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Combating Maritime Piracy: Inter-Disciplinary Cooperation and Information Sharing

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Introduction

In recent years, maritime piracy has reemerged as a serious threat to peace and security, notably following the significant increase in incidents of maritime piracy and armed robbery at sea that occurred off the coast of Somalia and in the Gulf of Guinea. As presented in this paper, international cooperation is indispensable for combating piracy. To that end, the paper argues that a duty to cooperate in the repression of piracy exists under international law. This duty, as articulated in article 100 of the United Nations Convention on the Law of the Sea (UNCLOS), should serve as a guiding principle in identifying the specific obligations imposed on States. Among those specific obligations is the duty to share relevant information that can assist in preventing piracy attacks and in facilitating prosecution of suspected pirates. It is further submitted that successful undertakings to fight maritime piracy necessitate inter-disciplinary cooperation, namely cooperation among entities whose expertise generally lies in different fields. The paper further discusses the main challenges for information sharing and proposes solutions to meet them.

Combating Maritime Piracy: The Duty to Cooperate

a. The primary legal sources underlying the duty to cooperate

Combating maritime piracy requires commitment and active engagement by States. As indicated by Mr. Helmut Tuerk, the honorable justice of the International Tribunal for the Law of the Sea: “The practice of piracy has been widespread over the centuries and

continues to be a menace. As a result, every State not only has a right, but also a duty, to take action to curb piratical activities."[1]

States are expected to take measures on both the domestic level - for example, by criminalizing piratical acts[2] – and the international one. The key element of the latter is international cooperation, whether directly among States or through the involvement of international organizations and other mechanisms created by States.

Indeed, international instruments repeatedly refer to the importance of international cooperation in the repression of maritime piracy. Thus, for example, the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation (the "SUA Convention"), provides in article 13 that State Parties shall cooperate in the prevention of the offences defined by that Convention.[3] Similarly, the United Nations Security Council [UNSC], in its series of Resolutions related to the threats of piracy and armed robbery at sea off the coast of Somalia and more recently also in the Gulf of Guinea, urged all States to cooperate with each other and with international organizations in combating acts of piracy and armed robbery at sea.[4] The importance of international and regional

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[1] Helmut Tuerk, "Combating Terrorism at Sea- The Suppression of Unlawful Acts against the Safety of Maritime Navigation", 15 U. Miami Int'l & Comp. L. Rev. 337, 342.

[2] Cf. United Nations Security Council Resolution 1918, 27 April 2010, S/RES/1918 (2010), which called on "all States, including States in the region, to criminalize piracy under their domestic law…". The Security Council reiterated this call in later Resolutions such as Resolution 2077, 21 November 2012, S/RES/2077 (2012).

[3] Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation art. 13, Mar. 10, 1988, 1678 U.N.T.S. 22. Though the Convention does not use the term "piracy", at least some of the offences listed in article 3 of the Convention such as the seizure of a ship by force are undoubtedly applicable to piratical acts. On the application of the SUA Convention in the fight against maritime piracy see, *inter alia*, Milena Sterio, "*Piracy Off the Coast of Somalia - The Argument for Pirate Prosecutions in the National Courts of Kenya, The Seychelles, and Mauritius"*, 4 Amsterdam L.F. 104 2012; Cheah Wui Ling, *Extradition and Mutual Legal Assistance in the Prosecution of Serious Maritime Crimes: A Comparative and Critical Analysis of Applicable Legal Frameworks*, collection of papers resulting from the research seminar, "Criminal Acts at Sea", by the Hague Academy of International Law (2013).

[4] With regard to the situation in Somalia, see, for example, UNSC Resolution 1816, 2 June 2008, S/RES/1816 (2008), para. 3. All UNSC Resolutions that followed on this matter highlighted the importance of international cooperation. With regard to the situation in the Gulf of Guinea, see UNSC Resolution 2018, 31 October 2011, S/RES/2018 (2011); UNSC Resolution 2039, 29 February 2012 S/RES/2039 (2012).

cooperation in this domain was also highlighted by the United Nations General Assembly in its resolutions on oceans and the law of the sea.[5]

Notably, article 100 of UNCLOS, titled "Duty to cooperate in the repression of piracy", specifies that:

> "All States shall cooperate to the fullest possible extent in the repression of piracy on the high seas or in any other place outside the jurisdiction of any State."[6]

The duty to cooperate is at the core of the piracy section of UNCLOS. Indeed, it is the first provision of this section, thereby providing the appropriate benchmark as well as framework for the substantive provisions that follow. Moreover, while international cooperation is a common theme of UNCLOS,[7] article 100 is unique in two ways: First, it is the only provision in UNCLOS whose title is the duty to cooperate.[8] Secondly, it uses the strongest wording found in UNCLOS with regard to this obligation, namely that all States shall cooperate "to the fullest possible extent."[9]

Article 100 of UNCLOS contains the precise wording of article 14 of the 1958 Geneva Convention on the High Seas (HSC),[10] which in turn incorporated (again, verbatim) the corresponding Draft Article adopted by the International Law Commission (ILC) on the

[5] See UNGA Res 63/111 (5 December 2008) UN Doc A/RES/63/111, para. 61: "[The General Assembly]…Recognizes the crucial role of international cooperation at the global, regional, subregional and bilateral levels in combating, in accordance with international law, threats to maritime security, including piracy, armed robbery at sea…" The General Assembly reiterated this point in its annual Resolutions on oceans and the law of the sea. Cf. A/RES/66/231 (24 December 2011) UN Doc A/RES/66/231, para. 81; A/RES/67/78 (18 April 2013) UN Doc A/RES/67/78, para. 88.

[6] Article 100 of the United Nations Convention on the Law of the Sea, December 10, 1982, 1833 U.N.T.S. 397, 21 I.L.M. 1245.

[7] As has been explained by Tanaka, international cooperation is one of the two basic functions of UNCLOS (the other being the spatial distribution of national jurisdiction) – see Yoshifumi Tanaka, The International Law of the Sea, [Cambridge University Press, 2012], p. 4.

[8] Compare with other cooperation-related sections or provisions in UNCLOS such as Section 2 (titled Global and Regional Cooperation) of Part XII (Protection and Preservation of the Marine Environment) or Section 2 (titled "International Cooperation") of Part XIII (Marine Scientific Research). The titles of those provisions do not make a specific reference to the "duty to cooperate".

[9] Compare with the wording of other UNCLOS provisions mentioning that "States shall cooperate" (articles 108-109) or "should cooperate" (article 123) or even "may cooperate" (e.g. article 129). Other provisions provide that "States should cooperate actively" (article 273) or refer to cooperation "to the extent possible" (article 199). Neither one therefore contains the clearest instruction on cooperation as prescribed by article 100.

[10] The Geneva Convention on the High Seas, Apr. 29, 1958, 13 U.S.T. 2312,450 U.N.T.S. 82 (entered into force Sept. 30, 1962).

law of the sea.[11] All those provisions went beyond the proposal put together in the scholarly work known as the Harvard Research Draft,[12] which later served as the basis for the discussions of piracy by the ILC and the negotiations of the piracy provisions in the HSC. Article 18 of the Harvard Research Draft provided that "the parties to this convention agree to make every expedient use of their powers to prevent piracy, separately and in co-operation." The commentary to this provision underscored that article 18 imposes on States only "a general discretionary obligation to discourage piracy by exercising their rights of prevention and punishment as far as is expedient."[13] By establishing a duty to cooperate UNCLOS and the HSC therefore send a clearer message than originally foreseen in the proposal of the Harvard Research Draft.

