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FIFTY-SIXTH SESSION

The role of the European Union in combating piracy

REPORT

submitted on behalf of the Defence Committee
by Kurt Bodewig (Germany, Socialist Group), Aristotelis Pavlidis (Greece, Federated Group)
and Tarmo Kõuts (Estonia, Federated Group), Rapporteurs

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Report transmitted to: the President of the Council of WEU; the President of the Council of the European Union; the WEU Secretary-General/EU High Representative for the Common Foreign and Security Policy; the President of the European Commission; the EU Commissioner for institutional relations and communication strategy; the Presidents/Speakers and the Chairmen of the Foreign Affairs, Defence and European Affairs Committees of the 39 national parliaments represented in the Assembly; the Presidents of the Parliamentary Assembly of the Council of Europe, the NATO Parliamentary Assembly, the OSCE Parliamentary Assembly, the Baltic Assembly, the Nordic Council, the Parliamentary Assembly of the Black Sea Economic Cooperation, the CIS Parliamentary Assembly; the President of the European Parliament; the Secretaries General of the Parliamentary Assemblies of the Council of Europe, NATO and the OSCE.

The role of the European Union in combating piracy

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by Kurt Bodewig (Germany, Socialist Group), Aristotelis Pavlidis (Greece, Federated Group) and
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MEMBERS OF THE COMMITTEE

¹ Adopted by the Committee on 6 May 2009.

RECOMMENDATION 840²

on the role of the European Union in combating piracy

The Assembly,

- (i) Noting the increase in acts of piracy and armed robbery in the Gulf of Aden and off the coast of Somalia in 2008 and the danger they represent for food relief being delivered to Somalia under the World Food Programme and for international trade;
- (ii) Conscious that the weakness of the Somali state prevents it from taking effective measures to combat piracy;
- (iii) Noting that there is a legal vacuum at international level with regard to bringing pirates to justice;
- (iv) Welcoming the fact that the international community as a whole has become aware of the scale of the problem, making it possible to establish a legal framework for action in cooperation with Somalia and Kenya and to organise maritime operations to combat piracy;
- (v) Welcoming not only the numerous naval operations involving Task Forces 150 and 151 and a number of third countries such as China, Russia, Japan and India, but also NATO's maritime patrol and counter-piracy activities in this zone;
- (vi) Welcoming the success of the European Union naval operation (EUNAVFOR Somalia – Atalanta) which has made a real contribution to the fight against piracy:
 - by organising patrols and escorts in the Gulf of Aden;
 - by installing representatives of shipowners at the Northwood Operation Headquarters;
 - by creating an information website enabling warships to share information in real time;
- (vii) Regretting, however, the lack of interoperability among those involved in action at sea;
- (viii) Considering the need for a comprehensive approach to the sharing of information among all such players,

RECOMMENDS THAT THE COUNCIL INVITE THE WEU NATIONS AS MEMBERS OF THE EUROPEAN UNION TO

1. Ensure coordination of all naval forces through the establishment of a permanent planning conference of all forces active in counter-piracy operations in the region;
2. Improve the systems for communicating with third countries participating in operations and the use of the website for real-time information exchange set up by the Operation Headquarters in Northwood;
3. Increase considerably the number of onboard protection teams (OPT) aboard ships in transit;
4. Equip one of the frigates of the task force with a surgical unit;
5. Strengthen maritime air patrol capability by using other bases, with the support of other countries concerned by counter-piracy activities;
6. Provide ongoing support for the conduct of the maritime operations;
7. Set up, in cooperation with the EU Council Secretariat and the EU Directorate-General for Justice, Freedom and Security, a legal study group to enable member states to consider enacting legislation that can strengthen the ability of all EU states to prosecute captured pirates;
8. Set up a legal team to be seconded to Kenya with a view to assisting the prosecution process and welcome the Kenyan Government taking on this responsibility;

² Adopted by the Assembly on 4 June 2009 at the 4th sitting.

9. Support the action being taken by the Commission to ensure that Somalia and the coastal states have access to judicial institutions competent to try pirates who are apprehended, and to a coast guard service;
10. Participate in drawing up fishing agreements and in monitoring Somalia's exclusive economic zone in order to do away with illegal fishing;
11. Participate in the reconciliation process in order to establish the rule of law in Somalia;
12. Invite those countries participating in the counter-piracy operations that do not have the legal capacity to bring presumed pirates to justice to sign extradition agreements with the other member states;
13. Express their firm willingness to extend EUNAVFOR Somalia – Operation Atalanta's mandate (initially foreseen from 13 December 2008 to 13 December 2009) in accordance with the relevant United Nations Security Council resolutions, should the circumstances so require.

EXPLANATORY MEMORANDUM

submitted by Kurt Bodewig (Germany, Socialist Group), Aristotelis Pavlidis (Greece, Federated Group) and Tarmo Kõuts (Estonia, Federated Group), Rapporteurs

I. State of play

1. The main zones affected by maritime piracy

1. In 2008 piracy took on significant proportions in five regions of the world: the Caribbean, the Strait of Malacca (between Indonesia and Malaysia), the Red Sea, the Gulf of Guinea, the Gulf of Aden and off the coast of Somalia. Since 2007, things had considerably calmed down in the Caribbean and off the coasts of Peru and Ecuador. The same had been true of the Strait of Malacca following the creation in 2004 of coordinated police patrols by Indonesia, Malaysia and Singapore under the codename “Malsindo”. Now however, piracy, fed by the political instability and dire state of the economy in Somalia, is making the Gulf of Aden and the waters off the Somali coast dangerous for shipping and constitutes a major threat to international trade.

2. Somalia and the Gulf of Aden

2. The Gulf of Aden is a key point of passage for shipping between Europe and Asia. This area with its two million square kilometres and traffic in 2007 of 14.6 million teu,³ or 16 000 ships per year, is the world’s second busiest shipping route.

3. It is the route taken each day by merchant ships and World Food Programme (WFP) vessels carrying food supplies for some two million Somalis, travelling in convoys from Mombasa to Mogadishu. This shipping lane is also used by oil tankers: half the world’s oil supplies transit through the Gulf of Aden.

4. Attacks against ships in the waters off the Somali coast have become a routine source of income for inhabitants: the ransoms being demanded are huge and the risks are minimal. According to International Maritime Bureau (IMB) data, pirate attacks in this region increased by 75% in 2008. In the waters off the 3 700 km Somali coast there were 135 attacks against ships, with 33 hijackings.

5. Following a period of respite when Somalia was under the Islamic Courts regime, in 2007-2008 the pirates began to transfer their operations from the port of Mogadishu and the south of Somalia towards the Gulf of Aden, where the denser traffic offered much richer pickings. Effective government in Somalia ceased as of 1991 when the bloody battle for power began. The government has no control over the state and international aid to those in need is being blocked, with humanitarian convoys being attacked and the goods stolen. The African Union Mission to Somalia (AMISOM) is permanently under attack and is unable to control the situation. Unless this internal crisis is resolved it will not be possible to create the administrative structures in Somalia that will allow piracy to be effectively combated. The international community must continue its coordinated efforts to bring about a peace process in Somalia; these include the implementation of the Djibouti agreement and a strengthening of the Somali police forces. The African Union has a major role to play with the support of UN peacekeeping forces.

6. In 2008 there was a spate of attacks, including the seizure of the three-masted French ship *Le Ponant* and a rocket assault on the Japanese giant tanker *Takayama*. In September alone there were three incidents: the capture of the French yacht *Le Carré d’As*, the attempted assault on the French tuna boat *Le Drennec* 420 nautical miles off the Somali coast and, finally, the hijacking of the Ukrainian ship *Faina* with its unusual cargo of 33 T-72 tanks as well as air defence systems and rocket launchers. The ship, which had been held for five months, was released at the beginning of February after a ransom of 3.2 million dollars was paid. The pirates gave another demonstration of their temerity with the capture in November of the 330 metre-long *Sirius Star* carrying two million barrels (100 million dollars worth) of oil, 450 nautical miles off the Kenyan coast. The vessel was released in January 2009 in exchange for a three-million dollar ransom.

