
◆

CONTEMPORARY PIRACY: CONSEQUENCES AND CURES

◆

A POST-WORKSHOP REPORT
OCTOBER 2009

AMERICAN BAR ASSOCIATION STANDING COMMITTEE ON
LAW AND NATIONAL SECURITY

JOHNS HOPKINS UNIVERSITY,
THE PAUL H. NITZE SCHOOL OF ADVANCED
INTERNATIONAL STUDIES,
INTERNATIONAL LAW AND ORGANIZATIONS PROGRAM

MCCORMICK FOUNDATION

NATIONAL STRATEGY FORUM

UNIVERSITY OF VIRGINIA,
CRITICAL INCIDENT ANALYSIS GROUP

The “Contemporary Piracy: Consequences and Cures” workshop was conducted in Washington, D.C., at The Paul H. Nitze School of Advanced International Studies, Johns Hopkins University, on June 15, 2009. The workshop discussion was not for attribution.

Report by Tiffany Basciano, J.D., Program Coordinator, Johns Hopkins University, The Paul H. Nitze School of Advanced International Studies, International Law and Organizations Program.

The views expressed in this report are those of various individual discussants and do not reflect the official policies of their respective agencies, governments, or private sector organizations. The views also should not be construed to be the policy of the American Bar Association or the Standing Committee on Law and National Security, unless otherwise adopted pursuant to the bylaws of the Association. These materials are intended for educational and informational purposes only.

ISBN number: 978-1-60442-632-8

AMERICAN BAR ASSOCIATION STANDING COMMITTEE ON LAW AND NATIONAL SECURITY

JOHNS HOPKINS UNIVERSITY, THE PAUL H. NITZE SCHOOL OF ADVANCED INTERNATIONAL STUDIES, INTERNATIONAL LAW AND ORGANIZATIONS PROGRAM

NATIONAL STRATEGY FORUM

THE MCCORMICK FOUNDATION

UNIVERSITY OF VIRGINIA CRITICAL INCIDENT ANALYSIS GROUP

**CONTEMPORARY PIRACY:
CONSEQUENCES AND CURES**
JUNE 15, 2009
WASHINGTON, D.C.

TABLE OF CONTENTS

I.	FOREWORD	4
II.	OVERVIEW AND EXECUTIVE SUMMARY	6
III.	INTRODUCTION: CONTEMPORARY PIRACY IN SOMALIA	8
IV.	PIRACY IN SOMALIA: THE UNDERLYING CAUSES	10
V.	PROTECTING THE GULF OF ADEN: POLICY OPTIONS FOR ADDRESSING SOMALI PIRACY	12
	A. PROSECUTION	
	I. EVIDENCE: PROVING PIRACY	
	II. "CATCH AND RELEASE"	
	III. JUDICIAL CAPACITY IN KENYA	
	A. ALTERNATIVE VENUES FOR PROSECUTING PIRATES	
	B. REGIONAL COOPERATION	
	C. ARMING SHIPS AND MILITARY ESCORTS	
	D. STRATEGIC TARGETING & INTELLIGENCE GATHERING	
	E. CRIMINALIZING RANSOM PAYMENTS	
	F. CHANGES TO THE MARITIME INSURANCE INDUSTRY	
	G. REBUILDING THE SOMALI STATE	
VI.	CONCLUSION	20
	APPENDIX I:	21
	APPENDIX II: <i>LIST OF WORKSHOP PARTICIPANTS</i>	39

I. FOREWORD

The problem of maritime piracy is as old as the American Republic, and as new as collapsing governments and failed states. In the early 1800's, President Jefferson tried various ways to protect American merchant shipping against raids conducted by the Barbary pirates operating from home ports on the northern coast of Africa. The United States was a trading nation and, as a young republic that stayed neutral during Europe's wars, had a lucrative carrying trade. Jefferson made financial arrangements with some of the ruling local piratical beys to ransom cargoes and crews, but he also increased the size of the American navy to provide protection.

Fast forwarding to the 21st century, violent attacks against merchant shipping are again a serious problem – with a surprising spate of serious attacks off the coast of East Africa. As a consequence, the ABA Standing Committee on Law and National Security and the National Security Forum – together with the Johns Hopkins School of Advanced International Studies and the University of Virginia's Critical International Analysis Group – decided to convene a one-day workshop in Washington on June 15, 2009, to discuss the problem and practical responses.

Once again, the United States has to decide on a workable way of protecting international shipping as vessels traverse a critical waterway off Somalia, through the Gulf of Aden, to reach the Red Sea, the Gulf of Aqaba, and the Suez Canal. This is a critical route for maintaining globalized product supply chains in an open world economy. It is critical for the transportation of energy supplies. The loss of Suez Canal access would be highly damaging to the economy of Egypt, and would threaten the delivery of oil supplies to Europe and Israel. It would increase delivery costs, slow down product cycles, and set a dangerous example for piracy elsewhere in the world.

The seizure of merchant vessels by relatively unsophisticated brigands – groups of young men in fishing skiffs armed with rocket-propelled grenade launchers, automatic weapons, and grappling hooks – has caught international attention because of the peculiar difficulties in devising an effective remedy. Somali pirates have captured an oil tanker carrying \$100 million of crude from Saudi Arabia, and a vessel carrying 32 Ukrainian battle tanks to southern Sudan. They have hijacked slow-moving vessels of all types, and recently threatened the life of an American sea captain on the *Maersk-Alabama*, leading to a rescue operation that made the world hold its breath. Even with patrols by the United States navy and its allies, dozens of merchant vessels and hundreds of sailors have been captured and held hostage in the seaports of Somalia, awaiting the delivery of ransom.

The rise of piracy off the east coast of Africa has many causes – but foremost is the problem of failed states. The collapse of effective governance in states such as Somalia means that there is no national authority to police territorial waters and to deter the young men who turn to sea robbery, much less to grow the local economy in a fashion that would provide alternative employment. Somalia argues that illegal fishing and the dumping of wastes in its territorial waters by other countries have helped to thwart the traditional ways of making a living.

But in the short term, other vexing questions must be answered. Should the American navy and coast guard be involved in providing deterrence – or can shippers gain adequate protection by hiring private security guards? Would non-lethal weapons provide sufficient protection? When pirates are caught in the act, why are the sea robbers often delivered back onto shore by our allies, who are reluctant to undertake criminal trials and want to avoid claims of asylum? And how can we stop a cycle of violence in which the payment of ransom to rescue a captured crew and cargo provides, in turn, the incentive for the next act of piracy? As lawyers, we asked whether the international treaties and national criminal statutes that address sea piracy might need amendment or reinterpretation.

These questions and others were debated at a timely seminar that included participants from the national security community, the shipping and insurance sectors, diplomats, international lawyers, area specialists, and the deputy permanent representative of Somalia to the United Nations. We hope that the discussion and report will help to craft a more effective response. The problem of ungoverned land has created a problem for the ungoverned sea.

Ruth Wedgwood
Edward B. Burling Professor of International Law and Diplomacy,
School of Advanced International Studies,
Johns Hopkins University

II. OVERVIEW AND EXECUTIVE SUMMARY

On June 15, 2009, experts from the legal, national security, diplomatic and commercial maritime communities met in Washington, D.C. for a workshop exploring the critical issue of armed piracy off the coast of Somalia. The workshop was funded by the McCormick Foundation and the Critical Incident Analysis Group, University of Virginia. The program was organized by the Standing Committee on Law and National Security of the American Bar Association; the Program on International Law and Organizations of The Paul H. Nitze School of Advanced International Studies, Johns Hopkins University; and the National Strategy Forum.

The discussion focused on the underlying causes of Somali piracy and on the policy options for eradicating or mitigating this criminal activity. In exploring both the causes and cures, the discussants were asked to consider the following topics:

- The problems posed by piracy for international shipping and states in the region;
- Somalia's historical and political situation, and its limited capacity to address piracy;
- Operational issues for international maritime forces in countering Somali piracy;
- Legal authorities for capturing and repelling pirates and for rescuing hostage crews, including Security Council authority and useful amendments to the Law of the Sea Convention and the Convention on the Suppression of Unlawful Acts against the Safety of Maritime Navigation;
- Venues for prosecuting pirates, and ways to encourage participating states to do so.

From these topics, an instructive dialogue developed, in which there were several points of wide agreement:

First, piracy is a compelling and unresolved problem for international commerce, states in the region, and the future of Somalia. Piracy adds to shipping costs, threatens international commerce, and challenges the economies of states

in the region. Moreover, there is a profoundly human dimension to piracy. The situation of crews held as hostages for ransom is unacceptable, and ship owners are deeply concerned about the safety of their crews. On the other hand, Somalis are turning to piracy because of a lack of better economic opportunities, further fueling the problem.

