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International cooperation in combating modern forms of maritime piracy: Legal and policy dimensions

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CHAPTER FIVE: THE PRAGMATIC APPROACH CHARACTERIZING THE COUNTER-PIRACY INITIATIVES

6.1. INTRODUCTION

In September 1814, ambassadors from European countries gathered in Vienna, Austria, to negotiate a long-term peace plan for Europe following the Napoleonic Wars. Deliberations were long – it was not before June 1815 that they adopted the Final Act of the Congress of Vienna - and were accompanied by many social events that put Austria to great expense. The Prince of Ligne, one of the participants, described the Congress at the time as follows: "Le congrès danse beaucoup, mais il ne marche pas" ("the Congress dances a lot, but it does not get anywhere").⁷⁹¹

To a large extent, the engagement of the international community that followed the spike in piracy attacks off the coast of Somalia was an antithesis to the Vienna Congress and to the classic features commonly associated with international gatherings. Rather than engaging in lengthy deliberations, commonplace in the diplomatic world, or creating costly, formal, and cumbersome new mechanisms, what emerged from the various counter-piracy undertakings was a **pragmatic** approach. Efficiency has become a guiding principle.

The pragmatic, informal, paradigm has been manifested in a number of aspects. Noteworthy of which are the legal framework and the institutional landscape, whose presentation in this chapter illustrates the application of that paradigm.

⁷⁹¹ See "Congress of Vienna", available at <http://www.wien-vienna.com/congress.php>.

6.2. THE LEGAL FRAMEWORK

A common, traditional approach of the international community in addressing an emerging threat is the adoption of new legal instruments, typically new treaties or protocols to existing treaties. Considering the shortcomings in UNCLOS, discussed in previous chapters, it is therefore unsurprising that in response to the piracy incidents calls were expressed to create new instruments such as a new treaty to specifically address maritime piracy.⁷⁹²

Nonetheless, not a single new international treaty was concluded. To the contrary, it was stressed from the very outset that UNCLOS remains the main legal framework, complemented by existing conventions such as the SUA Convention and UNTOC. Nor did countries and organizations launch negotiations over potential amendments to treaties such as to UNCLOS definition of piracy.

Instead, countries engaged in a rapid conclusion of non-binding regional arrangements (the Code of Conducts discussed in Chapter 5) as well as bilateral agreements, for instance on the transfer of piracy suspects from capturing warships to regional States willing to prosecute them or on post-conviction transfers, i.e. with regard to the transfer of sentenced pirates from the prosecuting State to a State willing to detain them. These agreements were concluded in an informal manner (e.g. Memorandum of Understanding,⁷⁹³ Exchange of Letters⁷⁹⁴), were not

⁷⁹² Cf. Bento, *supra* note 16, at 441-3 (proposing the adoption of a “United Nations Treaty Against Maritime Piracy” with, inter alia, a new piracy definition, better tools for apprehending and prosecuting pirates, an obligation to establish information centers, and criminalization of ransom payments. The author rejected the idea of adopting a maritime piracy protocol to UNCLOS in light of the inherent limitations on protocols to treaties – see there at 439).

⁷⁹³ For example, the UK signed with a number of countries such as Tanzania and Mauritius a Memorandum of Understanding (MOU) on the transfer of piracy suspects – cf. “UK signs agreement with Mauritius to transfer

registered at the United Nations,⁷⁹⁵ and were not always made publicly available, though their existence was mentioned in the media.⁷⁹⁶ By concluding such agreements, lengthy procedures associated with new treaties such as ratification by national parliaments were circumvented. In light of efficiency embodied in this course of action, international organizations facilitated and supported the conclusion of such agreements.⁷⁹⁷

The transfer agreements were indeed effective in facilitating the transfer of many suspects to face trial in regional States such as Seychelles and Kenya and the transfer of

suspected pirates for prosecution”, Gov.UK, (June 8, 2012), available at <https://www.gov.uk/government/news/uk-signs-agreement-with-mauritius-to-transfer-suspected-pirates-for-prosecution>.

⁷⁹⁴ For example, in March 2009 the European Union signed an Exchange of Letters with Kenya for the transfer of suspected pirates detained by EUNAVFOR - see “Exchange of Letters between the European Union and the Government of Kenya on the conditions and modalities for the transfer of persons suspected of having committed acts of piracy and detained by the European Union-led naval force (EUNAVFOR), and seized property in the possession of EUNAVFOR, from EUNAVFOR to Kenya and for their treatment after such transfer”, available via <http://ec.europa.eu/world/agreements/prepareCreateTreatiesWorkspace/treatiesGeneralData.do?step=0&redirect=true&treatyId=7883>.

⁷⁹⁵ In accordance with article 102(1) of the UN Charter, “Every treaty and every international agreement entered into by any Member of the United Nations after the present Charter comes into force shall as soon as possible be registered with the Secretariat and published by it.”

⁷⁹⁶ See Treves, *Developments*, *supra* note 147, at 411 (mentioning that “the difficulties met in surrendering captured pirates to a neighbouring state and ensuring that such state will exercise jurisdiction and respect human rights have led to bilateral agreements, mentioned in the media but not made public, between the United Kingdom and the United States and Kenya”).