³ teu (or TEU) = twenty foot equivalent unit, corresponding to the size of a standard container.

7. Despite the fact that the naval forces of a number of countries are deployed in the area, the pirates have stepped up their activities dramatically since April 2009. Within the space of two weeks, an Italian tug and several ships (British, Taiwanese, German and Yemeni) were captured by pirates who appear to be increasingly determined. The French yacht *Le Tanit*, bound for Zanzibar and captured off Puntland, and the American cargo ship the *Maersk-Alabama*, attacked 270 nautical miles off the Somali coast and carrying WFP cargo, were both rescued “by force” in operations mounted by the French and American navies respectively. Three out of four pirates were caught in the French operation and have been sent to France to stand trial.

3. *The pirates’ origins and tactics*

(a) Origins

8. Most of the pirates operating in the Gulf of Aden are based in the semi-autonomous region of Puntland in Somalia, more precisely the ports of Harardheere, Hobyo and Eyl. A smaller number are from Yemen. Puntland, which has sunk into chaos due to the absence of a strong sovereign state, is one of Somalia’s most poverty-stricken regions. Somali pirates are for the most part young stockbreeders having left their community in order to hire themselves out as mercenaries to the highest bidder. However, they use ridiculous pretexts: they like to present themselves as coast guards defending the integrity of their country’s territorial waters in danger of being polluted by toxic waste and plundered by unlicensed foreign operators fishing illegally in Somalia’s exclusive economic zone⁴ (EEZ, defined by the 1982 United Nations Convention on the Law of the Sea (UNCLOS) as the maritime zone extending 200 nautical miles (370 km) from the coast in which the coastal state has “sovereign rights”). Somalia, which is incapable of asserting its sovereignty and does not have a coast guard fleet, is unable to stem these illegal fishing activities which, according to a UN estimate taken up by Greenpeace, are costing Somalia 300 million dollars each year in lost revenues. A pirate by the name of Yassim explained the situation in an interview with Reuters: “No-one was monitoring the sea and we couldn’t fish properly, because the ships which trawl the Somali coasts illegally would destroy our small boats and equipment. That is what forced us to become pirates”.

9. Moreover, the country’s fishing industry is in a state of collapse. The December 2004 tsunami destroyed the boats and equipment that had enabled 16 000 families to make their living from the sea.

(b) Tactics

10. Piracy is endemic along the 3 700 kilometre Somali coast but the scale on which it is now happening no longer bears any comparison to the 1980s, when it consisted of simple fishermen robbing the crews of foreign boats they accused of fishing illegally in Somali waters.

11. The pirates use small skiffs. Although these are fast and manoeuvrable their range of action is small, which has led to the use of “mother ships” to place the skiffs in the water at much greater distances from the coast. The mother ships are generally trawlers captured off the coast and converted into bases for further attacks. It has recently been proven that the pirates hide behind boats carrying illegal migrants, making it even more difficult for the forces on the spot to intercept them.

12. Some of these vessels are equipped with sophisticated electronic devices such as GPS systems and satellite phones, allowing them to plug into an international network providing information from the ports of Europe, Asia and the Gulf. All this has enabled the pirates to increase their range of action up to 500 nautical miles, rendering the recommendation to ships to stay at least 200 instead of 50 nautical miles away from the coast ineffective. The pirates themselves are equipped with automatic weapons, AK-47 assault rifles, Kalashnikovs and RPG-7 portable rocket-launchers easily available in Somalia.

13. The attacks, carried out at high speed, are highly effective against slow vessels moving at less than 15 knots and with sides less than five metres high, with small crews and inadequate watch-

⁴ Roger Middleton, “Piracy in Somalia: Threatening global trade, feeding local wars”, Chatham House Briefing Paper, October 2008.

keeping. To give an example, only 16 minutes after having been sighted, pirates had already boarded the *Sirius Star* as it sailed on the Indian Ocean.

14. In reality, according to NATO data, piracy has become a well-organised criminal activity: in the south and the north of the country pirate groups are operating together under a centralised command. Somalia's clan system supports piracy: many officials, while publicly claiming to combat piracy, are in fact entering into agreements with the pirates.

15. According to interviews given by two Estonian sailors following their rescue from captivity aboard a ship hijacked by pirates (one after 40 days and the other after 71 days), although the pirates may have highly modern equipment and arms, they are sometimes on drugs or simply totally uneducated and unable to control their weapons. The sailors described the days spent in captivity as a nightmare and felt that if ship crews included three or four armed men for protection, this would substantially improve the situation in the waters off the Somali coast, the Gulf of Aden and the Strait of Malacca. The two men were firmly convinced of the need to eradicate piracy. They also explained that they had to choose their words carefully because the Somali pirates had a coordination centre and could follow the media and the interviews given by rescued sailors.

16. Piracy these days is taking on organised crime proportions, with:

- nine separate and competing pirate gangs;
- hostages being held either on board the ships or in the little ports of Eyl, Hobyo or Alula pending the payment of ransoms which are getting higher all the time: "A few years ago ransoms were in the tens to hundreds of thousands of dollars range. So far in 2008 they have hovered between half a million and two million dollars, although recent reports indicate that demands have again shot up".⁵ A total of some 18 to 30 million dollars by way of ransoms was paid in 2008.⁶ The proceeds are shared out according to fixed rules: 30% goes to the investors, 50% to the pirates and 5% to the families of deceased or captured pirates.⁷
- some pirates now wealthy enough to hire others to do the work, allowing them to reap the profits without exposing themselves to the risks. They are investing in the purchase of weapons, boats and communications equipment, thus feeding a thriving business. The pirate Yassim describes himself as a financier: "I have employees doing the business for me now (...) I get my money and I don't have to leave Eyl". Thus there are organised structures governed by a code of honour. Investors put up between 5 000 and 10 000 dollars at the start of an operation and sign a contract with hired men. The pirates are members of the Darod clan and are assisted on land by Hawiye. Organising such an operation involves numerous professionals, from interpreters and tradesmen to the accountants who keep a ledger and draft the agreement with the investors acknowledging the debt for each operation.

17. Pirates in the Gulf of Aden, then, are becoming more and more professional thanks to the use of increasingly sophisticated equipment and efficient organisational structures. They appear to be becoming more aggressive, with the acquisition of MANPADS (Man Portable Air Defence Systems) with which to threaten planes and helicopters flying at low altitude.

4. Reaction of the western states

(a) Isolated operations by certain countries

18. Among the states engaged in combating piracy in this maritime zone, two in particular stand out for their ambition to launch not just national but also multinational operations in order to eradicate this problem.

⁵ Chatham House Briefing Paper, October 2008.

⁶ *Ibid.*

⁷ Le Monde, 5 December 2008.

The United States

19. US Navy forces were deployed in the Gulf of Aden and Indian Ocean with the launch on 7 October 2002 of Operation Enduring Freedom-Horn of Africa (OEF-HOA) as part of the wider counter-terrorism operation, Enduring Freedom, set up the year before in the wake of the 11 September attacks. OEF-HOA is being conducted jointly with the naval forces of a number of countries (France, Spain, Germany, the United Kingdom, etc.). Its naval component, Task Force 150 (TF 150),⁸ operates under the command of the US Fifth Fleet. At the beginning of January 2009 the US set up a specific naval task force (TF 151) to carry out counter-piracy operations, with its command based in Bahrain.

20. In April 2009, following attacks on two American cargo ships carrying humanitarian food supplies, US Secretary of State Hillary Clinton announced the introduction of a four-point plan to combat piracy. This involved firstly sending US Special Envoy John Yates to the international conference on peacekeeping and development in Somalia held in Brussels in the course of that month. Secondly, Mrs Clinton has called for immediate talks within the International Contact Group on Piracy in order to develop a wider multinational response. Thirdly, a team of diplomats has been given the task of starting talks with representatives of the Somali Transitional Federal Government and the regional leaders in Puntland. Fourthly, the plan advocates close coordination between governments, shipping lines and insurance companies regarding on-board self-protection measures.

