Mair, Stefan (Ed.)

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Piracy and maritime security: Regional characteristics and political, military, legal and economic implications

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Stefan Mair (Ed.)

Piracy and Maritime Security

Regional characteristics and political, military, legal and economic implications

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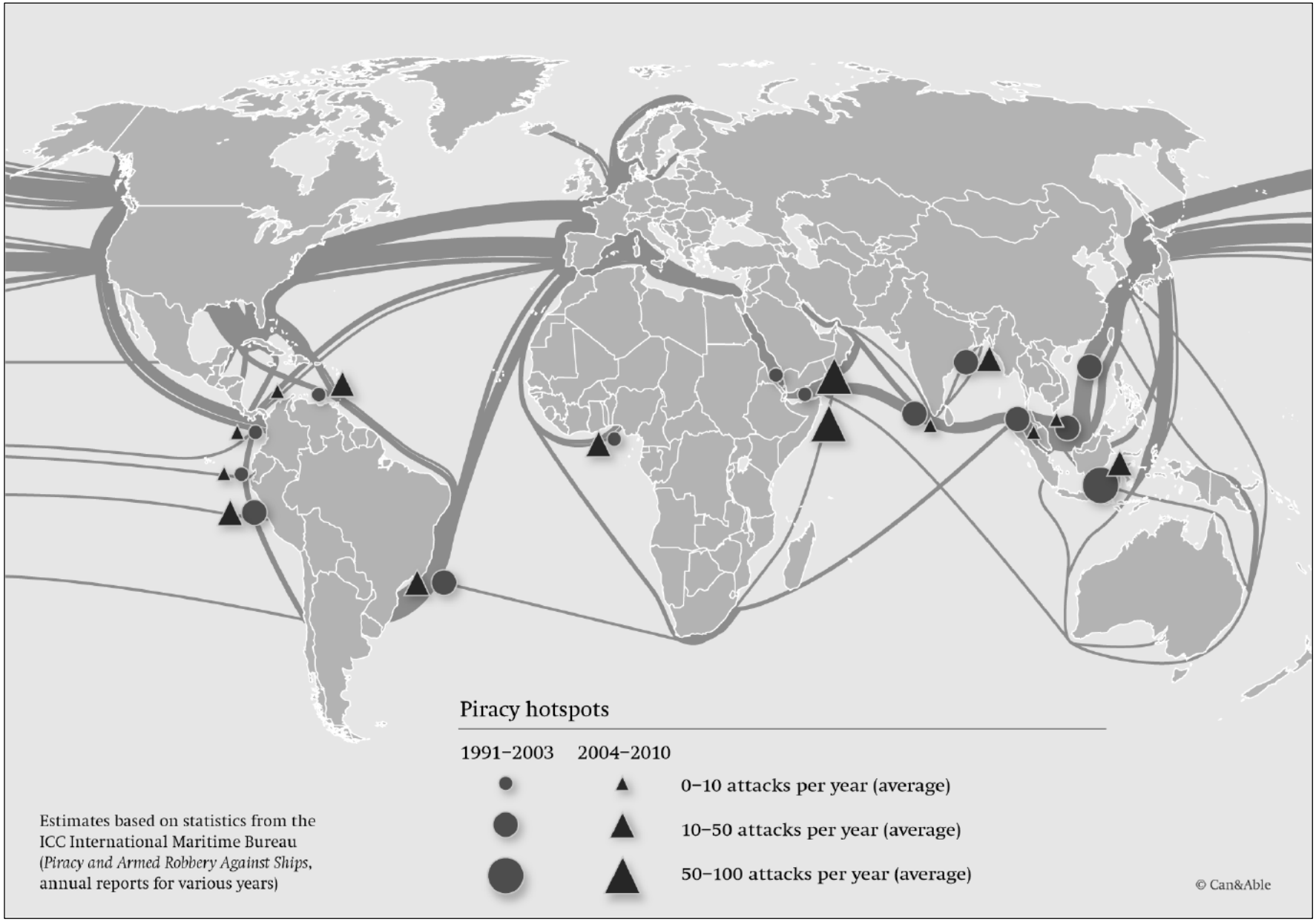


Synopsis

Stefan Mair

Piracy and maritime security

Any discussion of piracy begins with a problem of definition that has far-reaching political consequences. International law, as codified in Article 101 of the United Nations Convention on the Law of the Sea, contains three criteria for the offence of piracy: It must be conducted (1) on the high seas against (2) another vessel and (3) for private gain. The definition used by the International Maritime Organisation (IMO) is broader, speaking not specifically of piracy, but of acts of armed robbery against ships or at sea, which also encompasses attacks in territorial waters (including internal waters) and on vessels in port. This definition, too, still presupposes private purpose. As the following studies on Somalia and the Gulf of Aden, West Africa, the Straits of Malacca and Latin America demonstrate, that fails to fully reflect the realities of the situation. In all these cases, attacks on ships or at sea mingle private motives with political. Applying too narrow a definition to the problem of piracy hinders efforts to resolve it, because it denies the international community the rights of intervention it requires when a state is unwilling or unable to act against piracy within its own territory. The more promising approach is to treat the field of maritime security as a whole (see "Piracy and Maritime (In)security" on page 6).

Development and economic impact of piracy

Maritime security has deteriorated perceptibly over the past fifteen years, with the number of attacks on ships and maritime facilities increasing sharply. During this period the centre of gravity has shifted from the Straits of Malacca and Southeast Asia to the Gulf of Aden and the Somali Basin. The nations worst hit by piracy are those with the biggest merchant fleets; there is no discernible political bias in the choice of targets. Despite the issue creating a storm of attention in the European media, the direct economic costs remain comparatively small. Although 90 percent of the EU's external exports are transported by sea, the probability of pirate attack is fairly small. Even in the Gulf of Aden in 2009 it was only about 0.58 percent. But from the commercial point of view, the enormous value of the vessels and the cargoes they transport means there is nonetheless a significant financial risk, reflected for example in increased insurance premiums. Furthermore, as the revenue stream from piracy is spent on improving arms and equipment there is a real risk of the problem blowing up into a generalised economic threat (subsequent effects). Finally, piracy increases the risk of shipwreck, which in the worst case could completely block a major sea route.

Forms of piracy

Maritime insecurity adopts regionally very distinct forms. In West Africa and in the Gulf of Guinea there is a concentration of attacks on ships in the Port of Lagos and along the nearby Nigerian coast. Here the pirates' objective is usually to steal cargo, although frequently crew members are

Piracy and Maritime (In)security – *Günther Maihold und Kerstin Petretto*

Counter-piracy and protection of maritime security are hampered by legal problems; especially the definition of piracy under international law draws tight limits around the phenomenon. Under Article 101 of the UN Convention on the Law of the Sea piracy comprises:

"a) any illegal acts of violence or detention, or any act of depredation, committed for private ends by the crew or the passengers of a private ship or a private aircraft, and directed: (i) on the high seas, against another ship or aircraft, or against persons or property on board such ship or aircraft; (ii) against a ship, aircraft, persons or property in a place outside the jurisdiction of any State;

(b) any act of voluntary participation in the operation of a ship or of an aircraft with knowledge of facts making it a pirate ship or aircraft;

(c) any act of inciting or of intentionally facilitating an act described in subparagraph (a) or (b)."[a]

This restriction of piracy to waters outside the twelve mile zone (national territorial waters) has repercussions for the pursuit of pirates by warships, which are prohibited from entering another country's territorial waters. The high seas, to which the definition is restricted, are generally at less risk than coastal waters, and moreover, piracy is limited to the private sphere, with the definition excluding politically motivated acts and "public actors".[b] The absence of a statutory duty of intervention means that any action against pirates in national territorial waters is subject to that country's jurisdiction, where the necessary laws are often lacking.

It therefore comes as no surprise to find a growing shift in attitudes, towards tackling not just the phenomenon of "piracy" but the entire field of maritime security – regardless of the geography of incidents and the motives of perpetrators. From this perspective, which is largely shared by the present study, the only relevant criterion is attack on a maritime vessel or facility involving threat or use of violence and intentionally disregarding or violating existing laws. Thus maritime security includes not only monitoring and suppressing piracy and preventing smuggling and theft in commercial trade, but also policing fishing quotas and protecting offshore platforms and tankers.

a Treaty text: http://www.un.org/Depts/los/convention_agreements/texts/unclos/closindx.htm.

b Martin N. Murphy, *Contemporary Piracy and Maritime Terrorism: The Threat to International Security*, Adelphi Paper 388 (London, 2007), 14.

also kidnapped and held for ransom. Such attacks also target oil platforms, sometimes with the aim of stopping oil production. In the Gulf of Aden the predominant manifestation is capturing vessels and holding them and their crews for ransom. In South and Southeast Asia, on the other hand, the aim is generally to steal cargo, although for a period an extremely sophisticated form of piracy was practised here in which whole ships were

taken over, repainted and furnished with forged documents allowing their new "owners" to operate them in their own name. In Latin America robbery is the main threat to maritime security, affecting inland waterways as well as coastal waters and ports.

Piracy inseparable from situation on land

The four regional studies in this volume demonstrate very clearly that piracy and maritime insecurity cannot be understood in isolation from political and socio-economic developments on land. In Nigeria the weakness of the state and its infiltration by organised crime creates fertile ground for piracy. Here, moreover, motives of personal enrichment coalesce with the political objectives of the Niger Delta rebels seeking to end the economic exploitation and marginalisation of their region. The utter collapse of the Somali state preceded the rise of piracy in the Gulf of Aden. Here a culture of violence, a pervasive war economy and a lack of alternative sources of income turned piracy into a plausible survival strategy. In the Straits of Malacca it was the temporarily weakened statehood of Indonesia and poor economic prospects in the wake of the Asian crisis of 1997 that allowed piracy to flourish. Piracy often becomes a worthwhile business where legal employment offers only a marginal income and the weakness of state institutions limits the risk of punishment. This also applies to Latin America.

Counter-piracy

Accordingly, effective counter-piracy requires more or less functioning statehood. The example of the Straits of Malacca, where maritime security has been largely restored in recent years, illustrates this very well. The stabilisation and recovery of the Indonesian state was a central factor in this success, but Malaysia and Singapore also intensified their national efforts. Successful trilateral cooperation between these states and the backing of wider multilateral support programmes are also important factors for the consolidation of maritime security in Southeast Asia, along with improvements in the economic and social conditions of coastal populations. All these factors are missing in the other three cases examined in this study. Nigeria is far from stabilising its state apparatus; international cooperation to improve maritime security in the Gulf of Guinea is emerging, but it is still early days. Governments in Latin America face an uphill task reasserting control over areas of limited statehood, especially where efforts are hampered by squabbling among domestic security forces and a widespread reluctance to pursue cross-border cooperation. In the Gulf of Aden the multinational anti-piracy forces lack a partner on land capable denying the pirates access to safe havens.

Legal obstacles

Effective counter-piracy is hampered not only by weak statehood, but also by certain aspects of national and international law. Under the Law of the Sea the international community is permitted to intervene against piracy only on the high seas – outside territorial waters. This rule applies even in cases where a state's ability or willingness to take action in its own territorial waters is restricted or non-existent. For all their enthusiasm for multilateral cooperation, the littoral states of the Straits of Malacca watch keenly to ensure that such initiatives do not impinge on their national sovereignty. Even in the case of Somalia the UN Security Council made

sure it asked the Transitional Federal Government – which hardly possesses any power in the country – for its approval of anti-piracy measures, despite this being unnecessary under Chapter VII of the UN Charter. On the national level, Germany provides an excellent example of the extent to which legal considerations can limit a determined counter-piracy strategy. Although the German naval involvement in anti-piracy operations in the Gulf of Aden is adequately legitimised under international law and the German constitution, there was a long debate over whether the mission violated the constitutional requirement to separate police and military forces. That question has been resolved: the separation clause does not apply abroad. But the problem of proper law enforcement remains. Although the detention of pirates is covered by international law, it remains unclear whether it is fully in accordance with German legislation. The doubts are even greater when it comes to the question of how long pirates may be held before they are handed over to the courts, and to which state they should be transferred.

Cost-benefit ratio

The third great obstacle to counter-piracy is the cost involved. If it is true that maritime security is inseparable from security on land and political, economic and social developments there, then effective counter-piracy demands nothing less than a comprehensive programme to strengthen weak states, promote good governance and support social and economic development. In view of the relatively small overall economic cost of piracy, the international community can hardly justify such action on the basis of the piracy problem alone. Even where the intervention is restricted to primarily military action fighting pirates directly at sea – as in the Gulf of Aden – doubts over the direct cost-benefit relationship are justified. The observation that these expensive operations go ahead anyway leads some to wonder whether the military operations in the Gulf of Aden are ultimately about the question of future control of the Indian Ocean. In an era where competition over dwindling resources will increasingly shape international relations this motive certainly cannot be dismissed out of hand. But neither can it be separated from another motive that is possibly foremost in the Gulf of Aden: The international community responds to piracy and maritime security above all when these problems are not only causing direct economic costs but are part of a complex context of regional insecurity that threatens to drag in neighbouring regions. In that case military counter-piracy is a central measure to counteract the spread of risk.

Lessons

Nonetheless, purely military operations will not be enough to dispel the spectre of piracy from the Gulf of Aden, the Somali Basin and elsewhere. Multilateral, cross-border initiatives for resolving political conflict and establishing effective statehood are, as the example of the Straits of Malacca shows, the decisive lever for fighting piracy and restoring maritime security. The international community still baulks at the cost of such an intervention in Somalia, but rapid recalculations can be expected if reinvestment of the proceeds of piracy exacerbates the problem in the waters off the failed state and the zone of instability expands to the southern

Arabian Peninsula and East Africa. Effective action against piracy and maritime insecurity is, however, more than a question of political will. In the field of international law it would be useful to modify the Law of the Sea to broaden the definition of piracy to allow the issue of maritime security to be tackled comprehensively. An international court with regional structures for prosecuting pirates is also needed. Most of all, from the experience in the Gulf of Aden we can draw lessons about how to achieve effective cooperation and coordination between the naval forces of different countries.

Piracy as a Problem of International Politics

Kerstin Petretto

Risk zones

Although the issue of piracy recently rather dropped out of the top headlines, the world's oceans have certainly not become any safer. On the contrary, the level of risk remains high, especially around the Horn of Africa. Despite a strong presence of naval forces patrolling in the Gulf of Aden and the adjacent Indian Ocean, merchant vessels are regularly attacked and hijacked. Of 445 attacks reported globally in 2010, 219 were attributed to Somali pirates. Forty-nine of these were successful hijackings.[1] Yet the waters off Somalia are far from being the only piracy hotspot for international shipping. Vessels also fall prey to attack especially off the coasts of Nigeria, Indonesia, Malaysia and Bangladesh, and in the South China Sea.

Harm to trade and maritime security

Although the attacks may differ in location, method and impact, they all share one thing in common: They have become a problem of international politics. There are two reasons for this. Firstly, shipping routes form the arteries of the global economy, accounting for 80 percent of international trade, so violent attacks here have the potential to cause real harm.[2] As such, piracy touches directly on the elementary interests of all trading nations. Secondly, security problems on land are increasingly linked to questions of maritime security in the global context. Political and social instability in Somalia, Nigeria or Bangladesh may not at first glance appear to endanger German or European security, but the emergence of "piracy" as a business shows once again that state fragility and regional conflicts cannot be understood or tackled in isolation from the international system; they have blowback effects. Looking beyond immediate military and police responses, establishing long-term maritime security will thus have to involve solving the problems on land.

Facts and Figures

Shift from East and Southeast Asia ...

With a global total of 469 attacks, 2000 was the year with the highest rate of pirate activity since the Piracy Reporting Centre (PRC) began publishing annual reports in 1992.[3] Back then, the phenomenon was still concen-

1 ICC International Maritime Bureau, ed., *Piracy and Armed Robbery Against Ships: Report for the Period of 1 January – 31 December 2010* (London, January 2011).

2 UNCTAD, *Review of Maritime Transport 2009* (New York and Geneva, 2009), 28, www.unctad.org/en/docs/rmt2009_en.pdf; see the contribution by Stormy-Annika Mildner and Franziska Groß in this volume, pp. 20ff.

3 Central recording of violent attacks on ships began in the early 1980s with the founding of the ICC International Maritime Bureau (IMB), a department of the International Chamber of Commerce (ICC) specialising in maritime security. Since 1992 the IMB has been supported by the Piracy Reporting Centre (PRC), which was set up primarily to provide round-the-clock assistance to shipowners and crews and collect incident reports.

trated in East and Southeast Asia, especially off the coast of Indonesia (119 attacks), in the Straits of Malacca (75),[4] off Bangladesh (55 cases, mostly in the Port of Chittagong) and in the South China Sea (12). Fourth place in the country ranking was occupied by India with 35 incidents. At this time the waters around the Horn of Africa were still comparatively calm, with just 13 attacks in the southern arm of the Red Sea and nine off Somalia and Djibouti; by way of comparison, the figure for Nigeria in the same period was 33. The total number of attacks fell over the next two years (2001: 335, 2002: 370), but shot up again in 2003 to 445. The regional focus was still Southeast Asia, with 121 attacks reported just from the Indonesian coast and a further 28 in the Straits of Malacca. The South China Sea had become safer, with only two attacks, whereas the Port of Chittagong (Bangladesh) had become a high risk zone, reporting 58 incidents. Other important hotspots were the waters off Nigeria (39 incidents) and India (27).

... to the Gulf of Aden and the Indian Ocean

Since then the focus has shifted markedly. Of the 445 incidents reported globally in 2010, 219 were attributed to Somali pirates, whose radius of operations extends from the Red Sea through the Gulf of Aden, the coast of Oman and the Arabian Sea right across to the Seychelles far out in the Indian Ocean, reaching almost to the Indian coast in the east and Madagascar and Mozambique in the south. The waters off Nigeria occupied second place in the statistics concerning African coasts, although the trend here was falling: from about 40 per year in 2007 and 2008 to 28 in 2009 and 19 in 2010. Compared with the figures for 2003, piracy has been reduced considerably in Southeast Asia, the Straits of Malacca being the regional success story with only two incidents reported in 2008, 2009 and 2010 respectively, while off India only five incidents were registered. However, after years of calm piracy has been on the rise again in the South China Sea, where 31 incidents were reported in 2010. Relatively few incidents are reported from the high seas close to Latin American states, or from their territorial waters. Although there have been recurring incidents involving commercial vessels and yachts, the rate for each country has never exceeded 13 in a year (the figure for Peru in 2009). European, North American and Australian waters are to all intents and purposes free of piracy.

Forms of Piracy

Broad spectrum

Piracy occurs in widely varying forms across the world, with differences in the place of attack (ports, coastal waters, high seas), the objectives of the attackers and the type and severity of violence used. Such differences are

As well as its quarterly and annual reports on global piracy (published since 1995) the PRC website also supplies continuously updated information, see www.icc-ccs.org/index.php?option=com_content&view=article&id=30&Itemid=12. These statistics should be treated as a rough approximation to the actual situation, because it is known that many incidents go unreported.

4 See the contribution by Howard Loewen and Anja Bodenmüller in this volume, pp. 42ff.

decisive both for the impact on the international system and for the response options available to potential victims and the international community.

Place of attack

In 2000 most incidents still concerned ships anchored in port or in the territorial waters of the affected states, although in very busy shipping lanes such as the Straits of Malacca ships moving at full speed were also attacked. Since 2009 the pattern of attacks has changed, with a majority of incidents now taking place on the high seas while vessels under way, especially off Somalia and in the South China Sea. Particularly off Nigeria vessels are still more likely to be attacked close to the coast or in port, and the same applies to Brazil, Peru, Venezuela, India, Bangladesh and Indonesia.

Ransom demands

Regional differences are found above all with respect to the pirates' intentions. Attacks and hijackings off Somalia are generally conducted in order to demand a ransom, which is a form of piracy that has tended to be rare in other parts of the world. The statistics tell a clear story here: of 53 ship hijackings recorded globally in 2010, 49 occurred in the waters off Somalia, with 1,016 crew members taken hostage. The other four took place in Southeast Asia, i.e. off Malaysia, Indonesia and in the South China Sea.

Robbery

In the waters off Asia, Latin America and West Africa incidents of piracy are largely simple robberies where the crew's personal belongings, unsecured material on deck and, where possible, the contents of containers and crates are taken by threat of violence. Such cases of robbery actually make up the bulk of piracy incidents worldwide. Attacks off Nigeria often involve political and/or economic objectives connected with the local oil industry, while in Latin America, especially Colombia, we occasionally see violent armed conflicts on land spilling over onto the water (but not necessarily reflected in international statistics as most of these incidents take place on inland waterways).[5]

Ship takeover

Another form of organised piracy practised particularly in East and Southeast Asia until the turn of the millennium was the takeover of entire vessels. Here, pirates seized ships with the goal of discharging the entire cargo and reloading. This demanded an enormous scale of planning and logistics, including accomplices on land to ensure rapid disposal of the stolen goods. Captured ships were generally repainted and given new names and documents, plying the oceans as "ghost ships" until the swindle was discovered or the perpetrators no longer needed the vessel and abandoned it. The regular crew was often either killed or dropped on islands (or in lifeboats on the high seas); some simply remained missing.[6] Today this type of piracy has been almost completely stamped out by measures taken on land, including anti-corruption campaigns and the

5 See the regional studies in this volume by Denis M. Tull (pp. 28ff.) and Daniel Brombacher and Günther Maihold (pp. 49ff.).

6 Martin N. Murphy, *Contemporary Piracy and Maritime Terrorism: The Threat to International Security*, Adelphi Paper 388 (Abingdon, 1 June 2007); Michael Stehr, *Piraterie und Terror auf See: Nicht-staatliche Gewalt auf den Weltmeeren 1990 bis 2004: Ein Handbuch* (Berlin, 2004).

development of information-sharing structures by the affected states in the region.[7]

Sophistication of Somali Piracy

At the same time, the organisation of Somali piracy is becoming increasingly sophisticated. After being rather loosely organised throughout recent years,[8] an "industrialization of the phenomenom"[9] occurred in 2010: Pirate structures on land seem to have consolidated, with the construction of a proper logistical base enabling them to hold more vessels simultaneously than ever before and more and more people from the Somali hinterland also becoming involved in the business. Furthermore, pirates now regularly make use of technical equipment to track traffic and "motherships" that permit them to conduct attacks not only from their bases along the coast but also from the high seas right across the Indian Ocean. These ocean-going motherships have usually themselves been hijacked and often still have hostages on board (to deter armed counter-attack by navy vessels). Whereas previously the monsoon season led to a pause in pirate activity, the use of motherships now allows year-round activity. By extending their operational radius and refining their tactics Somali pirates have directly reacted to the international presence off the Somali coast – and have thus proven their growing ability to adjust their modus operandi to evade countermeasures taken against them.

Human costs of piracy

Attacks on ships are generally extremely violent. Whereas most attacks until the end of the 1990s were carried out using knives and machetes, today automatic firearms are generally in use as well as, especially where Somali pirates are concerned, rocket-propelled grenades. The highest death rates were in the 1990s in Asia, with 78 deaths in 1998, whereas in 2010 "only" eight people were reported killed in pirate attacks; however, the number of injuries has risen, especially off Nigeria. Deaths were distributed across all regions, with Somalia always recording the lowest figure – until 2009. During 2010 Somali pirates became more aggressive during attacks and towards their hostages, and were responsible for all reported killings that year.[10] Moreover, the number of people taken hostage by Somali pirates has risen dramatically in recent years, from just nine in 2000 to no less than 1,016 in 2010, while the figure for all other regions remained comparatively low at 165. Hostages not only suffer considerably during their captivity, which generally lasts several months, but also afterwards (posttraumatic stress symptoms).

Affected countries

Piracy of whatever type and in whichever region fundamentally affects vessels from any country of origin. There is no indication so far of pirates

7 See the contribution by Howard Loewen and Anja Bodenmüller in this volume, pp. 42ff.

8 Security Council, *Report of the Monitoring Group on Somalia pursuant to Security Council resolution 1853 (2008)*, S/2010/91, March 2010; Stig Jarle Hansen, *Piracy in the Greater Gulf of Aden – Myths, Misconception and Remedies* (Oslo, 2009), esp. 34–41.

9 *Report of the Special Adviser to the Secretary-General on Legal Issues Related to Piracy off the Coast of Somalia*, 25 January 2011.

10 Ibid. Also ICC International Maritime Bureau, ed., *Piracy and Armed Robbery Against Ships* (see note 1).

targeting specific nationalities. The incident statistics instead reflect the size of a country's fleet. Japan, Greece and Germany have the largest merchant fleets (by nationality of owner) and are always at the top of the incident statistics. The same applies to the largest fleets by flag: Panama, Liberia, Singapore and the Marshall Islands.[11]

Anti-Piracy Measures

Defensive and offensive measures: state ...

Piracy is fought on different levels depending on the type and purpose of the measures and who they are carried out by. The acute threat of piracy can be met with defensive and offensive countermeasures. At the state level this involves military and/or police protection of shipping, as currently provided in the Gulf of Aden and the adjacent Indian Ocean by various national and multilateral forces (e.g. EU NAVFOR Atalanta and NATO Operation Ocean Shield).[12] A visible show of force and recognisable willingness to go on the offensive can deter pirates from attacking ships, but this is only an option in narrowly defined geographical areas. In the Straits of Malacca, for instance, the number of attacks dropped massively after local states stepped up naval patrols.[13] The current high risk area in Gulf of Aden and the adjacent Indian Ocean is much more extensive, and even with about forty warships from two dozen states deployed there it is impossible to ensure adequate surveillance of the area. Consequently additional precautions were introduced to protect shipping: Warships escort convoys of vulnerable vessels and guard an international transit corridor in the Gulf of Aden, ready to intervene if needed to ward off attack or free a hijacked ship. The corridor has been quite successful, reducing attacks by approximately 50 percent since its creation in early 2009. Three factors however hamper the long-term effectivness of this approach: Firstly, travelling in convoy and using the corridor are both subject to scheduling, which places heavy logistical constraints on shipping companies, whether commercial carriers or humanitarian deliveries such as the vessels used by the World Food Programme.[14] Therefore, some shipping companies and masters still decide not to use the service provided by the states. Secondly, the permanent deployment of warships is extremely expensive and therefore unsuitable as a long-term solution. Thirdly, the pirates adapt their activities by switching to areas that are even harder to control, such as the wider Indian Ocean. It is simply impossible for state actors to provide international shipping with permanent blanket protection in such extensive waters.

11 ICC International Maritime Bureau, ed., *Piracy and Armed Robbery Against Ships* (see note 1); Verband Deutscher Reeder, *Daten der Deutschen Seeschifffahrt 2010* (Hamburg, 2010), http://www.reederverband.de/files/images/VDR_Statistik.pdf.

12 See the contribution by Frank Kupferschmidt in this volume, pp. 62ff.

13 See the contribution by Howard Loewen and Anja Bodenmüller in this volume, pp. 42ff.

14 *Report of the Special Adviser to the Secretary-General*, 25 January 2011 (see note 9).

... and non-state

State activities therefore need to be backed up by civilian countermeasures on the vessels themselves, to preventing pirates boarding ships in the first place. The spectrum of options is broad and advice is offered to shipowners and masters in a constantly reviewed Best Management Practices Guide compiled by IMO and the shipping industry.[15] Measures include: registering vessels planning to transit the high risk areas around Somalia with national and international authorities that have forces deployed to the region;[16] developing an internal emergency plan to provide an effective response in the event of attack or hijacking; increasing crew numbers and providing security training; keeping a 24-hour watch in high risk areas; installation of special radar and infrared equipment to detect attackers in good time; barbed wire barriers and non-lethal weapons such as water cannon or sonic weapons to prevent pirates coming on board; and installing impenetrable safe rooms where the crew can take refuge in the event of attack. There have already been many cases where crews have succeeded in foiling an attack with such measures, yet the increasing sophistication particularly of Somali pirates necessitates constant refinement of any such countermeasures and often an attack cannot be repelled at all, especially if lethal force is involved on the side of the attackers.