Both UNCLOS and HSC, however, did not set out the precise obligations that fall within the scope of the general duty to cooperate,[14] thereby leaving this provision open to interpretation with regard to the means that should be employed by States to fulfill their obligation. At the very least, however, it is evident that inaction or failure to cooperate in response to piratical acts - and where both the factual circumstances and the applicable legal framework allow for action and cooperation - cannot be reconciled with the duty as prescribed by article 100. The ILC, in its above commentary, clearly stated that "[A]ny State having an opportunity of taking measures against piracy, and neglecting to do so, would be failing in a duty laid upon it by international law."[15] Similarly, Mr. Jack Lang, the Special Adviser appointed by the United Nations Secretary General to address the legal issues related to piracy off the coast of Somalia, underscored that the degree of flexibility provided by the wording of article 100 "should not be used as a pretext for failure to prosecute."[16] Professor Rüdiger Wolfrum, the honorable justice and former President of the International Tribunal for the Law of the Sea, echoed this approach by

[11] [1956] II YbILC, 282, article 38.
[12] *Harvard Research In International Law, Draft Convention on Piracy,* 26 AM. ***J.*** INT'L L. 741 (Supp. 1932).
[13] *Idem*, commentary to article 18.
[14] Compare to other sections of UNCLOS that specify the various areas and means of cooperation such as article 123 on cooperation of States bordering enclosed or semi-enclosed seas or article 143 on collaboration in the field of marine scientific research.
[15] [1956] II YbILC, 282, commentary to article 38.
[16] See Report of the Special Adviser to the Secretary-General on Legal Issues Related to Piracy off the Coast of Somalia, 25 January 2011, S/2011/30, para. 49.

indicating that "a ship entitled to intervene in cases of piracy may not, without good justification, turn a blind eye to such acts."[17] Professor Wolfrum went a step further by stating that "[T]urning a blind eye to the activities of pirates is in itself an act of piracy"[18] and suggesting that States permitting piracy activities may be subject to counter measures and theoretically also to an intervention by the Security Council.[19]

b. Interpretation of the duty to cooperate: The applicable legal test

Notwithstanding UNCLOS' shortcoming in not detailing the specific obligations within the scope of the general duty to cooperate, certain conclusions can be reached regarding the nature of the duty, the applicable legal test and the specific actions expected from States such as the duty to share relevant information.[20]

In this respect, article 100 should be interpreted broadly. This derives from the provision's wording (duty to cooperate "to the fullest extent possible") as well as from the underlying rationale of the piracy section of UNCLOS, namely, ensuring the international's community common interest in protecting the freedom of navigation and safety of persons at sea.[21]

Further, while article 100 does not create an absolute obligation, its clear wording entails the existence of a **presumption** on cooperation in the face of piracy. This presumption also derives from the general principle of good faith in fulfilling treaty obligations, long recognized as "[o]ne of the basic principles governing the creation and performance of legal obligations, whatever their source,"[22] and explicitly mentioned in UNCLOS.[23] Thus,

[17] See Rüdiger Wolfrum, "Fighting Terrorism at Sea: Options and Limitations under International Law," P. 4, Available at http://www.itlos.org/fileadmin/itlos/documents/statements_of_president/wolfrum/doherty_lectire_130406_eng.pdf.
[18] *Idem*, at 5.
[19] *Idem.*
[20] See discussion below concerning the duty to share information.
[21] Douglas Guilfoyle, *Shipping Interdiction and the Law of the Sea* (Cambridge University Press 2009), p. 38 (stating that "the rule against piracy exists to protect the freedom of navigation and the safety of persons upon the high seas").
[22] Nuclear Tests Case (N.Z. v. Fr.), 1974 I.C.J. 457 (Dec. 20 1974), para. 49. With regard to performing treaty obligations in good faith see also article 26 of the Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331. On the principle of good faith in the context of international cooperation see also the commentary to Draft Article 4 of the International Law Commission [ILC] Draft Articles on Prevention

a State that was in a position to act and failed to do so carries the burden of justifying – based on factual, legal or other grounds - its lack of action.

For the purpose of assessing compliance with the duty to cooperate, it is proposed to apply the **due diligence** principle. This fundamental principle of international law,[24] used as early as 1871,[25] has been frequently applied in different fields such as environmental law as well as invoked by international tribunals in various cases.[26] In some instances the principle has been mentioned in an international instrument,[27] yet an explicit reference is not required as a precondition of utilizing it as the relevant standard. Thus, for example, in its commentary to the Draft Articles on Prevention of Transboundary Harm from Hazardous Activities, the ILC often refers to this concept even though it is not expressly mentioned in the Draft Articles. Moreover, the ILC commentary to those Draft Articles concluded that "[A]n obligation of due diligence as the standard basis for the protection of the environment from harm can be deduced from a number of international conventions."[28] As an example of such a convention, the commentary mentions article

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of Transboundary Harm from Hazardous Activities, Yearbook of the International Law Commission 2001, vol 2, part 2 (New York: UN, 2008) at 148.

[23] Article 300 of UNCLOS ["Good faith and abuse of rights"] reads: "States Parties shall fulfil in good faith the obligations assumed under this Convention and shall exercise the rights, jurisdiction and freedoms recognized in this Convention in a manner which would not constitute an abuse of right."

[24] Robert P. Barnidge, Jr. "The Due Diligence Principle under International Law", 8 Int'l Comm. L. Rev. 81 2006, at 121, quoting Luigi Condorelli, "The Imputability to States of Acts of International Terrorism", 19 ISR. Y.B. H.R. 233, 240.

[25] The 1871 Treaty of Washington (1871) mentioned due diligence in reference to the responsibility of a neutral State for damages caused by private individuals acting within its jurisdiction – see Treaty for an amicable Settlement of All Causes of Differences Between the Two Countries (Treaty of Washington), May 8, 1871 (United Kingdom/United States) 17 Stat. 863, T.S. 133. A year later, the treaty and this concept were subject to an international arbitration (the *Alabama Arbitration)* between the United States and the United Kingdom over the alleged failure of the United Kingdom to fulfill its duty of neutrality during the American Civil War.

[26] Cf. *Pulp Mills on the River Uruguay* (Arg. v. Uru.), International Court of Justice, Judgment, 20 April, 2010; Seabed Disputes Chamber of the International Tribunal for the Law of the Sea, Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area, Advisory Opinion, (Feb. 1, 2011) [hereinafter "Responsibilities and Obligations Advisory Opinion"].

[27] Cf. the International Law Commission Draft Articles on the Law of the Non-Navigational Uses of International Watercourses (1994), where draft Article 7.1 ("Obligation not to cause significant harm") provides that "Watercourse States shall exercise due diligence to utilize an international watercourse in such a way as not to cause significant harm to other watercourse States;" article 4(1) of the UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects (Rome, 24 June 1995), in relation to the right of a possessor of a stolen cultural object to obtain restitution upon returning the object if, inter alia, he/she proved the exercise of due diligence when acquiring the object.

[28] International Law Commission Draft articles on Prevention of Transboundary Harm from Hazardous Activities, commentary to Draft Article 3.

194(1) of UNCLOS ("Measures to prevent, reduce and control pollution of the marine environment"), which does not expressly use the term due diligence.

The definition of this principle has been subject of discussions from the very early days of its existence.[29] Maria Flemme proposed to view due diligence as signifying "the conduct to be expected of good government in order to effectively protect other States and the global environment."[30] She also suggested that the concept entails "a minimum level of efforts which a State must undertake to fulfill its international responsibilities."[31] In its commentary to the Draft Article 3 of the Draft Articles on Prevention of Transboundary Harm from Hazardous Activities, the ILC defined a higher threshold than Flemme's "minimum level of efforts", namely that of "reasonable efforts."[32] Elsewhere, it has been suggested that "the due diligence obligation requires the State's *best effort[s],"*[33] a position reflected also by the International Tribunal of the Law of the Sea in the Responsibilities and Obligations Advisory Opinion.[34]

As mentioned, UNCLOS uses the strongest wording when referring to the duty to cooperate in the repression of piracy (cooperation "to the fullest extent possible"). It is also noteworthy that among the factors to be considered when determining the applicable standard of due diligence is the specific risks generated by the case or activity at hand.[35]

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[29] In the 1872 *Alabama Arbitration*, the parties to the dispute (the U.S. and the UK) presented different definitions of the due diligence concept as referred to in the 1871 Treaty of Washington.

