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Piracy – a crime and a challenge for democracies

Report

Political Affairs Committee

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Summary

In recent years, piracy has reached unprecedented importance and has become nearly endemic in some stretches of sea, seriously threatening the security of commercial shipping and the safety of crews and passengers.

Even if military deterrence has managed to reduce the ratio of successful attacks off the coast of Somalia, the main worldwide hotspot, it cannot provide a long-term solution as the root causes of piracy are ashore. A comprehensive approach is needed to address instability, lack of governance and poverty in Somalia and other countries which generate piracy, as well as to ensure effective prosecution of pirate suspects, in compliance with human rights standards.

A. Draft resolution

1. The Parliamentary Assembly is concerned at the upsurge of piracy, which has become endemic in some stretches of sea, causes an economic loss of billions of dollars every year, great human suffering, with people being kidnapped, injured, traumatised or killed and may serve to finance extremist or terrorist groups. This phenomenon is directly related to the inability of the coastal state to enforce police control in its territorial waters or their proximity, due to lack of good governance.
2. Since 2009, the sea off the coast of Somalia has become the main hotspot worldwide with pirate activities expanding from Somali territorial waters to the Gulf of Aden, Kenya, Madagascar, the Seychelles and Tanzania and pirates using increasingly sophisticated weapons and technology.
3. So far, the main emphasis of the counter-piracy framework has been on military deterrence: 45 countries have dispatched warships off the coast of Somalia to escort merchant vessels flying their flags or vessels in which they have a particular interest, due to the nationality of the crew or the nature of the cargo on board.
4. States have started to co-operate and set up collective security systems, with a view to deterring, defending against and disrupting pirate attacks against ships, irrespective of their flag. In this context, the Assembly commends the efforts undertaken by NATO and the European Union, since 2008, with a number of successive military operations, which have made it possible to deliver safely thousands of tons of humanitarian aid to the Somali civilian population, thwart dozens of pirate attacks and provide assistance to victims.
5. Military deterrence has managed to reduce the ratio of successful attacks off the coast of Somalia from 1 out of 3 in 2006 to 1 out of 6 in 2009. At the same time, the capacity of commercial ships to avoid or escape pirate attacks on their own has increased considerably, making them less and less reliant on private security firms.
6. The Assembly is convinced, however, that military deterrence cannot provide a long-term solution to the problem of piracy as its root causes are ashore. A comprehensive approach is needed to address poverty, instability and lack of governance in Somalia and other countries which generate piracy.
7. The practice of some Council of Europe member states to set free pirate suspects is a matter of concern. A comprehensive approach to piracy requires ensuring effective prosecution as an integral part of any credible deterrence effort and as a way to demonstrate genuine political commitment to enforcing the rule of law.
8. The Assembly acknowledges that a number of hurdles prevent the effective prosecution of pirate suspects, the main being that the majority of pirate attacks take place in a state's territorial waters: in such cases, according to international law, the sole responsibility for apprehension and prosecution lies with the coastal state, as the principle of universal jurisdiction does not apply, with the exception of Somalia by virtue of Resolution 1851 (2008) of the United Nations Security Council.
9. In addition, some Council of Europe member states are reluctant to enforce prosecution, on the grounds that their domestic legislation is obsolete, unclear or unsuitable to fit the reality of today's piracy. Furthermore, in the case of international operations or when a number of countries are involved, there are no clear rules on which state should undertake prosecution, and in which order of precedence.
10. The Assembly notes that the European Union has signed agreements with the governments of Kenya and the Seychelles for the transfer and prosecution of persons suspected of having committed acts of piracy on the high seas and apprehended by navies of the European Union Naval Force (EUNAVFOR); the Netherlands, the United Kingdom and the United States have done likewise. The Assembly regrets that these arrangements do not seem appropriate to deal with the size and the scale of the problem.
11. While acknowledging that the transfer of pirate suspects to a third country is not *per se* unlawful, and that geographical proximity with the theatre of pirate attacks is important in order to facilitate further investigations, collect evidence and hear witnesses, the Assembly recalls that Council of Europe member states must ensure the compliance of all the agreements which they conclude with the European Convention on Human Rights and other relevant human rights instruments. It also recalls that they could be held responsible for breaches of the Convention, for instance when transferring individuals to a country where they might be subjected to torture or inhuman and degrading treatment or where they would not be given a fair trial.

12. The Assembly also recalls that compliance with the European Convention of Human Rights is mandatory for Council of Europe member states when exercising extraterritorial jurisdiction: thus, they must abide by the relevant provisions of the Convention in the course of apprehension, detention on board or transfer of pirate suspects irrespective of where they take place.

13. Although lack of transparency surrounds the solution of most piracy cases, especially those involving protracted kidnappings, there are grounds to believe that the majority of them end with the payment of ransoms. Council of Europe member states should introduce clear policies and legislation to address this issue, in order to avoid further encouraging piracy and the use of ransom payments to finance extremist or terrorist groups.

14. In the light of these considerations, the Assembly, as regards military deterrence:

14.1. encourages Council of Europe member states to provide naval escort to ships crossing areas at risk of piracy;

14.2. asks NATO, the European Union and countries concerned to renew and strengthen their anti-piracy operations off the coast of Somalia.

15. As regards prosecution, the Assembly calls on Council of Europe member states to:

15.1. modernise and develop a common and more relevant domestic legal framework in order to criminalise the act of piracy wherever it takes place and ensure prosecution in Council of Europe member states, or introduce appropriate legislation where it does not exist;

15.2. introduce legal provisions to allow the apprehension, transfer and prosecution of pirate suspects apprehended in Somali territorial waters or on Somali territory, pursuant to Resolution 1851 (2008) of the United Nations Security Council;

15.3. draw up rules on the treatment of pirate suspects while on board their military ships, ensuring full compliance with the European Convention on Human Rights and other relevant international human rights instruments;

15.4. step up international co-operation and agree on clear rules for identifying the state responsible for prosecution of pirate suspects;

15.5. seek appropriate ways in which the existing international legal framework can be adapted to face current needs of policing at sea;

16. The Assembly calls on Council of Europe member states and the European Union to:

16.1. conclude agreements with third countries on the transfer and prosecution of pirate suspects and ensure that these agreements comply fully with the European Convention on Human Rights and other relevant international human rights instruments;

16.2. monitor closely the treatment of pirate suspects after their transfer to a third country, in particular as regards detention conditions, availability of a fair trial, absence of torture and inhuman and degrading treatment or capital punishment.

