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Conference report

**Countering piracy: what are the rights and obligations of states and private security providers?**

Monday 30 January – Wednesday 1 February 2012 |  
WP1150



## Conference report

# Countering piracy: what are the rights and obligations of states and private security providers?

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The roundtable on counterpiracy was convened over three days at Wilton Park in January–February 2012 to look at legal issues relating to acts by states and private security providers, with particular reference to the situation off the coast of Somalia. The main challenges to tackling piracy are said to be on the national level, and include the need to criminalise piracy in domestic legislation in any jurisdiction which has not yet done so, and to increase the political will to prosecute and incarcerate pirates. Obtaining and preserving evidence for possible prosecutions as well as the post-trial transfer of convicted pirates are analogous challenges. Yet, despite these acknowledged obstacles to tackling piracy, raising the necessary funds to support such prosecutions and subsequent imprisonment, as well as to address underlying poverty and lack of work in Somalia, has proved difficult. With regard to private security companies the key challenges relate to ensuring greater clarity with regard to the use of force and procedures for detention (should that situation arise), as well as developing a coordinated response among states which addresses the movement of guns through territorial waters and the safe keeping of guns and ammunition in port. There is general agreement, however, that the solution to piracy off the coast of Somalia is to be found on land within Somalia.

## Background

Piracy and armed robbery at sea are costing the international community billions of dollars each year. In January 2012, Wilton Park, in partnership with the Geneva Academy of International Humanitarian Law and Human Rights (the Academy) and the Geneva Centre for the Democratic Control of Armed Forces (DCAF), and with support from Switzerland,<sup>i</sup> convened a roundtable of more than 40 experts to discuss the adequacy of the normative and policy framework for counter-piracy with respect to states and private security service providers (PSSPs).<sup>ii</sup> This report seeks to capture a sense of the discussions, but does not claim to be exhaustive or to capture fully the range of views presented.

## Trends in piracy

1. The extent to which Somali pirates are linked to *al-Shabaab* is disputed. This issue is significant as it is generally agreed that international humanitarian law is not applicable to counterpiracy operations as the pirates are not a party to the armed conflict in Somalia. On the one hand, conventional orthodoxy holds that the two groups are distinct, and the existence of an ongoing operational relationship is contested by most experts; indeed, *al-Shabaab* officials have spoken out publicly against piracy (although

it is widely acknowledged that the funds the two groups raise may be laundered through the same sources). On the other hand, it has been claimed that the links between the two are 'clear and obvious' and that the two groups are merely 'different sides of the same coin'.<sup>iii</sup> Moreover, according to the UN Office on Drugs and Crime (UNODC), pirates are increasingly launching their cross-ocean raids from the *al-Shabaab*-controlled southern coastal city of Kismayu.<sup>iv</sup> The question of the nexus was addressed several times during the meeting with most participants considering the piracy issues as separated from the armed conflict for the purposes of the application of the law of armed conflict. The language of Security Council Resolutions, which refers to 'applicable international humanitarian law', was considered to be irrelevant to a determination of the question of whether international humanitarian law actually applies.

## The impact of piracy

2. Piracy impacts multiple stakeholders, none more so than the seafarers attacked, held hostage, or killed. In 2011, Somali pirates attacked 237 ships and successfully hijacked 28, with 24 seafarers being killed. Oceans Beyond Piracy's report on the 'Economic Cost of Somali Piracy' estimates conservatively that piracy cost nearly \$7 billion in 2011.<sup>v</sup> The study assessed nine different cost factors, and found that more than 80% of the costs are borne by the shipping industry, while governments account for 20% of the expenditures associated with countering piracy attacks. Almost one-half of the total economic costs were the result of increased speeds by merchant vessels or their re-routing to avoid high-risk areas. Only 1% of the estimated \$7 billion is believed to have been directed towards addressing the long-term problems in Somalia, even though there is widespread agreement that progress in promoting peace, stability, and development in that country is essential to efforts to counter piracy.
3. The success of piracy as a form of organised crime can also be seen in the steep increase in average ransom payments over time, from about \$500,000 in 2006 to some \$5 million in 2011. This rise can be partly ascribed to more effective negotiations by the pirates and their representatives, combined with a willingness to retain hostages for a longer period of time (an average of six months in 2011). Indeed, it is rumoured that prior to the successful intervention by Navy Seals in Somalia in late January 2012 to free two hostages working for Danish Demining Group,<sup>vi</sup> the suspected pirates had turned down an offer of \$1.5 million as a ransom payment.<sup>vii</sup>

## An overview of the legal regimes governing counterpiracy

### States

4. The international legal for counterpiracy is found in the 1982 UN Convention on the Law of the Sea (LOS Convention). Also relevant to this framework are the resolutions of the UN Security Council in respect to piracy and armed robbery at sea off the coast of Somalia as well as international human rights law. Although the extraterritorial application of certain human rights law treaties is not accepted by all states, it is not suggested that action against suspected pirates is not constrained by relevant national law or human rights principles. In particular, where events take place on a military ship such acts would be considered to be within the jurisdiction of the state, or even assimilated to acts within the territory. Where state agents act on another ship and bring suspects under their authority it was suggested that the jurisprudence of the European Court of Human Rights suggests that the Convention applies to the acts of that agent even where these take place on or near the pirate ship. As explained above, it was generally agreed that piracy does not form part of, or have a sufficiently close nexus to, the armed conflict of a non-international character on mainland Somalia, so international humanitarian law is not applicable.
5. The LOS Convention allows states to visit suspected pirate vessels and to arrest pirates and seize their ships (see below). This power is only given to states or

specifically authorised and marked ships (Article 107)<sup>viii</sup> and only applies with respect to pirate vessels (Article 103), although this term covers both mother ships and skiffs. Under the LOS Convention piracy encompasses the following acts:

- the use of unlawful violence,
- unlawful detention,
- attack, and
- plunder (i.e. the theft of goods using force).<sup>ix</sup>

6. To constitute piracy, such acts must be committed *by* the crew or passengers of a private ship or aircraft *against another* ship or aircraft,<sup>x</sup> including its crew or cargo, and the acts must be motivated by 'private ends'.<sup>xi</sup> Furthermore, the acts must take place on the high seas or within a state's exclusive economic zone.<sup>xii</sup> 'Inciting' or 'intentionally facilitating' an act of piracy is also an offence.<sup>xiii</sup> This could include, for example, a person who intentionally provides weapons or a boat to individuals in the knowledge, or with the wish, that these items (will) be used to carry out an act of piracy – such a person would be guilty of facilitating the offence.
7. Specific powers relating to counterpiracy off the coast of Somalia were set out in UN Security Council Resolutions 1846 and 1851. Resolution 1846 stipulated that for a period of 12 months from 8 December 2008, states and regional organizations cooperating with the Somali Transitional Federal Government (TFG) could enter Somalia's territorial waters and, 'in a manner consistent with such action permitted on the high seas with respect to piracy under international law', use 'all necessary means' to repress piracy and armed robbery at sea off the Somali coast.<sup>xiv</sup> Resolution 1846 also calls upon states and regional organizations to seize and dispose of 'boats, vessels arms and other related equipment used in the commission of piracy and armed robbery off the coast of Somalia' or where there is 'reasonable ground for suspecting such use'.<sup>xv</sup>
8. Resolution 1851, also of 2008, called for the creation of the Contact Group on Piracy off the Coast of Somalia (this was set up in January 2009). Crucially, the resolution calls upon UN Member States to assist the TFG, at its request and upon notification to the Secretary-General, to strengthen its operational capacity to bring to justice those who are using Somali *territory* to plan, facilitate or undertake criminal acts of piracy and armed robbery at sea. The resolution stresses that any such measures undertaken must be consistent with applicable international human rights law.<sup>xvi</sup> It is not certain whether the resolution would allow entry into Somali airspace by military aircraft.
9. Key issues raised by international human rights law include the legality of the use of force against suspected pirates, the legal basis for the arrest of suspected pirates, the requirement that detainees be brought promptly before a judge (an obvious challenge on the high seas), the conditions of detention of suspected or convicted pirates, the choice of jurisdiction, the requirements of fair trial, and the prohibition on *refoulement* of persons to a jurisdiction where they have a substantial risk of being subjected to torture or other cruel, inhuman, or degrading treatment or punishment. These issues are reviewed further below.

### Private security service providers<sup>xvii</sup>

10. PSSPs are governed by the relevant national law.<sup>xviii</sup> Many PSSPs are professional organisations, although some concern was expressed about the number of 'cowboys' now operating. Determining what is required by law is particularly important in this context as, insurance contracts for shipping companies typically provide for loss of coverage where laws are violated by those on board.
11. In addition, in June 2009, substantive agreement was reached on an International Code of Conduct for Private Security Service Providers (ICoC), which was formally launched and signed by a number of companies on 9 November 2010. As of 1 February 2012, more than 300 companies from 51 countries had signed the ICoC. On

16 January 2012, the Temporary Steering Committee released for consultation a draft Charter for an independent governance and oversight mechanism (IGOM) for the ICoC

12. The extent to which the ICoC addresses maritime security has been queried at various times. It was explained that §13 of the Code states that 'This Code articulates principles applicable to the actions of Signatory Companies while performing Security Services in Complex Environments.'. Complex environments are defined in Section B (Definitions) as 'any areas experiencing or recovering from unrest or instability, whether due to natural disasters or armed conflicts, where the rule of law has been substantially undermined, and in which the capacity of the state authority to handle the situation is diminished, limited, or non-existent.' The reference to 'any areas' as opposed to 'any territory' was said to suggest that the definition was intended to be broader than acts within the exclusive territorial jurisdiction of a state. So in considering whether the open sea near Somalia counts as a complex environment one should take note of the fact that Somalia, for instance, is certainly unstable, continues to suffer from armed conflict, and the capacity of the state to handle the situation is unquestionably limited.
13. Another indication that the ICoC should be read as relevant to maritime security is contained in §7 in which it is stated that the Signatory Companies to the Code commit to consider the development of 'additional' principles and standards for related services, such as the provision of maritime security services. The use of the word 'additional' was understood to mean further principles and standards as well as those laid down in the Code itself. Moreover, more than half of the signatory companies are either partly or exclusively engaged in maritime security, which might indicate that they perceive that the ICoC has relevance to their work. Nevertheless it was suggested that, in light of the specific problems relating to detection of suspected pirates and the use of force against pirates and their vessels it might be appropriate to revisit the existing principles and/or supplement the ICoC with detailed guidelines.

