

**Asser 50 Years - Public International Law Symposium
"International Legal Aspects of Countering Piracy"**

T.M.C. Asser Instituut, The Hague, 15 October 2015

In celebration of the 50 year anniversary of the T.M.C. Asser Instituut and this year's establishment of the Antonio Cassese Initiative Foundation in the Netherlands, the T.M.C. Asser Instituut and the Antonio Cassese Initiative co-organised a conference on the 'International Legal Aspects of Countering Piracy'. The symposium was held at the T.M.C. Asser Instituut in The Hague on 15 October 2015, and addressed the most important international legal questions regarding the countering of maritime piracy by repressive means. Prof. Dr Janne Nijman, Academic Director of the T.M.C. Asser Instituut, provided a word of welcome, before Dr Christophe Paulussen, Senior Researcher at the T.M.C. Asser Instituut, and Ms Iris van der Heijden, of the Antonio Cassese Initiative, opened the conference by introducing the central themes to be discussed.

In his keynote lecture entitled 'Now That We Have Stopped Talking about Somali Piracy - Legal Lessons for Oceans Governance', Commodore Neil Brown of the United Kingdom Royal Navy highlighted the strategic lessons from the efforts of States to counter piracy. He suggested that by focusing on relatively tactical difficulties of prosecuting pirates in Europe we were in danger of overlooking the success in the repression of piracy, and the strategic lessons of that success. He emphasised the international character of Naval counter piracy missions and the extraordinary co-operation between US-led forces based in Bahrain (which included states from the Americas to Asia), NATO and the EU, and independent actors such as Russia and China. He stressed that the co-operation of regional states such as Kenya and Tanzania, Mauritius and the Seychelles (where the vast majority of over 1200 Somali pirates captured by Western Navies had been accepted for criminal prosecution) was even more important. Such co-operation showed how legal complexity can be managed where state interests were engaged, because the legal framework of the oceans lends itself to international and interagency co-operation. This was the foundation for successful counter-piracy operations and the comprehensive capacity building championed by the UN Contact Group on Piracy, the UN Organisation for Drugs and Crime and the International Maritime Organisation in particular.

Cdre Brown noted that every successful counter piracy mission had relied on not just warships, surveillance and communications capability, but the United Nations Convention on the Law of the Sea (UNCLOS), UN Security Council Resolutions, Formal agreements with the Transitional Federal Government in Mogadishu, Legislation and Law Enforcement capacity in every capturing and receiving state, and of course prison transfer agreements. He described the geopolitical structure of the oceans and the balance of the rights of coastal and Flag states, but highlighted the lack of capacity of most states to exercise their rights and meet their obligations. While such weakness may have been there from its inception, it had been exacerbated by the end of the Cold War and reduction in Naval capacity, the acceleration in the creation of independent states, and the explosion of a global trade. Tremendous progress had been made, and the decision to build regional capacity rather than supplant it with an international court had been vindicated, but Somali Piracy was only in abeyance, and increasing lawlessness at sea in other regions across the Tropics, the prevalence of IUU fishing, and even illegal migration in the Mediterranean showed the widespread effects of poor oceans governance.

Cdre Brown welcomed the focus of the conference but stressed that maritime security is not yet a fixture on the international agenda. Because of Somali Piracy, National strategies had

been instigated and steps to counter piracy were now being adapted to tackle narcotics traffickers and migrant smugglers, but more was needed to provide oceans governance and harness its contribution to stabilisation and prosperity. The Indian Ocean Forum on Maritime Crime promised to make a strategic connection but state, naval, law enforcement and industry co-operation were vital. Progress had been made in every area but the strategic utility of the international capability developed and regional gaps that remain needed to be addressed. Effective ocean governance is in the interest of all of us.