[30] Maria Flemme, "Due Diligence in International Law", Lund University (Spring 2004), available at http://www.lunduniversity.lu.se/o.o.i.s?id=24965&postid=1557482, p. 12 (and the references made there is footnote 54).

[31] *Idem*. P. 1.

[32] The ILC stated that: "In the context of the present articles, due diligence is manifested in reasonable efforts by a State to inform itself of factual and legal components that relate foreseeably to a contemplated procedure and to take appropriate measures, in timely fashion, to address them."

[33] Barnidge, supra note 24, at 112 [emphasis in the original text], referring to Pierre-Marie Dupuy, *Reviewing the Difficulties of Codification: On Ago's Classification of Obligations of Means and Obligations of Result in Relation to State Responsibility*, 10(2) EUR. J. INT'L L. 371, 379 (1999).

[34] The International Tribunal for the Law of the Sea concluded that "[T]he sponsoring State's obligation "to ensure" is "an obligation to deploy adequate means, to exercise best possible efforts, to do the utmost, to obtain this result" –see the Responsibilities and Obligations Advisory Opinion, para. 110 [emphasis added].

[35] On the link between the applicable standard of due diligence and the specific risks posed see the Responsibilities and Obligations Advisory Opinion, where the Tribunal indicated that "[T]he standard of due diligence has to be more severe for the riskier activities" – see there, para. 117. See also the ILC commentary on its Draft Article 3 of the ILC Draft Articles on Prevention of Transboundary Harm from Hazardous Activities, where it stated that "[T]he required degree of care is proportional to the degree of hazard involved."

In that regard, it is indisputable that piracy presents serious risks to the international community, as manifested, *inter alia*, by the unprecedented number of Security Council Resolutions adopted on the matter in a relatively short period of time. Accordingly, in the counter-piracy field, the standard of due diligence should be higher than minimum or even reasonable efforts; rather, it should be based on the "**best efforts**" test. Put differently, compliance with article 100 of UNCLOS would require **sincere, concerted and proactive efforts** to cooperate internationally in the repression of maritime piracy.

As a flexible concept,[36] assessing the due diligence standard requires assessment not only of the particular field of law but also the specific obligation within the general duty to cooperate (such as the duty to share information). There is also a need to consider the facts and circumstances of each case. Indeed, the duty to cooperate prescribed by article 100 of UNCLOS may entail different actions in different instances, also taking into consideration the tools and resources available to the State concerned. Thus, the requirement for "sincere, concerted and proactive efforts" should not be perceived as defining a uniformed specific set of actions applicable to all State in all situations. This conclusion corresponds to the position expressed by the ILC in its commentary on the duty to cooperate in combating piracy, where it stated: "[O]bviously, the State must be allowed a certain latitude as to the measures it should take to this end in any individual case."[37] In addition, and similar to other fields where the due diligence principle has been applied, it is clear that the concept of due diligence implies an obligation of conduct, not of result.[38]

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[36] See the ILC Commentary to Article 2 of its Draft Articles on the Responsibility of States for Internationally Wrongful Acts, whereby it is mentioned that standards such as due diligence "vary from one context to another for reasons which essentially relate to the object and purpose of the treaty provision or other rule giving rise to the primary obligation." See also the Responsibilities and Obligations Advisory Opinion, where the Tribunal stated that "[T]he content of "due diligence" obligations may not easily be described in precise terms. Among the factors that make such a description difficult is the fact that "due diligence" is a variable concept" – see there, para. 117; Flemme, stating that "Flexibility is an essential characteristic of this standard of conduct" – Flemme, supra note 30, at 12.

[37] [1956] II YbILC, 282, commentary to Draft Article 38.

[38] Cf. the ILC Draft Articles on the Law of the Non-Navigational Uses of International Watercourses (1994), where the ILC explained in its commentary to draft article 7 ("Obligation not to cause significant harm"), that the "obligation of due diligence contained in article 7 sets the threshold for lawful State activity. It is not intended to guarantee that in utilizing an international watercourse significant harm would not occur. It is an obligation of conduct, not an obligation of result." See also the Responsibilities and

c. Article 100 as the guiding principle in identifying the specific duties imposed on States

A detailed listing and in-depth discussion of all the specific duties required pursuant to article 100's general obligation to cooperate exceeds the scope of this paper. For the purpose of the current discussion it is submitted that certain duties can be identified based on a holistic interpretation of the piracy section of UNCLOS, that is based on a joint reading of article 100 and the substantive provisions of the piracy section. **Put differently, the interpretation and implementation of UNCLOS' piracy provisions should be done in light of the general guideline – namely the duty to cooperate - prescribed by article 100.**

Thus, for example, a key provision under UNCLOS is article 105, which reads:

> "On the high seas, or in any other place outside the jurisdiction of any State, every State may seize a pirate ship or aircraft, or a ship or aircraft taken by piracy and under the control of pirates, and arrest the persons and seize the property on board. The courts of the State which carried out the seizure may decide upon the penalties to be imposed, and may also determine the action to be taken with regard to the ships, aircraft or property, subject to the rights of third parties acting in good faith."[39]

Commentators have pointed to the hortatory characteristic of the provision, notably due to the use of the verb "may" throughout this article.[40] It appears, however, that the use of

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Obligations Advisory Opinion, where the Tribunal noted in para. 110 that "[T]he sponsoring State's obligation "to ensure" is not an obligation to achieve, in each and every case, the result that the sponsored contractor complies with the aforementioned obligations. Rather, it is an obligation to deploy adequate means, to exercise best possible efforts, to do the utmost, to obtain this result. To utilize the terminology current in international law, this obligation may be characterized as an obligation "of conduct" and not "of result", and as an obligation of "due diligence"[emphasis added].

[39] Article 105, UNCLOS.

[40] Cf. Guilfoyle, supra note 21, at 30-31, stating that: "Under article 105 of UNCLOS, any State *may* seize a pirate vessel and its courts *may* 'decide upon the penalties to be imposed'. This implies a permissive, not mandatory, grant of universal jurisdiction and a choice of means as to how to co-operate to suppress piracy" [emphasis in the original text]; Tullio Treves, "*Piracy and the international law of the sea*", in Modern Piracy – Legal Challenges and Responses" (ed. Douglas Guilfoyle, Edward Elgar Publishing, 2013), p, 122, stating that: "The language of article 105 (i.e. 'may') seems to indicate that the exercise of jurisdiction by the seizing state's courts is a possibility, not an obligation, notwithstanding the 'duty' to

the verb "may" does not imply the discretionary nature of the provision but is rather meant to indicate that the concrete actions listed under article 105 are allowed as an exception to the general principles that would generally forbid them.

Accordingly, article 105 permits the seizure of a pirate ship navigating on the high seas as an exception to the general principle of freedom of navigation on the high seas enshrined in UNCLOS,[41] according to which such an intervention would have been considered as illegal. Similarly, article 105 allows every State to exercise criminal jurisdiction over pirates as an exception to the general principle that confers exclusive jurisdiction upon the flag State.[42]

Thus, through the use of the term "may" article 105 sanctions certain actions that would have otherwise been considered as prohibited under international law. This interpretation of the term "may" also corresponds to the way it is used in other provisions in UNCLOS' piracy section such as in article 107, which provides that "[A] seizure on account of piracy *may* be carried out only by warships or military aircraft, or other ships or aircraft clearly marked and identifiable as being on government service and authorized to that effect."[43] As manifested by the title of the provision ("Ships and aircraft which are entitled to seize on account of piracy"),[44] the use of the term "may" in this article indicates which vessels or aircrafts are allowed to conduct the seizure rather than whether States has a discretion or an obligation to carry such act.

