

“Piracy – Scourge of Humanity”

by Thilo Neumann*

In 2008 293 incidents of piracy and armed robbery¹ against ships had been reported to the ICC International Maritime Bureau’s (ICC IMB) Piracy Reporting Center.² 111 incidents were reported for the east coast of Somalia and the Gulf of Aden, including the largest tanker ever being hijacked and successful attacks carried out further from land than ever before. Worldwide 49 vessels were hijacked, 889 crew members taken hostage, 32 crew members injured, 11 killed and 21 missing – presumed dead.³

The international community responded by committing naval forces to protect the endangered sea-lanes off the Somali coast. According to Art. 105 UN Convention on the Law of the Sea (LOS Convention),⁴ every state may, on the high seas, seize a pirate ship, arrest the persons and seize the property on board. The courts of the state that carry out the seizure may decide upon the penalties to be imposed. Concerned by the threat that acts of piracy pose to the delivery of humanitarian aid to Somalia, the safety of commercial maritime routes and international navigation, the United Nations Security Council (UNSC) authorized all States that cooperate with the Transitional Federal Government of Somalia (TFG) to enter the territorial waters⁵ and territory⁶ of Somalia to suppress acts of piracy and armed robbery at sea in a manner consistent with action permitted on the high seas. In support of the UNSC Resolutions, the Council of the European Union established the European Union Naval Force (EUNAVFOR) anti-piracy operation ATALANTA,⁷ which operates up to 500 nautical miles off the Somali coast and neighboring countries in order to protect the vessels of the World

* PhD candidate; research and teaching assistant, Chair of Prof. Dr. Doris König, Bucerius Law School, Hamburg.

¹ For statistical purposes the ICC IMB defines piracy and armed robbery as “*an act of boarding or attempting to board any ship with the apparent intent to commit theft or any other crime and with the apparent intent or capability to use force in the furtherance of that act.*”

² The ICC IMB is a specialized division of the International Chamber of Commerce (ICC). Established in 1981, it acts as a focal point in the fight against all types of maritime crime and malpractice. Concerned at the alarming growth in piracy, the ICC IMB established the IMB Piracy Reporting Centre in Kuala Lumpur (Malaysia) in 1992. The Centre maintains a 24-hour watch on the world’s shipping lanes, reports pirate attacks to local law enforcement and issues warnings about piracy hotspots to shipping. The latest ICC IMB Annual and Quarterly Piracy Reports are available free of charge at <<https://www.icc-ccs.org>>.

³ ICC IMB, Piracy and Armed Robbery Against Ships, Annual Report 2008, p. 26.

⁴ United Nations Convention on the Law of the Sea (done at Montego Bay), 10 December 1982, in force 16 November 1996, (1982) 21 *International Legal Materials* 1261.

⁵ UNSC Resolution 1816 (2008).

⁶ UNSC Resolution 1851 (2008).

⁷ Cp. Council Joint Action 2008/851/CFSP of 10 November 2008 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 301 / 33.

Food Program (WFP), which delivers food aid to displaced persons in Somalia, as well as the protection of vulnerable vessels cruising off the Somali coast, and the deterrence, prevention and repression of acts of piracy and armed robbery. To achieve these objectives, EUNAVFOR shall liaise with organizations and entities, as well as States, working in the region to combat acts of piracy and armed robbery, in particular with the Combined Task Force 150 maritime force, which operates within the framework of Operation Enduring Freedom.

Notwithstanding the ongoing military efforts of the international community, the first quarter of 2009 witnessed an increase in attacks of 20 percent over the reports for the fourth quarter of 2008. In 2009 102 incidents had been reported, nine vessels were hijacked, 178 crew members taken hostage, nine injured and two killed.⁸

In view of the absence of a Somali judicial system and the reluctance of major flag states like Liberia, Panama and the Marshall Islands to try detained suspects, the EU and Kenya agreed on the transfer of suspected pirates to Kenya as well as their criminal prosecution by Kenyan courts.⁹ Until today, the German Navy has transferred 16 suspected pirates to Kenya.

Recognizing this development, the 6th annual Maritime Talks of the International Foundation for the Law of the Sea (IFLOS) focused on the impact of piracy on the shipping industry, the opportunities and drawbacks of military intervention as well as capacity building and cooperation opportunities in the affected region. The conference was held in co-operation with the Bucerius Law School and the German Federal Maritime and Hydrographic Agency on the premises of the International Tribunal for the Law of the Sea (ITLOS) in Hamburg on 24 April 2009 and attracted a distinguished audience of 128 scholars and practitioners.

