PIRACY OVERBOARD?

Combating piracy in the light of articles 5 and 6 ECHR

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Merchant and pirate were for a long period one and the same person. Even today mercantile morality is really nothing but a refinement of piratical morality.
Friedrich Nietzsche

1. Introduction

Historically piracy can be seen as one of the world's oldest professions. Stories on piracy go back to the Greek and Roman ages, when piracy was actually a respectable way to make a living. Even our "spotless" Dutch trading history owes its success partly to overtaking other ships at sea. Our great national heroes were quite adept at stealing treasures belonging to others. Dutch ships raided about 500 Spanish and Portuguese ships between 1623 and 1638[1]. In those days this was something a nation could be proud of.

The first image that comes to mind, when thinking of piracy is that of a flag with a skull and of men with parrots on their shoulders drinking bottles of rum. This highly romanticized view is tragically not in the least comparable to the current situation. Current piracy isn't considered honourable at all. In European waters piracy declined after the 17th century. In other parts of the world piracy never disappeared and in certain parts piracy only started to develop in the last decades.

Currently piracy is considered an important threat for international peace and security. It is mostly concentrated in the following areas of the world: Southeast Asia (Strait of Malacca), West Africa (Nigeria) and the Horn of Africa (Somalia). The reasons for the existence and development of piracy are related to historical, social and geographical facts in all of these areas. Though these reasons are very different for each area, a common denominator is unsurprisingly money, more specifically the lack of it.

When we look a bit closer into the Somali situation, the increase in pirate attacks off the Horn of Africa is directly linked to continuing insecurity and the absence of the rule of law in war-torn Somalia. In the early 1990s, members of the Somali political and military elite are said to have made deals with foreign companies, allowing them to dump toxic waste off Somalia's coast.[2] These foreign companies soon also learned that Somali waters are rich fishing grounds, and they payed Somali militias to forcefully take over local fishing. Somali fishers were furious as their waters and income were devastated. The absence of a functioning central government provided freedom of action for pirates. The lack of law enforcement capacity creates a haven where pirates hold hostages during ransom negotiations that can last for months. The obvious motive of most pirate groups,

1 http://pirateshipwrecks.com/history_of_piracy, May 1, 2011.
2 Globalisation's Deadly Side, Alisha Foster, April 11, 2011, http://www.diplomacist.org.

however, is profit, and piracy has proven to be well-paid. Somalia's "pirate economy" has grown substantially in the past two years, with ransoms now averaging more than $5 million.[3] In the rest of this paper we will focus on the Somali situation because this is where the problem is most visible at this moment. International trade is at stake and it is off the Somali coast that European naval forces have arrested suspects of piracy in the last few years.

The modern Pirate

Modern pirates are highly sophisticated. They use small boats and take advantage of the small number of crew members on modern cargo vessels. They also use large vessels to supply the smaller attack/boarding vessels, so called motherships. They use heavy firearms and new technologies for communication and navigation. Modern pirates can be successful because a large amount of international commerce occurs via shipping. Major shipping routes take cargo ships through narrow bodies of water (such as the Gulf of Aden) making them vulnerable to be overtaken and boarded by small motorboats.[4] It is said that the new pirates can be linked to organised crime in the sense that is part of a criminal network that is not only based at sea.

Current numbers on piracy attacks show the severity of the problem. In 2011 so far there have been 173 attacks and 23 hijackings worldwide. If we look closer at incidents in Somalia (Gulf of Aden) there have been 117 incidents, of which 20 hijackings, 338 people held hostage and 7 killed. At this moment there are in total 26 vessels held hostage by Somali pirates and on these vessels there are 518 people held hostage.[5] Also one should not forget the economic losses due to piracy. Though difficult to establish, estimates range from $ 1 to 16 billion per year. Direct economic damage is caused by high costs to insure risky sea transport, the costs for protection onboard, the payment of ransom for hijacked ships and crew end the extra costs for taking a longer route to avoid risk areas.[6] It is said that approximately 0,01 to 0,02 percent of ships worldwide deal with piracy and armed robbery. However, there are estimates that half of all cases of piracy are not being reported, which complicates the determination of the economic damage caused by piracy. The problem has been taken on by the world's governments. They have declared a new War on Pirates. Navy ships of more than two dozen nations, European countries, US and Chinese, are now sailing in Somali waters.

Combating piracy has raised many questions in the last decade, especially questions concerning the prosecution of pirates. Does national and international law allow us to prosecute and more importantly how will we be able to deal with human rights issues? Recent cases illustrate

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3 CRS Report - Piracy off the Horn of Africa, April 27, 2011.
4 http://en.wikipedia.org/wiki/Piracy_in_Somalia and http://en.wikipedia.org/wiki/Piracy, May 1, 2011.
5 ICC Commercial Crime Services (www.icc-ccs.org) (updated 28 April 2011), May 1, 2011.
6 Rapport: Piraterijbestrijding op zee, AIV 2010.

these problems. For instance the first European trial of alleged Somali pirates opened in the Netherlands in May 2010. They were arrested in the Gulf of Aden in January 2009 when their high-speed boat was intercepted by a Danish frigate while allegedly preparing to board the cargo ship Samanyolu, which was registered in the Dutch Antilles.[7]The pirates were sentenced to five years in prison, which was less than the maximum possible sentence. It is unlikely the men will be returned to Somalia after their sentence, as Somalia is considered too dangerous for deportation. One of the five has already applied for asylum in the Netherlands.

States participationg in counter-piracy operations have to take into account a broad legal framework of national and international law. For the state parties to the European Convention on Human Rights (the Convention), it is necessary to know if and under which circumstances the Convention applies and how they can guarantee the safeguards laid down in the Convention. The Articles 5 and 6 of the Convention entail a particular challenge, given the unusual context of arrest and detention at sea as well as prosecution taking place in states far away from the actual crime scene. Chapter 2 will give a brief overview of the legal framework and the applicability of the Convention in counter-piracy operations. Chapter 3 will address specific problems concerning Articles 5 and 6 of the Convention as well as possible solutions. In Chapter 4, we will give our view on the results of the counter-piracy efforts by the international community so far.

