The fight against modern piracy impeding maritime traffic and hampering United Nations fundamental rights.

Speech by Mr J.F. LECLERCQ, General Prosecutor at the Court of Cassation, on the occasion of the opening solemn audience of the Court of Cassation of Belgium, on 1st September 2010.

Section 1. – The frigate “Louise Marie" left ZEEBRUGGE to carry out a noble titanic task.

1. Those who wake up early this morning heard the news.

On a still uncertain date, a Belgian sailing ship, equipped for luxury cruises and named "ZEESYMFONIE", cruised in the international waters of the GULF OF ADEN, halfway between DJIBOUTI and the Yemeni island of Socotra, when it was boarded by two rapid crafts. About twenty armed men took part in the boarding and soon took control of the “ZEESYMFONIE”, of which thirty cabin crew were held hostages.

The Belgian sailing ship was then hijacked and driven to the Somali territorial waters, where it was finally parked in front of the fishing port of GARAAD, located in the PUNTLAND coast, province of the north-eastern SOMALI region, which became autonomous in 1998 and which name comes from the former kingdom of PUNT, the country of myrrh and incense.

After what appears to be a negotiation between the pirates and the shipowner and the payment of a ransom, the cabin crews were set free.

That was also seemingly at the very moment when the pirates prepared to head for terra firma in order to take flight, that, in the utmost secrecy, the soldiers on board of the frigate “Louise Marie” of the BELGIAN NAVY”, which was gone again on an assignment in the strictest secrecy, intervened and arrested part of the pirates.

Then we lost track of the “Louise Marie” until its return to ZEEBRUGGE was announced this morning at 5 o’clock. So

were the pirates, apparently Somalian nationals, brought to Belgium by the Belgian frigate.

The Federal Prosecutor in person and an investigating judge were on site, in ZEEBRUGGE. The issues that are now raised are the following: what did exactly happen and what is going to happen in the judicialisation of this quite unusual case([1])?

Mister First President,
Ladies and Gentlemen,

This is of course a fiction, there again... Is the term “of course” appropriately used?

2. For the Belgian Navy, 2009 was a year turned towards the high seas.

After that the frigate “Léopold I” hosted the command of the multinational maritime task force of the UNIFIL, from beginning of March 2009 to end of May 2009, it is its sister ship, the “Louise-Marie” which carried out a new original mission in the history of the “BELGIAN NAVY”. On 17 August 2009, the Belgian frigate “Louise-Marie” left from ZEEBRUGGE to head to the GULF OF ADEN. 169 cabin crew men and women left their port of registry in order to take part to the European anti-piracy operation named “ATALANTE” or “ATALANTA”.

3. The general context of the anti-piracy mission is known. Since 1988, maritime piracy has arrived back in force on both African coasts. Especially since the fall of Islamic Courts in December 2006, the HORN OF AFRICA and the coast stretching out to SOMALIA, SOMALILAND, THE SEYCHELLES and YEMEN have seen the emergence of a new generation of pirates able to destabilize the world trade.

As a reaction, the European countries joined forces to deploy a naval fleet in the area concerned which is

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([1]) I thank Michael TRAEST, public auditor at the Court of Cassation, for his valuable cooperation. See, with regard to this part of speech, G. POISSONNIER, "Les pirates de la Corne de l'Afrique et le droit français", D.H. 2008, p 2097; G. POISSONNIER, "Quels droits pour RACKHAM LE ROUGE?", Note sous Cass. fr. (crim.) 16 September 2009, D.H. 2010, pp. 631 s.

relatively offensive as the warships can board pirate vessels, make arrests and escort vessels in danger.

The frigate “Louise-Marie” is part of this European operation. It has a flight deck for helicopters extended to the size of the NH90 as well as a hangar. However, it put out to sea with an ALOUETTE III. The warship is regularly equipped with HARPOON surface missiles, with a 76 mm gun and with SEA SPARROW anti-aircraft missiles, not to mention its torpedo launch system.
As the “Louise-Marie” cast off, its captain, JAN DE BEURME stated that he would not release any pirates if he happened to capture any. He intended to put the pirates as soon as possible into the hands of the judicial authorities of Belgium if the vessel attacked was Belgian and if the federal Prosecutor office requested it or into the hands of the competent foreign judicial authorities if the vessel attacked sailed under another flag than the Belgian one[2].

However, the issue is not so simple at legal level. Is a soldier a policeman? May a soldier act as a policeman and arrest a Somalian pirate? Without any policemen on board, can we act quite legally?

4. In January 2009, Vincent HUGEUX wrote in an interesting study:

This fight between strength and speed is a strange naval battle. Between overarmed policemen and modern buccaneers who are swift enough to seize a sea colossus in ten minutes chrono. When the pirates are on the deck, it is already too late, concedes the captain of the NIVÔSE (French frigate which mission was to foil the pirates without having the right to detain them). My mission stops there. The reconquest by force is no part of my job. By the way, it is not easy to profile the enemy. How to distinguish the floating refrigerator and its squad of fishing canoes from the pirate head vessel, rear basis of the boarding skiffs? A weapon in a box? The Law of the Sea permits it. Of course, we rarely strike the grouper with a hail of kalach’ and of RPG-7. But they must also

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([1]) Concerning all these questions, see A. LALLEMAND, "Défense. La frégate 'Louise-Marie' a quitté ZEEBRUGGE pour l'OCEAN INDIEN. Cent jours à traquer les pirates", Le Soir, 18 August 2009, p. 11 In addition, regarding the Somalian president Cheikh SHARIF Cheikh AHMED’s will to foster national reconciliation and the signature of the DJIBOUTI AGREEMENT in the autumn 2008 which enabled the moderate elements from the former Islamic Courts to return to power along with the Transitional federal government, see A. LALLEMAND,"BEN LADEN pousse à l'escalade islamiste", Le Soir, 20 March 2009, p. 12.

be capable of being found under the tarpaulin. But the ‘visitors’ wearing their combat uniforms are in theory not allowed to scour without the crew’s consent.

Piracy is endemic and has quite recently changed of calibre or even of nature – may I emphasize that the press article dated January 2009. The expansion of piracy has been induced by the ruination of SOMALIA which is an archetype of the ‘failed State’ abandoned to chaos and anarchy after the fall of the dictator SIAD BARRE in 1991. At that time, fishing fleets from Europe and Asia rushed towards these fish-rich waters, scraping out the ocean with their trawl net without any licence or permit, whilst corrupt captains soiled the shore with toxic waste shamelessly dropped on it. The local fishermen, who were often persecuted, rebelled and began to chase the plunderers and to seize their ships, which were returned against a ransom. Pirates nowadays put forward this noble heritage, even if it means claiming the status of ‘coast guard’. ‘Easy alibi’ objected AHMEDOU OULD-ABDALLAH, UN Special Representative in SOMALIA. Piracy became a widely criminal business, having its own strategists and financing networks. Indeed, nothing is left to chance by the 10 to 12 gangs listed and installed for the most of them in PUNTLAND, an autonomous region located in the north-east of SOMALIA. They are well disciplined and have their own ‘investors’, whose capital funding covers the equipment, their recruiters, accountants, interpreters, mechanics and negotiators. But also their informants, who are posted in the ports of the region as well as their guards, in charge of watching on about fifteen pirated vessels anchored off EYL, HOBYO or HARARDHERE.

Shopkeepers and restaurateurs provide the supply, including the supply requested for the maintenance of the (…) sailors who are held hostage. The sharing out of the loot, i.e. more than 100 million EUR extorted in 2008 - complies with precise ratios. Generally, the financier gets between 20 and 30% of the ransom, like the local authorities or what is a substitute for it, for the price of their benevolence. The buccaneers themselves share out one good third of the total amount. ‘Sometimes, the first man who steps on the deck gets a risk premium of about 2%', says an initiated. The balance, i.e. from 5 to 10%, is paid into a fund meant either for coming assaults or for families of pirates killed or imprisoned. The fortune accumulated enables the ‘brains’ – the western intelligence services identified six or seven of them – to acquire state-of-the-art material: GPS systems, satellite phones and… counterfeit money detectors.

This technological leap forward has boosted pirates' daring as well as their field of action. So they ‘seized’ the tanker SIRIUS STAR at more than 800 kilometre south from MOMBASA (KENYA). Regarding the Ukrainian FAINA, which is another flagship added to their list of successes, it conveyed 33 Soviet T-72 tanks, 150 rocket launchers and 6 anti-aircraft guns, meant for a militia in SOUTH SOUDAN. Figures speak for themselves: (From) January 2008 (to January 2009), there has been about 120 boarding, that is three times higher than in 2007, among which 39 succeeded. Within one year (during the year 2008), the scourge has led to a tenfold increase of the insurance premiums, (has) forced many shipowners to reroute their flotilla at great expense towards the Cape of Good Hope and (has) ensured the prosperity of many companies of private protection agencies, which efficiency by the way remains uncertain. So, I am still quoting Vincent HUGEUX, the pirates of the chemical tanker BISCAGLIA destroyed in one hail its very costly ‘acoustic gun’ which was supposed to paralyze the attackers, whilst its three unarmed security guards jumped into the sea.

The ATLANTE soldiers and their allies are sometimes burning to shoot it out. But strong-hand methods have their downsides. For instance, the blunder of a Indian frigate, which occurred by the end of November (2008): the TABAR sent down a Thai trawler annexed by the pirates, who had left the vessel, while about fifteen sailors were drowned” ([3]). (end of quotation).