⁷⁹⁷ For example, IMO facilitated the conclusion of the Codes of Conduct. The UNSC invited “all States and regional organizations fighting piracy off the coast of Somalia to conclude special agreements or arrangements with countries willing to take custody of pirates in order to embark law enforcement officials (“shipriders”) from the latter countries, in particular countries in the region, to facilitate the investigation and prosecution of persons detained as a result of operations conducted under this resolution for acts of piracy and armed robbery at sea off the coast of Somalia” – S.C. Res. 1897, *supra* note 320. The UNSC also requested “States, UNODC and regional organizations to consider, consistent with applicable rules of international human rights law, measures aimed at facilitating the transfer of suspected pirates for trial, and convicted pirates for imprisonment, including through relevant transfer agreements or arrangements” (S.C. Res. 1976, *supra* note 167).

convicted pirates back to Somalia to serve their sentence. Their successful adoption and implementation should, however, be weighed against certain inherent disadvantages. For example, while the language used in them may appear to create binding obligations,⁷⁹⁸ there was no guarantee that the regional state will accept suspected pirates.⁷⁹⁹ And just as such agreements were swiftly concluded, they could be as quickly terminated or suspended.⁸⁰⁰ As previously mentioned, the transfer agreements raised legal questions, for example on their compliance with Article 105 of UNCLOS.⁸⁰¹ In some cases, the rapid conclusion of the agreements led to judicial challenges. For example, a 2011 European Council Decision on the signing and conclusion of a transfer agreement between the EU and Mauritius⁸⁰² was challenged before the European Court of Justice by the European Parliament (supported by the European Commission). The Court found that the failure of the European Council to properly and promptly inform the European

⁷⁹⁸ Cf. Article 2(a) of the annex of the EU-Kenya exchange of letters, *supra* note 794: “Kenya *will* accept, upon the request of EUNAVFOR, the transfer of persons detained by EUNAVFOR in connection with piracy and associated seized property by EUNAVFOR and *will* submit such persons and property to its competent authorities for the purpose of investigation and prosecution” (emphasis added).

⁷⁹⁹ See, for example, the following statement from the report of the UK *House of Commons Foreign Affairs Committee*, *supra* note 789, para. 102: “Even when a transfer agreement is in operation, there is no guarantee that the state will accept pirate suspects from naval forces...once EU naval forces detain suspects, they must undertake a negotiation with one or more states to obtain agreement to accept them for prosecution.”

⁸⁰⁰ For example, in 2010 Kenya announced the termination of the transfer agreement with the EU – see Lillian Leposo

“Kenya ends agreement with EU to prosecute suspected Somali pirates”, CNN, available at <http://edition.cnn.com/2010/WORLD/africa/10/04/kenya.eu.pirates/>.

⁸⁰¹ See discussion *supra* Chapter 2.

⁸⁰² Council Decision 2011/640/CFSP of 12 July 2011 on the signing and conclusion of the Agreement between the European Union and the Republic of Mauritius on the conditions of transfer of suspected pirates and associated seized property from the European Union-led naval force to the Republic of Mauritius and on the conditions of suspected pirates after transfer, available at <http://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1403731201058&uri=CELEX:32011D0640>.

Parliament of the agreement was in breach of the applicable EU law.⁸⁰³ Moreover, not making all agreements publicly available does not conform to the principle of transparency and prevents civil society from questioning or monitoring the agreements' compliance with established principles such as the prohibition on disguised extradition and, more generally, with human rights standards such as the principle of "non-refoulement."⁸⁰⁴

In addition to the adoption of regional arrangements and bilateral ad hoc agreements, various actors engaging in the counter-piracy efforts jointly produced supporting instruments and tools. Noteworthy of such instruments is the updated version of the Best Management Practices for Protection against Somalia Based Piracy (BMP), developed by the private industry with the support of IMO and other organizations such as INTERPOL. The purpose of BMP4, namely the updated 4th version of BMP, is "to assist ships to avoid, deter or delay piracy attacks in the High Risk Area."⁸⁰⁵ It contains specific guidance on the actions to be taken before, during, and following a piracy attack, and its contribution to the counter-piracy efforts was noted by commentators and the UNSC.⁸⁰⁶ Another example for a supporting tool is the "legal toolbox"

⁸⁰³ Case C-658/11 European Parliament v. Council (Pirate Transfer Agreement with Mauritius), Judgment of 24 June 2014, available at <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:62011CJ0658&from=EN>. Notwithstanding the Court's decision to annul it, the Court decided to maintain the effects of the Council Decision so as not to hamper the conduct of operations carried out on the basis of the Agreement and, in particular, the full effectiveness of the prosecutions and trials of suspected pirates arrested by EUNAVFOR. For an analysis of the Court's decision see Andrea Ott, *The Legal Bases for International Agreements Post-Lisbon of Pirates and the Philippines*, available at http://www.maastrichtjournal.eu/pdf_file/ITS/MJ_21_04_0739.pdf.

⁸⁰⁴ For a discussion the application of this principle with regard to the EU transfer agreements, cf. Robin Geiss and Anne Petrig, *Piracy and Armed Robbery at Sea – The Legal Framework for Counter-Piracy Operations in Somalia and the Gulf of Eden* (Oxford University Press, 2011), P. 210-218.

⁸⁰⁵ See BMP4, *supra* note 327, Introduction.