Reluctance and problems with tougher civilian countermeasures

For a long time many shipping companies showed little willingness to introduce such measures, tending to regard security of international shipping as the responsibility of states – which themselves hold a great interest in the free movement of merchant vessels for economic reasons. The cost of countermeasures to the individual companies also fostered negativity, particularly as the risk of vessel to being hijacked is still rather low when compared to the overall volume of traffic in international shipping lanes.[17]

The continuing prevalence of hijackings off Somalia has, however, persuaded many shipping companies to invest more in defensive measures for their vessels and crews after all.[18] Moreover, particularly in the face of increasingly apparent weaknesses of defensive approaches, some now even go as far as approving offensive measures by hiring private security firms to protect their vessels. But this heightens the risk of further escalating the level of violence already reached, particularly off the Somali coast, which leads both the IMO and the IMB to advise against such an approach. Furthermore, the use of private security personnel and weaponry on board commercial vessels creates legal and practical problems from various perspectives. The legality is unclear, particularly in countries such as Germany where such measures are generally subject to heavy regulation. Also, as no standards are yet in place regulating the performance of private

15 See http://www.imo.org/OurWork/Security/PiracyArmedRobbery/Pages/Default.aspx

16 See www.mschoa.eu

17 See the contribution by Stormy-Annika Mildner and Franziska Groß in this volume, pp. 20ff.

18 Pricewaterhouse Coopers, ed., *Deutsche Reeder zwischen Piraten und Wirtschaftskrise: Befragung von 101 Entscheidern in deutschen Hochseereedereien* (Hamburg, 2009).

security firms, it is often hard for shipping companies to judge whether the armed guards they choose actually decrease or increase the risk for their crews. Judicial questions also arise, for example if uninvolved persons (such as fishermen) are injured in shoot-outs. Furthermore, keeping weapons on board can present a risk if the cargo includes explosive material. Armed security guards might be able to repel pirate attacks, but will hardly be able to detain the attackers, leaving the problem of prosecution as unsolved as ever. In Germany this array of questions has led to a growing discussion of the idea of giving limited police or military protection to German-flagged merchant vessels passing through high-risk waters. This would ensure that the use of force occurred within a constitutional framework of rule of law. However, placing such detachments on commercial vessels might firstly exceed the financial resources of state institutions, despite the willingness of parts of the shipping industry to pay for such services.[19] Secondly, it would have to be determined whether existing police and/or military capacity (personnel and equipment) would be adequate and available for an operation of this kind at all.

Fighting root causes and organised crime...

Ultimately the measures outlined above can ward off pirate attacks but not eliminate them for good. Lasting success here will mean tackling the underlying causes. While piracy is primarily conducted for the purpose of personal enrichment, many pirates are driven by their lack of possibilities to earn a living by legal (and less risky) means. That is why the problem of piracy emerges above all in situations where economic and political instability rule, proximity to heavily used shipping routes provides the opportunity for attack, and state institutions are too weak to prevent such activities (or even profit from the proceeds). The longer piracy prevails in a country or region and comes to be regarded as an option for escaping poverty and hopelessness, the more it will develop organised structures detached from the host society and its concerns. These structures can only be tackled and contained via concerted action by national and international law-enforcement and judicial authorities to identify, paralyse and terminate the activities of instigators, organisers and profiteers in the background.

... requires staying power

These contributing factors therefore need to be taken into account if there is to be lasting success in the fight against piracy, which is above all a task for state actors. In Southeast Asia, for example, the states bordering on the Straits of Malacca have achieved great success by tackling official corruption and investing in alternative sources of income for inhabitants of the coastal regions. The challenge is incomparably greater in a country like Somalia, where two decades of civil war have destroyed the institutions and infrastructure of the state. In such cases piracy at sea represents a persistent side-effect of insecurity on land. Achieving improvements will demand staying power and a long-term commitment by the international community – both at sea and on land.

19 "Reeder fordern Soldaten auf ihren Handelsschiffen", *Frankfurter Allgemeine Zeitung*, 31 January 2011.

Piracy as a Challenge for International Politics

Piracy as transnational threat

It is the transnational character of piracy that makes this form of criminality such an enormous challenge for international politics. Transnational in this sense means activity taking place across several states or with repercussions on other states and actors, and involving not only states, but to a considerable extent also non-state actors. Piracy is transnational in two principal dimensions: the geographical context and the diversity of the affected actors. Both create obstacles to the fight against piracy, but also open up opportunities for the international community to respond jointly to a problem that in principle affects all seafaring states.

Geographical context

Piracy is a worldwide phenomenon. It may be concentrated in the regions identified above, but fundamentally attacks are possible on any shipping route. Any incident will normally involve the responsibility of several states and actors. Pirate attacks occur either on the high seas, where they are outside the sovereignty of any particular state, or in national waters. In either case the legal interests of several states are normally affected: ship (owner, operator, flag state), cargo and not least people.

Overlapping jurisdictions

This intersection of different geographical spaces and national jurisdictions represents a great challenge in the fight against piracy. The law of the sea allows a country's armed forces to seize ships suspected of piracy on the high seas at any time, but prosecution is governed by national laws. This is significant in two respects. Firstly, many states have inadequate laws for prosecuting piracy, or none at all.[20] Secondly, questions of competency arise where vessels are connected to several different countries and their crews are made up of different nationalities. Pirates also exploit the legal situation by fleeing into national territorial waters to hamper pursuit by international forces, especially where the coastal state involved is unwilling or unable to take up the pursuit and prosecute the perpetrators. This is currently the case first and foremost in Somalia.

Challenge 1: legislation and support

Two things are required of international politics. First, the individual national jurisdictions need to implement laws against piracy that take account of the transnational nature of the problem. Secondly, states with busy shipping routes passing their coasts must not only be given support in securing their territorial waters if they lack the necessary capacity to do so themselves. It is also crucial to improve their capacity to prosecute pirates through their own judical structures. If these are barely functioning or not in place at all (as is the case for Somalia), the international community must institute corrective steps.[21] The enormous importance of maritime infrastructure and its (necessarily) global extent makes such a policy absolutely essential.

Victims

As well as geographical transnationality, piracy is characterised by the involvement of state and non-state actors from different countries. This

20 See the contribution on law enforcement by Christian Schaller in this volume, pp. 56ff.

21 *Report of the Special Adviser to the Secretary-General*, 25 January 2011 (see note 9)

applies both to the perpetrators and the victims. On the side of the victims we have an absolutely internationalised shipping industry where it is normal for owners, operators and crews to belong to different states. States by their very raison d'être have a duty to protect their citizens and a responsibility for their security. But generally (especially for European countries) piracy represents a threat located outside a state's own sovereign territory, often leaving it unable to fulfil its duty to protect. Consequently non-state actors must also be integrated in the task of ensuring the security of shipping. However, the required measures are often associated with enormous costs for individual businesses, leading them to argue the state's responsibilities and demand state action to secure shipping routes.

Challenge 2: balancing interests of parties concerned ...

A second challenge in fighting piracy thus consists in balancing the interests, rights and duties of all involved. Above all, a balance must be found between the state's duty to protect its citizens, the principle of subsidiarity and the interests of the involved actors (including the shipping industry with its natural profit motive). This calls for an absolute willingness to compromise on the part of all involved.

... and acknowledging diverse backgrounds of perpetrators

The perpetrators are generally non-state actors: local gangs or criminal organisations with bases across different states and/or conducting piracy in the territorial waters of third states or on the high seas. But in most cases their activities would be impossible without the support or at least the acquiescence of state actors. Their assistance can take widely differing forms: bribed officials covering up crimes, the provision of false documents allowing the resale of stolen goods or even direct participation in attacks. The actors' motives vary widely. While some are driven by pure greed, others see few alternatives for making a living. Others again combine political goals with personal enrichment when attacking ships or maritime infrastructure.[22]

Challenge 3: comprehensive context-sensitive action

The third challenge for international politics thus emerges on two levels. Firstly, any measures to tackle piracy in the long run will need to be adjusted to the diverse backgrounds and motivations of the perpetrators if they are to show any effect in curbing the problem on a long-term basis. They must therefore address state instances as well as non-state actors. Secondly, because piracy manifests itself largely locally – despite its global repercussions – it is necessary to take full account of the sociopolitical context when adapting robust anti-piracy structures to tackle regionally specific variants. This is all the more important when the pirates' home state proves incapable of maintaining structures of law and order and international actors intervene, as is the case at the Horn of Africa. If the specific contextual conditions are ignored the best that can happen is that the measures taken will be ineffectual. In the worst case undesirable side-effects will actually exacerbate insecurity.

Promising multilateral approaches

All the enforcement structures set up in the fight against piracy, whether political, legal, military or economic in nature, must take into

22 See the contributions by Dennis Tull (pp. 28ff.), Bettina Rudloff and Annette Weber (pp. 34ff.), and Howard Loewen and Anja Bodenmüller (pp. 42ff) in this volume.

account the transnational character of the phenomenon if they are to have any chance of success. Another challenge is that the required measures themselves need to be anchored at different levels (international, national, regional, local) and that in turn requires a willingness to cooperate on the part of state and non-state actors. But the realm of security is still a core area of state activity defined by the state's exclusive prerogative to use legitimate force. For this reason states find it particularly difficult to co-operate at the multilateral and transnational levels on this issue and to share (or even relinquish) regulatory powers over shipping and sea routes. Nevertheless, as confirmed by successes in the Straits of Malacca and the achievements – however limited – of cooperative military/police anti-piracy in the Gulf of Aden, multilateral cooperation in this field can be exceptionally profitable and is preferable to unilateral action.

Piracy and World Trade: The Economic Costs

Stormy-Annika Mildner and Franziska Groß

A long-neglected problem

Although maritime transportation is one of the drivers of globalisation, the shipping industry and the complex web of sea routes until recently attracted scant attention compared to other transport sectors.[1] The impact of piracy on maritime trade only came under scrutiny after a sharp increase in pirate attacks and armed robberies of merchant vessels, above all off the coast of Somalia and in the Gulf of Aden. It comes as no surprise that attention generally focuses on the political aspects, given that the inadequacy of the data makes it exceptionally difficult to quantify the economic costs of piracy for world trade. So how great is the potential of piracy to disrupt maritime trade? And how vulnerable are states and businesses to the economic risks of piracy?

Dependency on maritime trade

States depend on sea routes to very different degrees depending on their geographical situation, their national and regional economic structures and their traditional trading partners. For the European Union, which has direct access to four seas, this is the preferred means of trade.[2] Nearly 90 percent of the EU's external freight trade is transported by sea, while coastal trade represents 40 percent of trade within the EU in terms of ton-kilometers.[3] As a major exporter Germany has a great interest in ensuring that global sea routes are secure. Moreover, with 3,522 vessels exceeding a gross tonnage of 1,000, Germany has one of the world's biggest merchant fleets.[4] In terms of global deadweight tonnage Germany is in third place with a share of 9.5 percent, behind Japan (3,720 vessels, 15.7 percent of global dwt) and Greece (3,064 vessels, 15.3 percent) but still ahead of China (3,499 vessels, 8.4 percent).[5] So Germany is especially vulnerable to disruption of merchant shipping.

Direct costs of piracy are manageable

That said, the overall (direct) economic costs of piracy remain manageable. Even the current attacks on a strategically important trade route like

1 Pablo Kaluza et al., *The Complex Network of Global Cargo Ship Movements* (Oldenburg: Institute for Chemistry and Biology of the Marine Environment, Carl von Ossietzky Universität), 2, http://arxiv.org/PS_cache/arxiv/pdf/1001/1001.2172v1.pdf.

2 Organisation for Economic Co-operation and Development (OECD), *Space Technologies and Climate Change: Implications for Water Management, Marine Resources and Maritime Transport* (Paris, 2008), 59.

3 "Maritime Safety", *EurActiv.com*, 10 October 2008 (updated 29 January 2010), http://www.euractiv.com/en/transport/maritime-safety/article-157042; EU Commission, "Maritime Transport: What We Want to Achieve", EU Commission, "Maritime Transport: What We Want to Achieve", http://ec.europa.eu/transport/maritime/index_en.htm.

4 The following measures are used in this contribution: gross tonnage (GT) is a measure of the overall size of a ship; deadweight tonnage (dwt) is the payload of a freighter (crew, passengers and cargo) expressed in long tons (1,016 kilograms).

5 UNCTAD, *Review of Maritime Transport 2009* (New York and Geneva 2009), 53, www.unctad.org/en/docs/rmt2009_en.pdf.

the Gulf of Aden cause only minor disruption in relation to the overall volume of world trade. Moreover, the network of shipping routes is comparatively robust and fundamentally capable of adapting to the loss of particular routes (albeit at the price of significantly increased costs). But that should not lead us to underestimate the (medium- and long-term) risks and knock-on costs associated with piracy.

The Importance of Maritime Trade

Advantages of shipping

How important is maritime trade for the global economy? In 2008 the volume of international maritime trade was 8.17 billion metric tonnes. That corresponds to more than 80 percent of global trade.[6] Shipping accounts for such a large proportion of global freight movements because no other form of transport is cheaper. One of the advantages lies in the size of ships: a lorry can transport one or two containers, a large freight plane the equivalent of nearly forty, and a train up to eighty, whereas a container ship will normally load between three and nine thousand containers.[7]

Trends

Before the onset of the global economic crisis in 2008/2009, maritime transport and the shipping industry recorded unusually rapid rates of growth. In 2007, on the eve of recession, international maritime transport grew 4.5 percent (by weight),[8] while the global merchant fleet expanded by 7.2 percent (deadweight tonnage).[9] Even in 2008, with economic crisis erupting, global shipping capacity was still showing vigorous growth of 6.7 percent.[10] Table 1 (p. 22) shows the development of the global merchant fleet by ship type from 1980 to 2009.

The dynamism of maritime transport and the shipping industry reflects the general global economic boom that preceded the crash of 2008/2009. Between 2000 and 2008 the global trade in goods grew at an annual average of 5 percent. However, as credit tightened, demand for goods fell and demand for transport services consequentially declined, growth in maritime trade slowed considerably in 2008 and 2009. In 2008 it was only about 3.6 percent.[11] In view of ongoing financial difficulties, future developments are uncertain.[12]

6 Ibid., 7, 28.

7 Deutsche Marine, ed., *Was bedeutet Maritime Abhängigkeit? – Beispiele*, 16 November 2007, www.marine.de.

8 UNCTAD, *Review of Maritime Transport 2009* (see note 5), 6.

9 UNCTAD, *Review of Maritime Transport 2008* (New York and Geneva, 2008), 31, www.unctad.org/en/docs/rmt2008_en.pdf.

10 UNCTAD, *Review of Maritime Transport 2009* (see note 5), 37.

11 UNCTAD, *Review of Maritime Transport 2009* (see note 5), 6.

12 OECD, *Space Technologies and Climate Change* (see note 2), 60.

Table 1
World fleet by principal vessel type (vessels of 100 gross tons and above)

	million dwt				*million dwt*	*percent*
	1980	*1990*	*2000*	*2008*	*2009*	*2009*
Other	31	49	75	69	85	7.1
Container	11	26	64	145	162	13.6
General cargo[a]	116	103	101	105	109	9.1
Dry bulk[b]	186	235	276	391	418	35.1
Oil tanker	339	246	282	408	418	35.1

a Carrying crates, pallets, sacks, bales, etc., as well as large unpacked items such as vehicles and machinery.

b Carrying bulk cargoes such as mineral ores, coal, phosphates, cement or grain.

Source: United Nations Conference on Trade and Development (UNCTAD), *Review of Maritime Transport 2009* (Geneva, 2009), 38.

The Main Shipping Routes

Five crucial choke-points

Open maritime trade routes are of central importance to free world trade, and with half the crude oil produced globally transported by sea they also play an essential role in global energy security.[13] The five most important international maritime routes are the Gulf of Aden, the Suez Canal, the Panama Canal, the Straits of Malacca and the Strait of Hormuz, with the last two being the world's most important choke-points for oil movements. Table 2 provides an overview of estimated freight volumes on the main trade routes in 2007 and 2008.

Straits of Malacca

Two of these five routes have been severely affected by piracy in recent years: the Straits of Malacca and the Gulf of Aden. Connecting the Indian Ocean with the South China Sea, the Straits of Malacca are 500 nautical miles long, but just nine miles wide at their narrowest point and in places only 30 metres deep. For oil supplies from the Persian Gulf they represent the shortest sea route to the markets of East Asia and the Pacific. Every year more than 50,000 ships pass the Straits of Malacca – or one every ten minutes. With a transport volume of 15 million barrels of oil per day (35 percent of global sea transport of crude oil in 2007) the Straits of Malacca represent one of the main choke-points for oil transport.[14] Up to 80 percent of China's oil imports and 30 percent of its iron imports take this route, as do 90 percent of Japan's oil imports.[15]

13 In 2007, corresponding to 43 million barrels per day. Energy Information Administration, ed., *World Oil Transit Chokepoints*, Country Analysis Briefs (Washington, D.C., January 2008), www.eia.doe.gov/cabs/World_Oil_Transit_Chokepoints/Full.html.

14 Committee on the "1,000-Ship Navy" – A Distributed and Global Maritime Network, National Research Council, *Maritime Security Partnerships* (Washington, D.C., 2008), here: "Sea Lanes of Commerce in the Various Regions of the World", 160; EIA, ed., *World Oil Transit Chokepoints* (see note 13), Background.

15 Jonathan Saul, "Strait of Malacca Threat Raises Cost Stakes for Global Shipper", Manila Bulletin Publishing Corporation, mb.com.ph, 6 March 2010, www.mb.com.ph/node/246454.

Table 2
Estimated cargo flows on major trade routes in 2007 and 2008 (in TEUs*)

Year	*Trans-Pacific*		*Europe–Asien*		*Transatlantic*	
	Asia–USA	*USA–Asia*	*Asia–Europe*	*Europe–Asia*	*USA–Europe*	*Europe–USA*
2007	15,247,955	4,986,106	17,236,936	10,085,181	2,711,037	4,464,206
2008	14,527,722	5,614,366	16,740,642	10,500,068	2,938,168	4,343,506
% change	−4.7	+12.6	−2.9	+4.1	+8.4	−2.7

* TEU (Twenty-foot Equivalent Unit) is the standard unit for counting containers of various sizes and for describing the capacity of ships and terminals.

Source: United Nations Conference on Trade and Development (UNCTAD), *Review of Maritime Transport 2009* (Geneva, 2009), 26.

If the passage were to be closed, for example after a tanker collision, ships would have to take a detour of approximately 1,000 nautical miles, adding billions of dollars to transport costs, causing bottlenecks in supplies of crude oil and bulk goods such as iron ore and coal, and significantly increasing raw material prices. In the worst-case scenario a longer closure of such an important transit route could trigger a global recession.[16]

Gulf of Aden

Another trade route of great strategic importance passes through the Gulf of Aden and the waters off the Somali coast. This route through the Red Sea and the Suez Canal to the Mediterranean connects the markets of Asia, the Arabian Peninsula and Europe, and every year about 20,000 ships pass through the Gulf of Aden. The route is of great relevance for oil transport, too, accounting for 12 percent of all oil transported by sea in 2008.[17] Closing this passage would be costly, as the following example shows: "Routing a tanker from Saudi Arabia to the United States via the Cape of Good Hope adds approximately 2,700 miles to the voyage. This longer distance will increase the annual operating cost of the vessel by reducing the delivery capacity for the ship from about six round-trip voyages to five voyages, or a drop of about 26 percent. The additional fuel cost of traveling via the Cape of Good Hope is about $3.5 million annually."[18]

Risks in Maritime Trade

Dense network of routes

Compared with the global distribution of airports, the web of connections in the global shipping network is a great deal denser, making it structurally much more resistant to the impact of loss of particular routes.[19] None-

16 Münchner Rück, *Piracy – Threat at Sea: A Risk Analysis* (Munich, 2006), 16.

17 International Maritime Organization, "IMO Chief Makes Direct Appeal to Security Council for Somalia Piracy Action", IMO Briefing 54, London, 21 November 2008, www.imo.org/newsroom/mainframe.asp?topic_id=1709&doc_id=10497.

18 U.S. Department of Transportation, *Economic Impact of Piracy in the Gulf of Aden on Global Trade*, http://www.marad.dot.gov/documents/Economic_Impact_of_Piracy_2010.pdf.

19 Pablo Kaluza et al., *The Complex Network of Global Cargo Ship Movements* (see note 1), 5.

theless, sea transport, too, is subject to various risks. Extreme weather conditions are still the main cause of loss of ships, with ordinary freighters exposed to the greatest risk,[20] but piracy also represents a growing problem.

Rise in attacks on large vessels

Until the surge of incidents off Somalia there was widespread agreement that large vessels were fairly safe from attack.[21] The latest figures tell a different story: In 2009 27 percent of attacks were on dry bulk carriers (109 of 406), 16 percent on container vessels (63) and 15 percent on general cargo vessels (53). Even tankers were affected in large numbers, with 11 percent of cases involving attacks on chemical tankers (46) and 10 percent on oil tankers (41).[22] Defying expectations, Somali pirates have developed the ability to attack even supertankers like the *Sirius Star*. Dry bulk carriers and tankers are the targets of choice for pirates, because they are relatively slow and lie lower in the water than other vessels (making it easier to get aboard).[23] According to the International Maritime Bureau, Somali pirates are also acquiring new capacities to operate far out to sea, and have been responsible for attacks off Kenya, Tanzania, the Seychelles and Madagascar, as well as in the southern Red Sea, the Bab el-Mandeb Strait and the Arabian Sea. But shipping remains most vulnerable to piracy in the narrow transit passages, or choke-points.

Dealing with the Risks

Types of risk

Piracy creates various risks for shipowners and operators: total loss of vessel and cargo, damage to vessel and cargo, contractual penalties for late delivery, lost revenues, and ransom demands. All owners and operators are forced to think about strategies for avoiding, reducing and insuring risk.

Risk avoidance

One option for avoiding the risk associated with piracy is to avoid especially risky waters altogether, albeit accepting longer shipping times, higher fuel consumption and consequently increased operating costs.[24] Moreover, individual locations and economies would be hit very hard by large-scale diversion of merchant shipping. For Egypt, for example, the Suez Canal contributes considerably to the country's GDP and is a major source of government revenue and foreign exchange, so a loss of traffic would have tangible negative effects on the country's economy.

Risk reduction

As one strategy to reduce their risk, operators have started introducing on-board precautions. These include carrying security guards when

20 OECD, *Space Technologies and Climate Change* (see note 2), 62.

21 Martin N. Murphy, *Contemporary Piracy and Maritime Terrorism: The Threat to International Security*, Adelphi Paper 388 (London: IISS, 2007), 42.

22 All figures from ICC International Maritime Bureau, ed., *Piracy and Armed Robbery Against Ships: Annual Report 2009* (London, January 2010), 17.

23 Michael Stehr, "Maritime Bedrohungen und deutsche Sicherheitspolitik", *ZFAS: Zeitschrift für Außen- und Sicherheitspolitik* 2, no. 1 (2008): 55–65 (58).

24 With regard to the Gulf of Aden see for example IMO, "IMO Chief Makes Direct Appeal to Security Council for Somalia Piracy Action" (see note 17); Roger Middleton, "Cape Route Beckons – and the Consumer Will Pay", *Times Online*, 18 November 2008, www.timesonline.co.uk/tol/news/world/africa/article5176076.ece.

passing through high-risk areas, securing the deck railings with barbed wire, electric fencing and slippery anti-traction foam (to make it difficult for pirates to get on board), installing sonic weapons to scare off attackers, providing safe rooms (panic rooms) for the crew and high-security containers for the cargo, and using high-sensitivity radar to detect approaching pirates. A survey by PricewaterhouseCoopers published in 2009 found that one in eight shipping companies put security guards on their ships in high-risk areas, while one in five had taken other precautions such as issuing guidance on how crews were to respond in the event of attack, installing water cannon on threatened ships, or fitting safe rooms.[25] These measures significantly increase operating costs.

Insurance against loss ...

For all their utility, these measures cannot completely eliminate risk either. Consequently owners and operators also insure against the risk of their vessels falling victim to piracy. However, the risk here is not covered in full; as is the case with most insurance policies the holder must contribute part of the cost in the event of a claim. These days the risks associated with piracy are usually covered either by the normal marine hull insurance or by special war insurance. Marine hull insurance covers the total loss if a vessel is stolen, sunk or damaged during an attack or during pursuit of a hijacked ship. In 1982 Lloyds reassigned the piracy risk from war insurance to the normal marine hull insurance, but in 2005 optional clauses excluding piracy from hull insurance were reintroduced to allow it to be insured as war risk.[26] This option has found growing use, especially in crisis zones, as the incidence of piracy has increased. War insurance allows insurers to insure individual voyages and to demand additional risk premiums for particular regions.[27]

... and other risks

Marine cargo insurance offers protection against loss or damage to cargo, for example caused by fighting during an attack or incorrect handling during illegal unloading or storage. Protection and indemnity insurance insures possible claims by third parties, while loss-of-hire insurance covers lost earnings attributable to damage to the vessel and ensuing repairs. Finally, kidnap and ransom insurance covers the ransom

25 "Piraten kommen Reeder teuer zu stehen", *Der Westen*, 9 July 2009, www.derwesten.de/nachrichten/politik/Piraten-kommen-Reeder-teuer-zu-stehen-id2220.html.

26 Although the insurers also use the same definition of piracy as the International Maritime Bureau (IMB) and the United Nations Convention on the Law of the Sea, there is no territorial or national restriction. While central to the aspect of criminal prosecution, the question of whose territory an act of piracy took place in is irrelevant for insurance against piracy. As a rule it is sufficient to ascertain that an attack took place at sea. The relevant criterion for insurance is the use or threat of violence before or during the incident. The attack must also have a private motive. Münchner Rück, *Piraterie – Bedrohung auf See: Eine Risikoanalyse* (Munich, 2006), www.munichre.com/publications/302-05052_de.pdf. See also the contributions by Daniel Brombacher and Günther Maihold (pp. 49ff.) and Kerstin Petretto (pp. 10ff.) in this volume.

27 Munich Re, *Recent Ship Hijackings Serve as Reminder of Persistance of Piracy Threat*, 2 November 2010, http://www.munichre.com/en/media_relations/company_news/2010/2010-11-02_company_news.aspx; Münchner Rück, *Piraterie – Bedrohung auf See* (see note 26).

payments and associated costs.[28] Risk coverage is naturally also associated with costs, and these have risen steeply as the number of attacks has increased.

The Economic Costs of Piracy

Quantification difficult

It is difficult to quantify the costs caused by piracy and armed robbery at sea. The breadth of estimates spans from $500 million to $25 billion annually.[29] The enormous range of the figures stems from the different methods of calculation. Some estimates omit the additional costs of increased insurance premiums and freight rates and rerouting. Another factor that makes it difficult to quantify the cost of piracy is that shipowners – partly out of fear of rising insurance premiums – do not by any means report all attacks and attempted attacks to the International Maritime Bureau. Reinsurer Münchner Rück estimates that only about 50 percent of losses are claimed, partly because they are often less than the deductible specified in the policy. Additionally, insurance statistics only list claims pertaining to piracy separately from other claims arising through robbery at sea or on land where piracy was insured as a separate risk. And because of the need for confidentiality there are no statistics on kidnap and ransom insurance either.[30]

Relatively small direct economic costs

However wide the range of estimates, the figures certainly show that the direct cost of piracy is small in comparison to the magnitude of global maritime trade, whose value in 2008 amounted to $11.8 trillion.[31] The annual costs attributable to cargo theft on land lie in the region of $30 to 50 billion. Even if we take the highest estimate for piracy losses, sea transport is still affected less severely than transport on land.[32] Moreover, the probability of being attacked by pirates is really rather small: in 2009 the probability of attack in the Gulf of Aden was 0.58 percent.[33]

Significant business risk

Even if the overall economic costs of piracy are negligible in relation to the value of global maritime trade and the risk appears manageable, from the business perspective piracy still represents a significant financial risk. The direct costs ensue from loss of vessel and cargo. A container vessel is worth about $150 million, while the value of the cargo can reach $1

28 Münchner Rück, *Piracy – Threat at Sea* (see note 16), 16.

29 Murphy, *Contemporary Piracy and Maritime Terrorism* (see note 21), 19f.

30 Münchner Rück, *Piraterie – Bedrohung auf See* (see note 26).

31 According to estimates by the World Trade Organisation the value of global trade in 2008 was $15.7 trillion. On the basis that 75 percent of world trade is transported by sea, we subtracted 25 percent from that figure. WTO, ed., *International Trade Statistics 2009*, Table 1.4: Intra- and Inter-regional Merchandise Trade, 2008, 9, www.wto.org/english/res_e/statis_e/its2009_e/its09_toc_e.htm. Martin N. Murphy uses the same method for his calculations.

