is considered as a source of suffering then piracy again becomes a secondary issue as the true one is facing humanitarian responses to people.

In focusing on the question of the effects of Somali piracy, Dr Bueger highlighted both negative and positive aspects. Certainly Somali piracy has led to considerable human suffering (especially for seafarers and their families) and to considerable economic costs (according to the World Bank, notably paid by for the regional States); thus African States are those suffering from the major problems related to piracy. As to the positive consequences, since 2008, a dramatic success story of international cooperation under a strong international consensus (CGPCS, SHADE) has emerged; besides, piracy has led to an entirely new engagement with Somalia, and this is one of the reasons that favoured a great level of attention to Somalia after decades of complete disregard; finally, a new recognition for maritime security not only in Europe but also in Africa has been achieved. In considering piracy as “a window of opportunity”, Dr Bueger questioned what happens to such a window now that we are moving closer to the situation where there are hardly any hostages within Somalia and there are no successful attacks anymore.

According to him, at least four lessons can be learned from Somali piracy, and they largely have to do with the character of maritime security threats. Firstly, these are delicate thus prevention is actually crucial. They also escalate quickly, hence require early warning infrastructures and reaction systems. They are even asymmetric, and for navies a broader spectrum of solutions (rather than firepower) may help. Finally, maritime security threats tend to look very local at first sight but they can rapidly lead to global effects, as Somali piracy has shown.

Besides, a number of substantive issues to be learned from the success of the maritime security governance in respect to Somali piracy were underlined. Firstly, remote control development policy was considered problematic. Then, the international functional cooperation shaped especially by the Djibouti conduct process worked well due to their large level of expertise of both the Djibouti Code of Conduct (DCoC), and SHADE. Thirdly, technology and particularly a surveillance system were very important only as part of a larger spectrum of solutions, otherwise they did not change anything. Furthermore, good law (such as UNCLOS) did not mean good law enforcement. Finally, public and private coordination was crucial, entailing that States had to work with the companies that dealt with maritime security in order to get effective results.

As to the challenges for redefining maritime security and policies in the future, three points were stressed. The first one concerned the coordination between the political and functional level (strategy and action, e.g. how should political support for a continuous engagement in the Horn of Africa be given after 2015 when

the mandate ends?). The second one concerned the mainstreaming of maritime security into development policy. The third one concerned the reform of the maritime security sector at home and abroad, also considering that the maritime security strategy for Europe did not look that much better than the African integrated maritime strategy.

#### 4. Prosecution: what do piracy court cases tell us?

As highlighted by Jonathan Lucas,<sup>30</sup> the United Nations International Crime and Justice Research Institute (UNICRI) is specifically involved in the issue of piracy by developing a program aimed at addressing the use of private security contractors on board ships as well as elaborating a set of guidelines and soft law standards regarding the use of PCASP on board merchant vessels, for the use of States as well as private sector companies. In partnership with the International Maritime Organization, UNICRI has also established a database on court decisions related to piracy off the coasts of Somalia.

According to a recent study carried out by the World Bank, the United Nations Office on Drugs and Crime and Interpol, from 2005 to 2012, between \$339 million and \$413 million were taken in ransom from the hijacking of ships off the coast of Somalia and the Horn of Africa,<sup>31</sup> the ransom money was used to fuel a wide range of criminal activities on a global scale. By tracing a pattern called “the pirate money model”, this joint report analyses the investments made by a sample of fifty-nine pirate “financiers” and estimated that between 30% and 75% of the ransom money ended up with these financiers. The pirate “foot-soldiers” aboard the ships took just a fraction of the proceeds, amounting to between 1% and 2.5% of the total ransom money. Only 1% of pirates were arrested. As underlined by Dr Lucas, however, the data of court cases may be used to know better who they are and where they come from, and so address the issue properly on land.

In this vein, focusing on pirates who were convicted, it was noticed they mostly came from Mogadishu, they belonged to a dominant clan, and they were mainly fishermen (so indicating why they are good seafarers). A challenging issue is the strong percent of minors who are not subject to prosecution under international law. The length of sentence ranges from 2 to 24 years, the acquittals are 19, with an average of 10 years. There is a certain difference in terms of sentencing, in view of the different jurisdictions and also depending on whether any deaths were caused by pirates’ actions. As to the places of detention, there were a lot of transfers back to Somalia. Focusing on piracy operations, the number of pirates involved in a single

<sup>30</sup> Jonathan Lucas is Director of the United Nations Interregional Crime and Justice Research Institute (UNICRI), Turin.

<sup>31</sup> See World Bank, United Nations Office on Drugs and Crime and Interpol, *Pirate Trails: Tracking the Illicit Financial Flows from Pirate Activities off the Horn of Africa*, Washington, World Bank, 4 November 2013, <http://hdl.handle.net/10986/16196>.

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attack range from 4 to 15, while the usual time of attacks concentrated between 12pm and 2pm, with very few in the morning or in the evening; the time-pick of attacks was in April. The number of crew aboard a skiff range from less than 3 crew members to 8 crew members. There was an instance where no skiff was used.

Looking at the whole structure, including the financing aspect, piracy has resulted to be much more like an organized crime activity, and in fact the role of the pirates is very similar to the one played by either the *campesinos* who are growing coca and opium poppies or the farmers in Afghanistan, they are the “foot-soldiers” at the bottom of the power structure, whereas those who are actually benefitting from piracy and making a profit from such organized crime activity are at the upper-level. While several pirates have been arrested on the high seas and then prosecuted, none of them come from those transnational criminal organizations related to piracy.

