

CLAREMONT McKENNA COLLEGE – KECK CENTER FOR INTERNATIONAL AND
STRATEGIC STUDIES

Implications of Private Anti-Piracy Navies off the Horn of Africa

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I. Introduction

Over the past five years, a serious increase in maritime piracy off the coast of Somalia has radiated from the Horn of Africa and far into the Indian Ocean. The number of attacks has spiked sharply, as has the number of successful hijackings. Pirates now seize some of the largest and most valuable vessels that traverse those waters, and have extorted hundreds of millions of dollars for the safe return of ships, cargo and crewmen. Several high-profile hijackings have led to violence and the deaths of hostages, and the resulting uncertainty is destabilizing trade across a wide area. The costs of ransoms and material losses are dwarfed by the indirect costs of piracy: expenditures to maintain a large combined naval task force off the Horn, increased fuel consumption and sailing time to avoid dangerous waters, punishing insurance premiums, and the retrofitting of ships with security countermeasures. These probably account for at least \$4.8 billion a year¹ — a staggering toll inflicted by a ragtag group of pirates estimated to number no more than a thousand.

Deploying a large enough naval force to decisively defeat the pirates would entail prohibitive expense and considerable logistical complexity. Further, many analysts acknowledge that it would require strikes on pirate ports by air and ground forces, necessitating a lengthy and difficult intervention in Somalia that would not be politically palatable. Instead, the use of private security contractors has presented itself as an attractive option. Whether guarding merchant ships or actively hunting pirates, an effective private force is projected to pay for itself via decreased insurance costs. Yet just how such a force might be created and used remains a matter of debate. This paper will first examine the history of piracy in the region, with an eye toward how it informs responses to the present situation. It will then review current proposals for private naval forces, and then assess financial considerations, command structure, tactical issues, legality and the rules

¹ “The Cost of Piracy.” One Earth Future Foundation. Archived at http://oneearthfuture.org/index.php?id=120&pid=37&page=Cost_of_Piracy. Accessed 05-02-11.

of engagement. It will conclude with an analysis of the costs and benefits of possible private schemes, reasons for caution and a review of prospects as of May, 2011.

II. Historical Lessons of Piracy in the Region

Although Arabian and Indian corsairs periodically raided shipping off the Horn of Africa during the middle ages, the surrounding nations did not have significant regular navies, and so coordinated efforts to stamp out piracy were not possible. With the opening of the region to trade with the West in the 16th century, however, global powers with large navies for the first time saw their economic interests there threatened by pirates. As the spice islands of Zanzibar and the East Indies infused the shipping lanes with fabulous wealth over the following three centuries, European pirates were attracted in large numbers. Often wearing the mantle of privateers, they were often better armed than the forces tasked with guarding against them — and when the protracted wars that gave them legitimacy came to an end, there was little to stop them from striking out on their own².

Because the depredations of these pirates jeopardized the flow of wealth from India, the most powerful colonial entity there, the English East India Company, formed its first anti-piracy force there in 1612³. By 1686 it was called the Bombay Marine, and was responsible for hunting both native and European pirates, and patrolled as far west as the Horn of Africa. By the middle of the 18th century, the East India Company had largely swept the pirate menace from its area of operations. Dedicated Royal Navy squadrons spent much of the 19th century pacifying the last lawless stretches of African coastline, although by this time, their primary concern was not

² Kleinen, J. and Osseweijer, M. (Eds.). (2000). *Pirates, Ports, and Coasts in Asia: Historical and Contemporary Perspectives*. Singapore: Institute of Southeast Asian Studies.

³ Bhatia, H.S. (1977). *Military History of British India, 1607-1947*. Deep & Deep Publications. 7, 15.

pirates but slavers and smugglers. The apex of British power in the region coincided with unprecedented maritime security across the Indian Ocean⁴. Unchallenged on the seas, the Empire was content to use its navy as an instrument of diplomacy and geopolitics, confident that its maritime interests were secure.

They were not secure for long. In August 1914, the German cruiser Emden sortied from Tsingtao at the outbreak of the First World War, and steamed into the Indian Ocean with the aim of disrupting Entente shipping. This so-called British Lake was thinly guarded, patrolled by a relative handful of warships stretched across a vast 28 million sq. mile expanse of ocean. Few British merchantmen were armed at war's beginning, and the Emden had easy going — accounting for ten unsuspecting ships before Winston Churchill's admiralty even realized she was on the loose. When the threat became clear, powerful warships were scraped together from all over the world to hunt her down. Yet the era's primitive communications made cornering her nearly impossible. The Emden⁵ remained at large for three months, sowing paralyzing fear from Durban to Rangoon, and driving insurance rates so astronomically high that most ships could not afford to leave port. When she intercepted wireless reports of a British cruiser in the area, Emden added a dummy fourth funnel to imitate her appearance — which initially served to reassure prey until it was too late for them to escape, and later, as word of the disguise spread, to send Allied merchant ships fleeing in terror at the sight of the real thing. That a single German cruiser could effectively halt shipping on the British Lake was a source of enormous embarrassment for the admiralty and for Herbert Asquith's government. Before she was

⁴ Preston, A., et al. (2007). *Send a Gunboat: The Victorian Navy and Supremacy at Sea, 1854-1904*. Naval Institute Press. 99.