32 Murphy, *Contemporary Piracy and Maritime Terrorism* (see note 21), 20.

33 About 20,000 vessels pass through the Gulf of Aden every year, and the IMB recorded 116 attacks on vessels there in 2009. Twenty of these incidents were successful hijackings. ICC International Maritime Bureau, ed., *Piracy and Armed Robbery Against Ships: Annual Report 2009* (see note 22), 5ff.

billion.[34] Shipowners also incur indirect costs through growing spending on security personnel and technical countermeasures. Insurance premiums for passing through particular areas have also risen,[35] especially since the Lloyd's Market Association's Joint War Committee classified the Gulf of Aden as a war risk zone in 2008 (in other words as a region of increased risk). Premiums are calculated as a percentage of the insured value. Within a very short space of time the premium for a voyage through the Gulf of Aden increased by 350 percent, from 0 to 0.05 percent of the value of the cargo to 0.05 to 0.175 percent. Premiums for kidnap and ransom insurance rose by up to 1,000 percent.[36] It is estimated that the additional cost for the 20,000 vessels that pass through the Gulf of Aden annually attributable to increased war risk insurance premiums could amount to $400 million.[37]

Negative subsequent effects

Apart from the financial cost to business there can also be undesirable subsequent effects. Pirates invest their proceeds in acquiring more effective equipment (faster boats, more powerful weapons), which allows them to steadily expand their radius of activity and makes them an even more incalculable threat to merchant shipping. At the same time the level of ransoms demanded has risen apace.[38]

Risk of catastrophic shipwreck

There is one special risk of piracy that involves much greater and more costly potential consequences. This is the wreck of a captured, temporarily uncontrolled ship or its collision with another vessel. Temporary closure of a route with shipping diverted to other alternatives would cause transport costs to explode, with knock-on effects in other sectors. A collision resulting in the loss of most or all of the cargo of an oil, liquid gas or chemical tanker would cause immense economic and environmental harm. The environmental costs of the two most expensive tanker accidents to date, the *Exxon Valdez* in 1989 and the *Prestige* in 2002, amounted to $9.5 billion and $1.2 billion respectively.[39] As can be seen, piracy represents a pressing economic risk that the international community needs to take seriously.

34 Münchner Rück, *Piracy – Threat at Sea* (see note 16), 7.

35 UNCTAD, *Review of Maritime Transport 2009* (see note 5), 9.

36 Rene L. Siemens, Joshua J. Pollack, and Jessica L. Freiheit, "Piracy's Impact on Insurance", *Risk Management* 56 (September 2009), 38–43.

37 This excludes coverage for injury, ransom demands and third-party liability. UNCTAD, *Review of Maritime Transport 2009* (see note 5), 10f.

38 Middleton, "Cape Route Beckons – and the Consumer Will Pay" (see note 24).

39 Münchner Rück, *Piracy – Threat at Sea* (see note 16), 37.

West Africa

Denis M. Tull

History of piracy

The Gulf of Guinea, which follows a sweeping arc from Mauritania east and south to Angola, has been one of the regions worst affected by piracy since the 1990s.[1] The vigorous growth of the coastal and offshore oil industry there (currently producing 5 million barrels/day) has drawn international attention to the region, and to its notorious reputation for piracy.[2] Forty-five cases of piracy were recorded in the Gulf of Guinea in 2009, and external actors increasingly perceive this as a security problem.[3]

Table
Cases of Piracy in the Gulf of Guinea, 2006–2009

	2006	*2007*	*2008*	*2009*
Equatorial Guinea	0	0	1	0
Benin	0	0	0	1
Ivory Coast	1	0	3	2
Ghana	3	1	7	3
Guinea	4	2	0	5
Guinea-Bissau	0	0	0	1
Cameroon	1	0	2	3
Liberia	0	1	1	0
Nigeria	12	42	40	28
Sierra Leone	2	2	0	0

Source: International Maritime Bureau (IMB), *Annual Report 2009* (London, 2010), p. 5.

Hot-spot Nigeria

In the worldwide ranking of regions afflicted by piracy West Africa occupies second place jointly with Southeast Asia. The Nigerian coast is the regional focus by a long chalk, with an annual average of 27 incidents between 2002 and 2009 (see table). A clear trend longer-term is not apparent, with the number of attacks fluctuating strongly. Twenty-eight cases were registered in 2009, but 40 and 42 in the two previous years, making Nigeria the single worst-affected country after Somalia.

Widely underreported

For two reasons the statistics published by the International Maritime Bureau (IMB) tell only part of the story. Firstly, they comprehend only those incidents that are reported by shipowners. The IMB estimates that the actual number of attacks in West Africa is probably at least twice the official figure, with owners of fishing boats and oil industry vessels

1 For more on the Gulf see Ricardo Soares de Oliveira, *Oil and Politics in the Gulf of Guinea* (London: Hurst, 2007).

2 In 2011 Ghana will also begin producing oil (planned approx. 125,000 barrels/day).

3 ICC International Maritime Bureau (IMB), ed., *Piracy and Armed Robbery against Ships: Annual Report 2009* (London, 2010), 5.

especially likely to leave incidents unreported. The Nigerian navy estimates there to be 10 to 15 cases per month; but in January 2009 alone, 50 fishing vessels were attacked with a total of ten deaths.[4]

Maritime insecurity

Secondly, many manifestations of maritime insecurity cannot be strictly classed as piracy under the definition used in international law. Even more broadly couched definitions (e.g. "armed robbery against ships") cover only some of the spectrum of events that, although perhaps not piracy under international law, can certainly be regarded as a threat to maritime security. This would include, for example, armed attacks on oil installations and facilities (including drilling platforms and floating pump stations). The following thoughts are based on a broader definition of maritime security (and insecurity) that is especially relevant in Nigeria where even the distinction between land and sea is blurred by the vast extent of the Niger Delta in the south of the country. The great majority of attacks take place not on the high seas but within about 100 nautical miles of the shore, and many are indeed close to the coast.

Fluid boundaries between piracy and political rebellion

Examining the spectrum of targets "pirates" choose, we can distinguish piracy in the narrower sense more clearly from other activities that do not truly merit the term. For example, the following spectacular incidents can hardly be subsumed under the term of piracy in the conventional sense:

- On 19 June 2008 the rebel Movement for the Emancipation of the Niger Delta (MEND) attacked a $3.6 billion offshore terminal owned by Royal Dutch Shell in the Bonga oil field, forcing it to cease production of 220,000 barrels of oil per day. MEND stated that it had deliberately targeted the oil facility located about 120 kilometres off the coast in order to demonstrate that offshore oil facilities were not outside its range and warned oil and gas tankers to avoid Nigerian waters.[5]
- On 12 July 2009 MEND fighters used speedboats to attack the Atlas Cove jetty in the Port of Lagos, which serves as a docking station for oil tankers. Like the Bonga incident, this operation, in which eight people lost their lives, did not fail to create the desired psychological impact. By conducting an attack within the Nigerian commercial capital, which is several hundred kilometres from the heart of the Niger Delta, the rebels demonstrated both the extent of their radius of operations and their determination to force the oil industry and the government into submission.[6]

Robberies and kidnappings

Aside from activities of such an unusually daring nature, maritime attacks in Nigeria occur largely in the Port of Lagos or target ships anchored very close to the coast.[7] Pirates in speedboats armed with knives,

4 "Pirates Take New Territory: West African Gulf of Guinea", *Christian Science Monitor*, 15 January 2010; "Tanker Trade Group Seeks Action on W. Africa Piracy", *Reuters*, 3 December 2009; "IMB Piracy Report and Implications for Nigerian Shipping", *Daily Independent* (Lagos), 4 February 2010.

5 "Nigeria Attack Stops Shell's Bonga Offshore Oil", *Reuters*, 19 June 2008.

6 One day after the attack, the government released MEND leader Henry Okah. "Militant Leader Freed after Raid on Lagos", *Financial Times*, 13 July 2009.

7 *IMB Report 2009* (see note 3), 22.

hand grenades, handguns, machine guns and rocket-propelled grenades attack freighters, fishing vessels and oil and chemical tankers. Contrasting sharply with piracy in Somalia, only one vessel was actually hijacked by pirates in 2009. The objective is normally robbery, but crew members are often kidnapped and released shortly afterwards against payment of a ransom, especially where the oil industry is involved.[8] Pirates in Nigerian waters routinely use violence to make crews do as they say. Between 1998 and 2008 twenty people were killed during pircacy-related attacks.[9] Nigeria's pirates have a considerably more violent reputation than their Somali counterparts.[10]

The Political Context of Maritime Insecurity

Conflict in the Niger Delta

The reason why West African maritime insecurity is so concentrated in Nigerian waters lies above all in the conflict in the Niger Delta, the heartland of the Nigerian oil industry. The long-smouldering conflict erupted into open combat in 2005 when armed groups declared war on the central government in Abuja and the oil industry. The two principal complaints of the rebels and political groups involved in the conflict are the catastrophic environmental destruction and loss of ecological resources, which has steadily worsened since drilling began in the region, and the economic exploitation and marginalisation of the region. For many years oil has accounted for 90 to 95 percent of Nigeria's export revenues and supplies 80 percent of the total state budget. At the same time the socio-economic situation of the Delta population has deteriorated noticeably. Even after the end of the military dictatorship in 1999, the Nigerian state has continued to largely ignore demands to pass on a larger share of oil revenues to the Delta. Most recently in 2005 a national debate about constitutional reform and new revenue-sharing arrangements ended in deadlock.

Rebel goal and strategy

This was the trigger for the armed rebellion, whose explicit strategy is to force the state to meet the region's demands by hampering oil production. The rebels' chosen tactics, which they deploy to great success, are attacks on oil industry infrastructure (pipelines), vessels and personnel (kidnappings). Although Nigeria theoretically has the capacity to produce 2.4 million barrels of oil daily, production remained 20 to 30 percent below that level between 2006 and 2009.[11] Just in the first nine months of 2008 stoppages enforced by the rebels cost the Nigerian state $23.7 billion in lost revenues.[12] Although the countless militias and armed groups are far

8 "The Hostage Business", *New York Times*, 6 December 2009.

9 Stefan Eklöf Amirell, "La piraterie maritime en Afrique contemporaine: Ressorts locaux et internationaux des activités de piraterie au Nigeria et en Somalie", *Politique Africaine* 116 (2009): 104.

10 *IMB Report 2009* (see note 3), 25.

11 Oil production recovered slightly in 2010 due to an amnesty initiative launched by the government in an effort to end the conflict.

12 "Niger Delta – Country Loses U.S. $24 Billion Oil Revenue in Nine Months", *This Day* (Lagos), 9 April 2009.

from being a hierarchical formation, MEND has emerged over the years as the umbrella organisation for up to 25,000 rebels. MEND is an exceptionally professional group whose targeted attacks on infrastructure cause damage and loss of revenues. Step by step it has driven the central government and the oil industry to their economic limits, by 2009 forcing the government in Abuja to declare an amnesty programme after all its attempts to defeat the rebellion with military means had failed. The difficulty of controlling the swampy terrain of the Delta and the widespread availability of weapons were decisive for this failure.[13]

Two manifestations of maritime insecurity ...

In this context, two main manifestations of maritime insecurity in Nigeria can be distinguished. The primarily politically driven rebellion directed explicitly against the oil industry and claiming responsibility for almost all attacks on that sector's vessels and infrastructure needs to be distinguished from other dangers to maritime security along Nigeria's coasts. The latter, broadly speaking, are criminal acts carried out for the end of self-enrichment, but their contexts and causes are diverse. While to some extent they can be regarded as spin-offs or side-effects of the rebellion, they can also be placed in the context of a general trend of organised violence and counter-violence, especially in Greater Lagos, whose port is the scene of numerous attacks on ships. To interpret these crimes as piracy is misleading insofar as the perpetrators belong to organised criminal gangs that also plague many of Nigeria's cities. Conversely, it is certainly conceivable that the Delta rebels could also be conducting attacks against targets outside the oil industry or that members of these groups could be committing robberies to boost their personal income. At any rate the rebels – and other groups – have secured themselves an exceptionally lucrative source of revenue by selling oil stolen from pipelines ("bunkering").[14]

... closely interlinked

Where the boundary lies between funding the rebellion and other economic motives is, like in conflicts in other resource-rich regions, absolutely unclear. It would be wrong to assume that organised crime and a rebellion driven primarily by political motives cannot happily coexist.[15] For example, there are groups that sabotage pipelines specifically in order to win pollution clean-up or security contracts from the affected company. Because the Nigerian authorities (navy, coastguard, police) rarely succeed in stopping an attack in the Delta, still less detaining those responsible, the precise identity of the "pirates" remains a mystery.

13 The number of small arms circulating in West Africa is estimated to be several million, including one million in Nigeria. Alex Vines, "Combating Light Weapons Proliferation in West Africa", *International Affairs* 81, no. 2 (2005): 341.

14 According to conservative estimates up to 100,000 barrels of oil are stolen daily. Antonio L. Mazzitelli, "Transnational Organized Crime in West Africa: The Additional Challenge", *International Affairs* 83, no. 6 (2007): 1071–90 (1083).

15 Michael Watts, "Petro-Insurgency or Criminal Syndicate? Conflict and Violence in the Niger Delta", *Review of African Political Economy* 34, no. 114 (2007): 637–60 (650); Ukoha Ukiwo, "From 'Pirates' to 'Militants': A Historical Perspective on Anti-State and Anti-Oil Company Mobilization among the Ijaw of Warri, Western Niger Delta", *African Affairs* 106, no. 425 (2007): 587–610.

Initiatives to Improve Maritime Insecurity

Intensified cooperation in the region

Many of the attacks by "pirates" in the Port of Lagos and in the branching mouth of the Niger Delta are fundamentally no different from the organised robberies carried out by gangs on the Nigerian mainland. The main difference is that the so-called pirates of the Delta endanger the economic interests of central government, foreign oil companies and their Western customers. This has recently spurred the Nigerian government to launch initiatives to improve cooperation with neighbouring states in the field of maritime security. Despite a situation where bilateral relations in the region are pretty poor, especially Nigeria's with Cameroon and Equatorial Guinea's with Cameroon and Gabon,[16] the rising political and economic costs of maritime insecurity have encouraged efforts towards regional and bilateral cooperation. In 2009 Nigeria agreed to intensify cooperation with São Tomé and with Equatorial Guinea, including action against organised crime, piracy and illegal fishing.[17] Also in 2009 Equatorial Guinea, Cameroon, Gabon and São Tomé decided to conduct joint naval patrols with the same objective in the framework of the Communauté économique et monétaire de l'Afrique Centrale (CEMAC). The first joint manoeuvre by naval units from the four states, held in September 2009, focused on fighting piracy, illegal fishing and drug trafficking.[18]

Strengthened U.S. involvement ...

Naval cooperation in CEMAC is encouraged by France and the United States.[19] The United States is foremost among those who regard maritime insecurity in West Africa as a problem. From the American perspective the region's strategic importance has grown over the past decade. The share of total American oil imports originating from the Gulf of Guinea is currently about 18 percent and set to increase to 25 percent by 2015.[20] Nigeria plays an important role in this project, striving to increase its production to 3 million barrels daily,[21] but as long as the conflict in the Delta continues to fester that will remain a pipe-dream. Alongside energy security, the importance of fighting international crime (especially drug trafficking) has also grown, leading the United States to launch a series of initiatives to improve maritime security in West Africa. At the heart of these efforts organised by US Africa Command (AFRICOM) stand assistance with training and equipment (boats, communications systems) to strengthen military and police (navy, coastguard) capacities, for example under the Africa Partnership Station and the Africa Maritime Law Enforcement Program.

16 On 17 February 2009 a heavily armed group attacked the island capital of Equatorial Guinea and fought its way to the presidential palace in Malabo. The country's government accused MEND of responsibility for the attack, but MEND denied this.

17 Economist Intelligence Unit, *Equatorial-Guinea, Country Report* (London, October 2009), 9.

18 Ibid.

19 Economist Intelligence Unit, *Cameroon, Country Report* (London, June 2009), 10.

20 By way of comparison, imports from the Persian Gulf region, including Saudi Arabia, currently account for 21 percent.

21 "Nigeria's New Leader Woos Oil Companies", *Wall Street Journal*, 12 February 2010.

... based on false assumptions

However the prospects of success for these efforts are dubious. Firstly, because it is false to assume that maritime insecurity is caused by the weakness of local law enforcement, naval forces and coastguard service.[22] The case of Nigeria is a very good example of the limits of repressive measures, and no capacity-building programme, however sophisticated, will enable the government to permanently neutralise the Delta rebellion. At most, deficits in state capacities may make life easier for pirates. Successfully tackling the causes of piracy will demand fundamental political, economic and ecological reforms that offer the population of the Delta a development perspective and erode support for the rebellion. A second deficit is the largely unchallenged distinction between state and non-state actors. To counterpose "violent non-state actors" causing the problem to problem-solving state institutions is to ignore the reality of Nigeria and its neighbours in the Gulf of Guinea. State elites are in fact part of the problem and deeply implicated in the militarisation of political and social conflicts. Some of the militias in the Delta were originally mobilised by local politicians to intimidate political adversaries and their voters during election campaigns. Moreover, members of the political and military elites are also involved in the lucrative "bunkering" of oil.[23] Under these circumstances external initiatives designed to strengthen state institutions run the risk of actually exacerbating the problems. Fighting corruption and promoting transparency and rule of law should be the top priorities. But if there is to be any prospect of success all involved – central, state and local government, oil companies, and Western oil importers – will have to summon up the political determination to carry through structural reforms.

Characteristics of maritime insecurity in West Africa

Maritime insecurity in West Africa has two core characteristics. Firstly, its centre is clearly still in Nigeria's coastal waters, albeit with signs that the phenomenon may be on the rise in neighbouring states too. Secondly, piracy in the classical sense is only to a very limited degree responsible for maritime insecurity in West Africa. Piracy in the region has two manifestations: Firstly, relatively conventional criminal acts such as armed robbery and theft, above all in the Port of Lagos, which do not differ fundamentally in nature from criminality on the mainland; secondly, the Niger Delta rebellion that broke out in 2005, strategically targeting vessels, installations and employees of the oil industry. Largely because oil production is coastal, these rebel activities are generally perceived as a maritime threat or even piracy. But rebels' activities in these waters are not directed at seeking particular advantages associated with classical piracy. The West African dimension of the problem is much more closely tied to a specific context that relativises the alarming impression created by the statistics for the Gulf of Guinea.

22 Mazzitelli, "Transnational Organized Crime" (see note 14), 1074; Gernot Klantschnig, "The Politics of Law Enforcement in Nigeria: Lessons from the War on Drugs", *Journal of Modern African Studies* 74, no. 4 (2009): 529–49.

23 "The Fight Gets More Serious", *Africa Confidential*, 29 May 2009; Human Rights Watch, *Chop Fine: The Human Rights Impact of Local Government Corruption and Mismanagement in Rivers State, Nigeria* (New York, 2007).

Somalia and the Gulf of Aden

Bettina Rudloff and Annette Weber

History of piracy

Before 1990 attacks by Somali pirates were much rarer than they have become today, and were not conducted to extract ransoms. The phenomenon was restricted to minor incidents where catches were stolen from fishing vessels.[1] Hijackings for ransom began about 2000 and shot up after 2005: between 2005 and 2009 the annual tally increased from 48 to 449 (attempted or successful incidents).[2] The area affected by Somali piracy extends from the coastal waters of Somalia itself, across the whole Indian Ocean, and along the Gulf of Aden, the Red Sea, the Arabian Sea and the coast of Oman.[3] These developments can only be understood in the full context of political and economic factors. The collapse of the Somali state, the explosive emergence of clan-based violence, and the destruction of the political, social and economic foundations of society are the causes of piracy off Somalia's coasts. Consequently, fighting piracy demands comprehensive solutions.

Political Context

Violent conflict and fragmentation

Despite being the most homogenous state at the Horn of Africa, Somalia has endured decades of violent conflict. The toppling of President Siad Barré in 1991 ended an era of clientelist neo-patrimonialism and initiated a process of progressive fragmentation, above along clan lines, that affects both the actors of violence and society as a whole.[4] Until the end of the Cold War military conflicts were generally liberation struggles and conflicts over the use of resources fought with the objective of taking over state power. Since 1991 the central state has become an irrelevance, with the country split into three entities: Somaliland, Puntland and southern Somalia. Somaliland in the north-west – independent but not internationally recognised – occupies the borders of the former British protectorate. It is primarily inhabited by Isaaq, Dir and Darood/Harti clans and governed from the city of Hargeisa. Somaliland is stable, with a peaceful change of leadership following democratic elections and a government that fulfils its constitutional functions.[5] Puntland in the north-east is also inhabited by

1 International Expert Group on Piracy off the Somali Coast, ed., *Piracy off the Somali Coast* (Nairobi, 2008), 14ff.

2 Ibid.

3 ICC International Maritime Bureau, ed., *Piracy and Armed Robbery Against Ships: Annual Report* (London, 2009).

4 Gero Erdmann and Ulf Engel, *Neopatrimonialism Revisited: Beyond a Catch-all Concept*, GIGA Working Papers 16/2006 (Hamburg: German Institute of Global and Area Studies, February 2006).

5 Michael Walls, "The Emergence of a Somali State: Building Peace from Civil War in Somaliland", *African Affairs* 108, no. 432 (July 2009): 371–89 (385–89).

Darood/Harti clans, but these are different sub-clans than in Somaliland. Because President Siad Barré came from Puntland (he was Darood/Mahertjan), government posts were largely occupied by members of Puntland clans until 1991. The provisional constitution that established a government in Garowe in 1998 envisaged Puntland becoming part of a future federal Somali state.[6] Currently there are four main obstacles standing in the way of resolving violent conflicts, stabilising state structures and establishing rule of law.

Absence of state and statehood

1. A lack of state structures and political decision-makers leaves all aspects of life in southern Somalia in private hands, from commerce through health and education to security.[7] The situation in Puntland is perhaps less precarious, but even here we find that the anti-corruption and anti-piracy measures initiated by the government in Garowe have precious little impact on the ground.[8] When the state of Puntland was set up in 1998 under Abdullahi Yusuf Ahmed(a long-serving general who later became President of Somalia from 2004 to 2008) the security sector was given pride of place. A police force, and army and above all a secret police organisation were established, while other state functions were neglected.[9] The intelligence service quickly became a state within the state. Many from the ranks of police and army became "soldiers during the day, rebels at night" ("sobels", from "soldiers" and "rebels"). The emergence and expansion of smuggling networks, the government's neglect of the coastal regions, high unemployment and not least overfishing by foreign fleets have led to a veritable boom in piracy since 2008. Allies in the administration are not hard to find, and the pirates enjoy a high standing in the community because they – unlike the representatives of the state – contribute to improvements in quality of life in the coastal regions.[10] Where it can offer neither security, nor well-being, nor education, nor health, nor even

6 Markus V. Höhne, "Political Identity, Emerging State Structures and Conflict in Northern Somalia", *Journal of Modern African Studies* 44, no. 3 (September 2006): 397–414 (400–406).

7 Annette Weber, "State Building in Somalia – Challenges in a Zone of Crisis", in *Hot Spot Horn of Africa Revisited: Approaches to Make Sense of Conflict*, ed. Eva-Maria Bruchhaus and Monika M. Sommer, 14–27 (22–26) (Münster, 2008).

8 In its latest report (S/2010/91 of 10 March 2010) the UN Security Council's Monitoring Group on Somalia reported that the Puntland government had failed to abide by its promise to energetically combat piracy and was instead profiting from it. See Jeffrey Gettleman and Neil MacFarquhar, "Somalia Food Aid Bypasses Needy, U.N. Study Says", *New York Times*, 9 March 2010, www.nytimes.com/2010/03/10/world/africa/10somalia.html. The Puntland government vehemently denied this in a press release: "Somalia: Puntland Government Continues Anti-Piracy Campaign, Rejects Monitoring Group Accusations", *Garowe Online*, 11 March 2010, www.garoweonline.com/artman2/publish/Press_Releases_32/Somalia_Puntland_Government_Continues_Anti-Piracy_Campaign_Rejects_Monitoring_Group_Accusations_printer.shtml.

9 Above all the Puntland Intelligence Service, which is actively supported by the United States; International Crisis Group, *Somalia: The Trouble with Puntland*, Africa Briefing 64 (Nairobi and Brussels, 12 August 2009), 7, www.crisisgroup.org/~/media/Files/africa/horn-of-africa/somalia/B064%20Somalia%20The%20Trouble%20with%20Puntland.ashx.

10 Inter-Governmental Authority on Development, *Report on the Impact of Piracy on the IGAD Region: IGAD Capacity Building Program Against Terrorism (ICPAT)*, unpublished draft, 16.

collect taxes from foreign fishing fleets by legal means, the legitimacy of the state is eroded.

Culture of violence and war economy

2. For decades struggles over power and resources in Somalia have been conducted primarily through the use of violence. For many young men violent conflict has become everyday reality, and also a source of income. While pirates in Puntland feed their families and villages with the proceeds of hostage-taking,[11] in southern Somalia soldiers' pay from the Transitional Federal Government or the jihadist al-Shabab militia offers one of the few opportunities to earn a living. For warlords, drug and arms dealers, human trafficking rings and guards at roadblocks, the war economy is a lucrative business.[12] Soldiers of the Transitional Federal Government, trained by Ethiopian members of the African Union peace-keeping force, generally remain loyal to the government only as long as they receive their pay, joining one of the militias if it dries up. Without deeper ties to government, state, nation and society it will be impossible to end the culture of violence. And as long as the government in Puntland itself profits from piracy and the foot-soldiers see joining a clan militia as the only alternative to piracy, the warlords will remain a menace at sea. Looking ahead, it is only a matter of time before other groups like al-Shabab also develop an interest in the profitable business of piracy, raising the prospect of a nexus arising between piracy and jihadism.

Collapse of traditional structures and regulatory mechanisms

3. Hope is often expressed that the conflicts wracking Somalia could be resolved through the negotiating and resolution mechanisms of the clans. But ongoing conflict in southern Somalia, massive displacement and waves of refugees, and the fragmentation of family structures have severely weakened the effectiveness of precisely these community-based mechanisms. And the collapse of social and family structures has also swept away the basis of a stable society. Although less violent in its expression, the influence of piracy on the societies of the Puntland coast certainly has a similar effect. Their enormous purchasing power even enables the pirates to disregard clan decisions.[13] Even in regions inhabited and governed by a majority clan that have to date been regarded as stable, fragmentation processes are proliferating within the sub-clans, allowing pirates to establish themselves as an independent political force. Given that a viable society is an essential precondition for stable statehood, the realisation that the supposedly local and authentic in Somalia cannot be the (only) solution also challenges the international community to think about strategies for stabilising Somalia in the long term.

11 Security Council, *Report of the Monitoring Group on Somalia Pursuant to Security Council Resolution 1853 (2008)*, S/2010/91, March 2010, 38–43.

12 On warlords in Somalia see Roland Marchal, "Warlordism and Terrorism: How to Obscure an Already Confusing Crisis? The Case of Somalia", *International Affairs* 83, no. 6 (2007): 1091–1106.

13 Mary Harper, "Life in Somalia's Pirate Town", *BBC News*, 18 September 2008, http://news.bbc.co.uk/2/hi/7623329.stm, also Tom Odula, "Pirate Ransom Money May Explain Kenya Property Boom", *Huffington Post*, 1 January 2010, www.huffingtonpost.com/2010/01/02/pirate-ransom-money-kenya_n_409219. html.

External actors

4. External actors have rarely played a positive role in the history of Somalia, with international involvement often fluctuating between utter neglect, containment and heavy-handed intervention. A policy approach that treads the line between external interests such as securing world trade and the internal need for stabilisation within Somalia has yet to be developed.[14] Piracy in particular is crying out for a political solution because even if security measures at sea can provide protection for merchant shipping, they cannot eliminate the root causes. Until there is political stability in southern Somalia and Puntland, the operations of the EU and other states in the Gulf of Aden will be without lasting effect. It is currently highly unlikely that the military balance of power is going to shift clearly in favour of one single Somali force, nor, with a precarious security situation and no peace agreement in sight, is a United Nations peace mission in the offing.