It is worth highlighting that one of the issues raised during the general debate was specifically the criminalization of piracy. As Admiral Caffio underlined, in many domestic legislations, including open-registry States, the crime of piracy is still not provided for. Primary action undertaken in this regard within the United Nations includes the resolutions adopted in the context of the Contact Group on Piracy off the Coast of Somalia (CGPCS), which was established pursuant to Security Council Resolution 1851 (2008) to ensure that all States laid down the foundations for the suppression of piracy. Remarkably, Security Council Resolution 2020 (2011) calls on States to enact punitive laws relating not only to the authors of acts of piracy but also their instigators and accomplices. In the same vein, States are invited to criminalize the activities related to piracy, such as the flow of money or the payment of ransom. However, according to the statistics produced by Working Group 2 of the CGPCS, apparently only around one hundred pirates have been subject to trial in respect of the number of around one thousand pirates captured.<sup>32</sup> In this regard, Dr Lucas referred to the difficult situation in the Indian Ocean where several States face challenges when arrested pirates are brought to their shores for trial and issues such as applicable jurisdiction. On this point, as highlighted by Prof. Pocar, the difficulty is probably due to the fact that those acts were committed in territorial waters or it was doubtful where they were committed and consequently it remains difficult to apply international law, under which piracy is an international crime when it is committed on the high seas and which provides for universal jurisdiction.

<sup>32</sup> States that have proceeded to indict pirates include the United States, some European countries such as the Netherlands, Germany, France, Italy, as well as Kenya and the Seychelles, but also the autonomous Puntland and Somaliland macro-regions of Somalia.

## 5. The policy of ship-owners

The shipping industry's view was introduced by Giles Noakes,<sup>33</sup> particularly referring to the largest shipping association, BIMCO, which focuses on the harmonization and standardization of shipping related activity, besides being very much active in the promoting of the application of internationally agreed regulatory instruments. Piracy and armed robbery risk areas are currently globally positioned, though BIMCO is focusing primarily on Somalia.

In the presentation of the overarching strategic view on piracy from the shipping industry perspective, a major concern was that piracy and potentially terrorist risks should be addressed by the international community decisively in order to be prepared to confront the potential use of piracy to achieve terrorist aims; one of the biggest concerns is the terrorist use of shipping as containers to deliver weapons of mass destruction. However, apparently no piracy terrorists are present in Somalia according to Mr Noakes.

As to the shipping industry's view on the role of the international community, it was emphasized that security is inherently governmental and States fear a loss of authority when challenged; governments have a vital interest to maintain security in order that the normal daily business and commerce can continue. Typical types of security that have been bought include three types of Private Security Contracts (PSC) purchase: government sponsored, logistical, and freelance. In this regard, relevant questions were raised as to what if there was a legal and law enforcement vacuum and absence of armed conflict *per se*, or, what if there was no "vital interest" perception. Indeed, the main consequential issue becomes how to come up with some way of running law on the high seas, since codes of conduct (ICoC) have no value unless they are policed (but can they be policed particularly on the high seas?). In the case the governments do not do it, it has to be the ship-owner that has to try to regulate to avoid abuses and potential liabilities when governments come back at them. Such business to business relationships traditionally self-regulate themselves.

According to Mr Noakes, this is the very real and unavoidable *status quo* today, which will remain unless piracy is defeated, rather than simply deterred or disrupted. As emerged in the case of Somalia, "lawlessness ashore equals lawlessness at sea"; while the law enforcement vacuum has been filled at sea, much further action is required on land.

As to the operational *status quo*, industrial concern was expressed about where naval resource constructions imposed by governments would lead, noting that national interests had to take second place to global strategic interests. However, the

<sup>33</sup> Giles Noakes is Chief Maritime Security Officer at the Baltic International Maritime Council (BIMCO), Bagsværd (Denmark)

industry-military relationship was deemed as positive in terms of communication and activities sharing, and the assets provided by governments were considered reliable. There are three pillars to currently deterring and defeating piracy on the high seas: Best Management Practices (BMP), armed guards, and naval presence therein.

As for the political *status quo*, apparently the shipping industry perceived the effective political will as questionable: despite the large number of initiatives only limited practical solutions implemented on the ground today were actually changing the situation. However, for Mr Noakes, the difficulty of implementation was not an excuse, and there was a need for more forceful political interventions.

As to the financial *status quo*, multiple streams of international funding with differing objectives and coordination, confusion and delays remain critical.

Regarding the position of the shipping industry on the root causes and efforts to change, the solution seems to lie ashore, but a requirement for effective law and coast guards as well as a requirement for change of conditions for fishermen who could potentially be pirates have been stressed too. As for ransom payments, they should not be hindered according to the industry: the ship-owner maintains the right to pay the ransom should it be necessary. Additionally, a focus on BMP and Citadels was confirmed: the industry would continue to contribute, for instance by revising BMP, by taking action to regulate and monitor PMSCs, and by regulating PCASP without any institutionalization so as to waive fundamental obligations of the international community and flag States. A final position taken was that industry could not, and would not, fund the counter piracy effort.

Focusing on the shipping industry strategy and policy, several dimensions were considered. At the supranational level (i.e. the Contact Group on Piracy off the Coast of Somalia and IMO), the shipping industry should reinforce its support and information for UNCLOS and the role of the international community, continue funding and, when it is possible, provide assets, besides enhancing cooperative efforts. On the governmental side, the shipping industry should encourage prosecution resolution and support for the right to pay the ransom. As to the military, maintaining dialogue and coordination remained a priority. As far as its own work was concerned, the shipping industry intended to reserve special consideration to the following aspects: the awareness and implementation of BMP by vessels in High Risk Areas; the improvement of self-regulation related to PCASP and PMSCs, and GUARDCON and membership,<sup>34</sup> the avocation for the use of

<sup>34</sup> ISO 28007 Certification provides standard for licences, for fire arms, import and export of firearms and other critical factors: 1. PCASP Team size, composition and equipment, Embarkation and disembarkation, Firearms and management of them, RUF; 2. Interface between Master and PCASP - "C2" procedures and policy; 3. PCASP Vetting and Training; 4. Maritime knowledge/ experience of management (PCASP/training and human rights. BIMCO will provide oversight through its ship-owner membership, and it is offering PMSCs a Consultation Forum and a "White List".

citadels; information sharing, particularly witnesses to prosecute pirates. Finally, the need was addressed for one common standard to be enshrined in some form of global "soft law" where currently a vacuum exists and UNCLOS is inadequate.