⁵ For a full account of this colorful episode, see: Hoyt, E.P. (2001). *The Last Cruise of the Emden*. Globe Pequot.

ambushed and sunk off the Cocos Islands in November of 1914, the Emden had accounted for 31 ships and scored a propaganda coup by staging a dramatic raid on the Indian port of Madras.

Although the material losses inflicted by the Emden were substantial, they were hardly crippling. What appealed to the Imperial Navy, though, was the wholly disproportionate impact she had achieved. Her cruise had forced the Royal Navy to divert significant resources from the main theater of war to protect interior supply lines that it had thought secure. For every ton of matériel sent to the bottom, tens of tons were delayed in harbor and thereby denied to the troops fighting in Europe. Yet the Kaiser's admirals were no longer in a position to send regular warships across thousands of miles of hostile waters to disrupt Allied shipping.

So they converted several cargo ships into auxiliary cruisers — disguised merchant raiders that could strike without warning and then melt back into multitude of ordinary steamers plying the busy shipping lanes. The most successful of these, Wolf⁶, accounted for 37 ships totaling some 110,000 tons on an epic 451-day romp across the Indian Ocean and coast of Australia. For minimal cost, the auxiliary cruisers had achieved results arguably greater than those achieved by the Emden. Once again, the Royal Navy had found the ocean too vast to destroy the raiders, who had the fundamental advantage of asymmetry. While Wolf and her sisters could strike at the time and place of their choosing and then spend weeks laying low, the numerous warships hunting her had to regard every innocent-looking merchant vessel with suspicion, and struggled to remain constantly fueled, provisioned and in repair to engage in battle at a moment's notice.

⁶ See: Guilliat, R. and Hohnen, P. (2010). *The Wolf: How One German Raider Terrorized the Allies in the Most Epic Voyage of WWI*. Simon and Schuster.

The hard-earned lessons learned by both sides came back to the fore on the eve of the Second World War in 1939⁷. Once again, the Germans readied a fleet of auxiliary cruisers to be slipped into the wide and unprotected Indian Ocean. Once again, the British made plans to defend their vulnerable shipping against against the raider threat. Yet technology had moved forward since the last war. Virtually all merchantmen were now equipped with powerful radios, and sophisticated protocols were soon in place for reporting attacks. Additionally, an increasing number of Allied ships were armed — not, perhaps, heavily enough to have much chance of sinking a raider, but at least enough to force the Germans to use caution. Yet even despite all these new advantages, it took the British nearly four years to scour the seas of Hitler's auxiliary cruisers.

III. Present Outlook

How is it that a handful of unspectacular converted cargo ships terrorized the Indian Ocean? The historical parallel is an apt one. Then, as today, the Allies had radios and aircraft, and a large number of powerful warships on continual patrol — but rarely managed to thwart an attack. Merchant crews were armed and wary, yet seldom got off even a single shot in their own defense. The decisive factor was the fundamental asymmetry of raider warfare. It simply isn't plausible to defend a wide area against unpredictable attack without devoting wildly disproportionate resources or accepting occasional losses. The present outbreak of piracy off the Horn of Africa has forced the international community to balance these two options with an appreciation of its own capabilities and the changing demands of the situation there.

⁷ See: Schmalenbach, P. (1979). *German Raiders: A History of Auxiliary Cruisers of the German Navy, 1895-1945*. Naval Institute Press.

The fall of the Somali government in 1991 created a gaping power vacuum that has persisted to the present day. Twenty years of lawlessness, famine and intermittent civil war have left Somalia one of the world's poorest nations — a failed state in the fullness of the term. The rekindling of civil war there, as the Ethiopian-backed Transitional Federal Government and insurgent Islamic Courts Union grappled for power, has led to the virtual dissolution state institutions. The years from 2005 to 2007, coincident with the start of hostilities, saw large swaths of Galmudug and Puntland coastline become safe havens for pirates and the warlords who harbor them⁸. Each year, the pirates extended their reach, striking further and further out to sea in attacks that grew in boldness and organization. Yet it was 2008 that the problem began to command international attention — with 122 reported attacks⁹, compared with roughly one sixth that the year before. In September of 2008, Somali pirates captured a freighter carrying 33 T-72 tanks¹⁰. Despite the best efforts of the widely-scattered international naval forces in the area, the pirates escaped with the valuable cargo. On November 15, pirates operating more than 500 miles off Kenya hijacked the MV Sirius Star, a 318,000 ton supertanker carrying 2.2 million barrels of crude oil en route to the United States¹¹. This was the first such tanker to be captured, and the

⁸ Awung, S.E. (2011). *A Critical Analysis of the Reasons of Underdevelopment in Africa: Failed States and Reasons for Social Unrest in Africa*. GRIN Verlag. 4.