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cooperate in the repression of piracy stated in article 100"; J. Ashley Roach, *Countering Piracy Off Somalia: International Law and International Institutions*, 104 AM.
J. INT'L L. 397, 404 (2010), p. 403, stating that "This article [article 105], like all of the piracy provisions save Article 100, is discretionary – "may"".

[41] Article 87(1)(a), UNCLOS.

[42] See article 92(1), UNCLOS, which reads: "Ships shall sail under the flag of one State only and, save in exceptional cases expressly provided for in international treaties or in this Convention, shall be subject to its exclusive jurisdiction on the high seas." See also the statement of the International Tribunal for the Law of the Sea in the *M/V Saiga* case: "[T]he ship, everything on it, and every person involved or interested in its operations are treated as an entity linked to the flag State" – The *M/V Saiga (No. 2)* case (1999) 38 *ILM* p. 1347, para. 106; The European Court of Human Rights judgment of 29 March 2010 in *Medvedyev v. France* (Application No 3394/03), para. 85, where the Grand Chamber mentioned the principle of universal jurisdiction over piracy acts as an exception to the rule of the exclusive jurisdiction of the flag State; Tanaka, supra note 7, p. 152-155.

[43] Article 107, UNCLOS [emphasis added].

[44] Article 107, UNCLOS [emphasis added].

Consequently, the use of the term "may" in these provisions does not imply that a State has complete discretion over whether or not to act. **Indeed, this is precisely where the link to article 100 becomes relevant**: If a State is in a position to seize a pirate ship or take other actions sanctioned by article 105, and it nonetheless chooses not to act due, for example, to reasons of political convenience, it can certainly be argued that this State did not fulfill its obligations under international law, specifically the obligation to cooperate in the suppression of piracy under article 100.[45] To be clear, the combination of articles 100 and 105 does not create an obligation to seize a pirate ship under all circumstances. Yet, the State concerned should present a sound explanation for its lack of action in light of the presumption of cooperation and the due diligence standard created by article 100. To that end, an attempt to rely on the term "may" in article 105 as allegedly pointing to the hortatory nature of the provision does not appear to be convincing and might put into question the good faith of the State in raising such an argument.

Article 100 can further serve to construe the piracy provisions in case a doubt arises on the appropriate interpretation. One example already mentioned in the literature on piracy concerns the practice of naval forces operating off the coast of Somalia to hand-over suspected pirates to regional States such as Kenya to face trial. Article 105 neither provides explicit authority to do so nor expressly prohibits such cooperation between the arresting State and the prosecuting one. In response to the argument that in accordance with article 105 only the arresting State has jurisdiction to try the pirate, it has been correctly contended that such an argument "is inconsistent with the strong duty of cooperation in the international law of piracy articulated by Article 100. The practice of States reflected in their arrangements with Kenya indicates that they believe cooperation

[45] A similar position (though without explicitly referring to a violation of a duty under international law) can be found in Professor Wolfrum's discussion of article 107 of UNCLOS, where he stated that: "It has to be acknowledged that the central provision, namely article 107 of the Convention, is worded as an option for States to take up rather than as an obligation incumbent upon them. However, States are under an obligation to cooperate in the repression of piracy (article 100 of the Convention). Reading article 100 and 107 of the Convention together, it can be argued that States may not lightly decline to intervene against acts of piracy" – see Wolfrum, supra note 17, at 3. A different position was expressed by Kavangh, who argued that "a state's non-compliance with the provision [article 100] would not constitute a breach of international law. In other words, a state could avoid the prosecution of a pirate who is within its jurisdiction or avoid the enactment of legislation to provide for prosecution" – see John Kavanagh, The Law of Contemporary Sea Piracy, 1999 Austl. Int'l L.J. 127 1999, at 140-1 (referring to Dubner BH, The Law of International Sea Piracy (1980, Martinus Nijhoff, The Hague), 108).

includes transfer ashore to third States for trial and that they are permitted under international law."[46]

The Duty to Share Information as a Specific Obligation under the General Duty to Cooperate

The concrete measures to be applied by States as part of their general duty to cooperate are determined based on the characteristics of the particular threat and the circumstances of each case. Whatever the specific measures are, however, there should be little doubt that information exchange is vital to ensure successful international cooperation in counter-piracy operations.

Indeed, the duty to share information can be identified as a particular obligation within the general duty to cooperate. This conclusion is supported by relevant international instruments. Thus, for example, the SUA Convention provides that

> "States Parties shall co-operate in the prevention of the offences set forth in article 3, particularly by:…(2) exchanging information in accordance with their national law…"[47]

As explained by Justice Tuerk in referring to that provision: "[t]here is a duty for States Parties that have a reason to believe that an offense set forth in the [SUA] Convention will be committed to furnish as promptly as possible any relevant information to those States having established jurisdiction over such offenses."[48]

In addition, the UNSC Resolutions related to the suppression of piracy and armed robbery at sea also urge all States to share information on acts related to piracy and armed

[46] Roach, supra note 40, at 404, countering the position of Eugene Kontorovich expressing a more restricted reading of Article 105. Roach also pointed to relevant UNSC Resolutions to support his position. A conclusion similar to that of Roach – though without basing it on Article 100 – was presented by Azubuike, who countered Kontorovich's position by arguing that "[N]othing on the face of the Article [105] makes the jurisdiction exclusive to the arresting State" – see Lawrence Azubuike, *International Law Regime Against Piracy*, 15 ANN. SURV. INT'L & COMP. L. 43, 54-55 (2009).
[47] See article 13.1(b) of the SUA Convention.
[48] Tuerk, supra note 1, at 348.

robbery at sea.[49] The United Nations General Assembly has also emphasized the importance of information sharing as part of international cooperation in addressing the problem of piracy.[50]

On the regional level, the need for information sharing as a means of promoting cooperation in the suppression of piracy was a prime motivator for Asian States in adopting the Regional Cooperation Agreement on Combating Piracy and Armed Robbery against Ships in Asia (ReCAAP).[51] A key feature of ReCAAP is the creation of an information sharing centre, based in Singapore, whose role is to undertake the collection, collation and analysis of information received from State Parties and to ensure a flow of information between them.[52] Similarly, the more recent sub-regional Codes of Conduct, adopted in 2009 in Djibouti[53] and in 2013 in Cameroon[54], and inspired by ReCAAP,[55] both provide that the cooperation among the State Parties shall include "sharing and reporting relevant information."[56] The Codes of Conduct further provide for detailed

[49] Cf. UNSC Resolution 1816 (2008), where the Security Council "*Urges* all States to cooperate with each other…and share information about, acts of piracy and armed robbery in the territorial waters and on the high seas off the coast of Somalia." The UNSC reiterated the importance of sharing information in other Resolutions such as Resolution 1846, 2 December 2008, S/RES/1846 (2008) and Resolution 1976, 11 April 2011, S/RES/1976 (2011). In more recent Resolutions the UNSC explicitly highlighted the importance of sharing evidence and information among States and international organizations for anti-piracy law enforcement purposes including with regard to the key figures of the criminal networks involved in piracy – see, for example, UNSC Resolution 2077.

[50] See UNGA Res 63/111, supra note 5: "[The General Assembly]…61. *Recognizes* the crucial role of international cooperation at the global, regional, subregional and bilateral levels in combating, in accordance with international law, threats to maritime security, including piracy, armed robbery at sea…through…the enhanced sharing of information among States relevant to the detection, prevention and suppression of such threats." Similarly, see UNGA Res 66/231, supra note 5, para. 81; UNGA Res 67/78, supra note 5, para. 88.

[51] Natalie Klein, Maritime Security and the Law of the Sea, Oxford, 2011, at 242.

[52] ReCAAP, art 7; Klein, idem, 242-3.

[53] Code of Conduct Concerning the Repression of Piracy and Armed Robbery against Ships in the Western Indian Ocean and the Gulf of Aden, adopted in Djibouti on 29 January 2009 [hereinafter "the Djibouti Code of Conduct"].