Lectures

In his welcome address, *Judge José Luis Jesus* (President of ITLOS) reminded the audience that whereas some decades ago piracy was believed to be a problem of the past, the current increase of illegal activities in the oceans, inter alia piracy, human trafficking and drug smuggling, poses a threat to regional and international navigation that has caught the

⁸ ICC IMB, Piracy and Armed Robbery Against Ships, 1st Quarterly Report 2009, p. 24.

⁹ Cp. 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 of 6 March 2009, Official Journal of the European Union, L 79 / 49.

international community off guard. *Jesus* underlined that even though ITLOS is a specialized body dealing with disputes arising out of the application of the LOS Convention, it has no competence to try individuals charged with piracy. Subsequently, *Prof. Dr. Doris König* (Chair of the IFLOS' Board of Directors) reminded the audience that even though present media coverage is limited to the incidents off the Somali coast, piracy is a global phenomenon and other parts of the world, e.g. Nigeria and Peru, are witnessing a growing number of armed attacks at sea.

The first presentation of the session by *Commander Snowy Lintern* (EUNAVFOR, Brussels) focused on the naval operations off the coast of Somalia. He stated that the number of warships deployed in the region is sufficient to protect maritime shipping for the time being. Confronted with the rise of the total number of attacks in the monitored region after the deployment of the EU forces, *Lintern* emphasized that the outcome of ATALANTA must be evaluated solely on the basis of the capture success rate, which declined in the Gulf of Aden from 33 percent in 2008 to 14 percent after the establishment of the EU operation. At the same time, he had to admit that the security situation at the east coast of Somalia remains worrying, because the protection of this sea-lane is not a top priority to non-EU States engaged in the region. *Lintern* went on to analyze the special mandate of EUNAVFOR that obviously differs from the other stakeholders' mandates. The main objective of the EU mission is to protect WFP vessels delivering food aid to displaced persons in Somalia. In comparison, the protection of other vulnerable vessels cruising off the Somali coast, irrespective of their flag, is subordinate. *Lintern* went on to underline the strenuous efforts of EUNAVFOR to improve the security situation by cooperating with all other organizations and state actors active in the region, e.g. NATO, CTF-151, Russia, China and India, as well as by providing ship operators with up-to-date piracy reports and self defense instructions via its website.¹⁰ *Lintern* concluded by pointing out that the most pressing prevailing problem is the national legislation of those states contributing to EUNAVFOR that cannot try apprehended suspects in their countries.

Vice Admiral Hans-Joachim Stricker (Commander-in-Chief German Fleet, Glücksburg) picked up where *Lintern* left off and focused his speech on the previous performance of EUNAVFOR off the Somali coast. He called upon the participants not to judge the performance of the EU forces irrespective of their restrictive mandate. The overriding task of

¹⁰ <<http://www.mschoa.eu>>.

the naval forces is to ensure the security of the jeopardized sea-lanes and not to chase pirates. Notwithstanding the military achievements, *Stricker* emphasized that military intervention can only be part of a short-term solution and that the war on piracy can only be won by state building in the affected region. In this context, he complimented the EU/NATO-donor conference on their decision to grant financial aid to Somalia amounting to € 160 million.

The following presentation by *Gert Jürgen Scholz* (German Federal Ministry of Transport, Building and Urban Affairs (FMTBUA), Bonn) dealt with the measures taken by the FMTBUA and its responsibility to provide for the safety and security on board vessels flying the German flag. He underlined the importance attached to the prevention of crime at sea by the Federal Government and the relevance of finding the quickest solution possible to safeguard the interests of German ship-owners operating one of the world's largest fleets. In addition to the German military contribution to EUNAVFOR,¹¹ the FMTBUA initiated a dialogue between ship-owners, trade unions representing the interests of seafarers and the relevant ministries to mandate best use of present capacities. The recommendations prepared by these groups encompassed the notification of the military contact point of EUNAVFOR prior to voyages through Somali waters, regular reports of position course and speed as well as the active implementation of anti-piracy measures.¹² *Scholz* concluded by advising against the deployment of armed guards on board merchant vessels because such measures would imperatively lead to an escalation of violence.

Captain Stefan Bülow (John T. Essberger GmbH & Co KG, Hamburg) examined the problem from a ship-owner's point of view. He reminded the audience that piracy is not a new threat to international shipping and criticized the efforts of the international community as insufficient. *Bülow* called for better coordination of the different state actors active in the region, compliance of all measures taken with international public law, the protection of all merchant ships irrespective of their flag as well as the expansion of transit corridors and more frequent escorted convoys along endangered sea-lanes. Furthermore, he criticized any unilateral freeing of hostages because it would provoke acts of revenge against military and merchant vessels, endangers other hostages and might cause future collaboration between pirates and

¹¹ For some thoughts on the legality of the German contribution to EUNAVFOR under German constitutional law cp. *Fischer-Lescano*, NordÖR 12 (2009), p. 52ff. and *Wolfrum*, Hansa 140 (2003), p. 14f.

