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ABSTRACT

Modern piracy is a real threat to navigation, international trade, energy security and to seafarers' lives. In terms of volume, the great majority of international trade is made by sea. However, the number of acts of piracy and armed robbery against ships has increased almost 25% in 2009, most part of them off the coast of Somalia.

Several Countries and International Organisations, including the North Atlantic Treaty Organisation (NATO), deployed military vessels to the Gulf of Aden - Indian Ocean (20% of world maritime trade uses this route), in result of the United Nations call for intervention, trying to avoid acts of piracy against humanitarian and commercial vessels. Moreover, the European Union started its first naval operation in the region in December 2008.

The narrow definition of piracy adopted by the Parties of the United Nations Convention on the Law of the Sea (1982), the incapacity of "fragile States" to control territorial waters, including when humanitarian aid is to be delivery, and to prosecute suspects request further action from the international community.

In addition to counter-piracy military operations, the current situation calls for effective legal and political initiatives, in order to prevent and fight maritime piracy, having a truly comprehensive approach and sustainable intervention, when needed. Preserving the freedom and safety of navigation, avoiding impunity, promoting democratic governance, and providing technical assistance to the most affect States are key aspects.

Under the new strategic concept of NATO, recently approved in Lisbon, international trade routes and energy supply are considered important elements to the security and stability of the Euro-Atlantic area. Moreover, the Alliance should



increase political dialogue with other international partners, namely with the United Nations and the EU, taking into consideration civil and military components in future conflict resolution/conflict prevention operations, and avoiding duplication of means. But are NATO and the EU ready to build an effective strategic partnership?

Keywords: Piracy, Maritime security, Law of the Sea, Public International Law, Humanitarian aid, International trade, Counter-piracy operations, NATO, European Union, United Nations

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Table of contents

1. Introductory Remarks
2. Piracy under International Law
 - 2.1 Piracy *jure gentium* – *hostis humanis generis*
 - 2.2 Limits imposed by International Law
 - 2.3 Universal jurisdiction
 - 2.4 International Maritime Organisation – Between multilateral diplomacy and technical cooperation?
3. Counter-piracy and the new Strategic Concept of NATO
4. Conclusions



1. Introductory Remarks

Modern piracy is a real threat to navigation, international trade, energy security and to seafarers' lives. In 2009, according to the International Maritime Organization, the number of acts of piracy and armed robbery against ships has increased almost 25%, most part of them off the coast of Somalia.¹

In result of the high number of piracy acts and armed robbery against ships, namely in the Gulf of Aden - Indian Ocean (20% of global trade passes through the area²), several military operations have been organised in the region, in accordance with the International Law and the specific resolutions of the United Nations Security Council (UNSC).

The United Nations (UN), namely the Security Council and the International Maritime Organization (IMO), play a decisive role, particularly in what regards cooperation between all relevant actors (States, International Organisations, and shipping industry), the definition of preventive procedures, rules of conduct and a common framework which has already allowed the organisation of naval operations in the Gulf of Aden, such as those carried out by the North Atlantic Treaty Organization (NATO), the European Union (EU)³ and several Countries.

Indeed, Oceans are to be accessible to all Nations - as *res communis* - and incapable of appropriation according to the doctrine of the open seas, proclaimed by Grotius in the 17th century, in result of strong economic interests of North European States, which demand freedom of the seas for the purpose of exploration and expanding commercial intercourse with the East.⁴

¹ Since 1984 the total number of incidents of piracy and armed robbery against ships has risen up to 5227. IMO - MSC.4/Circ.152 (29 March 2010) – Reports on acts of piracy and armed robbery against ships - Annual report 2009.

² <http://www.eunavfor.eu/>

³ In terms of volume, 95% of the European Union's trade is transported by sea (<http://www.eunavfor.eu/>).

⁴ In contrast to *terra nullius*, *res communis* is not capable of being reduced to sovereign control. Shaw, Malcom; "International Law", Malcolm N. Shaw, Cambridge, Seventh printing 2009.



Although the doctrine of *mare liberum* has been generally accepted by the international community and Law, the fundamental principle governing the Law of the Sea is that “the land dominates the sea”. Indeed, maritime rights (and duties) of a coastal State are basically related with its land territorial situation.⁵ However, as the high seas are outside of any national jurisdiction, they offer numerous opportunities for supporting criminal and terrorist activities.⁶

Given the new security environment and global economic interdependence, maritime security threats request comprehensive efforts from the international community to safeguard trade routes, goods and energy supplies, mainly in high-risk waters.⁷

However, counter-piracy operations, using military means, can only be effective and sustainable if the origins of such a dangerous phenomenon are properly understood and tackled accordingly (political instability, fragile institutions, weak economies, extreme poverty, unemployment, regional context and lack of rule of law in coastal States).

Modern piracy has indeed become a large business enterprise that threatens the stability of maritime trade.⁸ The level of risk varies according to the regions and pirates’ objectives and it could aim either at the cargo vessels or the vessel itself.⁹

⁵ Ibid.

⁶ Hoch, Gottfried; “National and International Approaches to Maritime Security”, in “Legal challenges in maritime security”, Center for oceans law and policy, 2008.

⁷ Matison, Katie; “The Big Business of Maritime Piracy and the Modern Corsair: dead men tell no tales”, Journal of Transportation Law, Logistics and Policy, Vol. 76, No. 4, fourth quarter 2009.

⁸ Ibid.

⁹ “Contemporary pirates can be classified into two categories. First are those who cooperate on a small scale, interested either in the possessions of the crew (the captain usually keeps a substantial amount of money for payroll, maintenance and port fees), or various equipment on board the vessel. The majority of such pirates operate when ships are anchored in, or pass through, territorial waters. The second category involves well-organised groups whose operations go far beyond random attacks at sea”; For instance, a stolen vessel can be repainted, renamed and re-registered, using false documents, and cargo can be resold in the market. Bantekas, Ilias and Nash, Susan; “International Criminal Law”, Third Edition, Routledge-Cavendish, 2007.