2. Legal framework

History

In the 17th century, the scholar Hugo Grotius laid the foundations of the present-day law of the sea and wrote extensively on piracy and its legal pendant privateering in *De Iure Praedae,* the law of prize and booty.[8] It was Grotius who first developed the concept of the free transit through the high seas in *De mare liberum,* arguing that the high seas do not belong to any state and are joint property of humankind (*res communis*). The pirate formed a danger for the freedom of the seas and an enemy of all mankind (*hostis humani generis*). However, in Grotius' view, in certain circumstances it was justifiable to hijack ships and to commit robbery at sea, for example as a means against aggressive powers impeding free trade. The legitimate form of piracy was called 'privateering'. According to Grotius' principles of natural law, every man has a fundamental right to acquire the facilities necessary for the preservation of his life. It is uncertain what Grotius would have thought of the

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7 "Trial of alleged Somali pirates opens in Netherlands". BBC. 2010-06-25, http://news.bbc.co.uk/2/hi/world/africa/10151792.stm.

8 M. Kempe, 'Beyond the Law. The Image of Piracy in the Legal Writings of Hugo Grotius', in H. Blom (ed.), Property and punishment: Hugo Grotius on war and booty in "De iure praedae" : concepts and contexts, 2009, pp. 379-395.

present day pirates, who on the one hand, live under miserable conditions, but who, on the other hand, impede free trade and transit of the high seas. Piracy by non-state actors has always been subject to repression. At the end of the 17th century, the Caribbean pirates, then called 'buccaneers' were repressed by the French, Spanish and English navies.[9] In the beginning of the 19th century, piracy off the North African Coast, the so-called Barbary Coast, led to the Barbary Coast Wars between the USA and the North African States in the Mediterranean.[10]

The United Nations Convention of the Law of the Seas

Many decades after the entry into force of the Geneva High Seas Convention of 1958 and its follow up, the United Nations Convention of the Law Of the Seas (UNCLOS, 1982) and after the adoption of the major human rights treaties, the emphasis shifted to more lawful ways to tackle maritime piracy. In order to enable legal action against suspects of piracy, the international community had to provide for a legal basis to capture piracy suspects on the high seas - a vast territory not falling under jurisdiction of any state – and to take legal action against them. The concept of universal jurisdiction for acts of piracy was codified in the Geneva High Seas Convention and in UNCLOS. It provides a legal basis for any state to take legal action against acts of piracy falling within the definition of Article 101.[11]

> *Piracy consists of any of the following acts:*
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> *(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:*
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> *(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).*

The notion 'for private ends' discards activities with a political aim, but this it remains arguable what the exact scope of this notion is. In order to provide a legal basis for crime at sea not falling within the notion of mere 'private ends', the Convention for the Suppression of Unlawful Acts (SUA) against the Safety of Maritime Navigation was signed in 1998. The scope of the SUA convention is limited to the prosecution or extradition of offenders on sea who commit crimes that could lead to physical injury of material damage.[12]

The notion 'on the high seas' in Article 101 UNCLOS, excludes all acts committed in

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[9] R. Van Gelder, Vervloekte broeders van de kust, NRC Handelsblad, 31 July 2009.

[10] International Expert Group on Piracy in Somalia, Piracy off the Somali Coast, p.13, available at: http://www.imcsnet.org/imcs/docs/somalia_piracy_intl_experts_report_consolidated.pdf.

[11] Article 105 UNCLOS stipulates that "every State may seize a pirate ship [...] and arrest the persons and seize the property on board. The courts of the State which carried out the seizure may decide upon the penalties to be imposed."

[12] M.Murphy (2009), p.192.

territorial waters or inland waterways from the scope of the Article, in order not to infringe upon the sovereignty of the coastal states.[13] However, to tackle this problem in a somewhat artificial way, the notion of "armed robbery at sea" was invented by the International Maritime Organization, to cover acts of piracy in territorial waters.[14] In the case of piracy off Somalia, the UN Security Council consecutively adopted several resolutions in order to provide for a legal basis for Somali territorial waters, in addition to the jurisdiction endowed by UNCLOS for the high seas. At this moment, Security Council Resolution 1950 enables states and international organizations to operate in Somali territorial waters, on Somali land territory and in Somali airspace in the fight against piracy or armed robbery at sea. The Resolution also provides for a so called right of 'reversed hot pursuit': pursuits commenced in the high seas can be carried on in Somali territorial waters provided that the Somali transitional government has given its consent.[15]

Even though states have authority to take action against pirates, UNCLOS is no legal basis for a 'war on piracy': pirates are not combatants, but 'ordinary' robbers at sea.[16] For the same reasons, the law of armed conflict does not apply to combating piracy: there is no conflict between states and armed groups. However, this distinction is not as sharp as it may seem, for this form of law enforcement can only be carried out by a robust military force.[17]

UNCLOS prevents lawlessness on the high seas and forms a bridge between international law and the domestic jurisdictions belonging to the different actors on sea. UNCLOS does not constitute a supranational system of criminal law: it creates a legal basis for states to take action under their own domestic legislation.[18]

The applicability of the European Convention of Human Rights (the Convention) on the high seas

Because most states participating in the naval missions off the Somali coast are contracting carties to the Convention, the question whether the Convention applies to the actions against piracy on high seas is important. This paper focusseson the applicability of the Convention concerning arrest and detention at sea and the right of a fair trial (Articles 5 and 6).

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13 Article 3 UNCLOS: "Every State has the right to establish the breadth of its territorial sea up to a limit not exceeding 12 nautical miles, measured from baselines determined in accordance with this Convention". However, in some cases there is disagreement about the demarcation of territorial waters (e.g. in the Chinese Sea or off the Iranian coast).

14 Ibid.

15 Normally speaking, foreign military vessels are forced to stop pursuing upon the entry of territorial waters of a State. Conversely, hot pursuit from the territorial waters into the high seas is provided for in Article 111 UNCLOS.