17. Finally, as regards the elaboration of a comprehensive counter-piracy framework, the Assembly calls on Council of Europe member states to:

17.1. support the efforts of the Federal Transitional Government of Somalia as well as of the international community, in particular the United Nations and the European Union, to restore peace and stability in Somalia;

17.2. step up assistance to Somalia, directly or through the World Food Programme, the United Nations High Commissioner for Refugees and other human rights and humanitarian organisations;

17.3. establish clear policies and legislation against the payment of ransoms, and ensure compliance by both private actors and state authorities;

17.4. enhance international co-operation in order to identify the criminal networks, based in Somalia or outside, which mastermind pirate attacks and ensure that they are brought to justice;

17.5. investigate whether ransom payments are used to finance extremist or terrorist groups and, if so, take all necessary action to stop this and prevent it from occurring.

B. Explanatory memorandum, by Mrs Keleş, Rapporteur

I. Introduction

1. Maritime piracy was believed to have largely disappeared in modern times, or at least to have fallen to levels that did not demand considerable attention. Contrary to this assumption, in recent years piracy has reached unprecedented importance and has become nearly endemic in some stretches of sea, seriously threatening the security of commercial shipping and the safety of crews and passengers.

2. Worldwide, the economic loss due to piracy amounts to more than 16 billion US dollars a year.¹ In addition, thousands of hostages are taken and hundreds of sailors are injured, traumatised, or killed.

3. There are also other potential risks:

- pirates could, deliberately or not, cause environmental disasters, for instance when attacking ships carrying oil, dangerous chemicals or explosives – which is more and more frequent;
- the prices of some goods – such as oil and manufactured products - could increase, as a result of the rise in the insurance premiums paid for crossing certain hotspots;
- the gains of piracy might be used to finance terrorist groups or, in the light of the success of piracy, terrorists might decide to take advantage of the vulnerability of merchant shipping and use pirate techniques to target it.

4. It is not surprising, therefore, that in recent years piracy has attracted growing attention by governments, international organisations and other actors, with a view to setting up a meaningful counter-piracy framework.

5. Amongst international parliamentary assemblies, the European Parliament has been a pioneer in addressing the issue, with a far-reaching resolution on piracy at sea adopted in 2008.² Since then, piracy has constantly featured in the agenda of European Parliament committees and political groups, with the organisation of various hearings and other initiatives. In June 2009, the European Security and Defence Assembly adopted Recommendation 840 on the role of the European Union in combating piracy, which focuses on military deterrence efforts while suggesting several measures to strengthen prosecution.³ In November 2009, the NATO Parliamentary Assembly adopted Resolution 375 in a comprehensive and co-ordinated response to piracy off the coast of Somalia.⁴

6. In the course of 2009, three motions were tabled by members of the Parliamentary Assembly of the Council of Europe. One by myself, on Piracy and hostage-taking on the high sea⁵; another one underlying the challenges that counter-piracy poses to democracies, namely as regards the role of private security firms, tabled by Mr Wodarg⁶; and a third one, tabled by Mr Kosachev, focusing on the necessity to take additional international legal steps to deal with sea piracy⁷. The former two were merged and referred to the Political Affairs Committee, where I was elected Rapporteur; while the third one was referred to the Committee on Legal Affairs and Human Rights (Rapporteur: Mr Holovaty).

7. In a concern not to duplicate the work of others but to ensure synergy, I have tried to approach the issue of piracy from an angle where the Council of Europe can have an added value. In this report, therefore, I shall focus on rule of law and policy aspects, basing myself, amongst others things, on the Hearing on Modern Day Piracy, organised by the Political Affairs Committee on 17 November 2009, in Brussels. I shall not dwell on strictly legal issues, which will be covered by Mr Holovaty's report.

2. Overview of the phenomenon

2.1. Definitions

8. According to the 1982 United Nations Convention on the Law of the Sea (UNCLOS)⁸, which has been ratified by 160 states with the important exception of the United States of America, piracy is defined as:

¹ Joshua Haberkornhalm, White Paper on Managing the Risks of Maritime Piracy, 2004.

² European Parliament resolution on Piracy at sea, 23 October 2008, B6-0537/2008.

³ Document A/2037, 4 June 2009.

⁴ <http://www.nato-pa.int/default.asp?SHORTCUT=1949>.

⁵ Doc. 11803.

⁶ Doc. 11837.

⁷ Doc. 11947

⁸ Article 101.

- “(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 inciting or intentionally facilitating an act described in sub-paragraph (a) or (b).”

9. The legal definition of piracy is more restrictive than the notion of piracy which is used in common language, as the former refers only to acts committed on the high seas (the possibility of other places outside the jurisdiction of any state being only theoretical). Attacks taking place within the territorial waters of a given country, instead, from a legal point of view should be referred to as armed robbery at sea.

10. In this present report, however, I will use the expression piracy in its common usage and I will specify where it takes place in order to make a distinction. It is important to note that 80% of reported piracy attacks occur inside territorial waters.⁹

2.2. A phenomenon on the rise¹⁰

11. The most comprehensive collection of data on sea piracy is compiled by a private industry organisation, the International Maritime Bureau of the International Chamber of Commerce (ICC-IMB), which also issues periodic reports, through its Piracy Reporting Centre (IMB PRC). The trend observed indicates a quantitative and a qualitative upsurge of the phenomenon:

- in 2009, 406 actual or attempted attacks took place in the world. As a comparison, there were 293 in 2008, 263 in 2007 and 239 in 2006;
- these attacks have become increasingly sophisticated and dangerous for the safety of people: during the 406 actual or attempted attacks in 2009, 153 ships were boarded, 49 were hijacked and 120 were fired upon; 1052 crew members were taken hostage, 68 were injured in the various incidents and 8 were killed.