Economic Context

The limited problem of international predatory fishing

The rise in incidents of piracy is often explained as a reactive expression of self-defence against international illegal fishing that robs Somali fishermen of the means to make a living. However, this explanation, which is advanced by the Somali side and echoed in the public debate within the EU, is only plausible if the following three conditions apply: firstly, it would have to be demonstrated that predatory fishing was indeed occurring on an economically relevant scale; secondly, fishing would have to represent an essential source of income; and thirdly, there would have to be an absence of alternative sources of income.[15] Although the first condition still applies to some extent in Somalia, the last two cannot be confirmed. Under the international definition of the UN Food and Agriculture Organisation, illegal fishing is only one of the three dimensions of illegal, unreported and unregulated fishing. Illegal fishing in the broader sense concerns, on the one hand, fishing within a country's exclusive economic zone (200-mile zone, EEZ) that belongs to its sovereign territory.[16] On the other, it affects the high seas outside the EEZ and thus the regulatory territory of any regional fisheries management organisation there may be.[17] Illegality relates here to the violation both of national standards (within the EEZ) and of the norms and rules of regional organisa-

14 On the Somalia policies of external actors see Bronwyn E. Bruton, *Somalia: A New Approach*, Council Special Report 52/2010 (Washington, D.C.: Council on Foreign Relations, 2010); Ken Menkhaus, John Prendergast and Collin Thomas-Jensen, *Beyond Piracy: Next Steps to Stabilize Somalia* (Washington, D.C.: Center for American Progress, May 2009).

15 The economic developments of the past twenty years are hard to assess because of massive data deficits. Historic data sources were destroyed when the state collapsed and the establishment of new recording systems with international assistence has only just begun. The data cited here must therefore be regarded as only approximate.

16 On the definitions see the contribution on the implications of international law by Christian Schaller in this volume, pp. 56ff.

17 Food and Agriculture Organization of the United Nations (FAO), *International Plan of Action to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing* (Rome, 2001).

tions and international law. It covers such different transgressions as quota violations, seasonal fishing bans and reporting obligations. According to surveys and local case studies, the biggest problem for Africa as a whole appears to be the non-observance of specific regulations such as fishing bans for particular species.[18] But specifically in Somalia the transgressions registered between 2000 and 2008 also involve fishing within the EEZ without a valid permit. Fleets involved in this are known to have operated under the Kenyan, Syrian, Taiwanese and Spanish flags.[19]

Fishing rights and sanctions

Somalia is estimated to have the world's worst illegal fishing problem, with illegal catches worth $94 million representing 75 percent of the total catch (2003).[20] Pursuing such transgressions within the EEZ is Somalia's own responsibility, but one that the country is powerless to discharge adequately if Somali actors are involved and drawing financial gains from illegally issued licences. Outside the EEZ, regional fishing management organisations govern the fishing rules and quotas of, in the first place, their members, by issuing fishing quotas and setting standards. Unused quotas may be issued to non-members. The organisation has the power to sanction violations of these rules. Somalia is a member of one of two relevant fishing management organisations in the Indian Ocean, through which it can in principle receive and guard quotas.[21] There is no publicly accessible data about Somali fishing rights outside the EZZ, but the established procedure of basing allocations on historical catches means that Somalia's are bound to be marginal because of the country's tiny technical capacity for deep-sea fishing. Global overfishing plays a role in this region too, with depleted fish stocks restricting any expansion of the fishing sector.

Fishing economically marginal

In 1990 the fishing sector accounted for just 2 percent of Somali GNP, so to that extent it plays a very minor role in the economy as a whole.[22] It does however make up the livelihood of particular groups, above all of the small fishermen in the south who fish only within the EEZ. In overall economic terms the sector is often said to possess great economic potential. It is estimated that sustainable fishery could produce up to 300,000 tonnes of fish and 10,000 tonnes of shellfish annually.[23] The historic peak to date was achieved in 1989, when the Somali catch amounted to 21,000 tonnes

18 Marine Resources Assessment Group (MRAG), ed., *Review of Impacts of Illegal, Unreported and Unregulated Fishing on Developing Countries: Final Report* (London, July 2005).

19 Ibid.

20 Ibid., 53.

21 The South West Indian Ocean Fisheries Commission (SWIOFC), founded in 2004 is a relatively young organisation covering stocks of all fish apart from tuna. As well as Somalia its members include France, Kenya, Madagascar, Tanzania and Yemen. The second organisation, the Indian Ocean Tuna Organisation (IOTC), is responsible only for tuna. Its members include the EU, France, China, Korea, Oman, and African states such as Eritrea und Kenya, but not Somalia.

22 MRAG, *Review of Impacts of Illegal, Unreported and Unregulated Fishing on Developing Countries* (see note 18).

23 World Bank, ed., *Somalia – From Resilience towards Recovery and Development: A Country Memorandum for Somalia* (Washington, D.C., 2006), 86.

of fish and 4,700 tonnes of shellfish.[24] However, Somali fishermen account for just 3 percent of the total annual catch in Somali waters, most of which is accounted for by legal and illegal fishing by foreign fleets.[25] The lion's share of the local Somali catch goes to small-scale subsistence fishermen.[26] Apart from shark and lobster, Somalia exports very little fish; exports in 2003 amounted to 2.5 million tonnes, or about $3.4 million in terms of value.[27] The general lack of processing capacity prevents existing export potential from being tapped.

Membership in fishing management organisations

Unlike many of its neighbours, Somalia is a member of only one of the regional fishing management organisations for the waters off its coasts (namely SWIOFC). These organisations set quotas and define permitted fishing methods for their members, issue export certificates and conduct ongoing monitoring. Membership makes it easier to get hold of technology and equipment, but also binds members to rules. Even without membership Somalia should profit because members' quotas are defined and violations incur penalties. In practice, however, no sanctions are currently applied if a member ignores the rules.[28]

Great importance of alternative sources of income

With a share of 64 percent of GNP in 1991, agriculture is by far the dominant economic sector in Somalia. Livestock predominates, especially in the drier regions of Puntland and Somaliland. Alongside the immense importance of exports of livestock and camel, sheep, goat and cow's milk, the sector also employs 55 percent of economically active Somalis.[29] Cultivation of sesame, fruit (such as bananas) and maize occupies second place in the agricultural sector after livestock.[30] Livestock contributes 80 percent of Somalia's total foreign currency revenues.[31] Although the collapse of the state left many marketing channels disrupted or blocked by conflicts, livestock-herding itself proved to be fairly robust. The traditional herding routes are largely autonomous of modern transport infrastructure and logistics. Financial transfers from Somalis working abroad are the second most important source of income, and are set to overtake agriculture. With an estimated volume of up to $1 billion per year they amount to about double the total sum of official international development aid.[32] However, this great economic importance also involves considerable risks.

24 Ibid.

25 MRAG, *Review of Impacts of Illegal, Unreported and Unregulated Fishing on Developing Countries* (see note 18).

26 World Bank, *Conflict in Somalia: Drivers and Dynamics*, World Bank Economic and Sector Work Paper (Washington, D.C., 2005).

27 FAO, ed., *FishStat*, www.fao.org/fishery/statistics/software/fishstat/en.

28 Indian Ocean Tuna Commission, ed., *Report of the IOTC Performance Review Panel* (2009), www.iotc.org/files/misc/performance%20review/IOTC-2009-PRP-R%5BE%5D.pdf.

29 United Nations Development Programme and World Bank, *Country Re-Engagement Note: Somalia*, April 2003.

30 FAO, ed., *FAO Country Profiles, Food and Agricultural Commodities Production 2007*, http://faostat.fao.org/DesktopDefault.aspx?PageID=339&lang=en&country=201.

31 European Commission, *Somalia, Joint Strategy Paper for the Period 2008–2013* (Brussels, 2008), 7, http://ec.europa.eu/development/icenter/repository/scanned_so_csp10_en.pdf.

32 Ibid., 13; UNDP and World Bank, *Country Re-engagement Note: Somalia* (see note 29), 14.

The flow of funds depends strongly on the economic situation abroad, and could decline in coming generations as family ties unravel.[33] In the whole of East Africa revenues from unregistered trade play a greater role than official trade.[34] Somalia managed to keep routes open for informal exchange of goods after the 1991 collapse, especially with Kenya. Although the Kenyan side closed the crossing in 2003, the Somali-Kenyan border has since become more permeable once again.[35]

Anti-piracy as a Comprehensive Stabilisation Task

Political stabilisation

Piracy in Somalia can only be judged in the context of the overall political and economic situation. Singling out individual factors such as international fishery policy and practice is short-sighted, as monodimensional approaches to containing piracy are predestined to failure. Somalia can only achieve lasting political stability if the needs of the individual regions are addressed (Somaliland, Puntland and southern Somalia). The actors of violence and criminal networks differ in nature between the regions, so consequently the solutions applied must differ too. In Puntland it would make sense to support and monitor the anti-corruption policies of President Abdirahman Mohamud Farole. In Somaliland we need to consider what forms of development work can be conducted without having to make a decision about the independence that the region seeks. For southern Somalia the humanitarian question has top priority. In the interests of feeding the population, negotiations will have to be conducted even with violent jihadists like the Shabab, whose suitability as political negotiating partners is extremely limited. With southern Somalia in a situation of political and military stalemate external actors can ultimately only facilitate and support talks between different factions. The Somali actors themselves will have to find a political solution.

Economic stabilisation

In economic terms a spectrum of solutions are required too. The known problem of illegal fishing must be tackled and contained and the fisheries sector strengthened as source of income. At the same time the development of alternative sources of income needs to be supported. Such measures are likely go hand in hand with a general political stabilisation and the establishment of functioning Somali institutions. Effective exercise of control within the Somali EEZ is not only hampered by lack of resources; there is also a deficit of statehood and of commitment on the ground. The initiative launched in Puntland to protect the coast using private security organisations should be more strongly encouraged by the

33 Abdusalam Omer, *A Report on Supporting Systems and Procedures for the Effective Regulation and Monitoring of Somali Remittance Companies (Hawala)* (Nairobi: UNDP Somalia, 2010).

34 Peter Little, *Unofficial Trade when States Are Weak: The Case of Cross-Border Commerce in the Horn of Africa*, Research Paper 2005/13 (Helsinki: United Nations University, World Institute for Development Economics Research, April 2005).

35 Ibid., 21.

international community.[36] Illegal fishing conducted by external actors is not actually the main motivation for Somali piracy, but the Somali justification that they are resorting to criminal means to protect themselves against international crime needs to be challenged by sending the right signals. The relevant fishing management organisations could also lend stronger support to non-members like Somalia by assigning quotas and providing technical assistance (taking development factors into account in the way they already are in the sphere of commerce), as well as supplying assistance to ensure that the technical means are available to properly exploit existing quotas. As a general point, these organisations, wherever they are in the world, currently make inadequate use of their powers of sanction; they must do so more frequently. As a member of one of the relevant fishing management organisations itself, the EU has possibilities to exert influence in this direction. Better marketing structures would help to exploit the full potential of fishing, especially for export, and thus improve incomes.[37] And finally, addressing the issue of global overfishing is fundamental to turning fishing into a sustainable source of income in Somalia.

Income alternatives

In order to promote alternative sources of income, it will be particularly important to enhance livestock quality systems. Only if the quality of Somali exports is backed by internationally recognised certificates will it be possible to avoid the economic losses caused by disease-related import bans of the kind imposed by major importers in 1998.[38] A comprehensive programme run by the World Bank and the UN Development Programme and a national Somali strategy are seeking to improve animal health and marketing strategies.[39] Somalia's official exports are disadvantaged by its being a member of few regional trading groups. But Somalia will only join be able to join international bodies in the course of successful state-building because, firstly, only states can be members and, secondly, the actual benefits of membership can only be realised if there are mechanisms in place to guarantee implementation and quality control. Furthermore, Somalia makes extremely poor use of existing and export incentives to which it is entitled. The main reason for this is the lack of capacity to issue the certificates of origin without which no preferential tariffs can be obtained. Development projects should promote the establishment of internationally recognised Somali certification agencies.

36 Stig Jarle Hansen, "Private Security and Local Politics in Somalia", *Review of African Political Economy* 35, no. 118 (December 2008): 585–98.

37 Various programmes of the EU and the FAO (Strategic Partnership for a Sustainable Fisheries Investment Fund in the Large Marine Ecosystems of Sub-Saharan Africa) go in this direction and must be continued. (see also World Bank, *Somalia – From Resilience toward Recovery and Development* [note 23], 87.)

38 Most lifted their import bans at the end of 2003, but Saudi Arabia did not follow until 2009; "Saudi Lifts Somali Livestock Ban", *BBC News*, 5 November 2009, http://news.bbc.co.uk/2/hi/8345370.stm; Economist Intelligence Unit (EIU), *Country Report Somalia* (London, 2010), 21, www.eiu.com.

39 Cindy F. Holleman, *The Socio-Economic Implications of the Livestock Ban in Somaliland* (Washington, D.C.: USAID, December 2002), 1, http://pdf.usaid.gov/pdf_docs/PNADJ083.pdf.

Straits of Malacca

Howard Loewen and Anja Bodenmüller

History of piracy

The Straits of Malacca between Malaysia, Singapore and Indonesia are one of the world's most important international shipping routes. Every year 65,000 vessels pass the Straits, carrying about one third of world trade and half of global energy supplies.[1] Even more than for the states they pass between, the Straits are absolutely crucial for the region's economic powers: about 80 percent of Japanese and 60 percent of Chinese oil imports depend on this route.[2] At the same time, the waters of insular Southeast Asia in general and the Straits of Malacca in particular have a traditional reputation for piracy.[3] According to the International Maritime Bureau Piracy Reporting Centre, attacks on shipping here increased especially significantly during the 1990s, but for the past six years the number of reported incidents has been falling strongly. From 38 attacks in the Straits of Malacca in 2004, the figure fell to twelve in 2005, eleven in 2006, seven in 2007 and finally just two in each of the years 2008 and 2009. Lloyd's Market Association declared the Straits a war risk zone in 2005, but lifted the classification in August the very next year, as the security situation improved markedly.

Forms of piracy

Most cases of piracy recorded by the IMB in Southeast Asia are simple "hit and run" robberies of fishing boats and commercial vessels.[4] The perpetrators are predominantly active at night, their attacks are crimes of opportunity and because they meet little in the way of resistance violence is generally minimal. The pirates mostly disappear into their fishing communities, where they are often protected by corrupt local law enforcement officials. Alongside the "hit and run" incidents there are also sporadic cases of systematically organised piracy by well-informed syndicates that set out to take temporary or long-term control of medium-sized freighters. This mode of piracy demands a much more sophisticated level of organisation and coordination, including financial outlays for speedboats, weapons, training and information about cargoes. Depending on the duration of possession the pirates' goal may be to steal as much of the goods as possible. This variant of piracy also presupposes a buyer or market for the stolen goods and planning for what to do with any hostages that may be

1 Ian Story, "Maritime Security in Southeast Asia: Two Cheers for Regional Cooperation", in *Southeast Asian Affairs 2009*, ed. Daljit Sing, 36–58 (38) (Singapore: Institute of Southeast Asian Studies, 2009).

2 Kay Möller, *Maritime Sicherheit und die Suche nach politischem Einfluss in Südostasien*, SWP-Studie 35/2006 (Berlin: Stiftung Wissenschaft und Politik, December 2006).

3 Insular Southeast Asia comprises Indonesia, Malaysia, Singapore, the Philippines and the Sultanate of Brunei.

4 Sam Bateman et al., *Safety and Security in the Malacca and Singapore Straits: An Agenda for Action*, Policy Paper (Singapore: Institute of Defence and Strategic Studies, May 2006), 1–40 (22).

taken.[5] In the Straits of Malacca – as in Southeast Asia in general – pirates are usually young persons with little formal education who, if they work at all, are fishermen or water taxi crew. Most of them live in fishing communities along the Straits.[6] All the states bordering the Straits, with the notable exception of Singapore, suffer great socio-economic disparities between fishing communities and urban populations.

Causes of Piracy in the Straits of Malacca

Economic and social conditions

For certain sectors of the population along the Straits piracy is a lucrative business associated with little risk. One of the most important determining factors for the development of piracy is the social and economic state of the societies of Southeast Asia and the resulting financial incentives for maritime robbery. An Indonesian study demonstrates, for example, that for the impoverished fishermen of the island of Batam in Riau Islands Province, piracy is basically always worthwhile: their average earnings of €3 for a day of legal work are minuscule in comparison with the rewards of a successful attack, which can earn participants between €7,000 and €10,000 each. Given that Indonesia suffered significant declines in income in the course of the Asian financial crisis of 1997–98 piracy must primarily be understood as a land-based socio-economic phenomenon with maritime manifestations.[7] Economic crisis strongly affects the population's social situation in all three Straits states, but the influence on piracy is generally time-lagged. For instance, the full impact of the Asian crisis was not seen until 1999, when the number of reported cases in Indonesian territorial waters suddenly jumped from 47 to 115.

Poor security, weak statehood and political transformation

Another reason for the emergence of piracy is the relatively poor security situation in waters that are often difficult to control and where questions of state sovereignty are not always clear. Fragile national security often correlates with weak statehood, especially in periods of transition between authoritarian and democratic rule. Whereas Singapore and Malaysia are fairly stable semi-authoritarian systems and are not expecting any significant transformation of their structures of political power, Indonesia offers an example of a transformation-related increase in piracy. The end of the Suharto era in 1998 marked a political turning-point in the country's history, where Indonesia found itself confronted with the difficulties and challenges of a new, open system of government. The initial years of the transformation process were characterised by political in-

5 Adam J. Young and Mark J. Valencia, "Conflation of Piracy and Terrorism in Southeast Asia: Rectitude and Utility", *Contemporary Southeast Asia*, 25, no. 3 (August 2003): 269–83 (272f).

6 Eric Frécon, "Piracy and Armed Robbery at Sea along the Malacca Straits: Initial Impressions from Fieldwork in the Riau Islands", in *Piracy, Maritime Terrorism and Securing the Malacca Straits*, ed. Graham Gerard Ong-Webb, 69–83 (75f) (Singapore: Institute of Southeast Asian Studies, 2006).

7 Eric Frécon, *Beyond the Sea: Fighting Piracy in Southeast Asia*, RSIS Commentaries, 2/2010 (Singapore: S. Rajaratnam School of International Studies, 6 January 2010), www.humansecuritygateway.com/documents/SRSIS_FightingPiracy_SoutheastAsia.pdf.

stability, corruption and weak structures of government. Another decisive factor was President Jusuf Habibie's unexpected willingness, immediately after taking office in 1998, to consider independence for East Timor. The emergence of the new state was accompanied by violent clashes between East Timorese independence fighters and parts of the Indonesian military supported by Indonesian loyalists. On top of these stresses, socio-economic pressure on the nascent political transformation process was exacerbated by the collapse of the country's tourism industry after the Bali bombing of October 2002. It therefore comes as no surprise to learn that Indonesia's piracy statistics peak in 2003, with 121 recorded incidents.

Efforts to Overcome Piracy

Problem long neglected

For many years the countries of Southeast Asia treated piracy as a negligible phenomenon. Other national and transnational security threats, in particular terrorism, and maritime issues like illegal fishing and smuggling of people, weapons and goods appeared more pressing by comparison. This attitude began to change in 2004 under increasing international pressure from states using the region's sea routes. One of the decisive factors was a proposal by the United States for a regional maritime security initiative (RMSI) that provoked great controversy (partly due to ambiguous wording).[8] Although the plan itself, which envisaged close cooperation between Washington and the countries of Southeast Asia to contain transnational security risks, was never implemented, the discussion led all three states bordering the Straits of Malacca to make fighting piracy a security priority.

Unilateral efforts by Singapore, ...

The anti-piracy initiatives pursued since 2004 involve unilateral, trilateral and multilateral components and are in some respects dependent on external actors. The unilateral efforts of Singapore, Indonesia and Malaysia are strongly conditioned by their national interests, while the different geographical situations of the three states impact the intensity and political weighting of their respective anti-piracy efforts. Whereas the Straits of Malacca represent the only waters that Singapore needs to monitor and protect, they make up but one small part of a much larger national territory for Indonesia and Malaysia. Singapore's great economic dependency on this maritime trade route leads it to grant very high priority to security for commercial shipping.[9] In April 2005 the Singapore government introduced Accompanying Sea Security Teams (ASSeTs), deterring attacks on merchant vessels carrying high-value cargoes by deploying specially trained security guards. In the shape of the Changi Command and Control Centre, Singapore has also developed a bastion of maritime security whose significance extends well beyond the Straits of Malacca. This facility brings together command, communication and training

8 Story, "Maritime Security in Southeast Asia" (see note 1), 40.

9 Mark J. Valencia, "Co-operation in the Malacca and Singapore Straits: A Glass Half-Full", Policy Forum Online 06-103A, 12 December 2006, www.nautilus.org/fora/security/06103Valencia.html.

under a single roof, greatly assisting coordination of the various national security initiatives.[10] Unlike Malaysia and Indonesia, Singapore bases its national maritime security strategy on a fundamental assumption of a link between piracy and transnational terrorism.[11]

... Malaysia ...

Malaysia's unilateral efforts to contain piracy in the Straits of Malacca are largely determined by historically shaped interests concerning territorial self-determination and sovereignty.[12] In order to ensure effective control over its territorial waters and provide an outward demonstration of state sovereignty, Abdullah Badawi's government in 2005 transferred the fragmented responsibility for maritime security from eleven different agencies to a single national coastguard, the Malaysian Maritime Enforcement Agency (MMEA). The Malaysian government also supports stricter law enforcement against piracy to create a deterrent effect.[13]

... and Indonesia

Indonesia's national efforts, too, are strongly oriented on its own sovereign interests. However, the country represents a special case in terms of the necessity and transnational repercussions of unilateral efforts. Until 2007 Indonesia's territorial waters were the world's most dangerous, topping the piracy statistics year after year. Since the process of state consolidation began under President Susilo Bambang Yudhoyono in 2004, the government has invested massively in coastguard training, maritime radar systems and new patrol boats. Information-gathering in fishing communities has been improved and law enforcement against pirates and their corrupt allies in the bureaucracy and military has been intensified. In 2004 President Susilo also ordered the navy to step up its patrols in the Straits of Malacca.[14] As well as dealing with the maritime symptoms, the government is also working to fight the land-based causes of piracy: socio-economic insecurity, corruption and weak statehood. Just two months after taking office President Susilo launched a comprehensive national action plan against corruption in order to improve the transparency and effectiveness of state institutions. Through this combined strategy Indonesia has been able to record a significant fall in its piracy statistics since the turning point in 2004: from 121 incidents in 2003 to no more than 15 in 2009.

Trilateral cooperation

Malaysia, Singapore and Indonesia entered concrete trilateral agreements in July 2004, driven in particular by the desire to avoid a potential restriction of their sovereignty through the intervention of external forces in regional security arrangements. The resulting MALSINDO programme of coordinated patrols in the Straits of Malacca is consequently strongly

10 Denise Hammick, "Turning the Tide", *Jane's Defence Weekly* 44, no. 47 (November 2007): 20ff.

11 Ian Story, "Securing Southeast Asia's Sea Lanes: A Work in Progress", *Asia Policy* 6 (July 2008): 95–127 (110).

12 Valencia, "Co-operation in the Malacca and Singapore Straits" (see note 9).

13 Joshua H. Ho, "The Security of Sea Lanes in Southeast Asia", *Asian Survey*, 46, no. 4 (July/August 2006): 558–74 (566).

14 John Bradford, "Shifting the Tides against Piracy in Southeast Asian Waters", *Asian Survey*, 48, no. 3 (May/June 2008): 473–91 (480).

coloured by ASEAN's fundamental principle of non-intervention, with the three states conducting coordinated but not joint patrols. Each patrol vessel remains under the command of its own country and each country is responsible for its own territory. Incursions into foreign waters are at present not permitted even in hot pursuit. Furthermore, Malaysia and Indonesia insist that patrols may only be conducted by the three states themselves and not by external powers.[15] In April 2006, two years after its introduction, the MALSINDO programme was renamed the Malacca Straits Patrols (MSP) and rules of conduct and standard procedures for cross-border action were agreed to improve the effectiveness of patrols. Today the programme comprises three elements: the Malacca Straits Surface Patrols (MSSP), Eyes in the Sky (EIS) and the Intelligence Exchange Group (IEG). As well as turning out to be a very successful anti-piracy strategy, the MSP programme also represented a step forward in the difficult relations between the three states. Indeed, the Eyes in the Sky flights that began in September 2005 are conducted jointly whilst the Malacca Straits Patrols Information System (MSP-IS) developed by the Intelligence Exchange Group improves data exchange and coordination between all participants.[16] Thailand joined the MSSP in October 2008 and EIS in January 2009.

Regional and broader efforts

Since 2003 we have observed increased bilateral and multilateral anti-piracy cooperation at the regional level within ASEAN, but these initiatives are still in their early days. Because not all ASEAN members are directly affected by the problem, no joint anti-piracy strategy has yet been instigated. Instead the issue has been taken up over the course of the years in various declarations and agreements on transnational criminality and terrorism. The geostrategic situation and economic significance of the Straits of Malacca have led the regional economic powers and the United States to express a strong interest in shaping security measures there. According to the International Law of the Sea (UNCLOS), user states are entitled and indeed required to cooperate in fighting piracy on the high seas and in any other area that is outside the responsibility of a particular state.[17] Defence ministers from seventeen countries including the United States, China, India, Japan and the ASEAN states attending the fourth Shangri-La dialogue in Singapore in 2005 agreed the following three basic principles for multilateral security cooperation in the Straits of Malacca, which in places deviate from the UNCLOS arrangements: 1. Primary responsibility for the security of the entire maritime territory of the Straits of Malacca, even outside territorial limits, remains with the three littoral states. 2. The international community and the user states fulfil a supporting role on the basis of consultation with the littoral states. This includes financial and material support, capacity-building measures, exchange of information, and joint anti-piracy exercises, but not the active conduct of security measures by external actors. 3. All multilateral cooperation must

15 Story, "Maritime Security in Southeast Asia" (see note 1), 41.

16 Ibid.

17 United Nations Convention on the Law of the Sea (UNCLOS), Article 100, www.un.org/Depts/los/convention_agreements/texts/unclos/unclos_e.pdf.

be compatible with International Law of the Sea, and the sovereignty of the three littoral states must be respected.[18]

Japan and United States

Of all the external user states, Japan and the United States have shown the greatest interest in becoming involved in security in the Straits of Malacca. Japan has provided regular financial, material and strategic assistance to Malaysia and Indonesia, for example for new satellite surveillance and communications systems and anti-piracy training.[19] In September 2006 a total of fifteen countries ratified the Regional Cooperation Agreement on Combating Piracy and Armed Robbery against Ships in Asia (ReCAAP), the first inter-state agreement on multilateral cooperation for fighting piracy in Asia. Its operational platform, the ReCAAP Information Sharing Centre, opened in November 2006 in Singapore with a remit to improve communications and conduct capacity-building measures. Although this multilateral initiative fundamentally represents a great step forward, its full potential has yet to be tapped, because Indonesia and Malaysia currently remain outside. The strong American interest is rooted in the rising importance of non-traditional security risks since 2001, where Washington assumes a connection between piracy and terrorism. However, the aforementioned U.S. proposal for regional maritime security cooperation made in 2004 impacted negatively on the perception of all subsequent American initiatives. Indonesia and Malaysia condemned the proposal as a direct attack on their sovereignty, and warned that a regional U.S. presence could actually boost radical Islamism in Southeast Asia.[20] In recent years appreciation of the United States as an important donor has risen again and mutual relations have improved accordingly. At the same time the United States is working hard on capacity-building in the region.

Summary and Outlook

Conditions for success

Towards the end of the 1990s Southeast Asia found itself facing the world's worst piracy problem. At first, the problem was inadequately addressed by the security policies and activities of the affected countries. It took increasing international pressure to force Indonesia, Singapore and Malaysia to take steps to ensure the security of the geostrategically and economically crucial maritime trade route through the Straits of Malacca. Around 2004, the three littoral states made fighting piracy and strengthening maritime law enforcement into priorities of their security policy. The energised national commitment of the Straits states can be judged as a first important step towards successful containment of transnational piracy. Since 2004 the three states have shown increasingly willingness to

18 International Institute for Strategic Studies, "2005 Ministerial Lunches" Shangri-la Dialogue 2005, press coverage, www.iiss.org/conferences/the-shangri-la-dialogue/shangri-la-dialogue-archive/shangri-la-dialogue-2005/2005-ministerial-lunches/.

19 Story, "Maritime Security in Southeast Asia" (see note 1), 43.

20 Mark Valencia, "The Politics of Anti-Piracy and Anti-Terrorism Responses", in *Piracy, Maritime Terrorism and Securing the Malacca Straits*, ed. Ong-Webb (see note 6), 84–102 (92).

enter into trilateral security cooperation, which in view of their historically troubled relations represents an important step forward. The massive presence of coordinated air and sea patrols and improved exchange of information have brought about significant successes in fighting piracy in the Straits of Malacca. Furthermore, the pan-Asian anti-piracy information centre established under ReCAAP is already doing an outstanding job of simplifying communication structures and conducting the necessary capacity-building measures. The potential of this initiative would be increased still further by the participation of Indonesia and Malaysia. The trilateral and multilateral efforts deserve mention as the second successful step in fighting piracy in the Straits of Malacca. A third important aspect is the way Indonesia's leadership has worked increasingly since 2004 to improve socio-economic conditions in the country and enhance the transparency and effectiveness of government structures, making a political contribution to fighting the land-based causes of the piracy problem. The statistics reflect these successes, showing a massive fall in the number of reported cases in the Straits of Malacca from 38 in 2004 to just two in 2009.