([1]) V. HUGEUX, "SOMALIE Opération anti-pirates", Le Vif/L'Express, 9-15 January 2009, pp. 73-75. Regarding piracy off SOMALIA, see notably J.F. LECLERCQ, "De wet van 5 juni 1928 houdende herziening van het Tucht- en Strafwetboek voor de Koopvaardij en Zeevisserij, een minder bekend recht?", to be published in HULDEBOEK Luc HUYBRECHTS, Intersentia, 2010, nr 1 to 3; F.-X. TREGAN, "La nouvelle chasse au trésor", Le Soir 19 November 2008, p. 13; C. VANHOENACKER, "Piraterie: le jeu du chat et des souris", Le Soir, 27 March 2009, p. 41; P. REGNIER, "Les pirates du GOLFE D'ADEN sont en guerre", Le Soir, 16 April 2009, pp. 1 and 10; A. LALLEMAND and J.-F. MUNSTER, "Le POMPEI ne répond plus", "SOMALIE, Crise inédite pour la Belgique, Deux BELGES aux mains des pirates", "Qui est le patron des pirates?", "L'Europe doit être plus efficace", "Un abordage par la force? Hors de portée des BELGES" and "BRUXELLES, capitale de la SOMALIE", Le Soir, 20 April 2009, pp. 1, 2 and 3; A. LALLEMAND and C. BRAECKMAN, "POMPEI: préparatifs 'en toute sécurité'", "La mafia des déchets a précédé celle des pirates" and "Les pirates du clan SALEEBAN contrôlent la côte la plus proche", Le Soir, 21 April 2009, p. 3; V. KIESEL, "Il faut revenir à MOGADISCIO", C. BRAECKMAN, "(Louis) MICHEL: 'renforcer la structure politique'" and ANONYMOUS, "Contact enfin rétabli avec l'équipage du POMPEI", Le Soir, 23 April 2009, p. 14; M. LABAKI, "Des militaires belges sur les cargos belges?" and ANONYMOUS, "Des gardes privés sur les bateaux espagnols", Le Soir, 25 and 26 avril 2009, p. 20; M. LABAKI, "Soldats belges contre pirates",

As a consequence, two questions come upon both at legal and political level to know on the one hand if a strong reaction has to be shown, if the pirates have to be tracked down, if their weapons and money have to be seized and their boats sent to the bottom and, on the other hand to determine if an efficient international defence fleet can be more than an addition of nationalities. Will this more radical solution calm down the pirates? Welcome to PIRATISTAN ([4]).

To parody Michel SARDOU, I would be inclined to say, to refer to these modern pirates sailing all over: « Hugo de GROOT, réveille-toi; ils sont devenus fous ». [Hugo de GROOT, wake up; they've become crazy].

5. The fight against modern piracy impeding maritime traffic has been intensifying for one year.

Two pirates, who had captured the Spanish tuna boat ALAKRANA with 36 sailors on board off SOMALIA on 2 October 2009, were arrested by a frigate of the Spanish navy in the night of 3 to 4 October 2009. Both pirates were arrested after they left the tuna boat. The Spanish frigate CANRIAS had followed the pirates. One of them was slightly injured during the operation.

ATALANTA is a success regarding the escort of the WFP's boats.

EUNAVFOR permitted the delivery of several hundred thousand tons of food to the SOMALIAN population.

Being convinced that an efficient fight against piracy is not conceivable without a land operation, the 27 Ministers of Foreign Affairs and Defence of the European Union engaged on 17 November 2009 in an operation

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Le Soir, 2 and 3 May 2009, p. 13; J.-F. MUNSTER and A. LALLEMAND, "Un équipage libre pour la fin juin?", Le Soir, 25 June 2009, p. 7; M. LABAKI and A. LALLEMAND, "05h43, le POMPEI est libre" and ANONYMOUS, "La justice belge est déjà sur les traces des pirates", Le Soir, 29 June 2009, p. 3; A. LALLEMAND, "PIETER DE CREM: 'Il faut agir en SOMALIE'", "DE CREM: alerte rouge en SOMALIE", "Italiens, Allemands et Grecs nous ont aidés" and "Chaque vendredi, un briefing", Le Soir, 30 June 2009, pp. 1 and 3; ANONYMOUS, "L'équipage de retour ce lundi", Le Soir, 6 July 2009, p. 10; F. DELEPIERRE, "L'équipage du POMPEI a été bien traité", Le Soir, 7 July 2009, p. 9; A. LALLEMAND, "Défense. La frégate 'Louise-Marie' a quitté ZEEBRUGGE pour l'OCEAN INDIEN. Cent jours à traquer les pirates", Le Soir, 18 August 2009, p. 11; ANONYMOUS, "Retour triomphal pour les pêcheurs égyptiens enlevés", Le Soir, 24 August 2009, p. 17.

([1]) See V. HUGEUX, “Bienvenue au PIRATISTAN », Le Vif/L’Express, 9-15 January 2009, p. 74.

supporting the training of Somalian soldiers (EUSEC SOMALIA or EUSECFOR). This was a new kind of mission, which was not to be limited to counselling or supporting a State in its security reform or to train the staff but which was to provide a basic training to the soldiers. This was the first application of the Treaty of Lisbon, which broadens the scope of traditional intervention and pacification missions to missions aimed at providing advice and assistance in military matters.

As it concerns the payment of the Somalian soldiers, under the aegis of the UN, the firm PRICE WATERHOUSE COOPERS was asked to supervise the reception and management of the international funds ([5]).

6. In their « Kroniek van het Internationaal Puliekrecht » of April 2009, Professor Willem van GENUGTEN from the University of TILBURG and Professor Nico SCHRIJVER from the University of LEIDEN made this sad observation:

"Mare liberum en piraterij. In het jaar waarin wordt herdacht dat het 400 jaar geleden is dat het beroemde geschrift Mare liberum ('Over de vrije zee') van Hugo de GROOT uitkwam, is piraterij geheel terug op de internationale politieke agenda. de GROOT typeerde piraterij als een internationaal misdrijf en noemde piraten 'de vijanden van de mensheid'. Piraterij is van alle tijden, maar aan het begin van de 21ste eeuw valt op hoezeer het verschijnsel opnieuw de kop opsteekt. Met steeds moderner wapengeschut en steeds grotere brutaliteit worden de laatste jaren koopvaardijschepen, plezierjachten en olietankers aangevallen door piraten. Piraterij komt veelvuldig voor in AZIË, met name in de ZUID-CHINESE ZEE, de STRAAT VAN SINGAPORE en de STRAAT VAN MALAKKA, en in OOST-AFRIKA, met name voor de kust van SOMALIË in de GOLF VAN ADEN en in de INDISCHE OCEAAN"([6]).[(translation) “Mare liberum in piracy. In the year which commemorates the 400 anniversary of the publication of the famous book Mare liberum ('The Freedom of the Seas') by Hugo de GROOT, piracy is completely back on the international policy agenda. de GROOT characterized piracy as an international crime and called

([5]) Regarding all these issues, see notably ANONYMOUS, "Arrestation de deux pirates", Le Soir, 5 October 2009, p. 9; A. PANOSSIAN, "SOMALIE. Piraterie et questions de sécurité, décembre 2009", in "Chronique des faits internationaux" under the leadership of L. BALMOND, Rev. gén. dr. internat. 2010 (volume 114), nr 1, pp. 178-181.

([6]) W. van GENUGTEN and N. SCHRIJVER, "Kroniek van het Internationaal Publiekrecht", Nederlands Juristenblad (NJB) 2009, 10 April 2009, p. 909.

pirates 'the enemies of the humanity'. Piracy has existed from time immemorial, but it is striking to see how this phenomenon comes back in the beginning of the 21st century. These last years, trading vessels, pleasure yachts and oil tankers were attacked by pirates with the more and more modern weapons and an increasing brutality. Piracy appears more and more frequently in ASIA, notably in the SOUTH CHINA SEA, the STRAIT OF SINGAPORE and the STRAIT OF MALACCA, and in EAST AFRICA, notably the Somalian coast in the GULF OF ADEN and in the INDIAN OCEAN."]

7. In this case, it is thus not an overstatement to speak about a phenomenon and even about a phenomenon which consequences are sometimes the most unexpected, as for instance, when the Belgian ship POMPEI was held hostage by the pirates.

A BENELUX regulation on information to population in case of emergency was planned in 2007. Since then, the instances in charge of the communication in the three Benelux countries were clearly identified and a real network was set up. The convention is regularly applied in cases which hold the attention of the media and/or the politicians. It can be about situations occurring on the BENELUX territory but also about events occurring elsewhere whilst inducing consequences for the three BENELUX countries or for one of them. This was precisely the case when the Belgian cargo boat POMPEI was hijacked in 2009. For all the duration of the hijacking, the Belgian crisis centre was in daily contact with the corresponding services form the Netherlands and Luxembourg ([7]).

It can be said that the POMPEI case had consequences even at the level of the cooperation between the three BENELUX countries.

8. If we strive to be as complete as possible, we also have to emphasize not the criminal but well the civil and commercial aspects of the fight against modern piracy impeding maritime traffic. I particularly think about the aspects concerning charterers, maritime transporters, insurers and, consequently, also consumers.

Notably, the most recent International Convention on Contracts for the International Carriage of Goods Wholly

([7]) See THE BENELUX GENERAL SECRETARIAT, BENELUX actif et actuel, Bruxelles, September 2009, p. 42; THE BENELUX GENERAL SECRETARIAT, BENELUX actief en actueel, Brussel, September 2009, p. 42.

or Partly by Sea – “the Rotterdam Rules" (R.R.) – which has not yet entered into force, are expressly aimed at the consequences of piracy on the liability of the carrier for loss, damage or delay ([8]).

Article 17 of the aforementioned ROTTERDAM Rules deals with the basis of liability of the carrier for loss, damage or delay.

Pursuant to Article 17, §1, the carrier is liable for loss of or damage to the goods, as well as for delay in delivery, if the claimant proves that the loss, damage, or delay, or the event or circumstance that caused or contributed to it took place during the period of the carrier's responsibility as defined in chapter 4 of the Convention regarding the obligations of the carrier.

According to Article 17, §2, the carrier is relieved of all of part of its liability pursuant to paragraph 1 of this article if it proves that the cause or one of the causes of the loss, damage, or delay is not attributable to its fault or to the fault of any person referred to in Article 18 of the Convention regarding the liability of the carrier for other persons.

Finally Article 17, §3, c, notably foresees that the carrier is also, as a rule, delivered of all or part of its liability pursuant to paragraph 1 of this article if, alternatively to proving the absence of fault as provided in paragraph 2 of this article, it proves that piracy caused or contributed to the loss, damage, or delay.

9. According to specialists, the “HULL” insurance covering the ship and the liability, has evolved a lot. Additional premiums amounting up to 100,000 dollars can be charged for a passage in the zone off SOMALIA.