⁸⁰⁶ Cf. "BMP4 HRA Revision – Pragmatic Decision or Dangerous Gamble?" October 8, 2015, available at <http://www.dryadmaritime.com/bmp4-hra-revision-pragmatic-decision-or-dangerous-gamble/> ("The measures implemented by BMP4, along with other international efforts, have effectively stemmed the tide of hijackings that

developed by the Working Group on legal issues (WG2) of the Contact Group on Piracy off the Coast of Somalia (CGPCS).⁸⁰⁷

What characterizes the legal framework is therefore the adoption of new (or revised) non-binding, 'soft law', instruments, whose implementation took place under the umbrella of the existing 'hard law', namely UNCLOS and other applicable treaties such as the SUA Convention. This was complemented by supporting the enactment of or amendment to national legislation (antipiracy laws) to facilitate counter-piracy activities and in particular prosecution of pirates.⁸⁰⁸

This approach enabled the counter-piracy community to act swiftly and efficiently, rather than dedicate its efforts to lengthy negotiations that typify the conclusion of formal and binding instruments. Yet, as a consequence of the heavy focus on adopting non-binding, ad hoc agreements and other instruments, those involved in combating piracy perhaps missed an opportunity to thoroughly examine ways to ameliorate the existing formal legal framework, notably UNCLOS. This could have taken place in parallel to – rather than instead of - the conclusion of informal instruments. For example, WG2 of the CGPCS could have dedicated parts of its discussions, in particular in its meetings that followed the decline in piracy incidents,

were so prevalent in recent years"); S.C. Res. 1976, *supra* note 167, where the UNSC commended “the efforts of the shipping industry, in cooperation with the CGPCS and IMO, in developing and disseminating the updated version of the Best Management Practices to Deter Piracy off the Coast of Somalia and in the Arabian Sea Area (BMP) and emphasizes the critical importance for the shipping industry of applying the best practices recommended in the BMP”).

⁸⁰⁷ See description of the activities of WG2, available at <http://oceansbeyondpiracy.org/matrix/contact-group-piracy-coast-somalia-cgpcs> (“WG2 has focused on encouraging apprehension, prosecution, and imprisonment of pirates within national legal systems and has developed a 'legal toolbox' to support states and organizations and strengthen their capacity to combat piracy at armed robbery at sea”).

⁸⁰⁸ Cf. the amendment in 2010 of the Seychelles Penal Code – see <http://www.piracylegalforum.org/wp-content/uploads/2015/03/Piracy-manual-final-version-8.pdf>.

to examining possible amendments to UNCLOS or alternatively the possibility of concluding a protocol that can supplement UNCLOS in areas such as extradition, mutual legal assistance, and transfer of piracy suspects. Adopting such a protocol would not have remedied all of UNCLOS' shortcomings, but could have served as a long-term legal framework that can better facilitate counter-piracy undertakings in the future.

6.3. THE INSTITUTIONAL LANDSCAPE

Similar to the approach taken with regard to the legal framework, efficiency and informality have been the guiding principles in defining the institutional landscape. As already noted, not a single new formal and permanent international organization was created to counter piracy.⁸⁰⁹ Though this may have been influenced by a regional approach to the piracy threats, it certainly derived also from the reluctance of the international community to create new classic international (or even regional) organizations with costly bureaucratic structures.

The discussion over the prosecution of Somali pirates illustrates the predominant role efficiency considerations played in deciding whether to create new institutions. As mentioned, the various proposals made to address this challenge included the creation of a dedicated international piracy court or, as proposed by the Lang Report, establishing a Somali extraterritorial jurisdiction court in Tanzania.⁸¹⁰ These proposals were heavily debated at the UNSC and other fora such as WG2 of the CGPCS.⁸¹¹ With regard to Mr. Lang's proposal, for example, some member on the UNSC (Russia, France, and Portugal) spoke strongly in favor,

⁸⁰⁹ See discussion *supra* Chapter 4.

⁸¹⁰ See discussion *supra* Chapter 4.

⁸¹¹ Beekarry, *supra* note 2, at 167 (fn 32).

while the US and UK strongly opposed it, “questioning whether a court in Tanzania would be *practicable* in such a short time frame.”⁸¹²

The report of the UK House of Commons Foreign Affairs Committee, released shortly after that debate at the UNSC, shows that the underlying reasoning behind the UK’s opposition to the creation of new international or extra-territorial tribunals included practical considerations, such as the significant possible cost (estimated in the report as possibly reaching \$100 million a year).⁸¹³ With regard to the proposal to create a new international court, the report also mentioned the difficulty raised by Professor Douglas Guilfoyle, who “questioned the viability of an international court, noting that delays would occur while rules of evidence and procedure were established.”⁸¹⁴ The report concluded on this point by stating that “the [UK] Government was right to oppose the establishment of an extra-territorial Somali court as proposed in the Jack Lang report to try Somali pirates in a third country. We recommend that the Government set out in its response to this report its views on the more recent proposals for specialized anti-piracy courts established within regional states under ordinary national law.”⁸¹⁵

The strong position expressed by countries such as the U.S. and U.K against the creation of a new court or tribunal finally led to the decision to reject the various proposals and focus on prosecution in regional states.⁸¹⁶ As clearly evidenced by statements such as those made in the report of the UK House of Commons Foreign Affairs Committee, that decision was largely

⁸¹² Dubner and Fredrickson, *supra* note 245, at 257 (quoting from the report of *House of Commons Foreign Affairs Committee*, *supra* note 789) [emphasis added].