In conclusion, some real challenges were highlighted with the view of finding a way forward for the international community. Firstly, focus was placed on piracy but it is the lessons learnt from here that have to be applied for the future. Secondly, increasing domain awareness and information sharing was possible for example, through the Regional Co-operation Agreement on Combating Piracy and Armed Robbery against Ships (ReCAAP), the Maritime Trade Information Centre (MTISC) and IMB and this had to continue. Thirdly, enhancing cooperation, co-ordination and integration was possible, as SHADE proved. Fourthly, creating binding single standards through IMO as well as ISO. Fifthly, increasing maritime capacity building efforts in weak/failed coastal States should be achieved according to vital interests as identified by the international community. The relevance of all these aspects was explained by emphasizing that effective and efficient partnerships were the key solution, while significant disruption of commerce was clearly easily possible, and the more globalized the problem the more exposed we were to all existent vulnerabilities.

### 6. Smart defence and maritime security

Alessandro Marrone<sup>35</sup> addressed the issue of navy capability and maritime security through the concept of "smart defence" that, in theory, means spending money in a more efficient and effective way than in the past. It was noticed that the quest for efficiency and effectiveness was not new in history, as allied countries had managed to deploy sailors, airmen, soldiers, assets in multinational operations together in the last two decades. However, they continued to spend money in defence budgets predominantly at national level. According to Mr Marrone the novelty consisted of the enduring economic crisis that Europe had been facing since 2008, and the consequent introduction of the European Defence Budget cutting the military expenditure by forty-five billions of dollars only in the last two years. Therefore, it was argued that "smart defence" is about better spending the declining and fermented European Defence Budget, which would not increase in the next few years.

In this regard, three key elements describing how Europeans spent defence budgets in a more efficient and effective way were identified. The first one was prioritization, as a recent statement by NATO Secretary General Rasmussen clearly explained ("some of the capabilities we have we do not need, some of the capabilities we need we do not have"). As Mr Marrone stressed, the message seemed to suggest that certain military capabilities could and should be cut by the Allies (e.g. Cold War

<sup>35</sup> Alessandro Marrone is Researcher at the Istituto Affari Internazionali (IAI), Rome.

"Iran tanks" stored in European military bases), while other capabilities should be preserved or maintained (e.g. naval capabilities).

The second official element of "smart defence" was specialization. The major issue was that Europeans had cut their budgets in an uncoordinated way and with little information shared among Allies. This practice increased the risk that certain key capabilities would be cut by all member States, so implying that Europe as a whole would lose them. As Mr Marrone emphasized, this mattered in a NATO framework, not least because the United States made clear that Europeans should maintain their responsibilities for the security of Europe, the Mediterranean and the surrounding region. This also mattered for maritime security, since some European countries had completely given up anti-submarine warfare capabilities. Many other European countries delayed procurement programs to acquire new capabilities or stopped upgrading and maintaining available assets because these were too expensive for reduced defence budgets. Thus, it was underlined that a capability gap had been created.<sup>36</sup> Finally, few European countries reduced their investments in all capabilities areas, without giving up something, in an effort to maintain their full spectrum of military capabilities; however, for Mr Marrone, this was risky too because under certain thresholds capabilities were not effective anymore (in theory they were available, but in reality they were not sufficient and adequate for demanding military missions). In this context, according to a "smart defence" approach, specialization should be made in a way that Europe as a whole could maintain military capabilities distributed among NATO members.

The third main and last element of "smart defence" is cooperation. Certain military capabilities cannot be procured or cannot be maintained by any single European country. As Mr Marrone explained, when the defence budget was reduced and the cost of high-tech military capabilities increased this was just a matter of economics. Conversely, if European countries pool their investments to acquire and maintain shared military capabilities they could get it and maintain it. What they used it for was another issue.

The "smart defence" approach was therefore considered as being quite similar to the "pooling and sharing" concept put forward by the European Union. In this vein, it was noticed that both NATO and EU were indeed addressing the same European problem. It was not by accident that at least one European country was present in every single "smart defence" project launched by NATO, or that two thirds of these projects were led by European countries, or that European countries took part in one third of these projects. Unfortunately, it was also not surprising that both "smart defence" and "pooling and sharing" approaches were not working very well. Despite a small number of cooperative projects under the heading of "smart defence" or "pooling and sharing", there were no big numbers in comparison with

<sup>36</sup> An example mentioned by Mr Marrone in the maritime domain concerns the UK, which currently has no carriers available, since the old ones had been faced out and the next ones will not be deployable before 2020.

the total European spending.

According to Mr Marrone, this was due to three main reasons. Firstly, in some cases (e.g. France) the national defence budget, although declining, was perceived as sufficient to maintain national autonomy. Secondly, so far, multinational procurement programs were not satisfactory, because participating countries asked for different versions of the same capability by increasing costs and delays. In contrast, defence procurement cooperation among small groups of like-minded countries, including bilateral cooperation, appeared less problematic. Thirdly, there was a political reason: an example was taken by assuming that Germany and France pooled their investments to acquire and maintain a shared capability, but France wanted to use this capability in an operation in Africa while Germany did not want to; it was noticed that such a capability would not be used or it would be deployed with delays and caveats, thus not efficiently and not effectively. According to Mr Marrone, this hypothesis was not so unlikely, as shown by the example of the deployment of NATO Airborne Warning and Control System (AWACS) aircraft for intelligence and surveillance in Libya in 2011 in the context of the Operation Unified Protector.

In the recent past, NATO operations in the sea domain have experienced strong and stable support among Allies, and also between partners. A good example is Operation Ocean Shield to counter-piracy, extending the reach of previous NATO Operations Allied Provider and Allied Protector and cooperating well with the EU Operation Atalanta; indeed its mandate has been renewed until March 2014. Besides, NATO Operation Active Endeavour to deter and protect against terrorist-related activities in the Mediterranean is another good example: while it initially covered only Eastern Mediterranean, it has been extended to cover the whole Mediterranean Sea and it has received the contribution of both Russia and Ukraine.