Challenges for future security strategies

When it comes to establishing security in the Straits, ASEAN's principle of non-intervention limits the role of external actors to non-military activity and cooperation. But in the course of recent years the three littoral states have signalised that they are not only ready to accept international cooperation with user states in the areas of financial, military and strategic support, information exchange, and capacity-building, but indeed themselves regard this as necessary. Even if external actors have little direct influence on anti-piracy activity, they can still make a decisive contribution to the long-term resolution of this transnational problem through capacity-building measures and financial assistance. Future security strategies for the Straits of Malacca face the challenge of sustaining the ability and motivation of the littoral and user states to maintain the momentum and funding of the anti-piracy initiatives. The repercussions of the global economic crisis of 2008/09 could make this problematic, especially for the poorer states. The three littoral states face another challenge too: If they wish to deal with piracy properly they will need to work at strengthening their political and legal systems, fighting corruption, and reducing social and economic disparities within their societies.

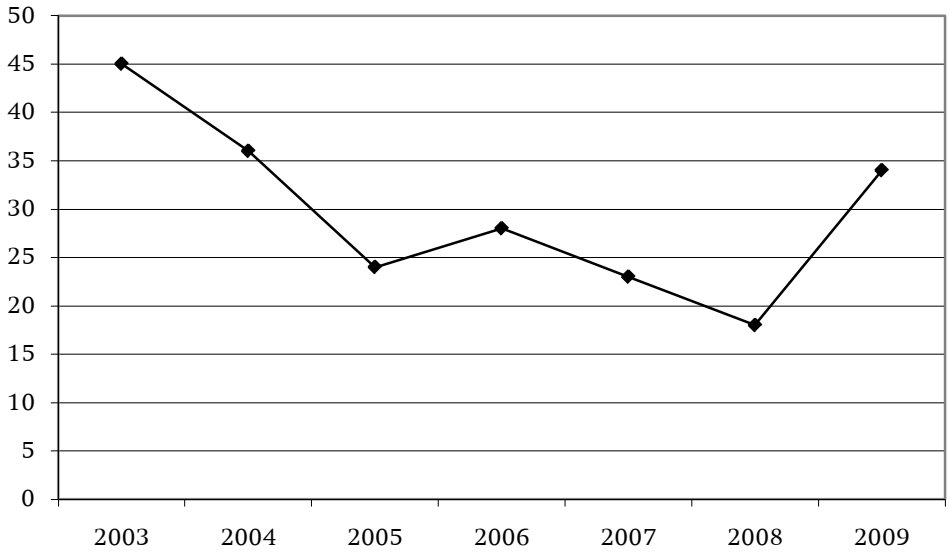
Maritime Security in Latin America

Daniel Brombacher and Günther Maihold

History of piracy

The broader concept of maritime security covers the free movement of shipping, the security of shipping routes and ports, and the fight against piracy and terrorism. In Latin America the threat of violent attack by organised crime in ports, on inland waterways and in coastal waters represents the greatest challenge to maritime security. Piracy on the high seas is negligible. The risk of experiencing such an attack is small in comparison to East Africa or Southeast Asia.[1] Especially in Colombia, the Worldwide Incidents Tracking System reports incidents classified as terrorist attacks.[2] These are usually kidnappings or violent acts against military or civilian targets, including aid agency vessels, carried out by the FARC guerillas and other armed groups. The main interest here is to extract ransoms and preserve control over territory that is also used to transport narcotics by sea. Altogether in Central and South America between 2004 and 2009 16 such incidents were reported, in which 49 people were killed, 40 injured and 56 kidnapped. Very many more go unrecorded.[3]

Figure 1
Attacks on ships in Latin America (ports, coastal waters, high seas), 2003–2009



Source: International Maritime Organization (London).

1 *AKE International Maritime Security Report*, January 2010, 5.
2 http://wits-classic.nctc.gov.
3 As shown by research on http://wits-classic.nctc.gov for Central and South America.

Maritime insecurity

This makes it quite clear that it is not piracy as such, but maritime insecurity in connection with organised crime that represents the central threat to Latin American shipping. Incidents in ports have proliferated in recent years and represent a special point of concern, while flourishing river piracy menaces above all the waterways of the Amazon Basin but evades capture in the statistics of the International Maritime Organisation. This means that we have to avoid focussing too narrowly on piracy as defined by international law, and instead broaden our perspective to encompass violence and property crimes in ports, coastal waters and inland waterways as well. Especially among the many islands of the Caribbean and in the fragmented deltas where South America's rivers flow into the Atlantic, it is often difficult to draw a clear geographical and legal distinction between high seas, national territorial waters and estuary waters.

Forms of Maritime Insecurity

Robberies

Rather than hijacking vessels on the high seas and forcing their owners to pay ransoms, the predominant form of incident in Latin America are robberies where the crew's valuables, the cargo and motors and other equipment are taken. Vessels are especially at risk in coastal waters and ports.[4] The spectrum of targets covers freighters, sailing yachts, fishing boats and even passenger ferries and cruise ships. The countries and regions worst affected are Peru, Brazil, Ecuador, Colombia, Venezuela and the Caribbean, in each case a geographically fairly well-defined area: around the port of Callao by Lima, waters around the port of Santos that serves the Brazilian conurbation of São Paolo, near Guayaquil in Ecuador, along Colombia's northern Pacific coast and near its border with Venezuela in the Gulf of Maracaibo, the Venezuelan Caribbean, the southern Lesser Antilles off Venezuela, and Jamaica, Haiti, and Trinidad and Tobago.[5] Freighters are regularly the target of violence and property crime in the vicinity of the larger Pacific ports of Peru (Callao), Ecuador (Guayaquil) and Colombia (Buenaventura) and in and near South America's biggest port of all, Santos on the Atlantic coast of Brazil. Attacks on fishing boats occur frequently in Venezuela and Mexico.

Yacht piracy

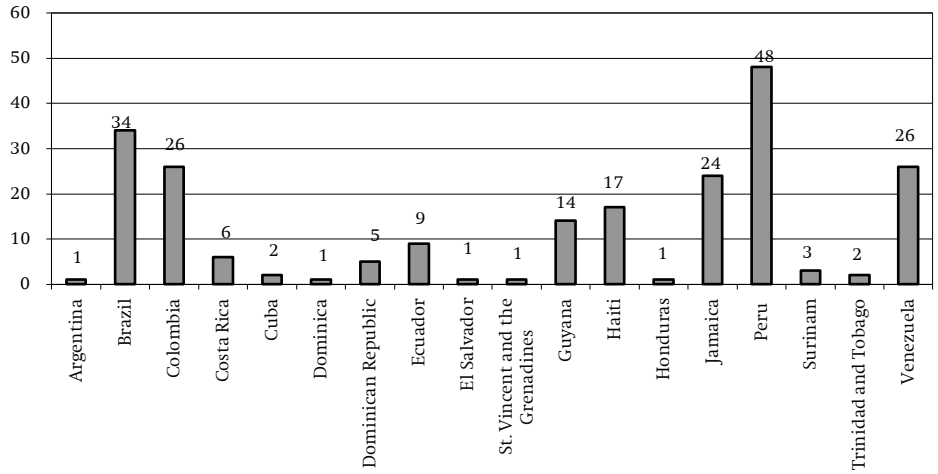
Yacht piracy has grown to become a grave and commonplace problem in the Caribbean.[6] Attacks on cruising yachts occur most frequently along the eastern Caribbean coast of Venezuela and among the Lesser Antilles just

4 As the statistics of the International Maritime Bureau show, incidents on the high seas are rare. IMB, *Yearly Reports 2003–2009*, Kuala Lumpur.

5 Organización Nacional de Salvamento y Seguridad Marítima de los Espacios Acuáticos de Venezuela, A.C. (ONSA), *Piratería Marítima en Venezuela: "un délito en secreto"*, July 2009, www.onsa.org.ve/documentos/pdf/pps/pirateriaenvenezuela2009.pdf; Mary Stone, *CSSN Crime Report Analysis 2005–2008 (June), Virgin Islands to Central America*, Puerto la Cruz (Venezuela), 11 August 2008 www.noonsite.com/Noonsite/PDF_Files/CSNNReport, 1.

6 Klaus Hympendahl, *Yacht-Piraterie: Die neue Gefahr* (Bielefeld, 2002); Martin N. Murphy, *Small Boats, Weak States, Dirty Money: Piracy and Maritime Terrorism in the Modern World* (London, 2008), 100ff.

Figure 2
Attacks on ships in Latin America by country, 2003–2009



Source: ICC International Maritime Bureau, ed., *Piracy and Armed Robbery Against Ships. Annual Report, 2003–2009* (London).

north thereof. The number of attacks in Venezuelan waters has increased markedly in recent years, with an observed trend of exploding crime rates on land spreading to the seas. Elsewhere, the authorities of the Central American states and the Lesser and Greater Antilles (principally Trinidad and Tobago, Haiti and Jamaica) regularly report attacks on and thefts of yachts, which are often subsequently used for drug-running.

Organised crime

In terms of absolute numbers the ports of Callao, Santos, Guayaquil, Buenaventura and Tumaco lead the regional statistics for incidents of piracy in ports and coastal waters. There is without doubt significant under-reporting and national data often deviate strongly from those supplied by the IMO and IMB.[7] Whether we are looking at the port of Callao (the most important in the Andes region and one of the biggest in Latin America), which handles 80 percent of Peru's exports, the biggest Ecuadorian port at Guayaquil or the Brazilian port of Santos, the pattern is very similar: operating by night within the port perimeter, an armed gang seizes a freighter or yacht by force, threatening the crew with firearms and taking away parts of the cargo or even the whole ship.[8] The perpetrators are looking for readily fenceable goods like electronics, clothing, valuables and ship equipment. The same happens in Colombia, where a great deal of internal commerce in the western part of the country is transported by ship along the Pacific coastal waters because of the poor state of inland infrastructure. More than thirty major river mouths and countless bays and headlands along the 1300-km coastal strip make it extremely difficult

7 *AKE International Maritime Security Report* (see note 1), 9.

8 "Peru Crimewave Spreads to Ocean as Pirate Attacks Rise", *Lloyd's List*, 13 March 2009; "Piratas Atacam Navios perto de Portos Brasileiros", *Folha de São Paulo*, 14 June 2009; "En as águas brasileiras …", *O Estado de São Paulo*, 19 April 2009.

to get piracy under control.[9] But in recent years crime on the water has grown most strongly in Venezuela, above all in the eastern part of the country in the Gulf of Maracaibo and in the waters between Venezuela and the southern Lesser Antilles (especially St. Vincent and the Grenadines). Here too, figures from the press and NGOs suggest a more serious increase than indicated by the Venezuelan authorities' official reports to the IMO/IMB. Above all yachts, fishing boats and smaller cargo vessels are attacked or stolen, their motors or nets taken.[10] Attacks on fishing boats in Venezuela and in Mexico, where cases are reported from the Pacific coast (near Mazatlán) and in the Gulf of Mexico, generally follow a similar pattern: A fishing vessel returning to port with its catch after a successful trip is intercepted by speedboats. While the crew is held captive their catch, generally a high-value product like shrimps, lobster or shark, is reloaded onto other vessels.[11]

River piracy – a Latin American speciality

In the Amazon Basin, which includes parts of Bolivia, Brazil, Ecuador, the Guianas, Colombia and Peru, waterways are the main means of transport for passengers and goods (about 8 percent of the territory of Colombia and Peru is covered by water). But it is almost impossible for state forces to control the enormous and extremely thinly populated expanse of the Amazon rain forest. Even in Brazil, whose security forces are otherwise comparatively well-equipped, the navy's ninth district based in Manaus has only eight patrol boats to patrol the entire Brazilian part of the Amazon Basin. It is important to remember the geographical scale: Brazil's part of the Amazon alone is more than ten times the size of Germany. River piracy, in the sense of violence and property crime on inland waterways, stands in direct connection with the almost complete absence of the state in this region. A comparable problem exists in the Orinoco Basin, which straddles the border between Venezuela and Colombia. Here the true extent of the problem is becoming ever more apparent. In Colombia only a few rivers in the tropical south and west and along the Venezuelan border are regarded as safe for shipping; guerillas, paramilitaries, smugglers and other assailants seek to control the waterways with illegal checkpoints and patrols, demanding tribute for safe passage, robbing passing vessels or kidnapping passengers. In Brazil, too, armed robberies are a frequent occurrence on the Amazon and its tributaries, with a rising trend and increasingly involving the use of violence.[12] In Peru inland shipping in remote regions is regarded as very unsafe, with a sharp increase in violence and property crimes, especially attacks on passenger ferries and

9 "Van al menos 7 Asaltos en el Pacífico: Piratas de Mar han Robado 80 Toneladas", *El Tiempo* (Colombia), 29 December 2008.

10 "Piratas Ahuyentan Embarcaciones Turísticas de Costas Venezolanas", *El Nacional* (Venezuela), 16 November 2008.

11 E.g. "Asaltan 'Piratas' Barcos Camaroneros en Mazatlán", *El Milenio* (Mexico), 17 March 2009; "Piratas Modernos Atracan en Campeche", *El Universal* (Mexico), 22 March 2008.

12 "En as águas brasileiras ..." (see note 8).

tourist vessels.[13] Attacks on yachts are regularly reported from Peru and also from Brazil, where yachts coming in from the Atlantic often head for the Amazon delta to sail upriver.

Causes of Maritime Insecurity in Latin America

In Latin America three complexes of causes are decisive when considering maritime security:

Crime spillover from conurbations

1. Organised crime spills over from the land to coastal waters, especially in the vicinity of heavily urbanised areas. This applies to the areas around Lima (Callao) in Peru, São Paolo (Santos) in Brazil and Guayaquil in Ecuador, each of which is the respective country's largest city with severe poverty and the nation's highest rates of violence and crime. Here, and plainly also in Venezuela, a general state of insecurity spreads to the water where it is directed towards merchant shipping and leisure craft. It also plays a role that the control density on the water is much weaker than on land. For example the federal police in the state of Río de Janeiro currently possess just one functioning vessel to patrol more than 600 kilometres of coastline.[14]

Areas of limited statehood

2. Shipping is especially vulnerable on waterways passing through areas where the state has only limited authority and control. This makes the waterways of the Amazon and its tributaries and of the Orinoco Basin highly insecure. In the extremely sparsely populated Amazon Basin the state's forces of law and order are spread very thinly across an enormous expanse of territory, fostering a culture of vigilantism and lawlessness. This affects even Brazil and Venezuela as well as poorer states like Bolivia. The Brazilian government is attempting to address the problem of weak state control capabilities with a pan-Amazonian satellite surveillance system (Sistema de Proteção da Amazônia, SIPAM), using technical means to compensate the lack of personnel.[15] Outside the Amazon region, Haiti and the Colombian Pacific provinces also find themselves confronted with the problem of inadequate state presence and lack of authority. In Colombia, guerilla groups and paramilitaries vie for territorial control of the waterways, with the repercussions reverberating along the rugged Pacific coastline.

Organised crime

3. Shipping routes are especially vulnerable where they coincide with routes used for trafficking in illegal commodities – especially drugs, illegally extracted raw materials and arms – or people.[16] This applies to the

13 E.g. "Hubo al menos 19 Asaltos en Ríos Amazónicos en lo que Va del Año", *El Comercio* (Peru), 18 August 2009; "Asaltan Embarcación con Turistas en Amazonía del Perú", *AFP*, 25 December 2009; "Piratas en el Amazonas, una Aventura Indeseable para los Turistas en Perú", *EFE*, 3 September 2009.

14 "Rio de Janerio está vulnerável por ar e por mar", *O Globo*, 1 November 2009.

15 Ministério da Defesa do Brasil, *Estratégia Nacional de Defesa, Paz e Segurança para o Brasil* (Brasília 2008), 11.

16 Katherie Bliss, *El tráfico ilícito en el corredor mesoamericano: Una amenaza para la seguridad de la vida humana y la región* (Washington, D.C.: Center for Strategic and International Studies, 2009).

maritime border between Colombia and Venezuela, the Gulf of Maracaibo, the waters between Venezuela, the Lesser Antilles and on out to Haiti and Jamaica, and to the Central American coasts. Well-established smuggling routes run through these areas, exporting cocain to the United States (via Central America) and to Europe (via the Caribbean or directly). The intermediaries of the cocain trade possess speedboats and heavy weaponry, creating an incentive to use that equipment for other purposes too. At the same time the structures created by organised crime – illegal markets, corrupt authorities, transnational criminal networks, logistics – also encourage other forms of criminality, such as violence and property crimes directed against shipping.[17]

Combating Maritime Insecurity

Maritime insecurity as an aspect of regional insecurity

In Latin America threats to maritime security tend to be dismissed as unimportant. The governmental defence strategies of the larger states mention piracy only implicitly or in passing, if at all.[18] The causal factors that encourage violent attacks at sea are at the same time the region's greatest security problems – rampant urban crime, weak or absent statehood, organised crime – that have stubbornly resisted attempts to resolve them. The continued existence of these difficulties can in turn be explained in terms of the inability of governments in the region to get crime under control, create more efficient security governance and assert proper control over their borders. As a consequence, criminal actors still enjoy great freedom of action in spheres that are largely beyond the reach of law and order. Both at sea and on inland waterways, law enforcement generally ends at national borders that present no serious barrier to pirates and other criminals and thus provide escape routes and refuges.

Wrangling over responsibility

In many countries internal squabbling between navy, police, army and coastguard ties up resources and stands in the way of coordinated action against maritime insecurity and illegal activities on the water. The task of protecting coasts and other waters is usually the direct responsibility of the navy, operating from the inland waterways right out to the ocean, but police and army may also have waterborne units. Especially in states whose territory includes significant water bodies organisational mandates tend to overlap. In Brazil the police and navy both fulfil surveillance functions on the Amazon and its countless tributaries, whereas in Peru the army, the police and the coastguard (as part of the navy) tend to obstruct each other in the fight against river piracy rather than effectively joining forces. The different institutional approaches and mandates for policing territorial waters and inland waterways also hamper cross-border coopera-

17 "Peru Crimewave" (see note 8).

18 For example: República de Ecuador, *Política de la Defensa Nacional del Ecuador* (Quito, 2006), 47; República de Panamá, Consejo de Gabinete del Gobierno de Panamá, *Resolución de Gabinete N. 3: Documento Final de la Estrategia Marítima Nacional*, Panamá, 28 January 2004, 10; Armada de Chile, *El Poder Marítimo Nacional*, Valparaíso, 5 June 2009, 65; Ministério da Defesa do Brasil, *Estratégia Nacional de Defesa* (see note 15), 20.

tion. Whereas, for example, the Chilean navy also performs quasi-policing duties in ports and waterways and fights crimes such as drug trafficking and smuggling, law enforcement on the water in neighbouring Argentina is the business of the coastguard and not the armed forces. Satellite surveillance of the Amazon Basin by Brazil offer the only opportunity to compensate weak statehood by technological innovation – following a drug enforcement model that has been successfully implemented with the help of the United States all along the Latin American Pacific Coast and in the Caribbean.

Combating Acts of Piracy under International Law

Christian Schaller

Historical background

The first international attempts to outlaw piracy at sea are found in documents dating back to the seventeenth century, where the pirate was classified as an enemy of mankind (hostis humani generis) and excluded from society.[1] Today, international law allows any state to fight and prosecute acts of piracy committed on the high seas (principle of universality). This principle, along with a number of other rules for combating piracy, was first laid down in the 1958 Geneva Convention on the High Seas. In 1982 the relevant provisions were adopted unchanged in the United Nations Convention on the Law of the Sea (UNCLOS). Having in the meantime acquired the status of customary international law, they are now also binding for states that refuse to sign UNCLOS (including the United States).[2] These arrangements, however, apply only to piracy on the high seas. Neither UNCLOS nor customary international law regulate how states are to deal with acts of piracy within their own territorial waters.

Security Council involvement

In June 2008 the United Nations Security Council discussed the problem of piracy for the first time and approved binding measures under Chapter VII of the UN Charter to put a stop to pirate activities off the Somali coast. According to Resolution 1816 (2008) states were specifically authorised to enter the territorial waters of Somalia for the purpose of repressing acts of piracy by all necessary means. This mandate which also forms part of the legal basis for the EU's military Operation Atalanta has since been regularly updated and amended by the Security Council.[3] For action on the high seas off the Somalia coast, by contrast, UNCLOS and customary international law already provide an adequate legal framework.

The Law of the Sea

Definition of piracy

The central provisions for fighting piracy are found in UNCLOS Articles 100–107 and 110. Article 101 defines piracy as "any of the following acts: (a) any illegal acts of violence or detention, or any act of depredation, committed for private ends by the crew or the passengers of a private ship or a private aircraft, and directed: (i) on the high seas, against another ship or

1 Joshua Michael Goodwin, "Universal Jurisdiction and the Pirate: Time for an Old Couple to Part", *Vanderbilt Journal of Transnational Law* 39 (2006), 973–1011 (989ff).

2 Ivan Shearer, "Piracy", in *The Max Planck Encyclopedia of Public International Law*, ed. Rüdiger Wolfrum (Oxford et al.: Oxford University Press, 2008), online edition, www.mpepil.com, marginal note 13.

3 Security Council Resolution 1816 (2008), 2 June 2008. The mandate was extended and expanded by Security Council Resolutions 1838 (2008), 7 October 2008; 1846 (2008), 2 December 2008; 1851 (2008), 16 December 2008; 1897 (2009), 30 November 2009, Resolution 1918 (2010), 27 April 2010, and most recently Resolution 1950 (2010), 23 November 2010.

aircraft, or against persons or property on board such ship or aircraft; (ii) against a ship, aircraft, persons or property in a place outside the jurisdiction of any State; (b) any act of voluntary participation in the operation of a ship or of an aircraft with knowledge of facts making it a pirate ship or aircraft; (c) any act of inciting or of intentionally facilitating an act described in subparagraph (a) or (b)."

Criteria: high seas, ...

This definition contains three important restrictive criteria. Firstly, it applies only to the high seas (and to the exclusive economic zone of a state) as well as to other places outside the jurisdiction of any state.[4] Acts of piracy in the territorial sea,[5] archipelagic waters,[6] internal waters and ports of a state fall outside the definition and are thus excluded from the anti-piracy provisions of UNCLOS. This is problematic, because pirates are often active near the coast and in archipelagos or retreat to such areas after conducting attacks on the high seas. For example, there is no provision in the Convention entitling a state to seize a ship which has been captured by pirates on the high seas and which is now held for ransom in a port or in the coastal waters of another state.

... against another ship ...

A second restriction is that even attacks on the high seas fall under the definition of piracy only if they are directed against *another* vessel. So the hijacking of a ship by its passengers is not classified as an act of piracy under UNCLOS.

... and for private ends

Thirdly, the act must be committed for *private ends*. Consequently, acts of violence that are predominantly politically motivated fall outside the scope of the definition.[7] This especially excludes acts of naval warfare attributable to state or non-state parties to an armed conflict.[8] Furthermore, acts of piracy are to be distinguished from acts of maritime terrorism, with the latter covered specifically by the 1988 Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation (SUA Convention). Nevertheless, it is conceivable that individual acts committed by pirates could also fall under the SUA Convention, which was drafted in response to the hijacking of the cruise ship *Achille Lauro* by Palestinian terrorists in 1985. After the attacks of 11 September 2001 an additional protocol was adopted to further expand the scope of the SUA Convention, although it has yet to enter into force.[9]

4 Under UNCLOS Article 58 (2), Articles 100–107 and Article 110 also apply to a state's exclusive economic zone, which can extend up to 200 nautical miles out to sea.

5 Under UNCLOS Article 3: "Every State has the right to establish the breadth of its territorial sea up to a limit not exceeding 12 nautical miles."

6 The legal status of archipelagic waters is regulated in UNCLOS Articles 46ff.

7 Shearer, "Piracy" (see note 2), marginal note 16.

8 Rüdiger Wolfrum, "Hohe See und Tiefseeboden (Gebiet)", in *Handbuch des Seerechts*, ed. Wolfgang Graf Vitzthum (Munich, 2006), marginal note 51ff.

9 On maritime counter-terrorism see Thomas A. Mensah, "Suppression of Terrorism at Sea: Developments in the Wake of the Events of 11 September, 2001", in *Verhandeln für den Frieden, Negotiating for Peace – Liber Amicorum Tono Eitel*, ed. Jochen A. Frowein, Klaus Scharioth, Ingo Winkelmann and Rüdiger Wolfrum, 627–47 (Berlin et al., 2003) and Rüdiger Wolfrum, "Fighting Terrorism at Sea: Options and Limitations under International Law", in the same volume, 649–68.

Duty to cooperate

Under UNCLOS Article 100 all states are obliged to "cooperate to the fullest possible extent in the repression of piracy on the high seas or in any other place outside the jurisdiction of any State". However, there is no consensus in international legal scholarship about the precise extent of that duty, and the clause has remained practically irrelevant to date.[10] Although states enjoy broad discretion in discharging their duties under Article 100, they are definitely prohibited from supporting or harbouring pirates. Therefore, it can be argued that the duty of cooperation under Article 100 at least means that coastal states must work actively to prevent pirates using their territory to launch operations in adjacent territorial or international waters.[11]

Right of visit and seizure of pirate ships on the high seas

According to the flag state principle a vessel on the high seas is subject to the exclusive jurisdiction of the state under whose flag it sails and whose nationality it claims (UNCLOS Article 92). UNCLOS Article 110 nevertheless allows any warship on the high seas to board a foreign ship (other than a ship entitled to complete immunity under the Convention) if there is reason to suspect that the other ship is engaged in piracy. In this case the warship may also send a party to verify the suspect vessel's right to fly its flag and carry out further investigations on board. Where a ship is indeed involved in piracy, every state has the authority on the high seas to seize the ship (or any vessel captured and controlled by pirates), arrest those on board and confiscate property (Article 105).

Limits to the use of force

There are, however, questions over the limits of the use of force against pirates. International humanitarian law is applicable only to measures of warfare during an armed conflict. In general, however, anti-piracy operations are conducted for purposes of law enforcement, which gives them a policing character. Such action must always be in line with international human rights law. This means that the standards of proportionality applicable to the use of force against pirates are usually much stricter than those governing military measures against organised armed groups in situations of armed conflict.[12] Killing a person during a police operation is permissible only under the most strictly defined circumstances, in particular for the purpose of self-defence or the defence of others. The traditional approach to qualify a pirate as a "hostis humani generis" who has forfeited his rights as an individual is clearly incompatible with modern human rights law.[13]

Action in territorial waters

In cases where pirates are active within the territorial, archipelagic or internal waters of a state or retreat to a port, UNCLOS Article 105 no longer applies. Action against pirates in these waters falls under the exclusive jurisdiction of the respective coastal state. Whereas vessels that flee

10 Wolfrum, "Hohe See und Tiefseeboden (Gebiet)" (see note 8), marginal note 47.

11 Ibid., 458.

12 With reference to the relevant precedents: Tullio Treves, "Piracy, Law of the Sea, and Use of Force: Developments off the Coast of Somalia", *European Journal of International Law* 20, no. 2 (2009): 399–414 (412ff).

13 For more detail see Andreas von Arnauld, "Die moderne Piraterie und das Völkerrecht", *Archiv des Völkerrechts* 47 (2009): 454–80 (466ff, 471).

to the high seas may be followed in hot pursuit under the strict terms of UNCLOS Article 111, hot pursuit from the high seas into the territorial waters of a foreign state is not permitted under the law of the sea.