16 F. Naert (2004), p.4.

17 Ibid.

18 G.J. Knoops, 'The War on Piracy: rechtspolitieke dilemma's en oplossingen', NJB 2009, 965, p.2.

Jurisdiction under Article 1 of the Convention

Article 1 of the Convention stipulates that: "*The High Contracting Parties shall secure to everyone* ***within their jurisdiction*** *the rights and freedoms defined in Section I of this Convention*". Jurisdiction on the high seas under international law can be derived from the principles of universality, personality, nationality or flag of a vessel. However jurisdiction in the context of Article 1 of the Convention does not necessarily coincide with jurisdiction on the basis of international law. For the Convention to apply outside the national borders of a Contracting Party, the European Court of Human Rights (the Court) ruled in a nutshell[19] that there has to be either an effective overall control by a Contracting Party over a region outside its borders[20], or direct control over a third person by state agents acting outside the borders of their sending state.[21]

What does the Court say in its case-law on applicability of the Convention on the high seas? The Chamber of the Court accepted French jurisdiction on the high seas in the case *Medvedyev v. France.* The French navy had arrested and detained a crew suspected of drug smuggling at sea, a crime for which universal jurisdiction does not apply, unlike the crime of piracy. However, the French government got permission in writing from the flag state of the ship, Cambodia. The first question the Court had to answer was whether the coercive action by the French marines on a ship sailing under the Cambodian flag fell within France's jurisdiction under the Convention. The Court ruled *"that other recognized instances of the extraterritorial exercise of jurisdiction by a state include cases involving the activities of its* ***diplomatic or consular agents*** *abroad and on board aircraft and ships registered in,* ***or flying the flag of, that state****".*[22] On the jurisdiction in this particular case, the Court considered *"that, as this was a case of France having exercised full and exclusive control over the Winner and its crew, at least de facto, from the time of its interception, in a continuous and uninterrupted manner until they were tried in France, the applicants were effectively within France's jurisdiction for the purposes of Article 1 of the Convention."*[23] There seems to be a flaw in the Courts logic; in spite of what the Court states in paragraph 65, it establishes jurisdiction for a law-enforcement action on a ship sailing under the French flag and not being controlled by consular or diplomatic staff. Even though the ruling lacks some clarity on this point, it seems clear that the applicants were under French jurisdiction due to the effective control over the applicants by state agents, like in the *Öcalan* case. Hence, we may assume that the arrest,

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[19] It is evident that the extraterritorial applicability of the ECHR is a complex matter and the EctHR's case law on this point is rich and diverse. However, a detailed analysis would go beyond the scope of this paper.

[20] An example of effective overall control is the Turkish control over Northern Cyprus, see for instance: ECtHR, 18 December 1996, *Loizidou v. Turkey* (application no. 15318/89).

[21] ECtHR, 12 May 2005, *Öcalan v. Turkey* (application no. 46221/99), see also: ECtHR, 12 October 1989, *Stocké v. Germany* (Application no. 11755/85).

[22] ECtHR, 29 March 2010, *Medvedyev v. France* (application no. 3394/03), para 65.

[23] Ibid., para 67.

detention and possible pursuant legal actions of piracy suspects by Contracting Parties at sea, none withstanding the flag of vessels involved or the nature of the state agents, fall under the jurisdiction for the purpose of Article 1 of the Convention.

However, we have one additional remark on the question of jurisdiction. In *Medvedyev*, the effective control of the state agents is direct and close. In the *Bankovic* case, however, the Court decided that the victims of the air strikes by participating states of the NATO operation *Allied Force* in the Federal Republic of Yugoslavia in 1999, did not fall under the jurisdiction of Article 1 of the Convention.[24] Is the dropping of bombs no form of 'effective control' by state agents? *Banković* concerned NATO led airstrikes, literally implying a larger distance between the victims and the state agents. But where does effective authority or control by a State end? If a skiff with piracy suspects is shot from a distance, does the *Medvedyev* ruling apply or is it the line of arguments the Court gave in Bankovic. It seems to be a case by case decision of the Court. The Court however does not mention jurisdiction as an obstacle to admissibility in the *Pad* case, which was about an airstrike as well.[25] Moreover, the Court ruled in the *Andreou* case that, even though the applicant who was shot by a Turkish official outside of the border of northern Cyprus, the fact that she was shot at a close range implied a sufficient amount of effective control to bring the case within Turkey's jurisdiction.[26] Even though the debate on extraterritorial application still is vivid, it is important in the light of this paper on Articles 5 and 6 of the Convention, to draw the conclusion from the *Medvedyev* case that, in principle, the Convention applies on the situations of arrest and detention at sea.

3. Problems concerning articles 5 and 6 of the Convention

In this chapter we will lay out the problems that arise in treating piracy regarding articles 5 and 6 of the Convention. We elaborate on lex certa and legality principle (chapter 3.1), arrest and detention (chapter 3.2), fail trial (chapter 3.3) and possible solutions to these problems (chapter 3.4).
To illustrate these issues we will follow a random Somali pirate and the road he follows when colliding with international law.

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[24] ECtHR, 19 December 2001, Banković and Others v. Belgium and 16 Other Contracting States (dec.) (application no. 52207/99).

[25] ECtHR, 28 June 2007, Pad and others v. Turkey (dec.) (application no. 60167/00). However, it must be noted that Turkey did not dispute its jurisdiction, as it pleaded that the air strikes had taken place on Turkish soil, which was contested by the applicants.

[26] ECtHR, 27 October 2009, Andreou v. Turkey, (application no. 45653/99), para 25.

First an introduction to our Pirate.
Our Pirate named A. is a Somali young man. Growing up in a community where people were hungry, had little or no educational opportunities, seeing his parents and family die from disease and civil disorder, he has learned at a young age that one can only survive in being strong and smart. A. was recruited by a pirate syndicate as a teenager. In a small boat, a so called skiff, he cruises the Gulf of Aden in search for a large tanker to board. When a large Belgian tanker passes through the Gulf, the pirates armed with machine guns follow and board the large ship. During the violent attack one of the pirates uses his weapon and the tankers captain gets severely injured. A distress call reaches a Dutch navy vessel, frigate the Zeven Provincien, patrolling the Gulf. Officers know that this can only mean another pirate attack and they steer the ship towards the Belgian tankers location. The navy ship shadows the Belgian tanker for several days and one early morning navy officers board the tanker provided in covering fire. During the successful operation ten pirates are captured, including A. He is transferred to the Dutch navy vessel.

