

PIRACY TODAY

AN UPDATE

At the Colloquium in Buenos Aires in October 2010, former President Patrick Griggs delivered an illuminating paper on piracy. The real scale of the issue had not perhaps been appreciated by all at that time. Piracy remains a major issue and I would like to bring delegates up to date.

The thesis of Patrick Griggs's paper was that, although there were legal mechanisms for combating piracy, in principle, they were difficult to apply in practice for legal, practical and political reasons.

The nature of the problem

In International law the starting place is Part VII of UNCLOS. It is titled High Seas and includes provisions relating to piracy. Article 101 refines piracy as “*any illegal acts of violence or detention, or any act of depredation*” committed on the high seas for private ends against another vessel or persons or property on board. Arts. 105, 106, 107, 110 and 111 allow warships and other authorised ships to stop, search and seize any vessel on the high seas that they have reasonable grounds for suspecting to be engaged in piracy.

UNCLOS defines the high seas, for the purposes of acts of piracy, as those waters which lie beyond the seaward limit (generally 12 miles) of the territorial sea. Acts within the territorial sea which would be regarded as piracy if committed on the high sea are treated as ‘armed robbery at sea’ and are subject to the primary jurisdiction of the coastal state in which the acts take place.

As I have said, however, the provisions on piracy apply only on the high seas and not within territorial waters where ‘*armed robbery at sea*’ is exclusively subject to the jurisdiction of the courts of the coastal state. UNCLOS does not permit seizure of a pirate ship and arrest of the pirates in the territorial sea unless the ship flies the flag of that state. The theory is that the power to seize ships and pirates only on the high seas, now enshrined in UNCLOS, ensures that coastal states, which have exclusive jurisdiction within their own territorial waters, will be able effectively to control unlawful acts within those waters. This is not always the case. Somalia itself is an example. This problem has been partly solved in the case of Somalia by UN Resolutions which, in broad terms, allow States to treat acts of piracy committed within Somali territorial waters as though they were committed on the high seas.

Whilst rights to board, search and seize foreign ships and persons on board exist under international law under UNCLOS, the prosecution of pirates is subject to national law. It is therefore essential that the rights given under international law are implemented by national legislation so that national courts are able to deal efficiently with those arrested and accused of crimes at sea. Art. 100 places a duty on States to cooperate in the repression of piracy which would involve States making arrangements to transfer suspected pirates from the arresting ship to another State for prosecution. Very few States have accepted the UNCLOS mandate and legislated specifically against piracy. In this context I should mention that in August 2007 CMI submitted to the IMO Legal Committee a paper entitled ‘Maritime Criminal Acts-draft Guidelines for National Legislation’. (LEG 93/12/1). It was suggested by CMI that States with an inadequate national law on maritime criminal acts including piracy might, when carrying out a review of their national legislation, find the guidelines a useful

“toolkit” from which to draft their new legislation. The Legal Committee decided to note the terms of the CMI submission but not to take the matter any further at that time.

The reasons for the reluctance of States to embrace the rights created by UNCLOS to exercise extra-territorial jurisdiction over pirates are essentially political but also economic. An example is Kenya which for a period was willing to accept the rendition of pirates and to prosecute them. But without international funding, its willingness to devote its own resources to the project soon ended. With some exceptions, other States here show no particular enthusiasm to step into the breach. However, as we shall see later, it would not be right to assume that pirates are not being prosecuted.

Finally, piracy is a crime of universal jurisdiction and pirates are criminals. However, they are not necessarily ‘individuals taking a direct part in hostilities’ in an armed conflict. This means that they cannot be targeted with lethal force. Nor are pirates necessarily terrorists.

How do matters stand today?