[54] Code of Conduct Concerning the Repression of Piracy, Armed Robbery against Ships, and Illicit Maritime Activity in West and Central Africa ["Gulf of Guinea Code of Conduct"].

[55] See preamble of the Djibouti Code of Conduct. The Gulf of Guinea Code of Conduct was in turn, inspired by the Djibouti Code of Conduct – see its preamble.

[56] Article 2(1)(a) of the Codes of Conduct.

obligations related to information sharing such as the need to designate a national focal point to facilitate coordinated, timely, and effective flow of information.[57]

The duty to exchange information related to the prevention and suppression of maritime piracy may independently derive also from the abovementioned principle of due diligence. This concept entails, *inter alia*, that States have a responsibility to forewarn other countries about potential threats by communicating relevant information and updating international police databases in a systematic and comprehensive fashion.[58] The "responsibility to forewarn" is not a new notion under international law; thus, for example, in the *Corfu Channel* case the International Court of Justice pointed to the duty of States to notify and warn countries of an imminent danger based on certain general and well-recognized principles such as elementary considerations of humanity.[59]

Bearing in mind the *Corfu Channel* case,[60] the obligation to forewarn was introduced into UNCLOS, where it is provided in article 24.2 that "[T]he coastal State shall give appropriate publicity to any danger to navigation, of which it has knowledge, within its territorial sea."[61] It would be reasonable to contend that activities of piratical nature pose "danger to navigation" in the meaning of article 24.2, thereby requiring the coastal State to warn other States of such known activity in its territorial waters. Beyond the territorial sea, the duty to forewarn is a corollary obligation of the duty to cooperate enshrined by

[57] See article 8 ("Coordination and Information Sharing") of the Djibouti Code of Conduct and similarly article 11 of the Gulf of Guinea Code of Conduct.
[58] Rutsel Sylvester J. Martha, *The Legal Foundations of Interpol* (Hart Publishing, April 2010), 26-28. See also the 2004 speech delivered by INTERPOL's Secretary General, where he stated that "Countries have a responsibility to forewarn other countries about individuals that present a potential threat… The practical implication is that countries have to ensure that they communicate all potentially relevant information to other countries and update international police databases in a systematic and comprehensive fashion." – see "*Prosecuting terrorism: the global challenge*" speech by Ronald K. Noble, organized by the NYU Center on Law and Security Florence, Italy, 4 June 2004, available at: http://www.interpol.int/Public/ICPO/speeches/SG20040604.asp. In the context of combating terrorism, the duty to forewarn of imminent threats was underscored by the UNSC in Resolution 1373 (2001), where the USNC, acting under Chapter VII of the UN Charter – decided that all States shall "...2(b) [T]ake the necessary steps to prevent the commission of terrorist acts, including by provision of early warning of other States by exchange of information." see UNSC Resolution 1373, 28 September 2001, S/RES/1373 (2001).
[59] *Corfu Channel Case* (Merits) [1949] ICJ Rep 35; Martha, *idem.*
[60] Tanaka, supra note 7, at 96.
[61] Article 24.2, UNCLOS. On the basis for the inclusion of this obligation based on the Corfu Chanel case.

article 100 of UNCLOS, and by other relevant instruments such as SUA Convention and the abovementioned UNSC Resolutions.

The Nature of Cooperation: A Call for a Holistic Inter-Disciplinary Cooperation

Having established the existence of a general duty to cooperate and to share information, consideration should be given to the nature of the required cooperation in combating maritime piracy. Specifically, it is proposed to depart from traditional concepts related to crime-prevention and adopt a holistic inter-disciplinary paradigm for cooperation.

Traditionally, governmental authorities and international entities operating in different fields have carried out their missions virtually independently of each other: the police engage in purely police work, the military engage in purely military operations and so on. In addition, the level of cooperation between such bodies and the private sector has frequently been insignificant if not practically non-existent.

This traditional paradigm may work effectively when combating classic forms of crime such as land-based murder, robbery and theft. Nonetheless, the challenges which have accompanied relatively new forms of crime such as terrorism or the "resurrection" of old crimes such as maritime piracy have highlighted the shortcomings of this conventional approach.

The shift in the risks posed to societies necessitates adjustment on two levels: First, substantive changes are necessary, namely with regard to the type of tasks carried out by each actor. Thus, for example, military forces might be requested to engage in activities of a law enforcement nature, and police forces might be asked to investigate illegal activities which, in the past, have not been considered as "typical" ordinary law crimes in the strict sense of that term.

Secondly, and stemming also from these substantive changes, institutional - or, more precisely, inter-institutional - adjustments are required. Concretely, there is a need to involve all relevant actors in this process – hence, the call for a holistic approach - and to establish cooperation among agencies and institutions whose role, mandate, and general

activities may often be significantly different from one another. Enabling and coordinating the interaction between such bodies, namely inter-disciplinary cooperation, is now not only desirable but is in fact imperative.

The "holistic inter-disciplinary cooperation" paradigm is of particular relevance in the field of maritime piracy: Despite the fact that piracy is a classic crime, its geographic location requires the involvement of naval forces. In addition, the shipping industry is often in possession of valuable information that can be used for criminal investigations and prosecutions. Thus, there is clearly a need to establish collaboration among navies, law enforcement agencies, and the private sector. As will be discussed below, such collaboration is not without challenges, yet it remains essential to successful counter piracy undertakings.

Challenges in Sharing Information in the Fight Against Piracy

As mentioned, sharing relevant information among States and international organizations is vital for combating piracy and should therefore be applied as the general standard procedure. Information exchange nonetheless faces a number of difficulties that will be addressed below.

a. Scope of the duty to share information and the "national security" exception

Frequently, the international instruments applicable to the suppression of piracy do not shed much light on the precise scope of the duty to share information. As already noted, in reference to piracy the duty to share information is not explicitly mentioned in article 100 of UNCLOS (or elsewhere in the piracy section).[62] In the SUA Convention, the need to share information is mentioned, yet without further details.[63]

Consequently, States are left to decide what precise information should be shared, how it is to be transmitted and when it is to be shared.[64] Moreover, even when more detail on the duty to share information is provided, restrictions are often imposed due to national

[62] Compare, for example, to article 200 of UNCLOS, according to which State shall cooperate through the exchange of information and data acquired about pollution of the marine environment.
[63] Article 13, SUA Convention.
[64] Klein, supra note 51, at 255.

security, sovereignty, or commercial confidentiality concerns.[65] Such restrictions are found in the SUA Convention (exchange of information "in accordance with national law"[66]), as well as in article 302 of UNCLOS, a general provision concerning the disclosure of information:

> "[n]othing in this Convention shall be deemed to require a State Party, in the fulfilment of its obligations under this Convention, to supply information the disclosure of which is contrary to the essential interests of its security."[67]

These restrictions – in particular those based on the "national security" argument - can be used by States to justify their decision not to share information.[68] Nonetheless, it is submitted that the implementation of laws and regulations that prevent or restrict the exchange of information should be done only as an exception to the general obligation to share information deriving from article 100 and the due diligence principle. Thus, if a State is in possession of relevant data, and it neglects - or even refuses - to share it, it carries the burden of justifying its position.

This approach is grounded in the wording of provisions such as the abovementioned article 302 of UNCLOS, which allows non-disclosure of information only for purposes of protecting "essential interests of [State] security."[69] It is further based on the fundamental principle under international law, which requires States to fulfill their obligations in good faith: Indeed, if, as a matter of policy, a State refrains from sharing information related to the prevention and suppression of maritime piracy, it can hardly be argued that it fulfills its obligation to cooperate in good faith.