⁸¹³ Report of the *House of Commons Foreign Affairs Committee*, *supra* note 789, para. 89 (stating that “[t]he costs of bring [an extra-territorial] court up to standard and using it on an ongoing basis would be huge”); Dubner, *id.*, at 259.

⁸¹⁴ Report of the *House of Commons Foreign Affairs Committee*, *supra* note 789, para. 90.

⁸¹⁵ *Idem*, para. 92.

⁸¹⁶ See discussion *supra* Chapter 4.

influenced by pragmatic considerations such as the expected costs and foreseen delays in creating new judicial mechanisms.⁸¹⁷

Without delving into a full survey of the various institutions involved in countering piracy,⁸¹⁸ two additional examples illustrate the practical approach that has dominated the institutional landscape: The CGPCS and the Regional Anti-Piracy Prosecution and Intelligence Coordination Centre (RAPPICC).

6.3.1. The Contact Group on Piracy off the Coast of Somalia (CGPCS)

The CGPSC was created on January 14, 2009 pursuant to UNSC Resolution 1851, which encouraged “all States and regional organizations fighting piracy and armed robbery at sea off the coast of Somalia to establish an international cooperation mechanism to act as a common point of contact between and among states, regional and international organizations on all aspects of combating piracy and armed robbery at sea off Somalia’s coast.”⁸¹⁹

Though the CGPCS was established under the auspices of the UNSC, has regularly reported to the UNSC and has been consistently mentioned in its Resolutions, it does not form part of the UN system (whether as a UN agency, UN committee or other formal UN mechanism).

⁸¹⁷ See also Beekarry, *supra* note 2, at 165-166 (describing various arguments raised against the prosecution of pirates before an international court or tribunal, including the fact that “the costs associated with establishing and operating an international court have been acknowledged as prohibitive. Many argue that money is better spent facilitating prosecutions in regional and affected states and supporting efforts to build a stable government in Somalia. The same concerns apply to the length of time it may take to establish and staff such a court when the focus is on addressing the piracy scourge as immediately and as robustly as possible”).

⁸¹⁸ For an examination of the institutional landscape cf. MARITIME PIRACY AND THE CONSTRUCTION OF GLOBAL GOVERNANCE, *supra* note 31, Part II (Constructions through Institutions); Bueger, *supra* note 636.

⁸¹⁹ See S.C. Res. 1851, *supra* note 189.

It is an international mechanism with a clearly defined thematic and geographic scope, which brings together various stakeholders affected by Somali piracy. It serves as a decentralized coordination mechanism on different levels (operational, legal, etc.) and a forum for discussing emerging problems, possible solution, and best practices.⁸²⁰

The CGPCS bears the following characteristics:

- **No permanent structure:** The CGPCS is an ad hoc loose network with neither a constituent instrument nor a permanent structure akin to a general secretariat of an international or a regional organization.
- **Flexibility:** Since the CGPCS has no formal “rule of speciality” that would limit its mandate⁸²¹ (as is the case with international organizations), and due to the lack of governing rules and cumbersome institutional procedures, the CGPCS has been able to rapidly adjust its activities (e.g. by creating additional working groups) and enlarge its membership.⁸²² It has been noted that the trade-off [of flexibility] “is limited visibility

⁸²⁰ An example of the facilitative role of the Contact Group is the work of Working Group 2 (on legal matters) on the transfer agreements of piracy suspects or convicts. As mentioned in the Report of the UN Secretary-General pursuant to Security Council resolution 1950 (2010), ¶ 67, U.N. Doc. S/2011/662 (Oct. 25, 2011): “Agreements on the transfer of convicted pirates were signed between the Government of Seychelles and the Transitional Federal Government, “Puntland” and “Somaliland”. These agreements were enabled by the efforts of the Contact Group on Piracy off the Coast of Somalia and will allow Seychelles to move convicted Somali pirates back to “Puntland” and “Somaliland” to serve their sentences.”

⁸²¹ William Smith, “Dimensions of Legitimacy: Evaluating the Contact Group”, Working Paper of the Lessons Learned Project of the Contact Group on Piracy off the Coast of Somalia (CGPCS), P. 4, available at <http://www.lessonsfrompiracy.net/files/2014/08/Smith-Legitimacy-of-the-Contact-Group.pdf> (“Although it emerged as a response to a UN Security Council resolution, it was not formally established by such a resolution and thus lacks as clear mandate for its activities”).

⁸²² See Danielle A. Zach et al, *Burden-sharing: Multi-level Governance – a study of the Contact Group off the Coast of Somalia*, available at http://www.lessonsfrompiracy.net/files/2015/03/OBP-Burden_Sharing.pdf (“While

and inclusiveness in agenda-setting and decision-making processes.”⁸²³ The CGPCS, however, was conscious of the importance of communication and, to that end, created a dedicated working group (WG 4).⁸²⁴

- **Informal membership:** Participation is voluntary and does not entail any legally binding obligations (no formal obligation to be bound by any decision taken, no membership dues, etc.). There is no formal admission process to admit new participants. This strengthens the legitimacy of the Group, since the voluntary participation can be taken as implicit or explicit consent to submit to its authority.⁸²⁵
- **Inclusiveness:** Though the CGPCS began its activities with a small group of States and international or regional organizations (in line with UNSC Resolution 1851), the forum has rapidly grown to include not only more States and organizations, but also other stakeholders, notably representatives of the private sector (e.g. of the shipping industry) and NGOs. Engaging civil society is particularly interesting considering that

somewhat constrained by diplomatic norms and processes, the group’s informal structure has allowed it to adapt its working methods, extend participation to non-state actors, and circumvent procedural constraints that can hamstring creativity and efficiency in finding solutions to problems”).