3.1 The legality principle

Pirate A. was arrested by a Dutch navy vessel. We've seen in the legal framework that universal jurisdiction must be provided for in national law. In Dutch law this is the case. But seen from the perspective of A., what can he expect from the international intervention? On what legal basis did the Dutch vessel intervene?

One of the most fundamental principles of criminal law is the legality principle. The legality principle is equally relevant for procedural as for material criminal law. The principle is enshrined in a separate article 7 of the Convention for material criminal law, but the Court has recognised its validity also for procedural criminal law in its case law.[27]
More specifically, the legality principle, laid down in Article 5(1), requires that any detention is based on a *procedure prescribed by law*. Also, Article 5(1)(c) restricts the lawful arrest or detention to the purpose of adjudication to the case in which it can be said that there is a *reasonable suspicion of having committed an offence*. The Court ruled in *Medvedyev* that the arrest on the high seas will require that the arresting state actually has jurisdiction over the suspected crime, according to its own law.[28]

Consistently the Court has held that the words 'in accordance with the law' brings about a four-fold legality test. Briefly summarized, there should be (a) a *basis in domestic law,* this law should be (b) *accessible* and (c) *foreseeable* as to its content, and the law should (d) objectively be in *conformity* with the Convention.

[27] ECrtHR, Kruslin vs France, 24 april 1990, A176-A: violation of Article 6: wire-tapping should be regulated by a precise procedure in law, or more recently: ECrtHR, Uzun vs Germany, 2 september 2010 (nr. 35623/05): no violation of Article 6: more lenient conditions apply to surveillance of individuals.
[28] ECrtHR, Medvedyev and others vs France, 10 july 2008 (nr. 3394/03): violation of Article 5.

(a) Basis in domestic law

First, let us look at the material criminal provisions, necessary to construct the *reasonable suspicion* to conduct a lawful arrest. All nations participating in the current anti-piracy operations have criminalized acts of piracy in one way or another. Two concrete problems may arise though.
First of all, not all European nations have adopted universal jurisdiction for piracy. In many legislations, there is a caveat in a way that jurisdiction can only be exercised if national interests are at stake.[29] Those countries would not be able to conduct a lawful arrest of a pirate, if that very pirate cannot be prosecuted back home.[30] This was exactly what went wrong in the French case *Medvedyev* before the Court. The French authorities had no original jurisdiction over trafficking of drugs on the high seas. The Court rejected the French position that the right to arrest could be derived from diplomatic letters between France and Cambodia.

One could argue that even when original jurisdiction lacks, the arrest for the purpose of extradition would still be permitted under Article 5 (1)(f) of the Convention. But also this path seems to offer no avail: it requires 'action [yet] being taken with a view to extradition'. It cannot be reasonably held that at the moment a patrolling military vessel spots a random *skiff*, there is already a nation actively seeking the extradition of a yet unknown pirate for future acts of piracy yet to take place.

Secondly, when it comes to clear, completed acts of piracy, in all European nations this will constitute a crime. However, imagine that a European marine vessel detects a heavily armed *skiff* simply sailing near a possible target ship, without having committed any violence or aggression. Most European nations will not be able to construct a *reasonable suspicion* as required for lawful arrest – due to the fact that in most national legislations only the act of attacking a ship will constitute an offence. A brief review of European legislations reveals that for instance, under Italian and Danish law, this would *not* constitute a criminal act for which they might prosecute – and therefore could not interdict the *skiff* for the arrest of the crew. In the Dutch situation, this will not be a problem, since the Dutch Criminal Code also criminalizes the 'sailing with the intention to commit piracy' in Article 381(1).

> So one could say that in the case of A. there was a basis in domestic Dutch law. But the next question that had to be dealt with is: how could A. know about these Dutch laws?

29 http://politiken.dk/newsinenglish/article572053.ece.

30 ECrtHR, Brogan and other vs UK, 15 july 1987, A 145-B, para 52 and 53.

(b) Accessibility

If we pass the test as to the *basis in domestic law* for the *reasonable suspicion*, another part of the legality test of the Court raises an interesting question: the *accessibility* test.

The question arises to what extent one can reasonably say that for a pirate on the Gulf of Aden, over which a numerous European (and other) nations exercise jurisdiction, the applied material and procedural legislation meet the standard of accessibility. It seems at the very least problematic to construct the accessibility of national legislation written for our Somali pirate, if published in the Danish language in a Danish state journal, for instance. Here also comes in an element of 'neo-judicial colonialism', since dozens of nations around the world are suddenly legislating over some indigenous Somali fishermen, who will not even have slightest idea that those hundreds of different legal regimes apply to them.

In the margin of this issue, we point again at Article 7. The foreseeability for a substantial criminal in the area of acts of piracy is far beyond fiction. In practice, anyone sailing around the Gulf of Aden, risks prosecution under statutory law of over a 190 countries, with different contents. In Korea, courts understood piracy already as the simple act of carrying an arm onboard, while Russian authorities can only prosecute for a completed hijacking of a vessel on the high seas. In the US, a judge released pirates that had not yet boarded their victim ship, because 'aggression' or 'violence' on the high seas fell outside the scope of the applicable US legislation.[31] But also within Europe, legislation is far from concordant.

In short, the universal jurisdiction as promoted by the UNCLOS, has created a complete cacophony of unharmonised national laws. If the individual pirate is used as the starting point for assessing foreseeability and accessibility, it is hard to say that any applied national law meets the standard the Court poses. It will depend on mere coincidence according to which law a pirate will be detained and (perhaps) be adjudicated.

> To be honest A. did know that what he and his fellow pirates were doing and planning at sea would probably be universally frowned upon, to put it mildly. So even though Dutch law would not be factually accessible to him, he knew it was wrong. But how was he supposed to know what his rights would be concerning the procedure of arrest and detention? What will happen to him now that he is detained on the navy ship?