So that is where we were and against this rather gloomy background that I would like to review the legal, practical and political response since October 2010 to this insidious problem. And make no mistake it remains a pressing problem. To illustrate the scale of the issue, some statistics:

- a) According to the International Maritime Bureau (IMB) quarterly report, as of 30 June 2012ⁱ Somali pirates are currently holding 11 vessels with 221 hostages captive. Despite the noticeable decline in Somali piracy over the first six months of this year, the IMB has stated that Somali piracy remains a serious threat.
- b) 439 attacks were reported to the IMB in 2011 of which 275 took place off Somalia on the east coast and in the Gulf of Guinea on the west coast of Africa. This was a slight drop, compared to the 445 recorded incidents of piracy and armed robbery in 2010ⁱⁱ. Ransoms of US\$160m were paid in 2011 to release 31 hijacked shipsⁱⁱⁱ.
- c) Piracy cost the shipping industry and governments between US\$ 6.6bn and US\$6.9bn last year, including US\$2.7bn in extra fuel and US\$1.3bn on military operations^{iv}. As I have said, the shipping industry paid Somali pirates US\$160m in ransoms last year, with the average ransom being US\$5m^v.
- d) Although the number of seafarers taken hostage in 2011 was down to 555 from 645 in 2010, captives were held for 50% longer in 2011 (an average of eight months) and the violence faced by seafarers has not subsided^{vi}. All hostages were subject to deprivation and unacceptable conditions when held by Somali pirates; in extreme cases of violence and deprivation, 149 hostages have been held for more than a year and 35 victims were killed at the hands of pirates last year^{vii}.
- e) The IMB has also recently reported that there has been a worrying increase in piracy attacks in the Gulf of Guinea: 32 incidents (including five hijackings) have been reported in 2012, compared to 25 in 2011.^{viii}

Recent press reports might have given the impression that the level of piracy is decreasing. Certainly it seems that attacks have shown a decrease in 2012. However the International Chamber of Shipping (ICS) has said the capability of the pirates is actually greater than it has

ever been. Further, public perception that piracy is exclusively a Somali problem is still not accurate, particularly since the problem has recently spread to the West coast of Africa, off Nigeria. Additionally, some attacks by Somali pirates have taken place closer to India than to Somalia. The continued use of “mother” ships has meant that Somali pirates have a large area of operations to include waters off Kenya, the Seychelles, Madagascar, the Maldives, Oman, the Red Sea and the Gulf of Aden. The IMB current Bulletin identifies as places where piracy is a risk: Bangladesh, Indonesia, Malacca Straits, Malaysia, South China Sea, Vietnam, Nigeria, Benin, Ecuador, off Oman (Arabian Sea), and off Seychelles / off Madagascar / off Maldives (Indian Ocean). Some recent piracy cases include:

- a) “FREE GODDESS” was hijacked by Somali pirates off the coast of Oman on 8 February 2012 and was still listed as a casualty on 16 July 2012. The 1995-built bulk carrier (22,051 dwt) had 21 crew on board when it was hijacked.
- b) “ROYAL GRACE” was hijacked by pirates off the coast of Oman on 2 March 2012 and was still being held by pirates as at 16 July 2012. Owners of the 1984-built chemical tanker (6,813 dwt) are said to have received an email stating the ship was being taken to Somalia.
- c) “BW RHINE”, a 2008-built product tanker, was hijacked off the coast of Togo after its automatic identification system was switched off on 28 April 2012. The vessel was released by 4 May 2012 but the pirates stole some of the vessel’s cargo of gasoline.

The International response

At the public international level States have continued with practical efforts to respond to the threat of piracy. Much of these are well known, for example the Maritime Security Centre – Horn of Africa (MSCHOA, established by EUNAVFOR), the UK Maritime Trade Operations (UKMTO), which works with the naval task forces, the 490 miles Internationally Recognised Transit Corridor (IRTC) operated by independent navies from countries such as Russia, China, India and Japan or the group transit system operated by EUNAVFOR. Three anti-piracy task forces have been assembled:

1. EUNAVFOR Somalia (“Operation Atalanta”)

- Establishment agreed by the Council of the European Union on 10 November 2008^{ix}, which became operational in December 2008.
- Mandate renewed by Council Decision 210/766/CFSP until 12 December 2012. Member States have indicated their willingness to extend it further, to December 2014.
- Patrols an area extending from the Gulf of Aden and coast of Somalia to South of the Red Sea and into the Western Indian Ocean - an area of 2m square nautical miles.
- On average, the force consists of 5-10 surface combat vessels, 1-2 auxiliary ships, 2-4 patrol and reconnaissance aircraft and 1500 military personnel.