Second, the only sustainable, albeit long-term, solution is to repair the failed state of Somali. Without a state based on the rule of law and with effective enforcement capacity, piracy will be difficult to eradicate because the criminal activity is sustained on-shore. However, given the complex realities of Somalia, this will be a long and trying task. The difficulties of international peacekeeping in Somalia and the history of failed interventions have created a reluctance to intervene directly. The next best solution is to try to eliminate the incentives for piracy.

Discussants considered the more immediate options for addressing Somali piracy, including:

- criminal prosecution of pirates and their sponsors;
- regional cooperation;
- arming ships and providing military escorts;
- strategic targeting and intelligence gathering;
- tracking and criminalizing ransom payments; and
- changes to the maritime insurance industry.

Piracy off the coast of Somalia is symptomatic of a much larger problem, the destabilizing effect of a failed state. With such a vast unregulated coastline, piracy and other ills such as arms smuggling, human trafficking, violation of Somali fishing rights, and off-shore dumping of toxic wastes are allowed to flourish. A failed state also can become a safe haven for terrorism and radical extremists. Piracy is a symptom of the overall problem. Some immediate measures may slow down pirate attacks, but only rebuilding the state and resurrecting the rule of law will ensure long-term success and stabilization. Thus, it is important for international actors, while addressing Somali piracy, to keep the underlying problem and ultimate solution in full view.

III. INTRODUCTION: CONTEMPORARY PIRACY IN SOMALIA

The Gulf of Aden is a vital trade route providing access to the Suez Canal. This trade route provides the most direct route linking the Indian Ocean with the Mediterranean Sea and North Atlantic. It is also an inviting target for pirates. Piracy off the coast of Somalia is not new. But recently, the problem has multiplied in scale and received critical attention. High-profile incidents, such as the hijackings of the *Maersk-Alabama* and the *Sirius Star*, have created a sense of urgency and alarm, and maritime crews have been threatened and held hostage for many months while large ransoms are negotiated. Moreover, the number of attacks has been on the rise. With the world's attention now on piracy, the question is how to address it. The workshop participants proposed a number of different options for addressing piracy, but the underlying thread of the dialogue was that the ultimate solution needs to take place on the ground in Somalia. The chaos needs to cease, institutions need to be built, and the rule of law needs to be put into place, while the Somali people need better economic alternatives.

The effects of piracy are profound and widespread. Pirate attacks affect global trade. Ship owners may decide that it is imprudent to sail through the Suez Canal, and instead choose to sail around Africa with added cost and travel time. This will slow down global supply chains and increase the costs of trade. In addition, vital interests in the region are affected. The Suez Canal provides a vital source of revenue for Egypt, and free access to the Gulf of Aqaba is crucial to Israel's oil supply.

From the ship owners' perspective, the hijacking of a ship is a significant economic loss because it presents a "loss of hire" situation. While a ship is being held hostage by pirates, it cannot be chartered to carry other cargo. The dangers posed to crews may make it difficult to recruit seamen. However, the primary concern of ship owners remains the safe return of the crews who are taken hostage.

A further concern analyzed by the discussants was whether there is a connection between Somali piracy and Al-Shabab, a Somali radical Islamist militia. To date, there is not much evidence linking Al-Shabab and the pirates, but it was noted that piracy would provide a convenient source of revenue for radical Islamists, and that the Islamist militia is gaining control of some coastal areas. It is also alleged that the pirates are providing arms to Al-Shabab, and that Al-Shabab is providing training to pirate crews. Any developing connections between the pirates and Al-Shabab warrant close monitoring. But so far, the pirates' interests are

apparently financial, and not ideologically motivated. Whether or not there is an Islamist connection, the problems and issues associated with piracy have serious implications for the private sector, the international community, the Somalis, and the crews serving at sea. Finding a sustainable solution to piracy in the region is vital, and much of the discussion was focused on viable options for addressing this issue.

There is an international legal framework in place for dealing with pirates on the high seas, but it requires updating and improvement. For example, the definition of piracy in international treaties – including the United Nations Law of the Sea Convention (“UNCLOS”)¹ and the Convention on the Suppression of Unlawful Acts against the Safety of Maritime Navigation (“SUA”)² – is currently limited to acts occurring on the high seas. Amendment of these treaties could be considered, to clarify that international enforcement action can be taken against acts of piracy within a state’s exclusive economic zone (within 200 miles of shore), within international straits, and even within territorial waters in certain circumstances.

In addition, in national criminal codes, the scope of possible criminal prosecution of piracy may be unduly limited – covering only piratical attacks against that state’s vessels or citizens. Under centuries-old international law, piracy has been a crime of universal jurisdiction, and national criminal codes should reflect this fact. In the case of Somalia, the Transitional Federal Government (“TFG”) has been cognizant of its own limits, and has acted to give the international community a major legal tool in addressing piracy. Security Council resolution 1846 allows other states to enter the territorial waters of Somalia to repress piracy, if “advance notification has been provided by the TFG to the Secretary-General.”³ In addition, even armed action on land to arrest pirates is permissible, with notification to the TFG, under Security Council resolution 1851.⁴ This extraordinary permission is a legal innovation limited to Somalia and the Gulf of Aden, and other states adjacent to international waterways insisted that it did not necessarily set a precedent. But this innovative resolution demonstrates that there are already some useful models in place for addressing piracy.

¹ United Nations Law of the Sea Convention art. 101, Dec. 10, 1982, 1833 U.N.T.S. 397.

² Convention on the Suppression of Unlawful Acts against the Safety of Maritime Navigation art. 3, March 10, 1988, 1678 U.N.T.S. 221.

³ S.C. Res. 1846, ¶ 10, U.N. Doc. S/RES/1846 (Dec. 2, 2008).

⁴ S.C. Res. 1851, ¶ 6 U.N. Doc. S/RES/1851 (Dec. 16, 2008).

IV. PIRACY IN SOMALIA: THE UNDERLYING CAUSES

The workshop discussants first sought to analyze why piracy has become such a major problem in Somalia. Identifying underlying causes will help to reveal the best solution for addressing piracy.

Somalia has been a failed state for many years. The collapse of the Somali state began well before 1991. In the early 1990's, both the United Nations and the United States intervened with peacekeeping forces in Somalia, to attempt to meet a critical food shortage. More recently, peacekeepers from the African Union have been deployed. But a whole generation of Somalis has grown up without knowing the rule of law. In the absence of an effective central government, armed conflicts and competition for power have ensued among traditional clans and newly organized militias. The former region of British Somaliland has also attempted to secede from the unified state since the early 1990's. Criminal activities, such as piracy, take place without governmental interference.

Currently, the only central government in Somalia is the Transitional Federal Government ("TFG"). The TFG has not been able to consolidate its control over the whole country. Even the presence of regional peacekeepers from the African Union has not been sufficient to stabilize the situation. Although recognized internationally as the central government of Somalia, the TFG has profound difficulties in gaining effective authority at home. Of particular note is the rise of the Al-Shabab militia, which has challenged the central government for control. As a result of the inability to establish law and order, Somalia continues to suffer from a lack of effective governance, which is the main reason why piracy has been able to flourish.

In addition, there may be more localized reasons why piracy has flourished. The traditional pursuit of coastal Somalis was fishing. But illegal fishing within Somali territorial waters by vessels from Europe and Asia along with the international dumping of toxic wastes, have reportedly diminished the fisheries. This has decreased the catch available to local fishermen, and served to create an attitude of resentment against the presence of foreign vessels. Some pirates are former fishermen who have turned to this far more lucrative pursuit. To prevent the abuse of its waters by international actors and police the use of its waters by pirate crews, Somalia would need an effective coast guard.

Thus, the Somalis have some legitimate grievances, and although they are not a justifiable excuse for piracy, these grievances are disturbing. Moreover, the international community will need to address these grievances. Indeed, as one

discussant observed, Somalis see piracy as connected to the issues of illegal fishing and toxic waste dumping. However, these grievances, as well as piracy, flourish because of the lack of effective governance, and therefore addressing the lack of governance in Somalia is integral to solving the problem of piracy.

V. PROTECTING THE GULF OF ADEN: POLICY OPTIONS FOR ADDRESSING SOMALI PIRACY

Discussants analyzed different policy options for addressing Somali piracy. This section will examine these options, and recommend the solution preferred by the participants: rebuilding the Somali state.

