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**The Pirates of Puntland:**  
Practical, Legal and Policy Issues  
in the Fight Against Somali Piracy

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## Practical, Legal and Policy Issues in the Fight Against Somali Piracy

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# Introduction—

## Somali Piracy in the 21<sup>st</sup> Century

Long the object of romanticized renderings in literature and popular imagination, piracy on the high seas seems like a barbaric chapter of history from another century that must surely have been overtaken by the modern age. While the existence of pirates in today's world may come as a surprise to some, those familiar with the maritime industry know that piracy is alive and well in our time – in the Strait of Malacca in recent decades before Somali pirates in the Gulf of Aden shot to first place in 2008. Readers of John McPhee will also remember his recounting of pirate stories by the crew of the *Stella Lykes* during a voyage along the west coast of South America in his 1990 book *Looking for a Ship*.

Aside from the threat to the life of mariners, the costs of this piracy are hard to estimate with anything approaching thoroughness. The top Somali envoy for the United Nations (UN) has claimed that pirates have brought in more than \$120 million in ransom in 2008, but even for vessels that are not seized, there are added costs of increased insurance premiums, additional crew pay of as much as twice the normal amount, diversion of the vessel, loss of hire, loss of management time, the costs of outside experts, etc.

The British began their involvement in Somalia late in the 19<sup>th</sup> century spurred by their interest in the Suez Canal. The Italians arrived in 1940, under the aegis of Mussolini. When British Somaliland and Italian Somaliland declared independence and united into one country in 1960, the ensuing instability led, in succession, to General Siad Barre's coup d'état in 1960 and the unsuccessful Ogaden war in Ethiopia in 1977 and 1978, seeking to liberate Somalis there. Revolution led to and followed the downfall of Siad Barre, independence of Somaliland in 1991 (including Puntland, today's pirates' land base), UN intervention, U.S. intervention (with the Black Hawk Down episode), and the rise of Islamism.

In the midst of the humanitarian crisis created by all of this, food had to be shipped into Somalia. Piracy emerged in mid-1990 as locals, claiming that the food aid was not being distributed equably, took matters into their own hands, while others became a self-proclaimed "coast guard" to protect fish stocks from illegal fishing by foreign fleets and the marine environment from illegal dumping of toxic materials.

The following grim distinctions help to measure the magnitude of Somalia's problems. In 2007, the Minority Rights Group International, a non-governmental organization, identified Somalia as the most dangerous country in the world for minorities, due to inter-clan rivalries. The following year, *Foreign Policy* magazine ranked Somalia as the most unstable country in the world. And the 2008 Ibrahim Index of African Governance ranked Somalia as clearly the worst performer in Africa in the categories of Safety and Security; Rule of Law, Transparency and Corruption; Participation and Human Rights; and Human Development. By the end of 2008, the Displaced Population Report, published by the UN Office for the Coordination of Humanitarian Affairs, estimated the number of persons displaced within Somalia as a result of instability at 1.3 million. A Somali-based human rights organization claims that the Somali Transitional Federal Government's (TFG) security forces have terrorized the population and have verified 16,000 civilian deaths and 30,000 injuries during 2007 and 2008, with many more people unaccounted for. In addition, there are weekly reports of aid workers being targeted and killed by gunmen. Drought, civil insecurity, and the activities of pirates have led to shortages and increased food prices.

According to the International Maritime Bureau's Piracy Reporting Centre, which tracks reports of pirate attacks worldwide, global maritime piracy reports in 2008 reached levels unprecedented since the Centre began keeping records in 1992. The Centre received reports of 111 incidents in the Gulf of Aden in 2008, a nearly 100% increase from the year before. Impressive as this increase is, it must be remembered that the vast majority of vessels that transit the Gulf of Aden—between 16,000 and 22,000—do so without pirate attack.

On a very practical level, there are three salient issues. The first two are addressed below. The third is outside the scope of this paper.

First, shipowners want naval warship protection.

Second, Western governments are reluctant to engage in another expensive international policing effort remote from their shores and even more reluctant to actually capture pirates if that means prosecuting them in their own courts.

Third, piracy is just one symptom of long-festering political, economic and social chaos in Somalia that will not be solved without a comprehensive, sustained dedication of resources.

### 1. Military Action

A prominent shipowner who has been involved in industry efforts to spur governments to take action against Somali pirates wrote to us recently "that in the ancient world, city states built navies primarily to protect their commercial ships from pirates, and to keep trade flowing unimpeded." For the United States, we need not go so far back in time. After the U.S. War of Independence, the country's only armed maritime fleet was the Revenue Cutter Service, one of the Coast Guard's predecessors. The Act to Provide a Naval Armament (1 Stat. 350), commonly known as the Naval Act, enacted on March 27, 1794, established a naval force that would eventually become the U.S. Navy. The spur to passage of this act was the seizure by Barbary pirates of 11 U.S. ships and continued foreign harassment of U.S. merchant vessels generally in that area. As a measure of the severity of the problem, tribute paid to North African agencies in 1800 amounted to 20% of federal revenue.

#### a. U.S. Department of Defense

Within the U.S. Department of Defense (DOD), responsibility for combating piracy off the coast of Somalia and the Arabian Sea and adjoining waters is divided between the newly established U.S. Africa Command (USAFRICOM) headquartered in Stuttgart, Germany, and the U.S. Central Command (USCENTCOM) headquartered at MacDill Air Force Base in Tampa, Florida. USAFRICOM has responsibility for land areas within Somalia and adjacent waters out to the 12 nautical mile limit from the low-water line recognized by the 1982 UN Convention on the Law of the Sea. USCENTCOM is responsible for the Arabian Sea proper (to 068 degrees East Longitude), the Red Sea, the Gulf of Aden (where the majority of Somalia-based attacks are occurring), the Gulf of Oman, and the Arabian/Persian Gulf. The countries of Saudi Arabia, Yemen, and Oman bordering these waters also fall within the USCENTCOM area of responsibility.