## The use of force

### By states

14. There is a lack of agreement on the extent to which the use of force by states in counterpiracy efforts in pursuance of the detention and arrest of suspected pirates needs to be justified solely on grounds of self-defence. For some naval forces such self-defence is said to translate into policies of 'protect, disrupt, deter', as opposed to a more offensive use of force which would be more akin to 'defeat, deny, destroy.' Other naval powers, however, consider that they enjoy law enforcement powers when they are engaged in search and seizure operations, justifiable in part by the LOS Convention Articles 100-107 and 110. The scope of these 'constabulary' or 'law enforcement' powers needs to be clearly elaborated in advance of counterpiracy operations.
15. In authorising stopping and boarding 'for the purpose of exercising the right of visit' under Article 110 of the LOS Convention or the seizure of a pirate ship under Article 105, the Convention 'presupposes that force may be used to reach these objectives.'<sup>xix</sup> Relevant jurisprudence from the International Law of the Sea Tribunal (ITLOS) has indicated that to be lawful force used must be the minimum necessary and must constitute the minimum threat to life.<sup>xx</sup> Similarly, the 1990 Basic Principles on the Use of Force and Firearms<sup>xxi</sup> provide that states and their law enforcement agencies must adopt and implement rules and regulations on the use of force and firearms against persons by law enforcement officials and that force and firearms may be used only if other means remain ineffective or without any promise of achieving the intended result. The Principles further require that law enforcement officials should be equipped with a range of means as broad as possible and various types of weapons and ammunition 'that would allow for a differentiated use of force and firearms.' These should include the development of 'non-lethal' weapons for use in appropriate situations, with a view to increasingly restraining the application of means capable of causing death or injury to

persons' (Principle 2).<sup>xxii</sup> According to Principle 9:

Law enforcement officials shall not use firearms against persons except in self-defence or defence of others against the imminent threat of death or serious injury, to prevent the perpetration of a particularly serious crime involving grave threat to life, to arrest a person presenting such a danger and resisting their authority, or to prevent his or her escape, and only when less extreme means are insufficient to achieve these objectives. In any event, intentional lethal use of firearms may only be made when strictly unavoidable in order to protect life.

16. With respect to action against suspected pirates and pirate vessels in accordance with the provisions of the LOS Convention, which may involve at a certain point disabling the vessel or the firing of one or more shots 'across the bows', a graduated approach to the use of force is required, and the precise parameters of that force need to be elaborated and made explicit. In the *MV Saiga* case cited above, ITLOS stated that:

The normal practice used to stop a ship at sea is first to give an auditory or visual signal to stop, using internationally recognized signals. Where this does not succeed, a variety of actions may be taken, including the firing of shots across the bows of the ship. It is only after the appropriate actions fail that the pursuing vessel may, as a last resort, use force. Even then, appropriate warning must be issued to the ship and all efforts should be made to ensure that life is not endangered...<sup>xxiii</sup>

### By Private Security Service Providers

17. For PSSPs, it is generally agreed that any right to use force is restricted to acts in self-defence, whether to protect their own personnel or the ship's crew they are guarding. It is worth noting here that although the norm is for PSSP personnel to consult with the Master of the ship with respect to a possible use of force, it was felt that each individual would ultimately retain the right to self-defence if that individual felt in danger or the need to protect the life of others. At what stage of a potential threat from suspected pirates an armed guard may lawfully open fire will vary from national jurisdiction to national jurisdiction based on the pertinent law pertaining to self-defence.<sup>xxiv</sup> It is, however, a key question, as an armed guard may find himself or herself facing a charge of homicide if he/she opens fire prematurely and kills another person. The parameters of this use of force need to be further explored. Indeed, in January 2012 the UK Parliamentary Foreign Affairs Committee stated with respect to armed guards engaged in maritime security on merchant vessels that: 'The guidance published by the Government offers practical advice, but does not provide clear and full guidance on the legal use of force.'<sup>xxv</sup>
18. It is not clear if PSSPs can lawfully shoot across a suspected pirate ship's bow to warn them. Although the judgment in the *Saiga* case cited above suggests that this is not a use of force, such an assertion would be questionable under international human rights law. Article 31 of the ICoC prohibits the use of firearms against persons, thereby appearing to allow warning shots. Could a PSSP fire into the engine block of a suspected pirate ship? Could this or similar action potentially expose PSSP personnel to a charge of piracy?<sup>xxvi</sup> Related to this is the absence of consensus on the type of firearms to be used by PSSPs, as some PSSPs are using 12.7mm sniper rifles, for instance, to fire warning shots at distances greater than that which observers and other companies deem to be safe and appropriate.<sup>xxvii</sup>
19. Other relevant issues include the extent to which varying national laws allow weapons to be carried into national territory (especially ports) or through territorial waters. The LOS Convention allows a right of 'innocent passage' through territorial waters (Article 17)<sup>xxviii</sup> but the extent to which the carriage of weapons violates the constraints upon that right (Articles 19 and 21) is not clear.<sup>xxix</sup> Different national jurisdictions require that either the weapons or the personnel carrying them or both be appropriately licensed. There may also be import/export restrictions relating to the disembarkation of weapons in port.<sup>xxx</sup> Various regimes are currently in force in order to ensure that weapons are

safely stored and delivered when a ship is in port, including gun-rental schemes whereby PSSPs are able to rent government-owned firearms for a daily fee. Faced with complex regulations, some PSSPs have relied on floating 'arms platforms' to embark and disembark firearms at sea, while others have simply dumped firearms at sea before entering territorial waters.<sup>xxxii</sup> It was suggested that greater harmony and transparency in this area could be beneficial for better control over PSSPs. It was also pointed out that where PSSP are protecting ships with petroleum cargo which is highly flammable and they are faced with a pirate firing a rocket propelled grenade (RPG), it would be necessary to fire first in order to protect life, even if no individual was being specifically targeted.