Contemporary organised piracy tends to occur when public authority is weak, being many times linked with illicit traffic of narcotic drugs and arms, and in certain cases with terrorism. Corruption, for instance, is considered one of the major obstacles in a number of countries for both the lack of prosecutions and enforcement, as well as for facilitating the disposal of stolen vessels and cargo.¹⁰

International cooperation and development aid are therefore critical to improve democratic governance and economic growth in the most vulnerable States and regions, as components of comprehensive counter-piracy strategies.¹¹

2. Piracy under International Law

2.1 Piracy *jure gentium* – *hostis humanis generis*

The most formidable of the exceptions to the exclusive jurisdiction of the State and the principle of the exclusive jurisdiction of the Flag State and the principle of the freedom of the high seas is the concept of piracy.¹² According to the Flag State principle, Public International Law is implemented and enforced in maritime areas outside the jurisdiction of the States.¹³

Otherwise known as piracy *jure gentium*, it is the oldest international offence¹⁴ and considered to be *hostis humanis generis*¹⁵, as an enemy of mankind.¹⁶

¹⁰ Ibid.

¹¹ Ibid.

¹² Shaw, Malcolm; *op cit.* and Beckam, Robert; “The 1988 SUA Convention and 2005 SUA Protocol: Tools to Combat Piracy”; in “Armed Robbery and Maritime Terrorism, Lloyd’s MIU Handbook of Maritime Security”, CRS Press 2009.

¹³ Wolfrum, Rüdiger; *op cit.*

¹⁴ Bantekas, Ilias and Nash, Susan Nash; *op cit.*

¹⁵ Brownlie, Ian; “Principles of Public International Law”, Seventh Edition, Oxford University Press, 2008.

¹⁶ “If one person commits otherwise unlawful acts against persons or property of one country on the high seas, that a person cannot readily be characterized as an enemy of mankind, only of the specific country.” Bantekas, Ilias and Nash, Susan; *op cit.*



Until the adoption of the definition of piracy *jure gentium* by the 1958 Geneva Convention on the High Seas,¹⁷ customary law was acknowledged as belonging to all States.¹⁸ The 1958 Convention, having 63 parties, including the United States of America, contains several articles pertaining to marine piracy very similar to the provisions of the 1982 United Nations Convention on the Law of the Sea (UNCLOS)¹⁹ on this regard (Articles 100-108). UNCLOS, signed in Jamaica - Montego Bay, was not yet ratified by the United States; however the European Union is one of the 161 parties of the 1982 Convention.

As underlined by Brownlie,²⁰ the definition of piracy has long been source of controversy, although it is thought that Article 15 of the Convention on the High Seas represents the existing customary law.²¹ Moreover, the *actus reus* of the offence is not dependent on factors such as gravity or an intention to act openly.²² One of the major deficiencies of the international rules concerning the suppression of piracy, as codified in the Geneva Convention on the High Seas of 1958 and repeated in the Convention on the Law of the Sea of 1982 (article 101), is their narrow definition (of piracy)²³, as follows:

¹⁷ Convention on the High Seas, 29 April 1958, United Nations Treaty Series, vol. 450, p.11. Entry into force: 30 September 1962.

¹⁸ Bantekas, Ilias and Nash, Susan; *op cit*.

¹⁹ United Nations Convention in the Law of the Sea, 10 December 1982, United Nations Treaty Series, vol. 1833, p. 3. Entry into force: 16 November 1994.

²⁰ Brownlie, Ian; *op cit*.

²¹ Article 15 of the 1958 Convention on the High Seas:

1 - Piracy consists of any acts of violence, 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:

- a) *On the high seas, against another ship or aircraft, or against persons or property on board of such ship or aircraft;*
- b) *Against a ship, aircraft, persons, or property in a place outside the jurisdiction of any State;*

2 - 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;

3 - Any act of inciting or of intentionally facilitating an act described in sub-paragraph (1) or sub-paragraph (2) of this article.

²² Bantekas, Ilias and Nash, Susan; *op cit*.

²³ "Contrary to the crime of piracy which was dealt with in detail in the 1982 Law of the Sea Convention, international law lacks binding rules for certain offenses such as the proliferation of weapons of mass destruction; illegal immigration/human trafficking; drug/alcohol smuggling; and terrorism – that would allow the employment of naval forces and other law enforcement agencies



“Piracy consists of any of the following acts:

- (a) any illegal acts of violence or detention, or any act of depredation, committed for private ends by the crew or the passengers of a private ship or a private aircraft, and directed:
 - (i) on the high seas, against another ship or 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).”

At the moment, the international legal regime applicable to piracy consists of the 1982 UNCLOS, other international and regional instruments, and several resolutions approved by the United Nations Security Council and General Assembly, IMO resolutions, in addition to the Countries implementing legislation.

(e.g. coast guards, police, etc) on the High Seas”. In Hoch, Gottfried; *op cit*. See also Wolfrum, Rüdiger, *op cit*.



2.2 Limits imposed by International Law

Regarding the definition of piracy provided by UNCLOS there are two elements that limit considerably its scope of application, as follows: i) “illegal acts” committed “for private ends”; ii) “on high seas”, “in a place outside the jurisdiction of any state”.

Some authors believe the word “illegal” in this regard is rather unclear.²⁴ In addition, hijacking or takeover for political reasons – in order to destabilize a government or to cause unrest and terror with the view towards blackmailing a government or targeting religious or ethnic groups²⁵ – are automatically excluded from the UNCLOS definition of piracy.

It is generally accepted, according to the mentioned UNCLOS definition, that attacks on ships for terrorist purposes or for the purpose of supporting a separatist movement are not piracy, and therefore the special rules on piracy do not apply.²⁶ Moreover, acts committed by the crew of a ship aimed at the vessel itself or property or persons on board do not fall as well in this category.²⁷

The 1982 Convention confines piracy to acts that take place on the high seas or ‘in a place outside the territorial jurisdiction of any State’. As a matter of principle, according to International Law, no State has the right to exercise police power and arrest the “pirates” involved in such attacks, except for the coastal State in whose territorial seas the attacks took place.²⁸

Only acts committed in the high seas and in the exclusive economic zones may be qualified as piracy, but not those committed in the coastal waters of a State

²⁴ Wolfrum, Rüdiger; *op cit.*

²⁵ Ibid.

