

Prosecuting Somali pirates, analyzing the impact of EUNAVFOR's efforts.



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Abstract

This thesis intends to provide insight in the legal challenges that have to be taken into account to enable the prosecution of pirates in the EUNAVFOR operation Atalanta of the coast of Somalia. Piracy is an age-old problem that usually centers around piracy hotspots due to the current circumstances on land. In case of Somalia, the lack of a functioning state has led to the demise of the country which can be considered the main reason for the surge of piracy in the international waters around its coast. Whereas it appears that with the conclusion of the United Nations Conference on the Laws Of the Sea (UNCLOS) and the Suppression of Unlawful Acts Against the Safety of Maritime Navigation (SUA) combined with the authorization of the United Nations Security Council Resolutions under Chapter VII all the legal provisions are in place to allow for prosecution, actual prosecution rates in the EUNAVFOR mission are low. The hypothesis that this low prosecution rate is therefore linked to factors that are not legal of nature is proven to be false as the sources suggest that the legal ramifications and the operational difficulties of prosecuting pirates could be the main reasons for the current lack thereof.

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1. Introduction

1.1 Somalia and failed Statehood

In the last 10 years many vessels making their way through the Gulf of Aden or passing the east coast of Somalia have come under pirate attacks. Piracy in the modern world is not a new phenomenon, but such an explosion of incidents is rare.

In 1990 Somalia's ruler Siad Barre was overthrown, leaving Somalia *de facto* without central government. Since then, over fourteen attempts have been made to establish a new government but so far none have been fruitful (van Rooyen, 2011). Currently, the Transitional Federal Government (TFG) is considered to be the government of Somalia, but its actual powers are nil (Homan and Kamerling, 2010; Moller, 2009). This has led to a situation of lawlessness in which Somalia can no longer be seen as an accountable state capable of handling its own national and international affairs. According to van Rooyen (2011) "it would appear that a state of stagnation has been reached" where the international community is no longer actively trying to pursue revived statehood in Somalia. This is why Somalia is seen by scholars as the typical example of a failed state (Strickmann, 2009; Van Rooyen, 2011) whose main indicators are the lack of monopoly of force and inability to exercise control over the territory. Furthermore, in the current situation Somalia finds itself there is a lack of public services, a high crime rate and an unstable and legitimacy-lacking government which is unable to collect tax. Due to these conditions there has been a rapid economic decline in the region with a current GDP of about 600 USD per head of the population (van Rooyen, 2011).

Rotberg (2002) speaks of Somalia as a 'collapsed state', a state whose situation has surpassed the deprivation exhibited in failed states. The state has been divided into several sub-state actors, and into three main areas: Somaliland, Puntland and the centre of the country which is being governed by the TFG. Yet even in the central part of the country, the power of the TFG is not undisputed, with warlords gaining substantive power even in the capital Mogadishu (Rotberg, 2002). Yet it is important to note that as of now, the international community has not officially declared Somalia a failed state. By officially doing so, it would allow for important legal ramifications such as Somalia losing the right to reign over its territorial sea. This loss would result from the fact that the territorial sea of Somalia would be considered outside of a State that has jurisdiction, for the jurisdiction of the State itself is being questioned. Such a decision is a highly political one and is highly unlikely to be taken for the sole purpose of tackling crime. This is amplified because of fears that declaring Somalia as an outlaw state without jurisdiction could lead to other political unrest in the area. (Fink and Galvin, 2009). But regardless of the classification used to describe Somalia, it is quite clear that the country is far from stable and lacks a legitimate government.

1.2 The rise of piracy hotspots

Due to the current political and economical situation in Somalia, there is no control over the maritime affairs of the country. The collapse of the state has subsequently led to the decline of the fishing industry, leaving many fishermen unemployed and increasing malnutrition issues (Van

Rooyen, 2011). Foreign trawlers started entering the Somali waters which were unprotected to profit from the fishing grounds, quickly bringing back the fish stocks and impoverishing the Somali fishermen (Strickmann, 2009). Another effect of the loss of power over the shores is toxic dumping, which has severely polluted the Somali shorelines. But the third and internationally most noticeable effect is the lack of such things as border control or coastguards (Moller, 2009).

In the beginning, piracy in Somalia was a counter reaction to the European and Asian fishing companies fishing within Somali waters and the dumping of toxic waste. Somali fishermen would try to force the foreign ships and trawlers to pay a 'tax' for using the Somali waters. However, this extraction of tax was slowly taken over by armed gangs because there was not sufficient funding to afford private security enterprises (van Rooyen, 2011; Strickmann 2009). The pirates tend to view themselves as protectors, trying to stop foreign vessels from entering into Somali waters without payment. They have taken on names such as the National Volunteer Coastguard (NVCG) and claim to distribute their earnings from piracy amongst the Somali people. The amount of money that actually makes its way into the community is quite limited as much is invested in new weaponry. However, pirates in Somalia have been described as "social bandits", with a certain popularity amongst the population (Moller, 2009).

The rise of hotspots for piracy, defined as a geographical concentration of piracy, is almost always connected to what happens on land. This is usually observable by determining push and pull factors that attribute to the likelihood of piracy. In this case, poverty is pushing the population toward criminal behaviour and the relatively low risks of piracy in combination with the high number of commercial traffic in the Gulf of Aden are pulling new men in. Thus, the lack of a Somali sovereign government has made the occurrence of piracy more likely especially combined with the lack of financial resources of the majority of the population. These piracy hotspots are known to arise in areas with lacking political control, and have a tendency to be durable (Moller, 2009). Whereas the east of Somalia started out as the sole Somali hotspot for piracy, the main concentration of pirate vessels soon moved towards the north of the country, in particular the Gulf of Aden. Those attacks on the east coast of the country usually affected the Somali population negatively by attacking vessels bringing humanitarian aid whereas attacks in the Gulf of Aden are mainly aimed towards

international commercial shipping (Kraska and Wilson, 2009; Moller, 2009).

Figure 1: the coast of Somalia (source: Lonely Planet, 2011)



1.3 Current piracy situation of the coast of Somalia

The number of pirate attacks of the coast of Somalia has been rapidly increasing in the recent years, with over two hundred vessels attacked annually. The United Nations Office on Drugs and Crime estimates that the pirates have over seventy base camps on shore from which they operate (UN, 2010). Piracy began to emerge in the beginning of the 2000s, with an immense growth occurring around 2007. This, combined with a worldwide economic crisis, has led to a decrease of the volume of vessels travelling through the Suez canal by as much as fifty percent according to Egyptian officials. Still, estimations of traffic assume about 21,000 commercial ships that transit annually (Strickmann, 2009) and predicted pirate profits in 2008 of about 300 million USD which was earned by taking hostage (commercial) vessels (Kraska and Wilson, 2009).

According to the ICC Commercial Crime Service, the crime reporter for the Chamber of Commerce, a total of 117 piracy incidents of the coast of Somalia occurred between the beginning of this year and the 28th of April. Of these incidents, twenty resulted in hijackings and a total of 338 hostages were taken, which included seven casualties (ICC-CCS, 2011). What has made Somali piracy different from other forms of piracy, such as in Southeast Asia, is the high level of organization of the pirates by the use of mother ships and their low level of reluctance towards the use of violence (Homan and Kamerling, 2010). Usually these mother vessels are ships that were captured previously and that are used to provide smaller pirate boats of fuel, food and heavy weaponry (UN, 2010).

Starting from 2008, the United Nations Security Council (UNSC) launched several resolutions concerning piracy of the coast of Somalia, following the 2006, 2007 and 2008 hijacking and attacks of UN World Food Programme vessels making their way to Somalia to provide relief to the population. Resolutions 1814 (2008), 1816 (2008), 1838 (2008), 1846 (2008) and 1851 (2008) all concern the protection of the WFP vessels and request anti-piracy operations by marine forces. It is viewed that the UNSC has been more persistent of combating piracy of the coast of Somalia compared to other areas of the world mostly because of the high level of lawlessness of the Somali State (Fink and Galvin, 2009). Currently, there are three multinational counter-piracy operations of the coast of Somalia, EUNAVFOR Atalanta, the NATO (operation allied protector and operation ocean shield), and the United States-led combined task force 151 (Homan and Kamerling, 2009). Due to the difference in objectives and mandates of the three missions, this thesis will focus solely on the EU efforts made in counter-piracy operations of the coast of Somalia. Apart from these missions within organizations there are also individual missions by countries who have economic interest in free navigation in the Gulf of Aden, such as Russia, India and China (Fink and Galvin, 2009; Strickmann, 2009).

When it comes to piracy in Somalia there are several geographical issues that play a role (Fawcett, 2010). Somalia has the biggest coastline of all African countries with a length of 3025 kilometres. This coastline is connected to one of the most important waterways of the world, the Gulf of Aden and the Indian Ocean. The large size of the operation area for the navies can be compared to the size of Western Europe. Furthermore, pirates have proven to be willing and able to conduct operations that are far from the Somali coast, with a 2009 attack on the Greece ship *Navios Apollon* as far as 700 nautical miles from the coast of Somalia (Homan and Kamerling, 2010). Piracy

has matured quickly in Somalia, with improved tactics such as fake attacks to lure international forces away from their preferred target (van Rooyen, 2011). Apart from the pirates use of ingenious tactics, they also have the benefit of being rather low-tech, and therefore being able to fly under the radar of the highly advanced navies (Homan and Kamerling, 2009).