## Actions to protect merchant vessels

20. The challenge in protecting merchant vessels is huge. The area most at risk from piratical attacks covers more than two million square miles – almost ten times the size of France's metropolitan territory. To police that area of the seas effectively, it has been claimed that states would need 1,000 ships with helicopters. One of the naval forces deployed in the area is the European Union's Operation Atalanta, the Union's first ever naval operation, which seeks to ensure the safe delivery of food aid by the World Food Programme.<sup>xxxii</sup>
21. For 2011, it is estimated by Oceans Against Piracy, based on incremental cost analysis only, that some \$1.3 billion was spent by states patrolling the seas off the coast of Somalia.<sup>xxxiii</sup> Yet, despite this significant commitment, the International Recommended Transit Corridor (IRTC) through the Gulf of Aden, which was established in 2009 with military naval and air assets deployed to provide protection and support to merchant ships, is considered by some as no longer safe.
22. Thus, action by the vessels and their owners is critical to minimising the risk of successful piratical attacks. In August 2011, a set of Best Management Practices for Protection against Somalia Based Piracy (BMP 4) was produced by the shipping industry in consultation with the combined naval forces – EUNAVFOR, the NATO Shipping Centre, and the UK's Maritime Trade Operations (UKMTO).<sup>xxxiv</sup> BMP 4 offer suggested planning and operational practices for ship operators, and masters of ships transiting the high-risk area, and cover issues such as risk assessment, reporting procedures, company and ship master's planning, ship protection measures, what to do if pirates take control of the vessel or if military action occurs, and post-incident reporting.<sup>xxxv</sup>
23. According to BMP 4, 'a proper lookout is the single most effective method of ship protection where early warning of a suspicious approach or attack is assured, and where defences can be readily deployed.'<sup>xxxvi</sup> Before constructing any physical barriers the Best Management Practices recommend that a thorough survey is conducted to identify areas vulnerable to pirates trying to gain access.<sup>xxxvii</sup> Where navigationally safe to do so, Masters are encouraged to practice manoeuvring their ships to establish which series of helm orders produce the most difficult sea conditions for pirate skiffs trying to attack, without causing a significant reduction in the ship's speed.<sup>xxxviii</sup>
24. Indeed, increased speed is one practical way to minimise the risks of piracy—no ship has been hijacked while travelling at 18 knots or more—although by no means is every ship capable of such speeds and, as already noted, this has significant cost implications. Re-routing vessels is another option to reduce risk of pirate attack however it is claimed that the business model for diversion of merchant vessels away from the Gulf of Aden is 'not viable'.
25. In response to the significant threat from piracy, increasingly ship owners are turning to PSSPs to protect their vessels with an estimated one quarter of ships travelling through risk areas having private armed guards on board. Initially, there was resistance from industry to putting armed guards on board merchant vessels. There are a number of reasons for this. First, putting guns onto boats is seen as increasing the risk of

accidental harm to seafarers. Second, it adds significant costs to transporting goods. Third, it is seen as the ‘thin end of the wedge’, with the fear that every seafarer on board a merchant vessel might request such protection, leading to unsustainable costs.<sup>xxxix</sup>

26. Another option is vessel protection detachments (VPDs), an option being considered by a number of states. VPDs are basically on-board state security personnel or navy, which has obvious and significant cost implications. A further option is to escort merchant vessels through high-risk areas by specialist PSSPs’ operating a convoy escort programme.
27. A campaign called ‘Save our Seafarers’, which was established in March 2011 by sectors of the maritime industry, is calling on governments across the world to take a firmer stance to help tackle piracy. Its main aims are: ‘to resolve the piracy problem off Somalia; to see piracy deterred, defeated and eradicated; and to stop seafarers being tortured and murdered.’<sup>xi</sup>

### Stop and search powers

28. The LOS Convention affords a right of visit on the high seas to ‘a warship which encounters on the high seas a foreign ship’ where there is ‘reasonable ground for suspecting that the ship is engaged in piracy’.<sup>xii</sup> A similar right is afforded to military aircraft.<sup>xiii</sup> The Convention also provides that on the high seas, ‘or in any other place outside the jurisdiction of any State’, every State may ‘seize a pirate ship or aircraft, or a ship or aircraft taken by piracy and under the control of pirates, and arrest the persons and seize the property on board.’<sup>xiii</sup> The right of seizure on account of piracy — it is not specified if the right extends to arrest, but presumably it must be so—may be carried out ‘only by warships or military aircraft, or other ships or aircraft clearly marked and identifiable as being on government service and authorized to that effect.’<sup>xiv</sup>

### Arrest and detention of suspected pirates

29. Thousands of suspected pirates have been detained over the past few years, although many have been released for lack of evidence or a suitable or willing national jurisdiction to try them.<sup>xv</sup> Some 300–400 suspected pirates are believed to have been lost at sea. The precise circumstances of their disappearance are not known. While the power under international law to arrest suspected pirates is provided to a state in the LOS Convention,<sup>xvi</sup> this must be supplemented by the requisite jurisdiction under national law.<sup>xvii</sup> Non-state actors will likely have to rely on the power of the Master of a ship, the individual who is ultimately responsible for the safety and security of those on board.<sup>xviii</sup>
30. International human rights law generally requires that an arrested criminal suspect must be brought ‘promptly’ before a judge. ‘Promptly’ must be interpreted in the context of a vessel at sea, possibly a long way from the nearest coast, let alone the territory of the flag state. Italy has successfully used video conferencing to overcome the physical distance and ensure that individuals are brought before a judge. A suspect must also be informed ‘promptly’ of the charges against him or her in a language (s)he understands. This may require an interpreter to be embarked. (S)he must also be given access to legal assistance, including when attempts are made to question or interrogate the suspect. Taken together,<sup>xix</sup> these requirements clearly pose major challenges to those engaged in counter-piracy.<sup>1</sup>