France

21. France is one of the countries most actively engaged in counter-piracy operations: for several decades now it has maintained a naval presence in the Indian Ocean (ALINDIEN) and is also part of the TF 150 multinational task force. In December 2001, it introduced a system of voluntary naval control of shipping (VNCS) protocols (protocole de contrôle naval volontaire, CNV) on cooperation between the French Navy and shipowners. Any vessel having signed such a protocol and transiting through the zone covered by it, from the Red Sea to the Strait of Malacca, receives security information and advice on dealing with any threats. The shipowners undertake to communicate their position every six or 12 hours and to report any suspicious sightings. It may well have been thanks to such "voluntary naval control" that the pirates' attempts to board the tuna boat *Le Drennec* were thwarted.

22. Military intervention is used to rescue French ships captured by pirates. The *Le Ponant* rescue operation (Operation Thalatine) is a good example.

23. Following an appeal by the World Food Programme (WFP) and International Maritime Organisation (IMO), France, together with Denmark, the Netherlands and Canada, launched a one-off mission codenamed Operation Alcyon (from November 2007 to January 2008) for the escort and protection of WFP ships.

24. Four French Navy vessels are positioned in the Gulf and there have been some 200 requests for escorts since 2008.

(b) The will to cooperate since 2008

25. Pirate attacks have become increasingly frequent and sophisticated since the beginning of 2008, posing a growing threat to international shipping. The national authorities, alarmed by the surge in attacks, have been obliged to seek a cooperative solution. Estonia, like all other countries whose sailors have been the victims of attacks by Somali pirates and spent long periods aboard hijacked ships, is seriously concerned about the current situation. It supports the action being taken by the UN, the EU and NATO to combat piracy by more powerful means and to establish a legal framework enabling the seizure of pirate ships. It is intolerable that it should be impossible to arrest pirates or that they should have to be released for want of the appropriate legislation.

⁸ See Chapter IV.

(c) Role of the International Maritime Organisation (IMO)

26. The IMO was the first specialised UN body to draw the attention of the UN Security Council to acts of piracy off the Somali coast in 2005, leading in 2008 to the adoption of Resolutions 1816 and 1838.

27. The IMO alerts countries and shipowners to the procedures to be followed in the event of an attack. In 2007, worried about the consequences of acts of piracy on world trade and food aid deliveries the International Maritime Organisation and the World Food Programme called for a mobilisation of the international community to coordinate counter-piracy operations off the Somali coast. In November of the same year, it adopted resolution A1002(25) on piracy and armed robbery against ships in waters off the coast of Somalia, in which it called on the Transitional Federal Government of Somalia to take the necessary measures to prevent and suppress acts of piracy and deprive pirates of the possibility of using its coastline as a safe haven from which to launch their operations. It requested that the government take appropriate action to ensure the prompt release of all ships seized by pirates and brought into its territorial waters, and that it consent to the use of its territorial waters and airspace by warships or military aircraft escorting World Food Programme ships in the framework of international operations.

28. In 2008 the IMO set about making the UN Security Council aware of the problem by organising a series of consultations, held between January and May 2008 among its members, and diplomatic missions to Security Council countries. Additionally, when Resolution 1844 was adopted by the Security Council in November 2008, the IMO reiterated its concerns over the security of fishing vessels, crews and passengers sailing on ships in the area, and of food aid deliveries.

29. In January 2009, The IMO chaired a regional meeting in Djibouti, attended by 17 of the 21 countries of the region. A code of conduct was adopted whereby they agreed to establish closer regional cooperation, in a manner consistent with international law, with a view to the arrest and prosecution of presumed pirates; the seizure of suspect ships (mother ships and skiffs), the rescue of vessels and their crews and the conduct of shared operations between the signatories and with other naval forces on the scene. This agreement provides for three information centres (in Mombasa, Dar es Salam and Sanaa) to be set up and for a training centre for officials in charge of counter-piracy operations to be opened in Djibouti. The code of conduct also calls on states to take appropriate legislative measures nationally to facilitate the arrest of pirates and bring them to trial.

(d) UN Resolutions

30. On 15 May 2008, the UN Security Council adopted Resolution 1814 reiterating its support for escorts of WFP vessels to be provided by nations or regional organisations.

31. On 2 June, at the initiative of the United States and France, it adopted Resolution 1816 aimed at bolstering the naval forces by giving their warships, for an initial period of six months, the right of hot pursuit of pirates into Somali territorial waters.

32. These two resolutions adopted following the seizure of *Le Ponant* completed the legal framework for the fight against piracy by providing a legal basis for national and multinational operations in this zone.

33. Resolution 1838 adopted on 7 October 2008 authorised the deployment of warships and airborne capabilities to combat piracy off the Somali coast and extended for a further six months the decisions taken under previous resolutions on the Maritime Security Patrol Area (MSPA)⁹ initiative establishing a corridor under military protection through which any ship could transit.

34. In parallel, on 14 January 2009, a first meeting of the Contact Group on Somali Piracy was held on United Nations premises in order to discuss coordination of the action of 24 states.

⁹ See Appendix I.

(e) Role of the NATO Task Force vessels

35. Pursuant to a request on 25 September 2008 by the UN Secretary-General and to UN Security Council Resolutions 1814, 1816 and 1838, NATO agreed to participate in the escort of WFP ships with the launch of Operation Allied Provider (October to December 2008). It also undertook to patrol Somali waters in order to prevent acts of piracy in coordination with other international players such as the European Union, which took over operations on 10 December 2008. At the end of March, the Alliance resumed operations off the Horn of Africa (Allied Protector). Five ships of the Standing NATO Maritime Group 1 (SNMG1) and two German vessels en route for deployment in south-east Asia took part in the counter-piracy operation.

(f) European Union action

36. At the initiative of France and Spain and in agreement with the authorities in Djibouti, on 19 September 2008 the EU set up a coordination cell for the fight against piracy (EU NAVCO) based in Brussels with the main objective of coordinating the resources made available by the member states for the escort of vulnerable ships.

37. Then, on 10 November 2008, with the adoption of Council Joint Action 2008/851/CFSP, the activities of EU NAVCO were reorganised as part of an operation called EU NAVFOR Somalia-Operation Atalanta, launched off the Somali coast for a period of one year, with the possibility of an extension. This first European naval mission has its headquarters at Northwood in the United Kingdom. Its forces, consisting on average of four or five frigates and two naval patrol aircraft, operate up to 500 nautical miles off the coasts of Somalia and neighbouring countries.

38. The mission objectives are to:

- protect the World Food Programme (WFP) ships, in particular by placing armed military personnel on board;
- protect merchant shipping;
- monitor the zones of the Gulf of Aden and Somalia;
- intervene against acts of piracy, using force if necessary;
- arrest, detain or transfer persons having committed acts of piracy in order to bring them to justice;
- liaise with other naval forces on the spot.

Ongoing operations are discussed further in Chapter IV.

39. In April 2009, the European Union launched an action to bolster Somalia's fledgling security forces by organising a donors' conference in Brussels, bringing together representatives from the United Nations, the African Union, Somalia and the EU Commission. The international community pledged 165 million euros to promote internal stability in Somalia by providing funding for an African Union peacekeeping force (AMISOM), a police force and the Somali security forces. The European Commission remains the most important donor of aid to Somalia, with a contribution of 72 million euros. 60 million euros are to be allocated to AMISOM and 12 million used to finance the police. Most EU member states have also contributed individually, adding a further 15 million euros to the total. France has chosen to train 500 Somali soldiers in Djibouti for an army founded by the Arab League.

(g) Other countries

40. China, Russia, India, Japan, Pakistan, Malaysia, Turkey and others are also contributing to counter-piracy operations in the Gulf of Aden, on the basis of the resolutions adopted by the United Nations. Some of these countries, like Pakistan, Japan and Turkey, have joined Task Force 151. Others such as Russia, China and India have remained independent of it while at the same time coordinating their action with that of the European forces and the Task Force.