2. NATO’s “Operation Ocean Shield”

- Deterrence patrols provided by NATO pursuant to the UN Security Council Resolutions.

- Replaced “Operation Allied Provider” (commenced October 2008) and “Operation Allied Protector” (commenced March 2009) in August 2009.
- At-sea counter piracy operations and escorts off the Horn of Africa and in the Gulf of Aden.
- Assists regional states, on their request, to develop their own counter-piracy abilities and activities.
- EUNAVFOR and Operation Ocean Shield operate from the same headquarters in Northwood, UK.
- Participants include Italy, the USA and Portugal.

3. Combined Maritime Forces

- Formerly the Maritime Coalition.
- A multi-national naval coalition formed under the auspices of the UN Security Council Resolutions.
- Up to 36 ships available from 25 Member States (but not all necessarily deployed at the same time).
- Patrol an area of more than 2.5m square nautical miles, from the Strait of Hormuz to the Suez Canal, and from Pakistan to Kenya.
- Member States include Canada, the UK, Germany, France, Korea, the USA, Italy and Spain.
- In addition individual states, for example China, India and Russia, may also send military vessels without coming within one of these larger organisations.

One of the reasons that the IMB believes there has been a reduced number of successful Somali hijackings is the efforts and actions of the naval forces, which have harassed the mother vessels and pirate action groups.

At the same time, in cooperation with States the shipping industry has developed Best Management Practice guidelines (latest version BMP4).

The Political response

On 23rd February 2012 the UK hosted a one day meeting with leaders from more than 50 countries and international organizations which focused on a range of actions across political, security and stability priorities, and also dealt with the issue of piracy. Some of the main points agreed in relation to piracy were:

- A Memorandum of Understanding between the UK and Tanzania to transfer suspected pirates to Tanzania for prosecution (the UK wants other states in the region to sign up to similar agreements).
- Somaliland signed an agreement with the Seychelles to transfer convicted pirates to prisons in Somaliland. The plan – supported by the British government – is to set up a “conveyor belt”, where pirates are tried in the Seychelles judicial system before being sent to a UN-backed prison in Somalia.
- The UK announced the creation of an international task force on pirate ransoms to understand better the ransom business cycle and how to break it.

The taskforce has been asked to report back on piracy by autumn of this year. The report will focus particularly on a proposal to ban the payment of ransoms to pirates. This has been criticised by both the British Chamber of Shipping and the trade union Nautilus, who have lobbied the government to allow commercial organizations to pay ransoms at their own discretion. According to the British Chamber of Shipping, banning ransoms will not stop people paying them and the concept of letting seafarers die to deter pirates is both unrealistic and unacceptable given lives are at stake. Overall the reaction of industry to the Conference was mixed it being felt that it failed to provide any firm political commitment or new actions to eliminate or significantly reduce the blight of piracy in the immediate future.

Whilst all this activity is going on ransoms continue to be paid - in fact the average ransom payment increased from US\$4m in 2010 to US\$5m in 2011^x. In this respect the ICS has discouraged any further idea of prohibiting or criminalizing ransom payments since the primary concern of the industry was to the crews and their families. Further, the criminalising or prohibiting payments would lead many in the industry to refuse to sail in the affected danger area. This would have significant implications for a large portion of world trade, including about 40% of world oil shipments, which are transported via the Western Indian Ocean. Although a US Presidential Executive Order of 13th April 2010 made it an offence to pay a ransom to certain specific groups of pirates, this approach has not been followed by other states. In England, the payment of a ransom has been held not to be contrary to public policy (*Masefield AG v. Amlin Corporate Member Ltd., The Bunga Melati Dua [2011] EWCA Civ 24*), thereby easing any difficulties in making claims under policies of insurance subject to English law.