The above conclusion is further supported by the nature of piracy as, in essence, an ordinary law crime. Accordingly, the information whose sharing is of importance for the purpose of combating maritime piracy would typically be that which is exchanged as a

[65] Idem, 255-6.
[66] SUA Convention, article 13.1(b).
[67] Article 302 of UNCLOS.
[68] See Klein mentioning the problem of national security interests trumping those of international security – Klein, supra note 51, 254.
[69] *Idem* [emphasis added].

standard procedure among law enforcement authorities when countering crime: identification of suspects, modus operandi, etc. Thus, in general, the sharing of such information between the entities involved in counter-piracy operations (whether the navies or law enforcement agencies) is unlikely to compromise national security. It should therefore not be surprising to note that at least among law enforcement agencies and based on INTERPOL's practice following the creation of its Global Maritime Piracy Database,[70] in the domain of maritime piracy very few restrictions have been imposed by INTERPOL's member countries on information exchanged via the INTERPOL information system.[71] As described in the next section, however, the flow of information between the navies and law enforcement entities was not without difficulties.

b. Challenges deriving from the nature of the crime and the entities involved in counter-piracy operations

1. Navies carrying out law enforcement activities

Since piracy takes place on the high seas – and often very far from the shore, combating piratical acts requires more than the typical police-prosecution cooperation, which is predominant in land-based ordinary law crimes such as theft or robbery. Notably, it calls for the involvement of navies as the front-line entities that both prevent attacks and gather relevant information that can facilitate prosecution. In fact, in such operations, the navies exercise activities of law enforcement nature. This unique feature in combating maritime piracy creates certain problems including with regard to information exchange.

[70] INTERPOL's Global Piracy Database was created in 2011 and was mentioned in UNSC Resolutions such as Resolution 2020 (2011): "[The Security Council]…*Commends* INTERPOL for the creation of a global piracy database designed to consolidate information about piracy off the coast of Somalia and facilitate the development of actionable analysis for law enforcement, and urges all States to share such information with INTERPOL for use in the database, through appropriate channels" – see UNSC Resolution 2020, 22 November 2011, S/RES/2020 (2011). As of July 2013, the database contains information on piracy events, pirates' weapons, bank accounts, suspected financiers and negotiators and more. For further information on the database see Pierre St. Hilaire, "Somali Piracy: Following the Paper Trail", p. 6-7 (fn 4), available via http://www.counterpiracy.ae/2012-briefing-papers.

[71] In accordance with INTERPOL's Rules on the Processing of Data (RPD), the source of data that circulated via INTERPOL's channels retains control over its data (article 7(1), RPD). This includes, *inter alia*, the right to impose restrictions on the access or the use of such data by other users of the system, namely by other countries or international entities (articles 7(1) and 58, RPD).

First, the lead role taken by navies in combating piracy has also led the international community to overlook the role of law enforcement organizations and agencies, particularly during the first stages of combating piracy off the coast of Somalia. Thus, despite the fact that already by the end of 2008 a shift towards a law enforcement paradigm was underway,[72] it was not until late November 2010 that the UNSC – in its ninth resolution related to piracy off the coast of Somalia[73] - made a clear reference to organizations such as INTERPOL and Europol operating in the counter-piracy field. In Resolution 1950, the UNSC underlined the importance of continuing to enhance the collection, preservation and transmission to competent authorities of evidence of acts of piracy; welcomed the ongoing work of IMO, INTERPOL and industry groups to develop guidance to seafarers on preservation of crime scenes following acts of piracy; and urged States, in cooperation with INTERPOL and Europol, to further investigate international criminal networks involved in piracy off the coast of Somalia, including those responsible for illicit financing and facilitation.[74] This rather late inclusion of the law enforcement angle in UNSC Resolutions (and elsewhere) was particularly surprising since the guidelines for involving police forces in combating maritime piracy have already been put in place when the situation off the coast of Somalia begun to deteriorate.[75]

By not considering the potential in engaging the law enforcement community, a number of difficulties have emerged, particularly with regard to facilitating the prosecution of

[72] See Douglas Guilfoyle, "Piracy off Somalia and counter-piracy efforts", Modern Piracy – Legal Challenges and Responses, supra note 40, 50-51.

[73] The first UNSC Resolution addressing the threats posed by maritime piracy off the coast of Somalia was UNSC Resolution 1814 (S/RES/1814 (2008), adopted on 15 May 2008). It was followed by the following seven Resolutions adopted by November 2010: Resolution 1816 (S/RES/1816 (2008), adopted on 2 June, 2008), Resolution 1838 (S/RES/1838 (2008), adopted on 7 October 2008), Resolution 1844 (S/RES/1844 (2008), adopted on 20 November 2008), Resolution 1846 (S/RES/1846 (2008), adopted on 2 December 2008), Resolution 1851 (S/RES/1851 (2008), adopted on 16 December 2008), Resolution 1897 (S/RES/1897 (2009), adopted on 30 November, 2009), and Resolution 1918 (S/RES/1918 (2010), adopted on 27 April ,2010).

[74] See UNSC Resolution 1950 (S/RES/1950 (2010), adopted on 23 November 2010,

[75] See, for example, the Code of Practice for the Investigation of the Crimes of Piracy and Armed Robbery against Ships, adopted on 29 November 2001 by the IMO Assembly via RESOLUTION A.922(22). Among the points included in that Code were the following: Involving relevant organizations (e.g. INTERPOL) at an early stage; Evidence accumulated from different cases may create opportunities to identify offenders; Appropriate databases should be searched; and the importance of contacting INTERPOL for information on the offenders (e.g. prior convictions).

pirates, which is a task that typically falls within the expertise of law enforcement agencies. Naval forces do not necessarily have the tools or the expertise to gather and preserve the relevant evidence necessary for criminal proceedings.[76] In addition, they generally do not have criminal databases where important data such as personal information on suspects, fingerprints, and DNA can be stored and compared with existing data. Such expertise and tools are at the core of law enforcement activities and international police cooperation. The relative lack of involvement of the police in those early stages therefore created a gap, a "missing link", between the navies operating off the coast of Somalia and the prosecution services.

The growing recognition of the need to engage all relevant actors – including the law enforcement community – as part of the holistic inter-disciplinary paradigm, led to welcome changes in the mindset that guided the international community in the early stages of combating piracy off the coast of Somalia.

Thus, in addition to the abovementioned UNSC Resolution 1950, three noteworthy examples of the positive shift in approach are found in the following instruments: First, UNSC Resolution 1976, in which the Security Council, acting under Chapter VII of the United Nations Charter: 1) invited States, individually or in cooperation with regional organizations, UNODC and INTERPOL, to examine domestic procedures for the preservation of evidence and assist Somalia and other States in the region in strengthening their counter-piracy law enforcement capacities; 2) underlined the importance of continuing to enhance the collection, preservation and transmission to competent authorities of evidence; and 3) urged States and international organizations to share evidence and information for anti-piracy law enforcement purposes with a view to ensuring effective prosecution.[77] UNSC Resolution 2020 further highlighted the

[76] See Hakan Friman and Jens Lindborg, "Initiating criminal proceedings with military force: some legal aspects of policing Somali pirates by navies", in Modern Piracy – Legal Challenges and Responses, supra note 40, p. 195.
[77] See UNSC Resolution 1976 (S/RES/1976 (2011) adopted on 11 April 2011).

importance of sharing information with INTERPOL and Europol, including for the purposes of investigating those responsible for illicit financing and facilitation.[78]

The second example is the amendment to the 2008 European Union Council Decision on Operation Atalanta, which is the European Union military operation off the coast of Somalia. The amended framework explicitly instructs Operation Atalanta to: 1) Collect data including characteristics likely to assist in identification of piracy suspects such as fingerprints; and 2) circulate via INTERPOL's channels and check against INTERPOL's databases personal data concerning suspects, including fingerprints and other identifiers (name, DOB, etc.).[79]

A third example concerns the updates introduced in the fourth version of the Best Management for Protection against Somalia Based Piracy (BMP4). In the BMP4, produced and supported by a number of prominent players in the civil industry and naval forces, a specific chapter was added on cooperation with law enforcement authorities.[80]

The above examples illustrate a positive shift in the strategic view of counter-piracy undertakings. Yet, certain complexities related to the exchange of information between navies and law enforcement entities had to be addressed. First, as a matter of normal procedure, navies tend to designate the data they collect as "classified information". This poses serious impediments with regard to the use of the data for the purpose of prosecution on the national level as well as in the context of international collaboration with entities (countries or international organizations) that generally do not have access to classified information. As an example from INTERPOL's practice, this issue had to be addressed during the discussions that led to the conclusion of a pilot agreement on information sharing between NATO and INTERPOL.[81]

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[78] UNSC Resolution 2020, supra note 70.
[79] See COUNCIL DECISION 2010/766/CFSP of 7 December 2010 amending Joint Action 2008/851/CFSP on a European Union military operation to contribute to the deterrence, prevention and repression of acts of piracy and armed robbery off the Somali coast.
[80] See Best Management for Protection against Somalia Based Piracy (BMP4, August 2011), Section 12.
[81] See "INTERPOL and NATO cooperation set to boost global efforts against maritime piracy", 6 October 2012, available at http://www.interpol.int/en/Internet/News-and-media/News-media-releases/2012/N20121006.