This division of responsibilities assumes greater importance as the debate within the DOD continues as to the best means of striking at Somali-based pirates – land-based actions such as by Special Operations Forces would fall under USAFRICOM, maritime security operations afloat against pirate vessels and merchant vessel protection are largely within USCENTCOM's responsibility, and any sea-based strike against pirate bases ashore would require coordination across both unified commands.

Meanwhile, U.S. Secretary of Defense Robert Gates has called for steps to combat the piracy threat, but noted that the United States needs to obtain more intelligence before it embarks on any land missions in pursuit of pirates. Additionally, senior U.S. officials have stated that the United States wants a UN force, not a multinational force, in Somalia, arguing that a multinational force requires manpower, resources and money that are not available at this time.

#### b. U.S. Navy—Act I

U.S. Navy forces involved in counter-terrorism/anti-piracy missions within the USCENTCOM area of responsibility are assigned to the U.S. Fifth Fleet headquartered in Bahrain, whose Commander, Vice Adm. William Gortney, also serves as Commander, U.S. Naval Forces Central Command. Major units of the Fifth Fleet include the USS *Iwo Jima* (LPD 7) Expeditionary Strike Force comprised largely of amphibious type vessels with escorts, and the USS *Theodore Roosevelt* (CVN 71) Carrier Strike Group with escorts (which is primarily engaged in supporting Coalition forces in Afghanistan).

Since 2002, the anti-piracy mission in the Gulf of Aden has been the principal responsibility of Combined Task Force (CTF) 150, which is comprised of both U.S. and allied vessels engaged in the counter-terrorism/anti-piracy mission, and which is supported logistically by civilian-manned U.S. naval vessels operated by the Military Sealift Command. Since its inception, CTF 150 has been commanded by naval officers from France, the Netherlands, the United Kingdom, and Pakistan. It is currently commanded by a Danish Royal Navy Commodore. In addition to deployed U.S. and Allied navy ships, the Fifth Fleet also provides force protection for logistics vessels using sailors from Mobile Security Squadron Three.

To date, the major U.S. Navy units assigned to the Fifth Fleet have focused primarily on supporting Operations Enduring Freedom in Afghanistan from the Northern Arabian Sea and Iraqi Freedom from within the Arabian/Persian Gulf. While the capability exists for increased anti-piracy roles by those units, such as strikes against shore bases, merchant vessel escort, and anti-piracy surveillance, the U.S. Navy's preference has been to rely on international navies for direct escort and counter-piracy roles.

#### c. European Union

In September 2008, the Council of the European Union (Council) adopted a Joint Action (2008/749/CFSP) in support of UN Security Council Resolution 1816, establishing a military coordination action (EU NAVCO) with a view to supporting the activities of Member States deploying military assets in the area, in particular by setting up a coordination cell in Brussels. This paved the way for the adoption of Joint Action 2008/851/CFSP in November 2008 on an EU military operation to contribute to the deterrence, prevention and repression of acts of piracy and armed robbery off the Somali coast. In this Joint Action, the Council made a commitment to conducting a military operation in support of UN Security Council Resolutions 1814, 1816 and 1838, to be called "Operation Atalanta," in order to contribute to the protection of vessels of the World Food Program delivering food aid to Somalia and to the protection of vulnerable vessels cruising off the Somali coast, and the deterrence, prevention and repression of acts of piracy and armed robbery off the Somali coast. In accordance with that Joint Action, suspected pirates who have been arrested are to be transferred to the competent authorities of the flag state of the vessel which took them captive or, if that state cannot, or does not wish to, exercise its jurisdiction, to another state which wishes to do so, subject to guarantees that no person will be subjected to the death penalty, to torture or to any cruel, inhuman or degrading treatment. On December 8, 2008, the

Council adopted Decision 2008/918/CFSP, launching Operation Atalanta, a European Union naval force (EU NAVFOR Somalia) to contribute to the deterrence, prevention and repression of acts of piracy and armed robbery off the Somali coast. EU NAVFOR Somalia relieved a North Atlantic Treaty Organization (NATO) Force that had provided similar support in delivering humanitarian supplies to Somalia; it also subsumed the operations of the EU NAVCO.

Operation Atalanta is the first EU maritime operation conducted in accordance with the European Security and Defense Policy. Although the EU NAVFOR Commander, a British Royal Navy Rear Admiral, admitted that a naval force in itself cannot completely eradicate piracy, the Force can make a significant contribution to counter piracy in a number of specific areas. Its first and most important task is to ensure the safe passage of World Food Program ships into Somali ports. Assuming the flag state agrees, the EU Force will put an armed presence on board those ships for the duration of their transit in order to guarantee their safety as they transit through Somali territorial waters.

The Force also will be looking to keep a close watch over the whole of the Somali coast, not an easy challenge given the thousands of square kilometers of sea with the airspace above them. This includes targeting high-risk areas and concentrating surveillance there, both with the ships of the EU naval force and their embarked helicopters and with the maritime patrol aircraft that the United States has in support of operations, as well as cooperation with CTF 150. If pirate activity is detected, force will be used to deter and prevent it and, if necessary, intervene in order to bring those acts of piracy to an end.

