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

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CONCLUDING REMARKS

In late 2012, when this dissertation was conceived, piratical attacks off the coast of Somalia were rampant. Maritime piracy, once viewed as an outdated - and for some even a romantic form of crime, again drew the attention of the international community. This attention also led to a growing interest and involvement in other piracy ‘hotspots’, notably in the Gulf of Guinea and South-East Asia, though in both cases the levels of engagement by the international community have not been equivalent to that in Somalia.

As this dissertation draws to a close, the number of attacks by Somali pirates has significantly declined, although the threat of a possible new surge of piratical attacks has not been entirely removed.⁸⁶⁶ It would be safe to argue that overall, the counter-piracy efforts with regard to piracy off the coast of Somalia have been successful. Indeed, within a relatively short period of time, the international community responded to the threat, actively engaged, formed

⁸⁶⁶ Cf. NATO – Counter-piracy Operations, 9 June 2016, available at http://www.nato.int/cps/en/natohq/topics_48815.htm (“There have been no successful piracy attacks since 2012. Somalia-based piracy has been suppressed, but not eliminated. Pirates still seek, and have the capacity, to mount attacks”); “Somali piracy is Down, Not Out”, Daily Mail, 8 April 2016, available at <http://www.dailymail.co.uk/wires/afp/article-3529397/Somali-piracy-not-out.html> (quoting John Steed, Horn of Africa manager for the US-based non-profit Oceans Beyond Piracy, stating that “[T]here hasn't been a proper pirate attack on a commercial vessel in over two years. He added, however, that “[But] the guys haven't gone away and nothing's changed on the ground”); Gady, *Japan Extends Anti-Piracy Mission off Somalia For Another Year*, *supra* note 467 (quoting Japan’s Defense Minister stating that “as a result of continuous anti-piracy operations by the international community, including the SDF's activities, the number of piracy cases in this maritime area, which was as high as more than 200 per year at the peak, has stayed very low in recent years, declining to zero last year”, but adding that “in light of the fact that the fundamental factors that foster piracy, such as poverty in Somalia, have not been resolved, the threat of piracy still continues. If the international community lets up on the effort, piracy activity may grow again).”

new alliances, and used existing frameworks complemented by flexible new ones to considerably reduce the menace of piratical attacks in that region.

This positive outcome has not been without difficulties. While a legal basis to combat piracy and support international cooperation clearly exists under international law, its centerpiece, namely the piracy section of UNCLOS, raises a host of legal conundrums, some of which - such as the shortcomings of the piracy definition and the scope of the duty to cooperate as defined by UNCLOS - have been explored in this dissertation.⁸⁶⁷ The lack of a single, clearly-defined, modern and comprehensive legal framework to support international cooperation, for instance with regard to extradition and mutual legal assistance, required States to invoke other conventions and to rapidly conclude ad hoc agreements, thereby creating a patchy and incomplete legal landscape.

Beyond the international legal framework, the counter-piracy initiatives were facing other legal challenges. These derived, for example, from inadequate national legislation as well as the difficulty in reaching a consensus over questions such as the appropriate fora to try pirates, the criminalization of ransom payments, and the use of private security guards to protect commercial ships.⁸⁶⁸ The efforts to curb Somali piracy were also hindered by the proliferation of communication networks and the need to overcome the challenges associated with alliances that comprise actors from different sectors (navy, law-enforcement, private sector, etc.).⁸⁶⁹

⁸⁶⁷ See the discussion over the UNCLOS piracy definition *supra* Chapter 1; the discussion over Article 100 of UNCLOS and the duty to cooperate *supra* Chapter 2.

⁸⁶⁸ See the discussion *supra* Parts 4.12, 5.4.2, 4.8.1 and 4.8.2, respectively.

⁸⁶⁹ See the discussion *supra* Parts 3.5.3 and 3.5.2, respectively.