12. All kinds of ships were targeted: not only bulk carriers, containers and tankers but also fishing vessels, yachts and passenger ships.

13. These figures, however alarming, do not reflect the entire size of the phenomenon, as many attacks against commercial ships – possibly even 50%¹¹ - are not reported, according to the ICC-IMB. The lengthy and cumbersome nature of the investigations – sometimes also involving the authorities of the coastal state - often deter shipping companies from reporting them, and so does the fear of losing customers.

2.3. Main hotspots

14. Piracy is a worldwide phenomenon the frequency of which is directly related to the inability of the coastal state to enforce police control off its coast, due to lack of good governance. The main hotspots are the coastal waters off Southeast Asia – especially the Straits of Malacca – West Africa, the Indian Ocean and the Gulf of Aden, South America and the Caribbean Islands.

3. The case of Somalia

3.1. The extent of the problem

15. Over the last year, there has been a dramatic increase in piracy and armed robbery at sea off the coast of Somalia, with an expansion of their geographical scope from Somali territorial waters to the Gulf of Aden, Kenya, Madagascar, the Seychelles and Tanzania.¹²

⁹ Munich Re, Piracy – Threat at sea, page 17.

¹⁰ Source: 2009 annual piracy report issued by the ICC International Maritime Bureau's Piracy Reporting Centre (IMB PRC).

¹¹ Munich Re, Piracy – Threat at sea, page 17.

¹² See the chapter below specifically devoted to this issue.

16. Pirates are believed to be using mother vessels which can proceed far out to sea and then launch smaller boats to attack and hijack passing vessels.

17. Out of the 406 actual or attempted attacks which took place in 2009, 217 were off the coast of Somalia, and involved 47 hijackings, 867 crew members were taken hostage, and four killed. In 2008, the number of actual or attempted attacks in this area was 111; in 2007, 31; in 2006, 10.¹³

18. 2009 has seen a significant shift in the area of attacks off Somalia. While the 2008 attacks were predominantly focused in the Gulf of Aden, 2009 has witnessed more vessels being targeted off the coastal villages of Eyl and Garaad in Puntland, and the coastal villages of Hobyo and Harardhere in the central area of Somalia.¹⁴ Since October 2009, increased activity has been observed in the Indian Ocean with 33 incidents reported, including 13 hijackings.

19. The surge in the phenomenon of piracy off the coast of Somalia raises great concerns due to:

- the importance of this stretch of sea for commercial shipping, with one third of the world's cargo going through the Gulf of Aden;
- the fact that, unlike in other regions of the world, Somali pirates have proved able to seize huge vessels and to take and keep their crews hostage, even for protracted periods, with a view to obtaining a ransom; and
- the fact that piracy disrupts the delivery of food and other humanitarian assistance on which the Somali population is strongly reliant.

3.2. The response of the UN Security Council

20. The gravity of this situation has led the UN Security Council, acting under Chapter VII of the UN Charter (threats to international peace and security), to adopt 5 resolutions on piracy off the coast of Somalia over a period of only 6 months.¹⁵

21. In these texts, the UN Security Council:

- calls on regional and international organisations that have the capacity to do so to take part actively in the fight against piracy and armed robbery by deploying naval vessels and military aircraft;
- invites all states and regional organisations fighting piracy off the coast of Somalia to conclude special arrangements with countries willing to take custody of pirates in order to embark law enforcement officials from the latter countries to facilitate investigation and prosecution;
- encourages the setting up of an international co-operation mechanism and the creation of a centre for information exchange;
- decides that, until the end of 2009, states and regional organisations co-operating in the fight against piracy and armed robbery at sea off the coast of Somalia may undertake all the necessary measures that are appropriate for the purpose of suppressing acts of piracy and armed robbery at sea, on the territory of Somalia, in respect of the relevant humanitarian and human rights law.¹⁶

22. This last decision by the UN Security Council should be seen in the context of a precise request addressed to the UN Secretary General by the Transitional Federal Government of Somalia (TFG), calling for the assistance of the international community in fighting piracy.¹⁷

3.3. The root causes of piracy in Somalia

23. In order to understand why piracy has taken root in Somalia, the political and socio-economic conditions of the country should be kept in mind.

24. Since the ousting of the Barre regime in the early 1990s, Somalia has been in a state of civil war, marked by inter-clan fighting and random banditry, with no central government being able to exert control over the whole Somali territory. At the moment, the Transitional Federal Government (TFG) – the internationally-recognised government of Somalia - is present in Mogadishu but controls only a few districts

¹³ Presentation by Mr Howlett, Divisional Director ICC International Maritime Bureau, Hearing on Modern Day Piracy, 17 November 2009, Brussels.

¹⁴ Raymond Gilpin, United States Institute of Peace, Counting the Costs of Somali Piracy, 22 June 2009.

¹⁵ Resolutions 1814, 1816, 1838, 1846 and 1851 (2008).

¹⁶ Resolution 1851 (2008), paragraph 6.

¹⁷ Letters of 1 September and 9 December 2008 signed by the President of Somalia.

of the capital; it is engaged in a war against extremist Islamist groups linked to Al-Qaida such as *al-Shabaab* and *Hizbul-Islam* which control the South of the country. The only parts of relative calm are Somaliland and Puntland, two regions that have declared their independence (which is not recognised by the international community) and are engaged in fighting against Islamist groups.

25. In this situation, local warlords set up their own coast guard which started levying taxes and fines on ships they managed to board. This rapidly evolved to piracy.¹⁸ At the same time, taking advantage of the collapse of state power, trawlers from other countries started to fish in Somali waters unhindered, jeopardising the livelihood of local fishermen who did not have many other alternatives than to turn to piracy to ensure their own survival.