(c) Foreseeability

Foreseeability is not merely a question as to which *precise* acts are actually illegal on the high seas. Is it illegal to be on a boat with a weapon? It goes beyond that point, where it concerns the possible

31 US vs Said: http://www.ejiltalk.org/prosecuting-pirates-in-national-courts-us-v-said-and-piracy-under-us-law.

penalties involved. Severity of punishment already differs strongly between the different European nations. But if the European nations extradite to other countries, this becomes even more problematic. In the Netherlands and Yemen pirates were sentenced to prison terms of five years, but if extradited to the US, punishments could go up to mandatory life imprisonment.[32] Malaysia has already sentenced several pirates to death.[33] In our opinion, these great differences in applicable penalties, create an urgent need for clear, foreseeable procedures concerning the arrest and adjudication of pirates by our nations. It is indispensable to establish, with which nations we cooperate, on which conditions, which rights the detainees have, and how they can enforce them.

The Court stresses in the Grand Chamber ruling in the aforementioned *Medvedyev* case the importance of foreseeability. The diplomatic note by the Cambodian authorities which granted permission to France to intercept and take legal action against the Winner, did not meet the standards of a legal basis prescribed in article 5 of the Convention. There was no treaty to which France and Cambodia were party, nor was there a regular cooperation between France and Cambodia in the field of counter-narcotics (§100). Moreover, articles 108 and 110 UNCLOS did not apply to the case and thus could not serve as a legal basis (§84). In short, the suspects could never have foreseen falling in French jurisdiction. The Court remarks on the sideline that the set of rules as to combat drug-smuggling at sea is not coherent, contrary to the articles on piracy in UNCLOS which clearly establish universal jurisdiction for this type of crime (§85).[34] Thus, it is recommended for states participating in counter-piracy operations to adopt a legal framework when it comes to detention at sea, accessible and foreseeable, which provides procedural guarantees.

3.2 Arrest and Detention

> The moment A. and the rest of his pirate crew have been apprehended by the Dutch marine vessel, they find themselves without doubt in the jurisdiction of a European nation. A. will enjoy the full range of protection of the Convention.[35] According to the Convention a detainee will have to be brought before a judge. He also has the right of legal assistance. How will these and other rights concerning to preventive detention be effected at sea?

Presentation before a judge

The Court has shown some willingness to accept that detention on the high seas entails that certain rights cannot directly be exercised or only to a limited extent, because the detention takes place

[32] http://jurist.org/paperchase/2011/03/federal-court-sentences-convicted-somali-pirates-to-life.php.

[33] http://jurist.org/paperchase/2011/02/malaysia-court-charges-suspected-somali-pirates.php.

[34] The Court came to the same conclusion in 2008 in the Chamber judgment, but for different reasons. The Chamber stressed the procedural safeguards of Article 5(1). Both French and international law failed to provide guarantees for the detainees' conditions on board, especially regarding the possibility to contact a lawyer or family and the lack of judicial supervision ECtHR, 10 July 2008, Medvedyev v. France (application no. 3394/03), para 61.

[35] ECrtHR, Bankovic and Others vs Belgium and 16 Other Contracting States, 19 December 2001 (n. 52207/99).

under special conditions. In *Medvedyev*, the Court accepted that the time to be promptly presented before a judge (as laid down in Article 5(3)), will be much longer than acceptable in 'land bound cases'. Interestingly, the Dutch government attempts to facilitate the speedily arraignment before a judge as much as possible. For instance, magistrates have been flown to the H.M. Amsterdam to conduct an on-board hearing on the prolongation of the pre-trial detention of detained pirate suspects. In this way, the suspects were enabled to exercise their right to have their detention timely reviewed by a judge, even in accordance with the time limits set out in the Dutch Code of criminal procedure.

Legal assistance

Creativeness will be required as well in the facilitation of the right to legal assistance and the free choice of a lawyer. The Court has explained Article 6 in a manner that it confers to apprehended suspects the right to legal assistance, before the first police interrogation.[36] On high seas, the access to legal assistance – let alone 'of his own choosing' – will cause special challenges for the detaining authority.

In a condemning judgment of five Somali pirates, the District Court of Rotterdam, rejected the defence argument that the defendants should have had access to legal assistance after their arrest by the Danish navy.[37] The Court took the somewhat surprising position that only after it became clear which country would prosecute the Somali pirates (i.e. two weeks after their arrest), the right to legal assistance came into play. In our opinion, from the fact that the Danish authorities were actively seeking a jurisdiction to prosecute the apprehended pirates, flows that they had to be treated as 'accused persons' and provided with legal assistance more promptly.[38]

The question as to the moment of legal assistance becomes even more relevant, when one takes into account that in fact apprehended pirates will always directly be questioned on board of the detaining vessel, at the very least for the purpose of collecting military intelligence.[39]

> When on board of the Zeven Provinciën A. is brought before a Dutch pre-trail judge. A. is requesting a lawyer, because he has been keeping up with Salduz jurisprudence and wants to consult a lawyer. A. is a smart kid and since a lawyer can not be provided to him at open sea, he decides to say nothing. He is wondering what will happen next. Will they bring him back to Somalia, release him and his companions onto their skiff or will he be taken to trial in another country?

36 ECrtHR, Salduz vs Turkey, 27 November 2008 (nr. 36391/02).
37 Rechtbank Rotterdam, 17 Juni 2010, BM8116 (nr. 10/600012-09).
38 Ibid. nr. 35.
39 http://neptunemaritimesecurity.posterous.com/arrested-pirates-fight-extradition.

Extradition

One of the considered strategies of the European nations participating in anti-piracy operations, is the quick and immediate extradition to jurisdictions geographically closer to the area of operations. For this purpose an agreement was reached, for instance, between the EU and Kenya. Several European states, amongst others Germany, have extradited suspected pirates to Kenya for trial.[40] In fact, the SUA provides for the 'aut dedere aut iudicare' rule, so that the state parties might actually legally be obliged to extradite.[41]

Article 5 plays a crucial role in the context of extradition for adjudication in another jurisdiction. Article 5(3) will apply to those instances of detention, and any suspected pirate that is supposed to be extradited for trial to (e.g.) Kenya, will have the right to contest the lawfulness of his detention before a national judge. However, in practice, the patrolling European nations, prefer strongly to extradite swiftly and directly from the detaining ship, instead of flying the apprehended Somali suspect back to Europe. The reason for this is the fear that the suspect will claim asylum upon arrival in Europe. Strong appeals were made by several Council of Europe institutions and human rights bodies, not to extradite to Kenya. In the Netherlands the independent advisory council for human rights, the Meijer Commission, explicitly called the government to fully guarantee the right to be brought promptly before a judge (Article 5(3)) and to take proceedings by which the lawfulness of the detention is decided speedily by a court (Article 5(4)), as well as the right to a fair (extradition) trial.[42] It is hard to imagine that any suspected pirate, that a European government wishes to extradite to Kenya, would be able to fully exercise his rights under the Convention, without being transferred to European soil. The conclusion should be that extradition to a country in the region of operations, cannot be effected without prior transfer to Europe first.