Operational Command of EU NAVFOR Somalia is exercised from Northwood just outside London in the UK. The Force Commander in theatre will be a command executed at sea and will be a rotational appointment that will be held for about four months at a time. The first rotation of force command will be by a Greek Navy Commodore exercising command from a Greek ship. Subsequently, the force will be commanded by a Spanish Navy Captain and then a Dutch Navy Commodore for the second and third rotations.

It is anticipated that at any one time there will be up to six frigates and destroyers in the force, and two or three maritime patrol aircraft will be flying in support of the mission throughout. To date, vessels from Belgium, France, Germany, Greece, the Netherlands, Spain, Sweden and the UK are expected to take part in the operation. Currently, warships from France, Germany, Greece and the UK, together with a single maritime patrol aircraft, are patrolling the area. In addition, the EU Force is looking to include vessels and personnel from third states to better achieve its mission. Indian and Russian naval patrols are also in the area and are coordinating their activities with the EU fleet.

EU forces reportedly prevented several pirate attacks in the first few days of 2009, but NAVFOR Commander Gerry Northwood warned in February that Somali pirates are poised for renewed attacks.

#### d. U.S. Navy—Act II

In January 2009 the U.S. Navy, acting in recognition of the fact that some of the navies in the coalition organized under CTF 150 did not have the authority to conduct anti-piracy operations, established a second task force, CTF 151, dedicated specifically to that mission. As the Commander of the Fifth Fleet noted, "The establishment of CTF 151 will allow those nations to operate under the auspices of CTF 150 [in support of regional security operations] while allowing other nations to join CTF 151 to support our goal of deterring, disrupting, and eventually bringing to justice the maritime criminals involved in piracy events."

The establishment of CTF 151 also heralded a more active response by the U.S. Navy to combating piracy in the Gulf of Aden, as illustrated by the following headlines: (January 16) "Navy awaiting OK to capture pirates," "U.S. Navy plans to chase, capture Somali pirates," "CENTCOM makes it tough to be a pirate"; (January 27) "U.S. to hand over any suspected pirates to Kenya"; (February 12) "U.S. Navy captures 7 suspected pirates in Western Gulf of Aden"; (February 13) "U.S. Navy, Russians seize 26 pirates off Somalia"; (February 17) "U.S. uses unmanned drones to hunt Somali pirates"; (February 19) "U.S. Navy toughens action against pirates"; and (February 23), "U.S. aircraft carrier to battle pirates."

In early February, the U.S. Naval Forces Europe and Africa deployed the USS *Robert G. Bradley* to the area to "help improve maritime safety and security in Mozambique [and East Africa]" as part of its Africa Partnership Station (APS). This marked the first time that a U.S. Navy warship tied up pier-side in Maputo, Mozambique, and the first time the APS extended to Eastern Africa. Though piracy was not among its initial objectives, APS is an initiative of the U.S. Navy that aims to work with U.S. and international partners to improve maritime safety and security in Africa, and to build the skills, expertise and professionalism of African militaries, coast guards, and mariners.

Even as U.S. and Coalition navies increase their presence and anti-piracy activities in the Gulf of Aden, the challenge facing those forces is similar to that faced by NATO and U.S. forces tracking terrorists in the mountains of Afghanistan and Pakistan or the crowded alleys of Sadr City in Baghdad. With very small targets in vast areas and support for those targets from the indigenous population, the total elimination of the threat by military action alone will be difficult if not impossible.

## 2. Legal Framework

The present-day international legal framework for addressing piracy is laid out in two international conventions, the UN Convention on the Law of the Sea of December 10, 1982 (UNCLOS) and the UN Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation, March 10, 1988 (SUA Convention), and in several International Maritime Organization (IMO) documents and UN resolutions.

### a. The International Conventions

Prior to the current situation in Somalia, anyone with even a passing familiarity with UNCLOS would have thought – correctly – that international law was very simple and clear on the subject of piracy. A distinguished international law scholar who is an expert on UNCLOS and the SUA Convention wrote to us that: "[UNCLOS] contains very clear provisions on this matter. It is for the states parties to the Convention to implement these provisions and that is where the major problem seems to lie. Furthermore, there are certainly complicated legal and practical issues in bringing pirates arrested off the coast of Somalia to trial in countries far away from the region."

Somali pirates have illustrated these practical shortcomings of the legal system. U.S. Navy Vice Adm. William Gortney, commander of the U.S. Fifth Fleet and of the Combined Maritime Forces who directed the establishment of the Maritime Security Patrol Area and established Combined Task Force 151, indicated in a Pentagon briefing earlier this year that without orders to capture pirates and a procedure to turn them over for prosecution somewhere, there is a serious gap in the arsenal of anti-piracy measures. This admission should have been a surprise to no one.

UNCLOS assigns a duty to all countries to cooperate to the fullest extent possible in the repression of piracy on the high seas or in any place outside the jurisdiction of any country. UNCLOS recognizes universal jurisdiction over piracy, i.e., it authorizes any country to seize, on the high seas or in any place outside the territory of any country, a pirate ship or a ship taken by piracy and under the control of pirates, and arrest the persons, seize the property on board, and impose penalties. Piracy is the oldest and one of the few crimes where this legal principle of universal jurisdiction has been generally recognized under customary international law. As respects piracy in general, UNCLOS merely codified existing, customary international law. The United States signed UNCLOS in 1994, but has not ratified it despite repeated efforts.