⁹ "Somali Pirate Attacks Increasing." *The Stars and Stripes*, 2 April 2010. Online at <http://www.stripes.com/news/somali-pirate-attacks-increasing-1.100512>. Accessed 05-01-11.

¹⁰ "Somali Pirates Land Russian Tanks in Surprise Haul." *The Times* (London), 27 September 2008. Online at <http://www.timesonline.co.uk/tol/news/world/africa/article4831652.ece>. Accessed 05-07-11.

¹¹ "Pirates Take Over Oil Tanker with British Crew on Board." *The Guardian*, 17 November 2008. Online at <http://www.guardian.co.uk/world/2008/nov/17/oil-tanker-pirates>. Accessed 05-01-11.

Somalis were seemingly bewildered about what to do with their quarter-billion dollar prize — eventually settling for a \$3 million ransom after seven weeks of negotiations¹².

In 2009, there were at least 214 attacks¹³, including the April hijacking of the MV Maersk Alabama, which was dramatically retaken¹⁴ by its own crew. Its captain, Richard Phillips, was abducted by the fleeing pirates and subsequently rescued after Navy SEAL snipers on the shadowing destroyer USS Bainbridge killed them when it appeared that Phillips' life was in imminent danger. The drama riveted the world — a sort of flashbulb incident not unlike the Emden's shelling of Madras. Public pressure to suppress the threat increased, and world governments pledged naval and air forces to patrol the region more heavily. The pirates were striking farther out to sea than ever, though, and the area to defend had swollen to 1.1 million square miles¹⁵. In 2010, Somali pirates succeeded in hijacking 49 major vessels, taking 1,016 hostages in the process, more than half of whom were still being held for ransom at the end of the year¹⁶. Where at first they were rarely seen out of sight of land, as of 2011, large pirate “motherships” threaten waters within a 1,200 mile radius of the Somali coast, making it no longer practical for ships to simply go around the danger zone. The equivalent of \$300 million has already been paid in excess ransoms, and the size of the payments is rapidly increasing (by

¹² “Hijacked Saudi Oil Tanker Released After Ransom Dropped by Parachute.” The Guardian, 9 January 2009. Online at <http://www.guardian.co.uk/world/2009/jan/09/sirius-star-released-somali-pirates-ransom>. Accessed 05-01-11.

¹³ “Record Number of Somali Pirate Attacks in 2009.” The New York Times, 30 December 2009, A9. Some sources give the number as 198, citing state department figures. The discrepancy may be due to a slightly different reporting area.

¹⁴ Eichstaedt, P. (2010). *Pirate State: Inside Somalia's Terrorism at Sea*. 7-20.

¹⁵ “Pirates Say Drownings Delay Ship's Release.” CNN.com, 09 January 2009. Archived at http://articles.cnn.com/2009-01-09/world/somalia.pirates.sirius.star_1_sirius-star-pirates-ransom?s=PM:WORLD. Accessed 03-13-11.

¹⁶ “Pirates Seized Record 1,181 Hostages in 2010.” MSNBC.com, 18 January 2011. Archived at http://www.msnbc.msn.com/id/41131456/ns/world_news-africa/t/pirates-seized-record-hostages/. Accessed 05-02-11.

36-fold over the last five years)¹⁷. Present signs suggest that attacks are still on the rise, with 97 during the first quarter of 2011, compared with 35 during the first quarter of 2010¹⁸. Although greatly increased naval presence off the Horn has foiled several notable hijack attempts, the continuing pace of attacks has left shippers and insurers alike clamoring for a solution beyond what the world's navies can provide. Just as the East India Company did four hundred years ago, they are looking to private naval forces to bridge the gap.

IV. Current Proposals

As piracy off the Horn of Africa spiked in 2008, Blackwater Worldwide floated the first major plan to use private naval forces in the region. It decided to dispatch the MV MacArthur, a helicopter-carrying patrol ship, to the Gulf of Aden in the first high-profile private involvement in the conflict¹⁹. Blackwater's contribution was limited, though, as shippers were reluctant to step into a highly uncertain legal situation. As a result, Blackwater abandoned the initiative. As reported by InterManager News, of the International Ship Managers' Association, several small private security contractors are presently running patrol and escort duties in the region, with the foremost of these UK-owned Protection Vessels International²⁰. None of these efforts have had backing from insurers or international navies, though, and are widely seen as only semi-

¹⁷ Alaric Nightingale. "Pirate Attacks Spur 36-Fold Increase in Ransoms: Freight Markets." Bloomberg, 25 January 2011. Archived at <http://www.bloomberg.com/news/2011-01-26/ships-seized-by-pirates-seeing-36-fold-increase-in-ransom-freight-markets.html>. Accessed 05-01-11.