Current statistics on the EUNAVFOR mission show a low number of prosecutions. Many EU naval ships have resorted to a 'catch and release' tactic where suspected pirates are not detained and prosecuted but rather disarmed and released (Fawcett, 2010). Only three participating countries to the EU-NAVFOR mission Atalanta namely: Germany, France and the Netherlands, have prosecuted these pirates under their own justice systems and appear to actively try to avoid recurrence of such an event. Agreements with third countries with regards to prosecution, such as Kenya and the Seychelles, have not created the anticipated results. It seems that the biggest problem within the EUNAVFOR operation Atalanta lies not within its operational capabilities, but rather in its legal aftermath.

2. Research Purpose

2.1 Research Questions

It is clear to see that piracy of the coast of Somalia has become a considerable problem that needs to be solved by the international community, seen the lack of capacities of the Somali authorities. Due to the failure to establish a legitimate government that is recognized throughout Somalia, a piracy hotspot has arisen which poses a threat to all commercial shipping in the area. For Europe there are considerable economic interests in the commercial shipping that makes its way through the Gulf of Aden. However, the investments made by European member states to participate in such a mission also add up to be a substantial amount. Most of the costs of the operation are borne by the participating countries, therefore it is quite safe to assume a certain output needs to be generated in order for the mission to be viewed as a success by the public.

In Council Joint Action 2008/851/CFSP the Council established that the mission mandate shall “*under the conditions in Article 12, arrest, detain and transfer persons who have committed, or are suspected of having committed, acts of piracy or armed robbery in the areas where it is present*” (Council Joint Action 2008/851/CFSP, Article 2 (e)). This clearly shows that catch and release practices were not incorporated in the original mission mandate. Meaning; there is a clear breach between what is stipulated in the mission mandate and the practices in the field. This thesis will focus on what factors contribute to the difficulty of prosecuting those suspected of acts of piracy of the coast of Somali.

The main research question of the thesis will be;

What are the legal challenges with regards to prosecuting Somali pirates in the EUNAVFOR operation Atalanta?

In order to answer this question four sub-questions will have to be answered;

1. *What are the applicable international legal rules with regards to the prosecution of pirates?*
2. *What does the EUNAVFOR mission entail and under what mandate does it operate?*
3. *To what extend is the current EUNAVFOR mission helpful in facilitating the prosecution of pirates?*
4. *What are the factors that hinder in the process of prosecuting pirates of the coast of Somalia?*

2.2 Methodology

The thesis consists of two separate parts that require different methods of research. Due to the novelty of the topics at hand in most of the research questions there are no existing models and theories, but it is important to define how the main concepts are constructed. The conceptualization and operationalisation of the main concepts is based on the relevant sources and on the specifics of the subject of analysis.

With regards to piracy, this thesis will define piracy according to the United Nations Convention on the Law Of the Sea (UNCLOS) article 101, which is currently the most relevant international law concerning piracy. This article is as follows;

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 aircraft, and directed:*
 - (i) on the high seas, against another ship or aircraft, or against persons or property on board such a 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).*

(article 101, UNCLOS, 1982)

The only reason why diversion from this definition is used is when the United Nations Security Council Resolutions (UNSCR) or the agreements made between the European Council and third parties divert from this specific definition in determining the mission mandate.

Academic definitions of the concept of prosecution are hard to find. The Oxford Advanced Learner's Dictionary defines prosecution as: "*the process of trying to prove in court that sb is guilty of a crime (= of prosecuting them); the process of being officially charged with a crime in court.*" (The Oxford Advanced Learner's Dictionary, seventh edition 2005). This definition implies that for this thesis the outcome of said trial is not under observation, rather the occurrence of a trial. As discussed above, even the occurrence of such a trial is rare. In cases where suspects are detained and transferred but released before trial causes will be explored, but this cannot be defined as prosecution.

With regards to the EUNAVFOR mission, the sole focus will be on anti-piracy efforts conducted under this European framework. This framework was first established by adopting council joint action 2008/851/CFSP under Title V of the EU Treaty on the 10th of November 2008. This mission is prolonged twice since then but remains to function on the same terms. This means the total operational time of this mission will be from the 10th of November 2008 until the 12th of December 2012. Furthermore, this implies that counter-piracy marine efforts by European Member States conducted within the NATO or Task Force 150/151 will not be included into this thesis. This is mainly due to the different mandates under which these missions operate and the different objectives they try to realize. These differences make them relatively incomparable. The thesis will only focus on the EU mission efforts conducted on the sea and on prosecution efforts that ensue and therefore also excludes UN and EU efforts to fight organized piracy and provide relief efforts on the Somali mainland.

The first part of the thesis will provide the legal context. It is in this part that the legal limits and possibilities with regards to the prosecution will be examined. This is necessary in order to properly evaluate the factors involved in the lack of prosecution, because one needs to have a good insight in the jurisdiction at hand. The main sources of legal documents that will be used for this part of the

thesis are UNCLOS, Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation (SUA) and UNSCR. The EU itself has declared these as the most relevant legal documents when setting up this mission (Csonka, 2009). Other sources that will be consulted are agreements concluded between the EU and third countries in order to enable prosecution and agreements between the EU and the TGF, and other EU legal documents and decisions with regards to the functioning of the mission. This means that most of the legal context part of the thesis will consist of the interpretation of primary sources. If there is a legal explanation for the lack of prosecution it will become clear in this part of the thesis.

The second part of the thesis will be an empirical study in which possible other factors will be examined that effect the level of prosecution. The empirical part of the paper requires a more thorough analysis of the sources. This part focuses on the last two sub-questions and by answering those will give a more complete overview of possible causes. The data collection for this part of the thesis will consist out of secondary sources, and mainly involve newspaper articles, government policies and relatively new scientific articles, mainly due to the relative novelty of this topic. What needs to be found out is what alternative reasons for the lack of prosecution could be relevant. This entails looking at the functioning of the Memoranda of Understanding and detecting possible problems. In this part it will also be necessary to look at the prosecution that has been done on European soil. All in all, what needs to be done is to create an insight in whether prosecution is the norm or a rarity, and in case of the latter, what the reasons are for this phenomenon. No statistical inferences will be conducted with the data, which implies that the empirical part will also greatly follow a qualitative and explanative approach. The empirical section will provide the reader with a thorough overview of both the current successfulness in prosecuting and its failures. In case it is concluded that the EUNAVFOR mission Atalanta proves to be unable to properly facilitate prosecution this will be linked back to the legal context of the mission. If it is proven that the legal capacity does exist to prosecute based on the previous knowledge in the legal context section of the report, the last research question will explore whether there are alternative factors responsible for the problem at hand.

This approach is the most effective for answering the research question since quite a lot of legal background is required to explain the functioning of naval mission and its mandate and the subsequent difficulties with regards to prosecuting pirates. Therefore the legal procedures need to be explained thoroughly and the applicable agreements and laws need to be interpreted. By constructing a clear framework with regards to how the prosecution of piracy is framed within the international legal system, it makes it possible to analyse the problems encountered with prosecution within the empirical part.

2.3 Scientific Relevance

This particular naval mission is the first of its kind within the Common Security and Defence Policy and it is therefore worthwhile to look at its functioning. Currently the most debated part of operation Atalanta is the lack of prosecution of the suspected pirates, leading to the so-called 'catch and release'(Fawcett, 2010) practices of the naval forces. The expenses of such an operation are quite extensive and are to be borne by the nations that participate, thus making it very costly. It goes

without saying that it is thus of utmost importance that those detained in anti-piracy actions must also be brought to justice to improve the legitimacy of the intervention. If there is no legal prospect for countries to enforce universal jurisdiction with regards to piracy it needs to be questioned what the purpose of sending navy personnel is.

The legal texts that are relevant for this topic grant third parties the right to intervene and if countries are signatories to the relevant legal provisions they will also have the national legal instruments to prosecute those arrested. Yet, this does not appear to be happening. Scientific articles regarding this topic have discussed the difficulties regarding prosecuting pirates in general but do not provide with accurate insight in why arrests do not appear to be followed through with prosecutions. This thesis will provide the reader with a thorough and complete insight in the legal aspects that need to be taken into account during this EUNAVFOR mission with regards to being able to prosecute those responsible. Besides that, it will also give a detailed and critical review of the current situation to see if the international legal instruments prove to be enough to make this happen. Especially this empirical part that studies the functioning does not currently exist and would help those reading it understand what would need to be altered and improved to the operation.

If this thesis shows that the current system is not functioning at all, it can be regarded as a reason to critically review the effectiveness of the mission as a whole. Although qualitative designs usually are weak with regards to external validity, this does not have to be the case for this thesis since one must realize that in situations of piracy in other parts of the world the same issues might arise where the same legal concepts apply. Thus the findings of this thesis will to some extent be relevant for other anti-piracy operations and could partially be extrapolated.

3. Legal Context

3.1 International legal rules applicable to the prosecution of piracy

In order to take a closer look at the functioning of the current system of prosecution of Somali pirates, one needs to take into account the applicable international legal rules. There are several bodies of legislation with regards to this issue but also several legal issues that come into play. In this section the first research question will be answered in paragraphs 3.1.1 and 3.1.2.