Prompted largely by the murder of Leon Klinghoffer during the seizure by Palestinian terrorists of the cruise ship *Achille Lauro* in 1985, the SUA Convention covers a broader range of unlawful acts against ships, regardless of whether the motive is piracy or terrorism, and primarily addresses international cooperation in apprehending and extraditing offenders. Building upon prior anti-terrorism conventions, the SUA Convention essentially obligates state parties to extradite or prosecute. The United States is a party to and has ratified the SUA Convention. Congress' ratification of the SUA Convention can be seen as an exercise of the power granted to it in Article 8 of the U.S. Constitution "To define and punish Piracies and Felonies committed on the high Seas, and Offenses against the Law of Nations."

Applying the statute that implements the U.S.'s obligations under the SUA Convention to a pirate attack, a U.S. court recently held that a non-U.S. national who forcibly seized control of a non-U.S. vessel in international waters and who was later found in the United States could be prosecuted in the United States. The court noted that piracy is *hostis humani generis*, an enemy of the human race, and that the doctrine of universal jurisdiction was originally developed to prosecute piracy.

### b. The IMO Documents

IMO Maritime Safety Committee Circulars 622/Revision 1 of June 16, 1999 and 623/Revision 3 of May 29, 2002 provide recommendations to governments and guidance to shipowners and ship operators, shipmasters, and crews, respectively, on preventing and suppressing acts of piracy and armed robbery against ships. These publications emphasize self-protection measures, reporting events, and coordination among countries. IMO MSC/Circular 622/Revision 1 addresses criminal jurisdiction by recommending that countries prosecuting persons apprehended at sea outside the territorial seas of any country should do so under mutual agreement with other substantially interested countries. This is consistent with a provision in UNCLOS that the actions of a state that seizes a pirate ship are "subject to the rights of third parties acting in good faith." Additionally, IMO Resolution A.922(22) adopted a Code of Practice for the Investigation of the Crimes of Piracy and Armed Robbery Against Ships.

These foundational documents basically establish a framework under which ships take their own precautions to protect themselves against piracy, countries respond to protect their direct interests from attacks in international waters, and countries cooperate in investigating such attacks and extraditing and prosecuting offenders. While some of these documents were developed in response to specific incidents, they are all drafted to apply broadly.

### c. The UN Resolutions

The UN Security Council issued five resolutions in 2008 regarding piracy off the coast of Somalia (1814, 1816, 1838, 1846, and 1851) which build upon the above foundational documents and include additional direction to account for the inability of the government of Somalia to control piracy originating in its own territory. Resolutions 1816 and 1846 temporarily authorized countries and regional organizations cooperating with the government of Somalia to combat piracy in the territorial waters of Somalia. Resolution 1838 calls upon countries whose naval vessels and aircraft operate on the high seas and airspace off the coast of Somalia to use the necessary means, in conformity with international law, for the repression of piracy. Resolution 1846 went one step further by calling upon countries and regional organizations that have the capacity to do so to take part actively in the fight against piracy and armed robbery at sea off the coast of Somalia. These two documents go beyond the UN and IMO foundational documents discussed above in requesting actions by countries that are not directly affected by a piracy incident. Finally, Resolution 1851 authorizes for 12 months all necessary measures appropriate in Somalia (including on land) to interdict those using Somali territory to plan, facilitate or undertake acts of piracy.

Resolution 1851 was introduced by the United States and unanimously adopted by the UN Security Council on December 16, 2008. It was cosponsored by Belgium, France, Greece, Liberia and South Korea, and gives those nations already involved in battling pirates off Somalia authority for one year to “undertake all necessary measures in Somalia, including in its airspace” to stop the pirates.

The Somali government has said that it will “welcome” the UN to fight pirates inland and on the high seas. Concerns about the effectiveness of Resolution 1851 began to surface a day after it was approved, when UN Secretary General Ban Ki-moon complained that governments in the UN have called for a peacekeeping force in troubled Somalia, but none has volunteered to lead it with large ground troops to stabilize the country. The German government has already made it clear that its troops will not participate in land operations against pirates, despite its involvement in the EU anti-piracy mission Atalanta. Before the resolution was approved, senior U.S. naval officers expressed reservations about pursuing pirates onto Somali territory.

In addition to early concerns about the adequacy of the international naval response to piracy and armed robbery at sea off the coast of Somalia, concerns were also expressed about the lack of activity to apprehend and prosecute individuals engaging in or abetting such acts. Resolutions 1846 and 1851 urge countries that are parties to the SUA Convention to cooperate with the UN and IMO to build judicial capacity for the successful prosecution of persons suspected of piracy and armed robbery at sea off the coast of Somalia.

### 3. Insurance Issues

Insurance coverage against the risk of pirate attacks involves marine hull, marine cargo and protection and indemnity insurance. Traditionally, piracy was covered as a marine peril under the owner’s hull insurance. However, with increased incidents of piracy a number of grey areas have arisen. For insurers outside the London market, piracy is a war risk and covered by the owner’s war risk insurance. The practical effects of this distinction may be lessened where the owner’s hull and war risk insurers are the same, except that war risk policies often have no deductible, but could be an area of dispute where coverages are by different insurers. With respect to cargo insurance, Institute

Cargo Clauses specifically cover piracy unless caused by a terrorist or person acting from a political motive. Coverage of these exclusions requires insurance with Institute War and Strike Clauses.

Ransom payments are another grey area. Although covered by protection and indemnity insurance, ransom payments potentially raise unsettled questions of general average (the requirement that cargo owners contribute to payment of the loss), loss of hire insurance and sue and labor clauses requiring the owner to protect the property from further loss once a covered loss has occurred. It is our understanding that even when not covered by a separate kidnap and ransom policy, ransom payments are being covered by many insurers under sue and labor clauses. Finally, though payment of ransom is not always illegal, it is likely to be illegal if the ransom payments are being used to fund terrorist activities. Testifying at a Congressional hearing on piracy in early February, Rear Adm. Ted Branch, director of information, plans and security at the Office of the Chief of Naval Operations, told the panel that agencies had been looking for a link between terrorism and the piracy taking place off the Somali coast but had not detected any.