On the other hand, regarding the insurance “on cargo” covering the goods, the incidence seems less marked for the insurer did not necessarily requested, which way had

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([1]) See the Resolution 63/122 adopted by the general Assembly of the United Nations on the UN Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea, on 11 December 2008. A particular attention will also be given to Article 17 of this Convention, the rules of which are generally referred to as the “ROTTERDAM Rules”. Regarding some civil aspects of maritime piracy in relation to international maritime traffic and the United Nations, see below, nr. 31 ss. However, the current evolution of maritime law is not necessarily linked to the existence of the modern maritime piracy. See, for instance, J.P. THOMAS, "Modification de la police française d'assurance maritime sur facultés", Dr. marit. franç., September 2009, pp. 676 and 677.

been chosen. In any case, it is true that the development of the techniques and practices related to the departure of the goods with a view to its conveyance, as well as the commercial shipping requirements related to the economic situation, without extending the cover to the consequence of the obstacles which are brought to the policyholder’s commercial operation, and which remain excluded from the maritime insurance policies “on cargo”, should sooner or later lead to an amendment of these insurances on cargo.

Let's take an example.

Since early 2009, the British market has issued a reviewed version of the conditions applying to the maritime insurance policy “on cargo”, which – I note in passing – enables to provide the best cover for the goods during their maritime conveyance and incidental transfers. In England, this insurance policy is called INSTITUTE CARGO CLAUSES, in short ICC.

The review of the English ICC focuses on the “TRANSIT CLAUSE” and, more particularly, on the moment from which the cover becomes effective. The amendment introduced in the “TRANSIT CLAUSE” results in a noticeable extension of the cover in time and space.

To understand this amendment regarding the time at which the risk begins, both old and new versions have to be compared:

- ICC 1982: "this insurance attaches from the time the goods leave the warehouse (or storage) at the place named for the commencement of the transit (…)";

- ICC 2009: "this insurance attaches from the time the good insured is first moved in the warehouse (or storage) for the purpose of the immediate loading (…) for the commencement of the transit".

Two verbs make the difference: “leave” and “moved”.

The new text aims at bringing forward the time form which the insurance cover becomes effective. The goods become insured from the moment they are first “moved” in the warehouses for the purpose of their immediate loading in the carrying vehicle for the commencement of the transit.

However, the new “transit clause” raises the question of its exact scope at the beginning of the risks. As it is specified that the first move refers to a handling

operation for the purpose of an “immediate loading”, I would logically consider that packaging operations are not included in the scope of the cover. Indeed, in the perspective of the conveyance, this implies that the goods are already packaged and ready to be sent. I admit, however, that this point is not expressly formulated. Consequently, items which are stored without packaging and which would be picked up on a shelve, then integrated in a dispatching chain within a warehouse (commercial packaging, conveyance packing, etc.) and finally loaded in a truck, might be considered as covered at the time of their first handling.

This situation entails a difficulty of interpretation.

When it comes to the end of the risks in the INSTITUTE CARGO CLAUSES policy, the old and the new versions must be compared as follows:

- ICC 1982: "(this insurance terminates) on delivery to the Consignees' or other final warehouse or place of storage at the destination named herein (…)";

- ICC 2009: "(this insurance terminates) on completion of unloading from the carrying vehicle or other conveyance in or at the final warehouse or place of storage (…)".

Here, two expressions make the difference: “on delivery” and “on completion of unloading”.

Henceforth, the goods are covered until completion of unloading from the carrying vehicle in or at the final warehouse or place of storage. So, it is no longer referred to the legal notion of delivery.

I wished to insist on that example as an attempt to explain that the current evolution of maritime law is not necessarily linked to the existence of the modern maritime piracy.

That said, it is none the less true that the civil and commercial consequences of a modern piracy which slipped into organized crime in SOMALIA (extortion, hostage-taking, financing banditry) are all the more sensitive since about 22,000 ships yearly sail through the SUEZ CANAL and all types of goods are concerned. As well as all types of ships sailing in this zone, ranging from fishing boats to big tankers and to “non-capesize” vessels, i.e. which are unable to skirt round AFRICA. All types of goods are also concerned, from manufactured

goods to bulk, to oil and by-products, to grain, to rice or even to cereals.

The customer will probably be affected by this phenomenon sooner or later ([9]).

10. In early May 2009, the press reported an unusual political reflection.

Maroun LABAKI notably wrote that:

“During two months, between early May and late June (2009), Belgian soldiers will be deployed on Belgian merchant ships cruising off SOMALIA. The government so ruled (…).

The soldiers will not be accompanied by policemen. And the decision to take action against a threat will be taken by the captain of the military team - composed of 8 men – and not by the captain of the vessel.

(…)

A shipowner will be entitled to solicit the Belgian government if the “ATALANTE” European force, present in the area, is not able to take charge of the protection of his ship (which will have to be properly insured). This will cost him a flat rate of 115,000 EUR per voyage of an about 8-day duration to the North or to the South. The shipowner will also have to abandon any claim against the State in the event of damages due to an act of piracy.

(…)

This is an innovative decision by the (Belgian) government (…) since private interests will have to pay for benefitting from military protection. That said” – Maroun LABAKI still reported - "this does not seem to be a bad business for the shipowners who must sail on these troubled waters. The additional premiums they have to pay to London insurers for freight amounting to 10 to 15 million EUR per ship, are reported to be far beyond the requested 115,000 EUR flat rate” ([10]).

A voyage through the GULF OF ADEN may reportedly cost up to USD 30,000 for a maximum cover of three million USD.

([9]) See B. LOOS, "Surprimes de 100.000 dollars", Le Soir, 16 April 2009, p. 10.
([10]) M. LABAKI, "Soldats belges contre pirates", Le Soir, 2-3 May 2009, p. 13.

Even if one will admit that the reflection undertaken in this context at political level was first and foremost aimed at reasonably providing a reactive unplanned adaptation, it has however rightly or wrongly led to a rumbling discontent of some. One spoke of “very significant risks”, of “illegality” or even “mercenary activities”. Some thought that the right solution was elsewhere: looking for an international cooperation of the navies, setting up corridors and oblige shipowners to use them ([11]).

Section 2. – Overview of the United Nations fundamental right on the fight against maritime piracy.

§ 1er. – La Convention des Nations Unies sur le droit de la Mer, faite à MONTEGO BAY. In English, the United Nations Convention on the Law of the Sea. Done at MONTEGO BAY.

A. – The Articles 100 to 107.

11. Maritime piracy has a very long history ([12]).

Since the 16th century, the conflict between the Cross and the Crescent deeply affected the seaborne trade in the Mediterranean Sea for Christian vessels were boarded by Muslim sailors who seized the goods and turned the sailors held prisoners into slaves.

This *guerre de course* mainly affected Italian and Spanish interests. It led to the counterattack of the knights of Saint Stephen in Tuscany, and of the knights of Saint John in Malta who, in turn, attacked the maritime economy of the Muslim world.

Little by little, agreements were concluded between Christian and Muslim powers aiming at reducing the negative impacts of these boardings.

However, maritime piracy was carried on by the other countries known in the past as the BARBARY COAST, i.e. the North African countries (ALGIERS, TRIPOLI, TUNIS and

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([11]) See M. LABAKI, "Soldats belges contre pirates", Le Soir, 2-3 May 2009, p. 13.

([12]) On this question, see R. YAKEMTCHOUK, "Les Etats de l'Union européenne face à la piraterie maritime somalienne", R.M.C. and E.U., July-August 2009, nr. 530, pp. 441-442. The related comments in the text of the speech are borrowed from this emeritus professor at the University of LOUVAIN.

MOROCCO). This maritime piracy only came to an end in western Mediterranean with the conquest of ALGERIA by FRANCE in 1830.

GREAT-BRITAIN obtained the termination of piracy activities against British vessels by the conclusion of peace treaties in 1820 and 1853 with the chiefs of the EMIRATES of the Pirates Coast of the PERSIAN GULF.

Much more recently, on 7 October 1985, the hijacking of the Italian liner ACHILLE LAURO off the port of ALEXANDRIA, illustrated the confusion of the contemporary international community facing the terrorist issue. What was it about? A Palestinian commando threatened to execute the passengers of American nationality if it could not obtain the release of 50 Palestinians detained by ISRAEL. The tragedy cost the life of one American passenger of Israelian origin before the retreat of the terrorists was negotiated ([13]).

Contrary to what happened during the hijacking of the ACHILLE LAURO, the Somalian pirates seem to have more economic than political motivations. They hold people hostage essentially to extort a ransom.

12. The United Nations Convention on the Law of the Sea, concluded at MONTEGO BAY on 10 December 1982 (M.B. of 16 September 1999, pp. 34484 s.), is particularly important in the fight against modern piracy impeding maritime traffic.

Despite its limited scope, the MONTEGO BAY Convention is indeed the legal basis for the maritime military operations undertaken by the European Union off the SOMALI coast to eradicate maritime piracy.

The European Union, within which the European Community acceded to the MONTEGO BAY Convention on 1st April 1998, explicitly elaborated its action and notably the ATALANTA military operation, within the international framework of Article 100 et seq. ([14]) of the United Nations Convention

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([13]) A. CUDENNEC, "Terrorisme et piraterie maritimes: l'U.E. affirme son statut d'acteur maritime international", R.M.C. and E.U., October-November 2009, nr. 532, p. 600.

([1]) See Joint Action 2008/851/CFSP of the Council of the European Union of 10 November 2008 on a European Union military operation to contribute to the deterrence, prevention and repression of acts of piracy and armed robbery off the SOMALI coast, O.J.E.U. nr. L301, 12 November 2008, p. 33; Decision 2008/918/CFSP of the Council of the European Union of 8 December 2008 on the launch of a European Union military operation to contribute to the deterrence, prevention and repression of acts of piracy and armed robbery off the SOMALI coast

on the Law at Sea ([15]). One should note that DENMARK does not participate in the implementation of this Joint Action, in accordance with the reservation it previously expressed and pursuant to which it does not participate in the elaboration and implementation of decisions and actions of the European Union which have defence implications ([16]). And therefore, DENMARK does not participate neither in the financing of the military operation.

13. Articles 100 *et seq.* of the United Nations Convention on the Law of the Sea, concluded at MONTEGO BAY ON 10 DECEMBER 1982, belong to the General Provisions of the Part of the Convention that is dedicated to High Seas.