¹⁸ "Pirate Attacks Hit an All-Time High Worldwide." MSNBC.com, 14 April 2011. Archived at http://www.msnbc.msn.com/id/42584628/ns/world_news-africa/t/pirate-attacks-hit-all-time-high-worldwide/. Accessed 05-01-11.

¹⁹ William Pentland. "Somalia's Growing Piracy Threat." Forbes.com, 17 November 2008. Archived at http://www.forbes.com/2008/11/17/piracy-shipping-somalia-biz-logistics-cx_wp_1117pirates.html. Accessed 05-13-11.

²⁰ "Dobson to Run Anti-Piracy Scheme." InterManager News, 25 January 2011. Archived at <http://www.intermanager.org/Resources/News/tabid/82/mid/500/newsid500/643/Default.aspx>. Accessed 05-11-11.

legitimate. Thus, until 2010, the international naval force has taken the lead in patrolling the vital Gulf of Aden and the waters off the Horn of Africa.

In the fall of 2010, however, a group of British maritime insurers came forward with plans for more comprehensive private involvement in defending against piracy. The project, InterManager News says, “marks the entry into this sensitive business area of a big name insurance broker, which should confer greater respectability on the process.”²¹ The joint undertaking has been spearheaded by Jardine Lloyd Thompson (JLT), one of the world’s largest shipping insurance firms, with cooperation from London’s Ascot Underwriting, Chartis (the spun-off “property casualty” division of AIG), and major shipping firms. The Baltic and International Maritime Council (BIMCO) has pledged additional support. Other stakeholders brought into the planning and solicited for funding include EU NavFor, the International Maritime Organization, the the UK’s Department for Transport and Foreign Office, and the United Nations Contact Group on Piracy off the Coast of Somalia²². Faced with mounting financial losses, these partners decided to create a private naval force of their own, rather than contracting with an established organization such as Blackwater (now operating as Xe Services). The organizers envision an armed escort and close patrol service, which they would package to shippers with several days of war-risk insurance from Ascot Lloyd’s Syndicate 1414. The details of the coverage structure have not yet been disclosed. Any profits from the scheme, JLT says, will go to the anti-piracy trust fund²³ set up by the U.N. Contact Group.

²¹ *ibid.*

²² *ibid.*

²³ *ibid.*

The plan envisions deploying 16-20 armed speedboats to suppress piracy in the Gulf of Aden, each carrying eight security personnel and four crew²⁴. Called the Convoy Escort Programme (CEP), it would provide a valuable adjunct to the thinly-stretched naval units in the area. In January of 2011, JLT awarded a contract to Dobson Fleet Management, a Cyprus-based maritime management firm, to run the CEP and administer its deployment. The CEP, they say, will be headquartered in London, with a regional office at a location in theater that is yet to be decided²⁵. The most recent public information suggests that funding went through successfully, and that the remaining hurdles are mainly logistical. Principally, these are legal issues still being ironed out, and questions of nationality. The CEP has been in serious discussions with two promising flag states (which have not been publicly identified), and InterManager News now reports that a single reputable flag state has been lined up to register 18 patrol boats, “each with a fixed gun position and an armed crew authorized to engage the pirates in battle.”²⁶ Project head Sean Woollerson of JLT has been quoted in multiple news outlets estimating that if the 27% of merchant traffic in the Gulf of Aden uses the escort service, the CEP will be able to provide its protection at no greater expense than shipowners already pay for security equipment and increased insurance premiums²⁷. These are indeed very strong indicators of viability, and the CEP is projected to be up and running in the Gulf of Aden some time during the summer of 2011.

²⁴ “London Insurers’ Private Fleet to Fight Somali Pirates.” Neptune Maritime Security, February 17, 2011. Archived at <http://neptunemaritimensecurity.posterous.com/london-insurers-private-fleet-to-fight-somali>. Accessed 04-09-11.

²⁵ See: “Dobson to Run Anti-Piracy Scheme.”

²⁶ See: “London Insurers’ Private Fleet to Fight Somali Pirates.”

²⁷ “‘Private Navy’ Is Close to Kick-Off.” InterManager News, 10 December 2010. Archived at <http://www.intermanager.org/Resources/News/tabid/82/newsid500/624/mid/500/Default.aspx>. Accessed 05-01-11.

V. Financial Considerations

Deploying the force of armed speedboats envisioned by the JLT plan to escort merchant ships through the highest-risk areas would entail startup costs as low as £15 million (\$23.5 million) for the purchase and modification of the vessels²⁸, and operations costs around £10 million (\$16.6 million) per year²⁹. Weighed against the direct and indirect costs of piracy of the Horn of Africa, this is minuscule — the equivalent of the insurance premiums on just thirty-seven trips by a large supertanker³⁰. As a point of comparison, the international naval patrols in the region are conservatively estimated to cost participating nations \$300 million a year in excess of fixed costs.³¹ Meanwhile, Somali pirates are estimated to have exacted some \$238 million in gross ransom payments in 2010, with total direct losses to shippers around an order of magnitude greater³². Although hard numbers are lacking, the extrapolations from the most credible recent projections, from the One Earth Future Foundation think tank, would place total excess economic costs of Somali piracy at at least \$4.8 billion per year³³. These costs primarily reflect spent fuel and time delays as ships avoid threatened waters, increases in maritime insurance, and losses to business from the pall of uncertainty cast over trade in the region.