1. What are the applicable international legal rules with regards to the prosecution of pirates?

3.1.1 United Nations Conference on the Law of the Sea and the Convention for the Suppression of Unlawful Acts against the safety of Maritime Navigation

The two most important pieces of international legislation are the United Nations Convention on the Law of the Sea (UNCLOS) and the Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation (SUA) (Strickmann, 2009., Csonka, 2009, Fink and Galvin, 2009; Satkauskas 2010). The UNCLOS was concluded on the 10th of December 1982 and has since then been ratified into many national legal systems and the SUA was concluded in 1988 (van Rooyen, 2011., Csonka, 2009). These treaties define when a state can take action with regards to piracy and also stipulate what kind of action can be taken. The most important articles in the UNCLOS with regards to piracy are articles 100 to 107 and 110 where, amongst other things, the duty of states to *“cooperate to the fullest possible extent in the repression of piracy on the high seas or in any other place outside the jurisdiction of any State”* can be found (article 100 UNCLOS, 1982). The UNCLOS is often viewed as customary law with regards to the laws of the sea (Fink and Galvin, 2009; Kontorovich, 2009).

However, due to the way in which the course of action with regards to piracy is defined in UNCLOS the international action that can be taken has many limitations. The most important limitation to this body of law is the fact that detaining pirates **can only be done on the high seas** as can be read in the previously mentioned article 100 UNCLOS, which also means that all acts of piracy within territorial waters cannot be defined as such and is to be dealt with by that state as an ‘armed robbery’. The SUA has the same limitations with regards to high seas and territorial waters (Moller, 2009). The limits of the Somali territorial waters are not always clear because Somalia filed a claim to extend its territorial sea with 200 nautical miles in 1972, but as it now appears, during the current anti-piracy operations of the EU and others that this claim is not renewed (Fink and Galvin, 2009). So, regardless of the 1972 claim, the international community has determined that UNCLOS overrides this and the territorial sea only expands of the Somali coast for the distance determined by the 1982 UNCLOS. Another issue with the applicable international legal rules is that conventions such as the UNCLOS are only binding upon those nations that have signed them and ratified them within their own legal system. The UNCLOS is currently not signed and ratified by all nations in the world including the

United States (Moller, 2009) but this does not have to be a big issue in this specific case because the UNCLOS articles regarding piracy are almost identical to the 1958 Geneva Convention articles on this topic. Thus, many nations are still bound to similar laws either by customary or conventional law (Treves, 2009).

Article 105 UNCLOS gives states of third parties the right to seize and arrest pirate ships and its crew on the high seas. According to UN law, military vessels are only allowed to do this in case of armed conflict or in case of *ad hoc* authorisation by the United Nations Security Council. This can be seen in article 105 UNCLOS: *“On the high seas, or in any other place outside the jurisdiction of any State, every State may seize a pirate ship or aircraft....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, and may also determine the action to be taken with regards to the ships, aircraft or property, subject to the rights of third parties acting in good faith.”* However, this is not an automatic right that is obtained by everyone. In order to have the legal right to board a vessel suspected of piracy or being under the control of piracy, the boarding third State needs consent of the state under which flag the ship flies. To avoid these practical issues in Somalia, article 110 UNCLOS allows third states to board vessels of which reasonable suspicion exists that they are engaged in acts of piracy (Fink and Galvin, 2009). As is specified in UNCLOS article 107, the seizure of piracy vessels may only be done by *“Warships or military aircraft, or other ships or aircraft clearly marked and identifiable as being on government service and authorized to that effect.”*

Even though third countries have the right to detain and prosecute, they are not legally obliged to do so by the UNCLOS (Blanco-Bazán, 2001). However, this is different for those who are signatories to the SUA Convention. Within the SUA Convention the principle of *aut dedere aut judicare* is included, which means that countries are obliged to either prosecute suspected pirates themselves or extradite them to a country that has the jurisdiction. This also means that if a SUA Convention signatory does not make a serious attempt of prosecution of someone suspected of piracy, they are breaching the Convention. Contrary to the UNCLOS, the SUA provides for the possibility of prosecution in a third state, if a fair trial can be guaranteed (AIV, 2010). This focus on prosecution can be found in article 10 SUA: *“The State Party in the territory of which the offender or the alleged offender is found shall....if it does not extradite him, be obliged, without exception whatsoever and whether or not the offence was committed in its territory, to submit the case without delay to its competent authorities for the purpose of prosecution.”* (SUA, 1988). So, whereas the UNCLOS is a framework treaty that gives countries the legal right to encounter in anti-piracy operations, SUA signatories are obliged to ‘establish jurisdiction’, especially in case of piracy involving their national citizens, in their territorial sea or against a ship flying their flag (Blanco-Bazár, 2001; Satkauskas, 2010). Currently there are 149 signatories to the SUA, however Somalia is not one of them because the state had disintegrated before the formal introduction of the SUA in 1992 (Kontorovich, 2009; Kraska and Wilson, 2009).

3.1.2 The legal issues concerning the legal status of pirates and the jurisdiction of third parties

There are quite some legal issues with regards to counter-piracy actions. The nationality of the offenders, vessel and the flag the vessel flies under are all of influence on the action that can legally be taken. Furthermore, the EUNAVFOR will have to adhere to international rules with regards to jurisdiction in different areas of the sea.

The territorial waters of a state usually constitute 12 nautical miles of its coastline (article 3, UNCLOS, 1982), this is a zone in which the country has full sovereignty. Apart from its territorial waters, states that border the coast usually also have a contiguous zone and a EEZ (Exclusive Economic Zone). In the last two of these three areas the states only have some jurisdiction, mostly because they are not the exclusive owners. As previously explained; the current existing international body of law countries can take action against piracy on the high seas and prosecute those pirates, but the scope of these treaties is limited to say the least (Moller, 2009).

When it comes to prosecuting pirates there are many legal difficulties that need to be taken into account. Piracy in its most simple form for legal procedures would involve a ship of nation A, attacked by a pirate vessel of nation A in the territorial waters of nation A. This is however almost never the case. In case of prosecuting piracy it is therefore always of importance where the attack happened, by what nationality and who was attacked. In case of those attacked it is essential to look at the flag under which the ship is flying, which might not always be the same as the nationality of the crew or the nationality of the owner of the cargo. Furthermore, many shipping companies choose to “flag out” which means their ships will use flags of countries that allow for their flags to be used by third parties. This complicates the matter considerably when looking at which state has the jurisdiction over the ship in question (Moller, 2009). These issues are illustrated in figure 2;

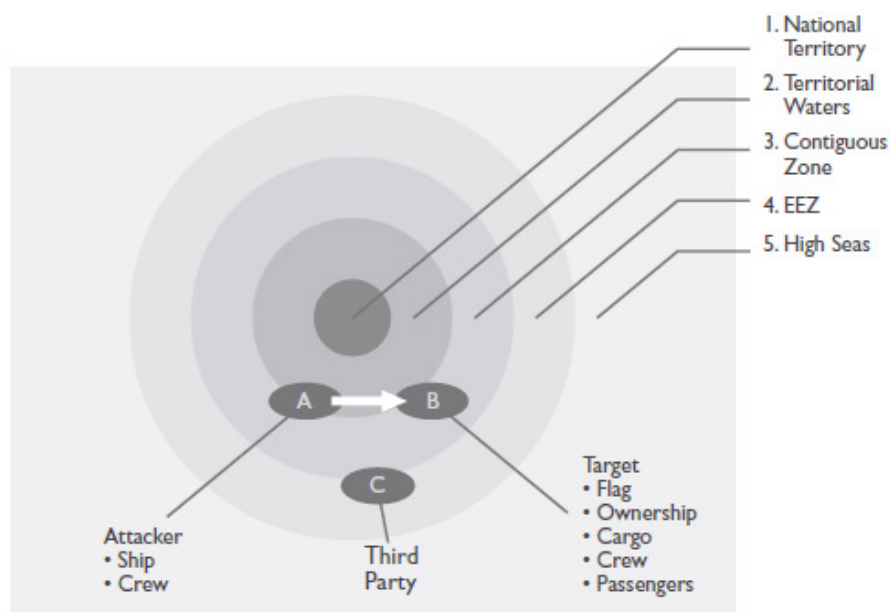


Figure 2: Legal Complications in Anti-Piracy operations (source: Moller, 2009)

Because of the set-up of most naval anti-piracy missions, usually a third party is the one interfering and making the arrests. This is possible through *ad hoc* authorization by the UN. This is also the case for the missions taking place off the coast of Somalia, with the United Nations Security Council issuing several resolutions requesting for assistance in detaining piracy under Chapter VII. According to Moller (2009) "the main body of relevant law consists of international law, subdivided into customary and written laws, the latter typically enshrined in treaties or conventions, and usually binding only on those states that have duly signed and ratified the agreement in question". When it comes to customary law, the most important and relevant international law principle is *mare liberum*, the high seas. This dictates that the high seas are always outside of the jurisdiction of individual states. This includes the right of free navigation on the sea, not just by ships but also by pirates. However, when pirates attack ships they are hindering them in exerting their right of free navigation, which makes them common enemies of mankind, the so-called *Hostes Humani Generis*. In case of such an enemy of mankind, it is written in international law that states have the obligation to detain and prosecute (Blanco-Bazán 2001; Moller, 2009).