And yet, the international community successfully overcame many of the difficulties. The legal challenges arising from UNCLOS' wording were frequently addressed by courts through a broad interpretation of the Convention's piracy section and the applicable national legislation. This approach was based on the recognition of the seriousness of the offence, reflected by: the long-standing criminalization under international law; the universal jurisdiction regime; and the comprehensiveness embodied in Article 101, UNCLOS, which views all acts associated with the piratical act – including facilitative acts - as piracy. As argued in this dissertation, a broad interpretational approach can also be deduced from the duty to cooperate as defined in Article 100 of UNCLOS.⁸⁷⁰ Though not without controversy, the broad interpretative approach espoused by courts enabled tackling various forms of piracy (e.g. “environmental piracy”),⁸⁷¹ prosecute “dry land” pirates, and support convictions based on circumstantial evidence through the creation of legal doctrines such as “common intention” ascribed to the entire Piracy Action Group (“PAG”).⁸⁷² Other legal challenges – for example with regard to the appropriate fora for prosecution – were solved through bilateral ad hoc agreements.

The legal basis for international cooperation is moored in various international instruments, as well as in general principles of international law. It requires states to adhere to due diligence ‘best efforts’ standards, which, in the context of maritime piracy, entail exercising sincere, concerted and proactive efforts.⁸⁷³ The challenges for international cooperation were addressed through the creation of a modern cooperative paradigm, whose main components (or

⁸⁷⁰ See the discussion *supra* Chapter 3 and specifically in Part 3.2.3.

⁸⁷¹ Cf. the Sea Shephard case described *supra* Part 2.2.1.

⁸⁷² See the discussion *supra* Part 2.2.3.

⁸⁷³ See discussion *supra* Chapter 2.

characteristics), examined as the overarching question of this dissertation, can be summarized as follows:

First, **pragmatism** dominated the deliberations in various fora and the decision-making process that responded to the piracy peril. The practical approach, noticeable with regard to the legal framework and the institutional landscape, was based on a three-prong method: Reliance on already existing traditional instruments or mechanisms; complemented by newly-created informal and mostly cost-effective ones; and reinforced through bolstering national legislation and institutions.

As noted in Chapter Five, this approach, while successful in surmounting many obstacles and enabling a swift and adaptable response, is not without shortcomings.⁸⁷⁴ Importantly, by focusing on a rapid conclusion on ad hoc agreements, the international community may have missed an opportunity to review and ameliorate the existing legal framework, in particular the anachronistic and imperfect piracy section of UNCLOS, and to establish a more modern, consolidated, and better defined set of rules and interpretive guidelines that would guide the international community and national courts in the future.

Second, an emphasis was put on a **regional** response to the piracy threat. The search for regional solutions derived mainly from: the recognition that piracy remains a local or regional problem (even though with implications – sometime significant – to the entire international community); the unique characteristics of piratical activities in different regions; and the importance of engaging regional states and organizations as part of a long-term solution. The creation of regional institutions and adoption of regional legal instruments – in both cases *in lieu*

⁸⁷⁴ Cf. the discussion in Chapter 5 of the legal challengers arising from the ambiguities surrounding the legal status and governing rules of the RAPPICC.

of new international ones – illustrates the focus on a regional response. Despite the legal basis for universal jurisdiction, prosecution of Somali pirates took place mostly in national courts of regional States.⁸⁷⁵ As explained in Chapter Four, the regional response was guided by a **complementarity paradigm**, according to which the involvement of the international community was primarily based on a supportive/coordinative role. Replacing the role of regional states and organizations took place only exceptionally and where the latter could not exercise the functions concerned (e.g. lack of capacity to carry-out enforcement activities in the region, which necessitated the deployment of navies from outside the region).

A *third* main characteristic is the **holistic inter-disciplinary** approach that gradually became a guiding principle in the counter-piracy activities and international cooperation. This approach has been manifested, *inter alia*, by the increased and improved collaboration among agencies and institutions from different sectors, which were previously unaccustomed to working together. Notably, the navies, law enforcement, and the shipping industry, which at first operated in isolation due to their different role, mandate, and general activities, were able to progressively overcome the traditional barriers and establish a successful strategic partnership.⁸⁷⁶ The holistic approach has also been present in the various forms of cooperative arrangements, ranging from deconflicting⁸⁷⁷ to joint patrols,⁸⁷⁸ from a supportive/coordinative paradigm to a replacement

⁸⁷⁵ See discussion *supra* Part 5.4.2.