⁸²³ *Idem.*

⁸²⁴ Working Group 4 (WG4) of the CGPCS was tasked with improving diplomatic and public information efforts on all aspects of piracy and using messaging and outreach strategies to raise awareness of the dangers of piracy and inform the public in the area and abroad of the dangers posed by piracy – see <http://oceansbeyondpiracy.org/matrix/contact-group-piracy-coast-somalia-cgpcs>.

⁸²⁵ Smith, *supra* note 821, P. 3.

organizations and networks dealing with military or law-enforcement matters are often suspicious of collaboration with non-state actors and therefore tend to be exclusive.⁸²⁶

- **Multiagency:** Different than certain international and regional organizations, where States representatives are designated from a single type of States agencies (e.g. INTERPOL or Europol, both of which bring together law-enforcement officials of their members), participants at the CGPCS' activities included representatives of different ministries and agencies. Though the thematic CGPCS working groups typically included representatives from similar agencies (e.g. WG1 on operational aspects with representatives from navies; WG2 on legal issues with representatives from ministries of foreign affairs or justice), the interaction between the working groups under the umbrella structure of the CGPCS enabled cross-cutting, multiagency deliberations and coordination.⁸²⁷
- **Horizontal paradigm:** The CGPCS has no hierarchical relations. It does not adopt formal binding resolutions or a similar format of decisions.⁸²⁸ Instead, it relies on soft mechanisms, such as consensual decision-making and mobilizing praise and blame as a form of peer pressure.⁸²⁹ The documents it has produced such as “toolkits”, “non-papers”, and “chairman’s conclusions” are of hortatory nature and aim at facilitating the

⁸²⁶ In that regard see also Smith, *supra* note 821, P. 8 (“As defence and security has traditionally been dominated by states and states-based organizations, it is surprising that the Contact Group has, from the start, included non-state actors within its activities”).

⁸²⁷ In that regard, see also Danielle A. Zach et al, *supra* note 822 (“Given that piracy is a cross-cutting issue area involving multiple ministries/departments within governments (e.g., defense, transportation, foreign affairs, finance), the contact group has cultivated horizontal linkages among national bureaucracies”).

⁸²⁸ Smith, *supra* note 821, P. 2 (“Along with similar informal policy networks in the global realm, the Contact Group does not have the power to enforce compliance with its recommendations”).

⁸²⁹ Zach et al., *supra* note 822, P. 33.

deliberations over the counter-piracy initiatives. Chairmanship of the entire group or of its thematic working groups rotates among participating States and organizations on a voluntary basis and without former elections.

Thus, by its very essence, the CGPCS is a different type of mechanism in comparison to classic international organizations. Nonetheless, it would be inaccurate to view it as completely departing from traditional concepts of international governance. In particular, despite having included actors from the private and non-governmental sectors, the discussions and deliberations were led primarily by States, often the powerful ones.⁸³⁰ It is also important to bear in mind that the CGPCS has operated as a complementing mechanism to established ones (such as UNSC and IMO); it would be therefore premature to assert that a loose-type network similar to the CGPCS can or should completely replace existing organizations. Finally, the creation of an ad hoc global policy network is not unprecedented; as has been noted, the CGPCS “has design and operational features that render it part of a family of global governance networks that have proliferated in recent years.”⁸³¹

All in all, the CGPCS has been considered as a successful initiative. It fostered the emergence of an anti-piracy community and cultivated horizontal linkages among national bureaucracies.⁸³² It was described by one participating State as a “remarkably - perhaps uniquely - effective ad hoc construct”,⁸³³ whose concerted efforts contributed to the significant drop in

⁸³⁰ Zach et al., *supra* note 822, Introduction. (“the CGPCS is almost as state-centric as its counterpart UN and regional organizations—undeniably power lies with states, and particularly the most resourced among them”]; see also Smith, *supra* note 821, P. 8 (“As in many other global governance networks, a core group of Western powers are particularly influential within the Contact Group”).

⁸³¹ Smith, *supra* note 821, P. 8.

⁸³² Zach et al., *supra* note 822, Introduction.

⁸³³ United States Counter Piracy and Maritime Security Action Plan, June 2014, Annex A: Framework for Combating Piracy and Enhancing Maritime Security off the Horn of Africa, P. 7, available at

piracy incidents off the coast of Somalia.⁸³⁴ As also noted in 2014 by the Chairperson of the CGPCS: “The Contact Group on piracy is unique. It is a laboratory for innovative multilateral governance to address complex international issues. The great thing is that it is delivering.”⁸³⁵

The CGPCS can therefore serve as a useful model to address other emerging threats that call for international or regional collaboration. One recent example for a regional network that is intended to bear similar characteristics to CGPCS (voluntary participation, flexible and horizontal forum) is the Indian Ocean Forum on Maritime Crime (IOFMC), created in 2014 by UNODC. IOFMC’s purpose is to provide a regional network between states in order to coordinate their responses to maritime crime concerns at the diplomatic, strategic and capacity-building levels. It is an initiative that will partner with regional and international organizations with a common interest.⁸³⁶ In a different domain, the creation in September 2014 of the Global Coalition to Counter ISIL bears some resemblance to the model of CGPCS (horizontal, loose network, etc.).⁸³⁷

http://www.whitehouse.gov/sites/default/files/docs/united_states_counter_piracy_and_maritime_security_action_plan_2014.pdf.