In the Preamble of the Convention, the State Parties to it notably emphasize the three following Recitals:

“Prompted by the desire to settle, in a spirit of mutual understanding and cooperation, all issues relating to the law of the sea and aware of the historic significance of this Convention, as an important contribution to the

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(ATALANTA), O.J.E.U. nr. L330, 9 December 2008, p. 19. The Joint Action was initially set for a 12-month period, subject to the prolongation of Resolutions adopted by the United Nations Security Council. According to Article 1.1 of the above-mentioned Joint Action, “the European Union (EU) shall conduct a military operation in support of Resolutions 1814 (2008), 1816 (2008) and 1838 (2008) of the United Nations Security Council (UNSC), 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 signed at MONTEGO BAY on 10 December 1982 (…) and by means, in particular, of commitments made by third States, hereinafter called ‘ATALANTA’ in order to contribute to:
the protection of vessels of the WFP (World Food Programme) delivering food aid to displaced persons in SOMALIA, in accordance with the mandate laid down in UNSC Resolution 1814 (2008);
- the protection of vulnerable vessels cruising off the SOMALI coast, and the deterrence, prevention and repression of acts of piracy and armed robbery off the SOMALI coast, in accordance with the mandate laid down in UNSC Resolution 1816 (2008)”.

([15]) See A. CUDENNEC, "Terrorisme et piraterie maritimes: l'U.E. affirme son statut d'acteur maritime international", R.M.C. and E.U., October-November 2009, nr. 532, p. 603.

([1]) See Recital 13 of the Joint Action 2008/851/CFSP of the Council of the European Union of the 10 November 2008 on a European Union military operation to contribute to the deterrence, prevention and repression of acts of piracy and armed robbery off the SOMALI coast, O.J.E.U. nr. L301, 12 November 2008, p. 34; A. CUDENNEC, "Terrorisme et piraterie maritimes: l'U.E. affirme son statut d'acteur maritime international", R.M.C. and E.U., October-November 2009, nr. 532, p. 603, note 31. The Recital 6 of the Decision 2008/918/CFSP of the Council of the European Union of 8 December 2008 (see above, note 14) mentions DENMARK’s position.

maintenance of peace, justice and progress for all peoples of the world,

(…)

Recognizing the desirability of establishing through this Convention, with due regard for the sovereignty of all States, a legal order for the seas and oceans which will facilitate international communication, and will promote the peaceful uses of the seas and oceans, the equitable and efficient utilization of their resources, the conservation of their living resources, and the study, protection and preservation of the marine environment,

Bearing in mind that the achievement of these goals will contribute to the realization of a just and equitable international economic order which takes into account the interests and needs of the mankind as a whole and, in particular, the special interests and needs of developing countries, whether coastal or land-locked,

(…)

(The States Parties to the Convention) have agreed as follows: etc.”.

14. The General Provisions of the Part of the Convention relating to High Seas deal with issues such as the Application of the provisions of this Part, the Freedom of the high seas, the Reservation of the high seas for peaceful purposes, the Right of navigation, the Penal jurisdiction in matters of collision or any other incident of navigation, the Duty to render assistance, the Prohibition of the transport of slaves or even various aspects relating to submarine cables and pipelines.

In order to see the Articles relating to piracy in context, it would be useful to remind in first place the dispositions of the foregoing Articles of the Part VII of the Convention relating to the High Seas.

In this respect, the scope of this speech which is inevitably limited, unfortunately forces me to review Article 86 of the MONTEGO BAY Convention only.

One will however easily and rapidly understand why this review is necessary from a practical point of view.

15. According to Article 86 of the Convention, on the one hand, the Part VII relating to the High Seas applies

to all parts of the sea that are not included in the exclusive economic zone, in the territorial sea or in the internal waters of a State, or in the archipelagic waters of an archipelagic State. This article does not entail any abridgement of the freedoms enjoyed by all States in the exclusive economic zone in accordance with Article 58.

This disposition is important for the following reasons.

Article 100 of the Convention provides that all States shall 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.

Article 101 defines piracy. Piracy consists of any of the following acts:

a) any illegal acts of violence or detention, or any act of depredation, committed for private ends by the crew or the passengers of a private ship or a private aircraft, and directed:

(i) on the high seas, against another ship or aircraft, or against persons or property on board such ship or aircraft;

(ii) against a ship, aircraft, persons or property in a place outside the jurisdiction of any State;

(b) any act of voluntary participation in the operation of a ship or of an aircraft with knowledge of facts making it a pirate ship or aircraft;

c) any act of inciting or of intentionally facilitating an act described in subparagraph (a) or (b).

It results from these provisions and from the combination of these articles 86 *in limine*, 100 and 101 that pursuant to the MONTEGO BAY Convention, the act of piracy is an act committed “on the high seas” or outside places under national “jurisdiction", for “private ends" ([17]).

This rule however has to be balanced with regard to Article 86 *in fine* which provides that the aforementioned

([17]) See A. CUDENNEC, "Terrorisme et piraterie maritimes: l'U.E. affirme son statut d'acteur maritime international", R.M.C. and E.U., October-November 2009, nr. 532, p. 602. See however, in the same study, the note 23 of the aforementioned p. 602. See also G. STRIJARDS, "Piraten en hun berechting", Nederlands Juristenblad (NJB) 2009, 19 June 2009, pp. 1512-1513.

article 86 does not entail any abridgement of the freedoms enjoyed by the States in the exclusive economic zone in accordance with Article 58.

Which are these freedoms enjoyed by all States in the exclusive economic zone in accordance with Article 58?

Before being more specific about these freedoms, I think I would be interesting to mention that in accordance with Article 55 of the Convention, the exclusive economic zone is an area beyond and adjacent to territorial seas, subject to the specific legal regime established by the Convention under which the rights and jurisdiction of the coastal State and the rights and freedoms of other States are governed by the relevant provisions of the Convention.

Within this framework, the rights and duties which, in the exclusive economic zone, are those of States other than the coastal State, and which permit to detail the freedoms enjoyed by all States in the exclusive economic zone in accordance of Article 58, are determined as follows:

"1. In the exclusive economic zone, all States, whether coastal or land-locked, enjoy, subject to the relevant provisions of this Convention, the freedoms referred to in Article 87 (relating to the freedom of the high seas) of navigation and overflight and of the laying of submarine cables and pipelines, and other internationally lawful uses of the sea related to these freedoms, such as those associated with the operation of ships, aircraft and submarine cables and pipelines, and compatible with the other provisions of this Convention.

2. The articles 88 to 115 (notably Articles 100 *et seq.* relating to maritime piracy) and other pertinent rules of international law apply to the exclusive economic zone in so far as they are not incompatible with the (…) Part (of the Convention relating to the exclusive economic zone).

3. In exercising their rights and performing their duties under this Convention in the exclusive economic zone, States shall have due regard to the rights and duties of the coastal State and shall comply with the laws and regulations adopted by the coastal State in accordance with the provisions of this Convention and other rules of international law in so far as they are not incompatible with this (…) Part (of the Convention relating to the exclusive economic zone)."

It results from these provisions and from the combination of the aforementioned articles 58, al. 2, 86, especially *in fine*, 100 and 101 that, I think, it is more precise to say that pursuant to the MONTEGO BAY Convention, the act of piracy is an act committed “on the high seas”, outside places under national “jurisdiction" or in the “exclusive economic zone”, for “private ends”.

According to me, the MONTEGO BAY Convention was wrongly criticized - as was the Convention on the High Seas, done at Geneva on 29 April 1958 - on the ground that it would only focus on facts committed on the high seas ([18]).

I think it is more exact to say that the condition resulting from the MONTEGO BAY Convention according to which the piracy act should not be committed on the territorial sea, i.e. on the sea of which breadth pursuant to Art. 3 of the MONTEGO BAY Convention does not exceed 12 nautical miles, measured from baselines determined in accordance with this Convention, no longer corresponds to the piracy of the 21st century.

Saying that the facts referred to should be committed on the high seas has not the same meaning than saying that the facts referred to should not be committed on the territorial sea as, in the first case, one loses sight of the fact that the facts committed in the economic exclusive zone are also referred to by the articles of the Convention which relate to maritime piracy, even if it is by thinking.

That said, subject to this shade of meaning, I admit that excluding the facts committed on the territorial sea from the international law enforcement no longer corresponds to the current necessity. By the way, some Resolutions of the United Nations Security Council were more bold than the MONTEGO BAY Convention ([19]) and, regarding SOMALIA, these Resolutions were all the more necessary since SOMALIA considers that its territorial sea spreads up to 200 nautical miles ([20]).

([18]) See notably A. KOZUBOVSKAYA-PELLE, "3ème colloque international sur la sûreté maritime et portuaire. Nantes, 22-23 October 2009", Dr. marit. franç., December 2009, p. 1000, note 6; C. LALY-CHEVALIER, "Lutte contre la piraterie maritime et droits de l'homme", Rev. b. dr. intern. 2009-1, p. 7.

([19]) See below, nr 16 and 29.

([20]) See A. KOZUBOVSKAYA-PELLE, "3ème colloque international sur la sûreté maritime et portuaire. Nantes, 22-23 October 2009", Dr. marit. franç., December 2009, p. 1000.

However, there is no general agreement about this opinion. Some consider indeed that a possibility to intervene within the SOMALI territorial waters infringes the sovereignty of the State on which territory pirates may be pursued ([21]).

While considering, as I just said, that excluding the facts committed on the territorial sea from the international law enforcement – what the MONTEGO BAY Convention does – no longer corresponds to the current necessity, I admit that the question is delicate. For instance, can the passage of a vessel placed under military protection through the territorial sea be innocent?

The Article 17 of the MONTEGO BAY Convention provides that “subject to this Convention, ships of all States, whether coastal or land-locked, enjoy the right of innocent passage through the territorial sea.” I can develop the notion of “innocent passage through the territorial sea” but I think it is however useful to mention the content of Article 18 and some terms of Article 19 of the Convention since these articles permit to be more specific about the scope of Article 17: what is the meaning of the terms “passage” and “innocent passage”?