²⁸ *ibid.*

²⁹ “German Shippers Reject British Plan for Private Anti-Piracy Battleships.” Neptune Maritime Security, 27 October 2010. Archived at www.neptunemaritimesecurity.posterous.com/german-shippers-reject-british-plan-for-privat-0. Accessed 04-26-11.

³⁰ Hrach Gregorian. “Oil: The West’s Soft Underbelly.” Bitterlemons-International.org Published online 29 March 2007 at <http://www.bitterlemons-international.org/previous.php?opt=1&id=174>. Accessed 05-01-11.

³¹ “Pirate Economics.” Strategypage, StrategyWorld.com, 20 May 2011. Archived at <http://www.strategypage.com/htm/htseamo/articles/20110520.aspx>. Accessed 05-23-11.

³² “The Economic Cost of Piracy.” Pamphlet by One Earth Future Foundation. PDF available at www.oceansbeyondpiracy.org.

³³ See: “The Cost of Piracy.” Excess costs above insurance premiums paid to fund ransoms were roughly \$148 million.

If a private anti-piracy force achieved even a 1 percent reduction in these losses, it would effectively pay for itself several times over. It is, of course, impractical to fund such a force from the millions of marginally-affected parties that suffer indirect forms of loss. But insurers' losses are concentrated enough for them to still plausibly fund a private scheme out of pocket. According to London's *The Independent*, Jardine Lloyd Thompson Group "insures 14 percent of the world's commercial fleet,"³⁴ much of which must pass through the Gulf of Aden or the waters off the Horn. In a best-case scenario, JLT's Dobson-run fleet would simply thwart more than £10 million of ransom hijackings a year to fund its own operations.³⁵ Yet additional support, if needed, could potentially come from a U.N. anti-piracy trust fund, or the budgets of international governments, along a model more similar to the security contracts in Iraq and Afghanistan.

In April of 2011, a major summit was held in Dubai jointly organized by the United Arab Emirates' Ministry of Foreign Affairs and port operator DP World, entitled "Global Challenge, Regional Responses: Forging A Common Approach to Maritime Piracy." The conference addressed both public and private options for dealing with Somali pirates, and resulted in pledges of over \$5 million to the U.N. anti-piracy trust, approximately equal to the the funds it disbursed last year in the course of its operations³⁶. Yet as U.N. Office on Drugs and Crime fund manager Tuesday Reitano told *International Freighting Weekly*, the trust would need to take in some \$20 million a year to be "internationally credible" — funds which likely involve some form of

³⁴ "Shipowners Reject Private Piracy-Combat Fleet." *Breakbulk*, 29 October 2010. Archived at <http://www.breakbulk.com/piracy/shipowners-reject-private-piracy-combat-fleet>. Accessed 04-29-11.

³⁵ In actuality, probably somewhat more than that, because fixed insurance premiums already account for some ransom funds.

³⁶ "Final Declaration of the United Arab Emirates Ministry of Foreign Affairs high-level Counter-Piracy Conference 2011, co-organised with global ports operator DP World." Dubai World Media Center, 19 April 2011. Archived at <http://www.dubaiworldmedia.net/2011/04/92391502.html>. Accessed 05-01-11.

public-private partnership³⁷. Governments are still financially strapped by economic woes at home, though, leading IFW to speculate that the shipping industry will be pressured to make up the lion's share of the shortfall³⁸.

VI. Command Structure

One of the principal questions surrounding private-navy projects like the CEP is what sort of command structure the 150-strong security team will have with respect to the other stakeholders in the region. For example, to what degree will this "private navy" be answerable to governments of ships that they accidentally damage? Under what circumstances would CEP forces take orders from regular warships and task force commanders? How much authority would shippers have over the security forces they pay for? International law is reasonably clear in supporting authority of masters over armed guards that might be serving onboard their own ships, but it becomes hazier when questions arise such as whether a ship owner could forbid defensive action that might, for example, jeopardize a vessel carrying toxic chemicals. JLT has not publicly disclosed how the command structure will work, but it's considered reasonably likely that the CEP patrol boat operations will be directly controlled by company officials in-theater, in consultation with the international task forces there.

VII. Tactical Issues

³⁷ "Huge Cash Bonus for Anti-Piracy Campaign." International Freighting Weekly, 19 April 2011. Archived at <http://www.ifw-net.com/freightpubs/ifw/article.htm?artid=20017866293&src=rss>. Accessed 05-01-11.