41. Piracy in the Gulf of Aden and off the coast of Somalia has an impact on international trade: companies are losing money due to delayed deliveries and the payment of ransoms for captured ships. The cost of insurance premiums for ships using this route has risen tenfold in recent years. Since this trend is continuing, some companies have decided to divert shipping routes around the Cape of Good Hope, adding 10 to 12 days to the journey and further increasing transport costs.

42. The repercussions are wide-ranging. Piracy provides a living to a host of small businesses in the ports (Eyl, Hobyo, etc.) where the pirates are based. Moreover, ransom money is being used to buy the weapons that are feeding the war which has been ravaging the country for decades.

43. Pirates captured by western countries benefit from a legal vacuum that gradually, it seems, is being filled; nonetheless at the end of the day the Somali authorities remain powerless. As Yassim tells us, "I was also once in jail in Garowe. But my family attacked the jail and they killed two of the policemen, and then in the exchange of fire I escaped together with other prisoners".

II. Means of combating piracy

44. United Nations Security Council Resolutions 1814, 1816 and 1838 provide the legal framework for the protection of ships chartered by the World Food Programme (WFP) and contribute to ensuring the safety of sea lanes under threat of piracy in the Gulf of Aden and off the coast of Somalia.

1. Potential courses of action

45. Potential courses of action to limit the effects of piracy on merchant shipping in the Gulf of Aden and/or off the east coast of Somalia using the military capabilities deployed for that purpose are:

- precaution: providing information and recommendations to civilian shipping;
- protection: improving or ensuring the safety of ships likely to be targeted by pirates;
- interception: intercepting pirates at sea before or after they commit acts of piracy;
- repression: retaking hijacked ships by force;
- eradication: taking action against pirate land bases in Somalia.

46. Depending on the priorities defined and the means available, such courses of action could be implemented for:

- vessels chartered by the WFP;
- shipping in the Gulf of Aden;
- shipping off the east coast of Somalia;
- fishing fleets operating off the coast of Somalia.

47. "Precaution" is the one course of action that is open irrespective of the capabilities deployed by nations in the Horn of Africa region. It involves extending "voluntary naval control" to ships sailing under European flags. Vessels that so wish can give advance warning that they will be in the area. They may request an onboard protection team (OPT), and agree to form part of a convoy in dangerous waters and steer a course along the Internationally Recommended Transit Corridor (IRTC).

48. The second course of action, "Protection", can be adapted according to the desired effect and the capabilities deployed for the operation. It can take different forms:

- a vessel can have an escort and an OPT or several vessels can sail in convoy escorted by a helicopter-carrying frigate;
- a frigate can patrol a merchant shipping transit zone and inform vessels in the area of any pirate activity. The frigate "visits" any vessel suspected of being a potential pirate vessel with a view to apprehending the crew and seizing any weapons and boarding equipment (grappling hooks, ladders, etc). The presence of maritime patrol aircraft makes such operations far more effective. However, a huge number of helicopter-carrying frigates would be required to patrol the Gulf of Aden effectively. For just one sector of the map (see

Appendix I), such as sector 3 for example, a minimum of five frigates and four maritime patrol aircraft would be necessary on a permanent basis. According to some theoretical calculations, 45 helicopter carriers and eight maritime patrol aircraft would be required to cover the entire Gulf of Aden.

- the only effective means of protection against pirate attacks are military helicopters that can take off from a nearby carrier, or for the ship to maintain a relatively high cruising speed.

49. “Interception” requires a significant improvement in the quality of intelligence gathered on pirate movements so as to provide sufficient advance notice for action to be taken and for the pirates to be intercepted at sea.

50. “Repression” complements the previous courses of action. It can only be implemented effectively under certain conditions and on a strictly national basis because of the sheer complexity of the legal framework. At the present time only the American, British and French navies have the special forces capability to carry out raids at sea. As a result, this course of action can only be envisaged in exceptional circumstances (for example: pursuit of *Le Ponant* pirates).

51. “Eradication” is not covered by the United Nations Security Council resolutions. In December 2008, the United States called a UN Security Council meeting to discuss the possibility of mounting a land operation in Somalia.

III. Legal problems

1. General points

52. Piracy is an international problem, as it is a crime against the safety of shipping on the high seas, outside the jurisdiction of any state. The repression of piracy therefore falls within the remit of international law (the 1982 United Nations Convention on the Law of the Sea (UNCLOS) – the so-called “Montego Bay Convention” (MBC) which came into force in 1996, and where appropriate, United Nations Security Council resolutions). The first Security Council resolutions on piracy, adopted in 2008, are Resolutions 1814, 1816 and 1838 regarding the situation off the coast of Somalia.

53. This international framework has two particularities:

- it excludes the application of the law of armed conflict (therefore pirates are not prisoners of war but criminals that should be prosecuted or prevented by legal means from causing harm);
- it refers back to the application of the national law of those states cooperating in the fight against piracy (using military means first and foremost, or other ships and aircraft on government service, as stipulated in UNCLOS). There is no international police force for the high seas, nor any international jurisdiction or criminal procedure to prosecute pirates. The legal framework for carrying out police activities at sea is that defined by each state at the national level.

54. When action is taken at sea against piracy with the aim of bringing the pirates to trial, a distinction must be made between:

- action taken by military forces to deter pirate attacks (organising convoys, deploying air-sea units to secure maritime zones, placing protection teams on board ships, voluntary or compulsory naval control, exchange of intelligence, etc); and
- action aimed at repressing piracy, which is in fact police action at sea (carried out on behalf of the public justice system). In the fight against piracy, this involves any act which is likely to result in the (intentional or incidental) capture of a pirate or pirate ship and which is therefore part of legal procedure and – depending on the type of operation and the country concerned – possibly carried out under the supervision of a judicial authority. Such is the case as regards visiting a ship, opening fire on a pirate vessel, retaking a hijacked ship by force, and generally any operation likely to result in pirates’ capture, detention on board and

transfer to a judicial authority, the seizure of their vessel or property they are in possession of or using.

2. Relevance of multinational action in the fight against piracy

55. When defining tasks that involve international coordination (EU, Operation Enduring Freedom coalition, NATO, etc.), a distinction must be made between those that can be legally shared (protection, deterrence) and those that must be carried out on a national basis (repression). The latter involve the implementation of the domestic criminal law and procedure of each intervening state and any international interference at this level could affect the legality of such action.

3. The international legal framework (see Appendix II)

The United Nations Convention on the Law of the Sea (UNCLOS)

56. The UNCLOS (United Nations Convention on the Law of the Sea) or MBC (Montego Bay Convention), the only international convention dealing with piracy (Art. 100 to 108 and Art. 110), stipulates in Article 105 that states may exercise their right of repression against piracy and in so doing are entitled to seize the ship and to arrest the pirates and bring them to justice.

57. The term piracy as used in the MBC does not refer solely to attacks on ships, present or past, carried out from a second vessel, on the high seas and for private ends.

58. If that were the case, under the convention state action would remain a dead letter, or states would only be able to act once hostages had been taken, as logically they would have to wait for the attack to take place and ascertain that it was committed for private ends before being able to launch criminal proceedings against the perpetrators.

59. On the contrary, the convention establishes a system for repressing acts of piracy already committed, ongoing or in preparation: indeed, Article 103 defining the pirate ship is based on the criterion of intentionality: “A ship [...] is considered a pirate ship [...] if it is intended by the persons in dominant control to be used for the purpose of committing one of the acts referred to in article 101”.

60. Article 101 states that the acts constituting piracy include:

- “(a) any act of intentionally facilitating illegal acts of violence, depredation or detention committed for private ends against ships, persons or property on the high seas or in a place outside the jurisdiction of any state” (although it is not specified whether such an act must have achieved its effect);
- “(b) any act of voluntary participation in the operation of a ship [...] with knowledge of facts making it a pirate ship” (it does not stipulate that such participation in the operation necessarily means being on board);
- “(c) any act of inciting or of intentionally facilitating an act described in subparagraph (a) or (b)”.

The Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation (SUA)

61. The SUA Convention aims at suppressing unlawful acts against maritime safety (in particular the hijacking of ships) not covered by the MBC; in particular those that are politically motivated (acts of terrorism, for example). For the United States this convention, unlike the MBC, has the advantage of making it obligatory for states to either prosecute or extradite the perpetrators, hence avoiding the risk of a legal impasse. Moreover, according to a certain interpretation of one of the 2005 protocols to the SUA Convention, a port state that is a signatory to the Convention is under the obligation to take into custody a terrorist captured by a ship and handed over to it. Since the United States does not draw any distinction between pirates and terrorists, it sees in the 1988 SUA Convention and its 2005 protocol a solution making it possible for individuals it has arrested to be prosecuted abroad for acts of piracy. By lumping piracy and terrorism together in the same category, the United States is actively

promoting a legal approach to the fight against piracy in which the SUA Convention is taken as the sole source (or the only one that is explicitly mentioned) of international law.

62. From the political standpoint, application of the SUA Convention is not specifically restricted to the high seas. As a consequence, used as the legal basis for counter-piracy action it allows action both at sea and on land, a highly controversial issue within the UN Security Council.

4. Differences in national criminal legislation in the fight against piracy

63. Counter-piracy operations can vary from one country to another. Differences in the national legislation of states that might participate in an international initiative remain a hindrance to or complicate international action against piracy.

64. When incorporating UNCLOS provisions into national law, states may choose to use its full potential or only part of it (for example, to repress piracy only when their own flag or nationals come under attack, or, on the contrary, universally). UNCLOS gives a very broad definition of piracy and includes acts preparatory to piracy (including land-based activities): incitement, support, voluntary participation in the operation of a ship with knowledge of facts making it a pirate ship. According to UNCLOS the repression of piracy includes prevention (action taken against pirates before they attack) and repression (action in flagrante or a posteriori).

65. The current difficulty lies in the fact that, since UNCLOS came into force, few states have undertaken to adapt their national laws to apply the Convention's provisions relating to the repression of piracy (and other offences on the high seas such as dealing in slaves, unauthorised broadcasting, etc). Thus:

- certain states (such as Germany) will not confer police powers on the military and will not give their armed forces the power to carry out police missions at sea. Countries that allow their navies to carry out this type of action are exceptions in this regard, in particular within the EU;
- other states are handicapped by the fact that there is no definition of the crime of piracy in their criminal law, or that the definition does not correspond to that given in UNCLOS (the United States where current legislation in this area is obsolete is a case in point);
- others have not taken any measures that will allow them to assume responsibility in case of errors and do not want to bear the cost;
- the EU states, having signed up to the European Convention on Human Rights (ECHR), must take account of the requirements for fair trial, the prohibition of inhumane or degrading treatment and the non-application of the death penalty when undertaking criminal procedure: as a result they cannot hand over captured pirates for trial to any country that does not meet ECHR criteria, nor can they capture them from on board ships under the flag and jurisdiction of such a state.

5. Adapting national laws

66. For states, in particular members of the EU, to participate effectively in the fight against piracy, they must undertake to incorporate the necessary provisions from the Montego Bay Convention into their national legislation.

67. States wishing to participate in the fight against piracy should:

- incorporate in their legislation all the provisions for preventive and repressive action against pirates;
- empower the appropriate military services to engage in criminal policing activities in the context of piracy;
- determine the conditions for detaining pirates on board ships or aircraft, their transfer and handover to the judicial authorities, and monitoring deprivation of freedom before handover; determine which judges should be responsible for monitoring deprivation of freedom and

instigating the legal proceedings associated with the operation; and determine at which point the judge should intervene in the process;

- determine rules for the seizure of pirate ships and equipment;
- adapt their laws to enable certain operations to be carried out where the conditions for carrying out such operations are not compatible with common law (the freeing of hostages).

68. Only a small number of member states – Germany, Finland, the Netherlands and Sweden – are able to exercise jurisdiction in cases of piracy. However, as explained in the previous chapter, much remains to be done in terms of adapting national laws to allow piracy to be combated more effectively.

69. Until such time as a legal framework has been properly defined, each state should establish a provisional legal framework where actions allowed under their current criminal law are clearly defined or specified (in particular for preventive action, i.e. action against pirates preparing to attack a ship).

6. Adapting the framework for cooperation between states

70. In addition individual countries, in order to carry out a particular course of action, might have to sign cooperation agreements with foreign states, such as:

- the flag state of a ship which has a protection team on board (such an agreement must guarantee that the rules of engagement for the onboard protection team are compatible with the flag state’s legislation and that the flag state will apply ECHR standards);
- the state where the pirate is to be put on trial when detained pirates are handed over to a foreign state prepared to conduct the legal proceedings (in this case the aim of the agreement is to guarantee that the state the pirates have been entrusted to will apply ECHR standards);
- Somalia’s Transitional Federal Government (for authorisation to carry out Security Council Resolution 1816 in its waters).

71. It is up to each state that wants to take part in the fight against piracy off the coast of Somalia to sign such bilateral agreements. Because of the legal points they must contain and the rules defining the responsibility of each state, such agreements are outside the EU’s area of competence. That such agreements should be bilateral is all the more appropriate as their contents largely depend on the respective national legislation on piracy of the contracting parties. However, under the EU Joint Action, individuals having committed acts of piracy in the territorial waters of Somalia and who have been arrested and detained with a view to their prosecution may be handed over to a third state wishing to exercise its jurisdiction over the people and goods in question, provided that the conditions for that handover have been agreed with the third state in compliance with international law.

72. Furthermore, the European Union has negotiated an exchange of letters between the EU and the government of Kenya on “the conditions and modalities for the transfer of persons suspected of having committed acts of piracy and detained by the European Union-led Naval Force (EUNAVFOR), and seized property in the possession of EUNAVFOR, from EUNAVFOR to Kenya, and for their treatment after such transfer”. Kenya, which is having difficulties coping with the influx of Somalis detained at sea, is considering setting up a tribunal specifically for prosecuting pirates, thus allowing the country to ask the international community for contributions and easing the burden on the domestic judicial system.

7. The question of private military companies

73. Private military companies (PMC) offer armed support in the form of onboard protection teams (OPT). However, this practice is limited by legal obstacles:

- first of all, it is not in keeping with the Convention on the Law of the Sea (UNCLOS) which specifies that the fight against piracy is a state responsibility;
- a private company taking action without a mandate could itself be accused of “piracy”, but which authorities can provide such a mandate?

- there is also the problem of carrying weapons on board. When coming into port, authorisation must be sought from the port state;
- currently the majority of shipowners agree to an escort and a (state-sanctioned) military onboard protection team but refuse outright to have private protection teams on board.

IV. Ongoing operations

1. Task Force 150

74. Task Force 150 is one of the three components of the United States' Combined Maritime Task Force (CMF) based in Bahrain. Working in cooperation with 10 or so countries, its main job is to fight terrorism, but its task is also to prevent piracy and trafficking in human beings and drugs, and to provide security on the oceans through maritime surveillance operations. Its missions include assistance to sailors in distress and "visit, board, search and seizure" (VBSS) operations. TF 150 operates under the command of a German admiral in the Gulf of Aden, the Gulf of Oman, the Arabian Sea, the Red Sea and the Indian Ocean. In August 2008 the CMF established a maritime security patrol area (MSPA) in the Gulf of Aden to combat piracy. Surveillance of the area is carried out by ships and aircraft of the TF 150 countries. In September 2008 a Danish frigate captured 10 pirates in possession of rocket-launchers, machine guns and grenades, but, since they could not be prosecuted under Danish law, later had to release them on a beach after confiscating their weapons.