26. Piracy, therefore, represents big business for the local warlords and is the main source of income for ordinary people. It is not unusual for villagers to help the pirates guard the kidnapped ships and crews once they are brought back to shore, in the hope of receiving a part of the ransom. According to some reports, even the Somali diaspora is involved in supporting pirates at home, by helping them get sophisticated equipment, intervening as intermediaries, etc.¹⁹

27. The population of Somalia totals nearly ten million, with a life expectancy of less than fifty years; the average age is seventeen. The country lacks the most elementary health and welfare structures; famine and perennial droughts condemn people to live on less than two dollars a day.²⁰ More than 1.3 million people live in a situation of internal displacement.²¹ Violence and human rights violations are every day occurrences. In the parts under their control, Islamist groups have imposed the strictest interpretation of *Sharia* law,²² the situation of women in these areas is a matter of special concern.

28. Somalis are greatly reliant on external food and humanitarian assistance. However, the provision of such assistance is hindered by piracy at sea and, overland, by attacks against aid workers, abductions and threats from armed groups, which has often led to the temporary closure of World Food Programme offices and the suspension of humanitarian services.

29. In November 2009, *al-Shabaab* posed '11 conditions' to humanitarian NGOs and UN agencies working in the areas under its control, such as: that they stop interfering with Islam, sack all their female staff and pay a tax of 20,000 dollars every six months. At the end of February 2010, *al-Shabaab* banned the activities of the World Food Programme altogether.

3.4. *The role of the international community*

30. After about 15 failed peacemaking processes, a new attempt to reach a negotiated peace settlement in Somalia has been under way since May 2008: the Djibouti peace process is a UN-led initiative which enjoys the support of major external actors within the region and outside, including Ethiopia, the League of Arab States and the United States. The Djibouti process, however, faces important challenges, namely:

- how to address the security concerns of other countries in the region, such as Ethiopia;
- how to involve all the important actors in the Somali crisis, including Islamist groups, civil society, business, local councils and the Somali diaspora;
- how to overcome divisions and disagreements between the actors currently party to the process itself.

31. Some observers point out the limitations of the Djibouti process:

- its focus has so far been on resolving the situation in South and central Somalia, the parts of the country where the conflict has been raging on for the past two decades. However, this approach fails to take into account the situations of Somaliland and Puntland, which are in many ways a result of the Somali crisis;

¹⁸ Raymond Gilpin, United States Institute of Peace, Counting the Costs of Somali Piracy, 22 June 2009.

¹⁹ Associated Press, Somali piracy backed by international network, <http://www.msnbc.msn.com/id/28158455/page/2/>, 10 December 2008.

²⁰ Source: World Bank.

²¹ Internal displacement monitoring centre, <http://www.internal-displacement.org/>.

²² BBC News, *Somali Justice – Islamist Style*, 20 May 2009. However, *Sharia* law is also applicable in the areas of Somalia subjected to the TFG's control, even if the President has vowed not to implement a strict interpretation of it (Al Jazeera, *Somalia votes to implement Sharia*, 19 April 2009).

- it neglects the issue of justice: since the beginning of the civil war, alongside the collapse of the state, Somalis have endured serious human rights violations including killing, rape and torture, without any mechanism to bring perpetrators to justice. This has led to the prevalence of a culture of impunity.

32. At the moment, the only international presence in Somalia is the military branch of the African Union Mission in Somalia (AMISOM), which conducts a peace support operation in order to stabilise the security situation and create a safe and secure environment in preparation for the transition to the UN.

33. Politically, a special role is played by the International Contact Group for Somalia, an informal group initiated by the United States to promote peace and reconciliation and involving Italy, Norway, Sweden, the United Kingdom, Tanzania, the European Commission and the Presidency of the European Union Council. 45 states and seven international organisations, including the International Maritime Organization and the European Union, are working together in a Contact Group on piracy off the coast of Somalia, in order to develop and implement anti-piracy measures.

34. The European Union (EU) has progressively increased its involvement: the International Conference in support of the Somali Security Institutions, held in Brussels on 23 April 2009, represented an important contribution towards the establishment of the Somali Security forces and the civilian Somali Police Force; in July 2009, the EU Council decided to step up the EU's engagement for promoting peace and development in Somalia. To this end, it has studied possibilities for the EU to contribute to international efforts, including in the security field. On 17 November 2009, the EU Council approved a Crisis Management Concept on a possible European Security and Defense Policy (ESDP) operation to contribute to the training of the Transitional Federal Government Security Forces and requested further planning work.

35. The EU overall support to Somalia for 2009 amounted to 180 million euros, with most projects focusing on humanitarian assistance and strengthening of the rule of law, in particular police and justice. The Joint Strategy Paper for Somalia for 2008 – 2013 provides an overall allocation of 215,8 million euros, covering three main sectors of co-operation: governance, education and rural development. The issue of the security of maritime routes is also included in the European Commission's 2009-2011 indicative programme.

4. A political choice: giving priority to deterrence

36. The response to the problem of piracy has so far mainly been a military one: various navies, such as those of Turkey, France, Russia, United Kingdom, China, India and the United States – the list comprises 45 countries - have dispatched warships in a number of hotspots with the purpose of escorting the merchant vessels flying their flag or in which they have a particular interest, due to the nationality of the crew or the nature of the cargo on board.