³⁸ *ibid.*

The basic tactical challenge faced by a private naval force would be achieving adequate effective coverage of the area. Today, Somali pirates are not only based in major pirate ports like Eyl and Harardhere, but in smaller havens across the rugged coastlines of Galmudug and Puntland³⁹. Pirate motherships, often themselves captured ships converted for the purpose, extend their range far out to sea, where they can discharge fast skiffs that take merchant vessels by surprise. The threatened area has ballooned to 1.1 million sq. miles, while JLT's proposed 20-boat force could even under the most optimistic assumptions only patrol some 37,000 sq. miles of ocean at a time⁴⁰. History suggests that the advantages of asymmetry enjoyed by the pirates means that the resources needed to completely secure the entire 1.1 million sq. miles would exceed the economic losses that would be thereby prevented.

Of course, maintaining a constant passive patrol over an area of ocean that large is not practicable. Instead, present consensus favors hunting pirate ships and denying them their shore bases, while escorting ships transiting the most dangerous areas. Allowing CEP forces to conduct escort missions would presumably free regular warships for more aggressive action, just as the introduction of numerous and cheap convoy escorts during the Second World War freed warships to form the hunter-killer groups that ultimately neutralized the U-boat threat.⁴¹ Given a similar strategy, the effectiveness of the CEP will depend on how efficiently limited resources can be prioritized — to the most dangerous areas, to the most vulnerable and valuable ships, and to the

³⁹ “Somali Pirates Quit one Puntland Base, Head South.” Reuters, 2 February 2011. Archived at <http://www.reuters.com/article/2011/02/02/us-somalia-piracy-idUSTRE7114WF20110202>. Accessed 05-01-11.

⁴⁰ Assuming near-perfect 24-mile visibility. Radar cannot readily identify pirates.

⁴¹ Large and irregular capital ship-escorted convoys on the model of those during the World Wars are no longer plausible due to the massive costs of delaying modern crude and bulk carriers.

places hardest for regular military assets to cover. Much of that will hinge on the willingness of shippers to sign on for protection.

VIII. Legality and Rules of Engagement

Perhaps the thorniest tactical problem concerns the rules of engagement that will apply to private anti-piracy forces. These concerns are tightly bound up with the underlying questions of legality which have long hobbled efforts to deploy them in the first place.

Whereas the battlefields of Iraq and Afghanistan are clearly under the jurisdiction of their respective governments, most envisaged anti-piracy operations will take place on the high seas. International law has traditionally declared pirates *hostis humani generis* (“enemy of human kind”), liable to be hunted and killed with legal impunity by anyone⁴². Piracy, indeed, is considered the paradigmatic example of universal jurisdiction in international law. Yet the mere concept of universal jurisdiction does little to solve the practical problem at hand. Because no one seriously proposes a policy of “no quarter,” any force likely to capture pirates must have some framework in place for how to legally dispose of them. Unfortunately, the idea of *hostis humani generis* evolved at a time when summary execution of outlaws was condoned, and therefore offers no instruction. The CEP might turn over its prisoners to its nation-state backers, but these in turn would face quandaries over how to administer justice.

In late 2010, the United States concluded its first modern piracy trial, with a federal jury convicting five Somalis on charges of “piracy, attack to plunder a vessel, assault and related

⁴² Schumaker, W. and Longsdorf, G.F. (1922). *The Cyclopedic Law Dictionary: With an Exhaustive Collection of Legal Maxims*. Callaghan. Volume 1, 769.

charges.”⁴³ Yet those pirates had attacked the USS Nicholas, an American warship. Another batch awaiting trial killed four American citizens on an American yacht. Others tried in Germany had hijacked the German-flagged MV Taipan.⁴⁴ While it’s not disputed that a nation’s courts have jurisdiction over pirates who attack vessels sailing under that nation’s own flag, its less clear how private anti-piracy forces would transmit jurisdiction. Would the UK have priority to dispose of captured pirates by virtue of the Convoy Escort Programme being organized in London? Or would the flag state of the ships it will protect? Or would both defer to naval vessels that arrive on the scene later? Developing rigorous and transparent guidelines will be of great importance to the success of the project.

The other ready standard course of action would be trying pirates in their home countries, or the countries in whose territorial waters they carry out attacks. Kenya had an agreement with the European Union to host trials of Somali pirates starting in February of 2009, but canceled the deal in October 2010, and has since refused to receive prisoners.⁴⁵ Somalia’s own government is too dysfunctional to reliably deliver justice, and the country has such a poor human rights record that Britain’s Foreign Office warned the Royal Navy in 2008 not to detain pirates at all — for fear that they could claim asylum in the UK.⁴⁶

⁴³ “First Piracy Trial in 200 Years Opens in Norfolk Court.” *The Virginian-Pilot*, 10 November 2010. Archived at <http://hamptonroads.com/2010/11/first-piracy-trial-200-years-opens-norfolk-court>. Accessed 04-26-11.

⁴⁴ “Somalis on Trial in Germany’s First Modern Piracy Case.” Reuters, 22 November 2010. Archived at <http://af.reuters.com/article/topNews/idAFJJOE6AL0I720101122>. Accessed 05-01-11.