¹² As early as 2002 the IMO published a list of measures to be taken by ship-owners and crews to counter piracy and armed robbery at sea (Piracy and armed robbery against ships, Guidance to ship owners and ship operators, shipmasters and crews on preventing and suppressing acts of piracy and armed robbery against ships, MSC/Circ.623/Rev.3, available via <<http://www.imo.org>>).

terrorists. In lieu thereof, *Bülow* called upon EUNAVFOR to identify and neutralize mother ships used by pirates to operate way off the Somali coast, to neutralize land bases in Somalia, to blockade all Somali ports except for aid supplies of the WFP to suppress the support of the local population as well as a ban on non-Somali fisheries within the Somali Exclusive Economic Zone (EEZ). *Bülow* concluded by assailing the media for being exploited by the pirates during negotiations on the release of abducted vessels and crews.

Dr. Hans Heinrich Nöll (German Shipowners' Association, Hamburg) tied in with *Bülow* and emphasized that even though military operations are inevitable at present, a long-term solution can only be reached by state building in Somalia as well as engaging law enforcement agencies and national courts of other states in the region. Subsequently, *Nöll* opined that the international community is not only entitled by the LOS Convention to fight piracy at the high seas but also obliged beyond international treaty law to protect shipping against acts of piracy. This obligation corresponds to the freedom of navigation as the fundamental principle of the LOS Convention as well as the economic importance of international marine freight in times of economic globalization.

Nigel Carden (Thomas Miller P&I Limited, London) overviewed the impact of armed robbery and the taking of hostages at sea on insurance companies. According to *Carden*, the insurable risks of pirate attacks include threats to life or physical condition of crew members and passengers, ransoms and the loss of cargo or the vessel itself. He went on to point out that until now the insurers did not have to face comprehensive claims of the insureds, because as long as ransoms are paid it is in the interest of the pirates not to harm the hostages or to damage the vessel. Subsequently, *Carden* expressed the opinion that the payment of ransoms is legal under national law as long as the hostage-takers are common criminals and the sum paid is not used to finance terrorist activities. Thereafter, *Carden* commented on the right of the insured to claim compensation for the ransom paid, depending on their insurance contracts, from their hull underwriters, war risk underwriters or protection and indemnity underwriters (P&I). Additionally ship-operators have the option to affect a kidnap and ransom insurance (K&R). Originally, K&R insurances were designed for other areas than marine transport and cover not only the amount surrendered as ransom but also fees and expenses of the response team as well as loss in transit of the ransom. In this context, *Carden* criticized that P&I underwriters do not tend to participate in the coverage of ransoms but benefit most when the hostages are released unharmed. He concluded by pointing out that the deployment

of armed guards on merchant vessels would not only imperatively lead to an escalation of violence but would also challenge the master's authority on board.

Subsequently, *Dr. Ewald Brandt* (Head of Public Prosecutor's Office, Hamburg) gave a lecture on the legal situation in Germany. According to section 6 item 3 of the German Criminal Code ("GCC"), German criminal law shall apply to assaults against sea traffic,¹³ regardless of the law of the place of their commission. *Brandt* emphasized that if a crime is committed abroad, the public prosecutor's office (PPO) is not, unlike cases of domestic crimes, strictly obliged to prosecute. Only if well defined interests of Germany are affected, e.g. if German nationals have been wounded or killed, a ship flying the German flag was attacked, a German shipping company or insurance company has been blackmailed or if suspects have been detained by the German Navy, the PPO will institute proceedings. If the criminal offense was committed on a ship authorized to fly the German flag outside the territorial scope of the German Criminal Procedure Code (GCPC), the competent court shall be the court in whose district the ship's home port is located,¹⁴ or, if no venue is established, the venue shall be Hamburg.¹⁵ Until today, the PPO in Hamburg has opened proceedings two times in the case of suspected pirates being detained by the German Navy. Both times, proceedings have been suspended after the Navy transferred the subjects to Kenyan authorities. *Brandt* concluded by pointing out that German officials monitor the proceedings to guarantee due process of law.

Discussion

Prof. Dr. Dr. hc. Peter Ehlers (Chair German Nautical Association, Hamburg) moderated the lively closing discussion.