37. In some cases, such as off the coast of Somalia/in the Gulf of Aden, states have started to co-operate and set up collective security systems, with a view to deterring, defending against and disrupting pirate attacks against ships, irrespective of their flag. In particular:

4.1. NATO²³

38. NATO has been active in this theatre since 2008, with a number of successive operations:

- the mission Allied Provider (12 October-12 December 2008) which, in addition to performing deterrence tasks, successfully escorted 8 convoys transporting 30 thousands tons of humanitarian aid of the World Food Programme towards Somalia and thwarted 6 pirate attacks;
- the operation Allied Protector (March-August 2009), which enabled 43 ships to be escorted, including 7 chartered vessels of the World Food Programme. NATO units responded to 46 emergency calls, thwarting pirate attacks or providing assistance to victims;
- the operation Ocean Shield, which is still ongoing. NATO ships patrol the Horn of Africa along the so-called Internationally Recommended Maritime Corridor, in close company support²⁴ (as opposed to escorting) of humanitarian convoys and other ships. Until mid-November 2009, NATO conducted close company support to 38 ships and disrupted 22 pirate attacks.

²³ Presentation by Ms Alexia Mikhos, Senior Policy Officer, Crisis Management Policy Section, Operations Division, NATO, Hearing on Modern Day Piracy, 17 November 2009.

²⁴ The concept of 'close company support' implies that ships are accompanied for a short stretch of sea and then handed over to the close company support of another ship, instead of being escorted by one single ship to destination.

4.2. *The European Union*²⁵

39. EU NAVFOR Somalia – Operation *Atalanta* (since December 2008) is the European Union’s first ever naval operation. Its mandate is to contribute to:

- the protection of vessels of the World Food Programme (WFP);
- the protection of vulnerable vessels sailing in the Gulf of Aden and off the Somali coast;
- employ the necessary measures, including the use of force, to deter, prevent and intervene in order to bring to an end acts of piracy and armed robbery which may be committed in the areas where they are present.

40. *Atalanta* operates in a zone comprising the South of the Red Sea, the Gulf of Aden and part of the Indian Ocean, including the Seychelles, which represents an area comparable to that of the Mediterranean.

41. Although scheduled for an initial period of twelve months, the Operation has been extended until December 2010. During this period, up to 12 EU ships will operate at any one time. At present, eight EU member states are making a permanent operational contribution to the operation: Belgium, France, Germany, Greece, Italy, Luxembourg, Netherlands and Spain.

42. Since the beginning of the Operation, 50 WFP vessels have been escorted, allowing the delivery of more than 267,000 metric tons of food into Somalia.

43. In a recent development, at their informal meeting of 24 February 2010 in Palma de Mallorca, the EU Ministers for Defence agreed that, from the end of March 2010, the scope of *Operation Atalanta* would be expanded to include the blockade of the three main Somali ports where pirates are based, in order to prevent them from launching attacks and neutralising mother ships.

4.3. *Coalitions of states*

44. The United States and a coalition of states have dispatched the operation CTF-151, a multinational task force with the aim to deter, disrupt and suppress piracy off the coast of Somalia in order to protect global maritime security and secure freedom of navigation for the benefit of all countries.

4.4. *Results*

45. Military deterrence, although not sufficient to solve the problem of piracy, has had a tangible impact on reducing it:

- while in 2006 one out of 3 pirate attacks was successful, the ratio fell to one out of six in 2009;
- since 2008, no one single attempted attack against a WFP ship has been successful;
- the capacity of commercial ships to avoid or escape pirate attacks has increased enormously, also thanks to the information, intelligence and know-how made available by military operations active in areas at risk. It is estimated that 70% of pirate attacks are defeated by commercial ships themselves.

46. However, it can be noted at the same time that, during attacks, more and more violence is involved, with pirates tending to fire indiscriminately to intimidate the crew and using more powerful weapons.

5. **The involvement of private security firms (PSCs)**

47. In an attempt to strengthen the security of commercial shipping, shipping companies have started to hire private security companies (PSCs) to ensure the protection of ships crossing dangerous hotspots. This represents a new and potential lucrative market for security firms which are scaling down operations in Iraq, as a result of Iraq’s improving security situation and of the removal of immunity from prosecution by the United States.

48. British firms dominate security work off the coast of Somalia and in the Gulf of Aden, but American companies occupy an increasing share of the market. Not all PSCs provide their staff with lethal weapons: some of them rely on tactics that can be as simple as greasing or electrifying hand rails, putting barbed wire around the freeboard or installing high-pressure fire hoses directed at vulnerable areas of the ship; sometimes they carry high-tech weapons, which stun, disorient or produce painful sounds.

²⁵ Presentation by Commander David Lintern, EU Navfor *Atalanta*, Liaison Officer to the EU, Hearing on Modern Day Piracy, 17 November 2009.

49. Insurance companies play a role in the success of maritime PSCs: pirate attacks have driven up insurance premiums ten times for ships crossing the Gulf of Aden but some insurers are prepared to reduce charges of 40% if boats hire their own security.

50. The recourse to PSCs has been severely criticised by relevant international organisations and experts, as it might lead to an armed race at sea with pirates and crews having recourse to more and more powerful weapons.

51. In addition, there are complex legal issues surrounding a civilian vessel carrying arms or armed guards, which would become even more complex if someone was injured or killed. Most flag states do not allow arms to be carried on board their merchant vessels; merchant vessels normally have the right of innocent passage through the territorial waters of a coastal state but this is based on the assumption that they are not armed and that they do not pose any threat. In addition, the law of the coastal state may well forbid the possession or use of unlicensed arms in its territorial waters.

52. As the ICC International Maritime Bureau affirms, '*on balance, there is little to be gained and much to lose from having private armed security on board a few vessels*' transiting high risk areas.²⁶

6. Apprehension and prosecution: legal and political challenges

53. In customary international law, piracy is such a serious crime that it is liable to universal jurisdiction: any country can apprehend pirates on the high seas – where no state exercises its exclusive jurisdiction – and prosecute them under its legislation.²⁷

54. This rule of international law, which arose as a response to the need to eradicate piracy in the 17th, 18th and 19th centuries, should still be applicable now. And yet, nowadays pirates hardly ever end up in court: in most cases, even when they could be apprehended, they are left free. Although the totality of scholars recognise that '*the law on piracy is 100 % clear*'²⁸, states prove to be reluctant to apply the principle of universal jurisdiction, due to practical, legal and political considerations.