Session One: Piracy and the Rise of Non-State Actors

The first session on 'Piracy and the rise of non-State actors', moderated by Mr Onur Güven (T.M.C. Asser Instituut), commenced with a presentation by Mr Peter Cook (Chief Executive Officer, Security Association for the Maritime Industry (SAMI)) on the growth of private security service providers in the maritime industry. Mr Cook began by giving a short introduction of SAMI as an international, independent, impartial association, which is integrated into maritime industry. After a short history of the evolution of security at sea, the current situation was discussed. Whereas the European navies have reduced in size by 33% overall, the world's commercial fleet has more than doubled in size since 2001 as a result of the increase in global demand, induced by a growing world population and the rise in the middle class/consumerist category. Mr Cook went on to describe the soft law measures taken by the commercial shipping industry to be able to act effectively and responsibly at sea, including BIMCO's GUARDCON, the MSC circulars, and the 100 series Rules for the Use of Force (RUF). Additionally, Mr Cook discussed ISO standard 28007, which he described as a very good and successful standard, although it needs to be built upon. However, it was a very good starting point, and is the quickest ISO standard to be produced, with now more than half of the industry using it. Mr Cook concluded that there are more security guards at sea now than there ever have been and it is a growing phenomenon that is here to stay.

The second speaker of the session was Mr Peter Post, Transport Adviser of the Ministry of Foreign Affairs of the Netherlands, discussing the Netherlands' position regarding the use of private armed guards against pirates. Despite the improvements made in the government's protection offered to ships via Vessel Protection Detachments (VPDs), Dutch ship owners were still not pleased with the level of protection. As a result, ship owners and trade unions have advocated for the deployment of private armed guards. Although initially denying this request, in April 2013 the Cabinet made a political U-turn, and stated that if the required level of protection cannot be guaranteed by the government, then the use of private armed guards may be allowed. However, in that case, the legislation must be changed. Working groups of Ministries drafted a preliminary policy paper on general and specific concepts. It was concluded that the State's monopoly on the use of force includes also the power to delegate the legitimate use of force to private parties. The State has to determine who is authorised to use force and under what conditions, and the protection offered by the State cannot be refused. This would mean that the use of private armed guards would only be in the case where State protection is not available, and if available, ship owners must accept their protection. However, it is recognised that some exceptions to this general rule may be necessary. More issues that have to be built upon in future policy is the licensing of companies entitled to provide armed security services, the division of responsibilities between the Master of the ship and the private security team, and the role of security guards with regards to acting in self-defence, reporting and supervision. Currently, the Netherlands is still in limbo and has so far not been able to agree on a solution.

The final presentation of session one was given by Mr Gert-Jan van Hegelsom, Head of the Legal Affairs Division of the European External Action Service, on 'Atalanta and Non-State Actors'. Mr van Hegelsom began by discussing the EU Naval Force's relationship with non-State actors (NSA). He stated that Atalanta's relations with third parties are detailed in the Decision establishing the mission (latest amendment OJ L 89, 27.3.2012, p.69). Formally there is no link or relations between Atalanta and private security companies. However, he added that NSAs are not limited to these private security companies. It includes major stakeholders which provide guidance and

operate on the ground. He highlighted the role of the Contact Group on Piracy off the Coast of Somalia (CGPCS) and its various working groups. The core of NSAs that were very influential in the fight against piracy was the shipping industry and the provision of their best management practice (BMP4), which was a product of cooperative work between operational actors, governments and the industry. The important factor is that it was created by the industry for the industry. Atalanta has itself been very open from the beginning on liaising closely with the shipping industry. The website provides for public access generally and, more specifically, registration by which the shipping industry can notify their wish to be identifiable in the area, and secondly, the possibility to report incidences at sea to forewarn other ships. In addition to Atalanta, the EU's comprehensive approach comprises nowadays a European Training Mission to give training to Somali military personnel contributing to the operations by the AU AMISOM mission as well as a capacity building mission (EUCAP Nestor) to contribute through local capacity building to Somali maritime law enforcement. Mr van Hegelsom believed that this comprehensive approach is the key to success as it is engaging with the Somali government and with local people who are then able to give basic training when international presence is no longer necessary in the area. Mr van Hegelsom contemplated about the future by asking the question of what further work Atalanta can do in terms of capacity building of States in the region in order to manage the maritime law enforcement themselves. He concluded that the change from international to regional ownership of the enforcement off the coast of Somalia is an important sign that the region is taking its responsibility seriously and is an important factor at this time. He highlighted in particular the succession of the EU by the Seychelles as chair of the CGPCS as an example of the transition.