⁸³⁴ *Idem*, P. 1.

⁸³⁵ Maciej Popowski, 2014 Chairman of the Contact Group, available at <http://www.lessonsfrompiracy.net/>.

⁸³⁶ See “UNODC’s contribution to the 2015 report of the United Nations Secretary-General on oceans and the law of the sea”, 30 January 2015, available at http://www.un.org/Depts/los/general_assembly/contributions_2015/UNODC.pdf; See also the report of the Contact Group: “The Forum has begun to address three forms of organised maritime crime: heroin trafficking, migrant smuggling/trafficking of persons and wildlife and forestry crime. The Forum supports Joint Investigation Teams, a prosecutors’ network, a training programme for judges, prosecutors, law enforcement officials and prison staff, and information sharing initiatives between the 29 states from South Africa in the West to Australia in the East” - “Communiqué: Contact Group on Piracy off the Coast of Somalia 18th Plenary Session”, available at http://eu-un.europa.eu/articles/en/article_16647_en.htm.

⁸³⁷ On the creation of the Global Coalition to Counter ISIL and its main objectives see the U.S. State Department site at <http://www.state.gov/s/seci/>.

6.3.2. The Regional Anti-Piracy Prosecution and Intelligence Coordination Centre (RAPPICC)

Less known than the CGPCS but legally speaking no less interesting is the Seychelles-based Regional Anti-Piracy Prosecution and Intelligence Coordination Centre (RAPPICC). The creation of the Centre was announced during the February 2012 London Conference on Piracy and Somalia.⁸³⁸ Temporary offices opened on 1 June 2012, with the permanent building completed by January 2013.⁸³⁹ The creation of the new Centre and its on-going activities were also mentioned in UNSC Resolutions.⁸⁴⁰

The RAPPICC was intended to bring together military and law enforcement capabilities in fighting piracy by facilitating the tracking of pirates and enforcement action against pirate financiers and leaders.⁸⁴¹ Though it was originally meant to focus on piratical activities, shortly after its creation the Centre's mandate was broadened to encompass three interlinked missions: A Transnational Organised Crime Unit (TOCU), a Maritime Trade Information Sharing Centre (MTISC) and a Local Capacity Building Coordination Group (LCBCG).⁸⁴² The Center's work

⁸³⁸ See the UK's Foreign Office Communique from the London Conference on Somalia at Lancaster House on 23 February, Gov.UK, available at <https://www.gov.uk/government/news/london-conference-on-somalia-communicue-2> (noting "the establishment of a Regional Anti-Piracy Prosecutions Intelligence Coordination Centre in the Seychelles").

⁸³⁹ See <http://www.oceansbeyondpiracy.org/matrix/regional-fusion-and-law-enforcement-centre-safety-and-security-sea-reflecs3>.

⁸⁴⁰ See S.C. Res. 2077, *supra* note 248, (the UNSC noted that "the ongoing initiative aimed at establishing the Regional Anti-Piracy Prosecution & Intelligence Coordination Centre, hosted by the Republic of Seychelles"); S.C. Res. 2125, *supra* note 353 (the UNSC took note "of the ongoing efforts of the Regional Fusion and Law Enforcement Centre for Safety and Security at Sea (formerly the Regional Anti-Piracy Prosecution and Intelligence Coordination Centre), hosted by Seychelles to combat piracy)." Similar references were made later in S.C. Res. 2184, *supra* note 353, and S.C. Res. 2246, *supra* note 353.

⁸⁴¹ See *House of Commons Foreign Affairs Committee*, *supra* note 789, para. 120.

⁸⁴² See the Maritime Trade Information Sharing Centre's website at <http://www.oceanuslive.org/Main/ViewNews.aspx?uid=00000845>.

has thus been expanded to also address other forms of organized transnational maritime crime such as human trafficking, drug smuggling and environmental crime.⁸⁴³ To better reflect its new mandate, the Centre was renamed and is currently called the Regional Fusion and Law Enforcement Centre for Safety and Security at Sea (REFLECS3).

The Centre was created based on a partnership agreement between the Seychelles, the United Kingdom, the Netherlands, Australia, Norway, and the United Arab Emirates.⁸⁴⁴ Its membership was later expanded to include the United States as well as two international partners - the International Maritime Organization (IMO) and the UNODC. Thus, different than regional organizations such as the European Union or the African Union, whose membership is typically comprised of regional States, the term “regional” in this context refers to the geographical area covered by the Centre rather than its membership. While it is not exceptional for regional bodies to include members from outside the region,⁸⁴⁵ it is uncommon to have a regional center with only one member (Seychelles) located in the region concerned.⁸⁴⁶

⁸⁴³ See <http://www.oceansbeyondpiracy.org/matrix/regional-fusion-and-law-enforcement-centre-safety-and-security-sea-reflecs3>.