Security Council Resolutions on Somalia

Resolution 1816

In Resolution 1816 (2008) the UN Security Council expressed its grave concern about the threat that acts of piracy pose to the delivery of humanitarian aid to Somalia, to the safety of commercial maritime routes and to international navigation. In particular it determined "that the incidents of piracy and armed robbery against vessels in the territorial waters of Somalia and the high seas off the coast of Somalia exacerbate the situation in Somalia which continues to constitute a threat to international peace and security in the region." In so doing, the Security Council did not classify piracy per se as a threat to peace under Article 39 of the UN Charter, instead treating such incidents as a factor that can worsen an existing threat to peace in a particular case. The general situation in Somalia was already defined by the Security Council as a threat to peace in early 1992 when it imposed an arms embargo on the country.[14]

Point of reference

The Security Council resolutions on Somalia refer to "piracy" as well as to "armed robbery against ships/at sea". In this respect the Security Council has adopted the terminology of the International Maritime Organisation (IMO).[15] The IMO defines "armed robbery against ships" as "any unlawful act of violence or detention or any act of depredation, or threat thereof, other than an act of piracy, directed against a ship or against persons or property on board such a ship, within a State's jurisdiction over such offences".[16] This term may be understood to include certain acts of violence similar to piracy which do not fall under the UNCLOS definition. By referring to both terms the Security Council resolutions apply to all acts connected with piracy, even when the attack is not launched by a pirate vessel against another ship but by persons who are already on board that ship.[17]

14 Security Council Resolution 733 (1992), 23 January 1992.

15 The International Maritime Organisation (www.imo.org) plays an important role in coordinating anti-piracy measures, and works to strengthen state capacities, promote regional cooperation, provide information on recent incidents and supply concrete guidance. But in contrast to international treaties and Security Council resolutions under Chapter VII, its decisions are not binding. See for example: "Code of Practice for the Investigation of Crimes of Piracy and Armed Robbery against Ships" (IMO, Assembly-Res. A.922[22], 29 November 2001); "Piracy and Armed Robbery against Ships in Waters off the Coast of Somalia" (IMO, Assembly-Res. A.100[25], 29 November 2007); "Code of Conduct Concerning the Repression of Piracy and Armed Robbery against Ships in the Western Indian Ocean and the Gulf of Aden" (Res. 1 of the Djibouti Meeting, 29 January 2009); "Piracy and Armed Robbery against Ships – Recommendations to Governments for Preventing and Suppressing Piracy and Armed Robbery against Ships" (IMO Doc. MSC.1/Circ.1333, 26 June 2009).

16 "Code of Practice for the Investigation of Crimes of Piracy and Armed Robbery against Ships" (see note 15), 2.2.

17 Treves, "Piracy, Law of the Sea, and Use of Force" (see note 12), 403.

Action in the territorial waters of Somalia and on the high seas

In Resolution 1816 (2008) the Security Council urged states whose naval vessels and military aircraft operate on the high seas and off the coast of Somalia to increase and coordinate their efforts to deter acts of piracy in cooperation with the Somali Transitional Federal Government and to render assistance to threatened vessels. In operative paragraph 7 of the resolution the Security Council authorised all states cooperating with the Transitional Federal Government to enter the country's territorial waters and to use all necessary means to repress acts of piracy in this area. With this paragraph the Security Council extended the powers granted by UNCLOS for anti-piracy missions on the high seas to apply also to operations in Somalia's territorial waters. Even the pursuit of pirate ships and hijacked vessels from the high seas into Somali territorial waters is now permitted under the mandate. Operations in the coastal waters of neighbouring states, however, are not covered by the resolution.

Counter-piracy on land

In order to strengthen the anti-piracy efforts in Somalia, the Security Council in Resolution 1851 (2008) expanded the mandate by authorising states and regional organisations to undertake all necessary and appropriate measures not only in the territorial waters of Somalia but also on the mainland.[18] At the same time the Council emphasised that any measures undertaken must also be consistent with international humanitarian law. This clause contains an implicit qualification of the situation in Somalia as an armed conflict in the meaning of international humanitarian law. In a failed state like Somalia where countless clans, warlords, militias and other armed groups are embroiled in the hostilities, it becomes more or less impossible to distinguish between warfare and violent organised crime. In such an environment a targeted policing operation against pirates can all too quickly conflagrate into full-blown military exchanges, as would be the case, for example, if certain acts of piracy could be attributed to a local conflict party. The high risk of an uncontrollable escalation of violence during such an operation may explain why most states participating in anti-piracy patrols off the Somali coast are baulk at deploying special forces to the mainland.[19]

The consent of the Somali Transitional Federal Government

The authorisation for anti-piracy action on Somali territory is in line with a request by the Transitional Federal Government of Somalia. Such consent by the affected state is not necessary from a legal point of view where the Security Council acts under Chapter VII of the UN Charter. Nonetheless, it is a further step to enhance the overall legitimacy of the operation and an important signal that the affected state is actually willing to cooperate in enforcing the Council decision. Letters conveying consent are regularly communicated to the United Nations through diplo-

18 Security Council Resolution 1851 (2008), operative paragraph 6.

19 For the operation by French forces in April 2008 that preceded the adoption of Resolution 1851 (2008) (the *Le Ponant* hijacking), see Treves, "Piracy, Law of the Sea, and Use of Force" (see note 12), 404 (footnote 11).

matic channels.[20] Moreover, the Transitional Federal Government is responsible under the resolutions for notifying to the UN Secretary-General which states and regional organisations are permitted to take action on Somali territory. So the mandate authorises action only by states and regional organisations whose cooperation with the Transitional Federal Government has been officially notified to the Secretary-General.[21]

New International Law?

Somalia – not a precedent

In operative paragraph 9 of Resolution 1816 (2008) the Security Council affirmed that the authorisation provided in the resolution applies only with respect to the situation in Somalia and does not affect the rights or obligations of states under UNCLOS and other international law with respect to any other situation. In particular, the Council underscored that the authorisation should not be considered as establishing customary international law. This clarifying provision was included in the resolution in response to worries expressed by Indonesia, which was a non-permanent member of the Security Council in June 2008 and is itself gravely affected by acts of piracy in its own territorial waters. Therefore, Indonesia has a strong interest in avoiding any developments in international law which could abet interventionist ambitions by other states or international organisations in the global fight against piracy. Indonesia was supported by China and several other non-permanent members of the Security Council (Vietnam, Libya, South Africa), all emphasising that the approach pursued in the resolution was tailored exclusively to the specific situation in Somalia and could not be considered a precedent for other regions.

Piracy a threat to international peace?

South Africa also pointed out "that it is the situation in Somalia, not piracy in and of itself, that constitutes a threat to international peace and security" and that piracy is only a symptom of the situation in Somalia.[22] This statement reflects a general concern shared by many states that the Security Council could extend its powers at the expense of other UN organs by classifying particular development-related problems, such as environmental pollution, competition over scarce resources, the spread of epidemics or organised crime as threats to peace under Article 39 of the UN Charter – which would give the Council broad leeway to take universally binding decisions on the basis of Chapter VII in order to tackle such problems.

20 Security Council Resolution 1816 (2008), operative paragraph 9; Security Council Resolution 1851 (2008), operative paragraph 10; Security Council Resolution 1897 (2009), operative paragraph 8 (see note 3).

21 By October 2010 the Permanent Mission of Somalia to the United Nations had notified the Secretary-General of the following states and organisations as cooperating partners: Australia, Canada, China, Denmark, France, India, Iran, the Netherlands, Russia, Spain, South Korea, Turkey, the United Kingdom, and the United States, along with the EU and NATO (UN doc. S/2009/590, 13 November 2009, paragraph 17; S/2010/556, 27 October 2010, paragraph 8).

22 UN document S/PV.5902, 2 June 2008.

Multinational Military Engagement

Frank Kupferschmidt

Dimensions of military deployment

Naval intervention against piracy at the Horn of Africa, in the Gulf of Aden and in the Somali Basin began at the end of 2008. Since then there have been at times upwards of forty warships (plus reconnaissance planes) operating in multinational formations or under national command. It is believed that all attacks on international shipping in these waters are the work of about 1,200 Somali pirates, who can be regarded as organised criminals. The authority for action comes from a series of Security Council resolutions calling on states to participate in the fight against piracy and armed robbery off the Somali coast.[1] This move was spurred by a sharp increase in attacks on merchant shipping, in particular World Food Programme aid shipments destined for the population of Somalia. Which organisations and states participate in anti-piracy activities? Which concepts are applied? How smooth is cooperation between different actors, and how well have they done so far?

Actors and Mandates

EU Operation Atalanta

The European Union Naval Force Somalia (Operation Atalanta, international designation Task Force 465) was launched in December 2008. At least six frigates and destroyers patrol in the Gulf of Aden or off the Somali coast, supported by one or more supply vessels and three or four long-range maritime reconnaissance aircraft.[2] The aircraft operate from Djibouti, the Seychelles or a forward base in Mombasa. In June 2010 eight EU member states were participating in the formation off Somalia. Although, of course, many EU member states are unable to contribute warships or aircraft, some provide personnel for headquarters or – like Malta – armed teams for on-board Vessel Protection Detachments. Norway was the first non-member to participate, sending a frigate from August 2009 to January 2010; in the meantime Croatia, Montenegro and Ukraine have also contributed personnel. Operation Atalanta is commanded by British Major General Buster Howes from Operation Headquarters (OHQ) in Northwood

1 See especially Security Council Resolutions 1814 (2008), 1816 (2008), 1846 (2008) and 1897 (2009), available at www.un.org.

2 For details on Operation Atalanta see the presentation by Rear Admiral Peter Hudson at the NATO Parliamentary Assembly in Edinburgh on 15 November 2009, www.nato-pa.int/Default.asp?-SHORTCUT=1986 and www.eunavfor.eu. In 2010 up to twelve warships were operating simultaneously. For example, in November 2010 eleven combat vessels, three replenishment ships and five maritime patrol and reconnaissance aircraft from nine nations were on duty. See www.consilium.europa.eu/uedocs/cmsUpload/naviresnov.pdf.

near London.[3] In mid-December 2010 Spanish Rear Admiral Juan Rodriguez took over as Force Commander at sea.

Mandate

The Atalanta mandate prioritises protection for vessels carrying cargoes for the World Food Programme and the Somalia Mission of the African Union (AMISOM). Only after that come the security of other humanitarian supplies and merchant vessels operating under the flags of EU member states and other mission participants. Operation Atalanta's remit also encompasses maritime surveillance of especially endangered areas and fighting piracy in the entire area of operations, while its robust mandate permits the use of military force to detain persons suspected of piracy (and hand them over for prosecution to the authorities of any EU member state, Kenya or the Seychelles) and seize vessels and equipment. The EU sees Operation Atalanta as one element of a comprehensive approach for Somalia that also encompasses considerable humanitarian aid, development aid (including for security, rule of law and AMISOM) and training of Somali security forces.[4]

NATO

NATO has also been involved in fighting piracy and protecting merchant shipping in the Gulf of Aden and the Somali Basin since October 2008, in various constellations.[5] TF 508 off the Somali coast mostly comprises four or five frigates and destroyers rotated for four months at a time from the Standing NATO Maritime Groups, which usually operate in the North Atlantic and North Sea (SNMG1) and the Mediterranean (SNMG2).[6] Operation Ocean Shield (OOS), which began in August 2009, differs from its predecessors Allied Provider and Allied Protector in having the additional task of helping the states of the region to establish their own counter-piracy capacities.[7] It is planned, for example, to establish a pan-Arab Task Force that would ultimately replace NATO operations. The other objectives remain unaltered: to put a stop to pirate attacks and work together with merchant shipping to implement measures deterring and hindering piracy, ultimately seeking a state of affairs where the pirates are organisationally hamstrung and the level of attacks can be kept acceptably low even without a NATO presence. Operational command of Operation

3 Howes replaced Rear Admiral Peter Hudson on 14 June 2010. His deputy is Italian Rear Admiral Guido Rando since 13 January 2011.

4 For the details see EU Council Secretariat, *EU Engagement in Somalia*, factsheet, updated January 2011, http://www.consilium.europa.eu/uedocs/cms_data/docs/missionPress/files/110106%20FACTSHEET%20EU%20ENGAGEMENT%20SOMALIA%20-%20version%2010_EN01.pdf

5 Details on NATO's efforts to fight piracy can be found in Vice Admiral Hans-Jochen Witthauer's presentation at the NATO Parliamentary Assembly in Edinburgh, www.nato-pa.int/Default.asp?SHORTCUT=1961. See also *Counter-piracy Operations*, www.nato.int/cps/en/natolive/topics_48815.htm?selectedLocale=en#ocean.

6 From August to December 2010 SNMG1 with warships from Denmark (flagship), Italy, the Netherlands, the United Kingdom, and the United States. Public Diplomacy Division (PDD), Press and Media Section, Media Operations Centre (MOC), Nato HQ Brussels, *Counter-Piracy Operations*, www.nato.int/cps/en/natolive/topics_48815.pdf

7 Operation Allied Provider ran from October to December 2008, when it was replaced by Operation Atalanta. The three phases of Operation Allied Protector covered the period from March to August 2009.

Ocean Shield is exercised by NATO's Joint Command Lisbon, tactical leadership by Maritime Component Command Northwood (MCC NW).

Combined Task Force 151

The third multinational group is Combined Task Force 151 (CTF 151), set up in January 2009 to fight piracy off the Somali coast and in the Gulf of Aden. As well as the United States, which provides the main component with three warships, Australia, Turkey, Singapore and South Korea also contribute vessels. Operationally the force is under the commander of Combined Maritime Forces, who is at the same time commander of U.S. Naval Forces Central Command (US NAVCENT) based in Bahrain.[8] The staff of CTF 151 at sea is supplied by the participating nations and currently led by a Pakistani rear admiral. In addition to the aforementioned UN mandates this group also operates under Security Council Resolution 1851 (2008), which permits action against pirates on land.[9]

Combined Task Force 150/OEF

Although originally created for anti-terror tasks in Operation Enduring Freedom, the presence of Combined Task Force 150 at the Horn of Africa also helps to deter piracy and protect merchant shipping, given that it can provide emergency assistance to vessels under attack. CTF 150 is currently under the command of an Australian commodore. CTF 150 and CTF 151 share a long-range maritime reconnaissance aircraft with Operation Atalanta.

Warships under national command

As well as these multinational groups, vessels under national command from China, India, Iran, Japan, Malaysia, Russia, Saudi Arabia and the United States also participate in the fight against piracy, primarily in the Gulf of Aden. Altogether this currently involves twelve warships and supply vessels and at least two long-range maritime reconnaissance aircraft. There is a strong national bias to the interests pursued by some of these states. While operating under the UN resolutions, they pursue their own agendas and follow different rules of engagement. But nevertheless, this broad international response provides a clear and unmistakeable answer to the threat to free trade on this crucial sea route between Europe and the economic powerhouse of South and Southeast Asia, with all permanent members of the UN Security Council making substantial contributions. Above and beyond the obvious aspect of self-interest, China, India and Japan all want to demonstrate their willingness to take on real responsibility in international affairs.

8 Combined Maritime Forces, "Combined Task Force (CTF) 151", www.cusnc.navy.mil/cmf/151/index.html.

9 United Nations, Department of Public Information, News and Media Division, "Security Council Authorizes States to Use Land-Based Operations in Somalia as Part of Fight Against Piracy Off Coast, Unanimously Adopting 1851 (2008)", www.un.org/News/Press/docs/2008/sc9541.doc.htm. On the UN mandates concerning Somalia see also Christian Schaller's contribution on the implications of international law in this volume, pp. 56ff.

The Operational Approach

No blanket protection

The vast extent of the area of operations – equivalent to the entire area of the Mediterranean – makes blanket protection of shipping impossible.[10] Strategically, the enormous expanses of the Somali Basin and the western Indian Ocean demand a different approach from the geographically more limited waters between the south coast of Yemen and the north coast of Somalia. To tackle these challenges as effectively as possible Operation Atalanta conducts three different kinds of operation: deterrence through the presence of patrols, escorts for vessels meriting special protection, and operations targeting suspicious vessels or specific areas.

Information, escorts, patrols

In order to maximise the impact of naval forces and aircraft a guarded transit corridor has been established in the Gulf of Aden. Merchant vessels are advised to register with the Maritime Security Centre – Horn of Africa (MSCHOA) and report before passing through the corridor.[11] Registered vessels receive up-to-date warnings of pirate activity, reports of past attacks and advice on self-defence and recommended routes. Depending on the category of vessel, three different kinds of protection are practised: group transits through the corridor, escorted group transits and individual protection. All cargoes for the World Food Programme and AMISOM are escorted. Although the recommended transit corridor is 450 nautical miles long (833 kilometres), permanent surveillance by warships means that a merchant vessel in trouble should receive assistance within twenty minutes. Chinese and Japanese warships provide a cordon, patrolling the waters between the Yemeni and Somali coasts and the corridor. Numerous other warships are at the ready nearby to intervene if needed. An escorted group transit through the corridor is offered for ships whose low freeboard or slow speed puts them at special risk, but otherwise escorts and other close-quarters protection are the exception.

Repressive action

Such protective measures will not, however, do anything to reduce piracy in the long term. For that more pirate vessels need to be put out of action and above all the "motherships" that make it possible to conduct attacks hundreds of miles from land must be identified and neutralised. The EU's mandate includes that possibility: In April 2010 the French frigate *Nivôse* sunk a "mothership" and two attack boats 480 nautical miles east of the Somali coast.[12] What is even more effective is to stop the pirates in Somali coastal waters before they even reach the high seas, as occurred in February 2010 when the Danish OOS flagship *Absalon* scuttled a "mother skiff" near the coast.

Multinational Cooperation

EU and NATO: complementary yet ...

With so many different actors, mandates and commanders involved, highly efficient cooperation and coordination are required in order to

10 A ship requires five days to cross the area north/south and one day east/west.

11 See www.mschoa.eu.

12 See www.eunavfor.eu/2010/04/eu-navfor-french-warship-destroys-pirate-mother-ship

avoid friction and duplication and achieve an outcome corresponding to the objectives of the Security Council resolutions. Numerous bodies and coordination processes at different levels have been established to ensure this. Because the EU and NATO are the most important actors in the fight against piracy off Somalia, their cooperation is crucial. In theory this should be unproblematic, given that their memberships are largely congruent. The spatial proximity of EU-OHQ Atalanta and NATO-MCC in Northwood facilitates direct communication and coordination, and the two organisations also complement one another operationally. For example the EU provides the maritime reconnaissance component and runs a logistics centre in Djibouti, while NATO makes its own important contribution by coordinating aircraft movements at sea and processing and analysing reconnaissance data. The long tradition of naval cooperation within NATO (and with non-members in the Partnership for Peace) greatly assists mutual understanding and expedites the application of NATO procedures. In the shape of its special envoy to Somalia, the EU possesses a political representative in the region, whereas NATO enjoys privileged access through the Istanbul Cooperation Initiative and the longstanding American presence in the Persian Gulf.

... sometimes fraught

Although NATO and the EU declare their deployments to be complementary to each other and to the efforts of other actors and state that there is no place for duplication, still less rivalry between the participants, the relationship is sometimes fraught. Both NATO and the EU like to emphasise the importance of their own contribution, and there is some justification for the persistent criticism that they are engaged in a "beauty contest". After several deployments of land forces (for example in Bosnia and Herzegovina and in the Democratic Republic of the Congo) this is the EU's first chance to demonstrate the naval punch of the Common Security and Defence Policy. That said, there are numerous positive examples of mutual support, for example the shared use of naval helicopters.

Combined Maritime Forces

The Combined Maritime Forces (CMF) represent the third major partner, allowing the naval anti-piracy forces to be reinforced rapidly if required. With a large American component, they also provide access to the American tanker fleet for refuelling.

Complex coordination

But there is more to coordinate than just these three actors. Twenty-six countries (including China, India and Russia) plus representatives of the three multinational groups and the shipping industry sit at the table with the CMF Commander at HQ NAVCENT for the monthly coordination meetings (SHADE, chaired jointly by CMF and the EU).[13] The EU representatives enjoy strong political backing from Brussels for their efforts to deepen cooperation. Between SHADE meetings, EU NAVFOR, NATO and CMF talk every two weeks, often using video conferencing. Additionally there are all kinds of direct contact between the actors involved in counter-

13 SHADE stands for Shared Awareness and Deconfliction. Other participants are Australia, Bahrain, Egypt, India, Japan, Jordan, Pakistan, Russia, Saudi Arabia, the Seychelles, Singapore, South Korea, Ukraine and Yemen. "Operation Ocean Shield", www.aco.nato.int/page208433730.aspx.

piracy. Liaison officers also play an important coordinating role: the EU's are stationed in Mombasa, on the Seychelles and with the CMF; NATO's with CMF, in Djibouti and at HQ NAVCENT in Bahrain (the latter being an airspace coordinator).

Leading role for China?

China is seeking a leading role. In November 2009 the Chinese defence ministry held a meeting in Beijing designed to help improve cooperation between the naval forces at the Horn of Africa.[14] The hosts told the participating officers from EU NAVFOR, NATO, CMF, India, Japan, Pakistan and Russia that China sought greater participation in future joint patrols, rather than simply independently escorting its own ships. Then in January 2010 the Chinese commander in the Gulf of Aden discussed anti-piracy operations with the commander of TF 508. Although the Chinese defence ministry remained taciturn on the question of whether this concerned assuming command of a task group or co-chairing SHADE, Beijing made it clear that it had reached agreement with the EU and other participants in operations off the Somali coast on the matter of a leadership role.[15] This was confirmed indirectly in April when the Council of the European Union welcomed China's willingness to share rotating responsibility for coordinating naval forces in the transit corridor through the Gulf of Aden.[16]

Impact

Shift from Gulf of Aden to Somali Basin

Numerous different criteria are available for measuring the success of international cooperation against piracy, starting with the number of pirates detained and the number of attempted and successful attacks and hijackings. But this dry data needs to be weighed and placed in context. The operational goal of the forces deployed under the UN mandate is first and foremost to protect World Food Programme aid consignments, and after that to guard the security of sea routes. The priority of the military operation must be to drive the cost to the pirates so high that it far exceeds any material gain. The initial balance is certainly positive. The WFP cargoes that EU NAVFOR escorted through the coastal waters all arrived safely; as of 13 June 2010 these comprised 73 vessels carrying more than 414,000 metric tonnes of food to feed 1.6 million Somalis. Escorts were also provided for 51 AMISOM supply vessels. The number of attacks in the Gulf of Aden fell from 43 in August to mid-November 2008 to 13 in the same period in 2009, and the number of hijackings from 24 to zero. The situation looks less good in the Somali Basin, where the number of attacks rose from 9 to 24 in the same period, the number of hijackings from six to

14 News Release Allied Maritime Component Command HQ Northwood, Ref: MANW 2009/13, 10 November 2009.

15 "China führt Kampf gegen Piraten an", *Der Standard* (online edition), 29 January 2010, http://derstandard.at/1263706282034/China-fuehrt-Kampf-gegen-Piraten-an; "China's Anti-piracy Role off Somalia Expands", http://newsvote.bbc.co.uk/go/pr/fr/-/2/hi/asia-pacific/8486502.stm.

16 Extract from Council Conclusions on CSDP, 26 April 2010, www.consilium.europa.eu/uedocs/cms_data/docs/missionPress/files/somaliaEN01.pdf.

seven.[17] What this shows is that the massive military presence in the Gulf of Aden displaces piracy to the less easily guarded Somali Basin and western Indian Ocean. Consequently, the NATO, EU and CMF task groups intend to work together even more closely in these areas.

More intelligence needed

Even if the pirates' success rate has fallen considerably, there are no grounds for complacency. Looking at 2009 as a whole, the number of attacks by Somali pirates almost doubled compared to 2008 (from 111 to 217); of the 49 hijackings of merchant vessels reported globally 47 took place off Somalia.[18] If the positive trend seen in the Gulf of Aden is to be repeated in the Somali Basin, a much closer network of reconnaissance, pursuit and engagement will need to be woven there. That will mean intensifying maritime air reconnaissance and deploying additional warships outside the monsoon season, when pirate activity is particularly intense. To accomplish this, the EU will need to recruit additional naval forces from non-members. In November 2009 the NATO Parliamentary Assembly in Edinburgh passed a resolution calling for additional aerial surveillance (for instance AWACS), improved coordination of national and multinational warship deployments, and stronger efforts to engage partner nations and contact countries.[19] The last point applies only to New Zealand, because the other three (Australia, Japan and South Korea) are already on board, if not under NATO command. Altogether the impact of counter-piracy in the Somali Basin seems to have grown in spring 2010, with multinational forces achieving important successes and smashing twenty-three pirate gangs in March alone.[20] Even if the number of pirate attacks rose again in April, the number of hijackings still fell by one quarter.[21]

Sustained military engagement

Taking stock at the end of 2010, the international community is as active as ever in fighting Somali piracy. Commanders and ships taking part in the operations have been rotated, with even a Dutch submarine joining Operation Ocean Shield to provide intelligence on pirate movements. Estonia became the twenty-sixth state to join Operation Atalanta, contributing a vessel protection detachment. Twenty successful escorts for the WFP increased the overall total to 93, delivering around 490,000 tonnes of food aid, while another 24 AMISOM escorts were conducted, bringing the total to 75. Other results, however, have been far from satisfactory. Whereas attacks on commercial shipping in the Gulf of Aden fell by more than 50 percent (53 compared to 117 in 2009), they rose substan-

17 Presentation by Vice Admiral Witthauer (see note 5).

18 ICC International Maritime Bureau, ed., *Piracy and Armed Robbery Against Ships* (London, April 2010), 5f, 8.

19 Resolution 375 on a Comprehensive and Co-ordinated Response to Piracy Off the Coast of Somalia, adopted by the Plenary Assembly on Tuesday 17 November 2009, Edinburgh, UK, www.nato-pa.int/Default.asp?SHORTCUT=1949.

20 "Navy Task Groups Work Together to Attack Piracy", news release, Allied Maritime Command HQ Northwood, 1 April 2010, Ref: SNMG2 2010/07.

21 "Breakthroughs along with Challenges during First Month of Swedish Command", www.eunavfor.eu/2010/05/breakthroughs-along-with-challenges-during-first-month-of-swedish-command.

tially in the Red Sea (25 compared to 15) and off Somalia (139 instead of 80). Attacks attributed to Somali pirates totalled 219 in 2010 compared to 218 the year before, including those in the Arabian Sea, off Oman and in the Indian Ocean.[22] Hijackings rose in number too, with 49 compared to 47 in 2009. At the end of 2010, 28 vessels were being held for ransom by Somali pirates.[23] Without the multinational task forces keeping up the pressure on the pirates and assisting merchant ships the number of hijackings would have been substantially higher.

Pirates increase, area of operation and efforts

To avoid the intense naval patrols in the Gulf of Aden the pirates switched their activity southward and eastward. Now, their area of operations extends south to waters off Mozambique and Madagascar and east to 72 degrees longitude (east) off the Maledives (about 1200 nautical miles from the coast of Somalia and 300 nautical miles southwest of Mumbai in India). The EU therefore had to adjust the operational area of Operation Atalanta for a second time, but without additional forces. Two further developments give cause for great concern: the increasing use of lethal weapons and the use of hijacked "mother ships", giving Somali pirates them a much greater radius of action and allowing them to move close to other ships without arousing suspicion.[24] The international community is far from having a remedy against piracy in the Somali Basin and adjacent waters and it is also evident that military measures alone will not solve the underlying problems. All the efforts to date have been just enough to avoid a substantial increase in overall pirate activity and keep it at its current high level. Even the prospect of longer prison terms has little deterrent effect on the pirates, as the probability of being caught is relatively low. By the end of September 2010, the EU had transferred a total of 79 suspected pirates to the Kenyan authorities for prosecution in the Kenyan courts. Fourteen of them have already been convicted and sentenced to five years imprisonment.[25] In American courts Somali pirates have been sentenced to thirty years in prison.

Critical Voices

Dubious cost-benefit ratio

There are also critical voices, however, as illustrated by publications questioning the motives for the "hounding" of pirates and interpreting the panic as a "lucrative carry-on".[26] The core issues are: Do the pirate attacks and hijackings justify the enormous expense of the operation at sea (which costs Germany about €47.4 million annually and ties up about 1,400

22 See *ICC-IMB Piracy and Armed Robbery Against Ships Report – Annual Report 2010* (London, 2010), 5–6, 8 and 19.

23 An up-to-date list of pirated ships and a map where the hijackings took place is to be found at www.eunavfor.eu/wp-content/uploads/2010/10/Pirated-vessels-21.01.2011.pdf.