2. Task Force 151

75. In January 2009, the Combined Maritime Task Force headquarters announced the creation of a dedicated counter-piracy task force, TF 151, in order to allow TF 150 to concentrate on anti-terrorist operations. The new task force has set itself two objectives:

- to work in cooperation with shipowners to develop an information system to help prevent attacks;
- to ensure the prosecution of pirates. For that purpose the United States has signed an agreement with Kenya allowing American forces to hand over captured pirates to the Kenyan authorities so that they can be brought to trial.

76. TF 151, composed of ships and aircraft from three states – the United States, the United Kingdom and Singapore, is commanded by an American admiral and has been operational since January 2009. Marine and Coast Guard detachments are deployed in TF 151 operations.

3. EUNAVFOR Somalia – Operation Atalanta

77. In mid-December 2008, four months after launching the EU NAVCO Coordination Cell in Brussels in September 2008, the EU launched the EUNAVFOR Somalia - Atalanta naval operation for a renewable period of 12 months. The operation, based on UN Security Council Resolutions 1814, 1816, 1838 and 1846, comes under the political control and strategic direction of the Political and Security Committee (PSC), while the EU Military Committee (EUMC) is responsible for the proper conduct of the operation under the operation commander.

78. EUNAVFOR has two types of mission:

- escorting WFP ships or other vessels travelling in convoys through the Gulf of Aden under the "Group Transit Concept". EUNAVFOR escorted about 20 WFP ships during its first month of operations, enabling the delivery of some 70 000 tonnes of food aid (enough to feed four million Somalis);
- routine patrols in the Gulf of Aden in order to detect and deter pirate vessels.

79. Operation Commander is Rear-Admiral Philip Jones, whose second-in-command (as of May 2009) is a German rear-admiral. He works out of the Northwood headquarters near London. At sea, command is held by a CTF (Commander Task Force), provided by each of the participating states on a rotating basis, who has the job of organising all protection and patrol missions in the zone of operations.

80. Eliminating piracy off the Somali coast will be an extremely difficult task; EUNAVFOR faces three major challenges:

- the huge size of the area to be kept under surveillance;
- the long duration of the mission, which in all likelihood will remain necessary for as long as there is no rule of law in Somalia;
- the size of the force which in relation to the size of the area is bound always to fall short of requirements.

81. EUNAVFOR operates in an area covering the south of the Red Sea, the Gulf of Aden and the Indian Ocean, up to a distance of 500 miles off the Somali coast, representing a surface area of 2 000 000 km². Some 10 member states (France, Greece, the United Kingdom, Sweden, Germany, Spain, the Netherlands, Portugal and Belgium, joined in January 2009 by Italy) announced a contribution at the start of the operation. Five of them – France, Germany, Greece, Spain and the United Kingdom – are providing a permanent operational contribution. In March 2009 Switzerland joined the operation with a small unit dedicated to the protection of WFP ships and Norway will also participate in the efforts to combat piracy as of August 2009.

82. The precise configuration of the force varies all the time depending on the number of ships and maritime patrol aircraft available for operations, but on average it consists of four or five frigate-type vessels, three to five helicopters and two maritime patrol aircraft based in Djibouti.¹⁰ The common budget for the operation, funded through the ATHENA mechanism, is 8.3 million euros.

83. Although since the beginning of 2009 attacks have continued along the coast of Somalia, the number of successful assaults has fallen ten-fold as compared with the same period the previous year. There are several reasons for this:

- the stronger presence of patrol ships from the various nations working in coordination in the framework of the counter-piracy operation;
- better cooperation with shipowners;
- efficient communications with ships in transit, advising them to take security measures as they approach the Gulf of Aden and on the safest route to take.

More specifically there have been 250 calls to check merchant ships and 154 responses to SOS signals. 33 suspect fishing boats and four suspect pirate ships have been approached, nine ships boarded and one pirate ship destroyed.

84. The European Union is also in the process of setting up a Maritime Security Centre for the Horn of Africa¹¹ under the command of Rear-Admiral Philip Jones which will take over from the EU NAVCO Cell. Its task will be to assist sailors in the Gulf of Aden and off the coast of Somalia and the Horn of Africa, by providing them with advice and precise information about the risks. This centre is being developed in partnership with shipowners. More than 1 000 shipping companies – 20 to 30% of the companies operating in this zone – have registered their ships in order to obtain access to the centre's information service. It is a good example of coordination between commercial and security interests.

85. From the legal standpoint the creation of a European Union naval force is a step forward. At the end of February 2009 the Justice Ministers adopted an extradition agreement making provision for the prosecution in Kenya of certain pirates arrested by EUNAVFOR and defining the terms and arrangements for their handover. This agreement makes it unnecessary for the member states to sign bilateral agreements with Kenya. Now for the first time the ship of a member state whose law does not allow prisoners to be detained can hand over captured pirates to Kenya or another state that does have the possibility of bringing them to trial in accordance with international law on human rights.

¹⁰ The EU has signed a status of forces agreement with Djibouti which is hosting the forces for the operation.

¹¹ MSC-HOA.

4. NATO

86. In late March 2009, the Standing NATO Maritime Group (SNMG1), composed of five warships bound for south-east Asia, lay for a time in the northern part of the Indian Ocean and took part in the counter-piracy operation Allied Protector.

5. International cooperation

87. In January 2009, the PSC set up a framework for cooperation with China, Russia and Saudi Arabia – which it enlarged in February 2009 to include Japan, Malaysia, India, Yemen, Oman and Egypt – in order to combat piracy in the region by facilitating exchanges of information on the location of ships, successful or thwarted attacks and the pirates' modus operandi. The Atalanta Operation Headquarters (OHQ) has established instruments for coordination among the different forces in the form of internet chatrooms, video-conferences and meetings at sea or at Northwood. Local coordination is by meetings at sea between the EU force and the naval forces of other countries (Russia, China, India and TF 151) arranged by EUNAVFOR Command. There are also working groups for exchanges with the World Maritime Organisation (WMO) and shipowners' representatives are present at OHQ.

88. The European Union is developing a comprehensive response to piracy in the Gulf region encompassing the legal framework, institutional arrangements and operational measures such as strengthening information exchange capability. The programme (costing 14-18 million euros) essentially concerns coastal states along the main maritime routes from the Gulf of Aden to the Straits of Malacca and is due to start in 2010.

89. At the beginning of February 2009, at the initiative of Operation Atalanta and in agreement with the WMO, the UK Maritime Trade Organisation (UKMTO) and the US Maritime Liaison Office (MARLO) established a new International Recommended Transit Corridor (IRTC) in the Gulf of Aden. The corridor is patrolled by ships belonging to EUNAVFOR, TF 151 and third countries involved in the counter-piracy operations (Russia, China and Malaysia). It takes ships further from the Yemeni coast and from the traditional fishing areas which are a source of numerous false alerts.