In another development, a request was submitted by Ukraine to the IMO (LEG99/7/1) at the 99th session of the Legal Committee on 16-20th April 2012 for information on the apprehension of pirates which operate in the Gulf of Aden, the Arabian Sea and the Northern Indian Ocean. Such a request was made on the basis that the prosecution of pirates had long been viewed as a complicated problem. The data provided would enable the Legal Committee to make an informed decision on further steps to improve the legislative framework to combat piracy and armed robbery. The IMO responded (LEG 99/7/2) with data obtained from a report of the United Nations Secretary-General (S/2012/50). This detailed that the number of States prosecuting acts of piracy off the coast of Somalia in their courts was 20, and the total number of prosecutions which had taken place so far was 1,063. Interestingly, the UK has not prosecuted any of the pirates detained by naval vessels. Meanwhile, Kenya has held 143, convicting 50; and the USA has held 28, convicting 17.

The IMO Secretariat is planning to undertake a study to consolidate information regarding court decisions resulting from piracy prosecutions so that it is publicly available on the IMO website.

Piracy was also prominent on the agenda of the Asian Shipowners' Forum (ASF) that took place in Port Douglas, Australia on 22nd May 2012. The ASF urged continued and stronger political will to address the root causes of piracy, on land in Somalia. The ASF is in the process of developing a Counter Piracy Proposal in response to the continuing threat of Somali piracy – the details of which will be presented to Working Group 1 of the Contact Group for Piracy off the Coast of Somalia. The ASF was also alarmed by the increased magnitude of piracy in West African waters off Benin and Nigeria, urging the UN to take immediate action to address the problem.

The second UAE Marine Counter-Piracy Conference took place in Dubai in June 2012. The Conference welcomed the significant progress made in combating piracy on land and in the waters off the coast of Somalia in the year since the inaugural conference in April 2011. The Conference reaffirmed its commitment to strengthening public-private partnerships in the search for a sustainable solution to the violence. The Conference also emphasized the importance of state building and harmonization with local governments and other agencies to counter the destabilizing impact of piracy. A declaration was adopted by foreign ministers and senior government officials from 41 countries, as well as representatives from UN agencies, including the IMO, and top executives from 73 leading maritime companies and organisations. The Conference expressed backing for a UAE proposal to make the UN Trust Fund to Support Initiatives of States to Counter Piracy off the Coast of Somalia (affiliated to the Contact Group on Piracy off the Coast of Somalia) the central manager for new funds donated towards the development of Somalia's maritime security capacity. The UAE also made an initial pledge of US\$1m towards this new initiative within the Trust Fund.

In other relevant political developments, the UK government formally endorsed the use of armed guards on 30 October 2011, when the Prime Minister announced ships sailing under the British flag would be allowed to carry armed guards to protect themselves from pirates. The announcement was in direct contrast with previous government policy, which strongly discouraged the use of armed guards. However, the Prime Minister stressed that the placing of armed guards on board commercial vessels was only a short-term measure and not a long-term solution to the piracy problem. Justine Greening MP, Secretary of State for Transport, recently noted, in a speech to the IMO on 16 May 2012, that perhaps as a result of these actions taken by the UK government, the number of successful attacks on shipping actually fell during the second half of 2011.

Finally, I should mention that in June 2012, the Cypriot House of Representatives approved a new counter-piracy Bill, which makes Cyprus one of the first EU countries to specifically authorize the use of force. The new laws underline the authority of the master and forbid armed guards to use their weapons without the explicit order or permission of the master. The legislation also lays down reporting requirements and other measures to be taken by the master and shipowners in order to prevent piracy attacks. It safeguards the rights of seafarers and regulates the licensing of Private Maritime Security Contractors (PMSCs) and their personnel, clarifying their responsibilities. The jurisdiction of the Cypriot courts is also established for the trial of those involved in piracy.

Industry response – Civil law

Nevertheless, there remains an uneasy feeling that enough is still not being done to rein in the problem of piracy. Many Owners are resorting to hiring PMSCs to deploy armed guards on board their vessels. The use of PMSCs has increased as a response to the fact that the task forces have not to date proved to be entirely successful. There are too few ships covering too large an area. More importantly some vessels remain uniquely vulnerable to pirate attacks: those with a low freeboard, low speed, small crew, poor manoeuvrability. Further, the cost of piracy is rising in terms of ransom payments, the economic cost of the time during which a vessel is held and insurance costs. Last but not most important is the humanitarian cost of piracy is becoming more prominent and Owners want to protect their crew.