24 As before, p.19.

25 See www.consilium.europa.eu/showPage.aspx?id=1567&lang=EN

26 Brigitte Mahnkopf, "Piratenhatz am Horn von Afrika", *Internationale Politik und Gesellschaft*, 2010, 1, 69f, and Brooke Smith-Windsor, "Lukrative Seeräuberpistole", *Financial Times Deutschland*, 9 January 2010, www.ftd.de/unternehmen/versicherungen/piraterie-lukrative-seeraeuberpistole/50057815.html.

servicemen and -women)?[27] Is the point really only to protect shipping routes, or are there other strategic considerations in play? Successful attacks on between 40 and 100 of the 16,000 to 20,000 ships that pass the Horn of Africa every year are not enough to justify such an expensive military operation, argues one commentator, as only 0.7 percent of ship movements are affected. Insurers make huge profits from risk surcharges ($300 to 500 million in 2008 just for the Gulf of Aden) and in that way profit from the piracy warnings, notes the other. Both authors suspect other motives besides security of shipping behind the strong presence of international naval forces in this region – ultimately the question of future control of the Indian Ocean.[28] Another line of argument is that piracy offers the navies of individual states a welcome opportunity to demonstrate their importance.[29]

Deployment justified nonetheless

Other motivations apart from counter-piracy may indeed play a role in the deployment of naval forces, and those mentioned would in fact be legitimate too. Quite apart from the aspect that the Indian Ocean is important to the Chinese government because Africa is a focus of its foreign policy, China is seeking to add a serious naval component to its armed forces and gain experience by participating in international operations far from home waters. The EU for its part has the chance to test its collective military capabilities in its first naval operation. Despite the existence of such additional motives, the primary and necessary task remains anti-piracy. The substantial international engagement at sea confirms this. But the states bordering on the affected waters need to make bigger contributions and cooperation and communication between the numerous actors needs to be deepened and better coordinated. If other navies operating autonomously in the Gulf of Aden would follow the Chinese example and join the multinational task groups, it might be possible to do without some of the NATO warships currently operating there. They could then be used for a greater show of force in the Somali Basin and significantly increase the impact of the anti-piracy mission there. The enormous extent of the area of operations, however, demands more maritime surveillance and warships dedicated to fighting piracy and a doubling of efforts to find a political solution to the conflicts and problems in Somalia itself. But given that it is doubtful that the international community will make the necessary effort and investment, insecurity on shipping routes in the western Indian Ocean will probably demand our attention for many years to come.

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27 Bundestags-Drucksache 17/179, 9 December 2009, http://dipbt.bundestag.de/dip21/btd/17/001/1700179.pdf, item 9. €45 million were earmarked for the period December 2008 to December 2009; see Bundestags-Drucksache 16/11337, 10 December 2008, http://dipbt.bundestag.de/dip21/btd/16/113/1611337.pdf, item 10.

28 Mahnkopf, "Piratenhatz am Horn von Afrika" (see note 26), 75ff.

29 Smith-Windsor, "Lukrative Seeräuberpistole" (see note 26).

The Role of the German Navy and Federal Police

Andreas Paulus and Micha Comnick

Concentration on constitutional law

Any exploration of the legal status of the German contribution to EU Operation Atalanta quickly finds itself in a complex web of international law, European law and German constitutional law. For reasons of space this contribution concentrates on the constitutional aspects that are of central relevance to the deployment of the German navy, along with their implications for international and European law. Special attention is given to the changes brought about by the Treaty of Lisbon.[1] Towards the end, we also examine the implications of the constitutional requirement for separation of police and military roles. Questions of international law are touched on only in passing.

Deployment of the German Navy for Counter-piracy

Counter-piracy fundamentally a police responsibility

In order to isolate the specific constitutional ramifications of military counter-piracy, we must first – in line with the distinction between warships and "other government ships operated for non-commercial purposes" – distinguish between the armed forces (here the German navy) and the police (here the German Federal Police).[2] The task of fighting piracy, which generally involves acts of violence, property crimes or kidnappings committed for personal gain, falls fundamentally under the responsibility of the police. The coastguard, as a body coordinating the executive powers of the state at sea (including customs, waterways and shipping administration, and fishery protection) is in principle responsible for counter-piracy, too. As a rule piracy has structural causes, including the poverty of fishing communities, general criminality (drugs, smuggling), and weak and often corrupt law enforcement authorities. Crime prevention is certainly the exclusive prerogative of the police, but when it comes to repelling armed attacks on merchant shipping or freeing hostages on the high seas we would venture that these are tasks for which the police are less well-equipped.

Special capacities of the German navy

The German navy possesses a wide range of capabilities that it can deploy for fighting piracy on the high seas. They include reconnaissance of the area of operations, escorting and protecting civilian vessels and use of force to suppress actual acts of piracy. Alongside facilities and personnel

1 The "Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, signed at Lisbon, 13 December 2007" (see *Official Journal of the European Union*, vol. 50, C 306/1, 17 December 2007) entered into force on 1 December 2009 following the deposition of the last instrument of ratification as per Article 6 (2) of the Treaty.

2 See the definition of war ship in Article 29 of the UN Convention on the Law of the Sea (UNCLOS) of 10 Dec. 1982, 1833 United Nations Treaty Series 3.

for medical care and evacuation, there is particular call for the abilities of the Bundeswehr special forces for scenarios include liberating hostages, recapturing vessels, taking action against pirate ships at sea, and investigating and detaining suspicious vessels at sea.[3] The German navy is certainly de facto in a position to conduct counter-piracy operations, even if the outlined options represent only the *ultima ratio*.

International legal basis for the German navy

The capabilities deployed by the German navy remain within the framework prescribed by international law for counter-piracy. UNCLOS Article 110 regulates the right to board and search a suspect vessel, while Article 105 permits the seizure of any vessel identified as a pirate ship and the detention of those on board. But the legitimacy of the German naval deployment under international law says nothing about its compatibility with the national constitution. Given that the German Basic Law contains no explicit provision comparable to UNCLOS Articles 105 and 106, the fundamental question of the constitutional admissibility of foreign operations by German armed forces needs to be discussed. First we must consider whether the deployment of the German armed forces actually needs explicit authorisation through the Basic Law. Then we need to know whether the decision of the government requires the approval of parliament, which must, of course, remain in accordance with the mandate approved pursuant to international and European law.

Legal Basis

Touchstones of German Basic Law

In our opinion the German Basic Law comprehensively regulates the deployment of German armed forces abroad.[4] According to Article 87a (2): "Apart from defence, the Armed Forces may be employed only to the extent expressly permitted by this Basic Law." Consequently, we must first examine whether fighting piracy falls under the definition of "defence". If this is not the case then deployment of the German navy must be "expressly permitted" by the Basic Law.

3 "Antwort der Bundesregierung auf die Kleine Anfrage der Abgeordneten Winfried Nachtwei, Kerstin Müller (Köln), Omid Nouripour, weiterer Abgeordneter und der Fraktion Bündnis 90/Die Grünen – Drucksache 16/11150 – Pirateriebekämpfung am Horn von Afrika", Bundestags-Drucksache 16/11382, 17 December 2008, 19.

4 Undecided in the Constitutional Court ruling: Bundesverfassungsgerichtsentscheidung, vol. 90, 286ff., here 355. See Christian Tomuschat, "11. September 2001", *Europäische Grundrechtezeitschrift* 28 (2001): 544f.; also Werner Heun in *Grundgesetz: Kommentar*, ed. Horst Dreier, vol. 3, 2nd ed. (Tübingen, 2008), Art. 87a, marginal note 16; Klaus Stern, *Das Staatsrecht der Bundesrepublik Deutschland*, vol. 2, *Staatsorgane, Staatsfunktionen, Finanz- und Haushaltsverfassung, Notstandsverfassung* (Munich, 1980), 1477. Restricting Article 87a (2) of the Basic Law to the internal deployment of armed forces would not regulate and thus also not permit external deployment. Whether such deployments would be possible at all without specific authorisation in the Basic Law would appear questionable. The question remained largely unresolved in the rearmament debate of the 1950s; see the documentation *Der Kampf um den Wehrbeitrag* (Munich, 1953), published by the Institut für Staatslehre und Politik in Mainz.

Fighting piracy is not "defence" in the sense of Article 87a (2) of the Basic Law

According to Article 87a (1.1) and (2) of the Basic Law the armed forces exist for "defence", but the Basic Law contains no closer definition of the term. It uncontestedly includes national defence in the sense of repelling an armed attack on German sovereign territory. There is also no question that it covers the *casus foederis*, where military assistance is provided to an allied state under attack insofar as permitted by the constitution and international law. The classic case here is naturally NATO.[5] Whether a military alliance can be entered into ad hoc has not thus far been discussed, but it runs into difficulties regarding the requirement of "defence" of national territory. Another problem is that pirates are non-state actors acting for personal gain. In some quarters it is argued that defence against non-state actors (terrorists) falls under the definition of defence as per Articles 87a (2) of the Basic Law.[6] But the acts of violence, property crimes and kidnappings normally committed by pirates do not usually achieve the war-like dimensions required for this interpretation, especially where they cannot be attributed to the actions of a single "organisation". Ultimately, any deployment of the armed forces outside the scope of the Basic Law is regulated by international law. Therefore the concept of defence must be interpreted in conformity with international law as set out in the Basic Law.[7]

Enforcing Security Council resolutions is not "defence" in the sense of Article 87a (1) and (2) of the Basic Law

The UN Security Council explicitly authorised action against piracy off the Somali coast under Chapter VII of the United Nations Charter in Resolutions 1816 (2008), 1838 (2008), 1846 (2008), 1851 (2008), 1897 (2009) and most recently 1918 (2010).[8] By including action with the consent of the transitional government in Somali territorial waters and most recently also against pirate bases on land, this authorisation goes well beyond the provisions of the UN Convention on the Law of the Sea.[9] It is questionable whether Article 87a of the Basic Law also covers a deployment of armed forces under a Security Council mandate under Chapter VII of the United Nations Charter that cannot be subsumed under the concept of individual or collective self-defence in the sense of Article 51 of the United Nations Charter. It is sometimes argued that defence in the sense of Article 87a of

5 Thomas Günther, "Zum Einsatz der Bundeswehr im Ausland", in *Wehrhafte Demokratie: Beiträge über die Regelungen zum Schutze der freiheitlichen demokratischen Grundordnung*, ed. Markus Thiel, 329–64 (345f.) (Tübingen, 2003).

6 Manuel Ladiges, "Reichweite des Verteidigungsbegriffs bei terroristischen Angriffen", *Humboldt Forum Recht*, 2009, no. 2, 19–29 (27).

7 Otto Depenheuer in *Grundgesetz: Kommentar*, 55th ed., ed. Theodor Maunz and Günter Dürig (Munich, 2009), Art. 87a, marginal note 78ff., 119ff.; Bodo Pieroth in *Grundgesetz für die Bundesrepublik Deutschland: Kommentar*, 10th ed., ed. Hans D. Jarass and Bodo Pieroth (Munich, 2009), Art. 87a, marginal note 9; Article 26 of the Basic Law already requires defence to be interpreted in conformity with international law.

8 Security Council Resolution 1918 (2010) proposes various options for dealing with the problem of criminal prosecution, including the establishment of an international tribunal.

9 See the codification of long-established practice in UNCLOS Articles 100–107. UNCLOS applies only on the high seas, which Article 86 defines negatively as "all parts of the sea that are not included in the exclusive economic zone, in the territorial sea or in the internal waters of a State, or in the archipelagic waters of an archipelagic State".

the Basic Law can be equated with any use of force permitted under international law, and that this applies especially, in the light of Article 1 (2) of the Basic Law, to measures under Chapter VII of the United Nations Charter.[10] But then the concept of defence in Article 87a of the Basic Law would be nebulous, representing simply the negation of the war of aggression prohibited by international law. Article 87a of the Basic Law applies to self-defence in the strict sense but not to ensuring the peaceful coexistence of the international community. Here Article 24 (2) of the Basic Law is the *lex specialis*.[11] In particular, on the basis of the deliberations of the Parliamentary Council and the circumstance that Article 87a was only later added to the Basic Law,[12] Article 87a (2) of the Basic Law poses no obstacle to the application of Article 24 (2), however.[13]

Explicit admission in Article 24 (2) of the Basic Law: maintaining peace in a system of mutual collective security

Article 24 (2) of the Basic Law empowers the German state to join a system of mutual collective security for maintaining peace. A system of mutual collective security in the sense of Article 24 (2) of the Basic Law is characterised by establishing through a "peace-securing legal framework and the creation of an autonomous organisation a status under international law for each and every member that mutually obliges them to maintain peace and guarantees security."[14] The United Nations incontestably represents such a system of mutual collective security.[15] In particular, under Article 25 of the United Nations Charter, decisions of the Security Council are binding and must be implemented by the member states.[16] This also applies to the aforementioned Security Council resolutions on fighting piracy off the Somali coast, which form part of the international legal basis for the deployment of German armed forces.

NATO as a system of mutual collective security

According to the rulings of the Federal Constitutional Court, NATO as a defensive alliance is a system of mutual collective security to enforce the objectives outlined in the Basic Law.[17] It forms such a system of security because Article 5 of the NATO Treaty obliges all members to provide mutual assistance in the event of an attack on any one of them. Furthermore, NATO serves to maintain peace in the sense of Article 24 (2) of the Basic Law because its members agree in Article 1 of the NATO Treaty to "settle any international dispute in which they may be involved by peace-

10 Karl-Andreas Hernekamp in *Grundgesetz-Kommentar*, vol. 3, 3rd ed., ed. Ingo von Münch and Philip Kunig (Munich, 2003), Art. 87a, marginal note 4.

11 Bundesverfassungsgerichtsentscheidung, vol. 90, 268; Julyane Kokott in *Grundgesetz: Kommentar*, 5th ed., ed. Michael Sachs (Munich, 2009), Art. 87a, marginal note 28.

12 According to the report of the Committee on Legal Affairs, Article 87a (2) of the Basic Law is intended to prevent the derivation of unwritten competences. On the other hand it is not to be excluded that powers derive from a textual connection with the right of self-defence (Bericht des Rechtsausschusses vom 9.5.1968, Bundestags-Drucksache V/2873, 13).

13 Bundesverfassungsgerichtsentscheidung, vol. 90, 286ff., here 349f.

14 Translated from ibid., 349; Wolff Heintschel von Heinegg in *Beck'scher Online-Kommentar zum Grundgesetz*, ed. Volker Epping and Christian Hillgruber, Art. 24, marginal note 32.

15 Bundesverfassungsgerichtsentscheidung, vol. 90, 286ff., here 352.

16 Ibid., 349f.

17 Ibid., 350f.

ful means".[18] After first becoming involved in counter-piracy in the limited-term Operation Allied Provider at the request of UN Secretary-General Ban Ki-Moon,[19] NATO is today permanently involved in fighting piracy off the Somali coast through Operation Ocean Shield (since 17 August 2009 successor to Operation Allied Protector). The legality of a NATO operation whose relevance to the Euro-Atlantic region is marginal or non-existent is the subject of lively debate.[20] The Federal Constitutional Court requires a threat to the security of the Euro-Atlantic region,[21] and there are good grounds for doubt as to whether a mere danger to the merchant shipping of NATO member states represents a threat sufficient for this provision.

The EU as a system of mutual collective security ...

We now move to consider whether the European Union also represents a system of mutual collective security. According to Article 21 (2) (c) of the post-Lisbon Treaty on European Union its objectives include to "preserve peace, prevent conflicts and strengthen international security, in accordance with the purposes and principles of the United Nations Charter".[22] Under Article 42 (2) of the same treaty (ex Article 17 TEU), the common security and defence policy "shall include the progressive framing of a common Union defence policy".[23] The defence policy encompasses the "Petersberg tasks" defined in 1992 at the Western European Union Council of Ministers held at Petersberg near Bonn, Germany, and listed in Article 43 (1) of the post-Lisbon Treaty on European Union:[24] "joint disarmament operations, humanitarian and rescue tasks, military advice and assistance tasks, conflict prevention and peace-keeping tasks, tasks of combat forces in crisis management, including peace-making and post-conflict stabilisation".[25] The institutions for implementing these goals are the High Representative of the Union for Foreign Affairs and Security Policy, the Political and Security Committee (PSC), the Military Committee (EUMC) and the Military Staff (EUMS).[26] Under Article 43 (2) of the Treaty on European Union, the High Representative of the Union for Foreign Affairs and Security Policy, acting under the authority of the Council and in close and

18 Ibid., 351.

19 Allied Provider was a limited-term operation (October to December 2008) in which Standing NATO Maritime Group 2 (SNMG 2) was responsible for the security in Somali waters of vessels chartered by the UN World Food Programme.

20 Bundesverfassungsgerichtsentscheidung, vol. 118, 244ff.; cf. earlier Bundesverfassungsgerichtsentscheidung, vol. 104, 151ff.

21 Bundesverfassungsgerichtsentscheidung, vol. 118, 244ff.

22 Compare Article 11 (1) of the previous treaty: "to preserve peace and strengthen international security, in accordance with the principles of the United Nations Charter."

23 Under Article 17 (1) of the previous version: "The common foreign and security policy shall include all questions relating to the security of the Union, including the progressive framing of a common defence policy, which might lead to a common defence, should the European Council so decide."

24 Cf. Article 17 (2) of the previous version.

25 Treaty of Amsterdam, Article J.7 (2).

26 Hans-Joachim Cremer in *EUV/EGV: Das Verfassungsrecht der Europäischen Union mit Europäischer Grundrechtecharta: Kommentar*, 3d ed., ed. Christian Calliess and Matthias Ruffert (Munich, 2007), Art. 17 EUV, marginal note 25.

constant contact with the Political and Security Committee ensures coordination of the civilian and military aspects of these tasks. Under Article 6 of Joint Action 2008/851/CFSP the PSC assumes strategic leadership and political control of Operation Atalanta under the responsibility of the Council.[27] The Council Decision to prolong the operation left these responsibilities unaltered.[28]

... since Treaty of Lisbon came into force

The EU certainly displays the essential characteristics of a system of collective security, in the shape of a set of rules designed to secure peace and corresponding institutional mechanisms. Whereas earlier versions of the Treaty on European Union contained no explicit duty of mutual assistance in the event of armed attack on a member state, the situation changed when the Treaty of Lisbon came into force on 1 December 2009. Article 42 (7) of the Treaty on European Union now provides a binding duty of assistance in the event of armed attack on a member state.[29] Indeed, strictly according to the wording of the clause, there is not only a legal duty to act, but the objective rendering leaves the member state no discretion with respect to the type of assistance.[30] This makes the new European mutual assistance clause stronger than Article 5 of the NATO Treaty, which grants member states discretion in their choice of means. A collision of the EU and NATO assistance clauses is avoided by the provision in Article 42 (7) of the Treaty on European Union that "Commitments and cooperation in this area shall be consistent with commitments under the North Atlantic Treaty Organisation." While the WEU decided on 31 March 2010 to dissolve itself, with all activities to be wound up by June 2011,[31] with the "NATO first" principle continuing to apply in the EU, the EU can at least since 1 December 2009 be designated a system of mutual collective

27 Hans-Georg Erhart, "Die EU als zivil-militärischer Krisenmanager: Zwischen Anspruch und Wirklichkeit", in *Human Security und Auslandseinsätze der Bundeswehr*, ed. August Pradetto, 127–48 (131) (Münster, 2005); see also Andreas Fischer-Lescano and Timo Tohidipur, "Rechtsrahmen der Maßnahmen gegen Seepiraterie", *Neue Juristische Wochenschrift*, 2009, 1243.

28 Council Decision 2009/907/CFSP of 8 December 2009 amending Joint Action 2008/851/CFSP on a European Union military operation to contribute to the deterrence, prevention and repression of acts of piracy and armed robbery off the Somali coast, *Official Journal of the European Union*, L 322/27, 9 December 2009.

29 "If a Member State is the victim of armed aggression on its territory, the other Member States shall have towards it an *obligation* of aid and assistance by all the means in their power, in accordance with Article 51 of the United Nations Charter." (emphasis added).

30 Hans-Joachim Cremer in *Verfassung der Europäischen Union: Kommentar der Grundlagenbestimmungen*, ed. Christian Calliess and Matthias Ruffert (Munich, 2006), Art. I-41, marginal note 18; Given that the English and French versions of Article I-41 (7) of the Treaty Establishing a Constitution for Europe and Article 42 (7) of the Treaty on European Union are identical, we can safely assume that the minor textual discrepancy between the German versions ("müssen Hilfe leisten" and "schulden Hilfe") does not imply any difference of meaning.

31 "Statement of the Presidency of the Permanent Council of the WEU on behalf of the High Contracting Parties to the Modified Brussels Treaty – Belgium, France, Germany, Greece, Italy, Luxembourg, The Netherlands, Portugal, Spain and the United Kingdom", WEU Press Release, Brussels, 31 March 2010.

security in the sense of Article 24 (2) of the German Basic Law, with further constitutional legitimacy under Article 23 (1) (European Union – Protection of basic rights – Principle of subsidiarity).

Article 24 (2) of the Basic Law as the legal basis

The constitutional authorisation provided by Article 24 (2) of the Basic Law is not restricted to the international integration of armed forces; it also legitimises the individual deployment of armed forces as a consequence of such integration, for otherwise the phrase "enter into" in Article 24 (2) would not make sense.[32] Article 87a (2) of the German Basic Law in conjunction with Article 24 (2) thus offers an adequate legal basis for the German navy's participation in Operation Atalanta.

Admissibility of Deployment

Touchstones of the Federal Constitutional Court

In several rulings, the Federal Constitutional Court has laid out further preconditions for such a deployment.[33] Firstly, it must be determined whether the deployment conforms to international law. Secondly, the Bundestag must express its approval of the deployment under the provisions of the Parliamentary Participation Act (parliamentary reservation).

Conformity with international law

The international legal admissibility of counter-piracy, specifically off the Somali coast, is only explored here in brief. For measures on the high seas it stems both from international treaty law, specifically the UN Convention on the Law of the Sea of 10 December 1982, and from customary international law.[34] Because the applicability of the Convention on the Law of the Seas is restricted to the high seas, any action against pirates within another state's territorial waters violates that state's sovereignty. Naturally a coastal state may consent to the incursion of foreign forces in its sovereign territory, as the Somali Transitional Federal Government did by letter of 27 February 2008 to the Security Council.[35] But even without this consent, an internationally legal violation of Somali sovereignty is explicit authorised in Security Council Resolutions 1816 (2008), 1838 (2008), 1846 (2008) and 1851 (2008), which so to speak offer the participating states a legal "safety net".

Parliamentary reservation

With its ruling of 7 May 2008 (AWACS deployment to Turkey) the Federal Constitutional Court reconsidered the division of powers between Bundestag and national government regarding military deployments. In the specific case of foreign deployments of German military forces the Parliamentary Participation Act restricts the otherwise generous freedom of

32 Bundesverfassungsgerichtsentscheidung, vol. 121, 135ff., here 157 – AWACS-Türkei.

33 See the ruling on foreign operations of the German armed forces from 1994: AWACS/Somalia, Bundesverfassungsgerichtsentscheidung, vol. 90, 286ff.; AWACS-Türkei, Bundesverfassungsgerichtsentscheidung, vol. 121, 135ff..

34 Douglas Guilfoyle, "Piracy off Somalia", *International and Comparative Law Quarterly* 57 (2008): 690–99 (693).

35 "Taking further note of the letter from the Permanent Representative of the Somali Republic to the United Nations to the President of the Security Council dated 27 February 2008, conveying the consent of the TFG to the Security Council for urgent assistance in securing the territorial and international waters off the coast of Somalia for the safe conduct of shipping and navigation", UN Security Council Resolution 1816 (2008).

action enjoyed by the executive branch.[36] The Bundestag is not only the indirectly guiding and controlling organ; here it also bears direct responsibility for any deployment of armed forces (the "parliamentary army", which in this sense also comprises the navy).[37] In order for parliament to discharge this responsibility adequately it must satisfy itself both of the legal basis of the deployment (e.g. NATO treaty) and of the legality of the concrete deployment itself.[38] The decisive criterion for the requirement of parliamentary approval is accordingly the question of deployment. It does not matter whether armed clashes have already taken place, but whether an involvement in armed clashes is to be expected.[39] Examples of such exchanges include the fire fights between pirates and the *Spessart* on 29 March 2009 or the Norwegian *Fridtjof Nansen* on 31 October 2009 (in the latter case two suspected pirates were killed) and on 5 April 2010 the commando raid launched from the Dutch frigate *Tromp* to liberate the German freighter *Taipan*, in which a Dutch serviceman was injured. Whether these examples already represent a "deployment of armed forces" can be left to one side, for the Bundestag resolution of 17 December 2009 extending the deployment satisfied the requirement of parliamentary approval.

The Federal Police and Counter-piracy

Federal Police deployments only temporary

The maritime division of the German Federal Police is fully equipped to tackle all required policing tasks in the North Sea and the Baltic. Although the interior ministry special forces (GSG9, Aviation Group), like the military, possess the wherewithal for international counter-piracy operations,[40] their operations must always be temporary. The Security Council mandate, on the other hand, specifically requires long-term deployments, without which it will be practically impossible to make tangible progress on protecting shipping, fighting and deterring piracy and bringing peace to the region. The Federal Police lack the equipment, personnel, and logistical capacity to take on an operation lasting several weeks or even months. But even if it is in reality impossible for the Federal Police to discharge the counter-piracy mandate, the question as to whether it would be entitled to do so in the first place (or indeed whether counter-piracy falls under the exclusive responsibility of the police) is nonetheless of legal interest.

36 Christian M. Burkiczak, "AWACS II – In dubio pro Bundestag", *Neue Zeitschrift für Verwaltungsrecht*, 2008, 752–54 (752).

37 Heiko Sauer, "Das Verfassungsrecht der kollektiven Sicherheit", *Linien der Rechtsprechung des Bundesverfassungsgerichts*, ed. Hartmut Rensen and Stefan Brink, 614 (Berlin, 2009).

38 Constitutional Court ruling of 7 May 2008 (2 BvE 1/03) in *Neue Juristische Wochenschrift*, 2008, 2018ff., here 2023.

39 Constitutional Court ruling of 7 May 2008 (2 BvE 1/03) in *Neue Juristische Wochenschrift*, 2008, 2022.

40 Bundestags-Drucksache 16/11382 (see note 3), 14.

Conformity with European and international law ...

Some of the counter-piracy measures offered by the Law of the Sea, such as hot pursuit, detention and seizure are, in the German legal framework, fundamentally police powers. Nonetheless, UNCLOS Article 107 assigns the power to fight piracy *ratione personae* both to the armed forces and to other authorised vessels. Accordingly, the Law of the Sea leaves it to the national law of the deploying state to determine whether police and/or military are to be involved. UNCLOS Article 107 initially assumes the deployment of military air or sea forces, but also opens up the possibility of other vessels and aircraft in government service.[41] European law on this point comes down clearly in favour of the armed forces, and Operation Atalanta is a purely military operation. The commander of the EU forces is a military officer, with political control and strategic leadership in the hands of the EU's Political and Security Committee.[42] The military oversight is the responsibility of the EU Military Committee (EUMC).[43] It thus appears doubtful whether police personnel could be permitted to be deployed at all in Operation Atalanta. At most this could take the form of providing assistance under military command.

... justifies exclusive responsibility of the armed forces

An exclusive responsibility of the Federal Police could however ensue from national law. Thus the Maritime Responsibilities Act assigns tasks on the high seas to the authorities and personnel of the police "where international law permits or requires" (section 1 (3)). However, where the Federal Police Act lists the responsibilities of the Federal Police at sea, the tasks of detention, hot pursuit and seizure are reserved exclusively for warships. So it is doubtful whether these laws justify a counter-piracy responsibility for the Federal Police. On the one hand it is argued that the laws governing responsibility date from an age when the deployment of German armed forces was not yet conceivable; for that reason, it is said, they should be interpreted restrictively and counter-piracy does not even come under their scope.[44] On the other hand, it is argued that parliament in its recently completed reform of the law on the Federal Police saw no reason to act, even though it was aware of the restricted deployment possibilities

41 Under UNCLOS Article 29, "a 'warship' means a ship belonging to the armed forces of a State bearing the external marks distinguishing such ships of its nationality, under the command of an officer duly commissioned by the government of the State and whose name appears in the appropriate service list or its equivalent, and manned by a crew which is under regular armed forces discipline." Article 107 stipulates that any other ship carrying out a counter-piracy seizure must be "clearly marked and identifiable as being on government service and authorized to that effect".

42 On 4 December 2009 the PSC adopted Decision Atalanta/8/2009 appointing Rear Admiral Giovanni Gumiero as "EU Force Commander for the European Union military operation to contribute to the deterrence, prevention and repression of acts of piracy and armed robbery off the Somalia coast".

43 The PSC adopted the corresponding decisions on the basis of Article 38 of the Treaty on European Union (formerly Article 25), Council Joint Action 2008/851/CFSP of 10 November 2008.