6.1. Territorial waters as the main theatre for piracy attacks

55. The first, factual consideration is that the majority of pirate attacks take place in territorial waters. In this stretch of sea, which the UNCLOS Convention extended to twelve nautical miles from the coast in 1982, the principle of universal jurisdiction does not apply.

56. In its territorial waters, a state has the sole responsibility to apprehend and prosecute pirates under its legislation. This is, however, wishful thinking, since sea piracy concentrates in countries which are not able or willing to tackle the problem.

57. As mentioned earlier, however, this limitation enshrined in international law has been temporarily suspended in the case of Somalia, on the basis of UN Security Council Resolution 1851 (2008) affording states the right of hot pursuit on Somali territory and following a specific request from the Somali authorities.

6.2. Difficulty in identifying pirates before they attack

58. Even in international waters, states are very cautious as regards apprehension because it is not so easy to identify pirates before they attack: when pirates see a naval frigate coming, they throw their weapons, boarding ladder, and even satellite telephones into the sea. Once ashore, they can easily re-equip themselves and set out to sea again. The ransoms, often several million dollars, are enough to comfortably pay for new equipment.

59. The difficulty of this identification is well exemplified by the case of an Indian military ship which, in November 2008, thinking of sinking a pirate vessel in the Gulf of Aden, sank instead a Thai fishing trawler that had been captured by pirates, killing 15 of its innocent crew.²⁹

²⁶ ICC-IMB Piracy and Armed Robbery Against Ships Report, Annual Report 2008, page 40.

²⁷ Mitsue Inazumi, Universal Jurisdiction in Modern International Law: Expansion of National Jurisdiction for Prosecuting Serious Crimes under International Law.

²⁸ Kenneth Randall, Dean of the University of Alabama School of Law, quoted by Alex Calvo in *Somali Piracy, International Customary Law and the Dispatch of Japan's MSDF*.

²⁹ Fox News: Official: Destroyed Pirate 'Mother' Ship Actually Thai Boat, 26 November 2008.

6.3. *The rights of apprehended suspected pirates*

60. Furthermore, the law has evolved since the time of the buccaneers: while centuries ago captured pirates were normally executed on the spot and without a trial, nowadays a legitimate issue arises of what rights should be granted to the suspected pirates while they are kept in custody and on what legal basis they should be held. Amongst the issues to be clarified are whether they should have access to legal assistance, to an interpreter, to the asylum procedure. In addition, when it comes to multilateral military operations such as those under NATO and EU command, there are often no guidelines on the detention of civilians on board, including the arrest of potential criminals.

6.4. *Absence or obsolete character of domestic law criminalising piracy*

61. Domestic law is often silent about these problems, precisely because piracy was considered as something belonging to history and hardly any country has modern criminal legislation on piracy or sea-robbery.

62. The *Comité Maritime International (CMI)*, a non-governmental international organisation with the objective of contributing to the unification of maritime law, tried to respond to this challenge by producing, in 2001, guidelines for legislation to be used by states as a basis to adapt their domestic law. This work was later revised in co-operation with the International Maritime Organization (IMO) and resulted, in 2007, in a proposal called *Maritime Criminal Acts, Draft Guidelines for National Legislation*. These guidelines cover all forms of maritime violence, with a view to ensuring their prosecution and punishment by one or more states.

6.5. *Difficulty in identifying the relevant jurisdiction*

63. Individual cases can be extremely complex: for instance: *'A vessel flying a Panamanian flag is carrying a shipment from Japan. The cargo is insured in Germany, the crew comes from the Philippines and the Netherlands. The vessel has been boarded on the high seas by Indonesian pirates. Which law applies?'*³⁰

64. This kind of complexities and the ambiguities of the law often make it possible for pirates to escape prosecution.

6.6. *Unwillingness to undertake prosecution*

65. It can certainly be argued that a number of states do not wish to see hundreds of pirates serving prison sentences in their prisons and standing trials in their courts.

66. The alternative of apprehending suspected pirates and then extraditing them to their countries of nationality, on the other hand, which would be possible under international law, is not viable: first of all, extradition should be requested by the country of nationality of the pirate and secondly, such countries of origin often have a poor human rights record and sometimes even enforce capital punishment (extradition would therefore raise a number of questions under the European Convention on Human Rights and other human rights instruments).

67. As regards countries such as Somalia, concerned to keep asylum requests to a minimum, some states might be reluctant to take pirates home to submit them to a trial, fearing that they would apply for asylum, or would argue that their return is impossible due to the situation in the country.

6.7. *Prosecution by a directly-affected state*

68. Having said that, a few countries have recently shown great resolve in prosecuting pirates.

69. To give some examples, on several occasions, France apprehended Somali pirates and took them to France, where they are now awaiting trial. For instance:

- in April 2008, French commando forces captured six pirates in Somali territory (following the authorisation for hot pursuit provided by the latest UN Security Council resolution on piracy), who had been responsible for the capture of the luxury yacht *Le Ponant* off the coast of Somalia;
- in September 2008, an elite frogman commando unit stormed the *Amel Super Maramu* sailboat, freed the hostages – Mr and Mrs Delanne – and captured six pirates;

³⁰ Munich Re, Piracy – Threat at sea, page 24.

- in May 2009, the commando squad Hubert stormed the yacht *Tanit*, taken hostage by Somali pirates. The skipper was killed during the operation. Six pirates were captured.

70. In April 2009, the trial of a Somali pirate involved in the hijacking of the *Maersk Alabama* started in New York. He is accused of *'the crime of piracy as defined by the law of nations'*, which was included in the US criminal code in 1819. The last time that someone was found guilty of piracy under this article, he was sentenced to death by hanging.

71. In May 2009, 5 Somali pirates stood trial in the Netherlands for having tried to hijack the ship *Samanyolu*, flying a Dutch flag. Following the failure of their attempt, they had been rescued at sea by a Danish ship, and extradited from Denmark to the Netherlands.