### Prosecution of suspected pirates

31. An estimated 1,000 suspected or convicted pirates are believed to be held in prisons around the world.<sup>ii</sup> Numerous trials have taken place in Kenya, Mauritius, the Seychelles, and Tanzania in particular, as well as in Somaliland. Despite regular calls by the UN Security Council to states to adopt domestic legislation providing for universal jurisdiction to try suspected pirates, many states still have to do this and are

therefore unable to prosecute alleged offenders.<sup>iii</sup> Other obstacles include the transfer of witnesses and the exchange of evidence between—or sometimes even within—states.<sup>iii</sup>

### **Post-trial transfer of convicted pirates**

32. There is a need for greater prison capacity to hold convicted pirates, especially within Somalia, as regional states that are willing to prosecute suspected pirates are not necessarily willing to foot the bill for their incarceration, which may be for years or even decades. A prison is being built in Puntland, but obtaining the requisite financial resources remains a challenge. In October 2011, the Security Council renewed its call for further consideration to be given to the establishment of specialised anti-piracy courts in Somalia and other states in the region.<sup>liv</sup>
33. International human rights law will be applicable to transfers of convicted—or suspected—pirates as the principle of non-refoulement prohibits the transfer of any individual to another jurisdiction where he or she is likely to be subjected to torture or other cruel, inhuman, or degrading treatment or punishment. It was explained that in a recent case in a German administrative court, Germany was prevented from transferring a suspect to Kenya on this basis.<sup>lv</sup>

### **Release of convicted pirates**

34. In a high-profile instance in 2011 in Somaliland, 66 convicted pirates were said to have been prematurely released from imprisonment, allegedly after payments were made.<sup>lvi</sup> For those who serve out their sentences, it must be considered whether their transfer back to their state of origin is in accordance with the provisions of national law and international human rights law, including the principle of non-refoulement. Bearing in mind the uncertainties surrounding return to Somalia it is clear that there is a clear disincentive to accept prisoners for incarceration as they will most likely challenge deportation once they have served their sentence.

### **The adequacy of the international legal regime for counterpiracy**

35. It is generally agreed that the existing international legal regime offers a sufficient legal basis for action by states to counter piracy. Some, however, contest whether the LOS Convention provisions relating to piracy are entirely adequate on their own, or only when read in conjunction with the relevant resolutions of the UN Security Council. Moreover, these resolutions do not extend powers beyond the coast of Somalia.
36. There are key issues to be addressed under international human rights law, including the detention of suspected pirates and their treatment while in detention, as well as a possible need to clarify the scope of extraterritorial application of human rights law in piracy situations. A 2010 decision by courts in the Netherlands found that the detention by a Danish Navy vessel of suspected pirates for 40 days was excessive, although the suspects were still convicted of piracy.<sup>lvii</sup>

### **Key challenges**

37. At the international level, coordination of counterpiracy efforts is provided, among others, by the Contact Group on Piracy off the Coast of Somalia, set up in January 2009 following a call by the UN Security Council in its Resolution 1851.<sup>lviii</sup> Nearly 70 countries and several international organizations participate in the Contact Group, including the African Union, the Arab League, the European Union, the International Maritime Organization, the North Atlantic Treaty Organization, and various UN departments and agencies. There are five working groups, the second of which (WG II) addresses legal issues.<sup>lix</sup> Coordination at regional level has also progressed although this is said to have occurred 'more slowly'.<sup>lx</sup>
38. Thus, the main challenges to tackling piracy are said to be on the national level, and

include the need to criminalise piracy in domestic legislation in jurisdiction which have not yet done so, and to increase the political will to prosecute and incarcerate pirates. Obtaining and preserving evidence for possible prosecutions as well as the post-trial transfer of convicted pirates are analogous challenges. Yet, despite these acknowledged obstacles to tackling piracy, raising the necessary funds has proved difficult.<sup>lxi</sup> With regard to private security companies the key challenges relate to ensuring greater clarity with regard to the use of force and procedures for detention, as well as developing a coordinated response amongst states which addresses the movement of guns through territorial waters and the safe keeping of guns and ammunition in port.

## The way forward

39. Greater clarity on the lawful use of force is urgently needed, especially with respect to the use of force in self-defence by private maritime security service providers.
40. Ultimately, there is general agreement that the solution to piracy off the coast of Somalia is to be found on land. As the International Crisis Group noted in February 2012:

The root cause of Somalia's many troubles – terrorism, piracy, periodic famine and constant streams of refugees – is collapse of effective governance, with resulting chronic conflict, lawlessness and poverty. The most effective and durable solution to these ills is to build gradually an inclusive, more federal government structure that most clans can support. Otherwise, Al-Shabaab (or some similar successor) and other disparate groups of would-be strongmen with guns will exploit continued dissatisfaction with Mogadishu and innate Somali hostility to 'foreign occupation'.<sup>lxii</sup>
41. In the current climate, the requisite political will—and financial resources—seem unlikely to be provided in the near future. This means that when naval forces are withdrawn or drawn down, as appears probable, the protection of merchant vessels will largely be in the hands of the shipping industry.

### Stuart Casey-Maslen and Alice Priddy

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<sup>ii</sup> The normative framework for counterpiracy is set out in the 1982 United Nations Convention on the Law of the Sea (see, Security Council resolutions 2020 (2011), 1851 (2008) and 1846 (2008)). The Security Council has repeated in its resolutions concerning piracy and armed robbery at sea off the coast of Somalia ‘that international law, as reflected in the United Nations Convention on the Law of the Sea of 10 December 1982’ sets out the legal framework applicable to combating piracy and armed robbery at sea, as well as other ocean activities. See also, Security Council resolution 2018 (2011) which states that ‘international law, as reflected in the United Nations Convention on the Law of the Sea of 10 December 1982, in particular, its articles 100,101 and 105’, sets out the legal framework applicable to combating piracy and armed robbery at sea as well as other ocean activities).