When an arrest is made, there are three different options for a marine vessel. The first is prosecution by the nation whose flag the naval ship flies under, the other is transfer the suspects to a country with whom a Memorandum of Understanding (MoU) is concluded and if prosecution is impossible the only option left is to release them again though relieved of weaponry. Especially in the beginning of counter-piracy operations many of the arrested pirates were released immediately. This goes against the strong sense amongst many that those 'enemies of mankind' should be held accountable for what they have done (Fink and Galvin, 2009). But there are no international laws under which criminals can be prosecuted, so prosecution has to be done through the national legislation of a country that has adopted the right legal instruments to do so, including the so-called extraterritorial jurisdiction (Satkuskas, 2010). Conflicting about the naval mission is that it uses military means to deal with an issue that is to be prosecuted as a criminal offense. With regards to the actual prosecution, there again are three options; national prosecution, regional prosecution, or prosecution through an international court of justice. Currently, the latter does not exist in prosecuting piracy (Fink and Galvin, 2009).

To answer this sub-question; this means that the applicable international legal rules consist out of several different documents and agreements. The most relevant international law regarding the prosecution of piracy is the UNCLOS which is viewed as customary law on all issues regarding the laws of the sea. The provisions of the UNCLOS allow countries to actively deter acts of piracy, by providing legal possibilities to board pirate vessels and detain and prosecute those suspected of engaging in acts of piracy. This means that on the high seas, and only on the high seas, countries can actively apply universal jurisdiction. However, this has to be viewed as a right rather than an obligation. The other relevant legal rules stem from the SUA, which has 149 signatories. Within the SUA countries hold an obligation to prosecute whomever is detained and countries are required to adjust their legislation to allow for this prosecution. The arrest and prosecution of pirates is further complicated due to the different parties involved in most incidents, which makes it unclear under whose jurisdiction the crime falls. What is clear however, is that piracy is viewed as a crime against mankind which should be halted in order to allow for free navigation of the ocean. In order for a country to actively combat piracy, *ad hoc* authorization from the UN is necessary.

3.2 The legal specifics of the EUNAVFOR mission

Now that it is established what international legal rules influence the character of possible international action against piracy, it will be interesting to see how the EUNAVFOR mission is set-up, and under what mandate it performs its operations. This section will provide insight in the mandate under which the EUNAVFOR mission Atalanta operates. In order to discuss this mandate, first the relation between the United Nations Security Council resolutions and the EU decision to participate shall be discussed (3.2.1) after which the specifics of the mission will be examined (3.2.2), including the Memoranda of Understanding (3.2.3).

2. *What does the EUNAVFOR mission entail and under what mandate does it operate?*

3.2.1 United Nations Security Council Resolutions and the European response

The current EUNAVFOR mission Atalanta was established under the Treaty on the European Union title V. The most important articles of this Treaty are article 14 on Joint Actions and articles 25 and 28(3) regarding the operational and budgetary aspects of the mission. Within the declaration of Joint Action that led to the EUNAVFOR operation Atalanta, the council actively refers to the United Nations Security Council Resolutions 1814 (2008), 1816 (2008) and 1838 (2008). Within these resolutions the UNSC has requested States and organizations to help take action to protect the delivery of human aid to the Somali people and later on expands this request to include the safety of commercial maritime vessels. Within UNSCR 1816 (2008) it is clearly urged that those nations that have the biggest commercial interest should respond in order to secure safe maritime navigation within the region whilst cooperation with the Transitional Federal Government of Somalia (TFG). In the 2003 European Security Strategy, the EU underlined the importance of the United Nations in international relations, law and security and it was stated that *“Strengthening the United Nations, equipping it to fulfill its responsibilities and to act effectively is a European priority”* and expands this argument by saying *“The EU should support the United Nations as it responds to threats to international peace and security”* (European Security Strategy, 2003).

The action in Somalia falls under the framework of Chapter VII in the UN Charter (Treves, 2009; Fink and Galvin, 2009). This chapter concerns *“Action with respects to threats to the peace, breaches of the peace and acts of aggression.”* This means that the security council can decide whether the current situation is in fact a breach or threat to the peace and can also stipulate what action can be taken or at least recommend a certain course of action. Article 42, Chapter VII also stipulates that *“it may take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security. Such action may include demonstrations, blockade, and other operations by air, sea, or land forces of Members of the United Nations”* (Charter of the United Nations, Chapter VII, Article 42, 1945). This also signifies that the UN has chosen to not classify the counter-piracy actions as armed conflict against non-state actors which falls under another UN Chapter. Thus, the laws of armed conflict at sea do not apply in this situation and permission to exercise jurisdiction needs to come from either *ad hoc* consent, a United Nations Security Council Resolution (UNSCR) that gives this consent, or by creating bilateral or multilateral agreements (Fink and Galvin, 2009).

Council Joint Action 2008/851/CFSP (Official Journal of the European Union, 2008) marked the launch of a European mission which was to be called EUNAVFOR operation Atalanta. This mission is the first European naval mission under the Common Security and Defense Policy (Homan and Kamerling, 2010). Its connection to the United Nations Security Council Resolutions and applicable laws laid down in the UNCLOS are underlined in Article 1 (1): *“The European Union (EU) shall conduct a military operation in support of resolutions 1814 (2008), 1816 (2008) and 1838 (2008)...in a manner consistent with action permitted with respect to piracy under Article 100 et seq. of the United Nations Convention on the Law of the Sea.”* (L 301/34, 2008). These resolutions are all acting under the Charter's Chapter VII whose Article 40 shows that the UN may request compliance to provisional measures that are deemed necessary. This shows that the UN can request Somali cooperation with the counter-piracy operations or other measures that need to be taken by members of the United Nations. The UN Security Council is also able, under chapter VII, to conclude agreements with members of the United Nations about the use of armed forces and possible rights of passage into third countries' territory to maintain peace and security (Article 43, Chapter VII, Charter of the United Nations).

The above mentioned EUNAVFOR mission Atalanta falls under the in 2003 established Common Security and Defence Policy (CSDP) and since its set-up 22 crisis management operations have been conducted under this framework. The amount of operational forces contributed to EU missions by member states since 2003 is greatly surpassed by the amounts contributed to NATO and UN missions at the same time so the overall scope of the policy is still rather small. In the CSDP the council works unanimously, which means that in case of the Atalanta mission all member states had to agree to adopt the decision. This however does not imply that all member states contribute forces to this mission. Whether or not a state ends up contributing to the mission is decided by national governments (Soder, 2010).

3.2.2 The setup of the EUNAVFOR operation Atalanta

The mission mandate as established in Council Joint Action 2008/851/CFSP lays down the rights and obligations of the EUNAVFOR operation Atalanta. With regards to the objectives as determined in the mandate, the EU shall;

- Provide protection to WFP and (on a case-by-case assessment of the level of threat) commercial vessels in the area including fishing trawlers,
- Guard the waters in the area, including the territorial waters of Somalia,
- Take those measures that are necessary to prevent or stop acts of piracy, this includes the use of force,
- Try to enable prosecution by states who have the jurisdiction by arresting, detaining and transferring those suspected of or caught in acts of piracy,
- Cooperation with other similar missions in the area, both by organizations or individual states.

There are also limitations laid down for the operational forces, such as the fact that the area of operation shall be up to 500 nautical miles of the coast of Somalia (Article 1.2). Thus, in cases such as

the previously states hijacking of a Greek vessel 700 nautical miles of the coast, operation Atalanta cannot be of any help. In this joint declaration it becomes clear that the EU mandate is not merely indented to facilitate protecting WFP vessels but is also extended to the protection of commercial vessels that are in the Gulf of Aden or other waters of the coast of Somalia.

Currently, 10 European Member states are contributing (or have contributed) to the EU NAVFOR mission, namely; Belgium, France, Germany, Greece, Italy, Luxembourg, the Netherlands, Spain, Sweden and the UK (Soder, 2010). The EUNAVFOR has a rotating leadership and the UK provided the mission with its headquarters in Northwood, but has since then stopped actively participating in the mission to become more involved in the NATO mission in the same area (Soder, 2010; Homan and Kamerling, 2010). The missions are always on a short term basis, with the first mission having a duration of a year. On December 7, 2010 the mission mandate was prolonged with two years, which will extend the mission to 12 December 2012 (European Union External Action, 2011). The daily control over the mission is exercised by the Political and Security Committee (PSC) who determines both the political direction and strategic control. Whether the directions given by the PSC are executed correctly is then monitored by the European Union Military Committee (EUMC).

Previously, the importance of the use of Chapter VII of the UN Charter has been discussed because it can authorize action taken by UN member states to maintain peace and security. A reflection of the scope of this chapter can be seen in the EU mission mandate. In this case, the UN has chosen not to define the situation in Somalia as an 'armed conflict' but has instead concluded multilateral and bilateral agreements with other parties to provide navies with the authority to board pirate vessels. In resolution 1816 (2008) of the UNSC, it was authorized that those states that would cooperate with the TFG in Somalia would, for a limited amount of time, be allowed to also enter into the territorial seas of Somalia to repress acts of piracy (Fink and Galvin, 2009, AIV, 2010; Treves, 2009). This can also be seen in UNSCR 1846 (2008) in which it was determined that States and regional organizations cooperating with the TFG are allowed to enter into Somalia's territorial waters and use "*all necessary means...to fight piracy and armed robbery at sea off the Somali coast, in accordance with relevant international law.*" In these resolutions the UNSC was very careful with its phrasing to avoid setting a precedent in international customary law, by clearly stating the exclusive nature of such an order (Treves, 2009; Fink and Galvin, 2009) this was also done by a clear *ratione temporis*, a time limitation to the measures, and a *ratione loci*, which is a limitation to the location of such rights (Treves, 2009). However in the agreement between the EU and the TFG it appears that UNSCR 1816 (2008) was superfluous, because in the bilateral agreement article 105 UNCLOS was referred to by the two parties as providing sufficient legal basis to enter into Somali territorial waters. It can be assumed that the EU has three main reasons to conclude such agreements with the TFG: underlining Somali state sovereignty, increasing the strength of the TFG but also because concluding such agreements ensured only the most involved counter-piracy operations are allowed access in Somali territory which increases cooperation (Treves, 2009).