⁸⁷⁶ Cf. the discussion in Chapter 2 on the sharing of information between navies, law enforcement and the private sector.

⁸⁷⁷ Deconflicting means a coordination mechanism that enables to avoid an intrusion by one actor in operations or activities of another actor. In the context of combating piracy off the coast of Somalia, this type of cooperative mechanism has been exercised by “The Shared Awareness and Deconfliction” (SHADE) - see the discussion in *supra* Part 3.5.3.

one.⁸⁷⁹ The UNSC piracy Resolutions serve as an additional example of the application of a holistic inter-disciplinary paradigm: They have consistently addressed additional actors (e.g. the private sector or additional organizations involved in counter-piracy activities such as INTERPOL or RAPPICC)⁸⁸⁰ as well as new aspects related to piracy, varying from protection of victims to financial support to the counter-piracy undertakings, from the collection of evidence to best practices to be implemented by shipping industry.⁸⁸¹

Importantly, the holistic inter-disciplinary approach echoes the common understanding that national and international security are becoming increasingly interrelated and that inclusive multiagency collaboration must replace a traditional silo-style approach. Employing a holistic inter-disciplinary paradigm has been instrumental in the field of maritime piracy in light of the unique nature of the crime, notably the fact that it is committed outside the jurisdiction of states but prosecuted by national courts, and that the first line of response is the foreign navies rather than domestic police forces.⁸⁸² This led to the creation of new practical tools such as handover guides (explaining to navies how to produce evidence packages for prosecution)⁸⁸³ or the BMP4 (guiding the shipping industry on collaboration with law enforcement).⁸⁸⁴

⁸⁷⁸ For example the joint patrols operated under NATO's auspices as part of operation Ocean Shield – see NATO – Counter-piracy Operations, *supra* note 866. As explained in Chapter 4, joint patrols have also been carried-out in other piracy hotspots such as the Gulf of Guinea and South-East Asia.

⁸⁷⁹ See the discussion in *supra* Chapter 4.

⁸⁸⁰ See in that regard the preamble to S.C. Res. 2446, *supra* note 744 (“Noting that the joint counter-piracy efforts of States, regions, organizations, the maritime industry, the private sector, think tanks, and civil society have resulted in a steady decline in prate attacks as well as hijackings since 2011”).

⁸⁸¹ See the discussion in *supra* Part 4.8.

⁸⁸² See the discussion in *supra* Part 3.4; Beekarry, *supra* note 2, at 173.

⁸⁸³ Beekarry, *supra* note 2, at 173-4.

⁸⁸⁴ See the discussion in *supra* Part 3.5.2.

Fourth, international cooperation in combating piracy has also been characterized by a **horizontal** and **decentralized** approach. Though the UNSC heavily engaged in combating piracy through a series of Chapter VII Resolutions, these Resolutions did not convey binding obligations. They have focused on a guiding - rather than instructing – discourse, addressing the various challenges by using hortatory terminology (the Security Council “urges”, “encourages”, etc.).⁸⁸⁵ Similarly, the CGPCS, perhaps the most important cooperation mechanism created to combat Somali piracy, has operated based on a horizontal and decentralized paradigm.⁸⁸⁶ True, in certain aspects leading states exerted their powers to advance their interests (e.g. to prevent the creation of a piracy international court), yet this did not derive from a legally-based hierarchical structure (similar to the one governing the operation of the UNSC) and did not dominate the otherwise open and free deliberations. These characteristics of the counter-piracy activities, wherein informality replaced bureaucracy and enabled swift actions (conclusion of bilateral agreements, creation of informal networks), also created a somewhat disjointed legal, organizational, and operational landscape, which presented difficulties, for example due to the proliferation on non-synchronized communication networks.⁸⁸⁷

Fifth, adherence to well-established **human rights** norms has been a fundamental tenet for the international counter-piracy undertakings. From the very first stages of responding to Somali piracy, states and organizations had to address a host of legal issues related to human rights aspects. For example, questions arose over the legal authority to detain suspected pirates at

⁸⁸⁵ See the discussion in *supra* Part 4.12.