A. Prosecution

Criminal prosecution is the ordinary way of fighting crime and dismantling criminal organizations. The enforcement of criminal law through trials and sentencing can provide general deterrence and remove the leadership of criminal organizations from the scene, as well as provide possible rehabilitation. However, trying Somali pirates presents a number of difficult legal and logistical issues.

i. Evidence: Proving Piracy

One of the first problems in prosecuting pirates is sufficient evidence. If a pirate is caught in the act of capturing a ship, it is an easier case to prosecute. However, other situations of attempt and preparation will raise difficult questions about what proof is sufficient under national legal systems, measured against the standards of a criminal trial. For example, a local vessel may engage in multiple activities such as piracy, fishing, and smuggling, and when the ships are apprehended, the crewmen on board claim that they are not pirates. An officer on the scene, who may not be trained in criminal law, must decide whether there is enough evidence to take these individuals into custody. So, too, the use of “mother ships” can mask preparations for piracy – a larger vessel may dispatch smaller skiffs to engage in piratical acts, but this gambit will not be visible until the last moment. The eyewitnesses to a piratical act may be merchant seamen who travel around the world in their trade. The availability of witnesses for trial is thus a problem, especially in legal systems where an affidavit is not sufficient for proof at trial. These evidentiary challenges may partially explain why some states have engaged in “catch and release”, as discussed below.⁵

One discussant suggested that there should be a new crime defined comparably to the crime of possession of burglary tools. In the case of piracy, one could criminalize the possession of a rocket-propelled grenade (“RPG”) in a skiff. In other

⁵ See *infra* § V (A)(ii).

words, one should make it a crime to possess the characteristic tools of piracy. This would help to close the evidentiary gap: where you cannot prove piracy, you may be able to prove possession of piracy tools. Even so, some weapons may be seen as more characteristic for self-defense while at sea, and thus some evidentiary problems will remain

ii. “Catch and Release”

“Catch and release” refers to the practice of responding to a pirate attack with foreign naval patrols, but then releasing the pirates back to their ships, or taking them back to the Somali coast. “Catch and release” presents a serious problem because when the pirates are released, they are free to resume their criminal activities. Moreover, the practice of releasing the pirates is not a very effective deterrent. There was some disagreement among participants over how large the “catch and release” problem has been in practice. Some reasons why “catch and release” may occur are: lack of political will for countries to prosecute, concern that piratical suspects will make claims for asylum under international law and will remain in the countries of trial indefinitely, the lack of a domestic legal framework to prosecute, insufficient evidence, the cost of prosecution, and the lack of incentives for individual states to bear those costs. In addition, naval officers are not trained in gathering and preserving evidence for criminal prosecutions.⁶

Prosecuting the pirates presents the classic collective action problem, i.e. why should my country shoulder the burden and expense of prosecution, when another country could take care of it? One discussant suggested that a treaty could impose a duty to prosecute or extradite suspected pirates in a country’s custody (“*aut dedare aut judicare*”). This is a traditional provision in international treaties addressing terrorism. Such a duty would discourage the release of suspected pirates, but it might also lead to a slower response by naval vessels on the scene in interrupting pirate attacks.

States are obliged to respect the principle of non-refoulement, which forbids the return of any individual to a state where there is a high probability that he will be

⁶ See *supra* § V(A)(i)(discussing the lack of evidence issue).

persecuted, tortured or subjected to serious physical abuse.⁷ States taking part in a counter-piracy naval flotilla may remain reluctant to arrest pirates, out of concern that there will be a claim for asylum after the pirate has served his sentence or in the event of an acquittal. One discussant questioned whether this was a realistic concern on the part of States.

A further reason why States may be reluctant to arrest pirates is because they lack a domestic legal framework to prosecute the suspected pirate. However, as one discussant noted, states can pass legislation to punish piracy on the high seas, and international law can be clarified to permit national jurisdiction over piracy captures even in the exclusive economic zone and straits passage. (In addition, simply advising states of the effect of the TFG permission for prosecutions would make a difference). Thus, States should be encouraged to pass domestic legislation to enable them to prosecute piracy

iii. Judicial Capacity in Kenya

Several countries have agreements with Kenya allowing pirates to be brought there for prosecution. However, the discussants raised several concerns about the use of Kenya as a venue for prosecuting pirates. These concerns included: the capacity for Kenya to try so many pirates, whether the Kenyan domestic legal code is sufficient to try pirates, and human rights issues, such as prison conditions.

There was some disagreement on the capacity of Kenya to try such a large number of pirates. One discussant noted that there were currently 126 pirates at different pretrial stages in Kenya, and noted that the European Union was providing funding to improve judicial capacity. Other discussants were skeptical about Kenya's capacity to try the pirates. One discussant noted that Kenya was almost at full capacity in trying pirates, while another noted Kenya's failure to prosecute the terrorists responsible for the 1998 American Embassy bombing. Moreover, there was concern that Kenya's penal code may be inadequate to try pirates.

⁷ The principle of non-refoulement was recognized in the 1951 Refugees Convention. *See* Convention Relating to the Status of Refugees art. 33(1), adopted on July 28, 1951, 189 U.N.T.S. 150. It has since been recognized as implicit in the prohibitions on torture and cruel, inhumane and degrading treatment in international human rights conventions. There is an ongoing debate on the extent to which diplomatic assurances against such abuse can be seen as sufficient. European states are also subject to the human rights provisions of the European Convention on Human Rights, which allows a right of individual petition by persons who assert that they have been deprived of their rights. The practice of "interim measures" may preclude a state from taking action while the proposed course is under legal challenge.

A further concern was the human rights situation in Kenya, with a specific concern raised about the prison conditions. This is obviously troubling, and as one discussant noted, the human rights situation may limit the ability of European countries to transfer prisoners to Kenya, even by placing “ship riders” on naval vessels that make the formal arrest. As noted by the discussants, there are many reasons to be concerned about Kenya as a long-term solution for prosecuting pirates.

a. Alternative venues for prosecuting pirates

Given the concerns over Kenya, discussants had several suggestions for alternative venues. One suggestion was to create a regional court; another discussant suggested expanding the list of crimes prosecuted by the International Criminal Court (“ICC”) to include piracy. Another possibility is to create an international piracy court through the power of the Security Council acting under Chapter VII of the U.N. Charter, akin to the ad hoc international war crimes tribunals.

In regard to adding piracy to the list of crimes that can be prosecuted by the ICC, it was noted that the efforts against piracy could offer an opportunity for the US to reconnect with the ICC. The 2010 Review Conference might provide a venue for this discussion, and the U.S. plans on attending the conference.⁸ Moreover, it was suggested that if the ICC were the venue to prosecute pirates, it should start small and build up its legitimacy, including by drafting a uniform sentencing code, since one does not currently exist. A sentencing code may be a further topic for discussion at the scheduled Review Conference.

One complication with the ICC as a potential venue is that the Court has no jurisdiction over juveniles.⁹ According to Article 26, “[t]he Court shall have no jurisdiction over any person who was under the age of 18 at the time of the alleged commission of a crime.”¹⁰ A number of pirates may fall into this category, and this limitation adds another layer of complexity to venue selection.

⁸ “Seven years after the entry into force of this Statute the Secretary-General of the United Nations shall convene a Review Conference to consider any amendments to this Statute.” Rome Statute of the International Criminal Court art. 123 (1), *opened for signature* July 17, 1998, 2187 U.N.T.S. 90 (entered into force July 1, 2002).

⁹ *See id.* art. 26.

¹⁰ *Id.*

B. Regional Cooperation

Somalia is in a region of weak states. Therefore, another underlying thread of the workshop was the importance of building regional capacity. One suggestion for addressing piracy is to build an effective regional coast guard patrolling the Gulf of Aden and the near reaches of the Indian Ocean. It was further suggested that a tax or proportion of the dues levied for the passage of commercial vessels through the Suez Canal could be used to finance the regional fleet. A regional coast guard would be plausible, but it may depend on the composition of such a force.

Somalia belongs to a subregional organization with neighboring countries called “IGAD” or Intergovernmental Authority on Development. One discussant said that it may be difficult to involve the IGAD countries. Some of the countries in the group are landlocked, and therefore have less of an incentive to participate in a regional coast guard, while some of the countries in the region do not have good relationships with their neighbors.