<sup>iii</sup> See also, e.g., Nick Hopkins and Richard Norton-Taylor, ‘Somalia: UK weighs up air strikes against rebels’, *Guardian*, 22 February 2012, [www.guardian.co.uk/world/2012/feb/21/uk-considers-air-strikes-somalia](http://www.guardian.co.uk/world/2012/feb/21/uk-considers-air-strikes-somalia).

<sup>iv</sup> Cited in Richard Lough, ‘[Piracy ransom cash ends up with Somali militants](#)’, *Reuters*, 7 July 2011.

<sup>v</sup> [www.oceansbeyondpiracy.org](http://www.oceansbeyondpiracy.org), accessed 12 February 2012.

<sup>vi</sup> See, e.g., ‘Seal team six, the unit that killed Bin Laden, frees Somali pirate hostages’, *Guardian*, 26 January 2012. It has been suggested that the hostages were ‘traded’ between Somali pirates and *al-Shabaab*.

<sup>vii</sup> According to US Executive Order 13536 of 12 April 2010 (‘Blocking Property of Certain Persons Contributing to the Conflict in Somalia’), payments of ransoms to certain individuals in Somalia are prohibited. Not all ransom payments are rendered unlawful by the Order, however, and ransom payments are generally lawful according to UK law unless they violate relevant legislation preventing support to terrorism or involvement in organised crime.

<sup>viii</sup> ‘...other ships or aircraft clearly marked and identifiable as being on government service and authorized to that effect...’.

<sup>ix</sup> Attack and plunder are referred to in the LOS Convention as ‘depredation’.

<sup>x</sup> No specification as to the minimum size of the ship is made in Convention.

<sup>xi</sup> The precise meaning of the term ‘private ends’ is disputed. Some hold that it refers to monetary gain as opposed to political acts; the better view is that it distinguishes state acts (once known as privateering) from the acts of other individuals or groups.

<sup>xii</sup> Piratical acts committed within a state’s territorial waters are generally referred to as armed robbery at sea.

<sup>xiii</sup> Article 101(c), LOS Convention.

<sup>xiv</sup> Security Council Resolution 1846, §10.

<sup>xv</sup> *Ibid.*, §9. Thus, it was asserted by one expert that the resolution allows states to destroy pirate equipment offensively but not to kill pirates.

<sup>xvi</sup> *Ibid.*, §7.

<sup>xvii</sup> The International Maritime Organisation (IMO) uses the term ‘privately contracted armed security personnel’ or PCASPs.

<sup>xviii</sup> Which could be the flag state of the vessel on which they are boarded, the state where the PSSP is incorporated, the coastal state (depending on the location of the vessel), and/or the port state. According to MSC.1/Circ.1405/Rev.1 (16 September 2011), ‘flag State jurisdiction and thus any laws and regulations imposed by the flag State concerning the use of PMSC and PCASP apply to their vessels. Furthermore, it is also important to note that port and coastal States’ laws may also apply to such vessels.’ See page 1 of the Annex to MSC.1/Circ.1405/Rev.1.

<sup>xix</sup> Tullio Treves, ‘Piracy, Law of the Sea, and Use of Force: Developments off the Coast of Somalia’, *European Journal of International Law*, Vol. 20, No. 2 (2009), p. 413.

<sup>xx</sup> According to the judgment in the *M/V Saiga No 2* case, ‘international law ... requires that the use of force must be avoided as far as possible and, where force is inevitable, it must not go beyond what is reasonable and necessary in the circumstances. Considerations of humanity must apply in the law of the sea, as they do in other areas of international law.’ [MV Saiga \(No. 2\), Saint Vincent and the Grenadines v. Guinea](#), ITLOS Reports 1999, No. 10, para. 155.

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<sup>xxi</sup> Available at: <http://www2.ohchr.org/english/law/firearms.htm>.

<sup>xxii</sup> See in this regard, e.g., Rick Blears, 'Pirates aopt – make ready the pepper broadside', *Sunday Times*, 25 March 2012, p. 21.

<sup>xxiii</sup> [MV Saiga \(No. 2\), Saint Vincent and the Grenadines v. Guinea](#), *op. cit.*, para. 156.

<sup>xxiv</sup> In Switzerland, for example, a person may use means that are reasonable in the circumstances where a threat is imminent. Under UK jurisdiction, a person may use such force as is reasonable in the circumstances for the purposes of self-defence; defence of another; defence of property; prevention of crime; or lawful arrest. See, e.g., UK Department for Transport, *Interim Guidance to UK Flagged Shipping on the Use of Armed Guards to Defend Against the Threat of Piracy in Exceptional Circumstances*, London, December 2011, available at: [www.dft.gov.uk/publications/use-of-armed-guards-to-defend-against-piracy/](http://www.dft.gov.uk/publications/use-of-armed-guards-to-defend-against-piracy/).

<sup>xxv</sup> [www.publications.parliament.uk/pa/cm201012/cmselect/cmfaff/1318/131803.htm](http://www.publications.parliament.uk/pa/cm201012/cmselect/cmfaff/1318/131803.htm). The guidance published by the UK Government states that: 'Lethal force can generally only be used in the context of self defence or defence of others. The decision to use lethal force must lie with the person using force where they believe there to be a risk to human life. Neither the Master nor the security team leader can command a member of the security team against that person's own judgement to use lethal force or to not use lethal force.' UK Department for Transport, *Interim Guidance to UK Flagged Shipping on the Use of Armed Guards to Defend Against the Threat of Piracy in Exceptional Circumstances*, *op. cit.*, para. 5.6.