⁸⁸⁶ See the discussion in *supra* Part 6.3.1.

⁸⁸⁷ See the discussion in *supra* Part 3.5.3.

sea and their right to be brought promptly before a judicial authority;⁸⁸⁸ non-refoulement and transferring suspect pirates to regional States for prosecution; and the application of fair-trial rights in such transfers.⁸⁸⁹ As the antipiracy initiatives evolved, additional human rights concerns emerged, for instance in relation to the prosecution of juvenile pirates⁸⁹⁰ or with regard to the increase use of private security guards and the applicable rules of engagement.⁸⁹¹

To address the various concerns, human rights aspects were at the center of deliberations in fora such as WG2 of the CGPCS. The importance of observing human rights was systematically emphasized in the UNSC piracy Resolutions, where the UNSC underscored that

⁸⁸⁸ One example for a discussion over the legality of the detention at sea is found in the piracy case before the courts of Mauritius, discussed in this dissertation: While the court of first instance (the Intermediate Court) held that the 18 days the suspects had been held aboard the French Navy ship were sufficient to merit a stay of charge (dismissal), on appeal the Supreme Court held differently, concluding that “The trial Court erred in coming to the conclusion that the period of detention on board of the *Surcouf* and the failure to bring the respondents (the suspects) promptly before a judge would warrant a stay of proceedings when in fact the relevant and material, the consideration is whether the respondents had a fair trial” – see Ali Abeoukader Mohamed & ORs, *supra* note 61, P. 21. Conversely, in two cases brought before the European Court of Human Rights in reference to arrest and treatment of Somali piracy suspects by France, the Court found violations of the right to liberty and security protected under the European Convention on Human Rights – see Ali Samatar and Others v. France (applications nos. 17110/10 and 17301/10) and Hassan and Others v. France (applications nos. 46695/10 and 54588/10), ECHR, 4 December 2012.

⁸⁸⁹ See Douglas Guilfoyle, *Counter-piracy Law Enforcement and Human Rights*, *supra* note 864, at 159.

⁸⁹⁰ On the questions arising in relation to the prosecution of juveniles pirates cf. Shelly L. Whitman, *Children and Marine Piracy*, 46 Case W. Res. J. Int'l L. 217 2013 (calling, *inter alia*, for the creation of an international standard on the treatment of juvenile pirates); Lauren Hahn, *Juvenile Justice and Piracy: Prosecutions of Juvenile Pirates in the United States*, 20 Geo. Mason L. Rev. 241 2012-2013 (arguing that the application of the United States piracy statute to juveniles is unconstitutional in light of the prohibition on cruel and unusual punishment because it would result in mandatory life imprisonment without parole for a non-homicide juvenile offender); Emily Holland, *Hijacked Childhoods, under the Radar: How the International Community Can Help the Youth Associated with Somali Piracy and Why it Must*, 17 UCLA J. Int'l L. Foreign Aff. 175 2013 (pointing to a number of potential legal issues such as on the use of force applied to youth associated with Somali piracy and the possible abuse of child pirates in the process of detention).

⁸⁹¹ See the discussion in *supra* Part 4.8.2.

counter-piracy operations must be “consistent with applicable international law including international human rights law.”⁸⁹² One concrete example where human rights aspects served as a guiding principle is the transfer agreements, which included various guarantees related to the fair treatment of the suspects or convicts.⁸⁹³ Overall, it is evident that human rights considerations have been an integral part of operations and discussions in this field.⁸⁹⁴

Six, the **role of non-state actors** has also been noteworthy: The shipping industry has increasingly and actively participated in the deliberations of various groups and has used its clout to influence the decision-making process, for instance with regard to the attention given by bodies such as the CGPCS to the wellbeing of abducted seafarers. Its important role was recognized and promoted by the UNSC, which also took the uncommon step of addressing the private sector directly.⁸⁹⁵ Studies conducted by scholars and think-tanks such as Oceans Beyond

⁸⁹² See S.C. Res. 1816, *supra* note 125. Subsequent piracy Resolutions contained similar statements.