Another discussant suggested forging a partnership between Yemen and Oman. It seems plausible that there should be mutual interest in building coast guard capacity, since Yemen and Oman have major coastlines. Yemen is quite similar to Somalia in a number of ways. Yemen is poor; it has suffered from internal disorder and terrorism; and it has encountered illegal fishing as well. Furthermore, Yemen is a party to the Djibouti Code of Conduct concerning the Repression of Piracy and Armed Robbery against Ships in the Western Indian Ocean and Gulf of Aden.¹¹

The international community would need to provide Yemen and Oman with equipment, support and training, but it may be a worthwhile investment to build regional coast guard capacity. Indeed, as one discussant mentioned, there has been a reasonably successful model for building such additional law enforcement capacity in Yemen. And, if these countries effectively patrol the region, there will also need to be judicial capacity in the region to prosecute the pirates. Indeed, there was some discussion about an overarching approach to reforming the security sector because all of these capacities are linked. Increasing regional

¹¹ See High-Level Meeting in Djibouti Adopts a Code of Conduct to Repress Acts of Piracy and Armed Robbery against Ships, IMO, Briefing 03, (Jan. 30, 2009) http://www.imo.org/About/mainframe.asp?topic_id=1773&doc_id=10933 (last visited Oct. 31, 2009).

law enforcement capacity does not help, if there is not a venue for prosecution and safe and humane detention facilities to house inmates.

Finally, one discussant expressed concern about Yemeni waters becoming a safe haven for pirates, and strengthening Yemeni capabilities would help ensure that Yemeni waters do not become a protected zone for Somali pirates escaping pursuit.

C. Arming Ships and Military Escorts

It was suggested that private security companies could be hired for shipboard guard duty, at least for slower moving vessels, as they approach the coastline. However, there was disagreement on whether private armed security was a desirable or even a realistic idea.

Some concerns raised by discussants about hiring private armed security included: what legal framework would govern their use of force, liability concerns on the part of ship owners, the possibility that pirates would counter by escalating their own firepower, and the cost of hire. With regard to the problem of cost, one discussant thought that it was unrealistic to arm all ships. Indeed it was thought that armed guards may only be attainable for the wealthier companies. Shippers may be reluctant to bear the costs of hiring armed security, when they are reimbursed through insurance for the payment of ransom. Only a small percentage of ships are hijacked, and some ship owners may be willing to take the risk of pirate capture, rather than incur the security expense.

One discussant mentioned having national militaries provide guards or escorts. There was a question whether many militaries have the capacity to provide such a service.

Other defensive measures discussed included: the use of barbed wire, hanging tires along the side of the ship, and high frequency sound devices. Some discussants mentioned that these techniques have already been employed by ship owners. Nonetheless, there are a variety of non-lethal weapons that could be used.

As some discussants mentioned, the practice of shooting flares at pirate ships is futile. This practice does not deter pirates, who just choose an easier target.

D. Strategic Targeting and Intelligence Gathering

One area of discussion was whether there is adequate intelligence on pirate operations and their enablers. For example, it is difficult to tell whether a hovering vessel is, in fact, a mother ship for pirate attacks. Satellite or aircraft surveillance of the relevant maritime areas could be provided. However, sometimes these ships are used for multiple purposes, so it may be difficult to determine with accuracy whether a specific ship is deployed for piracy.

As one discussant observed, Somali piracy is fairly decentralized with different pirate groups that are not necessarily linked to each other. However, there were a number of suggestions on how to target the criminal network strategically and it was further mentioned that the number of individuals coordinating the criminal networks is small. One discussant suggested going after the “piracy cycle” by strategically attacking each phase of the cycle. In response to the issue of inadequate intelligence, this discussant recommended using open source data, further suggesting that it may be useful just to talk to the average Somali.

Finally, it would be useful to follow the money. This could provide intelligence on the criminal networks and the individuals within them. In addition, one discussant recommended criminalizing the financing of piracy. With the informal banking sector, including the use of Hawallah banks, this may be difficult.

E. Criminalizing the Payment of Ransom

Piracy is not only a criminal activity; it is also a high stakes business. One discussant noted that ransom payments from piracy generate more revenue than the government of Somalia has in its coffers. However, as discussants observed, the payment of ransom is a double-edged sword. It secures the release of the crews taken hostage, but it also perpetuates the problem of piracy.

Noting how ransom payments perpetuate the problem, one discussant suggested that ransom payments should be criminalized under international law, using the Chapter 7 authority of the UN Security Council. But there was disagreement on criminalizing ransom, with some believing that it was not a viable idea. For the ship owners, the payment of ransom is an insurable cost, and therefore, the payment makes financial and practical sense to ship owners. If ship owners cannot pay ransom, there is no way to negotiate with the pirates, putting the crews at great risk.

F. Changes to the Maritime Insurance Industry

One discussant suggested a change to the commercial maritime insurance industry to address the issue of piracy – namely, through an industry-wide pool to spread and share the risk of attack.

This suggestion was rejected by some discussants. The main reasons for the rejection were in practicality and in fairness. It would be difficult to identify the appropriate pool of shippers or ship owners. Ship owners are not a homogenous group (i.e., some ships do not trade in the Gulf of Aden and some ships are too fast to be prone to an attack). Therefore, it would be impractical and perhaps unfair to spread the risk across the industry.

G. Rebuilding the Somali State

The underlying theme of the workshop was that the ultimate solution to piracy is rebuilding the Somali state. It is less clear how to support state-building activities, without undue interference. In the end, the problem needs to be solved by Somalis, and a call for non-interference was addressed by some discussants both to the international community and neighboring countries. Moreover, international actors must be careful not to make the problem worse.

The workshop produced worthwhile suggestions regarding the road to rebuilding the Somali state. Some discussants suggested working with Somalia's legitimate business community. Indeed, the international and local business communities surely appreciate the fact that a stable government is critical for legitimate business. Moreover, working with the local business community has the potential to build viable economic alternatives to piracy. Finally, it was thought that this would be a more useful endeavor than trying to work with the clan structure, since it was asserted that the clan leaders' traditional powers are waning.

Another suggestion was to work within the culture, particularly working with the Sufis. The Sufis are very well respected and powerful in Somali society. An alliance with the Sufis might help to reestablish order.

VI. CONCLUSION

A multi-faceted approach may be the most useful in addressing the problem of piracy in the Gulf of Aden. US interagency cooperation is crucial. Several discussants commented on how well U.S. government agencies cooperated in addressing the Maersk-Alabama hostage emergency. Joint action will continue to be required in fighting maritime piracy.

Some discussants expressed concern about how to maintain the political will for governments to act when reports of piracy are not making front page news. Even when piracy is not in the headlines, the underlying cause of piracy remains – Somalia is a failed state. Until Somalia is repaired, its role as a base for international piracy will continue to threaten international peace and security.

APPENDIX I

United Nations Convention on the Law of the Sea

10 December 1982, 1833 UNTS 396

Article 101

Definition of piracy

Piracy consists of any of the following acts:

(a) any illegal acts of violence or detention, or any act of depredation, committed for private ends by the crew or the passengers of a private ship or a private aircraft, and directed:

(i) on the high seas, against another ship or aircraft, or against persons or property on board such ship or aircraft;

(ii) against a ship, aircraft, persons or property in a place outside the jurisdiction of any State;

(b) any act of voluntary participation in the operation of a ship or of an aircraft with knowledge of facts making it a pirate ship or aircraft;

(c) any act of inciting or of intentionally facilitating an act described in subparagraph (a) or (b).

Article 105

Seizure of a pirate ship or aircraft

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. The courts of the State which carried out the seizure may decide upon the penalties to be imposed, and may also determine the action to be taken with regard to the ships, aircraft or property, subject to the rights of third parties acting in good faith.

Article 107

Ships and aircraft which are entitled to seize on account of piracy

A seizure on account of piracy 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.

Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation

10 March 1988, 1678 U.N.T.S. 221

ARTICLE 3

1. Any person commits an offence if that person unlawfully and intentionally:
 - a. seizes or exercises control over a ship by force or threat thereof or any other form of intimidation; or
 - b. performs an act of violence against a person on board a ship if that act is likely to endanger the safe navigation of that ship; or
 - c. destroys a ship or causes damage to a ship or to its cargo which is likely to endanger the safe navigation of that ship; or
 - d. places or causes to be placed on a ship, by any means whatsoever, a device or substance which is likely to destroy that ship, or cause damage to that ship or its cargo which endangers or is likely to endanger the safe navigation of that ship; or
 - e. destroys or seriously damages maritime navigational facilities or seriously interferes with their operation, if any such act is likely to endanger the safe navigation of a ship; or
 - f. communicates information which he knows to be false, thereby endangering the safe navigation of a ship; or
 - g. injures or kills any person, in connection with the commission or the attempted commission of any of the offences set forth in subparagraphs (a) to (f).
2. Any person also commits an offence if that person:
 - a. attempts to commit any of the offences set forth in paragraph 1;
 - b. abets the commission of any of the offences set forth in paragraph 1 perpetrated by any person or is otherwise an accomplice of a person who commits such an offence; or
 - c. threatens, with or without a condition, as is provided for under national law, aimed at compelling a physical or juridical person to do or refrain from doing any act, to commit any of the offences set forth in paragraph 1, subparagraphs (b), (c) and (e), if that threat is likely to endanger the safe navigation of the ship in question.