Article 18 provides that:

"1. Passage means navigation through the territorial sea for the purpose of:

a) traversing the sea without entering internal waters or calling at a roadstead or port facility outside internal waters; or

b) proceeding to or from internal waters or a call at such roadstead or port facility.

2. Passage shall be continuous and expeditious. However, passage includes stopping and anchoring, but only insofar as the same are incidental to ordinary navigation or are rendered necessary by *force majeure* or distress or for the purpose of rendering assistance to persons, ships or aircraft in danger or distress".

([21]) See A. KOZUBOVSKAYA-PELLE, "3ème colloque international sur la sûreté maritime et portuaire. Nantes, 22-23 October 2009", Dr. marit. franç., December 2009, p. 1000 and the note 9.

According to the terms of Article 19, §2 of the MONTEGO BAY Convention, "passage is innocent as long as it is not prejudicial to the peace, good order or security of the coastal state" and “it shall take place in conformity with this Convention and with other rules of international law”.

The paragraph 2 more particularly adds:
“Passage of a foreign ship shall be considered to be prejudicial to the peace, good order or security of the coastal State if in the territorial sea it engages in any of the following activities:

a) any threat or use of force against the sovereignty, territorial integrity or political independence of the coastal State, or in any other manner in violation of the principle of international law embodied in the Charter of the United Nations;

b) any exercise or practice with weapons of any kind;

(…)

e) the launching, landing or taking on board of any aircraft;

f) the launching, landing or taking on board of any military device;

(…)

l) any other activity not having a direct bearing on passage”.

Can the passage through the territorial sea of a ship placed under military protection and thus having weapons on board be considered as an offensive passage by the coastal State?

In my opinion, it results from the provisions and the combination of the aforementioned articles 17, 18 and 19 that it is not the presence of weapons in itself on board that characterizes the offensive passage through the territorial sea. Otherwise, how could we indeed admit, whereas it is not contested, an “innocent” passage through the territorial sea of warships or an “innocent” passage through the territorial sea of merchant ships with a cargo of munitions? According to me, the element, as regards the fight against piracy in the territorial sea in the MONTEGO Convention, that characterizes the offensive passage through the territorial sea of a ship

having weapons on board, is essentially the passage of this ship when it begins to infringe or even present a danger for – as stated in the Dutch version indeed: een gevaar opleveren - the “good order of the coastal State” or when this ship “threatens or uses force against the sovereignty of the coastal State”.
In other words, as long as there is no disruption of public order or use of weapons, the passage of a ship having weapons on board can be considered as innocent pursuant to the MONTEGO BAY Convention ([22]).

My aforesaid comments can be summed up as follows.

According to me, the act of piracy pursuant to the MONTEGO BAY Convention is an act committed on the high seas, outside places under national jurisdiction or in the exclusive economic zone.

16. This definition of the act of piracy pursuant to the MONTEGO BAY Convention seems broader to me – unless different texts are combined - than the definition in the sense of the Joint Action 2008/851/CFSP of the Council of the European Union of 10 November 2008 on a European Union military operation to contribute to the deterrence, prevention and repression of acts of piracy and armed robbery off the SOMALI coast ([23]).

([22]) Comp. A. KOZUBOVSKAYA-PELLE, "3ème colloque international sur la sûreté maritime et portuaire. Nantes, 22-23 October 2009", Dr. marit. franç., December 2009, pp. 1001-1002.

([1]) Joint Action 2008/851/CFSP of the Council of the European Union of the 10 November 2008 on a European Union military operation to contribute to the deterrence, prevention and repression of acts of piracy and armed robbery off the SOMALI coast, O.J.E.U. nr. L301, 12 November 2008, pp. 33 et seq. The upsurge of acts of maritime piracy led the European Union to develop its action. More especially, different agreements have been signed between the European Union and the countries of the horn of Africa which are dealing with the piracy that is rampant off SOMALIA. Given that the scope of this speech is inevitably limited, it is impossible to me to examine the whole Community law related to maritime piracy. I will confine myself to draw the attention to the Decision 2009/293/CFSP of the Council of the European Union of 26 February 2009 concerning the Exchange of Letters between the European Union and the government of Kenya on the conditions and modalities for the transfer of persons suspected of having committed acts of piracy and detained by the European Union-led naval force (EUNAVFOR), and seized property in possession of EUNAVFOR, from EUNAVFOR to Kenya and for their treatment after such transfer, O.J.E.U. nr. L79, 25 March 2009, p. 47, and to the Council Decision 2009/877/CFSP of 23 October 2009 on the signing and provisional application of the Exchange of Letters between the European Union and the Republic of Seychelles on the conditions and modalities for the transfer of suspected pirates and armed robbers from EUNAVFOR to the Republic of Seychelles and to their treatment after such transfer, O.J.E.U. nr. L315, 2 December 2009, p. 35. The aforesaid agreement with Kenya specifies the treatment that has to be

On the other hand - and I can only be delighted about it with a view to a consistent Law of the Sea, I think that the definition of piracy pursuant to Article 3 of the Belgian law of 30 December 2009 on the fight against maritime piracy seems to be more in line with the definition of piracy in the sense of the MONTEGO BAY Convention ([24]).

Article 1.1. of the Joint Action states that "the European Union (EU) shall conduct a military operation in support of Resolutions 1814 (2008), 1816 (2008) and 1838 (2008) of the United Nations Security Council (UNSC), in a manner consistent with action permitted with respect to piracy under Article 100 *et seq.* on the United Nations Convention on the Law of the Sea signed in MONTEGO BAY on 10 December 1982."

So, this article refers only to Articles 100 *et seq.* of the MONTEGO BAY Convention but not to Articles 58, §2 and 86, in fine, which permit to consider that the act of piracy also includes the act committed in the “exclusive economic zone”.

Of course, it seems that Article 2 of the Joint Action, which determines the scope of the Mandate of ATALANTA, can be interpreted in a less restrictive way concerning the possible intervention zones but this is only because this article does not refer only to Articles 100 *et seq.* of the MONTEGO BAY Convention. It also refers to the combined Resolutions of the United Nations Security Council, which permit to intervene in the territorial sea of SOMALIA.

Article 2, c, d and e provides the following:

"Under the conditions set by the relevant international law and by UNSC Resolutions 1814 (2008), 1816 (2208) and 1838 (2008), ATALANTA shall, as far as available capabilities allow:

(…)

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applied to the persons concerned and suspected of acts of piracy, after their transfer to Kenya: the prohibition against torture and cruel, inhumane and degrading treatment, the prohibition of arbitrary detention and the requirement to have a fair trial within a reasonable time. Concerning a review of the evolution of the Community law related to maritime piracy, see A. CUDENNEC et al., "L'Union et la mer. Chronique maritime", R.M.C. and U.E., February 2010, nr. 535, pp. 123-124.

([24]) M.B. 14 January 2010, pp. 1485 et seq.

c) keep watch over areas off the SOMALI coast, including SOMALIA’s territorial waters, in which there are dangers to maritime activities, in particular to maritime traffic;

d) take the necessary measures, including the use of force, to deter, prevent and intervene in order to bring to an end acts of piracy and armed robbery which may be committed in the areas where it is present;

e) in view of prosecutions potentially being brought by the relevant States 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 and seize the vessels of the pirates or armed robbers or the vessels caught following an act of piracy or an armed robbery and which are in the hands of the pirates, as well as the goods on board”.
The article 2, c, is then expressly aimed at “the areas off the SOMALI coast, including SOMALIA’s territorial waters" and when it respectively refers to the use of force and of pirates and armed robbery

Regarding the combined Resolutions 1814 (2008), 1816 (2008) and 1838 (2008) of the United Nations Security Council, they grant permission to intervene in SOMALIA’s territorial waters but under certain conditions, particularly a kind of agreement of the Somalian Transitional Federal Government.

The United Nations Security Council, in the Resolution 1814 (2008) it adopted on 15 May 2008, acting under Chapter VII of the Charter of the United Nations “Action with respect to threats to the peace, breaches of the peace, and acts of aggression”, “11. reiterates its support for the contribution made by some States to protect the World Food Programme maritime convoys, *calls upon* States and regional organizations, in close coordination with each other and as notified in advance to the Secretary-general, and at the request of the TFG, to take action to protect shipping involved with the transportation and delivery of humanitarian aid to SOMALIA and United Nations-authorized activities, *calls upon* AMISOM (African Union Mission in SOMALIA) troop-contributing countries, as appropriate, to provide support to this end, and requests the Secretary-General to provide his support to this effect."

The United Nations Security Council, in the major Resolution 1816 (2008) it adopted on 2 June 2008, acting again under Chapter VII of the Charter of the United Nations, “7. decides that for a period of six months from the date of this resolution, States cooperating with the TFG in the fight against piracy and armed robbery at sea off the coast of Somalia, for which advanced notification has been provided by the TFG to the Secretary-General, may:

a) enter the territorial waters of SOMALIA for the purpose of repressing acts of piracy and armed robbery at sea, in a manner consistent with such action permitted on the high seas with respect to privacy under relevant international law;

b) use within the territorial waters of SOMALIA in a manner consistent with action permitted on the high seas with respect to piracy under relevant international law, all necessary means to repress acts of piracy and armed robbery”.

The same Resolution 1816 (2008) adds that the Security Council “12. requests States cooperating with the TFG to inform the Security Council within 3 months of the progress of actions undertaken in the exercise of the authority provided in paragraph 7 above".