Because of these uncertainties, some insurers are offering specialized additional coverage for piracy risks. However, a more likely long-term solution is for the London and other insurance markets and their customers to make all forms of piracy, politically motivated or otherwise, the clear subject of war risk policies.

Finally, whether piracy is covered under marine or war risk policies may depend in the UK, a major center for marine insurance, on the number of pirates involved in the attack. According to the UK’s Public Order Act 1986, a riot occurs when 12 or more people use or threaten violence for a common purpose, and under UK case law, these are covered under war risk policies. So, 12 or more, call your war risk insurer; but if there are fewer than 12, call your marine risk insurer. Of course, it may not always be easy to know how many pirates are involved in a boarding attempt or to count them.

### 4. Self-help Measures by Vessel Operators and Use of Force

The IMO initiatives discussed above establish a framework under which ship operators take their own precautions to protect themselves against piracy. The Somali situation has given rise to a number of specific recommendations, including the following:

- Transiting at high speed to outrun attackers. An option for certain ships, like container ships; but not others, like tankers.
- Take the long route around Africa. Adds time and expense and will be less attractive in the Southern Hemisphere winter.
- Discourage or repel attackers by using Long Range Acoustical Devices (\$20,000 to \$30,000 apiece), raise boarding ladders, dangle fire hoses over the side, install razor wire at access points.
- Call for help and, like the crew of the M/V *Zhenhua 4* (depending on which news report you read), either lock the crew up or use Molotov cocktails, beer bottles and other missiles until rescue forces arrive. ... Or ... maybe hold the Molotovs.

There is the much-discussed, delicate question of the use of force by vessel operators or their contractors. In testifying before Congress in early February, Rear Admiral William D. Baumgartner, the judge advocate general of the U.S. Coast Guard stated with respect to armed guards that “the U.S. government does recognize that that’s an option available to a shipowner,” though one that “has to be thought out very carefully in advance.”

Many individual factors go into the decision whether to deploy armed guards onboard, but there seems to be agreement on a couple of things: never arm the crew, and if a decision is made to hire armed guards, be sure they know what they are doing.

A qualified private security firm should meet the following criteria: have significant ship-board experience; perform an individual vessel security assessment and deliver an individualized plan to recover the vessel from a potential or actual hijacking; have a detailed, well-thought out plan for engaging the threat in carefully defined stages, beginning with non-lethal deterrent and using lethal force only as the ultimate step; and include a crew training program. Finally, hardest to gauge perhaps, the firm needs to have the ability to execute the plan.

We contacted the head of a U.S.-based private security firm that is providing its services to a number of shipping companies. He summed up the issue by saying that he has found resistance in the shipping community to placing armed personnel on board vessels—both from company management and Protection and Indemnity (P&I) clubs. “Some of the CEO’s we have spoken to view piracy as an insurable event. As long as there is no loss of life, they are less inclined to place armed personnel on board. The CEO’s have also emphasized that this is a government problem and not an industry problem.” We understand that some P&I clubs have stipulated that armed security guards will invalidate coverage while others are evaluating the risks on a case-by-case basis.

It has been reported that the National Iranian Tanker Company, several of whose vessels have come under attack, has decided to seek private armed security guards onboard, though its chairman admitted that there was no enthusiasm in the industry for this option. By contrast, the National Shipping Company of Saudi Arabia is diverting some of its tankers around the Cape of Good Hope, though the president of its oil and gas section has stated that the company is investigating all available options.

Also much discussed but little clarified in this area is the legality of weapons onboard. As with other legal issues involving vessels that enter into or transit multiple jurisdictions, this one is complicated and a full analysis would require the examination of the laws of the specific countries involved in any voyage.

Lloyd’s List conducted an informal and not exhaustive survey of flag of convenience registers and found that there is no general prohibition on the part of the flag states contacted to arms on board. This leaves unanswered the question of the laws of the states having jurisdiction over the ports a vessel enters and the territorial waters through which it transits, but it is safe to assume that enough of them prohibit weapons or require a lock-down of weapons onboard so that in any voyage it would be hard if not impossible to avoid states with these prohibitions. To avoid these issues, some private security companies board and depart their clients’ vessels at sea.

## 5. Piracy and the U.S. Foreign Corrupt Practices Act and Anti-Terrorism Measures

To the extent that companies subject to U.S. law are considering the payment of cash or other benefits to enlist the support of foreign governments in protecting the movement of ships through trade lanes threatened by piracy, these companies must consider the potential implications of the U.S. Foreign Corrupt Practices Act (FCPA) and other U.S. anti-terrorism laws. The FCPA generally prohibits such companies from paying bribes to foreign government officials in order to obtain an improper business advantage. The FCPA also contains accounting provisions that require companies subject to U.S. securities law to accurately record payments made to government officials in their books and records. The FCPA does not apply to ransom, tribute or other payments made to terrorists or other non-government officials. Therefore, from an FCPA compliance standpoint, the focus is on direct or indirect payments that may be made to enlist the support of local government officials in combating piracy.

The FCPA contains an exception for facilitating payments that are made to secure routine governmental action such as providing police or military protection. However, the U.S. Department of Justice has interpreted this exception very narrowly and has warned companies that payments made to foreign government officials in order to prevent “economic extortion” or rent-seeking behavior by foreign government actors (as opposed to credible threats of violence against people or property) might be improper under the FCPA. Although payments made to secure the safe passage of ships through international waters threatened by violence probably would not violate the FCPA, it is important for companies to understand the potential applicability of this law.