ARTICLE 4

1. This Convention applies if the ship is navigating or is scheduled to navigate into, through or from waters beyond the outer limit of the territorial sea of a single State, or the lateral limits of its territorial sea with adjacent States.

2. In cases where the Convention does not apply pursuant to paragraph 1, it nevertheless applies when the offender or the alleged offender is found in the territory of a State Party other than the State referred to in paragraph 1.

ARTICLE 5

Each State Party shall make the offences set forth in article 3 punishable by appropriate penalties which take into account the grave nature of those offences.

ARTICLE 6

1. Each State Party shall take such measures as may be necessary to establish its jurisdiction over the offences set forth in article 3 when the offence is committed:
 - a. against or on board a ship flying the flag of the State at the time the offence is committed; or
 - b. in the territory of that State, including its territorial sea; or
 - c. by a national of that State.

2. A State Party may also establish its jurisdiction over any such offence when:
 - a. it is committed by a stateless person whose habitual residence is in that State; or
 - b. during its commission a national of that State is seized, threatened, injured or killed; or
 - c. it is committed in an attempt to compel that State to do or abstain from doing any act.

3. Any State Party which has established jurisdiction mentioned in paragraph 2 shall notify the Secretary-General of the International Maritime Organization (hereinafter referred to as “the Secretary-General”). If such State Party subsequently rescinds that jurisdiction, it shall notify the Secretary-General.

4. Each State Party shall take such measures as may be necessary to establish its jurisdiction over the offences set forth in article 3 in cases where the alleged offender is present in its territory and it does not extradite him to any of the States Parties which have established their jurisdiction in accordance with paragraphs 1 and 2 of this article.

5. This Convention does not exclude any criminal jurisdiction exercised in accordance with national law.

APPENDIX I

ARTICLE 7

1. Upon being satisfied that the circumstances so warrant, any State Party in the territory of which the offender or the alleged offender is present shall, in accordance with its law, take him into custody or take other measures to ensure his presence for such time as is necessary to enable any criminal or extradition proceedings to be instituted.
2. Such State shall immediately make a preliminary inquiry into the facts, in accordance with its own legislation.
3. Any person regarding whom the measures referred to in paragraph 1 are being taken shall be entitled to:
 - a. communicate without delay with the nearest appropriate representative of the State of which he is a national or which is otherwise entitled to establish such communication or, if he is a stateless person, the State in the territory of which he has his habitual residence;
 - b. be visited by a representative of that State.
4. The rights referred to in paragraph 3 shall be exercised in conformity with the laws and regulations of the State in the territory of which the offender or the alleged offender is present, subject to the proviso that the said laws and regulations must enable full effect to be given to the purposes for which the rights accorded under paragraph 3 are intended.
5. When a State Party, pursuant to this article, has taken a person into custody, it shall immediately notify the States which have established jurisdiction in accordance with article 6, paragraph 1 and, if it considers it advisable, any other interested States, of the fact that such person is in custody and of the circumstances which warrant his detention. The State which makes the preliminary inquiry contemplated in paragraph 2 of this article shall promptly report its findings to the said States and shall indicate whether it intends to exercise jurisdiction.

ARTICLE 8

1. The master of a ship of a State Party (the “flag State”) may deliver to the authorities of any other State Party (the “receiving State”) any person who he has reasonable grounds to believe has committed one of the offences set forth in article 3.
2. The flag State shall ensure that the master of its ship is obliged, whenever practicable, and if possible before entering the territorial sea of the receiving

State carrying on board any person whom the master intends to deliver in accordance with paragraph 1, to give notification to the authorities of the receiving State of his intention to deliver such person and the reasons therefor.

3. The receiving State shall accept the delivery, except where it has grounds to consider that the Convention is not applicable to the acts giving rise to the delivery, and shall proceed in accordance with the provisions of article 7. Any refusal to accept a delivery shall be accompanied by a statement of the reasons for refusal.

4. The flag State shall ensure that the master of its ship is obliged to furnish the authorities of the receiving State with the evidence in the master's possession which pertains to the alleged offence.

5. A receiving State which has accepted the delivery of a person in accordance with paragraph 3 may, in turn, request the flag State to accept delivery of that person. The flag State shall consider any such request, and if it accedes to the request it shall proceed in accordance with article 7. If the flag State declines a request, it shall furnish the receiving State with a statement of the reasons therefor.

ARTICLE 9

Nothing in this Convention shall affect in any way the rules of international law pertaining to the competence of States to exercise investigative or enforcement jurisdiction on board ships not flying their flag.

ARTICLE 10

1. The State Party in the territory of which the offender or the alleged offender is found shall, in cases to which article 6 applies, if it does not extradite him, be obliged, without exception whatsoever and whether or not the offence was committed in its territory, to submit the case without delay to its competent authorities for the purpose of prosecution, through proceedings in accordance with the laws of that State. Those authorities shall take their decision in the same manner as in the case of any other offence of a grave nature under the law of that State.

2. Any person regarding whom proceedings are being carried out in connection with any of the offences set forth in article 3 shall be guaranteed fair treatment at all stages of the proceedings, including enjoyment of all the rights and guarantees provided for such proceedings by the law of the State in the territory of which he is present.

ARTICLE 11

1. The offences set forth in article 3 shall be deemed to be included as extraditable offences in any extradition treaty existing between any of the States Parties. States Parties undertake to include such offences as extraditable offences in every extradition treaty to be concluded between them.
2. If a State Party which makes extradition conditional on the existence of a treaty receives a request for extradition from another State Party with which it has no extradition treaty, the requested State Party may, at its option, consider this Convention as a legal basis for extradition in respect of the offences set forth in article 3. Extradition shall be subject to the other conditions provided by the law of the requested State Party.
3. States Parties which do not make extradition conditional on the existence of a treaty shall recognize the offences set forth in article 3 as extraditable offences between themselves, subject to the conditions provided by the law of the requested State.
4. If necessary, the offences set forth in article 3 shall be treated, for the purposes of extradition between States Parties, as if they had been committed not only in the place in which they occurred but also in a place within the jurisdiction of the State Party requesting extradition.
5. A State Party which receives more than one request for extradition from States which have established jurisdiction in accordance with article 6[1] and which decides not to prosecute shall, in selecting the State to which the offender or alleged offender is to be extradited, pay due regard to the interests and responsibilities of the State Party whose flag the ship was flying at the time of the commission of the offence.
6. In considering a request for the extradition of an alleged offender pursuant to this Convention, the requested State shall pay due regard to whether his rights as set forth in article 7, paragraph 3, can be effected in the requesting State.
7. With respect to the offences as defined in this Convention, the provisions of all extradition treaties and arrangements applicable between States Parties are modified as between States Parties to the extent that they are incompatible with this Convention.

ARTICLE 12

1. State Parties shall afford one another the greatest measure of assistance in connection with criminal proceedings brought in respect of the offences set forth in article 3, including assistance in obtaining evidence at their disposal necessary for the proceedings.
2. States Parties shall carry out their obligations under paragraph 1 in conformity with any treaties on mutual assistance that may exist between them. In the absence of such treaties, States Parties shall afford each other assistance in accordance with their national law.

ARTICLE 13

1. States Parties shall co-operate in the prevention of the offences set forth in article 3, particularly by:
 - a. taking all practicable measures to prevent preparations in their respective territories for the commission of those offences within or outside their territories;
 - b. exchanging information in accordance with their national law, and coordinating administrative and other measures taken as appropriate to prevent the commission of offences set forth in article 3.
2. When, due to the commission of an offence set forth in article 3, the passage of a ship has been delayed or interrupted, any State Party in whose territory the ship or passengers or crew are present shall be bound to exercise all possible efforts to avoid a ship, its passengers, crew or cargo being unduly detained or delayed.

ARTICLE 14

Any State Party having reason to believe that an offence set forth in article 3 will be committed shall, in accordance with its national law, furnish as promptly as possible any relevant information in its possession to those States which it believes would be the States having established jurisdiction in accordance with article 6.

ARTICLE 15

1. Each State Party shall, in accordance with its national law, provide to the Secretary-General, as promptly as possible, any relevant information in its pos-

APPENDIX I

session concerning:

- a. the circumstances of the offence;
- b. the action taken pursuant to article 13, paragraph 2;
- c. the measures taken in relation to the offender or the alleged offender

and, in particular, the results of any extradition proceedings or other legal proceedings.