Session 2: Legal frameworks and soft law in countering piracy

The second session, moderated by Dr Kenneth Manusama of the Vrije Universiteit Amsterdam, addressed the legal frameworks and soft law instruments in countering piracy. The first speaker, Dr Efthymios Papastavridis of the Academy of Athens, gave a presentation entitled 'An Overview of the Applicable Legal Regimes'. His presentation dealt strictly with hard law instruments, and touched upon seven legal regimes that are being applied to countering piracy. He started off by noting that the legal regimes have been affected by the 'Somalia experience', describing it as a turning point in piracy law. Thereafter, he discussed the UNCLOS, which is central in addressing piracy issues. It provides a definition, and, importantly, creates enforcement and adjudicative jurisdiction (though no obligation to prosecute) over piracy issues. The jurisdictional provision has become conflated with provisions in the Suppression of Unlawful Acts Against the Safety of Maritime Navigation Convention, requiring States to prosecute actions of maritime terrorism. Regarding piracy in the territorial waters, however, a legal gap remained. The United Nations Security Council filled this void by adopting a series of resolutions regarding the Somalia situation, even allowing 'hot pursuit' in Somalia's territorial waters. Dr Papastavridis went on to discuss the possible application of human rights law, European Union law and domestic law to piracy issues, before touching upon the secondary rules of international law regarding the attribution of responsibility for international law violations in counterpiracy operations.

The second speaker, Ms Nelleke van Amstel of the Geneva Centre for the Democratic Control of Armed Forces, gave a lecture on 'The Impact of Multi-Stakeholder Standard-Setting on the Legal Framework'. She addressed a number of soft law initiatives, focusing mainly on the (potential) contribution of the International Code of Conduct for Private Security Service Providers (ICoC) to the development of a more human rights-oriented private security service industry. She explained that the ICoC was developed as complementary to domestic legal systems and aimed at States that have not effectively legislated in the area of private security providers, but is nevertheless increasingly used as a reference tool in national legislation or procurement policies. The ICoC initiative consists of governments, civil society organisations focusing on human rights, and finally the organisations it addresses, namely the private security service providers themselves. She shortly discussed the Montreux Document, which deals with the implementation of human rights obligations of States regarding private security service providers. She then outlined a number

of ways in which such multi-stakeholder initiatives may have an impact on national legislation and regulation: by inclusion in legislation and voluntary certification, as a reference tool for national licensing, by providing good practices, or through procurement policies. Ms Van Amstel concluded by stressing the importance of soft law instruments in regulating these practices in absence of extensive treaty regimes.

The last speaker of the session, Dr Stuart Casey-Maslen, an independent consultant and co-author of the Geneva Academy of International Humanitarian Law and Human Rights' Academy Briefing 'Counterpiracy under International Law', discussed 'Use of Force Issues in Counterpiracy'. He dealt specifically with (perceived) gaps in the legal framework in countering piracy regarding the use of force by private maritime security companies (PMSCs) and members of the police and armed forces. With a striking anecdote, he introduced some of the problems maritime security providers may face. He went on to discuss the differences in national standards as to when the (lethal) use of force is allowed, illustrating the problems with national and international cases. He identified three elements that are problematic for human rights compliance in piracy contexts: a plurality of actors, ranging from State navies to private security service providers and crews on board of vessels; the maritime environment; and the lack of clarity regarding the application of the rules on the use of force. He then touched upon a number of issues regarding the indeterminacy of the legal concepts that apply, focusing specifically on the imminent threat requirement to use force and the distinction regarding the threat to property and the threat to life. Dr Casey-Maslen concluded by stressing that there is a (perceived) gap in the law on the use of force in maritime contexts, and that PMSCs need more specific guidelines in the battle against pirates.