Conversely, Mr Marrone underlined that narrower capability may be required for a variety of tasks, also in support of air operations and land-based operations, which may not enjoy such a strong and stable consensus among Allies or partners such as Ocean Shield and Active Endeavour. In this regard, in 2011 the Operation Unified Protector in Libya included an arms embargo against the Libyan government and it was also conducted at sea, it was quite risky, and not all NATO members participated.

Therefore, according to Mr Marrone, the political issue about the availability or not of shared capabilities in demanding operations in cooperation which had no consensus, also applied to naval capability and would continue to apply to the naval domain. Generally speaking, the whole "smart defence" approach applied to naval capabilities too.

Looking at the NATO maritime strategy published in 2011, it was noticed that this document calls for the transformation of processes and capabilities and "encourages greater multinational cooperation and pulling of resources", which exactly defines "smart defence". Under this strategy the NATO defence planning process would

need to develop the capabilities of Allies, and aims to develop capable, flexible, rapidly deployable, interoperable, and sustainable maritime forces. According to Mr Marrone, this was ambitious and not cheap, as it would require long-term investments that would have to be made in an effective and efficient way, or, in other words, in a “smart defence” way. Unfortunately, these investments would face the same challenges mentioned above and experienced by procurement program in the land domain or in the air domain.

In conclusion, it was highlighted that the low attention reserved for naval capabilities within the debate on European defence spending (as confirmed by the procurement program on the table of the next European Council dealing with defence as it includes air-to-air refuelling, satellite communication, amended vehicles, and cyber defence capabilities), did not mean that naval capabilities were not important or would not remain relevant for the future. At the same time, this did not mean that procurement in the naval domain was already effective and efficient across Europe or so to say “smart”.

### 7. Insuring piracy risk: legal and humanitarian problems

The social role played by the insurance industry as well as the material aspects of a disaster recovery plan were addressed by Giacomo Madia<sup>37</sup> in dealing with shipping insurance protection. The role of the insurance industry was deemed as instrumental in covering all the interests related to the ship, including the saving of human life (insurance for the crew) as well as the protection of the economic interests of the ship-owner (hull insurance) and of the cargo-owner (cargo risk); the “war risk” insurance was a traditional form used to cover against pirate attacks.

The maritime insurance industry has been strongly influenced by the rising number of pirate attacks, with an increase of its shipping rates and premiums, particularly those for high-risk piracy zones. For instance, the significant growth of attacks in 2008 produced a tenfold increase of the insurance premiums for kidnapping and ransom for ships sailing through the Gulf of Aden. As Mr Madia pointed out, statistics show a transit of twenty thousand ships via the Suez Canal until 2011, with a decrease to some sixteen thousand passages expected in 2013, against two hundred and thirty pirate attacks (with a maximum frequency of 20% only). However, minimizing the costs of carriage remains a major need for ship-owners and traders in view of a correct necessity to maintain low costs. In terms of expenses or time, transit via the Suez Canal is far preferable to the passage of the Cape of Good Hope and, despite the additional costs of insurance, the security team on board, and the Suez transit fees, it still remains competitive in respect of the Cape of Good Hope option.

<sup>37</sup> Giacomo Madia is Managing Director of the Banchero Costa Insurance Brokers, Genoa.

## The Threat of Contemporary Piracy and the Role of the International Community

Mr Madia took as an example the trip of an eighteen thousand deadweight tons vessel, from Mad to Singapore, costing \$300,000 in consumption; considering the Suez Canal transit fees, plus the insurance against piracy, plus the cost of an armed team, for a total of \$450,000 per a twenty-one-day trip. Fuel costs for the same type of vessel, for the voyage from a Mediterranean port to Singapore via the Cape is \$538,000, which means \$100,000 more, and the difference of ten days as the total trip via Cape would be thirty-seven days. Thus, \$18,000 per day would be some \$200,000 in addition to the hundred already mentioned. It was noticed that the total amount to buy the insurance is around four hundred million dollars.

Despite the excellent results achieved by the international community in the fight against piracy and the potential of security teams on board against pirate attacks, Mr Madia underlined the existence of some limits where any military action, any diplomatic attempt in the case of difficult and dramatic situations may result as being harmful and dangerous to the life of hostages. In this vein, "money against human life" may be the only basis of a possible solution; paying the ransom may become the only answer that pirates accept, and, after all, the only possibility to recover the ship, the crew and cargo. Since it remained difficult for the ship-owner to dispose of several million dollars in cash for a ransom requirement, the cost of insurance seemed to be the most feasible solution.

In considering the appropriate protection primarily afforded by the shipping community to the life of crew members and then to the economic aspects of the loss of the ship and the cargo, Mr Madia highlighted the delicate issue concerning ransom payment in exchange for the freedom of human life, stressing that, although no clear solution was available, clearness was needed. It was stressed that, admittedly, the insurance policy was and still remained an achievable solution. A new system of insurance policy, which was elaborated in 2007-2008 and called "Kidnap and Ransom Risk", has been able to pay in effect the ransom asked to free the vessel and the crew. However, insurance companies do not anticipate, they pay once the ransom has to be paid according to the principle "paid to be paid". In this regard, they pay a lot of items: the fees and costs for negotiations with pirates, the actual paid ransom (sometimes even twice if the delivered ransom in cash is lost), eventually the loss of via-period of the ship deviation, and sometimes two/three thousand dollars for the time of detention, the loss of personal belongings and keeping them on board, the permanent disablement of the crew, medical therapy treatment for the crew the fees and expenses incurred by the crew families for such treatment as well.

As Mr Madia noticed, the unanimous success of such a system permitted the continuity of trading via Suez Canal and the insurance industry was able to absorb the payment of around four hundred million claimed in ransom for pirate attacks between 2005 and December 2012 for a ship off the coast of Somalia. Unfortunately, around two hundred and twenty sailors were killed by pirates alongside an unknown number of crew members. Conversely, under the single crew permission to put security guards on board, the number of attacks and actual ship detentions in Somalia dropped from two hundred and thirty-seven to seventy-five in 2012 and

nil in 2013. As a consequence the insurance premium for a single voyage dropped from an average of \$50,000 to \$2,500 nowadays, with an additional sum of \$35,000 to put the team on board.