2. The State Party where the alleged offender is prosecuted shall, in accordance with its national law, communicate the final outcome of the proceedings to the Secretary-General.

3. The information transmitted in accordance with paragraphs 1 and 2 shall be communicated by the Secretary-General to all States Parties, to Members of the International Maritime Organization (hereinafter referred to as “the Organization”), to the other States concerned, and to the appropriate international inter-governmental organizations.

Resolution 1846 (2008)

**Adopted by the Security Council at its 6026th meeting on
2 December 2008**

The Security Council,

Recalling its previous resolutions concerning the situation in Somalia, especially resolutions 1814 (2008), 1816 (2008) and 1838 (2008),

Continuing to be gravely concerned by the threat that piracy and armed robbery at sea against vessels pose to the prompt, safe and effective delivery of humanitarian aid to Somalia, to international navigation and the safety of commercial maritime routes, and to other vulnerable ships, including fishing activities in conformity with international law,

Reaffirming its respect for the sovereignty, territorial integrity, political independence and unity of Somalia,

Further reaffirming that international law, as reflected in the United Nations Convention on the Law of the Sea of 10 December 1982 (“the Convention”), sets out the legal framework applicable to combating piracy and armed robbery at sea, as well as other ocean activities,

Taking into account the crisis situation in Somalia, and the lack of capacity of the Transitional Federal Government (“TFG”) to interdict pirates or patrol and secure either the international sea lanes off the coast of Somalia or Somalia’s territorial waters,

Taking note of the requests from the TFG for international assistance to counter piracy off its coasts, including the 1 September 2008 letter from the President of Somalia to the Secretary-General of the United Nations expressing the appreciation of the TFG to the Security Council for its assistance and expressing the TFG’s willingness to consider working with other States and regional organizations to combat piracy and armed robbery at sea off the coast of Somalia, the 20 November 2008 letter conveying the request of the TFG that the provisions of resolution 1816 (2008) be renewed, and the 20 November request of the Permanent Representative of Somalia before the Security Council that the renewal be for an additional 12 months,

Further taking note of the letters from the TFG to the Secretary-General providing advance notification with respect to States cooperating with the TFG in the fight against piracy and armed robbery at sea off the coast of Somalia and from other Member States to the Security Council to inform the Council of their actions, as requested in paragraphs 7 and 12 of resolution 1816 (2008), and encouraging those cooperating States, for which advance notification has been provided by the TFG to the Secretary-General, to continue their respective efforts,

Expressing again its determination to ensure the long-term security of World Food Programme (WFP) maritime deliveries to Somalia,

Recalling that in its resolution 1838 (2008) it commended the contribution made by some States since November 2007 to protect (WFP) maritime convoys, and the establishment by the European Union (EU) of a coordination unit with the task of supporting the surveillance and protection activities carried out by some member States of the European Union off the coast of Somalia, as well as other international and national initiatives taken with a view to implementing resolutions 1814 (2008) and 1816 (2008),

Emphasizing that peace and stability within Somalia, the strengthening of State institutions, economic and social development and respect for human rights and the rule of law are necessary to create the conditions for a full eradication of piracy and armed robbery at sea off the coast of Somalia,

APPENDIX I

Welcoming the signing of a peace and reconciliation Agreement (“the Djibouti Agreement”) between the TFG and the Alliance for the Re-Liberation of Somalia on 19 August 2008, as well as their signing of a joint ceasefire agreement on 26 October 2008, noting that the Djibouti Agreement calls for the United Nations to authorize and deploy an international stabilization force, and further noting the Secretary-General’s report on Somalia of 17 November 2008, including his recommendations in this regard,

Commending the key role played by the African Union Mission to Somalia (AMISOM) in facilitating delivery of humanitarian assistance to Somalia through the port of Mogadishu and the contribution that AMISOM has made towards the goal of establishing lasting peace and stability in Somalia, and recognizing specifically the important contributions of the Governments of Uganda and Burundi to Somalia,

Welcoming the organization of a ministerial meeting of the Security Council in December 2008 to examine ways to improve international coordination in the fight against piracy and armed robbery off the coast of Somalia and to ensure that the international community has the proper authorities and tools at its disposal to assist it in these efforts,

Determining that the incidents of piracy and armed robbery against vessels in the territorial waters of Somalia and the high seas off the coast of Somalia exacerbate the situation in Somalia which continues to constitute a threat to international peace and security in the region,

Acting under Chapter VII of the Charter of the United Nations,

1. *Reiterates* that it condemns and deplores all acts of piracy and armed robbery against vessels in territorial waters and the high seas off the coast of Somalia;
2. *Expresses* its concern over the finding contained in the 20 November 2008 report of the Monitoring Group on Somalia that escalating ransom payments are fuelling the growth of piracy off the coast of Somalia;
3. *Welcomes* the efforts of the International Maritime Organization (“IMO”) to update its guidance and recommendations to the shipping industry and to Governments for preventing and suppressing piracy and armed robbery at sea and to provide this guidance as soon as practicable to all Member States and to the international shipping community operating off the coast of Somalia;

4. *Calls upon* States, in cooperation with the shipping industry, the insurance industry and the IMO, to issue to ships entitled to fly their flag appropriate advice and guidance on avoidance, evasion, and defensive techniques and measures to take if under the threat of attack or attack when sailing in the waters off the coast of Somalia;

5. *Further calls upon* States and interested organizations, including the IMO, to provide technical assistance to Somalia and nearby coastal States upon their request to enhance the capacity of these States to ensure coastal and maritime security, including combating piracy and armed robbery at sea off the Somali and nearby coastlines;

6. *Welcomes* initiatives by Canada, Denmark, France, India, the Netherlands, the Russian Federation, Spain, the United Kingdom, the United States of America, and by regional and international organizations to counter piracy off the coast of Somalia pursuant to resolutions 1814 (2008), 1816 (2008) and 1838 (2008), the decision by the North Atlantic Treaty Organization (NATO) to counter piracy off the Somalia coast, including by escorting vessels of the WFP, and in particular the decision by the EU on 10 November 2008 to launch, for a period of 12 months from December 2008, a naval operation to protect WFP maritime convoys bringing humanitarian assistance to Somalia and other vulnerable ships, and to repress acts of piracy and armed robbery at sea off the coast of Somalia;

7. *Calls upon* States and regional organizations to coordinate, including by sharing information through bilateral channels or the United Nations, their efforts to deter acts of piracy and armed robbery at sea off the coast of Somalia in cooperation with each other, the IMO, the international shipping community, flag States, and the TFG;

8. *Requests* the Secretary-General to present to it a report, no later than three months after the adoption of this resolution, on ways to ensure the long-term security of international navigation off the coast of Somalia, including the long-term security of WFP maritime deliveries to Somalia and a possible coordination and leadership role for the United Nations in this regard to rally Member States and regional organizations to counter piracy and armed robbery at sea off the coast of Somalia;

9. *Calls upon* States 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, in particular, consistent with this resolution and relevant inter-

APPENDIX I

national law, by deploying naval vessels and military aircraft, and through seizure and disposition of boats, vessels, arms and other related equipment used in the commission of piracy and armed robbery off the coast of Somalia, or for which there is reasonable ground for suspecting such use;

10. *Decides* that for a period of 12 months from the date of this resolution States and regional organizations cooperating with the TFG in the fight against piracy and armed robbery at sea off the coast of Somalia, for which advance notification has been provided by the TFG to the Secretary-General, may:

(a) Enter into the territorial waters of Somalia for the purpose of repressing acts of piracy and armed robbery at sea, in a manner consistent with such action permitted on the high seas with respect to piracy under relevant international law; and

(b) Use, within the territorial waters of Somalia, in a manner consistent with such action permitted on the high seas with respect to piracy under relevant international law, all necessary means to repress acts of piracy and armed robbery at sea;

11. *Affirms* that the authorizations provided in this resolution apply only with respect to the situation in Somalia and shall not affect the rights or obligations or responsibilities of Member States under international law, including any rights or obligations under the Convention, with respect to any other situation, and underscores in particular that this resolution shall not be considered as establishing customary international law; and *affirms further* that such authorizations have been provided only following the receipt of the 20 November letter conveying the consent of the TFG;

12. *Affirms* that the measures imposed by paragraph 5 of resolution 733 (1992) and further elaborated upon by paragraphs 1 and 2 of resolution 1425 (2002) do not apply to supplies of technical assistance to Somalia solely for the purposes set out in paragraph 5 above which have been exempted from those measures in accordance with the procedure set out in paragraphs 11 (b) and 12 of resolution 1772 (2007);