Finally, the Security Council, in the Resolution 1838 (2008) it adopted on 7 October 2008, also here acting under Chapter VII of the Charter of the United Nations,

“Recalling (its) Resolutions 1814 (2008) and 1816 (2008) (above-mentioned),

Gravely concerned by the recent proliferation of acts of piracy and armed robbery at sea against vessels off the coast of SOMALIA, and by the serious threat it poses to the prompt, safe and effective delivery of humanitarian aid to SOMALIA, to international navigation and the safety of commercial maritime routes, and to fishing activities, conducted in conformity with international law,

Noting with concern also that increasingly violent acts of piracy are carried out with heavier weaponry, in a larger area off the coast of SOMALIA, using long-range assets such as mother ships, and demonstrating more sophisticated organization and methods of attack,

(…)

Taking note of the letter dated 1 September 2008of the President of SOMALIA to the Secretary-General of the United Nations expressing the appreciation of the Transitional Federal Government (“TFG”) to the Security Council for its assistance and expressing the TFG's willingness to consider working with other States, as well as regional organizations, to provide advanced notifications additional to those already provided, in accordance with paragraph 7 of Resolution 1816 (2008), to combat piracy and armed robbery at sea off the coast of SOMALIA,

(…)

1. Reiterates that it condemns and deplores all acts of piracy and armed robbery at sea against vessels off the coast of SOMALIA;

2. Calls upon States interested in the security of maritime activities to take part actively in the fight against piracy on the high seas off the coast of SOMALIA, in particular by deploying naval vessels and military aircraft, in accordance with international law, as reflected in the Convention (of the United Nations of 10 December 1982 on the Law of the Sea);

3. Calls upon States whose naval vessels and military aircraft operate on the high seas and airspace off the coast of SOMALIA to use on the high seas and airspace off the coast of SOMALIA, the necessary means, in conformity with international law, as reflected in the Convention, for the repression of acts of piracy;

4. Urges States that have the capacity to do so to cooperate with the TFG in the fight against piracy and armed robbery at sea, in conformity with the provisions of resolution 1816 (2008);

5. Urges also States and regional organizations, in conformity with the provisions of Resolution 1814 (2008), to continue to take action to protect the World Food Programme maritime convoys, which is vital to bring humanitarian assistance to the affected populations in SOMALIA;

(…)

9. (…)Expresses its intention to review the situation with respect to piracy and armed robbery at sea against vessels off the coast of SOMALIA, with a view, in

particular, upon the request of the TFG, to renewing the authority provided in paragraph 7 of Resolution 1816 (2008)".

The scope of this Resolution 1838 (2008) is very broad for it permits the use of force at large-scale against pirates. This legal base enables naval vessels to proceed to the arrest and judgment of persons responsible for acts of piracy. They are law enforcement measures against pirates, which go beyond the framework of self-defense. However, I think that this Resolution 1838 (2008) does not depart from the international law relevant in this matter for it is in line with Article 100 and Article 105 of the Convention of the United Nations on the Law of the Sea of 1982. Article 100 provides that all States shall 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. Article 105 grant to all States the competence to seize a ship taken by piracy on the high seas as well as to arrest pirates on the high seas and to judge them. However, it is to be noticed that Article 105 does not contain the obligation for the States to prove their competence but only their right to do it. Then, this competence can be validated at international level. If a State seizes a pirate ship or a ship taken by pirates and arrests individuals on board but has not declared its competence with a view to take cognizance of the offences committed, this State will not be in a position to impose a sentence on pirates based on Article 105. Article 105 has no direct effect. Article 105 is an exception to Article 92 under which ships are, in principle, submitted on the high seas to the exclusive jurisdiction of the State of the flag under which they sail. But, as pirates attack ships regardless of their States flags, the MONTEGO BAY Convention has foreseen this exception.

It is also to be noticed that the Resolution 1816 (2008),which importance has been underlined, was renewed in similar terms by the Security Council Resolution 1846 (2008) of 2 December 2008. The authorizations to enter SOMALIA's territorial waters and to use all necessary means to repress acts of piracy (see above, in this nr., paragraph 7 of the resolution 1816) are however granted, this time, for a twelve-month period from the date of the adoption of the Resolution 1846 (2008), i.e. from 2 December 2008 onwards (see paragraph 10).

It should also be noticed that the Security Council Resolution 1846 (2008) of 2 December 2008 has itself also been renewed by Resolution 1897 (2009) of 30 November

2009. Moe precisely, the above-mentioned authorizations are renewed for a twelve-month period from the adoption of the so-called Resolution 1897 (2008), i.e. for a twelve-month period from 30 November 2009 onwards (see paragraph 7).

The paragraphs 3, 7, 16 and 19 of the Resolution 1897 (2009) of 30 November 2009 are worded as follows, preamble included:

“The Security Council,

(…)

Continuing to be gravely concerned by the ongoing threat that piracy and armed robbery at sea against vessels pose to the prompt, safe, and effective delivery of humanitarian aid to Somalia and the region, to international navigation and the safety of commercial maritime routes, and to other vulnerable ships, including fishing activities in conformity with international law and the extended range of the piracy threat into the western INDIAN OCEAN,

(…)

Acting under Chapter VII of the Charter of the United Nations,

(…)

3. Renews its call upon States and regional organizations that have the capacity to do so, to take part in the fight against piracy and armed robbery at sea off the coast of Somalia, in particular, consistent with this resolution and international law, by deploying naval vessels, arms and military aircraft and through seizures and disposition of boats, vessels, arms and other related equipment used in the commission of piracy and armed robbery at sea off the coast of Somalia, or for which there are reasonable grounds for suspecting such use;

(…)

7. Encourages Member States to continue to cooperate with the TFG in the fight against piracy and armed robbery at sea, notes the primary role of the TFG in the fight against piracy and armed robbery at sea, and *decides* that for a period of twelve months from the date of this resolution to renew the authorizations as set out in paragraph 10 of Resolution 1846 (2008) and paragraph 6 of

Resolution 1851 (2008) granted to States and regional organizations cooperating with the TFG in the fight against piracy and armed robbery at sea off the coast of Somalia, for which advance notification has been provided by the TFG to the Secretary-General;

(…)

16. Requests States and regional organizations cooperating with the TFG to inform the Security Council and the Secretary-General within nine months of the progress of actions undertaken in the exercise of the authorizations provided in paragraph 7 above and further requests all States contributing through the CGPCS to the fight against piracy off the coast of Somalia, including SOMALIA and other States in the region, to report by the same deadline on their efforts to establish jurisdiction and cooperation in the investigation and prosecution of piracy;

(…)

19. Expresses its intention to review the situation and consider, as appropriate, renewing the authorizations provided in paragraph 7 above for additional periods upon the request of the TFG".

However, in the preamble as in its paragraph 5, Resolution 1897 (2009) also acknowledge SOMALIA's rights with respect to offshore natural resources, including fisheries.

In its preamble (7th recital), Resolution 1897 (2009) also (2009) also expressly notes the internationalization of the fight against maritime piracy off the Somalian coast; the Security Council "commending the efforts of the EU operation Atalanta, which the European Union is committed to extending until December 2010, North Atlantic Treaty Organization operations Allied Protector and Ocean Shield, Combined Maritime Forces' Combined Task Force 151, and other States acting in a national capacity in cooperation with the TFG and each other, to suppress piracy and to protect vulnerable ships transiting through the waters off the coast of SOMALIA".

In line with Resolution 1897 (2009) adopted on 30 November 2009 and also emphasizing the necessity of an action of the international community, the Resolution 1910 (2010) adopted by the Security Council on 28 January 2010 "decides to authorize the Member States of the

African Union to maintain AMISOM (African Union Mission in SOMALIA) until 31 January 2011” (paragraph 1).

I previously mentioned, I think that the definition of the act of piracy in the sense of Article 3 of the Belgian law of 30 December 2009 on the fight against maritime piracy is in line with the definition of the act of piracy in the sense of the MONTEGO BAY Convention as I personally interpret it, i.e. also including in this definition the act committed in the exclusive economic zone. I added that I can only be satisfied with it.

The text of Article 3 of the Belgian law of 30 December 2009 on the fight against maritime piracy recalls as a rule the one of the Articles 101 and 102 of the MONTEGO BAY Convention.

It provides the following:

"§ 1. Piracy consists of any of the following acts:

a) any illegal acts of violence, threat or detention, or any act of depredation, committed for private ends by the crew or the passengers of a private ship, and directed:

(i) on the high seas, against another ship, or against persons or property on board such ship;

(ii) against a ship, persons or property in a place outside the jurisdiction of any State;

(b) any act of voluntary participation in the operation of a ship with knowledge of facts making it a pirate ship;

c) any act of inciting or of intentionally facilitating an act described in subparagraph (a) or (b), or committed with a view to facilitating them.

§ 2. The acts of piracy as they are described in the 1st paragraph, committed by a warship or a government ship whose crew has mutinied and taken control of the ship are assimilated to acts committed by a private ship.

§ 3. The acts described in paragraphs 1 and 2, committed in a maritime zone other than the high seas, are assimilated to acts of piracy as defined in paragraphs 1 and 2, to the extent foreseen by the international law.”

This paragraph 3 is according to me a good and important formula. Indeed, it not only notably implements the

above-mentioned combined Resolutions of the United Nations Security Council 1814 (2008), 1816 (2008), 1838 (2008), 1846 (2008) and 1897 (2009) and so, authorizes an intervention in SOMALIA's territorial waters according to the conditions provided by these Resolutions, but it also implements Articles 86, specially in fine, and 58, specially paragraph 2, of the MONTEGO BAY Convention and, consequently, lead to a definition of the act of piracy which also includes the act committed in the exclusive economic zone".

As I previously mentioned, it results from these provisions and from the combination of the aforementioned articles 58, al. 2, 86, especially *in fine*, 100 and 101 of the MONTEGO BAY Convention that, in the sense of this convention, the act of piracy is an act committed "on the high seas", outside places under national "jurisdiction" or in the "exclusive economic zone", for "private ends".

17. It seems to me that this definition remains valid even in the event of piracy committed by a warship, a government ship or a government aircraft whose crew has mutinied. Even with regard to its scope, Article 102 of the MONTEGO BAY Convention, which expressly refers to "acts of piracy, as defined in article 101", indeed does not exclude the notion of "private ends". Article 102 provides that the acts of piracy as they are described in Article 101, committed by a warship or a government ship or government aircraft whose crew has mutinied and taken control of the ship or aircraft are assimilated to acts committed by a private ship or aircraft. In other words, I am inclined to think that the illicit acts committed for "political ends" instead of "private ends" - "voor persoonlijke doeleinden" in the Dutch text - by a warship, a government ship or a government aircraft whose crew has mutinied and taken control of the ship or aircraft, are not concerned by Article 102. It would be so in the event of a mutiny of the crew for political ends, against the existing government.