This special arrangement to enter into territorial waters can thus also be found in the agreement L10 concluded between the European Union and the Somali Republic on the 31st of December 2008 (Official Journal of the European Union, 2009). Within this agreement all rights and obligations of the EUNAVFOR naval forces are agreed upon by the two parties. It is provided in article 2 that the EUNAVFOR personnel shall have to respect Somali laws and regulations and inform the TFG when entering into territorial waters or harbours. Within entering the Somali territory they are exempted

of extensive passport controls or other forms of customs and once within territory *“the Host state shall grant EUNAVFOR and EUNAVFOR personnel freedom of movement and freedom to travel within its territory, including its waters and airspace”* (L10; article 4.2, 2009). When within the territory, the EUNAVFOR personnel is allowed to act according to the powers conferred upon them by the sending state (including the use of force) rather than adhere to Somali command. As Fink and Galvin (2009) write, the agreement concluded provided that *“EUNAVFOR personnel shall have primary jurisdiction over all the criminal jurisdiction matters when on land, internal and territorial waters”*.

3.2.3 Memoranda of Understanding

In Joint Council Action 2008/851/CFSP (Official Journal of the European Union, 2008) the Council decided upon which measures to take with those that have been held and detained by the forces of Atalanta. In order to ensure prosecution, those detained shall be handed over;

- *“To the competent authorities of the flag Member State or of the third State participating in the operation, of the vessel which took them captive, or*
- *If this State cannot, or does not wish to, exercise its jurisdiction, to a Member State or any third State which wishes to exercise its jurisdiction over the aforementioned persons and property.”*

(Joint Council Action 2008/851/CFSP, Article 12.1, 2008).

This allows for prosecution within third states and thus provides countries with the opportunity to exercise their jurisdiction as determined under UNCLOS and the SUA. Important is that in article 12.2. of the same agreement, the condition is created that when in case of prosecution by third countries the upholding of human rights need to be guaranteed. In 2009 the European Union concluded *“memoranda of understanding”* (MoU) with Kenya and the Seychelles with regards to the prosecution of suspected pirates. A Memorandum of Understanding is when two parties enter into an agreement fairly similar to a treaty but where the outcome is not legal binding in the way that a treaty is. One could consider this to be the middle way between a treaty and a gentlemen’s agreement.

On the 6th of March 2009, the EU and Kenya signed an agreement specifying the conditions under which pirates could be transferred to Kenya. In provision L 79 (Official Journal of the European Union, 2009) the specifics of such transfers are agreed upon. The agreement concluded falls under the Framework of the EU Council Joint Action 2008/851/CFSP and is part of the way the EU plans to conduct its counter-piracy operation. Within the agreement between Kenya and the EU it is established that the detaining and prosecuting of pirates within Kenya will adhere fully to the applicable human rights laws which includes that the death penalty cannot be used as a punishment. As it was agreed in the general principles of the agreement as concluded on the 6th of March *“Kenya will accept, upon the request of EUNAVFOR, the transfer of persons detained by EUNAVFOR in connection with piracy...and will submit such persons and property to its competent authorities for the purpose of investigation and prosecution.”* (2 (a) L49 2009). Within the agreement it is made clear

that all signatories have the right to terminate this contract by giving six-months notice to the other party involved.

A similar agreement, L 315 (Official Journal of the European Union, 2009), was concluded with the Republic of the Seychelles on November 10th of 2009. This agreement is fairly similar with respect to the rights and obligations of EUNAVFOR personnel and also includes the details with regards to transferring those suspected of piracy and detained by EUNAVFOR forces. However, while conducting this agreement it is inherently clear that the Seychelles has limited capacities and the *“EU, aware of the limited capacities of the Republic of Seychelles to accept, try, detain and incarcerate suspected pirated and armed robbers...shall provide the Republic of Seychelles with such full financial, human resource, material, logistical and infrastructural assistance for the detention, incarceration maintenance, investigation, prosecution, trial and repatriation of the suspected or convicted pirates and armed robbers.”*

In the council update of April 2011 it was revealed that the EU is currently negotiating with other countries in the region such as South Africa, Tanzania and Mauritius in the hopes of concluding more MoUs (Council update, 2011). Because African countries usually lack the resources and judicial capacity to start up large-scale projects such as the prosecution of pirates, European countries have been contributing to improve the prosecuting possibilities. For instance, the Netherlands has made contribution of € 800,000 to increase the judicial capacities of the Seychelles. But also the European Commission, Germany, France and Denmark have made such contributions and the total budget, including contributions of non-EU members, has amounted to a total of USD 9.3 million of funding granted through the UNODC for those Eastern African countries that are willing to prosecute Somali pirates (United Nations Office on Drugs and Crime) (AIV, 2010).

Where most scholars do not seem to doubt the legality of such an Memorandum of Understanding, Kontorovich (2010) questions the right of third countries to prosecute based on the provisions of the UNCLOS. It is important to look at Article 105 UNCLOS, first mentioned in section 3.1 of this report, where it is clearly stipulated that on the high seas every ship may seize a pirate ship but that the prosecution should be *“by the courts of the state which carried out the seizure”* (Article 105, UNCLOS). It is believed that this provision was drafted in such a way because piracy was considered to be mostly a problem from the past and was meant to stimulate prosecution on land rather than on board of ships and not meant for the unintended side effect of forcing the seizing state to prosecute. However, there needs to be a legal basis to justify the transfer of pirates to the jurisdiction of third states which is now relatively unclear due to the exact phrasing of the UNCLOS (Kontorovich, 2010). It is thus more likely that the SUA is the international body of law that provides better opportunities for prosecution by a third state.

To answer the sub-question; the EUNAVFOR mission is a military response made under the Common Security and Defence Policy to the requests made by the United Nations Security Council to counter the surge of piracy in the coastal areas around Somalia. The mission has been authorized by the UN under the provisions of Chapter VII of the Charter of the United Nations. Participation to the mission is done on voluntary basis by the EU member states. The mission fully adheres to the UNCLOS and enjoys the extra privilege of being able to venture into Somali territorial waters to deter piracy. This right was agreed with the TFG and was also the result of UNSCR 1816 (2008). In order to facilitate prosecution, the EU concluded Memoranda of Understanding with Kenya and the Seychelles. These

Memoranda of Understanding are agreements in which the terms of prosecution in the African nations are agreed upon. Within these Memoranda of Understanding, the EU has laid great emphasize on ensuring that the human rights of the suspects would be respected.

4. Empirical Findings

4.1 Analyzing results

After this construction of the most relevant international legal rules and the EU mandate, it is of interest to see to what extent the EUNAVFOR has been helpful in facilitating the prosecution of pirates. Thus, has the EUNAVFOR's efforts helped in any way to increase the occurrence of prosecution? This empirical section of the report will be based on secondary sources such as government documents, scientific articles and newspaper articles due to the novelty of the topic. This chapter will provide an insight in the current efforts of the EUNAVFOR, the current functioning of the Memoranda of Understanding and the current prosecution proceedings by answering the research question below.

3. To what extent is the current EUNAVFOR mission helpful in facilitating the prosecution of pirates?

The current counter-piracy efforts can in some way be viewed as quite effective. The EU has, together with the NATO and CTF-151 established the *Internationally Recommended Transit Corridor* which is a corridor that at 15 knots takes about 48 hours to get through. This transit, with a Westbound and Eastbound lane separated by a 5-mile zone, is the only transit opportunity for shipping that is guarded by naval forces. This guarding can be done on an individual basis for high risk cargo, group transits or increased support transits for those that go through the corridor alone but do not involve high risks (Homan and Kamerling, 2010). It is without question that the EUNAVFOR mission has been successful at decreasing the likelihood for commercial vessels to come under attack. By establishing a Maritime Security Centre- Horn of Africa (MSC-HOA) that advises ships with regards to the best route to take, the chance for a ship to be attacked has decreased from 1 out of

14,000 to 1 in 70,000 (Homan and Kamerling, 2010).