Although conscious that many eminent institutions have expressed different opinions on the negative effect of the payment of ransom, Mr Madia underlined that hardly any national law was successful when applied to a different social entity that did not differ purely for the language, but also for a totally different system of education, life and vital problems of survival. Nonetheless, in referring to the Italian law system that bans any possibility to pay ransom or the kidnapping of Italian citizens, it was concluded that the recourse to insurance was simply the application of what was permitted or not permitted under the law, and if the payment of ransom was prohibited then the insurance company would not permit it either.

In this regard, as Admiral Caffio stressed, the payment of ransom money presented many problems under a legal point of view, also considering that the UN Security Council had not completely condemned such a payment. Nonetheless, it was noticed that the cost of this payment was not so great in respect of the total cost of piracy, covering no more than 5% of it.

In this context, additional considerations were articulated by Stephen Askins.<sup>38</sup> Under Article 101 of UNCLOS, piracy is clearly understood as being an illegal act of violence, committed for private ends, on the high seas, and this makes cases such as the one concerning the action of the Israeli State against the vessel *Mavi Marmara* not included in that definition. Conversely, in the emblematic case regarding the vessel *Fairchem Bogey*, which was hijacked three miles from Salalah and in Omani territorial waters, the international community realized that most countries did not have national laws to deal with piracy or some uniformity across the board in relation to prosecution, with a real risk of proliferation of pirate attacks. On the other hand, in the *Enrica Lexie* incident, which happened in international waters in February 2012 in the framework of cooperation against piracy as regulated by the UN Security Council resolution,<sup>39</sup> India has claimed to exercise its criminal jurisdiction over the two Italian marines indicted of having killed two Indian fishermen under the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation (SUA Convention).<sup>40</sup> Furthermore, in the recent case involving the

<sup>38</sup> Stephen Askins is Partner at the international law firm INCE & Co., London.

<sup>39</sup> For a recent comment of this case, see Natalino Ronzitti, "The Enrica Lexie Incident: Law of the Sea and Immunity of State Officials Issues", in *Italian Yearbook of International Law*, Vol. 22, 2012, p. 3-22.

<sup>40</sup> Under Article 3 of SUA Convention, any person commits an offence if that person unlawfully and intentionally [...] performs an act of violence against a person on board a ship if that act is likely to endanger the safe navigation of that ship; or [...] injures or kills any person, in connection with the commission or the attempted commission of any of the offences set forth in subparagraphs (a) to (f). See SUA Convention, adopted on 10 March 1988 and entered into force on 1 March 1992, <http://www.un.org/en/sc/ctc/docs/conventions/Conv8.pdf>.

marine conservation society Sea Shepherd, the Ninth Circuit US Court of Appeals was so impressed by the aggressiveness shown by this environmental group that it spelled out several reasons why the acts of Sea Shepherd had to be considered "violent" as interpreted by UNCLOS.<sup>41</sup> Another recent controversial case concerned Russia's piracy claims against Greenpeace activists.

According to Mr Askins, all these cases show that the crucial problem remains the lack of uniformed understanding and the lack of appropriate protocols allowing private maritime security personnel to go back to their business.

As far as East Africa is concerned, military information reveals that around 80% of the ships are registered with the Maritime Security Centre Horn of Africa, 65% of these ships have citadels, and around 34% of the ships declare armed guards. However, Mr Askins underlined that a so-called "herd immunity" had been reached: the presence of Best Management Practices, armed guards and naval forces seems to create a situation where the risk to the pirates is now too great for them to go out to sea. In the past, it seemed pretty clear that pirates were motivated by a lack of risk rather than by the rewards, but now the risk is too great. The issue raised in this regard thus concerns the possibility of returning to a stage similar to what commonly happened in the past, with an escalation of pirates, in the case where the number of armed guards was reduced or governments removed some of their naval forces or the BMP resulted in being "soft".

Nevertheless, a clear test on risk and danger is now available among lawyers. In considering circumstances in which a master/owner can rely on "War Risk Clauses" such as "Conwartime" or "Voywar", the basic question to be raised is whether, in the reasonable judgment of the owner, there is a "real likelihood", in the sense of a real danger, that the vessel, her cargo, crew or other persons will be exposed to acts of piracy.<sup>42</sup> In this regard, according to Mr Askins, legally there is no danger under "the war risk clauses" used by owners, although this does not imply that there is no risk or threat. In particular, there is a "risk gap": the military and the maritime security want to get the shipping well covered assuming that the risk is higher than it was a year ago, whereas the actual risk is probably lower. However, this "risk gap" is costing money.

Conversely, a very different scenario was addressed with regard to West Africa, in which there have been around thirty-eight kidnappings and hijackings, with twenty-two occurring outside territorial waters and sixteen inside (twelve in Nigeria, two in Togo, two on the Ivory Coast). These very difficult situations have been characterized by lack of negotiations and communication with the ships, and

<sup>41</sup> Chief Judge Alex Kozinski of the Ninth Circuit US Court of Appeals overturned a lower court's ruling against Japanese whalers, by arguing that the lower court took too narrow a definition and was opposed to the definitions set by UNCLOS.

<sup>42</sup> This was considered in the Triton Lark case, see *Pacific Basin IHX Limited v. Bulkhandling Handymax AS (Triton Lark)*, 2012, EWHC 70 (Comm), <http://www.bailii.org/ew/cases/EWHC/Comm/2012/70.html>.

the removal by pirates of all navigation equipment and even the changing of the name of the ships.