Another set of U.S. laws with potential applicability are the anti-terrorism rules established under the International Emergency Economic Powers Act and Executive Order 13224, which generally prohibit U.S. persons from providing any form of material support (including funds) to terrorist groups or their supporters without appropriate authorization from the U.S. government. The Office of Foreign Assets Control of the U.S. Treasury Department maintains a detailed list of foreign terrorist organizations and specially designated global terrorists (including numerous individuals, financial institutions and other entities in Somalia and other countries that border shipping lanes threatened by piracy). Companies evaluating how to deal with piracy issues must be mindful of these restrictions.

## 6. Charter Contract Provisions

Under a typical major oil company time charter, piracy is treated as a war risk. The charterer cannot order the vessel into any area where a war risk exists. The owner must consent and if there is increased cost, such as increased insurance premiums, increased payments to crew, etc., the charterer must pay.

There is a paucity of case law in the United States or the EU adjudicating these contractual provisions in the context of modern piracy. In one case from the UK, a charterer successfully brought an action against a vessel owner to recover the value of a portion of the cargo that Chinese authorities recovered and detained after pirates seized the vessel. The vessel owner argued that a contractual provision in the charter contract disclaiming liability for acts of piracy should apply since, but for the actions of the pirates, none of the cargo would have been lost. An arbitrator rejected that argument and ruled

in favor of the charterer, and the ruling was upheld on appeal to the courts. The charterer, however, abandoned any claim against the vessel owner for the portion of the cargo stolen by the pirates and not recovered by the Chinese authorities. Few other reported cases have interpreted similar contractual provisions where pirates were the cause of the loss.

In December 2008, INTERTANKO's Documentary Committee produced model piracy clauses to supplement their model voyage and time charters. Previously, INTERTANKO's forms provided that without the owner's consent, a vessel will not be ordered into an area which is dangerous as a result of, among other things, piracy. The new model forms give the owner certain rights in the event the owner or master of the vessel determines there is a risk of piracy on an intended route. These rights include: taking reasonable preventative measures, following published recommendations, taking a safe alternative route, and entitling the owner to additional freight and costs.

## 7. Prosecutions of Suspected Pirates

Efforts to defend against and suppress pirate attacks will be sorely lacking as long as there is no efficient, effective means of bringing captured suspected pirates to stand trial. Of the countries involved militarily in the Somali anti-piracy effort, so far only the Netherlands and France have undertaken to try captured pirates in their own courts of law.

### a. In France

Colleagues in our Paris office have reported on the pending trials there. On April 4, 2008, the luxury yacht *Le Ponant* (an 88-meter (288-foot), 32-cabin, 3-masted sailing yacht) flying the French flag was captured with its 30 crew members (22 of whom were French citizens) by Somali pirates in the Gulf of Aden while sailing to the Mediterranean from the Seychelles.

Before being seized, the captain of *Le Ponant* radioed for help and a French frigate, *Le Commandant Bouan*, that was patrolling nearby was temporarily diverted from NATO duties and tracked the yacht.

Once on board, the pirates set sail for Garaad, a village in Puntland. When the yacht arrived two days later, some villagers showed up to offer services for guarding the yacht and its crew while the pirates obtained the ransom.

The ransom for the hostages and for *Le Ponant* was reportedly set at around \$2 million USD and the ransom was handed over to the pirates one week after the capture of the yacht. According to the chief of staff of France's armed forces, the pirates released the hostages after negotiations with the ship's owner.

As soon as the ransom was handed over on April 11, 2008, French special forces captured six men while they fled by car into the Somali desert. It appears these six men were part of a larger group of pirates that carried out the hostage-taking.

The Somali authorities granted speedy extraditions so the pirates could be brought to France. As reported by the French Foreign Ministry, the French government was in contact with Somali President Abdullahi Yusuf throughout the crisis and apprehended the pirates with the full agreement of the Somali leader.

The Somali pirates were transferred to France and placed in detention, where they are expected to face trial. The French prosecutor's office opened a preliminary inquiry into possible charges of hijacking a vessel and taking hostages for ransom. Apparently, the prosecutors did not add the charge for acts of terrorism.

The prosecutors are still instructing the case and will likely face legal issues arising from the fact that the pirates were not captured on a French ship or in international waters but inside Somali territory. The pirates' lawyers have raised the issue of the absence of an international treaty for extradition between Somalia and France and the fact that the French forces did not notify the pirates of their rights in due time, which is mandatory under French law for any arrest.

In addition to the pirates captured in connection with *Le Ponant*, six other pirates were arrested and are currently imprisoned and awaiting trial in France. *Le Carré d'As*, a 16-meter (50-foot) yacht flying the French flag, was captured on September 2, 2008, with its crew by seven pirates near Somalia en route to France from French Polynesia. Reports indicate that the pirates were demanding more than \$1 million in ransom to release the yacht.

In this case, the French commandos caught the pirates on board, not on land. On September 15, 2008, the forces launched a night-time assault in which one pirate was killed and six taken prisoners and the hostages freed.

The pirates were transferred to Paris on September 23, 2008, and placed in detention, where they are expected to face trial. The prosecutor's office opened a preliminary inquiry with the charges of hijacking a vessel and taking hostages to seek a ransom – the same as in *Le Ponant's* case.