44 Michael Allmendinger and Alexander Kees, "Störtebekers Erben: Die Seeräuberei und der deutsche Beitrag zu ihrer Bekämpfung", Neue Zeitschrift für Wehrrecht, 2008, 60–69 (67f.).

of the military under ordinary law.[45] However, any interpretation of legislation must be in conformity with constitutional, European and international law. With regard to counter-piracy in the scope of Operation Atalanta, the provisions of both international law (UNCLOS Article 107) and European law (Article 1 2008/851/CFSP) take precedence over mere (non-constitutional) legislation. Therefore in our case the responsibility of the military remains exclusive and the national laws find no application.

No violation of constitutional separation

Relating to substantive law it is often argued that the fulfilment of policing responsibilities by the German military violates the constitutional requirement of separation.[46] As already indicated above, in Operation Atalanta the German navy conducts what are fundamentally policing tasks. The ruling of the Federal Constitutional Court on the Air Security Act (in accordance with Article 87a (2) of the Basic Law) has clarified the question of domestic deployment of the German armed forces:[47] Except as specified by Article 35 (2) and 3 and Article 87a (3) and (4) of the Basic Law the German military has no authority to exercise policing powers. In our opinion, however, foreign deployments of the Federal Police are not covered by the constitutional restriction. The risks involved in a domestic deployment of the armed forces, namely the unleashing of military violence and the presence of a military power factor within the state, are irrelevant in a foreign deployment of the Federal Police.

Conclusions

Counter-piracy as naval policing

A closer examination of the legal framework of an apparently innocuous deployment like the one in Somalia reveals a number of unclarities concerning international and constitutional law, about which further discussion is needed within theory and practice and especially at the interface between the two. It remains important to note that the fight against piracy is not a "war on pirates"; in this specific case the German armed forces are fighting crime with police tools. We find no conflict of powers between the German navy and the Federal Police. Fundamentally counter-piracy is the responsibility of the Federal Police, but in cases outside a country's own territorial waters the Law of the Sea applies (UNCLOS Article 107). That means that alongside the police the military is *also* responsible. In Operation Atalanta an exclusive responsibility of the armed forces is justified by the EU mandate, with police involvement restricted to provision of support under military command. We believe that counter-piracy operations by the German military enjoy adequate constitutional legitimacy.

Alternative solutions

A glance at Switzerland shows a different approach to the problem. The reform of Article 69 of the Military Law, proposed by the Swiss Bundesrat

45 Dieter Wiefelspütz, "Die Beteiligung der Bundeswehr am Kampf gegen Piraterie – Völkerrecht und Verfassungsrecht", *Neue Zeitschrift für Wehrrecht*, 2009, 133–50 (138).

46 Kerstin Braun and Tobias Plate, "Rechtsfragen der Bekämpfung der Piraterie im Gulf of Aden durch die Bundesmarine: Wahrnehmung originär polizeilicher Aufgaben durch das Militär?", *Die Öffentliche Verwaltung* 63, no. 5 (2010): 203–209 (208).

47 Bundesverfassungsgerichtsentscheidung, vol. 115, 118ff., here 147.

but ultimately rejected, was designed to create an independent legal basis for international policing operations.[48] Such operations are conducted by the armed forces but directed neither against a state nor against combatants in the sense of international humanitarian law, and are thus distinct from acts of war. They therefore always require the consent of the affected state. In exceptions where such consent cannot be granted, for example where we are dealing with "failed states", a deployment may accordingly take place on the sole authority of a Security Council resolution.

48 See "Botschaft zum Bundesbeschluss über den Einsatz der Armee im Assistenzdienst im Ausland zur Unterstützung der Operation NAVFOR Atalanta der Europäischen Union sowie zur Änderung des Militärgesetzes vom 22. April 2009" (09.038 sn), *Bundesblatt*, 30 June 2009 (no. 26), 4535–56, http://www.parlament.ch/d/dokumentation/dossiers/dossiers-archiv/atalanta/Documents/atalanta-09-038-botschaft-d.pdf.

Prosecuting Pirates

Christian Schaller

Piracy and international law

Piracy is one of the oldest crimes outlawed under customary international law. It is subject to universal jurisdiction, which means that any state has the right to seize a pirate ship on the high seas, arrest those on board and prosecute them in court.[1] This principle is also enshrined in Article 105 of the United Nations Convention on the Law of the Sea (UNCLOS) of 1982.[2] But unlike genocide, crimes against humanity or war crimes, piracy does not represent an international crime in the strict sense. Whereas states have a positive duty arising from international law to prosecute international crimes, in the case of piracy international law merely grants the right to take action anywhere on the high seas, and entails no obligation to prosecute. Moreover, customary international law and UNCLOS Articles 100–107 place no obligation on states to criminalise piracy in any particular form in their national legislation.

Related offences under the SUA Convention

The 1988 Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation (SUA Convention) is also relevant to combating piracy. Although the SUA Convention does not deal with piracy as defined in UNCLOS Article 101,[3] it contains a list of acts, many of which are typical for pirate attacks. All offences contained in this list must be made punishable by each state party to the SUA Convention. Under Article 3 any person commits an offence "if that person unlawfully and intentionally: (a) seizes or exercises control over a ship by force or threat thereof or any other form of intimidation; or (b) performs an act of violence against a person on board a ship if that act is likely to endanger the safe navigation of that ship; or (c) destroys a ship or causes damage to a ship or to its cargo which is likely to endanger the safe navigation of that ship". The parties to the SUA Convention are obliged to establish their jurisdiction over these offences, submit alleged offenders to their competent authorities or extradite them to another state for the purpose of prosecution (aut dedere aut iudicare).

Issues of Jurisdiction

Principle of universality on the high seas

According to UNCLOS Article 105 a state may combat piracy on the high seas at any time, quite regardless of the nationalities of perpetrators and victims or the flags under which the ships involved are sailing. This

1 Ivan Shearer, "Piracy", in *The Max Planck Encyclopedia of Public International Law*, ed. Rüdiger Wolfrum (Oxford: Oxford University Press, 2008), online edition, www.mpepil.com.

2 On the international legal implications of counter-piracy see the contribution by the same author in this volume, pp. 56ff.

3 On the definition of piracy under UNCLOS Article 101 see the contribution by the same author in this volume, pp. 56ff.

provision is an expression of the customary international law principle of universal jurisdiction by which every state can claim criminal jurisdiction over certain offences, regardless of any specific territorial, personal or other link that is usually required to substantiate a state's right to prosecute. The principle of universal jurisdiction applies to particular crimes, such as genocide, etc., which are of such a grave nature that sanctioning them is in the interest of the international community as a whole. In the case of piracy on the high seas, however, the application of the universality principle is simply based on practical considerations, where the exercise of traditional forms of jurisdiction by single states would normally be ineffective. Although pirates are sometimes referred to as enemies of mankind (hostes humani generis), piracy cannot, in terms of its gravity, be compared with international crimes like genocide, crimes against humanity or war crimes.[4]

Other bases of jurisdiction

If pirates are detained in coastal, archipelagic or internal waters or in ports, the principle of universality does not apply. Here, the responsibility for prosecuting these persons rests primarily with the territorial state (territorial principle). Nevertheless, criminal prosecution may also be carried out by other states where there is a particular link between the offence and the state in question, for example, if the pirates or victims are nationals (personality principle/passive personality principle) or if the pirate ship or the captured vessel possesses the nationality of that state. In these cases the alleged offender may be extradited to a state which is prepared to exercise its jurisdiction over the offence.

Special case Somalia

Counter-piracy operations off the coast of Somalia are conducted within a special legal framework established by the UN Security Council in 2008.[5] Acting under Chapter VII of the UN Charter, the Security Council extended the powers granted by UNCLOS for anti-piracy missions on the high seas to apply also to operations in Somalia's territorial waters. This means that states officially cooperating with the Somali Transitional Federal Government may seize pirate vessels even within Somali territorial waters and try those detained on board before their own criminal courts.

Piracy in German Criminal Law

No specific crime of piracy in German criminal law

Although the German Criminal Code does not contain any specific crime of piracy, it covers all acts typically committed during a pirate attack. Section 316c ("Attacks on air and maritime traffic"), for example, establishes as a crime the use of force to gain control of a ship.[6] Moreover, acts

4 Claus Kreß, "International Criminal Law", in *The Max Planck Encyclopedia of Public International Law*, ed. Rüdiger Wolfrum (see note 1), marginal note 9.

5 See above, p. 56.

6 Under section 316c (1) of the German Criminal Code "Whosoever uses force or attacks the freedom of decision of a person or engages in other conduct in order to gain control of, or influence the navigation of (a) an aircraft employed in civil air traffic which is in flight; or (b) a ship employed in civil maritime traffic; or uses firearms or undertakes to

of piracy typically fulfil numerous other statutory definitions in the Criminal Code, in particular: robbery and aggravated robbery (sections 249, 250), blackmail and use of force or threats against life or limb (section 255), unlawful imprisonment (section 239), abduction for the purpose of blackmail (section 239a), taking hostages (section 239b), and criminal damage (section 303) as well as various offences against the person (sections 223ff.) and offences against life (sections 211ff.).

Jurisdictional links for crimes committed abroad

As far as acts of piracy are committed outside German territorial waters, application of the German Criminal Code requires a special jurisdictional link. Under section 4 of the Criminal Code, German criminal law applies to acts committed on a ship entitled to fly the German flag. It also applies to offences committed against German citizens abroad "if the act is a criminal offence at the locality of its commission or if that locality is not subject to any criminal jurisdiction" (section 7 (1)). Furthermore, German criminal law also applies to crimes against particular internationally protected legal interests regardless of the law where the crime is committed (section 6). This includes attacks on air and maritime traffic under section 316c.

Judicial structures

If German nationals have been killed or injured or vessels operating under the German flag have been attacked by pirates, German authorities will usually seek to prosecute the perpetrators before German courts. For the purpose of notifying the competent authorities of such cases the German government set up a special interministerial committee which also coordinates the transfer of suspected pirates to other states.[7] As soon as the state prosecutor is informed of the suspicion of a crime of piracy he or she is obliged to investigate the matter under sections 152 (2) and 160 of the Code of Criminal Procedure. The suspects can then be brought to Germany on the basis of a judicial arrest warrant. Currently it is envisaged for the German military to hand detainees to the German Federal Police at Djibouti airport for the purpose of transferring them to Germany.[8]

Arrest of Pirates by Military Forces

Applicability of human rights treaties

One of the tasks of Operation Atalanta is to arrest, detain and transfer pirates for criminal prosecution.[9] This task has also been included by the

cause an explosion or a fire, in order to destroy or damage such an aircraft or ship or any cargo on board shall be liable to imprisonment of not less than five years."

7 Antwort der Bundesregierung auf die Kleine Anfrage der Abgeordneten Birgit Homburger, Dr. Rainer Stinner, Elke Hoff, weiterer Abgeordneter und der Fraktion der FDP (Strafverfolgung von Piraterieverdächtigen), Bundestags-Drucksache 16/12927, 8 May 2009, Fragen 7 bis 11.

8 Bundesministerium der Justiz, 121. Sitzung des BT-Rechtsausschusses, TOP 7: Antrag der Bundesregierung auf Zustimmung des Deutschen Bundestags zu der Beteiligung bewaffneter deutscher Streitkräfte an der EU-geführten Operation Atalanta zur Bekämpfung der Piraterie vor der Küste Somalias (Fragen des Abgeordneten Jerzy Montag), 17 December 2008, Fragen 2 und 4.

9 Council Joint Action 2008/851/CFSP, 10 November 2008, *Official Journal of the European Union*, L 301, 12 November 2008, 33ff. (Article 2).

German Bundestag in the national mandate for the German armed forces (Bundeswehr) deployed to the coast of Somalia.[10] In fulfilling this mandate, the Bundeswehr is generally bound both by international human rights norms and by the constitutional provisions of the German Basic Law. Specific requirements for detention procedures arise in particular from the International Covenant on Civil and Political Rights (ICCPR) and the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR). The extraterritorial applicability of the International Covenant and the European Convention on Human Rights is a contested issue among legal scholars and practitioners. There seems to be, however, at least some consensus that the state parties are bound by these treaties if their organs exercise effective control outside their own territory – which clearly is the case if foreign nationals are detained on a German warship.[11]

Legal bases for arrest and detention

Under Article 9 (1) of the ICCPR and Article 5 (1) of the ECHR deprivation of liberty is permissible only on legally defined grounds and in conformity with legally prescribed procedures. It is, however, unclear whether the legal basis for such action may derive from customary international law or established case law or whether a formal legislative act is required in order to justify arrest or detention of a person under these treaties. Thus, it is argued by some legal scholars that there is no adequately defined legal basis for the arrest and detention of pirates by the German Bundeswehr.[12] On the other hand, it can be argued that UNCLOS Article 105 explicitly permits the arrest of pirates on the high seas. Since this power also exists under customary international law, it has become an integral part of German federal law (via Article 25 of the German Basic Law). To the extent that the German armed forces make use of this power, they do so on the basis of the authority of the Security Council under Chapter VII of the UN Charter and thus within the framework of a system of mutual collective security in the sense of Article 24 (2) of the Basic Law.

Detention on Warships

Immediate hearing before a judge

According to Article 9 (3) of the ICCPR any person arrested or detained on a criminal charge must be brought promptly before a judge or other competent legal authority and is entitled to trial within a reasonable time or to release. Similar guarantees are provided by Article 5 (3) of the ECHR. A general definition of what is meant by "promptly" does not exist. Interpretation of this term always has to take into account the specific circumstances of the case at hand. In two cases concerning the detention of

10 Bundestags-Drucksache 16/11337, 10 December 2008; Bundestags-Drucksache 17/179, 9 December 2009.

11 For detail on the extraterritorial applicability of human rights treaties see Andreas Fischer-Lescano and Lena Kreck, "Piraterie und Menschenrechte: Rechtsfragen der Bekämpfung der Piraterie im Rahmen der europäischen Operation Atalanta", *Archiv des Völkerrechts* 47 (2009): 481–524 (483ff).

12 Fischer-Lescano and Kreck, "Piraterie und Menschenrechte" (see note 11), 497ff.

suspected drug smugglers on the high seas, the European Court of Human Rights ruled that a duration of 13 and 16 days was exceptionally permissible because the ships on which the detainees were held each had to travel more than 5,000 kilometres to their home port.[13]

Standards under the German Basic Law applicable?

Narrower limits are drawn by Article 104 of the German Basic Law. Under paragraph 3 thereof, any person provisionally detained on suspicion of having committed a criminal offence must be brought before a judge no later than the day following his or her arrest. The judge must give him or her an opportunity to raise objections and without delay either issue a written arrest warrant or order the suspect's release. With regard to Operation Atalanta, the German government argued that the detention of pirates by German military personnel was justified directly by international law and was not in itself a measure of criminal prosecution – thus not falling under the scope of Article 104 (3) of the German Basic Law. Criminal prosecution would only begin when a German judge issued an arrest warrant and the detained person was transferred from the military to the Federal Police. Article 104 (3) of the Basic Law, the government argued, did not account for this special constellation because it was tailored to purely domestic matters. At the same time, the government argued that the procedural arrangements should be configured to satisfy as effectively as possible the purpose of Article 104.[14] This particular issue is part of a broader discussion on whether the strict standards applicable under German public law to the exercise of jurisdiction by state organs in Germany can and must be applied comprehensively to foreign deployments where the German Bundeswehr is mandated under international law to perform certain executive tasks in the framework of a system of collective security. In particular, it must be taken into account that the armed forces involved in Operation Atalanta off the coast of Somalia have no immediate access to an existing judicial infrastructure. As far as there is an official interest in trying pirates detained on the high seas before German criminal courts, then either German examining judges would need to be sent to the warship or the suspects would have to be promptly transferred by aircraft to Germany and brought before a judge there. The only remaining alternative – also outlined in the mandate of Operation Atalanta – is to transfer pirates promptly to other states that are willing to prosecute them.

Transferring Pirates to Other States

Transfer to Kenya

The United States and the United Kingdom were the first to conclude bilateral agreements with Kenya allowing them to hand over pirates to the

13 European Court of Human Rights, Application No. 37388/97, Judgment of 12 January 1999 (Rigopoulos v. Spain); Application No. 3394/03, Judgment of 10 July 2008, (Medvedyev and Others v. France).

14 Bundesministerium der Justiz (see note 8), Frage 5.

Kenyan authorities for prosecution on a case by case basis.[15] In March 2009 the European Union and the government of Kenya also agreed in an exchange of letters on conditions and modalities for the transfer of suspected pirates detained by EU-led forces.[16] Article 12 (2) of Council Joint Action 2008/851/CFSP stipulates that detainees may only be transferred to a third state if the conditions for the transfer are in accordance with international law and in particular with international human rights norms. This clause is intended to ensure that those persons do not face the death penalty, torture or other cruel, inhuman or degrading treatment or punishment. The conditions agreed between the EU and Kenya therefore define numerous procedural guarantees, some of which stem from the International Covenant on Civil and Political Rights and the European Convention on Human Rights.

Capacity-building in the region

Winning other countries in the region for active engagement in the prosecution and imprisonment of pirates requires considerable financial assistance and capacity-building by the international community. The EU, for example, has invested about $3 million in the Kenyan judicial system through the UN Office on Drugs and Crime (UNODC). Some of these funds have been used to build a special high-security facility for piracy trials.[17] With the help of the United Nations, the Seychelles has also established a regional piracy prosecution centre which has already begun operating. Moreover, several other states have shown interest in such cooperation.[18]

Embark law enforcement officials from third states

In order to facilitate prosecution by third states in the region, the UN Security Council has called for law enforcement officials from these states to travel on warships of Operation Atalanta and other missions, so that they can begin investigations of detainees immediately on board ("shipriders").[19] Such an exercise of criminal jurisdiction by third states in Somalia's territorial waters nevertheless requires the consent of the Somali Transitional Federal Government in each individual case.

15 Tullio Treves, "Piracy, Law of the Sea, and Use of Force: Developments off the Coast of Somalia", *European Journal of International Law* 20, (2009) 2: 399–414 (411).

16 Exchange of Letters between the European Union 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, 6 March 2009, *Official Journal of the European Union*, L 79, 25 March 2009, 49ff.

17 "No Stopping Them", *Economist*, 3 February 2011.

18 Antwort der Bundesregierung auf die Kleine Anfrage der Abgeordneten Jürgen Trittin, Volker Beck (Köln), Marieluise Beck (Bremen), weiterer Abgeordneter und der Fraktion Bündnis 90/Die Grünen (Überprüfung der Rechtsstaatlichkeit von Verfahren für Personen, die an Kenia überstellt werden), Bundestags-Drucksache 16/12648, 17 April 2009, Frage 1.

19 Security Council Resolution 1851 (2008), 16 December 2008, operative paragraph 3.

Prosecution in Practice

Many states cautious

The states participating in Operation Atalanta have so far been extremely reluctant when it comes to trying pirates before their own courts. On the one hand, there are considerable procedural and practical obstacles to overcome with respect to investigation and evidence. On the other hand, political considerations play an important role. In particular, concerns have been expressed that convicted pirates could apply for asylum after completing their sentence. As a consequence, there is a growing number of cases where pirates are disarmed and briefly detained by naval forces but then released again.[20] The commanders of EU and NATO naval forces estimate that about seven hundred suspected pirates were set free between January and June 2010.[21] In some incidents persons were even released far from the coast in small boats without navigational equipment.[22] Against this backdrop the UN Security Council has noted with concern the lack of capacity and clarity about how to deal with pirates after their capture,[23] and called on all states "to criminalize piracy under their domestic law and favourably consider the prosecution of suspected, and imprisonment of convicted, pirates apprehended off the coast of Somalia".[24]

The role of Kenya

As of May 2010, more than five hundred prosecutions were under way in the region (in Kenya, Somaliland, Puntland, the Seychelles and Yemen). In Kenya, eighteen Somalis have been sentenced to long terms of imprisonment and more than one hundred are awaiting trial.[25] Soon after the first trials, however, the government in Nairobi complained that its courts were overloaded. It suspended the acceptance of further cases and demanded fairer burden-sharing and more financial assistance. In September 2010 the Kenyan government finally announced that it was ending cooperation under the agreement with the EU, and in November a national court ruled that it had no jurisdiction to try pirates for attacks conducted outside Kenyan territorial waters.[26]

Prosecution in other countries

At the same time, more than forty prosecutions are under way in states outside the region (including Belgium, France, Germany, India, Malaysia, the Maldives, the Netherlands, South Korea, Spain and the United States).[27] In the United States, for example, a federal court in Virginia recently found five Somali men guilty of piracy for attacking a US warship in the Indian Ocean in April 2010. According to a statute dating back to 1819

20 See the examples in Treves, "Piracy, Law of the Sea, and Use of Force" (see note 15), 408ff.

21 UN Doc. S/2010/394, 26 July 2010, paragraph 20.

22 In May 2010 the Russian navy released ten pirates more than 300 nautical miles from the Yemeni coast. "Freed Pirates May Have Drowned", *Wall Street Journal Online*, 12 May 2010; "The Rule of Law Walks the Plank", Washington Post, 18 May 2010, A19.

23 Security Council Resolution 1851 (2008), 16 December 2008, Preamble.

24 Security Council Resolution 1918 (2010), 27 April 2010, operative paragraph 2.

25 UN Doc. S/2010/394, 26 July 2010, paragraph 19ff.

26 "A Better Way to Deal with Pirates", *Washington Post*, 9 December 2010.

27 UN Doc. S/2010/394, 26 July 2010, paragraph 22.

these persons face a mandatory life sentence.[28] Other cases are still pending before US courts. Moreover, in January 2011 five Somali pirates were captured by the South Korean navy and brought to South Korea, where they also could face up to life imprisonment.[29] In Malaysia, seven Somali suspects have been charged and face the death penalty for attacking a Malaysian-registered chemical tanker and Malaysian armed forces who entered the vessel and freed the crew.[30]

First trials in Europe

The first piracy trial in Europe began at the end of May 2010, when five Somali citizens appeared before a Dutch court. They had been detained by Danish forces in January 2009 in the Gulf of Aden, after having attacked a Turkish freighter operating under the flag of the Netherlands Antilles.[31] In November 2010 a court in Hamburg opened the trial of ten suspected pirates transferred to Germany by the Netherlands, who face charges of hijacking a Hamburg-registered container ship.[32]

An International Court to Prosecute Pirates?

Creating international structures for prosecution

Given the practical and legal obstacles associated with prosecuting pirates in national courts, the question arises whether it would be sensible and feasible to create an international court for such offences. Germany's efforts to work towards such a solution have initially met with strong scepticism and rejection in some quarters.[33] In the meantime, however, the UN Security Council requested the Secretary-General to present a report on possible options for creating more efficient court structures.[34] In his report of July 2010, the Secretary-General has identified several options for enhancing the prosecution and imprisoning of pirates.[35] These include:

- establishing a Somali court sitting in the territory of another state in the region, either with or without UN participation;
- establishing a special chamber within the national jurisdiction of a state in the region, either with or without UN participation;
- establishing a regional tribunal on the basis of a multilateral agreement among regional states, with UN participation;
- establishing an international tribunal on the basis of an agreement between a state in the region and the United Nations;
- establishing an international tribunal by the Security Council under Chapter VII of the UN Charter.

28 "Five Somali Men Convicted in Navy Ship Attack", *Wall Street Journal* (online), 25 November 2010.
29 "Somali Pirates Brought to South Korea", *Wall Street Journal* (online), 31 January 2011.
30 "Malaysia charges Somali Pirates", *Wall Street Journal* (online), 11 February 2011.
31 "Somali-Piraten vor Gericht", *Neue Zürcher Zeitung*, 26 May 2010.
32 "Deutsche Behörden im Kampf gegen Piraten", *dw-world.de*, 22 November 2010.
33 Antwort der Bundesregierung auf die Kleine Anfrage (see note 18), Frage 6.
34 Security Council Resolution 1918 (2010), 27 April 2010, operative paragraph 4.
35 UN Doc. S/2010/394, 26 July 2010.

Proposals for strengthening the Somali court system

The Special Adviser to the Secretary-General on Legal Issues Related to Piracy off the Coast of Somalia, Jack Lang, who presented his report to the Security Council in January 2011, called for the establishment of two specialised court chambers in Puntland and Somaliland as well as of a specialised Somali Court sitting in Arusha, Tanzania. This three-part court system should apply Somali law which, however, would need to be reformed under the aegis of UNODC in association with the Transitional Federal Government and the relevant entities of Puntland and Somaliland, respectively.[36]

Challenges

Whichever road is taken, implementing such proposals would require considerable political and financial commitment and would have manifold legal implications. In his report, the Secretary-General points out that a new judicial mechanism to address piracy would have to work under conditions different from those applying to the existing UN and UN-assisted tribunals. Such a mechanism would face ongoing criminal activity and potentially a large caseload, with no predictable completion date.

36 UN Doc. S/PV.6473, 25 January 2011.

Appendix

Abbreviations

AFRICOM	US Africa Command
AMISOM	African Union Mission in Somalia
ASEAN	Association of Southeast Asian Nations
ASSeTs	Accompanying Sea Security Teams
AWACS	Airborne Warning and Control System
GNP	Gross national product
CEMAC	Communauté économique et monétaire de l'Afrique Centrale
CFSP	Common Foreign and Security Policy
CMF	Combined Maritime Forces
CSDP	Common Security and Defence Policy
CSIS	Center for Strategic and International Studies (Washington, D.C.)
CTF	Combined Task Force
dwt	Deadweight tonnage
ECHR	European Court of Human Rights
ECHR	European Convention for the Protection of Human Rights and Fundamental Freedoms
EEZ	Exclusive Economic Zone
EIA	Energy Information Administration
EIS	Eyes in the Sky (aerial surveillance)
EIU	Economist Intelligence Unit
EU	European Union
EUMC	European Union Military Committee
EUMS	European Union Military Staff
EU NAVFOR	European Union Naval Force
FAO	Food and Agriculture Organsation
FARC	Fuerzas Armadas Revolucionarias de Colombia (Revolutionary Armed Forces of Colombia)
GIGA	German Institute of Global and Area Studies (Hamburg)
GT	Gross tonnage
ICC	International Chamber of Commerce
ICCPR	International Covenant on Civil and Political Rights
ICPAT	IGAD Capacity Building Program Against Terrorism
IEG	Intelligence Exchange Group
IGAD	Inter-Governmental Authority on Development
IISS	International Institute for Strategic Studies
IMB	International Maritime Bureau
IMB-PRC	International Maritime Bureau Piracy Reporting Centre
IMO	International Maritime Organisation (London)
IOTC	Indian Ocean Tuna Organisation
ISEAS	Institute of Southeast Asian Studies (Singapore)
MALSINDO	Malacca Straits Coordinated Patrols conducted by Indonesia, Malaysia and Singapore
MCC NW	Maritime Component Command Northwood
MEND	Movement for the Emancipation of the Niger Delta
MMEA	Malaysian Maritime Enforcement Agency
MRAG	Marine Resources Assessment Group
MSCHOA	Maritime Security Centre – Horn of Africa
MSP	Malacca Straits Patrols

MSP-IS	Malacca Straits Patrols Information System
MSSP	Malacca Straits Surface Patrols
NATO	North Atlantic Treaty Organization
OECD	Organisation for Economic Co-operation and Development
OEF	Operation Enduring Freedom
OHQ	Operation Headquarters
ONSA	Organización Nacional de Salvamento y Seguridad Marítima de los espacios Acuáticos de Venezuela, A.C.
OOS	Operation Ocean Shield
PIS	Puntland Intelligence Service
PRC	Piracy Reporting Centre
PSC	Political and Security Committee (EU)
ReCAAP	Regional Cooperation Agreement on Combating Piracy and Armed Robbery against Ships in Asia
RMSI	Regional Maritime Security Initiative
RSIS	S. Rajaratnam School of International Studies (Singapore)
SHADE	Shared Awareness and Deconfliction
SIPAM	Sistema de Proteção da Amazônia
SNMG	Standing NATO Maritime Group
UNCLOS	UN Convention on the Law of the Sea
SUA Convention	Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation
SWIOFC	South West Indian Ocean Fisheries Commission
TEU	Twenty-foot Equivalent Unit
TF	Task Force
TFG	Transitional Federal Government (Somalia)
UN	United Nations
UNCLOS	United Nations Conference on the Law of the Sea
UNCTAD	United Nations Conference on Trade and Development
UNDP	United Nations Development Programme
USAID	United States Agency for International Development
US NAVCENT	United States Naval Forces, Central Command
WEU	Western European Union
WFP	World Food Programme
WITC	Worldwide Incidents Tracking System

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