13. *Requests* that cooperating States take appropriate steps to ensure that the activities they undertake pursuant to the authorization in paragraph 10 do not have the practical effect of denying or impairing the right of innocent passage to the ships of any third State;

14. *Calls upon* all States, and in particular flag, port and coastal States, States of the nationality of victims and perpetrators of piracy and armed robbery, and other

States with relevant jurisdiction under international law and national legislation, to cooperate in determining jurisdiction, and in the investigation and prosecution of persons responsible for acts of piracy and armed robbery off the coast of Somalia, consistent with applicable international law including international human rights law, and to render assistance by, among other actions, providing disposition and logistics assistance with respect to persons under their jurisdiction and control, such victims and witnesses and persons detained as a result of operations conducted under this resolution;

15. *Notes* that the 1988 Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation (“SUA Convention”) provides for 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; urges States parties to the SUA Convention to fully implement their obligations under said Convention and cooperate with the Secretary-General and the IMO to build judicial capacity for the successful prosecution of persons suspected of piracy and armed robbery at sea off the coast of Somalia;

16. *Requests* States and regional organizations cooperating with the TFG to inform the Security Council and the Secretary-General within nine months of the progress of actions undertaken in the exercise of the authority provided in paragraph 10 above;

17. *Requests* the Secretary-General to report to the Security Council within 11 months of adoption of this resolution on the implementation of this resolution and on the situation with respect to piracy and armed robbery in territorial waters and the high seas off the coast of Somalia;

18. *Requests* the Secretary-General of the IMO to brief the Council on the basis of cases brought to his attention by the agreement of all affected coastal States, and duly taking into account the existing bilateral and regional cooperative arrangements, on the situation with respect to piracy and armed robbery;

19. *Expresses* its intention to review the situation and consider, as appropriate, renewing the authority provided in paragraph 10 above for additional periods upon the request of the TFG;

20. *Decides* to remain seized of the matter.

Resolution 1851 (2008)

Adopted by the Security Council at its 6046th meeting on 16 December 2008

The Security Council,

Recalling its previous resolutions concerning the situation in Somalia, especially resolutions 1814 (2008), 1816 (2008), 1838 (2008), 1844 (2008), and 1846 (2008),

Continuing to be gravely concerned by the dramatic increase in the incidents of piracy and armed robbery at sea off the coast of Somalia in the last six months, and by the threat that piracy and armed robbery at sea against vessels pose to the prompt, safe and effective delivery of humanitarian aid to Somalia, and noting that pirate attacks off the coast of Somalia have become more sophisticated and daring and have expanded in their geographic scope, notably evidenced by the hijacking of the M/V Sirius Star 500 nautical miles off the coast of Kenya and subsequent unsuccessful attempts well east of Tanzania,

Reaffirming its respect for the sovereignty, territorial integrity, political independence and unity of Somalia, including Somalia's rights with respect to offshore natural resources, including fisheries, in accordance with international law,

Further reaffirming that international law, as reflected in the United Nations Convention on the Law of the Sea of 10 December 1982 (UNCLOS), sets out the legal framework applicable to combating piracy and armed robbery at sea, as well as other ocean activities,

Again taking into account the crisis situation in Somalia, and the lack of capacity of the Transitional Federal Government (TFG) to interdict, or upon interdiction to prosecute pirates or to patrol and secure the waters off the coast of Somalia, including the international sea lanes and Somalia's territorial waters,

Noting the several requests from the TFG for international assistance to counter piracy off its coast, including the letter of 9 December 2008 from the President of Somalia requesting the international community to assist the TFG in taking all necessary measures to interdict those who use Somali territory and airspace to plan, facilitate or undertake acts of piracy and armed robbery at sea, and the 1 September 2008 letter from the President of Somalia to the Secretary-General of the UN expressing the appreciation of the TFG to the Security Council for its assistance and expressing the TFG's willingness to consider working with other States and regional organizations to combat piracy and armed robbery off the

coast of Somalia,

Welcoming the launching of the EU operation Atalanta to combat piracy off the coast of Somalia and to protect vulnerable ships bound for Somalia, as well as the efforts by the North Atlantic Treaty Organization, and other States acting in a national capacity in cooperation with the TFG to suppress piracy off the coast of Somalia,

Also welcoming the recent initiatives of the Governments of Egypt, Kenya, and the Secretary-General's Special Representative for Somalia, and the United Nations Office on Drugs and Crime (UNODC) to achieve effective measures to remedy the causes, capabilities, and incidents of piracy and armed robbery off the coast of Somalia, and emphasizing the need for current and future counter-piracy operations to effectively coordinate their activities,

Noting 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, and reiterating that the 1988 Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation ("SUA Convention") provides for 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,

Welcoming the report of the Monitoring Group on Somalia of 20 November 2008 (S/2008/769), and noting the role piracy may play in financing embargo violations by armed groups,

Determining that the incidents of piracy and armed robbery at sea in the waters off the coast of Somalia exacerbate the situation in Somalia which continues to constitute a threat to international peace and security in the region,

Acting under Chapter VII of the Charter of the United Nations,

1. *Reiterates* that it condemns and deplors all acts of piracy and armed robbery against vessels in waters off the coast of Somalia;
2. *Calls* upon States, regional and international 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, in particular, consistent with this resolution,

APPENDIX I

resolution 1846 (2008), and international law, by deploying naval vessels and military aircraft and through seizure and disposition of boats, vessels, arms and other related equipment used in the commission of piracy and armed robbery at sea off the coast of Somalia, or for which there are reasonable grounds for suspecting such use;

3. *Invites* all States and regional organizations fighting piracy off the coast of Somalia to conclude special agreements or arrangements with countries willing to take custody of pirates in order to embark law enforcement officials (“ship-riders”) from the latter countries, in particular countries in the region, to facilitate the investigation and prosecution of persons detained as a result of operations conducted under this resolution for acts of piracy and armed robbery at sea off the coast of Somalia, provided that the advance consent of the TFG is obtained for the exercise of third state jurisdiction by shipriders in Somali territorial waters and that such agreements or arrangements do not prejudice the effective implementation of the SUA Convention;

4. *Encourages* all States and regional organizations fighting piracy and armed robbery at sea off the coast of Somalia to establish an international cooperation mechanism to act as a common point of contact between and among states, regional and international organizations on all aspects of combating piracy and armed robbery at sea off Somalia’s coast; and recalls that future recommendations on ways to ensure the long-term security of international navigation off the coast of Somalia, including the long-term security of WFP maritime deliveries to Somalia and a possible coordination and leadership role for the United Nations in this regard to rally Member States and regional organizations to counter piracy and armed robbery at sea off the coast of Somalia are to be detailed in a report by the Secretary-General no later than three months after the adoption of resolution 1846;

5. *Further encourages* all states and regional organizations fighting piracy and armed robbery at sea off the coast of Somalia to consider creating a centre in the region to coordinate information relevant to piracy and armed robbery at sea off the coast of Somalia, to increase regional capacity with assistance of UNODC to arrange effective shiprider agreements or arrangements consistent with UNCLOS and to implement the SUA Convention, the United Nations Convention against Transnational Organized Crime and other relevant instruments to which States in the region are party, in order to effectively investigate and prosecute piracy and armed robbery at sea offences;

6. In response to the letter from the TFG of 9 December 2008, encourages Member States to continue to cooperate with the TFG in the fight against piracy and armed robbery at sea, notes the primary role of the TFG in rooting out piracy and armed robbery at sea, and decides that for a period of twelve months from the date of adoption of resolution 1846, States and regional organizations cooperating in the fight against piracy and armed robbery at sea off the coast of Somalia for which advance notification has been provided by the TFG to the Secretary-General may undertake all necessary measures that are appropriate in Somalia, for the purpose of suppressing acts of piracy and armed robbery at sea, pursuant to the request of the TFG, provided, however, that any measures undertaken pursuant to the authority of this paragraph shall be undertaken consistent with applicable international humanitarian and human rights law;
7. *Calls on* Member States to assist the TFG, at its request and with 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, and stresses that any measures undertaken pursuant to this paragraph shall be consistent with applicable international human rights law;
8. *Welcomes* the communiqué issued by the International Conference on Piracy around Somalia held in Nairobi, Kenya, on 11 December 2008 and encourages Member States to work to enhance the capacity of relevant states in the region to combat piracy, including judicial capacity;
9. *Notes* with concern the findings contained in the 20 November 2008 report of the Monitoring Group on Somalia that escalating ransom payments are fueling the growth of piracy in waters off the coast of Somalia, and that the lack of enforcement of the arms embargo established by resolution 733 (1992) has permitted ready access to the arms and ammunition used by the pirates and driven in part the phenomenal growth in piracy;
10. *Affirms* that the authorization provided in this resolution apply only with respect to the situation in Somalia and shall not affect the rights or obligations or responsibilities of Member States under international law, including any rights or obligations under UNCLOS, with respect to any other situation, and underscores in particular that this resolution shall not be considered as establishing customary international law, and affirms further that such authorizations have been provided only following the receipt of the 9 December 2008 letter conveying the consent of the TFG;