⁴⁵ “Kenya Refuses to Host Somali Pirate Trials.” UPI International, 1 October 2010. Archived at http://www.upi.com/Top_News/World-News/2010/10/01/Kenya-refuses-to-host-Somali-pirate-trials/UPI-33381285973187/. Accessed 05-01-11.

⁴⁶ “Ignore Pirates or Face Asylum Claims, UK Says.” Newser, 13 April 2008. Archived at <http://www.newser.com/story/24347/ignore-pirates-or-face-asylum-claims-uk-says.html>. Accessed 05-01-11.

The International Criminal Court is the most rigorous truly international judicial apparatus for trying individuals, but is limited in scope and mission to “genocide; crimes against humanity; war crimes; the crime of aggression.”⁴⁷ None of these offer possibility of trying large numbers of low-level pirates. Alternatively, piracy could be prosecuted through a special international court formed strictly for that purpose. The idea has been proposed several times, but has not gained significant traction. Yet even if such an entity were created, it would be unlikely to administer its own prisons, and would still have to rely on member states to incarcerate convicted pirates.

The already considerable legal murk will only be compounded by the entry of non-state security forces. The substantial controversy surrounding the use of security contractors in Afghanistan and Iraq, and the ongoing uncertainty over their standing in international law, have made governments, insurers and shippers highly cautious. It’s not clear, for example, who would bear the responsibility if armed guards sunk a harmless fishing skiff in error, or if contractors on a privately-run warship committed some sort of deliberate atrocity. What if a botched defense leads to crew members’ loss of life? What if rash action by security guards leads to the sinking of a tanker and resulting ecological catastrophe? Establishing a successful private anti-piracy force will necessitate answering these questions within a clear legal framework.

The ultimate shape of that framework will determine the rules of engagement available to anti-piracy contractors. If the organizers of the CEP are able to agree upon a model that provides for the disposition of prisoners and sharply limits private forces’ liability, they may be able to engage pirate vessels that they encounter in the course of their duties. If not, CEP boats will likely be relegated to strictly passive/reactive roles. Namely, they would be limited to purely

⁴⁷ Article V, Rome Statute of the International Criminal Court. Archived at <http://untreaty.un.org/cod/icc/statute/romefra.htm>. Accessed 05-01-11.

defensive actions in the course of running close escort duty. In the event of a pirate attack, they would be restricted to fending off the immediate threat until regular naval and air forces could arrive on the scene, and would not have the authority to actually process captured pirates. Further, different evidentiary requirements would strongly influence private forces' rules of engagement. An RoE set geared toward facilitating mass detention would give them more latitude to engage and capture pirates encountered on the open sea — who are perhaps not actively engaged in a hijacking. Rules meant to facilitate convictions in American federal courts, meanwhile, would restrict them significantly. Courts in Norfolk or Hamburg or the Hague are loath to wade into hearsay claims between pirates and security contractors, and in a region where both pirates and non-pirates are often armed young men in baggy clothes high on khat, there is real concern over how to distinguish the two. At present, at least, proper provisions are not in place for engaging — whether by private forces or national militaries — suspected pirates not caught in the act of attacking a ship. It is likely, then, that the CEP will begin life narrowly restricted to defending ships once pirates have initiated an engagement. Details of initial rules of engagement orders have not yet been made public.

IX. Analysis of Costs and Benefits

Considering the fairly minimal costs of getting the CEP or a scheme like it up and running, and the skyrocketing size of ransom payments, it seems to be a very sound plan. There are, of course, risks of legal liability in case of mishaps, but if the CEP at least proceeds with very clear legal guidelines in place, it can minimize uncertainty for all parties involved.

As designed, the Convoy Escort Programme also stands to ameliorate some of the risks previously associated with bringing security contractors into the situation. The massive global

media coverage surrounding the Maersk Alabama hijacking brought calls from many quarters to staff merchant ships off the Horn of Africa with armed security guards. Opinions in the popular press differed wildly on what armament would be sufficient for the purpose, with proposals ranging from small arms for the crew all the way through surface-to-surface missiles. Yet industry experts and naval analysts were quick to caution that such measures could do more harm than good. There was a risk, they said, borne out by the history of German raiders in those same waters, that fear of armed resistance would only encourage pirates to be more violent. During the first several years of the outbreak, there was a sense in maritime circles that Somali pirates would strenuously avoid violence if they thought that by “playing nicely” they could secure a fat ransom and a clean getaway. Meanwhile, shippers ordered their crews not to resist during hijackings, understanding that seven-figure ransoms were not worth risking the lives of the crew and hull and cargo worth tens or hundreds of millions of dollars. This status quo, while far from ideal, was tolerable to both sides.

Yet JLT says that the killing of several mariners over the last three years changed its mind. The increased violence culminated in February of 2011, when four civilians on the American yacht *Quest* were murdered by the pirates who had hijacked it.⁴⁸ Analysts described the *Quest* killings as a game-changing event. Where previously mariners had been hesitant to defend themselves for fear of provoking pirates’ aggression, they now see that passivity offers no assurance of safety.