Preventive detention

Arguably, detention, transfer, trial and ultimately expulsion of poor Somali pirates, is a costly process. And where no willing states can be found to extradite apprehended pirates to, the patrolling units have taken a more creative approach to what to do with their detainees. On a regular basis, if there is no clear interest in the prosecution of apprehended pirates, they are sent off in their boats with some water and fuel or left on the coastline, after destruction or confiscation of their weapons.[43] For instance a participating Danish marine vessel, apprehended over 200 suspected

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40 M. Gebauer, "Somali Pirate Trial Tests Limits of EU Mission", Der Spiegel, 4 januari 2009.

41 Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation (Rome, 10 March 1988), Article 7 (1).

42 Meijers Commission, Comment on the agreement between the EU and Kenya on the transfer of persons suspected of piracy to Kenya (CM0904), 20 May 2009, p3, see also: Comment of 8 December 2009.

43 Tweede Kamer (Parliament of the Netherlands), 2009/2010, 29251, nr. 131, p2, and: http://www.defensie.nl/actueel/nieuws/2011/05/06/46182362/Hr_Ms_Tromp_houdt_vermoedelijke_piraten_aan

pirates, all of which were released.[44] For some days up to several weeks, the intercepted pirates find themselves deprived of their liberty on a vessel of the intercepting European nation. It goes without question that this 'preventive detention' (*not* for the purpose of adjudication) – whether it lasts for hours or weeks – also falls within the scope of Article 5.

At first reading, Article 5(1)(c) seems to provide a very explicit basis for the arrest for the purpose of the prevention of offences. On this basis, any possible *skiff* with armed crew could be detained on high seas to prevent any future acts of piracy. *Prima facie* this 'preventive arrest', followed by release and destruction of weapons, seems to be a very elegant solution as supposed to the thorny road to a trial. Nonetheless, it should be noted that also this type of arrest brings about some questions concerning the application of Article 5.

Article 5(1) stipulates in the first place that such a 'preventive detention' should be regulated by law. Secondly, any detainee should be arraigned before a judge or officer (Article 5(3)). Thirdly, any preventively detained Somali would be entitled to have the lawfulness of their 'preventive detention' speedily reviewed by a judicial authority (Article 5(4)).

We find it difficult to distinguish a proper basis in Dutch law for any 'preventive detention', which meets the legality test as applied by the Court. The Rules of Engagement as applied by the naval forces, cannot – in our opinion – be regarded as a sufficient legal basis, not in the last place because they are not published. Any legal standard as to the time frame of the preventive detention or speedily judicial review of such a 'preventive detention' is missing in the Dutch case. Three years after the first Dutch naval vessel sailed made its first arrest, this legal vacuum has still not been filled.

Lastly, it is interesting to point out that under the Convention, there exists a right to compensation in the case of contravention of the safeguards of Article 5, encapsulated in paragraph 4. In the case of detention without a proper legal basis, in particular relevant for the 'preventively' detained pirates, a right to compensation will arise. One might think of this as a rather illusive right, however, the appointment of legal counsels during detention might facilitate the actual filing of compensation claims by released pirates. This is exactly what happened in the case of Denmark, where released pirates are now claiming compensation.[45] In general, it is a point for further considering, how Article 5(4) and Article 13 can be given an *effet util* for a person who sees his rights under the Convention affected, outside the geographical area of the Council of Europe.

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44 http://politiken.dk/newsinenglish/ECE1230301/somalis-demand-pirate-arrest-damages/

45 Ibid. nr. 43.

3.3 Fair trial

After detention on the Zeven Provincien A. is flown to the Netherlands to stand trial and is appointed a counsel.

The prosecution of pirates on European soil, causes several issues under Article 6 of the Convention, that we would like to point out. We already mentioned the right to legal assistance when detained onboard, but also upon arrival in any European nation, the prosecution of a Somali pirate will face some particular difficulties. We concentrate herein on the prove of age and equality of arms in relation to evidence.

Position of minors

According to reports a large amount of pirates operating in the Gulf of Aden are underage. Underage pirates will add another layer of complexity to the matter in terms of the different laws applicable as well as the need to adhere strictly to human rights standards.
The problems that arise start with establishing if a pirate is in fact a minor. It has shown that age is an often used defence. It is usually favoured to be tried as a minor. Defence lawyers have used X-rays to prove underage. This method however is usually not admitted as proof in procedures, because it is not sufficiently validated.[46] However a Spanish Judge recently released a suspected Somali pirate after the results of a medical test indicated that he *could* be a minor. Since minors cannot be jailed in Spain, prosecutors were expected to place the minor in a closed centre for minors and to request more medical tests to obtain full certainty about his age.[47] Because of the lack of government in Somalia it is hard to check identities or birth records, which constitutes as a big problem.

Because the subject of prosecuting children is an international setting is a subject that goes beyond the scope of this paper, we are only going to lift out two points related to articles 5 and 6 of the Convention. The Convention does not explicitly prohibit prosecution of minors, thus, it would seem that this is permitted. Article 5 § 1 d) of the Convention permits the detention of a minor for educational purposes or for the purpose of bringing him before the competent legal authority. In principle, criminal proceedings against minors should be accompanied by the procedural guarantees set out in Article 6, particularly where the rights of the defence are concerned. The Court has said that a trial on criminal charges of a child of ten or eleven years as such does not violate the fair trial guarantee under Article 6 § 1 as long as he or she is able to participate effectively in the trial.[48]

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46 http://www.rnw.nl/africa/article/dutch-court-looks-child-pirate-case.