72. This trial caused a great deal of controversy: first of all, because according to some press reports the pirates did not show any fear of the punishment; on the contrary they declared their wish to remain in a Dutch prison, where they would be safer and better treated than in Somalia.³¹ Secondly, it was the first time that the criminal code provision on piracy was ever applied and thirdly because the arbitrariness of justice against piracy was made apparent by the fact that, while these five were standing trial, another nine had been set free one month before by a Dutch ship, despite having been caught while trying to attack a Yemenite ship.

73. In November 2009, for the first time a Spanish prosecutor issued an indictment against two Somali pirate suspects, captured in the framework of the seizure of the trawler *Alakrana* and 33 members of its crew. The charges were illegal detention, criminal association and armed robbery. Earlier that year, a Spanish court surrendered a group of Somali pirates to Kenya, after trying to bring them to Spain.

6.8. Prosecution by a third state

74. Despite these examples, at least with regard to Somalia, the main avenue chosen to ensure the prosecution of acts of piracy seems to be the conclusion of bilateral agreements with third states, which agree to exercise their jurisdiction. Such agreements have been concluded by the European Union with Kenya (March 2009)³² and the Seychelles (November 2009)³³, in order to ensure the transfer, detention and prosecution of pirates apprehended on the high seas by EUNAVFOR, and between Kenya and, respectively, the United Kingdom, the Netherlands and the United States.

75. At the informal meeting of EU Defence Ministers in Palma de Mallorca (24-25 February 2010), it was agreed to improve the application of the agreements that exist with Kenya and the Seychelles and to conclude similar agreements with other countries in the region, such as Tanzania, Mauritius and South Africa.

76. When the agreement with Kenya was concluded, some commentators hinted that it should be seen as deterrent measures, given the poor human rights record of Kenya, the inefficiency and lack of independence of its judiciary, its penitentiary conditions and the reported cases of torture and ill-treatment in detention.³⁴

77. As of November 2009, 74 suspected pirates had been handed over to Kenya under the agreement with the EU.³⁵ Trials are under way.

78. The political decision, taken not only by some European states but also by the European Union, to deliver people who are in their custody to a country where the functioning of justice and the protection of human rights are questionable, raises fundamental political issues, and possibly also legal ones under the European Convention on Human Rights.

7. The ransom

79. Although the conclusion of piracy cases is surrounded by a lack of transparency, it seems that in most cases ransoms are paid to secure the liberation of the ship and its crew. On average, in Somalia, they range

³¹ Pays-Bas : des pirates somaliens à la barre, in *Libération*, 29 May 2009.

³² <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2009:079:0049:0059:EN:PDF>.

³³ <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2009:315:0037:0043:EN:PDF>.

³⁴ Daniele Archibugi and Marina Chiarugi, Piracy challenges global governance, in *Open democracy*, 9 April 2009, page 6. For the human rights situation in Kenya, see the latest human rights report of the US State Department, at <http://www.state.gov/g/drl/rls/hrrpt/2007/100487.htm>

³⁵ Presentation by Commander David Lintern, EU Navfor Atalanta, Liaison Officer to the EU, Hearing on Modern Day Piracy, 17 November 2009.

from 1 to 3 million US dollars. As a matter of fact, a new economy flourishes all over the world, with security companies, lawyers and specialised negotiators gaining profits for their involvement in solving piracy cases. London seems to have become the hub for firms that help ship owners deal with the legal aspects of paying the ransom and engage private security contractors to negotiate with pirates and carry out the ransom drop.

80. Furthermore, there is no clarity on what happens to the money which is delivered as ransom payments: as all transactions are in cash it is nearly impossible to follow a trail. It seems, however, that pirates make tens of thousands of dollars rather than millions because piracy has developed into a mini-economy, employing hundreds of people, all of whom take a share of the ransom. Maritime intelligence experts say that they have no real proof of money laundering and that the way in which the money is shared is unlikely to attract large criminal networks.

81. Some analysts report that pirates give as much as 50% of their revenues to the Islamist *al-Shabab* militias in the areas under its control. This is not, however, supported by evidence and *al-Shabab* has always taken a position against piracy. There have been consistent reports that officials from the breakaway region of Puntland – which is the heartland of Somali piracy - get a share. It seems that members of the Harardhere pirate group are linked to the trafficking of arms from Yemen to the Somali towns of Harardhere and Hobyo, which have long been two of the main points of entry for arms shipment destined for armed groups in Somalia and Ethiopia.

82. Some European governments have explicit policies and/or legislation prohibiting the payment of ransoms. Other countries, instead, such as the United Kingdom, do not have specific rules on the matter but the authorities advise against paying. As expressed by the German Chancellor Angela Merkel after a ransom of 2,7 million euros was paid for the liberation of the cargo ship *Hansa Stanger* and its crew, the main argument against giving in to ransom requests is that this encourages further acts of piracy.

83. The issue of whether to give in or not to ransom requests becomes particularly controversial in the case of private yachts. For instance, in the case of *Le Ponant*, the capture of the pirates happened only after a ransom of supposedly 2 million US dollars had been paid and the crew freed. The six pirates who are now standing trial in France were found in the possession of only 200,000 dollars, which indicates that some pirates managed to get away with the rest of the money.

8. Concluding remarks and recommendations

84. The response of European and other democracies to piracy, so far, has mainly been military and focusing on deterrence. The military response has been successful, to some extent, and has reduced the ratio of successful pirate attacks. It cannot, however, provide a long-term solution to the problem as the **root causes** of piracy are ashore. A comprehensive approach is needed to address poverty, instability and lack of governance in countries where the phenomenon is endemic, such as Somalia.

85. In addition, effective prosecution should be considered as an integral part of any credible deterrence effort. States which want to tackle the phenomenon of piracy, therefore, should:

- modernise the relevant domestic legal framework or introduce it where it does not exist;
- introduce clear rules to identify the state responsible for prosecution, for instance through the conclusion of an international agreement;
- ensure that the fight against piracy is conducted in full respect of human rights and the rule of law.