To address this concern, it is submitted that while the implementation of classified information rules is justified in the operations of navies during wartime or in preparation for military activities, a different approach should govern the operations of naval forces when carrying-out missions of a law enforcement nature such as counter-piracy activities. Thus, applying standard navy classification procedures in this context - and consequently withholding from law enforcement agencies important information such as fingerprints of suspected pirates, can hardly serve the original purpose of classified information and does not correspond to the general obligation to share information in combating maritime piracy. Piracy-related information either should not be designated as "classified information" in the first place or should be declassified as standard procedure.

Sharing information in the other direction, namely from law enforcement entities to the navies, also posed certain challenges. Thus, for example, in the context of INTERPOL's work a question arose whether INTERPOL may cooperate with navies considering article 3 of its Constitution, according to which "[i]t is strictly forbidden for the Organization to undertake any intervention or activities of a political, military, religious or racial character."[82] A plain reading of this provision could have led to the conclusion that INTERPOL must not share any information with the navies or organizations that operate off the coast of Somalia such as NATO. INTERPOL nonetheless concluded that so long as the purpose and nature of the collaboration is confined to promoting international police cooperation, article 3 does not prevent it from doing so.[83] Based on this functional interpretation of article 3, which permits in principle the flow of data from INTERPOL to naval forces,[84] INTERPOL shared with the navies deployed in the Indian Ocean information such as a photo album of suspected pirates. The information contained in the photo album, gathered by INTERPOL from its member countries, can assist the navies in

[82] INTERPOL's Constitution, art. 3, June 13, 1956, available via http://www.interpol.int/About-INTERPOL/Legal-materials/The-Constitution.
[83] For further discussion of article 3 of INTERPOL's Constitution and specifically on the application of the "purpose and nature" test in the field of maritime piracy see Y. Gottlieb, "Article 3 of Interpol's Constitution: Balancing International Police Cooperation with the Prohibition on Engaging in Political, Military, Religious, or Racial Activities," 23 Fla. J. Int'l L. 135 2011, p. 183-4.
[84] A decision on sharing such information must also be taken in conformity with all INTERPOL's rules, notably with the RPD.

identifying Somali pirates and potentially support a decision by the navy to detain suspects pending further investigations.

2. Interaction with the shipping industry

Another important player in the fight against maritime piracy is the private sector: Ship owners, operators and insurance companies.[85] The role of shipping companies is particularly important in the field of sharing information since they have access to crucial data and are also in a position to enable the collection of evidence by the police.

Nonetheless, cooperation and sharing of information between the private sector and law enforcement bodies have not been seamless. First, the shipping industry had to be sensitized to the importance of post-incident reporting, preserving the crime-scene for the purpose of evidence gathering, and facilitating interviews with the crew of hijacked ships.[86] Thus, despite existing guidelines, it was not uncommon to have cases where ships were thoroughly cleaned by their crews immediately upon their release by the pirates and prior to any law enforcement engagement, thereby destroying any potential crime-scene investigation. Direct collaboration with shipping companies proved that this hurdle can be overcome. Thus, for example, following the release of the hijacked oil tanker Irene SL in April 2011, INTERPOL immediately dispatched to the vessel an Incident Response Team (IRT). The IRT, supported by the South African Police Service and in coordination with European Union Naval Force (EU NAVFOR) and INTERTANKO, gathered evidence which later served to assist Greece in its first prosecution of a piracy case.[87]

[85] St. Hilaire, supra note 70, at 2-3.

[86]. BMP4, section 12. On securing of evidence see also the Code of Practice for the Investigation of the Crimes of Piracy and Armed Robbery against Ships, supra note 75, para. 6.7-6.9. See also UNSC Resolution 2077 (2012), supra note 2, where the Security Council underlined "the importance of continuing to enhance the collection, preservation and transmission to competent authorities of evidence of acts of piracy and armed robbery at sea off the coast of Somalia." The UNSC further welcomed "the ongoing work of the IMO, INTERPOL, and industry groups to develop guidance to seafarers on preservation of crime scenes following acts of piracy, and noting the importance for the successful prosecution of acts of piracy of enabling seafarers to give evidence in criminal proceedings." In that Resolution, the UNSC further urged States "to make their citizens and vessels available for forensic investigation as appropriate at the first suitable port of call immediately following an act or attempted act of piracy or armed robbery at sea or release from captivity."

[87] See "Greece to prosecute first maritime piracy case with evidence gathered by INTERPOL team", 12 December 2012, available at http://www.interpol.int/fr/News-and-media/News-media-releases/2012/PR098.

This successful deployment opened the way for similar INTERPOL-led IRTs, where crime-scene evidence was collected and hostages were debriefed following their release.[88] In July 2013, INTERPOL also carried out its first IRT on a ship that was attacked by pirates operating in the Gulf of Guinea.

An additional difficulty concerns the trust gap between the shipping industry and other entities – notably governmental authorities such as navies and law enforcement agencies. This obstacle for information sharing has been particularly relevant in reference to ransom payments: Typically, negotiations over ransom payments are conducted directly between the pirates or their representatives and the shipping company. In the context of such negotiations, information of relevance for future investigation and prosecution - names of negotiators, phone numbers, etc., can be obtained. Frequently, however, the shipping company has been hesitant to share information with governmental authorities. This may derive from an assessment that the information may be business sensitive; an assumption that sharing information might frustrate the on-going (or future) negotiations; or even from fearing potential criminal proceedings against the representatives of the shipping industry in countries where paying ransom to pirates is criminalized. Overcoming this trust gap enabled population of international criminal databases with relevant information to be used for future analytical reports and potential prosecution of pirates' kingpins. To maintain the positive momentum, it is important that the private sector receives feedback on the information it provides to governmental authorities so that it can appreciate the effects of its collaboration.

c. <u>The proliferation of information networks and its discontents</u>

One of the marked developments on the international level in recent decades is the proliferation of non-synchronized networks, which contribute to the creation of a "new world order."[89] This phenomenon was attributed to three core factors: technological innovation that enables information exchange; the expansion of domestic regulation; and

[88] As of July 2013, INTERPOL has carried out 6 more IRTs following the release of ships hijacked by Somali pirates.
[89] Anne-Marie Slaughter, A New World Order, (2004, Princeton University Press).

the rise of globalization.[90] The international response to the surge in piracy incidents off the coast of Somalia and in the Gulf of Guinea exemplifies the scope of this phenomenon: Within a relative short time, new institutions and structures were promptly created to address the new threats and specifically to facilitate the exchange of information. These included, for example, the creation of an operational network under the auspices of "The Shared Awareness and Deconfliction" (SHADE) initiative;[91] and the establishment of three information sharing centers under the Djibouti Code of Conduct.[92]

The proliferation of new information sharing networks raises a number of challenges. First, it creates confusion as to which network should be used and which entity should be approached in a particular case. This problem is even more acute where the possessor of the information, who wants to share it, is not accustomed to communicating with entities from other disciplines – for example where a private shipping company wishes to communicate information to the navy or the police.