⁸⁴⁴ The partnership agreement and other legal texts of the RAPPICC are on file with this author.

⁸⁴⁵ See, for example, the Singapore-based center established based on the Regional Cooperation Agreement on Combating Piracy and Armed Robbery against Ships in Asia (ReCAAP), whose contracting parties include States from various regions in the world such as Australia, China, the United Kingdom and the United States – see ReCAAP’s website at <http://www.recaap.org/AboutReCAAPISC.aspx/>.

⁸⁴⁶ As mentioned *supra* Part 5.4.2, this shortcoming led to the announcement that “[T]he Steering Group [of the Centre] also decided to invite countries from the East African and South Asian regions to join as new members” – See *supra* note 720.

Perhaps the most innovative aspect of the Centre is its legal basis: The Centre has been created as a “joint investigative body” pursuant to Article 19 of UNTOC.⁸⁴⁷ This provision reads as follows:

“Article 19: Joint investigations

States Parties shall consider concluding bilateral or multilateral agreements or arrangements whereby, in relation to matters that are the subject of investigations, prosecutions or judicial proceedings in one or more States, the competent authorities concerned may establish joint investigative bodies. In the absence of such agreements or arrangements, joint investigations may be undertaken by agreement on a case-by-case basis. The States Parties involved shall ensure that the sovereignty of the State Party in whose territory such investigation is to take place is fully respected.”⁸⁴⁸

The creation of a joint investigative body under Article 19 is arguably the most advanced form of joint undertaking under the auspices of UNTOC. In comparison with the more limited measures of cooperation provided for by Article 27 of the Convention, which provides lawful authority to enhance and establish channels of communication between competent authorities, the concept of a joint investigative body exceeds the coordination of investigative actions to encompass the co-sharing of investigative powers.⁸⁴⁹

⁸⁴⁷ See RAPPICC’s website at <http://www.rappicc.sc/page11.html>.

⁸⁴⁸ UNTOC. A similar provision was included in Article 49 of UNCAC.

⁸⁴⁹ Digest of Organized Crime Cases - A compilation of cases with commentaries and lessons learned, p. 72, available at http://www.unodc.org/documents/organized-crime/EnglishDigest_Final301012_30102012.pdf.

Conducting joint investigations – frequently (though not exclusively) done by neighboring countries, is certainly not new in the law-enforcement world.⁸⁵⁰ Indeed, domestic laws of many States already permit such joint activities, and for those few States whose laws do not so permit, Article 19 of UNTOC can serve as a sufficient source of legal authority for case-by-case cooperation of this sort.⁸⁵¹

Joint investigations teams would typically be created for a specific purpose and a limited period.⁸⁵² Conversely, it was concluded that a “joint investigative body” pursuant to Articles 19 UNTOC is distinct from both a “joint team” and “joint investigation” in that this was intended to be a more permanent structure formed on the basis of a bilateral agreement.⁸⁵³

As previously noted, UNTOC does not specifically address maritime piracy, yet there is little doubt that the Convention may apply to piracy activities that qualifies as organized criminal activity in the meaning of the Convention.⁸⁵⁴ Accordingly, using Article 19 of UNTOC as the legal basis to create a joint investigative body to combat maritime piracy (and later on to expand its activities to combating other criminal activities) is *a priori* legally sound.

⁸⁵⁰ See, for example, Bruce Zagaris, *U.S. International Cooperation against Transnational Organized Crime*, 44 Wayne L. Rev. 1401 1998-1999 (describing various joint investigations involving the U.S. even before the conclusion of UNTOC). Among European Union countries, a convention concluded in 2000 provides for detailed provisions on the creation of Joint Investigative Teams (JITs) – see Article 13 of the Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union [the “EU MLA Convention”].

⁸⁵¹ See UNODC Toolkit on Human Trafficking, available at https://www.unodc.org/documents/human-trafficking/Toolkit-files/08-58296_tool_5-10.pdf.

⁸⁵² Article 13.1 of the EU MLA Convention.

⁸⁵³ See Draft Informal Expert Working Group on Joint Investigations: Conclusions and Recommendations, 2 to 4 September 2008, Vienna, available at <https://www.unodc.org/documents/treaties/COP2008/crp5.pdf>.

⁸⁵⁴ See discussion *supra* in Parts 2.7 and 4.2.

One of the main advantages in creating joint investigation teams is the simplifications of activities that would otherwise be governed by the more cumbersome rules of mutual assistance.⁸⁵⁵ To that end, a JIT would typically imply the creation of a new official legal entity, the team itself, with its own investigative functions and investigative powers.⁸⁵⁶

With regard to RAPPICC, however, its creation under Article 19 of UNTOC left the question of its legal status and governing rules uncertain. Unlike Article 13 of the EU MLA Convention, Article 19 of UNTOC does not describe the main characteristics of joint investigative bodies.⁸⁵⁷ It is therefore unclear which law governs the activities of the Centre.⁸⁵⁸

The problem is compounded by the nature of the Centre's activities, which requires the collection, exchange, and storage of personal data such as names of suspected pirates and their identifiers (DNA, fingerprints, etc.). While national legislations of most members of the Centre provide for adequate data protection rules and guarantees, it is not entirely clear to what extent they govern the storage of data in the Centre's databases. The Centre's webpage indicates that "with regard to the application and observance of the European Convention on Human Rights, the Centre abides absolutely by the principles enshrined within the ECHR regarding an individual's right to privacy, effective data-security and rigorous application of data-storage rules. This ensures the Centre holds no material for any period longer than that strictly necessary to conduct a lawful and justified enquiry."⁸⁵⁹ Nonetheless, it remains uncertain to what extent

⁸⁵⁵ Digest of Organized Crime Cases, *supra* note 849, p. 75 (making a reference to Article 13.7 of the EU MLA Convention).