47 Krantenartikel http://dalje.com/en-world/suspected-somali-pirate-released-in-spain/278768.

48 Report on Child Friendly Justice, Counsil of Europe.

In case of prosecution, the guarantees set out in the UN Convention on the Rights of the Child and the UN Standard Minimum Rules for the Administration of Juvenile Justice are leading when dealing with children. These go beyond the guarantees set in The Convention.

Other issues that arise are those of national legal differences in prosecuting minors. For instance in England/Wales, the age of 10 years is when a children become criminally responsible for their actions and the consequences of their actions. From this age onwards, they can be prosecuted for any criminal offence. Sweden, Finland, and Norway all set the age at fifteen years. One could argue that these differences could constitute fair trail concerns.

Big differences between countries mean that for our pirate A. his age is an important matter. At say fourteen years old he would be tried in England and not in Sweden.

Equality of arms in relation to evidence.

Once in the Netherlands A. and his lawyer are preparing his defence. A. feels that he was forced into joining a pirate group, because he needed to provide for his brothers and sisters, since his parents both died at young age. To strengthen this defence he wants to question a few witnesses from his village. He also wants to emphasize that he did not know in advance that his fellow pirates would use their weapons when entering the tanker. He did not shoot at the crew, nor was he aware that the other pirates would. Therefore he should not be punished for this. How is A. going to be able to question witnesses on these issues?

The pirate is entitled to the principles of a fair trial enshrined in Article 6 of the Convention. In particular a pirate may be interested in exercising his right to examine witnesses à charge and decharge. A completed act of piracy or robbery at sea, often implies that the intervening naval forces were not present at the time of the taking of the victim ship, so that it will be of interest to the accused to examine the crew of the ship over the exact acts performed by the accused. Similarly, the arresting naval forces will often not be of the same flag as the prosecuting state, so that it will be of interest to the accused to examine foreign military personnel on the events and observations at the time of arrest and the applied level of force by them.

Article 6 (3)(d) ascertains the right to examine witness à charge. This right will be of increasing importance where the material evidence was destroyed – as is often the case with the weapons ceased and *skiffs* being left behind. Where the evidence consists to decisive degree of produced witness statements, the right for the defensive to examine those witnesses will gain importance. This results in particular interesting challenges in a pirate trial. The victim ship with its multinational crew will usually have sailed off, its crew members disembarked, scattered around the world, and they will often be of nationalities with whom cross border cooperation is not common

practice.[49] In the Dutch case of the Somali pirates, the prosecution was able to trace only a part of the victim crew, who were subsequently heard in Turkey by video-link.[50] Not imaginative will be discussion over the use of (lethal) force against pirate ships upon arrest, for instance on the question who opened fire first. In those cases, foreign military personnel will have to be heard by the court. It should be noted that the right to examine witnesses à charge cannot be easily set aside, not even when it proofs very difficult or even impossible to get the crucial witnesses to the court.[51]

The dimensions of Article 6 (3)(d) get more problematic when one examines the scope of the right to call witnesses à decharge. A recent line of defence illustrates this: three of the accused pirates who attacked a German ship claimed they had paid the crew of the *skiff* simply to be smuggled into Yemen, and that they had nothing to do with the raid executed by the crew.[52] The need to examine witnesses from the mainland will be even more pressing if an accused pirate claims to have been acting under duress, caused by threats to his family or force by his family (in particular in the case of minors). Crucial evidence for these positions in the form of witnesses à decharge will be located on mainland Somalia. However, hearing or summoning a witness by way of letters rogatory is not an option, seen that the Somali State is either disfunctioning or absent in much of its territory. A pirate on trial wishing to examine any witness in his homeland will be left empty-handed. This does not only concern the evidence for the alleged facts, but also for mitigating circumstances like extreme poverty or a particular family situation. Illustrative is how the court of Rotterdam was left to simply 'assume' the personal situation of the defendants was dreadful.

Whereas the right to call witnesses à decharge, as part of the principle of equality of arms, does not imply that every witness will necessarily have to admitted by the court[53], the impossibility to hear *any* witnesses on mainland Somalia seems to cause a particular obstacle for the realisation of a fair trial. It will require a lot of creativity of a court to compensate the defence for not being able to collect and examine evidence from the mainland. *Counter balancing procedures* should be in place to ensure that from the moment of arrest the naval forces also collect possible evidence à decharge.

3.4 Solutions considered in the light of the the Convention

Successful prosecution of pirates depends on the existence of adequate criminal law procedures in the state concerned and the political will to arrest suspects of piracy. The legal framework to combat

[49] See also: E. Kontorovich, "A Guantanomo at Sea: The Difficulty of Prosecuting Pirates and Terrorists", 98 California Law Review 234 (2010), p 265.
[50] Zeerovers voor de Rotterdamse rechter, NRC Handelsblad, 26 mei 2010.
[51] ECrtHR, Rachdad vs France, 13 November 2003 (nr. 71846/01), and: Hoge Raad, NJ 2004, 629.
[52] Ibid. nr. 39.
[53] ECrtHR, Vidal vs Belgium, 22 April 1992 (A 235-B), para. 33.

piracy is complete, although sometimes the nexus between international and national law is not very smooth.[54] Not every domestic legal system contains provisions criminalizing piracy and not every state has incorporated universal jurisdiction. However, legal flaws may be used as a pretext to avoid difficult trials back home. The political will to bring pirates before a domestic court seems to be the major bottleneck. Regularly, states operating off the Somali coast deliberately release piracy suspects. For instance, the Dutch frigate Evertsen, at that time in charge of the operational command of EU NAVFOR Atalanta, caught 13 pirates after the latter had attempted to attack the merchant vessel BBC Togo.[55] The pirates were detained during more than two weeks on the rear deck of the frigate, but no state in the region nor in the EU, including the Netherlands, was prepared to accept the pirates to bring them to trial, despite the availability of evidence and the adequate legal framework. In the end, the pirates had to be released.[56] One of the problems with bringing pirates to justice is the difficulty to expel the pirates or the suspects after their release, as the principle of *non refoulement* is likely to impede the expulsion or extradition in cases where the person faces a real risk of flagrant human rights violations, like Articles 2, 3 or sometimes 6 or 8 of the Convention.[57]