Confronted with the question about national competences of navy and police forces to battle piracy at sea and the proposal of the establishment of an international anti-piracy police force, *Stricker* answered that the German Federal Police as well as most other national police forces are ill-suited for anti-piracy operations. *Lintern* tied in with *Stricker* and emphasized that the current operation off the coast of Somalia could neither be qualified as a police action nor as a

¹³ Section 316 c paragraph 1 GCC defines assaults against sea traffic as the application of force to or the assault on the freedom of decision of a person or the engagement in other machinations in order to thereby gain control of, or influence the navigation of a ship employed in civil sea traffic or the use of firearms or the causation of an explosion or a fire, in order to destroy or damage such a ship or the cargo which exists on board thereof.

¹⁴ Cp. section 10 paragraph 1 GCPC.

¹⁵ Cp. section 10 a GCPC.

military operation. Furthermore, *Lintern* claimed that frequent requests for investigations against every vessel carrying weapons in the monitored area are escapist, since even fishermen carry guns for self-defense. *Nöll* picked up where *Lintern* left off and criticized the question as misleading. He emphasized that the LOS Convention would allow both, police and military units, to engage in countermeasures against acts of piracy. Therefore the question should not be who has the competence to fight piracy but who has the mandatory resources for such operations.

All participants agreed that the establishment of an International Court for Piracy as well as an International Law Enforcement Agency was necessary. *Brandt* indicated that such an approach could lead to the establishment of an international standard of proceedings in the long run, whilst *Lintern* and *Nöll* emphasized that global problems require global solutions. The latter advised the audience not to account the establishment of an international court or the amendment of ITLOS' mandate as part of a short-term solution because both solutions would imperatively come along with preceding long-lasting international negotiations. Subsequently, *Carden* reminded the audience that national and international proceedings would entail unclear financial burdens for the ship operators if their crews could be summoned as witnesses.

Afterwards, *Scholz* justified the limitation of ATALANTA to measures against the subjects at sea, which leaves the suborners unchallenged. He emphasized that the conviction of those behind the scenes is unequally awkward compared to the already difficult task of sentencing the perpetrators by due process of law. *Scholz* concluded by recommending the adaptation of measures against the string pullers similar to those taken by the international community to fight transnational money laundering.¹⁶

Lintern referred back to the call for a naval blockade of the Somali ports. He advised the audience that such a task could not be performed by EUNAVFOR because most maritime transport off the coast of Somalia is carried out by small boats which are capable of disembarking anywhere along the Somali coastline. Additionally, *Lintern* emphasized that any indiscriminate disruption of sea traffic along the Somali coast would affect inshore fishing activities carried out by the local population and thus infringe on obligations under public international law. *Nöll* tied in with *Lintern* and asked the audience to consider that a

¹⁶ Cp. inter alia Convention against Transnational Crime, A/55/383, p. 25-53.

naval blockade is not covered by the current mandate of EUNAVFOR and would have indiscriminate consequences for both pirates and the local population.

Thereafter, *Bülow* pointed out that the current increase of armed attacks off the coast of Somalia is in no way linked to third state fishing activities in the Somali EEZ. *Lintern* agreed with this evaluation and reminded the audience that actions against non-Somali vessels fishing illegally within the Somali EEZ would fail because of the cloudy legal situation. At present, not only the FTG but also the government of Puntland is issuing fishing licenses and delegating fishing inspectors. Additionally, *Nöll* took the claims of Somali pirates into consideration and highlighted the fact that these were always limited to financial requests. Not once did they order non-Somali vessels to stop fishing activities in Somali waters.

Subsequently, the participants agreed that the termination of ransom payments could not be part of the solution. *Nöll* argued that it would destroy the confidence of the seafarers in their employers, whilst *Scholz* emphasized that as long as no evidence for a connection between pirates and terrorists is provided; paying ransoms is preferable to further escalations of violence.

Thereafter, *Bülow* called upon the state actors to decrease pirates' operating range by identifying and destroying their mother ships. *Stricker* countered this request with the question as to how to identify a vessel that is used for illegal activities, if its appearance does not even slightly differ from that of the other some thousand vessels operating off the Somali coast, before it is engaged in an attack. In this regard, *Lintern* asked the audience to consider that EUNAVFOR has to patrol a tremendous sea area and is due to liability risks not able to conclude agreements with non-EU States on further division of labor.

In his concluding remarks, *Ehlers* recapitulated the different opinions given during the conference and reminded the audience that the fight against piracy cannot be won at sea but only by state building in the affected regions.