18. With regard to the fight against maritime piracy, the most commonly mentioned provisions of the United Nations Convention on the Law of the Sea, done at MONTEGO BAY on 10 December 1982 (M.B., 16 December 1999, pp. 34484 *et seq.*), are the articles 100([25]), 101([26]), 102([27])

([25]) See above, nr. 15 and 16. Regarding Articles 58 and 86 of the MONTEGO BAY Convention, see above, respectively, on the one end, nr. 15 and 16, and, on the other hand, nr. 14, 15 and 16.
([26]) See above, nr. 15, 16 and 17. Regarding Articles 58 and 86 of the MONTEGO BAY Convention, see above, respectively, on the one end, nr. 15 and 16, and, on the other hand, nr. 14, 15 and 16.

and 105([28]). I have already reviewed these articles and will therefore not go back over them.

Article 108 on illicit traffic in narcotic drugs or psychotropic substances, Article 110 on the right of visit and Article 111 on the right of hot pursuit are also generally mentioned. However, these provisions have a broader scope than the fight against maritime piracy. Article 110 notably holds that except where acts of interference derive from powers conferred by treaty, a warship which encounters on the high seas a foreign ship, other than a ship entitled to complete immunity in accordance with articles 95 and 96, is not justified in boarding it unless there is reasonable ground for suspecting that this ship is engaged in piracy. In this case, the warship may proceed to verify the ship's right to fly its flag. To this end, it may send a boat under the command of an officer to the ship suspected of piracy. If suspicion remains after the documents have been checked, it may proceed to a further examination on board the ship, which must be carried out with all possible consideration.

In the MONTEGO BAY Convention, the international scheme of maritime piracy is in fact mainly determined by the

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([27]) See above, nr 16 and 17.

([1]) See above, nr 16. Regarding Article 105, see also the Joint Action 2008/851/CFSP of the Council of the European Union of the 10 November 2008 on a European Union military operation to contribute to the deterrence, prevention and repression of acts of piracy and armed robbery off the SOMALI coast, Articles 2, e, 10 and 12, O.J.E.U. nr. L301, 12 November 2008, pp. 33 et seq.; A. KOZUBOVSKAYA-PELLE, "3ème colloque international sur la sûreté maritime et portuaire." Nantes, 22-23 October 2009", Dr. marit. franç., December 2009, p. 1001; G. POISSONNIER, "Les pirates de la Corne de l'Afrique et le droit français", D.H. 2008, pp. 2097 s., specially p. 2099; R. YAKEMTCHOUK, "Les Etats de l'Union européenne face à la piraterie maritime somalienne", R.M.C. and U.E. July -August 2009, nr. 530, pp. 441 s., specially pp. 441 and 449. It is to be noticed that, according to what is generally taught, the MONTEGO BAY Convention does not provide any right of hot pursuit from the high seas to the territorial waters. Article 111 of the MONTEGO BAY Convention, the reading of which is quite logical at the light of Article 105, provides a right of hot pursuit on the high seas against a foreign ship caught in territorial waters in irregular action. But, the above-mentioned Convention does not consider a reverse situation, i.e. a foreign ship caught on the high seas in irregular action, and notably action of piracy and which harbours in territorial waters. The government ship which finds it, is founded to inspect this ship on the high seas but is not authorized to pursue it beyond the limits of the high seas. On this issue and regarding the United Nations Security Council Resolutions tending to creating a right of "reverse" hot pursuit, see P. BONASSIES and P. DELEBECQUE, "Le droit positif français en 2008", Dr. marit. franç., June 2009, Hors série nr 13, pp. 7 and 8.

provisions of eight articles, i.e. the articles 100 to 107([29]).

19. Article 103 defines a pirate ship or aircraft. A ship or aircraft is considered a pirate ship or aircraft if it is intended by the persons in dominant control to be used for the purpose of committing one of the acts referred to in article 101([30]). The same applies if the ship or aircraft has been used to commit any such act, so long as it remains under the control of the persons guilty of that act.

20. Article 104 deals with the retention or loss of the nationality of a pirate ship or aircraft. It holds that a ship or aircraft may retain its nationality although it has become a pirate ship or aircraft. The retention or loss of nationality is determined by the law of the State from which such nationality was derived.

The article 104 of the MONTEGO BAY Convention marks a break with the tradition as it sets aside the automatic forfeiture of the flag for pirate ships.

With this provision, the terms of maritime piracy no have longer the same content as previously.

Professor Philippe WECKEL remarks what follows.

(translation) In the 18th/19th century, piracy referred to a crime under the law of nations. Moreover, the proximity between the crime of piracy and the crime of war enables to take an analogy any further which is not fortuitous and which has been developed in the case law of the Supreme Court of the United States. The forfeiture of the protection of flag (symbolized by the black flag) so reminds one the flag of the combatant who does not respect laws and customs of war. (…) Depredation on the high seas is then very close to highway banditry.

(On the other hand) piracy is currently referring to a set of common offences committed in an area outside the jurisdiction of one single State (…).

Indeed, in the 19th century, a pirate is an individual who belongs to the crew of a pirate ship; a pirate ship is a non-authorized armed ship. The activity of piracy is

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([29]) See P. WECKEL, "Journées méditerranéennes sur la piraterie maritime. Nice et Monaco, les 10 et 11 décembre 2009. Synthèse des travaux", Dr. marit. franç., January 2010, p. 70.
([30]) Regarding article 101, see above, nr. 15, 16, 17 and 18.

primarily criminalized, i.e. the fact that a crew heads for the open sea on board an armed ship, without any authorizations, to (...) perpetrate attacks on goods and persons (…). (At present), only the acts of piracy, i.e. attacks perpetrated on ships will be criminalized. It is no longer the belonging to a band of pirates that is punished but the participation in armed attacks against ships on the high seas. Previously (…), (the pirate) diverting the freedom of navigation for criminal purpose, also forfeited the protection of the flag. Today, the non-state armed groups are no longer necessarily regarded as illicit (resistance to occupation, national liberation war). As the freedom of navigation belongs to flag States and not to ships, a State could not be deprived of such freedom because of the behaviour of a crew. The granting and withdrawal of nationality of a ship indeed falls within the discretionary power of the relevant State([31]).

Article 104 of the MONTEGO BAY Convention attests to this evolution.

21. Article 106 of the MONTEGO BAY Convention deals with the liability for seizure without adequate grounds of a ship or aircraft suspected of piracy. It holds that where the seizure of a ship or aircraft on suspicion of piracy has been effected without adequate grounds, the State making the seizure shall be liable to the State the nationality of which is possessed by the ship or aircraft for any loss or damage caused by the seizure.

22. Article 107 of the MONTEGO BAY Convention defines the ship *and aircraft which are entitled to seize on account of piracy.* Pursuant to this Article, a seizure on account of piracy may be carried out only by warships or military aircraft, or other ships or aircraft clearly marked and identifiable as being on government service and authorized to that effect.

23. I will conclude these few considerations regarding Articles 100 to 107 of the MONTEGO BAY Convention with a brief reflection to see whether or not these articles have a direct impact.

On the one end, it is taught that the MONTEGO BAY Convention did not set up self-executing rules intended to apply directly and immediately to individuals and to give them own rights or freedoms and, on the other hand,

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([31]) P. WECKEL, "Journées méditerranéennes sur la piraterie maritime. Nice et Monaco, les 10 et 11 décembre 2009. Synthèse des travaux", Dr. marit. franç., January 2010, pp. 73-74.

that the above-mentioned Convention only applies to States ([32]).

This teaching seems too absolute to me.

Let us take an example outside the articles 100 to 107. Article 97 concerns the penal jurisdiction in matters of collision or any other incident of navigation.

Article 97 provides the following:

"1. In the event of a collision or any other incident of navigation concerning a ship on the high seas, involving the penal or disciplinary responsibility of the master or of any other person in the service of the ship, no penal or disciplinary proceedings may be instituted against such person except before the judicial or administrative authorities either of the flag State or of the State of which such person is a national.

2. In disciplinary matters, the State which has issued a master's certificate or a certificate of competence or licence shall alone be competent, after due legal process, to pronounce the withdrawal of such certificates, even if the holder is not a national of the State which issued them.

3. No arrest or detention of the ship, even as a measure of investigation, shall be ordered by any authorities other than those of the flag State."

With regard to the terms used, Article 97 is obviously self-executing. Denying individuals the right to call for the application of this provision of the Convention to their advantage would amount to depriving this provision of all practical effect.

I am inclined to think that, for same reasons, it should also be admitted that at least Article 101, which defines piracy and specifies the notion of act of piracy([33]), Article 102, which concerns acts of piracy as defined in Article 101, committed by a warship, government ship or government aircraft whose crew has mutinied([34]), Article 103, which defines a pirate ship or aircraft ([35]), Article 104, which concerns the retention or loss of the

([32]) See P. BONASSIES et P. DELEBECQUE, "Le droit positif français en 2008", Dr. marit. franç., June 2009, Hors série nr. 13, p. 24.
([33]) See above, nr. 15, 16, 17, 18 and 19.
([34]) See above, nr 16, 17 and 18.
([35]) See above, nr 19.

nationality of a pirate ship or aircraft ([36]) and Article 107, which concerns ships and aircraft which are entitled to seize on account of piracy([37]), also have a direct impact. The solution is obvious regarding Article 101 and regarding Articles 102 and 103, it is also confirmed by the reference made by both provisions to Article 101. On the other hand, in my opinion and with regard to the terms used, Article 100, which concerns the duty of all States to cooperate in the repression of piracy ([38]), Article 105, which concerns the rights of any State in the event of the seizure of a pirate ship or aircraft([39]) and Article 106, which governs the liability between States for seizure of a ship or aircraft suspected of piracy without adequate grounds([40]) do not have any direct impact on the individuals. It seems to me that the Articles 100, 105 and 106 create rights and obligations only towards States.

B. The boarding of the THALASSA.

24. Of course, maritime piracy is not the only possible incident of navigation.

Let's take an example.