Session 3: Human rights considerations in countering piracy and prosecuting pirates

The third and last session of the day was moderated by Dr Olivier Ribbelink, Senior Researcher at the T.M.C. Asser Instituut, and addressed the issue of human rights in the prosecution of pirates. Dr Anna Petrig of the University of Basel launched the discussion with a lecture entitled 'A Human Rights-Based Approach to Law Enforcement at Sea: Arrest, Detention and Transfer of Piracy Suspects'. She looked more specifically at the issue of human rights linked with the arrest, detention and transfer of piracy suspects and emphasised that, although a human rights-based approach to prosecuting piracy is not self-evident, an increasing number of case law shows a development in that direction. Studying the frameworks of EUNAVFOR and Denmark relating to arrest and detention, she discerned two tendencies: the ordinary suspect approach and the extraordinary approach. In the ordinary suspect approach, piracy suspects are seen as ordinary suspects and the requirements of the right to liberty are respected. In the extraordinary approach, piracy suspects only enter the door of criminal law and its procedural safeguards if specific requirements are met; most notably a decision to prosecute the suspects in own courts must have been taken. Dr Petrig discussed the right to liberty, notably the requirement of a legal basis to arrest and detain piracy suspects as well as the relevant procedural safeguards, such as the right to be brought promptly before a judge. Furthermore, she raised the question of deprivation of liberty by the shipmaster and/or Privately Contracted Armed Security Personnel (PCASP). She then touched upon the issues of the transfer of piracy suspects and how these transfers relate to the regional prosecution strategy. After that, she discussed the principle of non-refoulement, specifically to what extent the current transfer practice respects its procedural dimension and what operational challenges exist in that regard. Although there is a general agreement that human rights apply at sea, uncertainties and ambiguities remain.

The second and third speakers of the panel gave complementary lectures focusing respectively on the prosecution and the defence of suspected pirates in the Netherlands. Ms Annet Kramer, Public Prosecutor at the Netherlands Public Prosecution Service, National Prosecution Office, gave a lecture entitled 'Prosecuting Pirates: A Dutch Perspective'. She firstly provided an outline of the general framework for prosecuting piracy in the Netherlands and presented the piracy cases that have been brought before Dutch courts between 2010 and 2015. Additionally, Ms Kramer distinguished three stages - namely the arrest of the suspects, the pre-trial

(investigation) period and the trial itself - and she discussed the challenges faced today by the Dutch National Prosecution Office with regards to each phase. She concluded the presentation by stating in a nutshell the main obstacles related to the investigation and prosecution of pirate leaders. Firstly, available information may not be(come) evidence that can be used in court. Secondly, because of the specific context investigating is particularly complex and, finally, many obstacles are raised by the multi-jurisdictional nature of the prosecution of piracy suspects.

The last presentation of the day was given by Mr Floris Holthuis, defence lawyer specialised in criminal law and co-owner of Nolet Advocaten. Mr Holthuis addressed the issue of 'Defending a Pirate in the Netherlands: What Human Rights Does He Really Have?' He discussed the obstacles a defence lawyer faces while defending an alleged pirate in the Netherlands. He based his presentation on his experience with Ali Mahamed Jama, the last piracy suspect he defended – and who was fully acquitted in 2015. He discussed extensively the facts of this case and explained why it has been more difficult than the defence of other suspects. Ali Mahamed Jama pleaded not guilty, he said that he was a fisherman and had been asked to rent his boat to pirates. In 2014, the District Court of Rotterdam condemned him, along with three other suspects, to two years of imprisonment for acts of violence on a ship. He appealed the decision and was acquitted in 2015. His statements were consistent throughout the investigation and he fully cooperated with justice. However, Mr Holthuis raised several human rights issues, notably related to the right to a fair trial, since several witnesses were not interrogated. Investigators lacked time as well as resources to question properly the witnesses, due to the specific situation at sea. Moreover, Ali Mahamed Jama was a minor when he was arrested and this issue was brought up very late during the trial. Finally, he expressed his disappointment because Ali Mahamed Jama had not been granted asylum in the Netherlands and was expelled from the country before the issue of damage and interests was settled.

The symposium was concluded by Mr Leendert Erkelens, Visiting Research Fellow at the EU Law department of the T.M.C. Asser Instituut, who highlighted the main findings of each presentation. He expressed his gratitude to the speakers and the audience and emphasised that a lot of issues that have been discussed during the symposium are still open for debate.