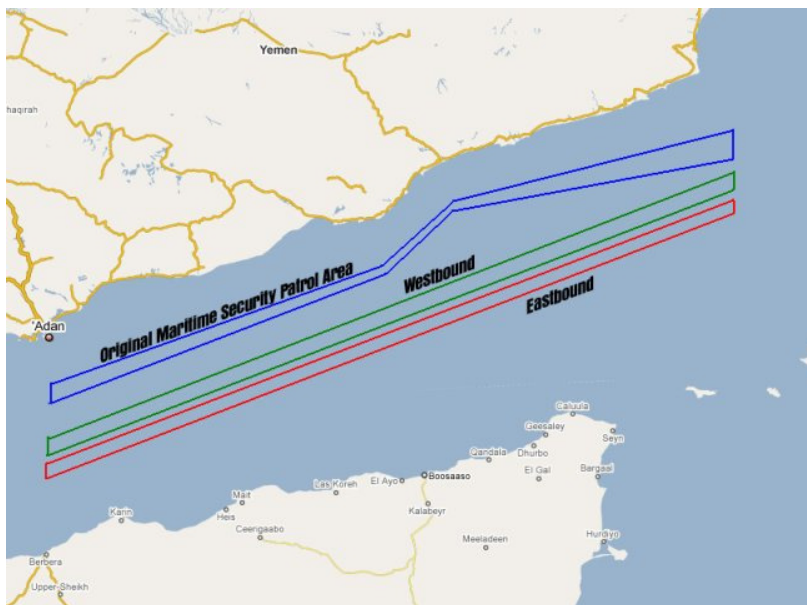


Figure 3: the Internationally Recommended Transit Corridor (Source: Maritime Information Center 2011)

Figure 3 shows the functioning of the IRTC, as established by EUNAVFOR. A clearly defined eastbound and westbound lane allow for shipping convoys to go through the Gulf of Aden while under navy protection.

Due to the high level of organization of the pirating, it proved to be difficult to capture those suspected of committing crimes of piracy. Smart tactics, such as moving their area of operation outside of the marine area of operation as determined in the mandate, has helped them avoid confrontations. Another tactic that was used often was to flee within the 12 nautical mile territorial sea of Somalia where they were inside Somali jurisdiction and out of international forces' hands (Kraska and Wilson, 2009). By concluding agreements with Somalia and the UN, the EUNAVFOR is now able to engage in hot pursuit and arrest and detain within the territorial waters.

However, prosecution rates are not nearly as impressive. Prosecuting in Somalia is not an option currently for a lack of resources to ensure that those detained will receive a fair trial. Torture and the death penalty cannot be ruled out when transferring detainees to the Somali *ad hoc* authorities, and conditions in Somali prisons are dire. Because of uncertainties about whether pirates can be sent back to Somalia after being tried in an EU country, many choose to release rather than capture. It has happened on several occasions that captives of the EU naval forces have been stripped of equipment used for pirating (weapons, ladders etc) and released (Treves, 2009). Both the Puntland and Somaliland authorities have requested the extradition of pirates captured by European navies, but this is often declined because of the human rights issues. Exception to this are France and Spain who have both occasionally handed over detainees to one of the three Somali authorities (Homan and Kamerling, 2009). However, it is part of the European and United Nations shared objectives to include Somalia more into the counter-piracy actions conducted by the EU. In an initiative launched by the EU and the UN in May 2009, it is stated that part of the objectives are: fair trial and imprisonment of the Somali pirates in the countries with which the MoU are concluded, the improvement of conditions in Somalia to enable imprisonment of pirates and the long term goal of being able to try within Somalia itself (AIV, 2010).

Countries that do have MoU with the EU are not willing to prosecute all those detained, for they are afraid to become a dumping ground for Somali criminals (Fink and Galvin, 2009; Treves 2009). Up until this moment most of the pirates that were brought to third countries for prosecution were brought to Kenya. Kenya has a customary law system that is based on the English system and appears to be most suitable from the countries of the region to fulfil this task (Fawcett, 2010). In the AIV report of 2010, it is reported that Kenya so far has prosecuted 123 Somali pirates. This was done in 14 group cases, of which 9 involved pirates that were transferred to Kenya by the European Union (and respectively, 2 by the UK and 3 by the US). Not all of these cases led to sentencing, for it proves to be quite difficult to provide sufficient evidence. In 2009, the Kenyan legal system was adapted in accordance with UNCLOS, which allowed for the prosecution of those that commit acts of piracy on the high seas or in territorial waters including non-Kenyan nationals. And in June 2010, a court was opened in Mombasa with the sole purpose of enabling Kenya to have more capacity to prosecute pirates. This court was paid for by the international community. (AIV, 2010). However, in the beginning of 2010 the Kenyan minister of Foreign Affairs claimed that Kenya was being overwhelmed with suspected pirates and urged other states to step in by making financial and operational contributions (Fawcett, 2010). Furthermore, the great influx of Somali pirates (who are Muslim) that were due for trial created irritations between Kenya and Somalia and also between the Kenyan government and its own Muslim population (Kontorovich, 2010). Kenya has since then terminated the agreements with other parties such as the US, NATO and the EU to prosecute pirates due to perceived lack of support (BBC, 1 April 2010). Thus, Kenya has chosen to use the opt-out clause that was part of the initial agreement between the EU and Kenya. Furthermore, a ruling by the High Court

of Kenya in a case against Somali pirates stressed that “the Local Courts can only deal with offences or criminal incidents that take place within the territorial jurisdiction of Kenya” (In re Mohamed Dashi & 8 others (2009) eKLR, 2009). This is even though the UNODC has spend over \$3 million in Kenya on improving the Kenya opportunities to try pirates, such as the construction of the new court. However, currently there are still 35 Somali men serving their prison sentences within Kenya (BBC, 2010).

The Seychelles also has a Memorandum of Understanding with the EU and they too feel overwhelmed, especially due to the large number of cases compared to their population of 88 000. For the Seychelles, the Internationally Recommended Transit Corridor has the side effect that many pirates are suddenly venturing into the Seychelles’ territorial waters. In June 2011, over 70 suspected pirates had been brought to the Seychelles for prosecution (UNODC, 2011). Over 40 of those were prosecuted in 4 separate cases (AIV, 2010). At least one of these proceedings was the direct result of a transfer of suspects detained by the European Union EUNAFVOR efforts. These 11 pirates were arrested by the French navy after attacking a Spanish fishing trawler and received six-year long sentences to be served on the Seychelles. The Seychelles also had to adapt their legal systems to be able to prosecute those suspected of piracy that have not conducted these acts within their territorial waters. (AIV, 2010). Like other Eastern African countries, the Seychelles lack resources to prosecute pirates, and “in late 2009, the Seychelles government reportedly repatriated 23 suspected Somali pirates prior to trial” (Fawcett, 2010). According to a 2011 report by the United Nations Office on Drugs and Crime, piracy as a source of crime is costing the Seychelles over 4 percent of its GDP, both due to increased naval patrols and to trials. Thus financial and operational contributions from the European Union and other multilateral partners are necessary (UNODC, 2011). The Seychelles was also the first country to enter into agreements with all three regional Somali governments to enable repatriation of pirates when the conditions within Somali prisons will have improved enough to adhere to international human rights’ laws (UNODC, 2011). However, data regarding prosecution by the Seychelles are conflicting. The EUNAVFOR mission website seems to report different data regarding the prosecution rate. According to EU sources; the first case held in the Seychelles marked (at that point) the trial of 43 out of 92 individuals who were arrested in the EUNAVFOR efforts. (EUNAVFOR, 2010).

In 2008, France detained 6 pirates that held hostage a French yacht with the intention to try them in France, these trial led to the sentencing of the pirates within France. And in June 2010 the Netherlands was the second European country to try suspects of piracy off the coast of Somalia. Five Somali nationals were found guilty of piracy and were sentenced to five years of imprisonment within the Netherlands. The choice was made to prosecute them in the Netherlands due to two specific facts, namely that the ship attacked was sailing under an Antillean flag and that the Netherlands were currently active in combating piracy. Prosecuting them was a possibility because “Under article 4, paragraph 5 of the Dutch Criminal Code, the Netherlands has universal jurisdiction over piracy as referred to in articles 381-385 of the Criminal Code- namely acts of violence against vessels, persons or property on the high seas- and may exercise this jurisdiction if the Public Prosecution Service decides to institute criminal proceedings” (AIV, 2010). The Dutch marine force has had several more encounters with pirates of which the liberation of an Iranian fishing trawler in April 2011 was particularly violent. The use of potentially lethal weapons by Somali pirates against Dutch marines has led the Netherlands to decide to also prosecute the 9 Somali pirates that were detained (NRC, 2011).

The Dutch court was also involved in extraditing 10 Somali nationals to Germany in 2010 where they faced piracy charges in German courts. The Dutch marine force liberated a German container ship and arrested the pirates. Because the Netherlands had no direct interest in prosecuting, Germany requested extradition. The act of piracy does not exist under German law, which meant that the suspects had to be tried for 'attacks on maritime traffic'. After that it was relatively easy to prosecute the pirates for German law is compatible with UNCLOS, and because the ship was German with a German crew and thus part of the German jurisdiction (AIV, 2010). Previously, Germany had already expressed that it was not interested in prosecuting Somali pirates, unless there was direct German interest involved (Kraska and Wilson, 2009).

However, thus far Germany, France and the Netherlands have been the only three European countries that put Somali pirates to trial. Many EUNAVFOR warships end up releasing the suspects either immediately after confiscating pirating materials (catch and release) or hold the pirates on board for a short period of time but release them again when no State expresses interest in prosecuting. These practices are common, with one of the more current occasions being the 21st of April 2011, when a Finnish warship held 18 suspects on board for as long as 15 days before returning them to the Somali mainland due to the lack of a State willing to exercise its jurisdiction (EUNAVFOR, 2011). According to a UN report, there are currently 780 pirates held in 13 countries awaiting trial, but 9 out of 10 suspected pirates are released at sea rather than brought back for criminal proceedings (France 24, 2011).