V. Conclusions/recommendations

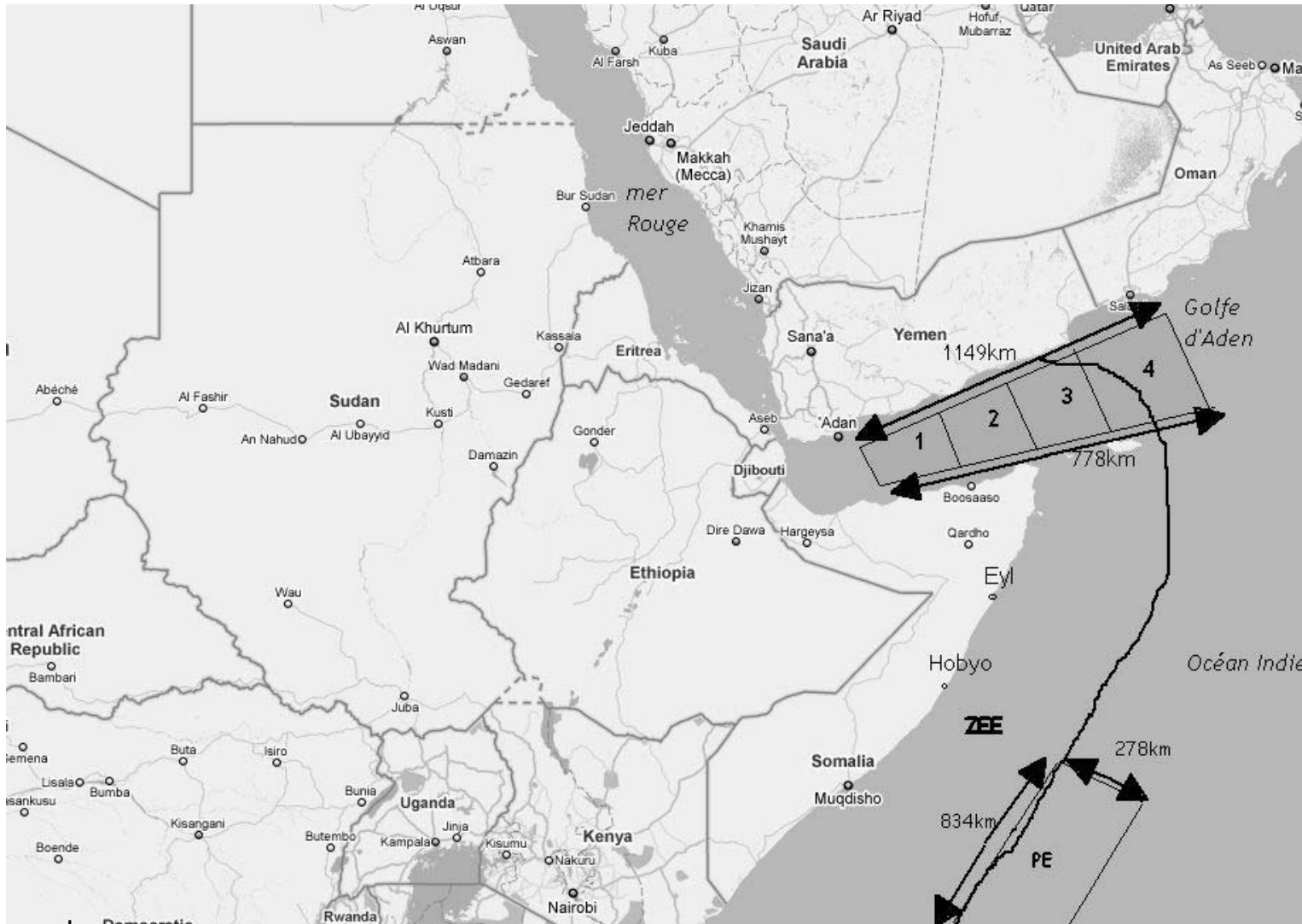
90. It is not possible to avoid pirate attacks by purely maritime means: OPTs (onboard protection teams) should therefore be allowed on board ships and a proper legal basis should be established to enable them to take action.

91. One should consider whether Operation Atalanta with its five or six frigates is really sufficient to cover a maritime zone three times bigger than France or whether it would not be better to combine operations at sea with land-based activities.

92. In view of the fact that from April 2009 there has been a displacement of piracy attacks towards southern Somalia, it is important for force deployment strategies to be adjusted continually in conjunction with the other forces in the locality.

APPENDIX I

Zonal map of Gulf of Aden and Somalia



Zones 1, 2, 3 and 4: Patrol area
ZEE: Exclusive Economic Zone (EEZ) (approximate)
PE: Fisheries area

APPENDIX II

Legal framework for counter-piracy operations

The starting point for any discussion of piracy is the legal framework. Indeed, states' rights and obligations are determined by international law.

The rules of law, once transposed into national law, allow each state to define the degree of its involvement in the fight against piracy, the legal instruments available to it and the limits it imposes on itself.

The legal aspect is only a starting point as each political authority decides on a case-by-case basis and in accordance with specific national (technical, diplomatic, political, etc.) considerations whether or not to make use of the legal instruments at its disposal.

The common law or normal framework for the fight against piracy: UNCLOS or MBC

(a) General points

The UNCLOS (United Nations Convention on the Law of the Sea) or MBC (Montego Bay Convention), the only international convention dealing with piracy (Arts. 100 to 108 and Art. 110), stipulates in Article 105 that states may exercise their right of repression against piracy and in so doing are entitled to seize the ship and to arrest the pirates and bring them to justice. The MBC does not specify whether a capturing state that chooses not to exercise that right of repression by legal means is bound to seek a judicial solution in another state, or whether it is at liberty to carry out other (extrajudicial) means of repression. The convention's silence in this matter allows action against piracy to be taken under Chapter VII of the UN Charter and under the law of armed conflict.

However, the common law on piracy according to the MBC is a peacetime law. The fight against piracy as conceived by western states is a matter of law enforcement at sea, not warfare.

According to the western conception of the rule of law, piracy is a criminal offence which as such is punishable by law (absence of extrajudicial sanctions). Such is the approach of the states participating in Operation Atalanta, launched on 8 December 2008.

The United States is also seeking judicial solutions for the fight against piracy (avoiding the need, since it is not warfare, for the military detention of pirates of undefined status).

However, the US and other states cannot conduct counter-piracy operations – which by definition take place on the high seas – without the support of the navy. But since they have not developed the concept of “state action at sea”, their naval forces are not authorised to exercise the prerogatives that would allow them to take action on behalf of the state judicial authorities. It is perhaps for these sorts of reasons that these states, while conscious of the need for a legal framework for action to combat piracy, are seeking to found such action on a legal basis other than that of the MBC.

(b) Definition of piracy

The term piracy as used in the MBC does not refer solely to attacks on ships, present or past, carried out from a second vessel, on the high seas and for private ends.

If that were the case, under the convention state action would remain a dead letter, or states would only be able to act once hostages had been taken, as logically they would have to wait for the attack to take place and ascertain that it was committed for private ends before being able to launch criminal proceedings against the perpetrators.

On the contrary, the convention establishes a system for repressing acts of piracy already committed, ongoing or in preparation. Indeed, Article 103, which defines a pirate ship, is based on the criterion of intentionality: “A ship [...] is considered a pirate ship [...] if it is intended by the persons in dominant control to be used for the purpose of committing one of the acts referred to in article 101”.

Article 101 states that the acts constituting piracy include:

(a) any illegal acts of violence or detention, or any act of depredation, committed for private ends and directed against ships, persons or property on the high seas or in a place outside the jurisdiction of any State,

(although it is not specified whether such an act must have achieved its effect);

“(b) any act of voluntary participation in the operation of a ship [...] with knowledge of facts making it a pirate ship [...]”

(though it is not stipulated that such participation in the operation necessarily means being on board);

“(c) any act of inciting or of intentionally facilitating an act described in subparagraph (a) or (b)”.

Hence, the fact of inciting, planning or supporting from the land or at sea (from a mother ship) past, present or even future acts of piracy is punishable as an act of piracy in exactly the same way as a pirate attack that has actually been carried out, but, for charges concerning participation in the operation of a ship, on the proviso that these acts were undertaken voluntarily and in full knowledge of the facts.

Article 105 grants every state the power to arrest “on the high seas, or in any other place outside the jurisdiction of any state” persons guilty of acts of piracy and to take them before its courts. But this is just an option for the state concerned (the state of the pirates’ nationality or the flag state maintain the right to exercise their criminal jurisdiction if they so wish).

The same option is offered to the “state which carried out the seizure” to determine the action to be taken with regard to the ships and property seized.