The International Union of Marine Insurance (IUMI) spoke out publicly at its annual conference in September 2011 in support of armed guards. The major reason for doing so was that no vessel with armed guards has been hijacked. It came to light in Lloyd's List (after

the IUMI gave its seal of approval) that insurers were offering a 35% discount for transits in the “High Risk Area” (this areas includes the Gulf of Aden and the Arabian Sea around the Somali coast) that were carrying armed guards. As already noted, the UK Government also followed this lead with its measured endorsement of the use of PMSCs. From the most recent quarterly report of the IMB there is some evidence that the preventative measures taken by merchant vessels, including the use of citadels and employment of armed guards and PMSCs, has been a factor in the recent reduction of successful hijackings off Somalia.

The extent to which PMSCs armed or unarmed had been used prior to 2011 is unclear. However, it is perhaps fair to say that the use of passive measures was the norm. These included: Water Cannon; Sonic Devices (Long Range Acoustic Device LRAD)^{xi}; trailing lines; barbed / razor Wire: recommended by BMP along with placing dummy lookouts; Citadels / Safe Rooms^{xii}. The problem with passive measures is illustrated clearly in the case of the “BISCAGLIA” in November 2008: an unarmed 3 man security team could not repel a hijack by pirates with the use of water cannons and a LRAD.

The Shipping industry has recognised that an increasing number of Owners and Operators wish to deploy armed guards on board their vessels but made clear that deployment of armed guards is a matter for each individual Owner:

- IMO: “*a decision for the individual shipowner after a thorough risk assessment and after ensuring all other practical means of self protection have been employed*”.
- BMP4: “*a matter for individual shipowners to decide following their own voyage risk assessment and approval of respective Flag States*”.

BMP4 does not contain a specific endorsement of their use: “*this advice does not constitute a recommendation or an endorsement of the general use of armed Private Maritime Security Contractors*”.

However, the use of armed guards and PMSCs raises its own issues. Obviously, there are practical questions such as having appropriate licenses for weapons on board from the flag state and ports at which the ship calls. At the heart of the issue is the use of force. The rules that will be applied to when weapons can be used will depend on among other possible laws, the law of the flag state, the law of the state where the Owners are incorporated or have their commercial seat, and the law of the states where the vessel will call. In the UK, lethal force is only allowed where there is a serious and imminent threat to life. The decision to use lethal force must be reasonable and the force used must be proportionate. The dangers are all too obvious, on 15 February 2012, two Italian marines on the “ENRICA LEXIE” shot dead two Indian fishermen, whom they believed were pirates. The two armed guards are currently being held by Kochi City Police, India. Italy has agreed to pay US\$ 192,000 in compensation to the families of the two fishermen (these payments will not affect the pending legal action against the two guards who have been charged with murder).

The Chairman of International Maritime Industries Forum (IMIF), Jim Davies, has suggested that the rules on the use of force must be more clearly established, recognised by the court of human rights and defined internationally. Although, as we shall see, BIMCO’s Guardcon produced additional advice on the use of force, it does not apply internationally as every country has the right to decide its own individual rules.

At the moment PMSCs sign up to the International Code of Conduct (ICOC) and other accreditation or vetting procedures on a purely voluntary basis. However, the intention is to take the guidelines from the ICOC and use them to produce a more formal oversight for PMSCs. The Security Association for the Maritime Industry (SAMI) has been set up with a view to regulating the provision of such services.

Finally, BIMCO has created Guardcon, a standard contract for employing security guards on vessels. This was launched in March 2012, to take the lead in giving shipowners and PMSCs guidance on employment and use of security guards, with or without firearms, on merchant vessels. It seeks to set an industry standard for governing relationships between the shipowner and the PMSCs as well as the master and on-board security guards. Although it is not a cure-all and should not be seen as the long-term solution, it does offer clarity on certain issues. For example, BIMCO has also published guidance on the use of force to accompany Guardcon. The desired template is for providing a layered defence, with lethal force being a last resort to be used in exceptional circumstances. The Master has overall authority and has the right to order a cease fire. This reaffirms the SOLAS position that the Master has absolute authority as to the safety of the vessel, her cargo, and her crew. However, certain issues do arise as to the authority of the Master where armed guards are deployed:

- The decision to open fire, according to Guardcon, is given to the PMSC team leader. Therefore, the Master can only decide to stop the firing – by which point the damage may have been done.
- In reality, the Master may not have authority because if there is an exchange of fire and the Master is in the citadel, he may not be in a position to control the situation.