As Mr Askins finally highlighted, the use of armed guards remained a controversial policy but more owners used them as they competed for business in a difficult market; thus, the debate is currently focused on how they can be used safely, with the emphasis on accreditation and accountability. In respect to the industries unfortunate need to provide ship-owners and PMSCs with a clear worded standard contract, GUARDCON was considered an important step forward in terms of regulation, since this is a comprehensive standard contract for the employment and use of security guards, with or without arms, on board merchant vessels and which offers a guidance for the Rules for the Use of Force (RUF). Although the industry still needs internationally approved RUF, this recent initiative is expected to be of great assistance to owners and PMSCs when drawing up and agreeing to the rules of engagement for their own purposes.

### 8. The cost of Somali piracy

In the context of the comprehensive issue of counter-piracy in the Gulf of Aden, the costs of Somali piracy in respect to the global economy have been one of the least explored and underestimated topics. Nevertheless, they deserve attention because the economic costs of piracy, especially collateral and indirect costs, have definitely become a much larger portion of direct ones, including ransoms. According to Paolo Quercia,<sup>43</sup> one of the main reasons for the emergence of such costs is connected to the difficulty of challenging the criminal phenomenon of piracy under the traditional instruments of prevention or repression (because of the vacuum State and the lack of adequate law enforcement agencies), which has led the international economic system to treat piracy simply as a "cost" by financing security aspects as well as spreading the cost over the final consumers of goods in transit between Asia and Europe.

In this regard, the use of force and the use of money may be seen as the two instruments through which public or private stakeholders have faced piracy. Specifically, the use of money has been the relevant dominant component of the "securitization" of piracy in the Gulf of Aden. Conversely, Somali piracy has ended up being a success story for pirates able to force the most powerful economic actors to change their routes in order to avoid precisely "the cost of piracy". Indeed, according to Mr Quercia, the economics for piracy, the money flow from piracy, should be considered as part of the Somali civil war. In particular, taking into consideration Somali piracy and its economics as part of the "war for power" in the stateless Somalia favours a better understanding of the peculiarities of Somali pirates in respect to other cases. In this vein, an historical parallelism may be traced

<sup>43</sup> Paolo Quercia is a Rome-based political-security analyst.

between the rise and then collapse of Al-Shabaab Islamist movement and the Somali piracy phenomenon. Accordingly, although several roots of Somali piracy are still present, the latter has almost disappeared not only in view of the reduced conflicting situation in Somalia and its new political environment, but also in view of the strong reduction of Al-Shabaab power.

Nonetheless, the issue of costs for facing Somali piracy appears quite complex and it is not over.<sup>44</sup> Between 2008 and 2011 approximately \$5 billion per year were estimated as the general costs of piracy in the Gulf of Aden; around \$3 billion were the indirect protection costs paid by the shipping industry (mostly for BMP enforcement, private guards, fueling) while around \$1 billion were the indirect contrast/deterrence costs paid by the public sector, national governments and international organizations (mostly for prosecutions, rule of law initiatives, naval missions); no more than one hundred million dollars per year constituted the direct material costs of piracy that are usually covered by insurance (namely the ransom and the damage caused by the ship). In respect of these statistics, relevant questions that arise are how long can the overall costs be sustainable, or whether any attempts to reduce them is actually debated, or how they are actually divided among the shareholders. In this regard, Mr Quercia emphasized that the protection costs (namely 63% of the overall costs) are ultimately passed on to the final consumers of the transported goods; the deterrence costs (around the 24%) are ultimately covered through general taxation of the contributing countries; instead, the real gain of Somali pirates has never been more than the 2% of the overall costs (where only one third is actually taken by pirates, while the rest is divided among several stakeholders, such as business men who financed the operation, managers, local communities for acquiring their social consensus, clans, logistic services); this means the equivalent cost of the transit fee of Suez canal which is around \$300 million dollars per ship.

Therefore, the criminal phenomenon of piracy resulted to be worth less than 1% of the overall huge costs that it produces and that the international community supports. Indeed, in a lawless scenario of a failed State the private sector (the business-to-business model) dealt with the security issue that States were not able or willing to deal with, by creating a huge market in security and protection services, alongside the criminal market.

An additional important comparison to be elaborated concerns the revenues from piracy and those from other transnational criminal activities taking place in the Horn of Africa, such as heroin trade or ivory trade or human smuggling across the Gulf of Aden (from Somalia and Ethiopia to Yemen). In view of these two benchmarks, namely the real value of the criminal market of piracy and the increased criminal activities in the Horn of Africa, it has been noticed that for a

<sup>44</sup> For a detailed analysis of the several costs of Somali piracy, see Paolo Quercia, "Il costo economico della pirateria somala", in Fausto Biloslavo and Paolo Quercia, *Il tesoro dei pirati*, Roma, Rivista Marittima, March 2013, p. 81-88.

criminal in Somalia it is not much more profitable to be a pirate than an ivory trader or a human smuggler.

Another perspective of analysis relevant to a better understanding of piracy in Somalia addressed the real causes that allowed piracy to reach colossal financial dimensions, up to \$155 million paid for ransoms in 2011, with the top average ransom of that year reaching the amount of \$5 million. In this regard, Mr Quercia observed that probably the market had much to do with the insurance contracts, the way the shipping system worked, and that the amount of five million could still be sustained, but more than this would be quite problematic.

### 9. The role of NATO in fighting piracy

As detailed by Michel Soula,<sup>45</sup> in the highly successful story of counter-piracy initiatives in the Indian Ocean,<sup>46</sup> NATO's role dates back to October 2008, when UN Secretary-General, Ban Ki-moon, specifically requested its assistance in escorting the World Food Programme (WFP) ships through the region (Operation Allied Provider, October-December 2008). Indeed, Somali piracy was seriously damaging both international trade and humanitarian aid and WFP ships had been attacked by rocket-propelled grenades, so crippling UN efforts to feed up to a million people in Somalia and throughout Eastern Africa. However, this persistent danger led to the evolution of NATO's mission beyond an escort role: since March 2009 a more robust presence was guaranteed under Operation Allied Protector, which conducted surveillance and deterrence patrols besides escorting WFP ships (March-August 2009). Then, a continuous NATO maritime presence off the Horn of Africa, as mandated by the UN Security Council, was established under Operation Ocean Shield (August 2009-end of 2014).