Article 105, then, does not establish an automatic link between jurisdiction over the ship and property seized, on the one hand, and criminal jurisdiction over the persons guilty of acts of piracy, on the other, any more than it obliges the capturing state to exercise its jurisdiction in either case. The state concerned is therefore free to choose to what extent it wishes to exercise jurisdiction of any kind in cases of piracy: it can either claim jurisdiction over the arrested pirates and the seized ship and property, or restrict its jurisdiction to cases corresponding to more specifically defined criteria.¹²

Pursuant to Article 100 (duty of states to cooperate in the repression of piracy), the matter of jurisdiction might be resolved by referring to other standards that are specific to the repression of piracy.¹³ Moreover, judicial cooperation or extradition agreements could enable a state having established its criminal competence but not involved in the arrest to bring to trial a pirate captured on the territory or in the territorial waters of another state.¹⁴

All things considered, the Montego Bay Convention allows repressive action to be taken on the high seas against the intention to commit an act of piracy and against indirect participation in past or future acts of piracy. UN Security Council Resolutions 1816 (2008) and 1846 (2008) make temporary provision for the repression under certain conditions of such acts in the territorial waters of Somalia.

¹² When the hijacked vessel or victims of an attack hold that state’s nationality, for example, or when a natural person or legal entity holding its nationality suffers prejudice as a result of the act of depredation.

¹³ Security Council Resolution, bi- or multilateral agreement such as the US-Kenyan agreement and possibly an IMO regional agreement, provided that it covers the aspect of criminal jurisdiction.

¹⁴ Without such a mechanism, the “universal” competence foreseen for the repression of acts of supporting or inciting piracy would be meaningless.

The Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation (the SUA Convention) (1988 and 2005)

The SUA Convention concerns unlawful acts against maritime safety (particularly the hijacking of ships) not covered by the MBC, in particular those committed for political reasons (acts of terrorism, for example). For the United States this convention, unlike the MBC, has the advantage of making it an obligation for states to either prosecute or to extradite the perpetrators, hence avoiding the risk of a legal impasse. Moreover, according to a certain interpretation of one of the 2005 protocols to the SUA Convention, a port state that is a signatory to the convention is under the obligation to take into custody a terrorist captured by a ship and handed over to it. Since the US does not draw any distinction between pirates and terrorists, it sees in the 1988 SUA Convention and its 2005 protocol a solution making it possible for individuals it has arrested to be prosecuted abroad for acts of piracy. By lumping piracy and terrorism together in the same category, the United States is actively promoting a legal approach to the fight against piracy in which the SUA Convention is taken as the sole source (or the only one that is explicitly mentioned) of international law.

From the strictly operational standpoint such an approach justifies:

- the use of military forces to combat piracy in connection with the fight against terrorism, without any need for intervention by an American judge (since the procedure only becomes a judicial one once the individual is handed over to the foreign state);
- possible recourse to alternative legal bases for action against piracy: the United Nations Security Council allows action to be taken against terrorism under relatively flexible conditions, making the conditions for military intervention more flexible;
- the use of private military companies (PMC) in the fight against piracy, although this is not compatible with the MBC legal framework which attributes to states (government ships and aircraft) the sole right to suppress piracy. Outside the MBC framework the use of private military companies would appear to be in keeping with international law.

From the political standpoint, application of the SUA Convention is not specifically restricted to the high seas. Therefore, using the SUA Convention as the legal basis for counter-piracy action makes it possible to include action both at sea and on land, a highly controversial issue within the United Nations Security Council.

Resolution 1816 refers both to Chapter VII and to the MBC. Resolution 1846, which extends Resolution 1816 for a year, refers to the same texts, but also mentions the SUA Convention. Moreover, the Security Council established a contact group on 16 December 2008 whose mandate includes, among other things, exploring the possibilities for action on the ground.

Current international framework (Somalia)

United Nations Security Council Resolutions 1814, 1816, 1846 and 1838 refer to UNCLOS and therefore favour legal repression through provisions contained in domestic laws.

Resolution 1816 adds an essential element: the “reverse” right of pursuit from the high seas into Somali territorial waters.

Therefore:

- no prisoners, but “persons captured”;
- no extrajudicial repression (risk of arbitrariness);
- for EU member states: need to observe certain criteria set by the ECHR and to ensure that bi- or multilateral cooperation arrangements fulfil the criteria set by this convention.

Problems posed by the international framework

Problems posed by the MBC

- the need to resort to national laws makes the effectiveness of repression dependent on the adaptation of national laws to the international framework. The provisions of the MBC concerning piracy have not been fully incorporated into any of the legal corpora of the European countries, nor of the United States;
- the need, when engaging military capabilities, to distinguish between the strictly military phase (deterrence) and the phase during which the military conducts actions on behalf of the public justice system (repression, i.e. any action likely to lead to the capture of a pirate, and all the phases of the legal procedure: detention, transfer, handover, indictment, custody, etc.).

Repression can be preventive when pirates are captured as they are preparing to act, but before they have actually taken any action.

Problems posed by Resolution 1816 and national laws

Resolution 1816 was adopted under Chapter VII but expressly states, as does Resolution 1838, that it should be implemented in the framework of the MBC (need for a legal basis).

Therefore, the countries that have not implemented the MBC might be tempted not to take part in international action; and if they wish to take part, while their national law does not completely incorporate UNCLOS, they are tempted to participate only on a limited basis or rule out the idea of involving the judicial authority.

Indeed, given the difficulty of meeting the demands of criminal procedure during maritime operations, particularly when it comes to liberating hostages in a maritime environment, some states are prepared to accept the idea of using military means to take action against piracy at sea, without the supervision of the national courts, and of handing over the persons captured as soon as possible to a third state which would then exercise criminal jurisdiction (which UNCLOS allows).

In order to legitimise the use of purely military means and the lack of national jurisdiction, and to avoid, as a result, having to incarcerate pirates in a military facility (in particular on board ships), these states invoke the legal regime against terrorism, as it is based on loosely formulated United Nations Security Council resolutions.

As these resolutions are not permanent, these states are also campaigning for the recognition of the SUA Convention (1988 and 2005), which deals with terrorism and the fight against proliferation, as a source of international law in the fight against piracy. In particular, they want the IMO and the United Nations Security Council to endorse this position in their forthcoming resolutions on piracy.

Such an approach, which affords the intervening state maximum flexibility in its action by completely ignoring the treatment of piracy under criminal law, is legally erroneous as it is incompatible with the MBC and combines two distinct legal regimes.

The flag question

As things stand at present, a shipowner may choose to register his ships under the flag of a state that is capable of protecting it against the threat of piracy, and pay an extra cost, or register his ships in another state where registration is not as expensive but which is not capable of exercising any sovereign prerogative on the high seas or assuming certain responsibilities vis-à-vis the ships flying its flag.

The most likely difficulty for states today is to choose who is to benefit from their protection:

- a ship sailing under flag X does not necessarily represent the interests of state X;
- a ship sailing under a foreign flag may represent the interests of another country (shareholders, cargo);
- states have difficulty identifying strategic cargoes, or, on the contrary, identifying ships warranting no protection on account of the illegal activities they might be engaged in.

The only reliable criterion is the flag, as it has a definite significance in law. It is probably not enough, but beyond that the complexity (and sometimes lack of clarity) of the interests represented in maritime trade makes it difficult for a state to choose. The state must have a clear idea of who it is acting on behalf of.

As with certain major pollution incidents at sea, the piracy crisis is therefore revealing:

- some states take a free-market perspective and consider the fight against piracy to be a “business choice”: current practices in the maritime world must not be affected by the rise in piracy, shipowners or insurers must deal with the risk of piracy, and state intervention should not distinguish between flags (therefore without investigation by the state providing security services of the interests it is protecting);
- other states are prepared to assume their responsibilities and to take action, but selectively and only to the extent that their limited capabilities allow, and have to be on the spot to act effectively (a pirate attack takes less than 15 minutes). But these states will no doubt need a better understanding of the maritime world in order to decide who is to benefit from their protection.

Conclusion

It is necessary to:

- avoid lumping terrorism and piracy together;
- campaign for the only valid international action that all states can apply: adapting national law to the MBC (making it unnecessary to lump terrorism and piracy together);
- ensure that new laws provide political authorities with a wider range of potential action: it will be up to them to decide which they will use, when and under what conditions;
- not rely on the state alone: the shipowner is responsible for his ship and can himself minimise the risks (choice of itinerary, technical measures, keeping an efficient watch, etc.).