⁸⁹³ See, for example, the EU-Kenya exchange of letters, *supra* note 794, which emphasized the application of international human rights law including the ICCPR and the CAT, and included detailed provisions related to the treatment, prosecution and trial of transferred persons in accordance with fundamental human rights standards (e.g. presumption of innocence, prompt proceedings, etc.). The agreement further provided for the possibility of representatives of both the EU and national and international humanitarian agencies to have access to the persons transferred to ensure that they are treated humanely; Beekarry, *supra* note 2, at 169-170 (“the transfer documents entered into by Seychelles and Mauritius fundamentally provide for the protection of a transferred person's human rights”). See also the discussion in Guilfoyle, *Counter-piracy Law Enforcement and Human Rights*, *supra* note 864.

⁸⁹⁴ See the Report of the Secretary-General pursuant to Security Council resolution 1950 (2010), *supra* note 820, ¶ 72, (“Human rights considerations continue to be important in guiding the actions of States in all phases of counter-piracy operations, including the apprehension, the detention, the prosecution and the transfer of suspected pirates, and equally in the imprisonment of convicted pirates. The United Nations, through the work of UNDP, UNPOS, the Office of the United Nations High Commissioner for Human Rights, UNODC and other entities, is assisting Somalia to build the necessary capacity in the areas of human rights, security and justice”).

⁸⁹⁵ On the recognition by the UNSC of the important role of the private industry see, for example, S.C. Res. 2077, *supra* note 248 (where the UNSC stated that “the joint counter-piracy efforts of the international community and private sector have resulted in a sharp decline in pirate attacks as well as hijackings since 2011.”) On the manner by

Piracy have contributed to the understanding of the piracy menace. And notwithstanding the significant contribution of the navies, it is also evident that the use of private security guards to protect ships traversing the waters off the coast of Somalia has been a key factor in deterring piratical attacks.⁸⁹⁶ At the same time, the involvement of various non-state actors added to the already complex and difficult to coordinate landscape, which has characterized the fight against Somali piracy.

It can certainly be argued that neither one of the above described components of the global counter-piracy model is entirely new on the international level. Thus, for example, regionalization is an on-going process in different areas (e.g. economic cooperation on regional and sub-regional levels), the human rights discourse has been an integral part of activities in other domains such as counter-terrorism, and informal inter-agency networks have been created before the CGPCS.⁸⁹⁷

Nonetheless, the counter-piracy paradigm marks an important step in the evolution of international law and, more specifically, in the creation of a new international governance model.

which the UNSC engaged the private sector see discussion in *supra* Part 4.9.

⁸⁹⁶ See William & Pressly, *supra* note 636, at 188-9 (the authors pointing to a link between the rising numbers of ships with onboard guards and the decline in piracy attacks off the coast of Somalia: “Despite the unprecedented international counter-piracy naval mobilization in 2008, pirate attacks and hijackings off the coast of Somalia continued to increase annually, peaking in 2010-2011, only to decline a year later when private security onboard ships rose from 10 percent to 50 percent. The following year, as private security usage became more common (adoption is estimate to be as high as 70 percent), pirate attacks and hijacking plummeted to a five-year low”) and at 204 (noting that “the bulk of anti-piracy gains have come from the private sector” and describing ship security personnel as “the most effective counter-piracy measure to date”). The authors therefore concluded that the use of private security personnel should be part of a sustainable global solution to piracy.

⁸⁹⁷ Cf. the creation in 2002 of the Camden Assets Recovery Interagency Network (CARIN), which is an informal network of contacts and a cooperative group concerned with all aspects of confiscating the proceeds of crime – see <https://www.europol.europa.eu/content/camden-asset-recovery-inter-agency-network-carin-leaflet>.