⁴⁸ “Killers, Cowards, Damned Liars: Navy Deny Pirates' Claim that U.S. Warship Started Firefight that Killed Four Innocent American Sailors.” *The Daily Mail*, 23 February 2011. Archived at <http://www.dailymail.co.uk/news/article-1359000/Somali-pirates-killed-4-American-hostages-hijacked-yacht-claim-US-Navy-fired-first.html#ixzz1NCpNUFdT>. Accessed 05-01-11.

Still, emplacing heavy weapons on ships to repel pirates risks firefights that could effectively destroy a vessel even if the pirates are driven off. Particularly in the case of the supertankers and chemical carriers that regularly transit the Gulf of Aden, this could spell disaster. An errant rocket-propelled grenade or shoulder-launched missile could not only destroy the ship, but potentially spill millions of barrels of crude oil into vital fishing waters.

Concentrating private security forces on separate patrol boats may alleviate some of this risk. Rather than violently assaulting all merchant ships for fear that they may be heavily defended, Somali pirates could clearly see a heavily-armed patrol boat sailing nearby, and would be unlikely to engage. This would have the unintended effect of increasing risk to ships not protected under the CEP, as pirates seek out “softer” targets — but that would only increase incentive for shipowners to join the plan. Admittedly, though, it is unlikely that deterrence can fully suppress Somali pirates. In a country where average annual income hovers around \$600⁴⁹, it will always be easy for pirate captains to find men willing to risk death for multimillion-dollar payouts. Already, the ransom money flowing into the Puntland has allowed pirates to buy newer and more sophisticated weapons and equipment. Inevitably, they will begin to engage patrol boats as desperation rises. But at least the personnel of the CEP will have a fighting chance. Rather than being cowed into submission and then murdered as those aboard the *Quest* were, they will be able to resist the pirates on fair terms. When it comes to reducing the dread and uncertainty caused by piracy in these volatile waters, this may be very significant indeed.

X. Reasons for Caution

⁴⁹ “Somali Pirates Are Getting Rich: A Look At The Profit Margins.” *Time Magazine*, 15 April 2009. Viewable online at <http://www.time.com/time/business/article/0,8599,1891386,00.html>. Accessed 05-01-11.

In addition to the concerns mentioned previously, it is important to be clear that several reasons for caution should be weighed carefully in bringing any private navy scheme into action. In the wake of several highly-publicized incidents in Iraq with security contractors, questions remain about the discipline and training of those hired to man the CEP's ships, and about the propriety of effectively allowing quasi-state actors to carry out what critics characterize as extrajudicial killings. Additionally, it is important not to overestimate the capabilities of armed patrol boats. Pirates will still have the element of surprise, and while merchant ships are brightly painted, clearly identified and longer than the Chrysler Building, CEP security forces will be forced to constantly evaluate passing fishermen for some subtle sign of criminality. Mistakes will inevitably be made. Innocent Somalis may be killed by trigger-happy guards, while some ships will be hijacked because their protectors were too cautious in trying to prevent an error.

Further, the relative isolation of a small team of guards on a patrol boat would leave them with far less room for circumspection. While regular warships are far too large to be attacked directly, and are able to monitor a situation while overwhelming forces mobilize and converge, the crew of a CEP boat would have to make snap decisions that might not ultimately be in the best interests of the ship they are protecting. Lacking the luxury to conduct a surgical strike on hijackers in a moment of weakness, CEP guards will be on the front line of the conflict, and they will be ever on the defensive. Under those conditions, ill-conceived action is undoubtedly more likely. When dozens of lives, a 1,000-foot tanker and millions of barrels of crude oil hang in the balance, skeptics suggest that it may be best to leave combat to the military.

XI. Prospects and Conclusion

Provided that the last legal questions can be resolved, it is likely that the Convoy Escort Programme will be active in the Gulf of Aden by summer. This will amount to the first true “private navy” initiative in the region, after several false starts and limited forays. If the CEP meets with success in the pirate-infested Gulf of Aden — the most vital waterway threatened by the Somali pirates — it may contemplate expansion into other areas around the Horn. As JLT’s Sean Woollerson told InterManager News, “I see the CEP as a self-destructing company. Maybe in many years’ time we will no longer be needed and could donate the tonnage to a Somali coastguard.”⁵⁰ Whether Woollerson is right about the company’s fate at sea likely depends on political developments on land. There is a growing consensus — even among the CEP’s backers — that Somali piracy will persist until the rule of law can be restored along its impoverished and anarchic coastline. Whether that will require a large multinational military presence like the one that arrived two decades ago is beyond the scope of this paper. But if an efficient and legitimate private naval force can be incorporated into the war against piracy off the Horn of Africa, it stands to contribute to this worthy effort far in excess of the costs to create it.

⁵⁰ See: “‘Private Navy’ Is Close to Kick-Off”