In this regard, all NATO counter-piracy initiatives have been conducted in full conformity with international law. UN Security Council Resolution 1816 of 2 June 2008 authorized States to combat piracy off the coast of Somalia, and this authorization has been renewed as necessary ever since. Then, Security Council Resolution 1851 of 16 December 2008 called on States to form an "international cooperation mechanism" to facilitate all aspects of the fight against piracy. Accordingly, the Contact Group on Piracy off the Coast of Somalia (CGPCS) was founded in January 2009 as an international body to bring together a broad cross-section of the international community (Australia, Brazil, China, India, Russia, etc.)

<sup>45</sup> Michel Soula is Head of the Operations Section in the NATO's Operations Division, Brussels.

<sup>46</sup> In contrast to the alarming scale of the threat by the end of January 2011 (thirty merchant vessels had been hijacked, with over seven hundred hostages held; ransom payments peaked at over \$150 million a year, further incentivizing pirate financiers and operatives), the progressively declining slope have included 45 successful pirate hijackings off the coast of Somalia in 2009, 45 in 2010, 24 in 2011, 8 in 2012, and none at all since May 2012. At the moment there are no ships held, and a total of fifty hostages on shore. Eighteen months have passed since the most recent successful hijacking, that of the MT SMYRNI.

with a tightly focused and unified purpose.

NATO's footprint off the Horn of Africa is modest. In terms of force profile, Operation Ocean Shield usually has between 3 and 5 ships committed at any given time, and intermittently operates Maritime Patrol Aircraft. NATO counter-piracy operations are conducted with one of its two Standing NATO Maritime Groups (the "work horses" of its naval forces). All vessels are provided on a voluntary and rotational basis. Currently 4 NATO ships (Standing NATO Maritime Group 1) are deployed in the region. At present, flagship and command are provided by Norway, with US, Danish, and Ukrainian participation.<sup>47</sup>

Despite such a small number of ships in an area the size of Western Europe (so sounding like a very small drop in a very big ocean), it was Mr Soula's view that NATO's success in reducing piracy rates was due to cooperation. International collaboration has definitely been fundamental to containing the pirate threat. Although NATO normally has between 3 and 5 ships positioned in the region, coordination with its partners means that between 10 and 15 ships are usually on patrol.

In this vein, emphasis has been placed on the fact that close cooperation at all levels has created invaluable synergies: increasing interoperability, expanding situational awareness, and strengthening relationships. Indeed, executed carefully multiple counter-piracy deployments have not resulted in redundancy and duplication. Besides being a positive step forward for cooperative security, this model has resulted in being good value for money, which nations appreciate in an age of austerity.

The broad scope of NATO's counter-piracy cooperation encompasses Allies as well as partners and other international forces. NATO's vital relationships in the region have been established with the EU-led Operation Atalanta, with US-led Combined Maritime Forces, and with independent deployers from many countries (including China, India, Japan, Korea, Pakistan, and Russia). Their common efforts are proceeding very smoothly as facilitated by the Contact Group on Piracy off the Coast of Somalia and the Shared Awareness and Deconfliction Mechanism.

This smooth cooperation has basically entailed that piracy rates are sharply down. Apparently the international community has effectively treated the symptoms of the disease, which is no small accomplishment. Nevertheless, the international community is now required to avoid forgetting or dismissing the underlying reasons of piracy in the Horn of Africa, and thus move to attack the root causes of piracy: poverty, instability, and institutional weakness.

<sup>47</sup> As to the Ukrainian ship currently participating in Operation Ocean Shield, NATO was proud to welcome its first-ever partner contribution last month, and New Zealand will shortly be joining as well.

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In this regard, a focus on regional capacity-building (RCB) is considered quite crucial. According to the UN Development Programme's Strategic Plan, capacity-building represents the best insulation against destabilizing "shocks" to a nation, and Somalia has indeed had its share of those. Accordingly, NATO engages in RCB efforts within means and capabilities, particularly during port visits: training coast guard personnel, offering ship protection advice, etc. Moreover, NATO has reached out to others for support, conducting RCB work in cooperation with the International Maritime Organization and with the NATO Maritime Interdiction Operational Training Centre in Crete.

Conversely, Mr Soula noted three important caveats. Firstly, NATO is not primarily a RCB organization; other actors are more appropriate for this task: the United Nations, the European Union, civil society, and private industry all have scope and multiple tools for developing their RCB roles. "While not negligible, NATO's efforts are just one piece of a large pie". Secondly, the achievement of results in regional capacity-building takes effort and time; it is not possible to develop an impartial judiciary or train a professional Coast Guard overnight. Finally, the continuous fragility of the situation in Somalia entails that Mogadishu is often unwilling or unable to pull its own weight.

Despite NATO's openness to joint RCB ventures, its need to remain creative and flexible was highlighted in order to effectively engage within its budget constraints. For Mr Soula, this will likely mean the development of further partnerships, and pursuing an RCB partnership with the UN Office on Drugs and Crime is just one possibility; or also further developing its relationship with the African Union.

Furthermore, a broad international engagement was viewed as highly required in Somalia, whose GDP per capita of \$284 remains among the lowest in the world, and almost three-quarters of the population live below the poverty line of \$2 per day. Mr Soula stressed that political immaturity, regional conflict, and the persistent violence of Al-Shabaab has weighed Mogadishu down as it tries to climb the ladder of development. As a traditional Somali proverb states, "poverty is slavery": if this is so, much of the country is in chains.

Another significant aspect was articulated: pirates are rational economic actors, some of whom are responding to necessity out of desperation. The World Bank has clearly reported how "an empty stomach is a powerful motivator", quoting a former pirate as saying he would never have started had he "been involved in a decent job" or by referring to another one saying he turned to piracy when his friends stopped lending him money.