In *Le Carré d'As'* case, however, the prosecutors should not face the same legal concerns as in the case of *Le Ponant*, for two reasons. The pirates were arrested on board a French vessel and, between the attacks of *Le Ponant* and *Le Carré d'As*, the UN Security Council issued Resolution 1816, which allowed the French government to send forces in the territorial waters of Somalia for the purpose of repressing acts of piracy (in a manner consistent with such action permitted on the high seas with respect to piracy under relevant international law) and use, within the territorial waters of Somalia, all necessary means to repress acts of piracy.

As has been reported in the press, France previously could have relied on a 19<sup>th</sup> century law (the Law for the Safety of Navigation and Maritime Business of April 10, 1825) that made piracy against a French ship a felony. However, as part of a broader effort to simplify the law in 2007, it was repealed because it was felt that the offenses sanctioned by it were also covered under the French Penal Code. Although maritime piracy is no longer defined as such under French law, Articles 224 *et seq.* of the French Penal Code prohibit any hijacking of ships, and other provisions of the Penal Code also prohibit acts related to piracy, such as illegal confinement or extortion committed by an organized gang. The Penal Code also establishes French jurisdiction to punish such acts committed outside of the French territory against any French citizen.

By its terms, French Penal law applies to all offenses committed within the territory of the French Republic or on board ships flying the French flag, or committed against such ships, wherever they may be. French Penal law is also applicable to any felony committed by a French citizen or by foreign citizens outside French territory where the victim is a French citizen at the time the offense took place. Finally, French Penal law is applicable to offenses committed beyond territorial waters, when international conventions and the law so provide.

### b. In the Netherlands

Early this year, after receiving a distress call from a Netherlands Antilles-registered freighter, the Royal Danish Navy vessel HDMS *Absalon* captured five men in the Gulf of Aden. The freighter fended off the pirates with signal flares until the Danish vessel arrived and sank the attacking vessel. The Danish

government handed over the men and the Dutch government will prosecute them, but not without having first reached – with exemplary diligence, we might add—an extradition agreement between the two countries. In September 2008, the *Absalon* had a learning experience when it seized and then released 10 suspected Somali pirates found with rocket-propelled grenades, AK-47 assault rifles, and other incriminating gear, and in December it rescued seven presumed pirates in distress (their speedboat had been adrift for several days), sank the speedboat, confiscated their piracy gear, and turned the men over to Yemen.

### c. In Africa

In November, a Kenyan court gave seven-year prison sentences to 10 Somali pirates captured by the U.S. Navy after hijacking an Indian-based merchant ship, and in mid-January of this year, eight suspected pirates detained by a British warship also went before a Kenyan court in Mombassa.

In mid-January, Yemen was reported to have accepted from Germany four suspected pirates, but reports also indicated Germany denied this. Yemen holds 12 suspected pirates turned over to it in December by India, which Yemen has indicated will be put to trial.

### d. The British Position

The British Foreign & Commonwealth Office issued a legal opinion widely reported in the press advising that suspected pirates should not be returned to Somalia because to do so might expose them to harsh treatment and thus infringe their human rights under the UK Human Rights Act 1998. Further, the Foreign Office has warned that there is a risk that captured pirates might claim asylum in Britain on human rights grounds if detained by the Royal Navy.

The UK and Kenya formalized an agreement on December 11, 2008 to hand over any suspected pirates captured on the high seas to Kenya. The agreement removes a key legal obstacle to prosecuting suspects, given Somalia's lack of effective government or legal system. The practical and legal difficulties of prosecuting offenders have resulted in some captured suspects being released by other members of the international naval coalition despite being found with weapons and boarding equipment such as ladders and grappling hooks.

### e. The German Position

On December 19, 2008, the German parliament authorized the German navy's participation in *Atalanta*, allowing up to 1,400 German troops and the Navy frigate *Karlsruhe* to join the mission. The mandate covers preventive measures as well as assistance to free captured ships, even by boarding special forces. The concrete tasks are described as determent, prevention and termination of pirate attacks. Captured pirates can be detained, brought to Djibouti and handed over. German Minister of Defense Franz Josef Jung referred to the mandate as the "strongest mandate we ever had."

A colleague in our Berlin office reports that it remains unclear, however, how detained pirates are to be handled. Criminal prosecution in Germany is unlikely, as the German federal government stated that it is not the main goal to detain pirates, but to prevent piracy acts. Prosecution in Germany would likely only take place if pirates have attacked German ships or citizens. In other cases, pirates would likely be handed over to the flag state of the attacked ship. If such country refuses to take over captured pirates or does not treat prisoners in accordance with human rights, Germany would not hand the pirates over and might set them free. To avoid this, there are negotiations between the German and Kenyan governments that Kenya will take over such

prisoners and prosecute them. Minister Jung has also stated a number of times that the International Tribunal for the Law of the Sea should have or be given jurisdiction to sentence pirates or that another competent international tribunal should be established, a call that has been echoed by others. As he put it: "Nobody wants a Guantánamo on the sea."

## Concluding Thoughts

In the topsy-turvy world of Gilbert and Sullivan's *Pirates of Penzance*, Frederic, duty-bound to the pirates despite his apprenticeship being undertaken by mistake and despite his moral repugnance at their way of life, accepts as part of his honest piratical duty to admonish the pirates for being too tender-hearted, attacking only parties stronger than themselves, for which they invariably get thrashed, and avoiding the weaker parties. Have we, turning the *Pirates of Penzance* on its head, become too tender-hearted to deal with the pirate threat?

In discussing the degree of involvement of the U.S. Navy in suppressing piracy at sea off the coast of Somalia, there was some early discussion in the press about how the U.S. Navy and Marine Corps dealt with Tripoli as an example of how U.S. military involvement can solve a similar problem today. It is important to note some significant differences between these situations.