²⁶ Beckam, Robert; *op cit.*

²⁷ Shaw, Malcom; *op cit.*

²⁸ Beckam, Robert, *op cit.*



(territorial waters). It is the responsibility of the coastal State concerned to fight piracy on its territorial waters. However, in the case of the so called “failed States”, given the lack of control of territorial waters and of the capacity to interdict piracy, it should be a matter of greater concern to the international community, calling for comprehensive counter-piracy strategies, like the case of Somalia.²⁹

Indeed, following the request of the Transitional Federal Government of Somalia to the United Nations, the Security Council has approved Resolution 1816 (2008) of 2 June 2008, urging States to increase and coordinate naval and military aircraft support, in particular those States interested in the use of commercial maritime routes off the coast of Somalia. The United Nations Security Council has also authorized States to enter the territorial waters of Somalia for the purpose of repressing acts of piracy, as allowed by international law on the high seas, using all necessary means.

As stated by Brownlie, “the use of force by ships against foreign vessels on the high seas may be unlawful and yet may not fall within the definition of piracy. (...) The tendency to enlarge the concept of piracy this evident is explicable partly by the existence of doubts relating to the definition of activity in the most unequivocal manner.” Some categories of acts can therefore cause difficulties of classification, such as insurgency, unlawful acts committed with the authority of a lawful government, politically motivated operations by organized groups, and unrestricted submarine warfare.³⁰

2.3 Universal jurisdiction

Furthermore, one has to take into consideration that the key and exceptional element of piracy regime under International Law is universal jurisdiction, as an offense to mankind. Every State may arrest and try third persons accused of

²⁹ Wolrum, Rüdiger, *op cit.*

³⁰ Brownlie, Ian; *op cit.*



piracy, as provided in article 105 of UNCLOS (outside territorial waters of a third country).³¹

Additionally, in light of the universal jurisdiction principle, article 105 of the 1982 Convention also recognizes that the courts of the State which carried out the seizure may decide upon the penalties to be imposed, and may also determine the action to be taken with regard to the ships, aircraft or property, subject to the rights of third parties acting in good faith.

Ships and people can only be seized by warships or military aircraft, or other ships or aircraft clearly marked and identifiable as being on government service and authorized to that effect, as provided in article 107 of UNCLOS.

Although article 107 of the 1982 Convention is worded as an option that States may exercise, rather than as an obligation incumbent upon them, Wolfrum considers that States are under an obligation to cooperate in the repression of piracy according to Article 100. Furthermore, the author emphasizes “piracy relies for its logistical basis and for the sale of goods on cooperation between a coastal State or at least the relevant authorities. Such cooperation between a coastal State and pirates is in violation of Article 100 of the UNCLOS. Similarly, a ship entitled to intervene in cases of piracy may not, without good justification, turn a blind eye to such acts.”³²

Even if the prosecution of alleged pirates is founded in the principle of universality, States have far not been induced to take forceful action against pirates.³³

³¹ Shaw, Malcom; *op cit.*

³² Wolfrum, Rüdiger; *op cit.*

³³ Ibid.



Several resolutions have been approved by the UNSC regarding the critical situation in Somalia, establishing one additional framework for States cooperating with the Somali Federal Transitional Government to combat piracy and armed robbery against ships.

UNSC Res. 1816 (2008), approved on 2 June 2009, regarding counter-piracy operations in the Gulf of Aden, called all States to “cooperate in determining jurisdiction, and in the investigation and prosecution of persons responsible for acts of piracy and armed robbery at sea off the coast of Somalia, consistent with applicable international law”. More recently, UNSC Res 1918 (2010), approved on 27 April 2010, still noted with concern that “the domestic law of a number of States lack provisions, criminalizing piracy and/or procedural provisions for effective criminal prosecution of suspected pirates”

The European Union, for instance, has adopted several bilateral agreements with countries in the region - Indian Ocean and Horn of Africa - in order to tackle specific issues regarding the implementation of the universal jurisdiction principle, in the context of its first naval operation (counter-piracy) – EUNAVFOR – Operation Atalanta.³⁴

Prosecution of suspects of piracy by special or common courts or chambers, fight against impunity, human rights, lack of judicial expertise and means, imprisonment structures according to international standards and repatriation of pirates, such other elements and constraints related with counter-piracy operations have been reported by the UN Secretary-General to the Security Council, as requested.³⁵ Several scenarios are being considered by the United Nations, Specialized Agencies and member States in order to define what would be the best judicial mechanism and framework to tackle the above mentioned judicial challenges and difficulties.

³⁴ www.eunavfor.eu

³⁵ UNCS Res. 1918 (2010); 27 April 2010.



The UN Secretary General has therefore presented one specific report to the Security Council on possible options to further the aim of the prosecution and imprisoning persons responsible for acts of piracy and armed robbery at sea³⁶ off the coast of Somalia.

This report includes several options for creating special domestic chambers possibly with international components, a regional tribunal or an international tribunal and corresponding imprisonment arrangements. It takes into account the work of the Contact Group on Piracy off the Coast of Somalia,³⁷ the existing practice in establishing international and mixed tribunals, and the time and resources necessary to achieve consideration and sustain substantive results.³⁸

The United Nations Secretary-General has identified, on July 2010, in its report seven options for the Security Council to consider³⁹, as follows:

³⁶ “Armed robbery against ships” is defined in the Code of Practice for the Investigation of Crimes of Piracy and Armed Robbery Against Ships (International Maritime Organization Resolution A.1025 (26), Annex, paragraph 2.2), as follows:

“Armed robbery against ships” means any of the following acts:

- a) Any illegal act of violence or detention or any act of depredation, or threat thereof, other than an act of piracy, committed for private ends and directed against a ship or against persons or property on board such a ship, within a State’s internal waters, archipelagic waters and territorial sea;
- b) Any act of inciting or of intentionally facilitating an act as described above.”

³⁷ The Contact Group on Piracy off the coast of Somalia is composed by 49 States and 7 intergovernmental organizations (African Union, European Union, IMO, INTERPOL, League of Arab States, NATO, and the United Nations Secretariat), in addition to shipping industry groups as observers. The Contact Group on Piracy was established in 14 January 2009, following the adoption of UNSC Res 1851 (2008) which has called for “an international cooperation mechanism to act as a common point of contact between and among States, regional and international organizations on all aspects of combating piracy and armed robbery at sea off Somalia’s coast”. The Contact Group, considered an important platform to coordinate activities across range of actors present in the region, held its fifth plenary session on 28 January and reiterated its pledge to continue its counter-piracy activities.