To avoid the above mentioned legal and political problems, the possibility of an international or regional tribunal has been brought forward. Confronted with a handfull of Somali prisoners standing trial in Rotterdam for acts of piracy, who hinted in the media that they were comfortable in their Dutch prison cells and wanted to ask for asylum after the trial, the Dutch Minister of Foreign Affairs launched the initiative of some kind of an international piracy tribunal.[58] However, the foundation of a fully fledged international tribunal has revealed to be problematic, as it would require either consensus within the Security Council or a founding treaty to be negociated and ratified by a considerable number of states. Moreover, it would entail considerable costs. The same obstacles rise when it comes to the possibility to include piracy among the crimes liable for prosecution at the International Criminal Court (ICC). International consensus would be necessary as to the question whether the ICC is the appropriate forum to deal with piracy cases, which are considered 'light' in comparison to crimes against humanity. However, an international piracy court or an incorporation in the ICC would entail coherence in judicial proceedings, the processing of evidence and a uniform standard of fair trial rights, also for the purpose of the guarantees provides by Articles 5 and 6 of the Convention.[59] According to the Netherlands and some other European countries, a hybrid tribunal, which would add international elements to an existing national court in

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[54] http://www.icln.net/index.php?option=com_content&task=view&id=44&Itemid=1, see also: Hans Heynen, 'Politieke wil ontbreekt om piraten in Nederland te berechten', NRC Handelsblad, 22 December 2009.

[55] http://www.blikopnieuws.nl/bericht/106330/Piraten_opgepakt_door_Nederlandse_marine.html.

[56] http://www.defensie.nl/missies/nieuws/eufor/2009/12/17/46142670/Hr_Ms_Evertsen_zet_piraten_van_boord

[57] ECtHR, 28 February 2008, Saadi v. Italy, (Application no. 37201/06), para 125.

[58] 'Verhagen: piraten in Kenia laten berechten', NRC Handelsblad, 19 May 2009.

[59] International lawyer A.G. Knoops presented these arguments on a conference of the International Criminal Law Network in Decemder 2009, see www.icln.net.

the region would be a more realistic solution. Neihter a hybrid court nor an international court have seen daylight until present. Recently, however, the Security Council adopted Resolution 1976 in which the enforcement of regional judicial systems is propagated as one of the solutions to the problem. The Security Council stipulates that the establishment of specialized Somali courts in Somalia or elsewhere in the region, including an extraterritorial Somali specialized anti-piracy court. The Resolution is based on the report of the special advisor to the Secretary-General Jack Lang, which underscores the urgency of the problem and the need to resolve the problems on a regional, preferably a Somalian level.[60]

Although some progress has already be made under the aegis of the UNODC, the judicial framework has to be built up from scratch. Clauses have to be adopted obliging the Somali courts to respect fundamental rights. Nonewithstanding the arguments in favour of a regional solution and the guarantees the Somali authorities might give, there are human rights concerns. Somalia is a failed state without central authority, so it would be unlikely that the guarantees provided by the Convention would be respected. State parties to the Convention might then face infringement of their obligations when handing over piracy suspects to Somalia.

4 Are we moving in the right direction?

As illustrated a correct and functioning international legal framework is still far ahead of us. International criminal law is under construction and piracy as an international problem is a relatively new issue.

If we want to prosecute effectively and assure that all legal rights of the pirates are guaranteed, we should develop a system with a uniform sentencing regime and a uniform application of international law. At this moment the legal path lying ahead of our arrested pirate A. is still too uncertain. He had no certainty on legal assistance, if, by who, where and when he will be prosecuted.

We have also seen that nations are unwilling to prosecute due to high costs and possible requests for asylum. As a Dutch minister reacted to a pirate saying that he much preferred his Dutch prison cell to life in Somalia and will ask his family members to join him here as soon as he has served his sentence: "This made me scratch my head" Continuing, in our opinion, the minister makes a good point: "we can't be on the right track if our punishment is perceived more as a treat than as a threat. This could lead to the strange situation that our attempts to punish pirates actually

60 Report by the Special Adviser to the Secretary-General on Legal Issues Related to Piracy off the Coast of Somalia, Mr. Jack Lang, contained in the annex to document S/2011/30.

encourage piracy instead of discouraging it. (...). I believe that a more standardised, and indeed international, approach is needed.[61]"

In our opinion criminal law may not be the most effective way to combate piracy. Naval interference with a criminal law basis has to lead to criminal prosecution and we've seen that the strict human rights requirements linked to criminal prosecution, in particular the challenges in relation to Articles 5 and 6 of the Convention can not be met at this moment, due to the legal uncertainty, the questions about arrest and detention titles, the lack of an adequate legal framework, the impossibility of gathering evidence on land, large numbers of minors and the impossibility of eviction. Experts like international lawyer Knoops have suggested to embed the naval operations in a hybrid legal framework of criminal and humanitarian law, which suits better the level of violence required.[62] The fight against piracy could then be more effective and the requirements of Articles 5 and 6 would be less stringent. It is the universal dilemma between the fight against crime and the respect of the rights of suspects or accused. An ideal solution does not exist.

And to conclude a last thought, the question of whether we should interfere at all. The answer to this question begins with the reasons for the rise of piracy in Somali waters, starting with illegal waste dumping and fishing by foreign companies. Who is right? European countries have benefitted dumping and fishing in Somali waters. Have the developed nations of the world caused this problem? Should we take moral responsibility and try to stop the piracy?

We think from a human rights perspective we should answer this question with "yes". Nonetheless one could argue that the main reason to intervene is to ensure safe trade routes through international waters, thus an economic motif.

Only taking on pirates does not end the underlying problem, which in our opinion is the poor and corrupt state of Somalia. Should we put our efforts into that? We leave the reader with this thought, because this raises issues that go far beyond the scope of this paper.

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61 Speech by Minister of Foreign Affairs Maxime Verhagen at the expert seminar ,Clingendael, 8 July 2009.

62 G.J. Knoops, 'The War on Piracy: rechtspolitieke dilemma's en oplossingen', *NJB* 2009, 965.