86. The statement adopted by the G8 summit in L'Aquila, calling for a strengthened criminal justice system to prosecute pirate suspects, is a positive development and a sign that European countries realise the urgency of the problem.

87. The role that the Council of Europe, as a European-wide standard-setting organisation, could play in achieving these objectives is worth further reflection. For instance, the Council of Europe could:

- propose guidelines for domestic legislation to be used by member states, along the lines recommended by the Comité Maritime International (CMI);
- in the context of its activities in the field of international criminal law, draft a framework convention on the prevention and suppression of piracy and robbery at sea, including clear rules on how to identify the state responsible for prosecution;
- conduct an in-depth study on member states' recent practice in dealing with suspected pirates and elaborate guidelines on how to ensure that future cases are dealt in a manner which is consistent with member states' obligations under the European Convention on Human Rights and other Council

of Europe instruments, including at the stage of the apprehension and of the transfer to the authorities of the country which will be in charge of prosecution.

88. It is apparent, however, that no legal response will be possible unless supported by a firm political will to address the phenomenon of piracy. To this end, the members of the Parliamentary Assembly should make full use of their dual mandate and, in the light of the findings of the present report, to exercise attentive scrutiny on their governments on the way in which piracy cases are handled, in particular as regards:

- bilateral agreements reached with third countries for the prosecution of pirates, in order to avoid the risk that people who are kept under the custody of European authorities are handed over to countries which cannot ensure a fair trial, the protection of human rights standards or contrary to other international obligations;
- the policy or practice of allowing pirates to go free and its consequence on the credibility and effectiveness of counter-piracy measures;
- the issue of the payment of the ransom, by the state or by private actors;
- the need to regulate (or explicitly forbid) the recourse to private security companies on board commercial ships.

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Reporting Committee: Political Affairs Committee.

Reference to Committee: Doc. 11803 and Doc. 11837, Reference 3531 of 29 May 2009

Draft resolution unanimously adopted by the Committee on 18 March 2010

Members of the Committee : Mr Björn **von Sydow** (Chairman), Mr Dariusz **Lipiński** (Vice-Chairman), Mr Konstantin Kosachev (Vice-Chairman) (alternate: Mr Alexander **Pochinok**), Mr Michael Aastrup Jensen (Vice-Chairman), Mr François Agius, Mr Alexander Babakov (alternate: Mr Sergey **Markov**), Mr Viorel Badea, Mr Denis **Badré**, Mrs Theodora Bakoyannis (alternate: Mr Miltiadis **Varvitsiotis**), Mr Andris Bērziņš, Mr Erol Cebeci, Mr Lorenzo Cesa, Mr Titus **Corlătean**, Ms Anna **Čurdová**, Mr Hendrick **Daems**, Mr Pol van den Driessche, Ms Josette Durrieu, Mr Frank Fahey (alternate: Mr Patrick **Breen**), Mr Piero Fassino (alternate: Mr Andrea **Rigoni**), Mr Hans Franken, Mr György **Frunda**, Mr Jean-Charles Gardetto, Mr Marco Gatti, Mr Michaël Glos, Mr Andreas **Gross**, Mr Michael **Hancock**, Mr Davit **Harutyunyan**, Mr Norbert **Hauptert**, Mr Joachim Hörster, Mrs Sinikka **Hurskainen**, Mr Tadeusz **Iwiński**, Mr Bakir Izetbegović, Mr Miloš **Jevtić**, Mrs Birgen **Keleş**, Mr Victor Kolesnikov, Mr Jean-Pierre Kucheida, Ms Darja Lavtižar-Bebler, Mr Göran **Lindblad**, Mr Marian Lupu, Mr Gennaro Malgieri, Mr Dick Marty, Mr Frano Matušić, Mr Silver Meikar (alternate: Mr Andres **Herkel**), Mr Dragoljub Mićunović, Mr Jean-Claude **Mignon**, Mr Aydin Mirzazada, Mr Juan Moscoso del Prado Hernández, Ms Lilja Mósésdóttir, Mr João Bosco Mota Amaral, Mrs Olga Nachtmannová, Mr Gebhard Negele, Mrs Miroslava **Nemcova**, Mr Zsolt Németh, Mr Fritz Neugebauer (alternate: Mr Franz Eduard **Kühnel**), Mr Aleksandar Nikoloski, Mr Maciej **Orzechowski**, Mr Johannes Pflug, Mr Ivan Popescu, Mr Christos Pourgourides, Mr John Prescott (alternate: Mr John **Austin**), Mr Gabino **Puche**, Mr Lluís Maria **de Puig**, Mr Amadeu Rossell Tarradellas, Mr Ilir Rusmali, Mr Predrag Sekulić, Mr Samad Seyidov, Mr Leonid **Slutsky**, Mr Petro Symonenko, Mr Zoltán Szabó (alternate: Mr Mátyás **Eörsi**), Mr Mehmet **Tekelioğlu**, Mr Han Ten Broeke, Mr Zhivko Todorov, Lord **Tomlinson**, Mr Latchezar Toshev, Mr Petré **Tsiskarishvili**, Mr Mihai Tudose, Mr Ilyas Umakhanov, Mr José **Vera Jardim**, Mr Luigi Vitali, Mr Konstantinos **Vrettos**, Mrs Katrin Werner, Mrs Karin S. **Woldseth**, Mr David **Wilshire**, Ms Gisela Wurm, Mr Emanuelis Zingueris.

Ex-officio: Mrs Anne **Brasseur**, Mr Tiny Kox, Mr Luca **Volonté**

N.B. : The names of the members who took part in the meeting are printed in **bold**

Secretariat of the committee: Mrs Chatzivassiliou, Mr Ary, Mr Chevtchenko, Mrs Sirtori-Milner