³⁸ UNSC – S/2010/394; 26 July 2010.

³⁹ UNSC – S/2010/394; 26 July 2010.



Option 1: The enhancement of the United Nations assistance to build capacity of regional States to prosecute and imprison persons responsible for acts of piracy and armed robbery at sea off the coast of Somalia.

Option 2: The establishment of a Somali court sitting in the territory of a third State in the region either with or without United Nations participation.

Option 3: The establishment of a special chamber within the national jurisdiction of a State or States in the region, without United Nations participation.

Option 4: The establishment of a special chamber within the national jurisdiction of a State or States in the region, with United Nations participation.

Option 5: The establishment of a regional tribunal on the basis of a multilateral agreement among States with United Nations participation.

Option 6: The establishment of an international tribunal on the basis of an agreement between a State in the region and the United Nations.

Option 7: The establishment of an international tribunal by Security Council resolution under Chapter VII of the Charter of the United Nations.

International Criminal Law is a relatively new area of Law. Traditionally and in general, the State has exercised jurisdiction over the definition and prosecution of crimes committed on its territory and/or by its subjects/citizens. Piracy has been an important exception, in that for hundreds of years it has been recognized as a crime for which all States could exercise jurisdiction, regardless of where the crime of piracy was committed and the nationality of the pirates.⁴⁰ Nowadays the international community, mainly through the UNSC is about to adopt measures

⁴⁰ Armstrong, David et al.; “International Law and International Relations”, Cambridge University Press, 2007.



that can improve the application of the universal jurisdiction principle for the crime of piracy, in order to avoid impunity and improve maritime security.

The international community faces additional challenges in its attempts to combat maritime piracy. Matison underlines two of them: i) the underreporting of attacks due to the high cost of reporting on the vessel owner and operator and; (ii) the debate over whether to arm commercial vessels so that they are better able to protect themselves in the event of a piratical attack.⁴¹

2.4 International Maritime Organisation – Between multilateral diplomacy and technical cooperation?

As previously mentioned, the IMO - the United Nations specialized agency for maritime affairs - has been very committed in defining, with all relevant actors, mechanisms to prevent and combat piracy and armed robbery against ships. Indeed, article 1 of the UN Charter includes, among the principles of the UN, the maintenance of the international peace and security.

Several initiatives have been developed by the IMO, some of them of high relevance, including in the particular context of Somalia:

- Collection of national legislation on piracy from all member States⁴²
- Recommendations to Governments for preventing and suppressing piracy and armed robbery ships⁴³

⁴¹ Matison, Katie; *op cit.*

⁴² IMO Circular letter No. 2933 to all member States (23 December 2008).

⁴³ IMO Resolution A.1333 (26 June 2009) – Recommendations to Governments for preventing and suppressing piracy and armed against ships, including: Self protection; Non-arming of seafarers; Use of unarmed security personnel; Use of privately contracted armed security personnel; Military teams or law enforcement officers duly authorized by Government; Action plans; Criminal jurisdiction; Coastal States situated in areas affected by piracy and armed robbery; Statistics, flow diagrams and other relevant information; “Phases” related to voyages in piracy and armed robbery threat areas; Ship’s message formats; Format for reporting to IMO through maritime administration or International Organisations; Draft regional agreement on cooperation in preventing and suppressing acts of piracy and armed robbery against ships.



- Guidance to ship owners and ship operators, shipmasters and crews on preventing and suppressing acts of piracy and armed robbery against ships⁴⁴
- Piracy and armed robbery against ships in waters off the coast of Somalia⁴⁵
- Code of Practice of crimes of piracy and armed robbery against ships⁴⁶

The implementation of an anti-piracy long-term project is being implemented by IMO since 1998, including evaluation and assessment missions, organization of regional seminars and workshops attended by Government representatives from Countries in piracy-infested areas of the world, in order to promote regional cooperation on counter-piracy.

⁴⁴ IMO MSC 1/Circular 1334 (23) (23 June 2009) – Guidance to ship owners and ship operators, shipmasters and crews on preventing and suppressing acts of piracy and armed robbery against ships, including provisions on: The pirates'/robbers' objective; Reducing the temptation for piracy and armed robbery; Cash in the ship's safe; Discretion by masters and members of the crew; Smaller crews; Recommended practices; The pre-piracy/armed robbery phase; Routing and delaying anchoring; Practice the implementation of the ship security plan; Precautions at anchor or in port; Watch-keeping and vigilance; Communications procedures; Radio watch-keeping and responses; Standard ship's message formats; Lighting; Secure areas; Alarms; Use of distress flares; Use of defensive measures; Use of passive and non-lethal devices; Firearms; Non-arming of seafarers; Use of unarmed security personnel; Use of privately contracted armed security personnel; Military means or law enforcement officers duly authorized by the Government; The phases of suspected or attempted piracy/armed robbery attack; Private/armed robbery start to board a ship; Pirates/armed robbers have succeeded in entering ship; The pirates/armed robbers begin to gain control and take one or more of the ship's crew into their custody; The pirates/armed robbers have stolen property/money; The pirates/armed robbers start to disembark from the ship; Action after on attack and reporting incidents; On leaving piracy/armed robbery high risk/high probability areas; Post-incident follow-up.

⁴⁵ IMO Resolution A.1026 (26) – 3 December 2009: Piracy and armed robbery against ships in waters off the coast of Somalia: The IMO Assembly has condemned deplored all acts of piracy and armed robbery against ships irrespective of where such acts have occurred or may occur. Moreover, the IMO has appealed to all parties which may be able to assist to take action, within the provisions of international law, to ensure that: all acts or attempted acts of piracy or armed robbery against ships are terminated forthwith and any plans for committing such acts are abandoned; and any hijacked ships, seafarers serving in them and any other persons on board are immediately and unconditionally released and that no harm is caused to them. It has also urged Governments to increase their efforts to prevent and suppress, within the provisions of international law, acts of piracy and armed robbery against ships. Finally IMO has advised the Security Council to continue consenting warships or military aircraft, or other ships or aircraft clearly marked and indentified as being on government service, to enter in Somali territorial sea to engage any operations against pirates or suspected pirates and armed robbers.

⁴⁶ IMO Resolution A.1025 (26) – 18 January 2010 – Code of Practice for the investigation of crimes of piracy and armed robbery against ships.