APPENDIX I

11. *Affirms* that the measures imposed by paragraph 5 of resolution 733 (1992) and further elaborated upon by paragraphs 1 and 2 of resolution 1425 (2002) shall not apply to weapons and military equipment destined for the sole use of Member States and regional organizations undertaking measures in accordance with paragraph 6 above;

12. *Urges* States in collaboration with the shipping and insurance industries, and the IMO to continue to develop avoidance, evasion, and defensive best practices and advisories to take when under attack or when sailing in waters off the coast of Somalia, and further urges States to make their citizens and vessels available for forensic investigation as appropriate at the first port of call immediately following an act or attempted act of piracy or armed robbery at sea or release from captivity;

13. *Decides* to remain seized of the matter.

APPENDIX II

LIST OF WORKSHOP PARTICIPANTS

Brad Barker

President
The HALO Corporation

Tiffany Basciano

Program Coordinator, International Law
and Organizations Program
The Paul H. Nitze School of Advanced
International Studies
Johns Hopkins University

RADM William D. Baumgartner, USCG

Judge Advocate General, USCG
U.S. Coast Guard

Ambassador Barbara K. Bodine

Former Ambassador to Yemen
Lecturer in Public and International Affairs
Woodrow Wilson School of Public and
International Affairs
Princeton University

Spike Bowman

Distinguished Fellow
University of Virginia School of Law

Daniel Carr

Assistant General Counsel
Stolt-Nielsen USA, Inc.

James Christodoulou

Shipowner of the Biscaglia
President and CEO
Industrial Shipping Enterprises Corp.

Thomas Countryman

Foreign Policy Advisor to the
Commandant, US Marine Corps

Charles Dragonette

Senior Commerical Maritime
Operations Analyst
NIMITZ Operational Intelligence Center
Office of Naval Intelligence

Michael Ennor

Director
Procintu Group

Fritz W. Ermarth

Former Chairman of the National
Intelligence Council

John J. Flood

Unit Chief
FBI, Critical Incident Response Group,
Tactical Section
Crisis Negotiation Unit

Eric G. Frost

Co-Director, Viz Center
Homeland Security Program
San Diego State University

Gerard W. Gawalt

Historian
Library of Congress
C&G Associates

Peter E. Harrell

Secretary's Policy Planning Staff
U.S. Department of State

Albert C. Harvey

Chair, Standing Committee on Law and
National Security
American Bar Association
Thomason, Hendrix, Harvey, Johnson,
& Mitchell PLLC

APPENDIX II

John L. Hirsch

Former Ambassador to Sierra Leone
Senior Fellow, International Peace Institute

Donna Leigh Hopkins

Political-Military Policy and Planning
Team Leader
Bureau of Political Military Affairs
U.S. Department of State

Sabra Horne

Senior Advisor for Strategic Partnerships
Office of the Director of National Intelligence, Open Source Collection

Colonel Kirk Hymes, USMC

Director
Joint Non-Lethal Weapons Directorate
U.S. Department of Defense

Christopher Joyner

Professor of International Law
Georgetown University

Brad Kieserman

Associate General Counsel for Operations
and Enforcement
U.S. Department of Homeland Security

Catherine Knowles

Office of the Secretary of Defense

David A. Koplou

Professor of Law
Georgetown University Law Center

Joseph E. Lucwiczak

General Secretary
Liberian Shipowners' Council, Ltd.

Virginia Lunsford, Ph.D.

Associate Professor
History Department
U.S. Naval Academy

Admiral James A. "Ace" Lyons, Jr.,

USN (Ret.)
President/CEO
Lion Associates, LLC

Terrence Lyons

Associate Professor
Institute for Conflict Management and
Resolution
George Mason University

Ambassador Idd Beddel Mohamed

Deputy Permanent Representative
Head of Political and Security Council
Affairs
Somali Mission to the United Nations

Martin N. Murphy

Senior Fellow
Center for Strategic and Budgetary
Assessments

Captain Patrick J. Neher, USN

Director, International and Operational
Law, U.S. Navy
Office of the Judge Advocate General

Mark Newcomb

U.S. Navy Judge Advocate General (Ret.)

Ambassador Robert Oakley

Former Ambassador and
President's Special Envoy
to Somalia

Daniel O'Shea

Founder
Daniel Risk Mitigation

Harvey Rishikof

Professor of Law and National Security
Studies, National War College
Incoming Chair, Standing Committee on
Law and National Security, American Bar
Association

Erik Rye

Senior Advisor for Hostage Affairs
U.S. Department of State

Gregory B. Saathoff, M.D.

Executive Director
Critical Incident Analysis Group (CIAG)
University of Virginia

Ambassador David Shinn

Former Ambassador to Ethiopia and
Former State Department Coordinator

Suzanne E. Spaulding

Principal
Bingham Consulting Group
Bingham McCutchen LLP

Jonathan S. Spencer

Average Adjuster
The Spencer Company

Edward T. Swaine

Associate Professor
The George Washington University Law
School

Colonel Tracy Tafolla

Incoming Director
Joint Non-Lethal Weapons Directorate
U.S. Department of Defense

Robert F. Turner

Professor and Associate Director
Center for National Security Law
University of Virginia School of Law

Ruth Wedgwood

Edward B. Burling Professor of
International Law and Diplomacy
Director of International Law and
Organizations Program
The Paul H. Nitze School of Advanced
International Studies

Edwin D. Williamson

Senior Counsel
Sullivan & Cromwell LLP

OBSERVERS

The following individuals attended the workshop as observers. The views expressed in this post-workshop report should not be construed to reflect their views and do not reflect the official policies or positions of the American Bar Association, the U.S. Department of Defense, the Joint Staff, the Department of Army, the U.S. Marine Corps, the U.S. Coast Guard, the U.S. Navy, or any other private or public entity or party.

David Anderson

Vice President of Civic Programs
McCormick Foundation

Lauren Bean

Editor, National Strategy Forum Review, and
National Security Analyst
National Strategy Forum

Christopher J. Bencal

Advanced Technologies
Raytheon

John Choate

President
Procintu Group

Reneta Dimitrova

The Paul H. Nitze School of Advanced
International Studies
Johns Hopkins University

BG David L. Grange, USA (Ret.)

President and CEO
McCormick Foundation

Brig. Gen. Thomas Hemingway, USAF

Senior Advisor
Office of the Deputy Secretary
Department of Commerce

LTC David E.A. Johnson, USA (Ret.)

Executive Director
Center for Advanced Defense Studies

Sarah Johnston-Gardner

The Paul H. Nitze School of Advanced
International Studies
Johns Hopkins University

Dennis J. Lehr

Hogan & Hartson LLP

Colonel William K. Lietzau, USMC

Office of the Legal Adviser
National Security Council

Holly McMahan

Staff Director
Standing Committee on Law and National
Security
American Bar Association

Gregory S. McNeal

Visiting Assistant Professor of Law
The Dickinson School of Law
Pennsylvania State University

Thomas J. Rozycki, Jr.

Senior Vice President,
Crisis Communications
CJP Communications

Cynthia Ryan

General Counsel
National Geospatial Intelligence Agency

Tamar Senikidze

University of Miami

Robert Taylor

Principal Deputy General Counsel
U.S. Department of Defense

Geoffrey A. Whiting

Security and Intelligence Programs
Raytheon

CONTEMPORARY PIRACY: CONSEQUENCES AND CURES



A POST-WORKSHOP REPORT

AMERICAN BAR ASSOCIATION STANDING COMMITTEE ON LAW
AND NATIONAL SECURITY

JOHNS HOPKINS UNIVERSITY,
THE PAUL H. NITZE SCHOOL OF ADVANCED
INTERNATIONAL STUDIES,
INTERNATIONAL LAW AND ORGANIZATIONS PROGRAM

MCCORMICK FOUNDATION

NATIONAL STRATEGY FORUM

UNIVERSITY OF VIRGINIA
CRITICAL INCIDENT ANALYSIS GROUP

OCTOBER 2009