To answer the sub-question; The EUNAVFOR mission Atalanta has been able to achieve impressive results with regards to decreasing the likelihood of a pirate attack. By making use of the *Internationally Recommended Transit Corridor*, many vessels have been able to exercise their right of free navigation. However, the EUNAVFOR forces have been less able to ensure prosecution, with catch and release practices still being the preferred method for many participants. By concluding Memoranda of Understanding the EU had hoped to facilitate prosecution, however it was soon clear that Kenya and the Seychelles feel overwhelmed by the amount of suspects which far surpasses their capacities. This has led to the situation where Kenya has terminated its agreement with the EUNAVFOR forces and where the Seychelles have been releasing suspects before trial. Trial within European countries has only been done a couple of occasions, and this was always the result of the countries direct interest in prosecuting, such as when the ship victimized was flying under their flag. This option appears to be seen as a last resort, regardless of the fact that several European countries have legislation that is in accordance with the UNCLOS and provides them with sufficient legal tools to exercise universal jurisdiction.

4.2 Factors that hinder the process of prosecution

As shown by the previous sub-question, the EUNAVFOR's efforts have helped the prosecution of Somali piracy only partially. Furthermore, there appear to be several reasons why countries are reluctant to prosecute and not all of these are directly legal reasons. This is assumed because the UNCLOS and SUA offer legal possibilities to exercise universal jurisdiction, yet countries seem reluctant to make use of these provisions. Now that it has been established that the EU has been unable to fully facilitate prosecution of suspected pirates of the coast of Somalia and that there

might be alternative reasons, it is necessary to discuss possible alternative causes for the low prosecution rate. This will be done by answering the last research question.

4. What are the factors that hinder in the process of prosecuting pirates of the coast of Somalia?

According to Treves (2009), those European countries that participate in the EU naval mission and seize the pirates “seem concerned by the expense involved, by legal complexities, relating for instance to evidence, inherent in criminal proceedings to be held far away from the place where the alleged crime was committed, and perhaps especially, by the human rights implications of exercising jurisdiction” (Treves, 2009). In order to give a complete overview of the issues that play a role in the prosecution of piracy, possible factors that help or hinder piracy will be explored in four different areas which are; law, sociology, politics and economics. These areas are chosen because they are four key areas within European Studies and have proven to provide one with excellent tools to give a complete overview of factors. Within each of these sectors, the secondary sources will provide for alternative reasons why prosecution has been partial at best. Assumed is the following hypothesis; The current lack of prosecution of Somali pirates in the EUNAVFOR operation Atalanta is both determined by legislative issues and alternative factors. All four of these factors will be examined by analyzing current data.

4.2.1 Legal/operational factors:

Although the legal aspects have been explored into depth in the previous sections, here the main legal issues that hinder prosecution both for European countries and the partners with whom the EU has a MoU will be further investigated. These are factors regardless of the legal provisions of the UNCLOS and the SUA. Operational factors of the legal proceedings that hinder prosecution will be incorporated in this section.

There are still many legal obstacles to prosecuting those suspected of piracy in the current EUNAVFOR mission. This is partially because not all of the participating countries include piracy as a criminal offense within their justice system making it thus impossible to prosecute. In a questionnaire held by the Contact Group on Piracy off the Coast of Somali, it turns out that the Netherlands, Denmark, Greece and Italy are the only European Countries that have the specific crime of piracy within their legal system (Satkauskas, 2010; AIV, 2010). Why would this be the case? If countries adapt their legislation to fit the prosecution of piracy, many legal issues can be avoided. Currently, it is impossible for some countries to prosecute because their legal system defines the current action against piracy as purely military. In that case, those that are detained are almost impossible to prosecute for common crimes, even though piracy for private ends is a crime committed by common criminals and not a war-crime (Blanco-Bazár, 2001). UNSC resolution 1846 of 2 December 2008 specifically requests, in article 14 and 15, States to remove legal obstacles in order to prosecute the Somali pirates (Moller 2009). However, although the UNSCR were able to allow EU forces into the

territorial seas of Somali to combat piracy, the UN is unable to change national laws with regards to the possibility of prosecuting pirates (Fink and Galvin, 2009).

The mandate of the mission does allow for the detention and prosecution of pirates within European Member States. Article 2 (e) of the mandate allows for arresting and detaining piracy suspects under the conditions set in Article 12 of the Council Decision which states; *“to the competent authorities of the flag Member State...if this State cannot, or does not wish to, exercise its jurisdiction, to a Member State or any third State which wished to exercise its jurisdiction.”* (Council Joint Action 2008/ 851/ CFSP, Article 12). This again, leaves room for political reluctance to prosecute for States are, very much similar to the UNCLOS, not obliged to do so.

It proves to be difficult to get the suspects on land on time, which means that the pirates stay on the marine vessels for an extended period of time (Kraska and Wilson, 2009). This almost led to acquittal in the trial in Rotterdam, because the suspects had not been brought in front of the judge in the required timeframe (AIV, 2010). This was according to the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) whose article 5(3) stipulates; *“Everyone arrested or detained...shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial”* (ECoHR, 1950). Another legal difficulty that it is hard to distinguish between pirates and fishermen and that is it therefore proving to be very difficult to provide enough evidence in court. Unless they are caught in the act or are carrying weapons that suggest piracy, many times the authorities are left with too little to prosecute (Wall Street Journal, 2008).

There are also a lot of operational factors that come into play, such as the fact that in order to provide evidence, perhaps naval officers in active service need to testify. Or the fact that most of the time, the victims of piracy attacks are not citizens of Somalia or any other Eastern African country and will not remain in the country where the pirates are prosecuted. This is one of the reasons why in the agreement between the EU and Kenya (which is no longer in force) it was specifically stated in article 5(g) that Kenya was to notify EUNAVFOR in a timely fashion when they were required to function as witnesses (L 79, Official Journal of the European Union, 2009). Also, establishing the identity of those suspected of piracy proves to be hard for they tend not to carry any identification. This is all besides the obvious operational aspects that are required such as interpreters and lawyers (Kontorovich, 2009).

4.2.2 Political factors:

There are also political factors that come into play in determining whether a country is willing to prosecute suspects of piracy. It might for instance be the case that a country has made the political decision to not prosecute for whatever reason and therefore their operational forces have no other option but to use the catch and release method. Currently, several European Nations have very specifically requested of their navies to avoid making any arrests (Kontorovich, 2010). This suggests that even though the legal provisions are in place to prosecute those responsible, the political will to do so might be lacking. An example of this is the Dutch political decision to only prosecute when either the pirates, victims or the crime scene falls under Dutch jurisdiction. This is despite the fact

that the Netherlands is a signatory to the SUA and does have the legal capability to prosecute. This has led Dutch forces to release pirates again on several occasions (Sky, 2009). It is often hard to estimate how much of the lack of capabilities of a country to exercise jurisdiction stems from legal reasons or from lack of political will.

4.2.3 Economic Factors:

Europe has considerable economic interests in shipping in the Gulf of Aden and has every intention of ensuring shipping is not hindered. The waterways around Somalia carry 7.5% of all seaborne trade in the world, and 30% of European oil (Kontorovich, 2010). Furthermore, insurance costs for European shipping companies that venture through those seaways have soared (AIV, 2010). Thus, preventing the occurrence of piracy attacks has direct economic benefits for the European Union. It was the UN who urged those countries with the highest economic benefits of free navigation in the region to step up and commence naval operations to prevent new attacks. By establishing the *Internationally Recommended Transit Corridor*, EUNAVFOR has managed to decrease the likelihood of piracy in some parts of the Gulf of Aden. Thus, economic benefits are achieved without prosecution.

Eastern African countries do not have the resources to afford the many trials against Somali pirates. Over the course of the last few years the EU has spend quite some money on helping Eastern African countries facilitating trials by funding through the United Nation's Office on Drugs and Crime. As a response to Kenya ending the agreement with the EU, the EU representative in Kenya has warned that by not prosecuting piracy Kenya is also damaging their own economic interests by decreasing traffic to their national ports. However, it appears quite clearly that the EU is willing to spend large quantities of money on the improvement of the legal system in Eastern African countries if this ensures that trial can be held there. Furthermore, it must not be underestimated what the costs for an individual participating European country are to be operational in the area. This leads to the assumption that economic factors are not of great importance in determining whether prosecution is an option or not, for the EU is willing to spend large quantities of money on other parts of the counter-piracy operation, which are all more expensive than trial costs.

4.2.4 Social Factors:

The fear of asylum claims has led to many national governments forbidding their naval vessels returning suspected pirates to national courts (Treves, 2009). During the trial in Rotterdam in 2009, 2 of the 5 Somali suspects expressed the interest in requesting asylum after their sentence was done (Telegraph, 2009). It is not unlikely that the European countries find themselves breaking national or European asylum laws by refusing asylum to former pirates. This fear is also expressed by the former Dutch minister of Foreign Affairs Maxime Verhagen who expressed the sentiment that "we cannot be on the right track, when the Dutch punishment is viewed more as a gift than as a threat. This can lead to the strange situation that our attempts to punish pirates, encourages them instead of discourages." (own translation from Dutch) (United Academics, 2010).