The success of the regional anti-piracy operation in the Straits of Malacca and Singapore is considered to be a good example how regional cooperation is a key element to prevent and combat piracy - the Regional Cooperation Agreement on Combating Piracy and Armed Robbery against ships in Asia (RECAAP), concluded in November 2004 by 16 countries in Asia, including the establishment of the RECAAP Information Sharing Centre (ISC).

In addition, IMO has organized a sub-regional meeting on maritime security, piracy and armed robbery against ships for Western Indian Ocean, Gulf of Aden and Red Sea States, held in Djibouti from 26 to 29 January 2009. The Code of Conduct concerning the repression of piracy and armed robbery against ships in the Western Indian Ocean and the Gulf of Aden (the Djibouti Code of Conduct) was adopted.⁴⁷ Capacity building activities at implementing the provisions of the Code were supported by the Governments of the Netherlands, Norway and the Republic of Korea.

The Djibouti Code of Conduct concerning the Repression of Piracy and Armed Robbery against Ships in the Western Indian Ocean and the Gulf of Aden includes specific mechanisms to share and report information through a system of national focal points and information centres.⁴⁸

To assist in anti-piracy measures, IMO issues reports on piracy and armed robbery against ships submitted by member Governments and International Organisations. These documents normally include names and descriptions of ships attacked, position and time of attack, consequences to the crew, ship or cargo and actions taken by the crew and coastal authorities.⁴⁹

⁴⁷ The Djibouti Code has 15 signatories: Comoros, Djibouti, Egypt, Ethiopia, Jordan, Kenya, Madagascar, Maldives, Mauritius, Saudi Arabia, Seychelles, Somalia, the Sudan, United Republic of Tanzania and Yemen.

⁴⁸ <http://www.imo.org/OurWork/Security/PiracyArmedRobbery/Pages/Default.aspx>

⁴⁹ <http://www.imo.org/OurWork/Security/PiracyArmedRobbery/Pages/Default.aspx>



Moreover, on December 7, 2001, the *Comité Maritime International* along with representatives of the working group of other agencies published a draft of the Model National Law on Acts of Piracy and Maritime Violence (“Model law”) – another relevant issue regarding piracy because many States still did not adopt specific domestic legislation.

The recommended model does not specify penalties that should be imposed upon the commission of piracy, being its principal focus the content of legislation rather than the *form* of legislation. Furthermore, the Model Law contains a definition of the crime of piracy, jurisdiction for the enacting State to prosecute perpetrators, extradition standards, and a process for reporting piracy incidents. Accordingly, States have been encouraged to adopt national legislation on piracy and eventually ratify the concepts proposed by the working group.⁵⁰

Some acts of piracy may also constitute offences under other international legal instruments, in particular the following:

- The 1988 Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation⁵¹ (SUA Convention) adopted by the International Maritime Organization in Rome, on 10 March 1988 and entered into force on 1 March 1992.⁵²

⁵⁰ Matison, Katie; *op cit*.

⁵¹ Some States have taken the view that the SUA Convention was intended to apply to acts of terrorism only. The Convention outlines several crimes against the safety of maritime navigation in Articles 1-11. These crimes include seizing control of vessel by force, acts of violence against people onboard the vessels, destruction of a vessel or maritime navigational facilities, placing a device or substance that may destroy a vessel onboard, and conspiracy to commit any of the enumerated crimes listed in Article 3. The remaining articles discuss jurisdiction requirements and the States Parties’ duty to pass domestic laws outlawing the crimes in Article 3 and imposing appropriate sanctions. SUA was, in part, inspired by the hijacking of the ACHILLE LAURO. The rationale behind this UN terrorism convention is simple. If all the states in a region are parties to the convention, persons who committed an offense under that convention will have no place of refuge. If they enter the territory of any state party to the convention, they will be taken into custody, and they will either be prosecuted in that state or extradited to another state party. *In The 1988 SUA Convention and 2005 SUA Protocol: Tools to Combat Piracy, Armed Robbery, and Maritime Terrorism*, Robert C. Beckam, Lloyd’s MIU Handbook of Maritime Security, CRS Press 2009.

⁵² Beckam, Robert; *op cit*.



- The 1979 International Convention against the Taking of Hostages.⁵³
- The 2000 United Nations Convention against Organized Crime aims to promote cooperation to prevent and combat organized crime more effectively.⁵⁴ This Convention focuses mainly on the profiteering of piracy attacks.⁵⁵
- 2005 SUA Protocol - After the 9/11 attacks, the IMO adopted Assembly Resolution A.924 (22) calling for a review of the existing measures and procedures to prevent acts of terrorism that threaten the security of passengers and crews and the safety of ships.⁵⁶

The number of attacks off the coast of Somalia has steadily increased since 1991. The number of attacked vessels in 2008 was 111 and in 2009 it has increased to 217. According to the ICC International Maritime Bureau, 30 attacks were reported in the period from 1 January to 31 March 2010.⁵⁷

According to the United Nations Office on Drugs and Crime (UNODC), pirates operate from around 70 camps on the Somali coast, and have become increasingly sophisticated, indicating greater planning, financing and organization. Normally “mother ships” tow smaller and faster vessels to the point of attack, providing fuel, water, food, equipment and arms, such as Global Positioning Satellite (GPS) and heavy weapons, including rocket-propelled grenades.

⁵³ United Nations General Assembly Resolution 55/25.

⁵⁴ “Over the past few years, well organized criminal cartels have begun sponsoring and funding the burgeoning business of piracy attacks. Piracy has involved into the equivalent of racketeering or a Mafia-like industry. It is reputed that pirates creating havoc in the Gulf of Aden are now receiving intelligence on shipping routes, cargo, crews, and vessels schematics from accomplices in London via satellite telephone. This advance planning now aided by sophisticated communications technology transforms piracy attacks into the equivalent of military operations. Moreover, technology gives pirates an enormous advantage and adds an additional transnational element to their attacks.” In Beckam, Robert; *op cit*.

⁵⁵ United Nations General Assembly Resolution 34/146.

⁵⁶ “As of 31 March 2008, only two States have ratified the 2005 SUA Protocol. It seems clear that the international community is very reluctant to create new exceptions to the principal of flag State jurisdiction on the high seas.” In Beckam, Robert; *op cit*.