The Barbary corsairs raided shipping off North Africa for more than 300 years before the U.S. military action in the early 1800s. The U.S. government had been paying ransoms to free captured U.S. citizens and tribute to minimize attacks on U.S.-flag vessels to the corsairs for a few decades after independence when the British fleet stopped protecting vessels from its former colonies, but thousands of U.S. citizens were captured or killed by the corsairs (at a time when the U.S. population was much smaller than today). As noted earlier, tribute paid to North African regencies in 1800 amounted to 20% of federal revenue. Therefore, there was significant political pressure on the young U.S. government to protect its citizens from this direct threat. This threat was a primary reason for the strengthening of the U.S. Navy at that time. The corsairs operated under the control of regional sultans who were aligned with the Ottoman Empire. The U.S. military action brought about a truce under which the United States paid for the release of thousands of prisoners and the corsairs agreed to stop raiding U.S.-flag ships. This truce worked because the sultans exercised strong control over the actions of the corsairs.

By contrast, piracy off the coast of Somalia is relatively recent and has had minimal impact on U.S. citizens (no U.S. citizens have been captured or killed and no U.S. Treasury funds have been used to pay ransoms) and U.S.-flag ships (none have been captured and there has been insignificant damage to the few that were attacked). The U.S. Navy's existence and strength is directly related to other types of threats than piracy and is significantly occupied at this time countering those threats, although it has significant resources near that region. The Somali pirates are not under the control of a strong government. While it is too early in the new Obama Administration to know if there will be a significant shift toward more U.S. military engagement in this area, it already appears that the U.S. Navy is playing an increasing role in resolving the piracy problem. There would be pressure to step up U.S. Navy involvement even further if there are noteworthy U.S. casualties or loss of U.S. military cargo.

Most importantly, perhaps, the world of today is not the world of the 1800s. In our era of saturation media coverage and embedded journalists, and after the U.S. experience in Iraq, there is unlikely to be any appetite to invade and occupy another country remote from the shores of Western democracies. And

the laws, substantive and procedural, that stand in the way of swift masthead or dockside justice for captured pirates are not likely to be repealed or ignored. In the final analysis, this is a good thing.

A more recent and apt example of successfully dealing with piracy is the experience in the Strait of Malacca, where regional cooperation resulted in increasing surveillance and a sharp drop in reported attacks. Some commentators have suggested that the current state of international law is sufficient to combat and prosecute piracy if supplemented with regional security agreements and specialized, regional tribunals to prosecute pirates on the basis of universal jurisdiction. The experience in the Strait of Malacca lends credence to at least part of this suggestion.

However, there are three important distinctions between piracy in the Strait of Malacca and in the Gulf of Aden. First, the Somali pirates are much better armed and organized. Second, the littoral states in the Strait of Malacca are more capable of organizing on their own to deal with the threat. Third, the geographic area that needs to be patrolled in the Gulf of Aden is much larger: the relatively narrow, approximately 500-mile-long Strait of Malacca is about 15.5 miles wide at the north end and 40 miles wide at its southern end and less than two miles at its narrowest point, versus the Gulf of Aden, which is about 900 miles long, has a mean width of 300 miles, and which, if you add the adjoining waters of the Arabian Sea and the Western Indian Ocean, is potentially as much as 1.1 million square miles, larger than the Mediterranean Sea.

Two recent developments in this area provide some grounds for optimism that the kind of regional coordination that is credited with bringing about a decline in piracy in the Strait of Malacca a few years ago is beginning to take hold in the Somali pirates' area of operation.

First, a Contact Group on Piracy off the Coast of Somalia met at UN headquarters in New York in January of this year, pursuant to UN Security Council Resolution 1851. Participants included representatives from Australia, China, Denmark, Djibouti, Egypt, France, Germany, Greece, India, Italy, Japan, Kenya, Republic of Korea, the Netherlands, Oman, Russia, Saudi Arabia, Somalia Transitional Federal Government (TFG), Spain, Turkey, United Arab Emirates, the UK, the United States, and Yemen, as well as the African Union, the EU, NATO, the UN Secretariat, and the IMO. The participants

formed smaller "working groups" to deal with military and operational coordination and information sharing and the establishment of the regional coordination center; address judicial aspects of piracy; strengthen shipping self-awareness and other capabilities; and improve diplomatic and public information efforts on all aspects of piracy.

Second, in February, after a four-day summit in Djibouti organized by the IMO, Djibouti, Ethiopia, Kenya, Madagascar, Maldives, Seychelles, Somalia TFG, Tanzania and Yemen signed a code of conduct (the Djibouti Code) dealing with anti-piracy cooperation, collaboration in the "arrest, investigation and prosecution" of suspected pirates as well as boarding and seizing suspected pirate vessels. The agreement, which is open for signature by other regional states, also provides for the establishment of three regional information centers and an anti-piracy training center in Djibouti.

The suggestion that a new world tribunal be created or an existing one empowered to try pirates has the appeal of logic to it. However, this would require the formulation and adoption of either a new international convention or the amendment to the protocol of an existing convention – either one a decades-long affair typically. We doubt that the Somali situation to date creates the kind of international outrage, such as the one that followed Mr. Klinghoffer's murder, to fuel this process.

We also don't see any benefit to the suggestion that the solution to the piracy threat is to equate piracy with terrorism. On the contrary, this is likely to confound matters immensely. The payment of ransom, for example, which is now merely a complicated but viable way out of a hijacking, would become a crime. This seems a woeful misdirection of resources. More fundamentally perhaps, there is to date no probable link between piracy and terrorism despite government investigations into the matter.



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