This model comprises of both state and non-state actors and is based on collaboration through non-hierarchical structures, seeking of pragmatic solutions, and challenging traditional practices that have governed international relations in the past.

Reverting to the specific case of Somalia, to a certain extent it can viewed as a *sui generis* situation. For example, the CGPCS' effectiveness as a model has been attributed to “a convergence of state interests—particularly among powerful states, some of whom are unlikely bedfellows—to suppress the problem; a coalition of the willing able to bear costs; and a very circumscribed geographic area of concern.”⁸⁹⁸ Indeed, the fight against maritime piracy off the coast of Somalia had some unique characters such as the non-controversial nature of the piracy threat (in comparison to the divergent positions over the designation of certain groups as “terrorists”, for example), the consensus in viewing Somalia as a failed State, and the TFG's willingness to collaborate with the international community and allow operations in Somali waters and on-land, a situation that is quite unique on the international level and stands in stark contrast to the situation in other piracy-infested regions. These features enabled unprecedented international co-operation, where for the first time since WWII all five permanent members of the UNSC deployed forces on the same side.⁸⁹⁹

Hence, duplicating the success in combating Somali piracy in the two other contemporary main piracy “hotspots”, namely in South-East Asia and the Gulf of Guinea, is far from evident. These difficulties derive not only from different piracy modalities (e.g. the frequent use of violence in piratical attacks in the Gulf of Guinea), but mostly from the overarching,

⁸⁹⁸ Zach et al., *supra* note 822, Introduction.

⁸⁹⁹ The Economist, *The Ungoverned Seas*, 29 November 2014, available at <http://www.economist.com/news/middle-east-and-africa/21635049-waters-around-somalia-are-calmer-piracy-west-africa-rising>.

fundamental principle of respecting states' sovereignty. Indeed, in both regions many of the attacks continue to take place in territorial waters and international cooperation is often hampered by states' unwillingness to allow for any action that, in their view, could negatively impact their sovereignty.

Yet, the lessons learnt in the successful combat against Somali piracy can and should serve to address piratical activities elsewhere and, more generally, other challenges posed to the international community. Thus, for example, the experience gained by NATO and EUNAVFOR in combating Somali piracy and in collaborating one with the other in that domain will certainly be useful in their recently-launched operations against the smuggling of migrants in the Mediterranean (EUNAVFOR MED Operation Sophia and NATO Sea Guardian).⁹⁰⁰ From a broader perspective, the creation of collaborative models based on a pragmatic, horizontal, holistic, and inclusive approach can and should guide future international undertakings. No less important, when tackling a new peril, the international community should first map all existing tools and mechanisms, identify the relevant actors that can contribute to the international efforts, and focus on coordination, interoperability, and centralizing the flow of information prior to creating new institutions and non-synchronized networks.

⁹⁰⁰ On Operation Sophia, established in 2015 with the aim of disrupting the business model of human smugglers and traffickers in the Mediterranean, see the description on the EU website at http://www.eeas.europa.eu/csdp/missions-and-operations/eunavfor-med/index_en.htm. On NATO's operation see Mark Landler & Rick Lyman, *Obama Tells NATO That 'Europe Can Count On' the U.S.*, NYTimes, July 9, 2016, available at http://www.nytimes.com/2016/07/10/world/europe/obama-at-his-final-nato-summit-meeting-acknowledges-challenges.html?smprod=nytcore-iphone&smid=nytcore-iphone-share&_r=0 (reporting that "NATO's maritime forces in the Mediterranean will be expanded and the operation renamed Sea Guardian, working in closer cooperation with the European Union's efforts across the Mediterranean and its anti-smuggling efforts in the Aegean Sea"). On the importance on cooperation on maritime security issues between NATO and the EU see also NATO's website at http://www.nato.int/cps/en/natolive/topics_70759.htm ("Cooperation with non-NATO partners, including other international organisations such as the European Union, is fundamental to efforts in the maritime domain").