⁵⁷ Piracy and Armed Robbery against Ships, report: www.icc-ccs.org



Even though the number of attacks is high, increased counter-piracy naval operations in the Gulf of Aden have effectively reduced the success rate of number of the attacks (in 2007, 63%; in 2008, 34%; and in 2009, 21% of the attacks were successful). Presently, the large majority of counter-piracy means available are provided by the EU, NATO and by the Coalition Maritime Forces.⁵⁸

However, as reported by the UN Secretary-General to the Security Council, although the number of patrolling naval States involved is high, the number of ships on patrol off the vast coast of Somalia at any one time may not be more than 10, namely due need to refuel and suppliers of warships involved in the operations. Effective coordination of international efforts at sea and land remains critical. Land-based efforts should be prioritized to effectively address the root causes of piracy.⁵⁹

Air support, based in the Seychelles, Kenya and Djibouti, is critical for the success of counter-piracy operations in the region, allowing the identification of pirates and potential attacks, directing naval ships to interdict, and advising merchant ships to alter course.⁶⁰

3. Counter-piracy and the new Strategic Concept of NATO

Heads of State and government of the North Atlantic Treaty Organization just approved in Lisbon the new Strategic Concept for the Defence and Security of the Euro-Atlantic area⁶¹. It was based on the report *NATO 2010: Assured Security*;

⁵⁸ UNSC – S/2010/394; 26 July 2010.

⁵⁹ Report of the United Nations Secretary-General on Somalia (11 May 2010).

⁶⁰ UNSC – S/2010/394; 26 July 2010.

⁶¹ “Strategic Concept For the Defence and Security of The Members of the North Atlantic Treaty Organisation”, adopted in Lisbon, on November 19, 2010 – “Active Engagement, Modern Defence”: www.nato.int/strategic-concept/index.html



Dynamic Engagement prepared by a group of experts, chaired by the former U.S. Secretary of State, Madeleine Albright.

In the 1990's, previous strategic concepts were approved in result of the end of the Cold War (in November 1991 and in April 1999); however, further developments in the international security environment and new threats required the reform of NATO and the definition of priorities for the next decade.⁶²

In order to safeguard the security of NATO's territory and population, facing new threats in the 21st century, the Alliance has committed to fulfil three major tasks in the coming years:

- a) Collective defence – as stated in Article 5 of the Washington Treaty, NATO has its commitment to “deter and defend against any threat of aggression, and against emerging security challenges where they threaten the fundamental security of individual Allies or the Alliance as a whole”.
- b) Crisis management – The use of NATO's political and military capabilities before, during and after conflicts, where possible and when necessary, namely if it affects the Euro-Atlantic security, working with other international actors.
- c) Cooperative Security – Establishment of partnerships with relevant countries and other international organizations, in particular to those who share common values, to improve international security.

Furthermore, the Lisbon Strategic Concept describes the new international security environment, identifying new threats to the Euro-Atlantic area, and not ignoring (low) risk of conventional attacks. According to the new strategic

⁶² According to NATO, “the Strategic Concept is an official document that outlines NATO's enduring purpose and nature and its fundamental security tasks. It also identifies the central features of the new security environment, specifies the elements of the Alliance's approach to security and provides guidelines for the further adaptation of its military forces”: www.nato.int/strategic-concept/index.html



concept, the security, freedom and prosperity of NATO Countries can also be compromised if international trade and energy security are not safeguarded - dependent on communication, transport and transit routes.

Indeed, the seas and the oceans are not merely a huge habitat and economic area, not only the route of transport that keeps the world's economy alive and not just the supplier of food, raw materials, and energy; they also constitute a large gateway for threats of all kinds, as underlined by Hoch.⁶³

Maritime piracy endangers sea lines communications, interferes with freedom of navigation and the free flow of commerce, and undermines regional stability.⁶⁴ For centuries the main focus of nations had been to defend either against symmetrical naval forces from hostile States or against profit-oriented piracy.⁶⁵ Unlike terrorism, piracy is mainly motivated by pecuniary gain⁶⁶ - although it is nowadays responsible for incidents of injury, kidnapping and loss of life.

Piracy in the Indian and Pacific Ocean costs shipping companies between USD 13-15 billion annually, according to Margaret Ryan (Captain Counts the Cost of Piracy, BBC News, February 2, 2006).⁶⁷

Although piracy costs the shipping industry billions of dollars annually, the majority of incidents go unreported. Matison believes the major cause of under-reporting is the enormous cost of maintaining a ship in port during a protracted investigation that may prove futile, the increase in insurance premiums, negative publicity, corrupt investigations and delays in movement of cargo. It has been

⁶³ Hoch, Gottfried; *op cit.*

⁶⁴ Kraska, James; "Developing Piracy Policy for the National Strategy for Maritime Security", in "Legal challenges in maritime security", Center for oceans law and policy, 2008.

⁶⁵ Hoch, Gottfried; *op cit.*

⁶⁶ Kraska, James; *op cit.*

⁶⁷ Ibid.



estimated it may cost vessel owners in excess of \$25,000 per day to report an attack.⁶⁸

In result of this situation, the IMO has adopted a Code of Practice for the Investigation of Crimes of Piracy and Armed Robbery Against Ships – Resolution A.922 (22), on November 29, 2001, focused on the efficiency of investigations.⁶⁹

The effects of piracy can be corrosive on social capital and economic development, reducing the incentives of producers and merchants to engage in maritime trade and commerce. In the contemporary era, piracy and armed robbery at sea tend to be concentrated in areas of heavy commercial maritime activity.⁷⁰

Nowadays, there are many proponents advocating arming cargo vessels with weapons to allow the crew to defend themselves. However, several risks and problems concerning this scenario were already identified. Some of them are: potential risks of injury to crew members caught in the cross-fire; the employment of trained personal (private security firms); potential risk of prosecution in foreign jurisdiction seafarers who kill or injure suspected attackers (when self-defence requirements are often different or non-existent in other jurisdictions); importation and use of weapons in foreign ports and in territorial waters.⁷¹

As recently recognized by the heads of State and government of NATO in Portugal, some member States have become considerably exposed to disruption given its increasing dependence on foreign energy suppliers. In terms of volume, the large majority of international trade is made by sea, and some important maritime routes are indeed less secured because of piracy.