But also the protection of human rights appears to be a reason for countries not to prosecute pirates, especially due to their consequences for asylum claims. In 2008 the Danish warship *Absalon* captured 10 pirates off the coast of Somalia. The decision not to prosecute was explicated by the fact that insecurities would arise over the possibility to send Somali pirates back to Somalia after they have completed their sentence, due to the possible violation of human rights within Somalia towards (ex)convicts. The British Foreign Office has officially warned their forces not to detain suspects of pirates because this might constitute to a violation of their human rights, which “could lead to claims of asylum in Britain” (Treves, 2009; Kontorovich, 2010). This fear of violation of human rights can be related back to the previously mentioned European Convention on Human Rights but also to the Geneva convention which forbids States to send people back to countries where they might be subject to torture or other harm. Avoiding breaching European Human Rights laws can be a very plausible explanation why European countries have often opted to bring their detainees to Kenya for trial (Kontorovich, 2010). This is because starting legal proceedings against the pirates within Europe will most definitely lead to asylum requests.

4.2.5 Answer to the sub-question:

To answer the sub-question; The information provided leads to the conclusion that the hypothesis is mainly false. It is undeniable that the lack of political will has had its effect on the willingness of marine forces to detain and arrest suspects of piracy. However, many of the reasons for political hesitance are connected to the legal implications of a possible trial. The operational aspects such as time limits and lack of evidence are only minor compared to the possible violation of human rights. States have, with reason, expressed the fear of possible asylum claims which cannot be refuted. This might be the reasons why many states have shown a clear lack of will to adhere to the demands of the UN and the obligations of the SUA to alter their national legislation in such a way that the prosecution of pirates is possible. Thus even though international legal provisions allow for States to prosecute, States appear hesitant because of the existing human rights laws and their possible implications.

5. Conclusions & Recommendations

In order to draw conclusions it is important to return to the research questions. The research questions for this thesis were the following;

What are the legal challenges with regards to prosecuting Somali pirates in the EUNAVFOR operation Atalanta?

1. *What are the applicable international legal rules with regards to the prosecution of pirates?*
2. *What does the EUNAVFOR mission entail, and under what mandate does it operate?*
3. *To what extent is the current EUNAVFOR mission helpful in facilitating the prosecution of pirates?*
4. *What are the factors that hinder in the process of prosecuting pirates of the coast of Somalia?*

As shown by the answers to the sub-questions, there are a lot of legal aspects that come in to play in the EUNAVFOR's attempts to enable the prosecution of pirates. The most relevant international bodies of law are the UNCLOS and the SUA, which allow for countries to exercise universal jurisdiction to help detain and prosecute the *Hostes Humani Generis* that pirates are considered to be under international law. However, these international rules are suffering from some important limitations and constraints. The fact that, in general, arrests can only be made on the high seas by warships is one of such constraints. Furthermore, determining who can exercise jurisdiction can be quite confusing due to practices within modern commercial shipping such as "flagging out". Other issues that can play a role is that not all nations are signatories to the UNCLOS or the SUA, which slightly limits the customary principles of its provisions. The most important issue with the relevant bodies of international law is that although countries have the right to prosecute in no way are they *obliged* to do so. Thus, in case where states perceive there will be constraints, it is relatively easy to avoid legal proceedings. The UNSCR have helped the EU avoid some of these issues within the EUNAVFOR mission Atalanta, mostly by its authorization through Chapter VII of the Charter. The UN requested EU action, and enabled the EUNAVFOR mission to venture into the territorial waters of the Republic of Somalia to detain and arrest those suspected of piracy. The Council Decision for Joint Action also clearly states that the EU will operate within the limits set by the UNCLOS, avoiding issues between different legal systems. In order to facilitate prosecution the EU concluded Memoranda of Understanding with Kenya and the Seychelles. These MoU are agreements that clearly stipulate the rights and obligations for both parties (the EU and the third country) under which the transfer of suspects for trial is possible. These conditions include the protection of the human rights of the suspects.

Thus, this appears to give enough legal leverage to ensure the prosecution of those suspected of piracy. However, when looking at the data regarding actual prosecution, the success rate is disappointing. Whereas the EU has proven to be relatively successful in decreasing the likelihood of an attack, the likelihood of prosecution appears to be relatively the same. Due to the low number of prosecution rates, some of the pull factors for piracy remain quite high. It is quite clear that prosecution within Somalia cannot be regarded as a feasible solution at the moment, even though it is many's preferred solution for the future. This is due to the lack of a fully recognized government and the disregard for the human rights of those held in Somali prisons. It is part of the EU and UN's

long-term objectives to involve Somali a more actively within counter-piracy operations, but it would be premature to regard this as a short-term possibility. Exceptions to this are Spain and France who have occasionally handed over piracy suspects to Puntland and Somaliland authorities but this should not mistakenly be regarded as the EUNAVFOR' s preferred method. The Memoranda of Understanding concluded between the EU and third parties have only had limited effect due to the hesitance of both Kenya and the Seychelles. Between the conclusion of the agreement with Kenya and its premature termination in 2010, the EUNAVFOR's efforts have led to the prosecution of about a hundred Somali pirates, of which not all trials end in sentencing. Kenya claims to have been expecting maybe 10 individual at most and thus terminated the agreement due to its success. The Seychelles have prosecuted at least 11 based on 2010 data and are clearly not capable to deal with a great increase in the influx of suspects. It begs the questions whether the EU has been taking signs from Eastern African partner countries about being overwhelmed seriously. It is undeniable that the preferred European discourse existed out of a transfer of suspects to Kenya or the Seychelles. And although the EU is engaging in talks with other African nations to conclude similar agreements it appears that most of these countries are not extremely willing to engage in such an agreement. These agreements also turn out to be costly for the EU, because they usually involve a financial contribution of the EU to increase the legal capacities of the host state.

The reasons for the EU Member States that are participating in the EUNAVFOR mission Atalanta to not prosecute at home thus appear to be linked to other reasons. While this led to the hypothesis that these reasons might not be of a legal nature, this hypothesis proved to be at best partially true. Most of the reasons for European countries to be hesitant to prosecute piracy suspects are related to the legal ramifications that go along with exercising universal jurisdiction. Most of these legal challenges are of an operational nature, with great difficulties in providing enough evidence and start trial proceedings in a timely fashion according to the requirements of the European Convention for the Protection of Human Rights and Fundamental Freedoms. However it cannot be denied that part of the political lack of will to allow prosecution within Europe is related to the possibility that doing so grants rights to the Somali suspects that could eventually lead to asylum proceedings. The construction of the mandate allows for prosecution but does not oblige participating States to do so, making it possible for States to avoid legal proceedings against suspected pirates. However, if the mandate were to be changed in such a way that the Member State would be obliged to prosecute, it is not very likely that countries would be willing to continue participation due to the aforementioned possible consequences. Furthermore, for most European countries the obligation to prosecute would entail the implementation of new anti-piracy laws and establishing potential universal jurisdiction.

The low level of prosecution can be viewed as failure to provide legal follow-through in this counter-piracy operation. It is not unlikely that due to the decreased occurrence of piracy achieved by the EUNAVFOR mission, many view it as an economic success. One must not forget that the financial contributions made by the EU both in mission costs and by improving partner countries' legal system are probably quite small compared to the financial benefits. This is because of the European Unions' economic interest in commercial shipping in the area and because of avoiding lengthy and costly legal proceedings in EU member States.

Thus, it cannot be expected that catch and release practices will come to an end without alterations being made to the current system. Or as Agustín Blanco-Bazán (2001) put it: “Unless laws ensuring the prevention and prosecution of piracy are in place, no amount of ships or weapons will be effective enough to discourage piracy. Force without law leads to nowhere. *Force* must therefore become *enforcement*, namely exercise of preventative and punitive action within a clearly defined legal framework.” In order for prosecution rates to be increased several actions would need to be taken;

1. More pressure upon participating countries to adhere to their legal obligations such as stipulated within the SUA and ensure prosecution of suspects of maritime crime, either in their own country or by a third party.
2. Better co-operation between EUNAVFOR and third parties such as Eastern African nations to increase the functioning of the MoUs, in such a way that the legal system of those countries participating is not stretched beyond its capabilities. This includes financial and operational support.
3. Possible cooperation with other counter-piracy operations in the area and the UN to create one general policy of best practices with regards to prosecution. This would take the strain of the legal systems of many of the partnering East African countries.
4. It must be understood that African nations cannot be considered a dumping ground for all Somali piracy suspects. Due to human right laws, there are considerable constraints for countries to send convicted Somalis back to Somalia. In order for the MoU to function it must be guaranteed by the TFG that those prosecuted for acts of piracy can (relatively) safely return to Somalia after their sentence is due. This is to decrease asylum possibilities.

Measure four would be hard to realize, since Somalia has a long way to come. Even the similar agreement between Somalia and the Seychelles regarding the return of convicted criminals is created for use in the far future. But it does illustrate the underlying problem. EUNAVFOR’s efforts have been focused upon ensuring safe passage of WFP and commercial vessels. However, as long as the situation on land in Somalia remains as dire as it is, it can be expected that the push and pull factors of piracy will remain relatively the same. Due to the anarchy in the Republic of Somalia and the low life expectancy and income, most of them see piracy as a last resort. It is proving to be very hard to win from those that feel like they have nothing to lose. With nobody wanting to take legal responsibility over the suspects, the EUNAVFOR is currently battling the symptoms without addressing the root of the problem.

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