⁸⁵⁶ *Idem*, P. 72.

⁸⁵⁷ *Idem*.

⁸⁵⁸ Compare to Article 13.3(b) of the EU MLA Convention, according to which "[T]he team shall carry out its operations in accordance with the law of the Member State in which it operates."

⁸⁵⁹ See RAPPICC's website at <http://www.rappicc.sc/page11.html>.

this general statement has been reflected in specific regulations that govern the retention of data in the Centre's databases.⁸⁶⁰ Since it is unclear which laws govern the functioning of the Centre, it is also unknown which data protection authority, if any, oversees the recording of personal data in its databases. This may pose difficulties for individuals who wish to know whether they are known in the Centre's databases and seek that the information concerning them be modified or deleted.

These difficulties can also negatively affect potential cooperation with other organizations as well as States not party to the Centre, whose rules allow exchange of personal data only with bodies that have a distinct legal personality and have adequate data processing rules. It is therefore unsurprising that the Seychelles government indicated its intention to enact legislation to incorporate the Centre as a legal entity,⁸⁶¹ yet, to date this has not taken place.

The creation of RAPPICC therefore serves as a good example for both the advantages and shortcomings of the informalization of international law: On the one hand, using the platform of a modern convention (UNTOC), RAPPICC was established in a relatively short time and without the lengthy and costly procedures associated with the adoption of an international instrument for the purpose of creating a new international or regional organization. The nature of a joint investigative body under Article 19 of UNTOC enables overcoming cumbersome MLA procedures, that could have been particularly difficult between European countries and the Seychelles since no MLA agreement exists among those countries.

⁸⁶⁰ Compare, for example, to the rules governing the processing of data in INTERPOL's databases, available at <http://www.interpol.int/About-INTERPOL/Legal-materials/Data-protection>.

⁸⁶¹ See "Contact Group on Piracy off the Coast of Somalia: Quarterly Update", *supra* note 720.

At the same time, the fact that emphasis was put on rapid creation of a body without clear legal status hampers the core activities of the RAPPICC. Notably, it can pose legal and practical difficulties related to compliance with data protection principles and consequently might also prevent the sharing of information with the Centre, which is its very core function. Finally, the ambiguity associated with the nature of the Centre and its governing law also raises concerns over the transparency in which it operates.⁸⁶²

6.4. CONCLUSION

Pirates were described as “profit seeking, rational utility maximizers”.⁸⁶³ To counter their practical business model, the international community has strived to implement a pragmatic paradigm.⁸⁶⁴ This approach was not driven only by utilitarianism or a narrow cost-effective rational; it was also guided by the fact that many of the challenges posed before the international community were, in essence, practical ones.⁸⁶⁵

⁸⁶² As of October 2016, namely more than four years after its creation, the Centre’s website (<http://www.rappicc.sc/index.html>) has yet to make publicly available its constituent instruments and governing rules.

⁸⁶³ William & Pressly, *supra* note 636, at 192.

⁸⁶⁴ See Saiful Karim, *supra* note 693, at 92 (“The global community should follow a policy that is pragmatic and implementable”); Douglas Guilfoyle, *Counter-piracy Law Enforcement and Human Rights*, 59 Int’l & Comp. L.Q. 141, 142 (2010) (“One-size-fits-all solutions have been eschewed for a pragmatic range of national and international mechanisms”).

⁸⁶⁵ See Beekarry, *supra* note 2, at 163 (“Too often the problems encountered were more practical than jurisdictional: Where to prosecute? How to investigate? How to overcome language barriers? How to judge the sufficiency of evidence?”); see also discussion in *supra* Chapter 2 of some practical difficulties arising from collaborations between navies-law enforcement-private sector (e.g. question of classification of information by navies).

The legal framework and the institutional landscape, reflecting this paradigm, possess similar characteristics that can be described as a three-prong approach:

- Reliance on already existing traditional instruments or mechanisms (e.g. UNCLOS, SUA, UNTOC for the legal framework; UNSC, IMO, and UNODC as some institutional examples).
- Complemented by newly-created informal and mostly cost-effective ones (ad hoc, non-binding agreements and arrangements for the legal framework; creation of loose networks such as the CGPCS or legally-innovative bodies such as RAPPICC).
- Reinforced through bolstering national legislation and institutions (enacting or amending national anti-piracy laws; strengthening capacities of national courts in regional states, etc.).

The pragmatic paradigm has not been without challenges and shortcomings, both legal and practical, some of which (e.g. lack of transparency) were mentioned in this chapter while others (e.g. the creation of new communication networks that often work in isolation) were described in earlier ones. The lessons learnt, however, can assist the international community in better addressing present and future threats.