⁶⁸ Matison, Katie; *op cit.*

⁶⁹ “IMO Resolution A.922 (22) provides guidance on criminalizing acts of piracy, training investigators, investigative strategy, and dealing with the initial report as well as conducting the actual investigation.” In Matison, Katie; *op cit.*

⁷⁰ Kraska, James; *op cit.*

⁷¹ Matison, Katie; *op cit.*



In the Gulf of Aden several International Organisations and States, such as NATO, the EU, the United States of America (USA), Japan, China, Russia, India, Malaysia, among others, have a military presence, given the real threat caused by pirates.

According to the new strategic framework, the Alliance is committed to “develop the capacity to contribute to energy security, including protection of critical energy security infrastructure and transit areas and lines, cooperation partners, and consultations among Allies on the basis of strategic assessments and contingency planning”.⁷²

NATO has been developing counter-piracy activities in the Gulf of Aden and off the Horn of Africa since 2008, on the request of the UN Secretary-General.⁷³ The Alliance started providing escorts to UN World Food Programme vessels under Operation Allied Provider (October-December 2008) following the adoption of UNSC Resolutions 1814, 1816 and 1838, and in coordination with other international actors, including the EU.⁷⁴ This operation was succeeded by Operation Allied Protector (March-August 2009) and currently Operation Ocean Shield.⁷⁵

⁷² “Strategic Concept For the Defence and Security of The Members of the North Atlantic Treaty Organisation”, adopted in Lisbon, on November 19, 2010 – “Active Engagement, Modern Defence”: www.nato.int/strategic-concept/index.html

⁷³ Currently, NATO’s primary contribution to maritime security threats is Operation Active Endeavor (OAE) which is focused predominately in the Mediterranean Sea and its approaches. OAE represents the first operation in NATO’s history in which Alliance assets have been required in support of Article V operations (Article V of the Washington Treaty States that an armed attack against one or more of the Allies in Europe or North America shall be considered as an attack against all). The operation commenced in October 26, 2001, and was initiated in direct response to the attacks of September 11, 2001. In Snoddon, Robert; “The North Atlantic Treaty Organisation’s Evolving Role in Maritime Security Operations”, Lloyd’s MIU Handbook of Maritime Security, CRS Press 2009.

⁷⁴ Another coordination mechanism is SHADE – Shared Awareness and Deconfliction. This group meets on a monthly base in Bahrain, providing for coordination of activities between maritime industry, NATO, EU, US-led Coalition Maritime Force and individual nations with assets in the region, which have included Australia, Bahrain, China, Egypt, India, Jordan, Pakistan, Saudi Arabia, Seychelles, Singapore, South Korea, Ukraine and Yemen.

⁷⁵ www.nato.int



Operation Ocean Shield is principally focused on at-sea counter-piracy operations in the Gulf of Aden and off the Horn of Africa. It was approved by the North Atlantic Council on 17 August 2009 and has been extended until the end of 2012. In addition, the Alliance is currently exploring ways in which it could offer training, to regional countries that request it, assistance in developing their own capacity to combat piracy activities.⁷⁶

According to Snoddon, NATO is also moving toward establishing a more robust operation in the Atlantic, and in particular off the west coast of Africa - Gulf of Guinea (Atlantic Ocean) - in a bid to stem the prospect of an energy supply crisis as a result of attacks on tankers and offshore platforms, a concern that is exacerbated by weak law enforcement and limited maritime patrolling and interdiction capabilities of countries in the region. The Gulf of Guinea is a significant and increasing source of petroleum (specifically crude and liquefied gas) for the USA and Europe, with oil exports providing vital revenue for producers in the region.⁷⁷

The new Strategic Concept recognizes moreover the importance of political dialogue and practical cooperation with other partners towards the reinforcement of international security, based on reciprocity and common values – such as human rights and individual liberty, democracy, rule of law. NATO is therefore interested in enhancing partnerships with nations and other International Organisations, in different formats, on security issues of common concern.

⁷⁶ NATO Operation Allied Protector (March-August 2009) helped to deter, defend against and disrupt pirate activities in the Gulf of Aden and off the Horn of Africa. NATO Allied Operation Allied Provider (October-December 2008) was responsible for naval escorts to World Food Program (WFP) vessels and, more generally, patrolled the waters around Somalia. Alliance presence also helped to deter acts of piracy that threatened the region. NATO ships could use force pursuant to the authorized Rules of Engagement and in compliance with relevant international and national law (www.nato.int).

⁷⁷ Snoddon, Robert; *op cit*.



The UN and the EU⁷⁸ have been considered the primary international partners with which the Alliance is committed to work more closely.

Indeed, NATO recognized the importance of deepening political dialogue and practical cooperation with the UN. In order to increase the effects of the existent partnership regarding world security, as set out in the 2008 UN-NATO Declaration, three steps were identified by the heads of State and government in Lisbon:

- Enhanced liaison between the two Headquarters;
- More regular political consultation; and
- Enhanced practical cooperation in managing crises where both organizations are engaged.

The entry into force of the EU Lisbon Treaty in December 2009 provides a framework for the development of the European Security and Defence Policy (ESDP), which is seen by NATO as a major step towards further cooperation and the definition of a strategic partnership. Not surprisingly, the EU⁷⁹ is recognized

⁷⁸ “21 member States of NATO are members of the European Union. Turkey and Iceland are prospective EU members, and Norway, aside from being part of the European Economic Area and signatory of Schengen agreement, participates in a number of EU agencies, notably the European Defence Agency.” In Vasconcelos, Álvaro, “Introduction: Why an EU perspective on the NATO strategic concept matters”, in “What do Europeans want from NATO?”, European Union Institute for Security Studies, Report No. 8, November 2010.