According to Mr Soula, the situation of Somalia struggling to stand on its own seems to render the risk of a resurgence of piracy still real. The view of the coordinator of the Somalia-Eritrea Monitoring Group, Dr Jarat Chopra, was emphasized in this regard: networks facilitating piracy have moved to other forms of crime (such as drug and human trafficking) because piracy has been suppressed, but they will return to piracy if international efforts are relaxed. In this vein, although the

international community has patched up the piracy crisis, a basic question remains as what will happen when its influence is removed.

The evidence that piracy is by no means a solved problem seemed to come from off both the East and West coasts of Africa where instability on shore drives men to careers in crime at sea. Consequently, it was highlighted that the international community should continue to face the challenge of creating conditions in which this is no longer seen as a viable option: conditions wherein strong institutions govern the country and gainful employment for all Somalis is a reality and not a dream.

According to Mr Soula, the holistic approach was promising though it required long-term dedication over many years. For now, complacency is not an option: if a security vacuum is allowed to develop in and off Somalia by the international community, a return to the maritime anarchy of the mid-2000s could be one of the dramatic consequences. At a time of international community fatigue, maritime security remains critically important.

In this vein, discussions on the future of NATO's counter-piracy involvement (the post-2014 future of Operation Ocean Shield) began in autumn 2013 and so far a general consensus that some continued presence is needed has been expressed. For Mr Soula, the answer may be a focused Indian Ocean presence during piracy high season, as this would retain a deterrent capability while diminishing the costs of the operation. Since the European Union is currently considering the future of its Operation Atalanta, and in view of the strong links between these two operations, the importance of parallel/synchronized reviews is supported by many Allies. This could further underscore NATO-EU interdependency in the maritime theatre. Decisions on both reviews are due in early 2014.

As Mr Soula concluded, over recent years the universal opposition to piracy has led to a level of international cooperation that is both rare and excellent. The productive collaboration of so many institutional actors is in itself a success story. The actual challenge of addressing the root causes of piracy on shore remains. Regional capacity-building is the key to success. To this end, NATO intends to continue working alongside its international partners. Given that 90% of global trade travels by sea, ensuring safe, secure, and free global maritime highways is in every nation's interest.

### 10. The general discussion

The reports and interventions stimulated a general discussion where a number of points were debated in addition to those already underlined.

In addressing the role of the international community in Somalia according to a unable/unwilling paradigm (in the sense that Somalia is unable to grant security in

its territorial waters and therefore the international community is willing to do it), a question was raised as to whether that paradigm has brought a legal constraint on the international community to act not only to stop attacks of piracy but also to address the root causes on land in Somalia with equivalent energy and effort. As Prof. Pocar highlighted, Security Council resolutions have actually authorized Somali-land operations, and in this connection international humanitarian law issues may arise.

In focusing on what action has been taken within the international community in order to face the criminal organizations behind the pirates and their several criminal activities, such as laundering, it was underlined that Working Group 5, created inside the Contact Group on Piracy off the coast of Somalia under Security Council Resolution 1851 (2009), has already done an impressive job in this respect and some measures have been taken in connection with Interpol. Besides, two conferences in Somalia and London (the next one will take place in Brussels) have debated this issue. Also the European Union has a program on capacity-building in Somalia, and last year 23 million euros were given but they could not find any projects as a current main problem in Somalia is identifying the right entity with whom to devise a strategy: capacity-building is difficult to set in motion if the government is unable to act.

Another point was raised by Dr Bueger about the very delicate issue of state-building in Somaliland where the internal conflict is not over, also stressing that the huge border dispute between Somaliland and Puntland does not seem easily solvable. As for the long-term solution on land, apparently there are no outstanding state-building records by the international community (the examples of Afghanistan or Iraq do not seem to reveal extreme positive lessons). Defining who is supposed to constitute the international community and its state-building efforts is thus important.

In the same vein, it was underlined that a long-term solution against piracy in Somalia should also address the law enforcement dimension by Somalis so as to make them independent in addressing their own issues concerning Somalia's territorial waters, especially in view of the very bad instances of exploitation of Somali fish resources as well as illegal toxic waste dumping along the Somali coast.

### Concluding remarks

A major point finally confirmed by all participants was that piracy remains a multifaceted phenomenon to be addressed with different means and under several perspectives, with a number of issues requiring still further action.

Several concluding observations were then addressed by Prof. Ronzitti. Firstly, the United Nations Convention on the Law of the Sea still offers the basic legal framework to face contemporary piracy, but this is not enough and new treaty

law would be welcomed alongside the elaboration of new soft-law instruments to be applied worldwide. In any case, the SUA Convention has nothing to do with piracy and it is not applicable to situations in which a State takes actions against pirates. Secondly, piracy constitutes still a real threat, though diminished, and there is an actual need to cope with it. Thirdly, the shipping industry cannot take the place of States, which should continue to exercise the essential role of policing the sea. Fourthly, the principle that “the land dominates the sea” remains worthy: preserving law and order on land is functional to have order on the sea, and this is a basic requirement of the international community. Fifthly, the prosecution of pirates represents an important deterrent that should be implemented by States more seriously. Sixthly, the payment of ransom remains a very controversial point: from a humanitarian perspective human life is saved, but on the other side there is the risk of stimulating other new ransoms. Seventhly, although it is generally acknowledged that PCASPs and armed guards on board private ships may help in facing criminal acts, several delicate problems concerning State responsibility alongside the accountability of companies cannot be overlooked: they should be clarified under the law: *inter alia*, a possible plan of action would be raising this issue at the European Union level in order to get at least a EU Directive on PCASPs on board private vessels. Additionally, enacting new soft-law instruments may have certain relevance, although they cannot result as effective as a treaty, even from a legitimation perspective.

An additional topic that should be taken into account concerns the action against fixed platforms located on the continental shelf, even though this criminal phenomenon does not fall under the definition of piracy. Furthermore, piracy necessitates clear action, policy, and cooperation, because it rises up from time to time. Indeed, nowadays, the international community does have multiple instruments to act against piracy and therefore it should use and implement them more effectively.

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# The Threat of Contemporary Piracy and the Role of the International Community

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