<sup>xxvi</sup> In this context, should the pirate skiff or ship be immobilised, the PSSP and the merchant vessel from which they had fired would then be obliged to bring the suspected pirates aboard, resulting in a complex set of issues surrounding the right to detain, the obligation to treat the suspects humanely, and questions about any subsequent transfer of the suspects.

<sup>xxvii</sup> Email from Nicolas Florquin, Small Arms Survey, 9 March 2012.

<sup>xxviii</sup> Subject to the LOS Convention, 'ships of all States, whether coastal or land-locked, enjoy the right of innocent passage through the territorial sea.'

<sup>xxix</sup> Article 19 provides that passage of a foreign ship shall be considered to be prejudicial to the peace, good order or security of the coastal State (and therefore not 'innocent' if in the territorial sea it engages in, inter alia: 'any threat or use of force against the sovereignty, territorial integrity or political independence of the coastal State, or in any other manner in violation of the principles of international law embodied in the Charter of the United Nations' or 'any exercise or practice with weapons of any kind').

<sup>xxx</sup> Thus, for example, the UK's Interim Guidance of December 2011 requires that the shipping company satisfy itself that the relevant PSSP has: 'An understanding of port State and coastal State laws and requirements with respect to the possession, carriage, and movement of firearms, ammunition and other security related equipment (such as body armour, night vision/thermal imaging equipment etc.).' UK Department for Transport, *Interim Guidance to UK Flagged Shipping on the Use of Armed Guards to Defend Against the Threat of Piracy in Exceptional Circumstances*, *op. cit.*, para. 3.2.

<sup>xxxi</sup> Nicolas Florquin, 'Escalation at Sea: Somali Piracy and Private Security Companies', in Small Arms Survey, *Small Arms Survey 2012*, Cambridge University Press, Cambridge.

<sup>xxxii</sup> [www.eunavfor.eu/about-us/mission/](http://www.eunavfor.eu/about-us/mission/).

<sup>xxxiii</sup> This includes \$300 million for the use of unmanned aerial vehicles ('drones') which, although relatively cheap to purchase, are expensive to run and maintain.

<sup>xxxiv</sup> Available at: [www.mschoa.org/bmp3/Documents/BMP4%20low%20resolution%20\(3\).pdf](http://www.mschoa.org/bmp3/Documents/BMP4%20low%20resolution%20(3).pdf).

<sup>xxxv</sup> It is not yet known which of the many practices recommended will be required by insurers if they are to provide insurance coverage of a merchant vessel.

<sup>xxxvi</sup> BMP4: Best Management Practices for Protection against Somalia Based Piracy, Suggested Planning and Operational Practices for Ship Operators, and Masters of Ships Transiting the High Risk Area, Version 4, August 2011, p. 24.

<sup>xxxvii</sup> *Ibid.*, p. 28.

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<sup>xxxviii</sup> Ibid., p. 35.

<sup>xxxix</sup> Another option of course is to arm the crew themselves, but this potentially poses even greater risks.

<sup>xl</sup> [www.saveourseafarers.com](http://www.saveourseafarers.com) The campaign asks governments to prioritise seven key actions:

1. Reducing the effectiveness of the easily-identifiable motherships.
2. Authorising naval forces to hold pirates and deliver them for prosecution and punishment.
3. Fully criminalising all acts of piracy and intent to commit piracy international laws, in accordance with their mandatory duty to co-operate to suppress piracy under international conventions.
4. Authorising naval forces to take action against pirates and their equipment ashore.
5. Increasing naval assets available in this area.
6. Providing greater protection and support for seafarers.
7. Tracing and criminalising the organisers and financiers behind the criminal networks.

<sup>xli</sup> Article 58(2), LOS Convention generally applies the relevant provisions of the Convention also to the exclusive economic zone.

<sup>xlii</sup> Article 110, LOS Convention. See also Article 110(5) which states that ‘these provisions also apply to any other duly authorized ships or aircraft clearly marked and identifiable as being on government service.’

<sup>xliii</sup> Article 105, LOS Convention.

<sup>xliv</sup> Article 107, LOS Convention.

<sup>xlv</sup> The oft-cited figure of nine out of ten suspected pirates caught and released without prosecution was criticised by a number of experts during the Roundtable as being unreliable and unrepresentative of state efforts. Yet, a BBC World TV programme last shown on 30 December 2011 (‘Pirate Hunters’) included an interview with a British naval officer on a vessel engaged in counterpiracy who stated that he would have liked ‘more guns, more action, more catching people.’ The programme also showed Royal Navy personnel detaining suspected pirates who admitted to piracy, where guns and hostages were found on board their vessel, but who were subsequently released without charge.

<sup>xlvi</sup> See Article 105, LOS Convention.

<sup>xlvii</sup> The European Court on Human Rights, in *Medvedyev and Others v. France* (App. No. 3339/03, 2010), laid down a two-stage test that must be satisfied for a detention at sea to be compliant with Article 5, para. 1, of the European Convention on Human Rights (ECHR). First, there must be clear legislation within a state’s domestic law that authorises detention, if such detention is to be lawful. Thus, a State Party to the ECHR who wishes to detain suspected pirates must have legislative authority to do so. Second, express authority under public international law must authorise the boarding of vessels at sea, the detention of persons on board and their subsequent prosecution. Article 105 of the LOS Convention would satisfy the second limb of this test.