⁷⁹ In December 2008, in the framework of the Common Security and Defence Policy (CSDP) and in accordance with the United Nations Security Council resolutions, the Council of European Union decided to establish Operation EUNAVFOR – Atalanta, the first EU naval operation. The mandate of EU NAVFOR has been extended until December 2012, and it consists of: a) providing protection for vessels chartered by the United Nations World Food Program; b) providing protection for merchant vessels; c) employing the necessary measures, including the use of force, to deter, prevent and intervene in order to bring to an end act of piracy and armed robbery which may be committed in the areas where they are present. More than twenty vessels and aircrafts take part in EU NAVFOR – more than 1800 military. Since August 2009, Norway is the first non-EU country to participate in ATALANTA. Croatia, Montenegro and Ukraine also participate in the operation. The EU Military personnel in the operation can arrest, detain and transfer persons who are suspected. The suspects can be prosecuted by an EU member State or by Kenya (agreement signed between the EU and Kenya, 6 March 2009). Similar agreements/arrangements with other countries in the region have been developed. The EU NAVFOR operation is in permanent liaison with: US-led coalition CTF-151; NATO; Russia; Japan; China; India; Malaysia (www.eunavfor.eu). Operation EU NAVFOR also includes coordination of vessel traffic in the region (www.mschoa.eu).



by NATO as a “unique and essential partner”⁸⁰, as a result of sharing a majority of members and common values, essential to the overall security of the Euro-Atlantic area.

Independently of the factors that have not allowed further developments of a stronger partnership EU-NATO, the new EU institutional framework set by the new EU Treaty and the new Strategic Concept of the Alliance call for further and concrete steps in terms of political dialogue, operational planning and coordination. NATO thus recognizes that both organisations “can and should play complementary and mutually reinforcing roles in supporting international peace and security”⁸¹.

In this context, it is underlined by NATO the importance of minimize duplication and maximize cost-effectiveness. According to the new Strategic Concept, the Alliance is committed to:⁸²

- Fully strengthen the strategic partnership between NATO and the EU;
- Enhance practical cooperation operations (including planning coordination and mutual support in the field);
- Broaden political consultations;
- Cooperate more fully in capability development.

Finally, a stronger platform of mutual interest between NATO and Russia has been achieved in Lisbon by the heads of State and Government of the Alliance, allowing further cooperation in several areas, including missile defence, counter-

⁸⁰ “Strategic Concept For the Defence and Security of The Members of the North Atlantic Treaty Organisation”, adopted in Lisbon, on November 19, 2010 – “Active Engagement, Modern Defence”: www.nato.int/strategic-concept/index.html

⁸¹ Ibid.

⁸² Ibid.



terrorism, counter-narcotics, counter-piracy and the promotion of wider international security.⁸³

4. Conclusions

The definition of piracy provided by UNCLOS limits enormously efforts to tackle this serious threat. Requisites and expressions such as “illegal acts” and “private ends” should be reassessed by the Parties of the 1982 Convention. The World has changed dramatically and modern piracy is nowadays interrelated with other security threats, such as terrorism, slavery, arms and narcotic trafficking. Being considered as an offence to mankind, the international community should take further steps to safeguard core values such as human life, freedom of navigation and communication.

Moreover, the possibility of foreign intervention in territorial waters in the case of humanitarian vessels threaten by piracy should be allowed International Law. Although States remain naturally reluctant to any limitation to their sovereign power, negative effects of modern piracy have to be tackled, without prejudice of preserving other important provisions regarding territorial waters and the Flag State principle. Humanitarian aid should be protected by the international community, including when it is provided by sea. It looks therefore unreasonable not to accept foreign intervention to protect humanitarian vessels against piracy or armed robbery for the benefit of human lives, as a rule of International Maritime Law.

In the present circumstances, the establishment of a special international tribunal or chamber looks inevitable to prosecute suspects of piracy, for a minimum period of 5 years (extendable), supported by the United Nations, and placed in Africa, where the situation remains critical. Once Nations recognize piracy as an international crime, ways of preventing this threat and prosecuting

⁸³ Ibid.



suspects have to be assured. Absence of judicial means and the lack of domestic legislation cannot be an “excuse” to impunity, to seafarers’ lives, energy supply and maritime trade disruption.

Even in a period of economic crisis, international assistance to democratic governance programs in developing countries is essential, namely where public authority is fragile. A comprehensive approach is crucial to tackle piracy, such as other security threats. Like in the case of Somalia, military means and naval operations carried out by States and International Organisations are essential. However, such a complex phenomenon requests further cooperation (international and regional) towards most affected Nations, in order to help them to build their own capacities in areas such as Justice, Security and Defence. Ultimately it will be a contribution for international security and to avoid negative effects on world economy.

Counter-piracy operations are expensive and tax payers are much more concerned with unemployment, pensions, health and education. In addition, costs of stop shipping and of being subject to judicial investigations nowadays are high, leading to numerous unreported attacks. Although naval operations managed to reduce the success rate of attacks in the Gulf of Aden, the international community should define effective judicial mechanisms of investigation and prosecution of suspects.

The new Strategic Concept of NATO clearly recognizes the importance of preserving energetic security and the safety of international maritime trade routes. Without referring expressly “piracy” as a danger or menace, the new strategic framework shows NATO’s intention of safeguarding the values and strategic assets that can be threaten by modern piracy, among other threats. For instance, the Gulf of Aden (Indian Ocean) and the Gulf of Guinea (Atlantic Ocean) in Africa are currently areas of major concern regarding strategic interests such as international trade and energy supply of the Euro-Atlantic area.



While NATO remains a regional and military alliance in its essence, the interest for stronger partnerships is increasing, for instance with the UN, the EU and Russia (including on counter-piracy). On the basis of the new strategic concept, the Alliance appears to be in favour of comprehensive and sustainable approaches to conflict resolution and prevention.

Counter-piracy operations of NATO and EU in the Gulf of Aden have been extended until 2012. According to the new Strategic Concept of the Alliance, political dialogue is likely to be improved with the EU, in the framework of the Lisbon Treaty, which could eventually allow planning of joint operations, with military and civil components.

Further political steps will depend on how the EU and NATO will be able to manage internal blockage vis-à-vis any security agreements between both organisations.⁸⁴ Hence, if politics allows it, current operational experience on counter-piracy in the Gulf of Aden is a valuable asset to build an effective strategic partnership between the two Organisations.

⁸⁴ The political relationship between the two organisations is far from satisfactory. Once France rejoined NATO's integrated military command, it became obvious that the problem was not French but Turkish in essence. Turkey refuses to recognize Cyprus which is not a member of NATO but which is a member of the European Union, and is blocking any security agreements and any possibility of cooperation between the EU and NATO. In Gnesotto, Nicole, "The EU and NATO: beyond appearances"; in "What do Europeans want from NATO?", European Union Institute for Security Affairs, Report no 8, November 2008.