In addition, the abundance of networks frequently leads to two extreme and problematic situations related to the circulation of an item of information: On the one extreme is a case where an item is circulated simultaneously in different networks and consequently users that are connected to these networks receive the exact same item multiple times. This duplication (or multiplication) of communication burdens the information system and its users, and wastes resources.

The opposite scenario is also quite common and is potentially even riskier: It concerns the situation where networks operate in "close circuit" and without coordination. This leads to valuable items of information being lost due to the silo-style structure of the networks. The situation can have harsh consequences where an item of information circulated in one network is the missing piece in the puzzle that entities connected to

[90] Kal Raustiala The Architecture of International Cooperation: Transgovernmental Networks and the Future of International Law, 43 Va. J. Int'l L. 1 2002-2003, at 16.
[91] The SHADE initiative began in 2008 as a mechanism of meetings aimed at coordinating and de-conflicting activities between the countries and coalitions involved in military counter-piracy operations in the Gulf of Aden and the western Indian Ocean - See information on SHADE on the Ocean Beyond Piracy website at http://oceansbeyondpiracy.org/matrix/activity/shared-awareness-and-deconfliction-shade.
[92] These centers were established in Kenya, Tanzania, and Yemen – see article 8 of the Djibouti Code of Conduct.

other networks are trying to put together. This shortcoming was underscored by Pierre St. Hilaire, Head of INTERPOL's Maritime Piracy Taskforce: "There is a large volume of information on piracy networks that is fragmented and in the possession of actors that have little past experience of working together closely. For example, information on piracy attacks and those responsible may be in the possession of the military; complementary information on the same attacks may be in the possession of the flag State, the ship owner, local law enforcement, crew members and hostages, and the private actors conducting the ransom negotiations."[93] Mr. St. Hilaire added: "Poor communication among ship owners, navies, and law enforcement agencies means that is has been difficult to develop complete pictures of what happens in pirate attacks."[94]

One suggested solution is to centralize the flow of information through the creation of a **single information sharing mechanism**.[95] This mechanism should comprise of **two layers**: The first would be on the national level, where each country should designate a single point of contact to facilitate domestic inter-agency coordination[96] as well as communication with external stakeholders. Such designation of "central authorities" has become standard practice in matter concerning international cooperation in criminal matters,[97] and has been proven efficient in preventing duplication of work, overcoming language barriers, and establishing informal personal relationships, which are often a key

[93] St. Hilaire, supra note 70, at 3.
[94] *Idem*, at 6 (fn 2).
[95] See also St. Hilaire, stating: "The ultimate goal is to collect and centralize this information for use by the law enforcement community" – *idem*, at 3.
[96] On the importance of coordination on the domestic level see Brian Wilson, "Reshaping maritime security cooperation: the importance of interagency coordination at the national level," Modern Piracy – Legal Challenges and Responses, supra note 40, p. 202, where the author stated: "In this context [of Somali piracy], cooperation between states is crucial. Recent efforts to repress piracy also demonstrate that cooperation *within* each state is equally crucial. Maritime security operations may involve extensive cooperation and coordination between different governmental agencies if they are to succeed" [emphasis in the original text].
[97] Cf. the abovementioned Codes of Conduct adopted in Djibouti and Cameroon; article 32 of INTERPOL's Constitution, according to which each member country appoints a body which will serve as the National Central Bureau (NCB). The NCB ensures liaison with: (a) The various departments in the country; (b) Those bodies in other countries serving as National Central Bureaus; (c) The Organization's General Secretariat - see INTERPOL's Constitution, supra note 82. See also Conventions adopted under the auspices of the United Nations, where, for the purpose of ensuring coordinated cooperation (e.g. with regard to executing requests for mutual legal assistance) the conventions require each State Party to designate a central authority – cf. article 18.13 of the United Nations Convention against Transnational Organized Crime, G.A. Res. 55/25, U.N. Doc. A/RES/55/25 (Nov. 15, 2000), available at http://www.unodc.org/documents/treaties/UNTOC/Publications/TOC%20Convention/ TOCebook-e.pdf.

factor in facilitating effective and timely international cooperation. Along this line, Working Group 5, created in October 2011 under the auspices of the Contact Group on Piracy off the coast of Somalia and focusing on the investigation of financial flows related to piracy,[98] recommended "the adoption of a single point of contact in each country to strengthen the domestic coordination process and to facilitate liaison with the private sector."[99]

Similarly, in the second layer, namely on the international level, a single empowered international mechanism – a "one stop shop" – should be identified. This mechanism need not be created based on hierarchical structure vis-à-vis States and other contributing entities; rather, it serves as an end-point and coordinator of all information sharing operations. With regard to communication regarding financial flows, working Group 5 identified INTERPOL as "the main international single point of contact with the shipping industry for information sharing to boost the international community's ability to identify, locate and prosecute pirates and their organizers and financiers."[100]

Where information centers and networks have already been created and identifying a single point of contact among them is not feasible, consideration should be given to integrating their work through applying an **interoperability paradigm**, namely identifying means to connect and synchronize the various existing networks, thereby creating a "network of networks".[101] From a technical perspective, this will ensure, for example, that a search in one system will generate responses from all other inter-connected networks and will therefore avoid the need to check each system individually.

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[98] As explained on the website of the Contact Group, "Working Group 5, chaired by Italy, focuses on how to advance information sharing internationally and between industry and government authorities to disrupt the pirate enterprise ashore, and works with other key partners such as INTERPOL, national law enforcement/prosecution agencies currently pursuing piracy investigations/prosecution, and the World Bank to better understand how illicit financial flows associated with maritime piracy are moving in the area." – see http://www.thecgpcs.org/work.do?action=workAd.

[99] See Report of the Secretary-General pursuant to Security Council resolution 2020 (2011), 22 October 2012, S/2012/783, Available at http://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/s_2012_783.pdf.

[100] *Idem*.

[101] Slaughter, supra note 89, stating that "[T]he best way to integrate the various governments networks…into a more recognizable structure of world order is to create network of networks" – see there, p. 135 and further discussion in chapter 4.1.

Finally, the already existing international and regional structures for sharing piracy-related information can generally provide adequate support and meet the needs for information exchange. Accordingly, prior to creating a new center or network in this field, it is recommended to carefully assess the added value in such an undertaking and to ensure that this would not in fact exacerbate the already existing problems discussed above. Indeed, this cautious approach was echoed in recent international instruments.[102]

Conclusion

Maritime piracy has posed considerable risks to the international community. A key component for successful counter-piracy undertakings is international cooperation among States, international and regional organizations, and the private sector. 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.

Sharing information is one of the specific duties within the general duty to cooperate. It should therefore lead to regular exchange of relevant data among all actors involved. Restrictions based on national security and classification rules ought to be applied only on an exceptional basis.

The implementation of the a strategic partnership based on an inter-disciplinary paradigm is not without difficulties, particularly in the field of information exchange and in light of the fact that the primary actors – navies, law enforcement agencies, and the private sector – are not accustomed to working together. Nonetheless, through collaboration in recent

[102] Cf. UNSC resolution 2039, supra note 4, in which the UNSC encouraged "the States of the Gulf of Guinea, ECOWAS, ECCAS and GGC, to develop and implement transnational and transregional maritime security coordination centres covering the whole region of the Gulf of Guinea, building on existing initiatives, such as those under the auspices of the International Maritime Organization (IMO)" [emphasis added]; the preamble of the Gulf of Guinea Code of Conduct, which emphasized "the importance of building on existing national, regional and extraregional initiatives to enhance maritime safety and security in the Gulf of Guinea" [emphasis added].

years, many challenges have been successfully met and solutions that have not been part of the traditional discourse in combating crimes were identified. To continue and build on those accomplishments, it is paramount to centralize the flow of information and avoid the creation of new close-circuit information networks.