At the 90th session of the IMO Maritime Safety Committee (MSC) in London, between 16 and 20 May 2012, the MSC agreed on interim guidance on PMSCs including, but without endorsing this, the use of armed guards. Additionally, interim guidance for flag states was also approved, which provides measures to prevent and mitigate Somalia-based piracy; listing recommended practices that flag states are encouraged to apply, taking into account national laws of flag states, to maximize efforts on counter-piracy measures being implemented.

Finally, I should mention the Convoy Escort Programme (CEP). The CEP is a plan by London market insurers to set up a private fleet of armed patrol boats in the Gulf of Aden to provide protection for vessels, whilst also reducing the costs of insuring vessels, cargo and crews against the risk of attacks by pirates. The CEP Package includes an escort service, insurance cover and an audit of the vessel's BMP4 and compliance during the transit period. Under the plan, the CEP would control a fleet of vessels with fixed gun positions and armed crews authorized to engage the pirates. It is currently in the process of raising finance from investors. However, it has courted much controversy within the shipping industry because it is seen by many as a private army for hire.

Closing remarks

I hope this review has been helpful. I should add that it is not intended to be exhaustive. Although there have been continuous political efforts through IMO and by States to tackle piracy, these remain of uncertain effect. The most significant development has been the growing tacit or overt support for PMSCs and armed response. According to IMO, anecdotal evidence suggests that up to 25% of ships are carrying firearms when transiting the Gulf of

Aden. This development and the efforts of the various naval detachments do appear finally to have had some impact on the frequency of attacks off Somalia. However, the long term effect on the incidence of piracy of the presence of armed PMSCs cannot be known. Armed guards can only be a supplementary measure to protect seafarers, vessels and cargoes. They do not solve the underlying problems that create piracy. Furthermore, many other practical and legal issues arise such as the wrongful use of force, the authority of the Master and insurance cover. The key to winning the battle is breaking the financial chain to financiers investing in piracy, successfully prosecuting pirates captured by the naval task forces, and greater political will and stability in the regions affected, particularly in Somalia. The latest report that a pirate “war lord” has been provided with diplomatic immunity by the President of Somalia emphasizes the scale of the task ahead.

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ⁱ ICC International Maritime Bureau Piracy and Armed Robbery Against Ships Report for the period of 1 January – 30 June 2012. This is the most current IMB report published and available at the time of writing on 16 July 2012.

ⁱⁱ IMB figures according to IMB Annual Report of 2011. IMO’s figures diverge from these.

ⁱⁱⁱ One Earth Future Foundation Report - The Economic Cost of Somali Piracy 2011.

^{iv} One Earth Future Foundation Report - The Economic Cost of Somali Piracy 2011.

^v Oceans Beyond Piracy - The Economic Cost of Somali Piracy 2011.

^{vi} Oceans Beyond Piracy – The Human Cost of Piracy 2011.

^{vii} Oceans Beyond Piracy – The Human Cost of Piracy 2011.

^{viii} ICC International Maritime Bureau Piracy and Armed Robbery Against Ships Report for the period of 1 January – 30 June 2012.

^{ix} Council Joint Action 2008/851/CFSP

^x One Earth Future Foundation Report - The Economic Cost of Somali Piracy 2011.

^{xi} this was used by “SEABOURN SPIRIT” to repel pirates in November 2005, although the actual effectiveness of the LRAD was unknown.

^{xii} the “MONTECRISTO” crew barricaded themselves into their citadel when attacked by pirates in October 2011 until being rescued by the Navy. Imabari Shipbuilding in Japan recently unveiled a new ship design which incorporates a citadel facility protected by security doors, bullet-proof windows and water canons.