<sup>xlviii</sup> The master’s authority is defined in International Convention for the Safety of Life at Sea (SOLAS), Article XI-2, Regulation 8(1), which forms part of Annex 1 to European Regulation (EC) No 725/2004: ‘The master shall not be constrained by the Company, the charterer or any other person from taking or executing any decision which, in the professional judgement of the master, is necessary to maintain the safety and security of the ship.’ A PSSP does not have the power to hold, detain or arrest, unlike a police officer, coast guard officer, naval officer or a merchant ship’s Master (see, e.g., Section 105 of the 1995 Merchant Shipping Act). James Brown, ‘[You’re Nicked: Arrest on the High Seas](#)’, *The Interpreter*, 18 January 2012. Paragraph 3.5 of IMO MSC.1/Circ.1405/Rev.1 of 16 September 2011, entitled ‘Revised Interim Guidance to Shipowners, Ship Operators, and Shipmasters on the use of Privately Contracted Armed Security Personnel on Board Ships in the High Risk Area’ states that the primary function of Privately Contracted Armed Security Guards ‘is the prevention of boarding using the minimal force necessary to do so.’

<sup>xlix</sup> See, e.g., Articles 5 and 6, ECHR.

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<sup>i</sup> France has recently updated its legislation governing the detention of persons on board vessels, setting out specific requirements that must be met with respect to the treatment of such individuals. See Code de la défense, Version consolidée au 16 mars 2011, Action de l'Etat en mer, Titre II : Opérations en mer, « Section 3 : Mesures prises à l'encontre des personnes à bord des navires ».

<sup>ii</sup> Contact Group on Piracy off the Coast of Somalia, 'Working Group 2', undated, [www.thecgpcs.org/work.do?action=workSub2](http://www.thecgpcs.org/work.do?action=workSub2).

<sup>iii</sup> For example, in Resolution 1851, the Council noted with concern 'that the lack of capacity, domestic legislation, and clarity about how to dispose of pirates after their capture, has hindered more robust international action against the pirates off the coast of Somalia and in some cases led to pirates being released without facing justice.' The Security Council reiterates in the preamble that the 1988 Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation Convention (SUA Convention) requires States Parties to 'create criminal offences, establish jurisdiction, and accept delivery of persons responsible for or suspected of seizing or exercising control over a ship by force or threat thereof or any other form of intimidation'.

<sup>iiii</sup> In this regard, it should be recalled that Article 100, LOS Convention imposes a duty on States Parties to the Convention to cooperate in the prosecution of suspected pirates: '[a]ll States shall cooperate to the fullest possible extent in the repression of piracy on the high seas or in any other place outside the jurisdiction of any State.'

<sup>lv</sup> UN Security Council Resolution 2015 (2011). See also the Report of the Secretary-General on specialised anti-piracy courts in Somalia and in other states in the region (UN doc. S/2012/50 of 20 January 2012).

<sup>lv</sup> Cologne Administrative Court decision, 11 November 2011, Decision No. 25 K 4280/09.

<sup>lvi</sup> See, e.g., Contact Group, '9th Meeting of Working Group 2 on Legal Issues, Seychelles, 11–12 October 2011, Chairman's Conclusions'. In contrast, on 22 February 2012 it was announced that Somaliland's parliament had passed legislation recognizing piracy as a crime and allowing for pirates convicted abroad to be transferred to it. Somaliland, which declared its independence from Somalia in 1991 but is still not recognized internationally, said the laws were a sign of the territory's commitment to fighting maritime attacks off Somalia's shores. Al Arabiya, '[Somaliland recognizes piracy as a crime, convictions to bring max jail term of 25 years](#)', 22 February 2012.

<sup>lvii</sup> In June 2010, the Rotterdam District Court agreed with the defendant's lawyers 'that it took too long before the suspects were brought before a judge after their arrest. In this case this was 40 days. That could and should have been done earlier. This constitutes a breach of article 5 of the European Convention on Human Rights. However, no consequences follow from this in these criminal proceedings.' See '[Dutch Court Ruling On Alleged Somali Pirates](#)', 17 June 2010.

<sup>lviii</sup> See, e.g., US Department of State, 'Counter Piracy and Maritime Security (PM/CPMS), International Response: Contact Group', undated, [www.state.gov/t/pm/ppa/piracy/contactgroup/index.htm](http://www.state.gov/t/pm/ppa/piracy/contactgroup/index.htm); and [www.thecgpcs.org/main.do?action=main](http://www.thecgpcs.org/main.do?action=main).

<sup>lix</sup> The Contact Group's five Working Groups are:

Working Group 1: Military and Operational Coordination, Information Sharing, and Capacity Building, chaired by the United Kingdom, focuses on force generation, operational coordination and capacity-building;

Working Group 2: Judicial Issues, chaired by Denmark, focuses on judicial mechanisms for deterring piracy;

Working Group 3: Strengthening Shipping Self-Awareness and Other Capabilities, chaired by the United States, works closely with the commercial shipping industry to enhance awareness and improve capabilities;

Working Group 4: Public Information, chaired by Egypt, seeks to make clear to the world, and especially to the Somali public, the damage being done by pirates; and

Working Group 5: Financial Flows, chaired by Italy, focuses on the illicit financial flows associated with piracy in order to disrupt the pirate enterprise ashore.

<sup>lx</sup> This could include, for instance, settling a regional interpretation of the right of innocent passage and harmonising law and policy on the presence of armed guards on board vessels.

<sup>lxi</sup> Moreover, there is some scepticism among experts as to the preventive effects of the prosecution of pirates.

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<sup>lxii</sup> International Crisis Group, [‘Somalia: An Opportunity that Should Not Be Missed’](#), Africa Briefing No. 8722, February 2012.