As he replied, on 3 December 2008 before the External Relations Commission of the Chamber of Representatives of Belgium, to the question of the Member of Parliament Peter LOGGHE on "the incident involving a Flemish skipper in the French waters", Mr Olivier CHASTEL, Secretary of State for Foreign Affairs stated that: "The Minister of Foreign Affairs has been informed by our embassy in Paris that the Flemish fishing boat THALASSA was boarded on 23 October 2008 in the French waters. According to the French inspector who drafted the report related to this incident, the THALASSA would have been a kind of scapegoat within the framework of strained relationship between French and English fishermen in this zone. The aggressors were reported to be inebriated. This incident is all the more regrettable since this Belgian national living in France makes real efforts to become integrated. In a press release, the regional committee of fishermen of Lower Normandy condemned the incident as well as the fishermen's behaviour. Different fishermen, who were on the spot apologized. In Oostende as well as in Cherbourg,

([36]) See above, nr 20.
([37]) See above, nr 22.
([38]) See above, nr 15, 16 and 18.
([39]) See above, nr 16 and 18.
([40]) See above, nr 21.

this type of incident is considered as unusual. The French maritime authorities systematically send law enforcement services in the fishing zones to guarantee the compliance with the regulations and to record potential tensions. The embassy is in contact with the Agriculture and Fisheries department in Oostende; it has got the reports and useful mail related to the incident. Moreover, the services concerned in Cherbourg are regularly contacted by telephone. The shipowner of the THALASSA lodged a complaint against the alleged responsibles. The reports have also been transmitted to the prosecutor's office, which will come to a decision concerning the complaint. The embassy did not contact the shipowner but it follows the file to encourage the French authorities to ensure that such incidents could no longer happen in the future. The Agriculture and Fisheries department keeps regularly in touch with the shipowner of the THALASSA" ([41]).

The incident related occurred in "the French waters" as stated in the integral report and therefore cannot be described as an act of piracy pursuant to Article 101 of the MONTEGO BAY Convention ([42]).

C. – The ARTIC SEA case.

25. The ARTIC SEA case, which was described as the "2009 summer soap opera", gave rise to numerous catchy expressions. "L'ARTIC SEA ne répond plus: acte de piraterie, vol de bateau, vol de cargaison?",("THE ARTIC SEA, no reply: act of piracy, ship hijacking, cargo hijacking?", "ARTIC SEA: le mystère en mer." ("ARTIC SEA: mystery on the sea."), "L'équipage de l'ARTIC SEA est sain et sauf (mais) ce n'est pas encore, pas tout à fait la fin du mystère; (…) mais quel est le ressort de l'intrigue: piraterie, mafia, double cargaison?" ("The crew of the ARTIC SEA is unharmed (but) the mystery has not really ended yet; (…) but what makes the plot get moving again: piracy, mafia, double cargo?"), "Piraterie. L'étrange odyssée de l'ARTIC SEA. Le bateau est libéré, restent les questions." ("Piracy. The strange odyssey of the ARTIC SEA. The ship is free. The questions remain."), "L'ARTIC SEA dans le brouillard." ("THE ARTIC SEA in the

([41]) Question of Mr Peter LOGGHE to the Minister for Foreign Affairs on "the incident involving a Flemish skipper in the French waters" (nr 8173), Answer of Mr Olivier CHASTEL, Secretary of State for Foreign Affairs, translated integral report and analytical report of the interventions, Ch. Repr., Commission des Relations extérieures, sess. 2008-2009, séance du mercredi 3 décembre 2008, Après-midi, pp. 5 s., especially p. 6.

([42]) See above, nr. 15, 16, 17, 18, 19 and 23.

dark.), or even "L'incroyable épopée de l'ARTIC SEA." (“The unbelievable epic of the ARTIC SEA”)([43]).

The fact as reported in the media is known: end July 2009, a cargo boat and its Russian crew disappeared on the European coast and then off CAPE VERDE; around mid-August 2009, the crew unharmed and the boat were released.

It is not for me to decide between conflicting versions of the news, which were published in the media. Was the hijacking of this cargo boat linked to an act of piracy or, as some asserted it, to a spy affair, to a mafia business or to other circumstances? I ignore it. By mentioning this case, my only aim is to draw the attention on how cautious one should be before describing a behaviour as an act of piracy. Even in early September 2009, several patterns went on going around in the media ([44]). However, I shall emphasize the fact that, according to the Russian Minister for Defense Anatolii SERDIOUKOV, it was an act of piracy ([45]).

§ 2. - The United Nations Security Council Resolutions concerning the situation in SOMALIA.

26. The United Nations Security Council adopted numerous Resolutions concerning the situation in SOMALIA, more particularly due to the acts of piracy committed against ships, and the Secretary-General of the United Nations gave the aforesaid Security Council an account of the situation in SOMALIA in several reports ([46]).

([43]) See Le Soir, 13 August 2009, p. 11; 17 August 2009, p. 9; 18 August 2009, p. 11; 19 August 2009, p. 14; 26 August 2009, p. 11 and 5-6 September 2009, p. 10.

([44]) See M. PICARD, "Espionnage. It would have been used by the Russian mafia to deliver missiles to IRAN. L'incroyable épopée de l'ARTIC SEA" (The unbelievable epic of the ARTIC SEA”), Le Soir, 5-6 September 2009, p. 10.

([45]) See B. QUENELLE, "Piraterie. L'étrange odyssée de l'ARTIC SEA. Le bateau est libéré, restent les questions", Le Soir, 19 August 2009, p. 14.

([46]) See notably the Resolution 733 (1992) adopted on 23 January 1992, the Resolution 751 (1992) adopted on 24 April 1992, the Resolution 1425 (2002) adopted on 22 July 2002, the Resolution 1519 (2003) adopted on 16 December 2003, the Statement done on 15 March 2006 on behalf of the 15 Members of the Security Council by the President of the Security Council, Mr César MAYORAL (the ARGENTINE), the Report handed over on 25 June 2007, of the UN Secretary General on the situation in SOMALIA, the Joint Call made in London on 10 July 2007 by the heads of two United Nations agencies, for concerted and coordinated international action to address the threat of piracy and armed robbery against ships in waters off the coast of SOMALIE (International Maritime Organization / World Food Programme), the

I have already reviewed the major Resolutions and, except for one point, I will no longer come back to them. These are the Resolution 1814 (2008) adopted on 15 May 2008([47]), the Resolution 1816 (2008) adopted on 2 June 2008([48]), the Resolution 1838 (2008) adopted on 7 October 2008([49]), the Resolution 1846 (2008) adopted on 2 December 2008([50]), the Resolution 1897 (2009) adopted on 30 November 2009([51]) and the Resolution 1910 (2010) adopted on 28 January 2010([52]). I also very briefly mentioned the Resolution 1851 (2008) adopted on 16 December 2008([53]) about which I will add the following while making a link to the aforesaid Resolution 1910 (2010).

In these Resolutions 1851 (2008) and 1910 (2010), the Security Council reminds the Transitional federal government of SOMALIA of its own responsibilities.

In the Resolution 1851 (2008) adopted on 16 December 2008, the Security Council in paragraph 6 "notes the primary role of the (Transitional Federal Government) in rooting out piracy and armed robbery at sea". In the Resolution 1910 (2010) adopted on 28 January 2010, the Security Council, in paragraph 10, "emphasizes that SOMALIA's long-term security rests with the effective development by the Transitional Federal Government of the National Security Force and the SOMALI Police Force, in the framework of the DJIBOUTI Agreement and in line with a national security strategy."

27. It emerges from all the Resolutions adopted by the Security Council and from the UN Secretary-General that the Security Council concerns have been evolving over

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Resolution 1772 (2007) adopted on 20 August 2007, the Resolution 1811 (2008) adopted on 29 April 2008, the Resolution 1814 (2008) adopted on 15 May 2008, the Resolution 1816 (2008) adopted on 2 June 2008, the Resolution 1838 (2008) adopted on 7 October 2008, the Resolution 1844 (2008) adopted on 20 November 2008, the Resolution 1846 (2008) adopted on 2 December 2008, the Resolution 1851 (2008) adopted on 16 December 2008, the Resolution 1853 (2008) adopted on 19 December 2008, the resolution 1863 (2009) adopted on 16 January 2009, the Resolution 1872 (2009) adopted on 26 May 2009, the Resolution 1897 (2009) adopted on 30 November 2009, the Resolution 1910 (2010) adopted on 28 January 2010 and the Resolution 1918 (2010) adopted on 27 April 2010.

([47]) See above, nr 16.
([48]) See above, nr 16.
([49]) See above, nr 16.
([50]) See above, nr 16.
([51]) See above, nr 16.
([52]) See above, nr 16.
([53]) See above, nr 16.

time. If on the one hand the Security Council was constantly concerned by the political situation in SOMALIA, by a ban on weapons and by the supply of humanitarian aid to the population of this country, on the other hand it has progressively been concerned by the protection of ships participating in the transport and carriage of humanitarian aid meant for SOMALIA, then by the strengthening of the security of navigation in general and by the freeze on funds and other financial assets and economic resources owned by or - directly or indirectly - under the control of individuals or entities identified as carrying out or supporting activities which threaten the peace, security or stability of SOMALIA, and finally by the repression of acts of maritime piracy involving naval military operations.

28. The United Nations takes a prominent position not only on the grounds of the universal values it establishes and defends but also because of the role and the powers of the bodies of which it is composed.

The Security Council appears as the central body of this system. Pursuant to the chapter VII of the Charter of the United Nations, entitled “Action with respect to Threats to the Peace, Breaches of the Peace and Acts of Aggression", specially the Articles 39, 41 and 42, the Security Council has indeed the power to impose measures to the States aiming at maintaining and restoring international peace and security.

The Security Council undeniably exercises a legislative power directly linked to its mandate based on the Charter of the United Nations but only valid within the limits of this mandate. Pursuant to Art. 39 *et seq.*of the Charter, the Security Council may temporarily create rights, grant authorizations and impose obligations to the States and consequently, the temporary character of it cannot be stressed enough. To take up ZEMANEK's phrase, reproduced by Catherine DENIS in her outstanding book ”Le pouvoir normatif du Conseil de sécurité des Nations Unies: portées et limites”, the measures provided in the chapter VII consist in “a specific action intended to achieve a concrete and, thus, a temporary, case-related reaction to one of the situations referred to in Article 39”([54]).

([54]) See C. DENIS, Le pouvoir normatif du Conseil de sécurité des Nations Unies: portée et limites, Collection de droit international, Bruxelles, Bruylant – Editions de l'Université de Bruxelles, 2004, nr. 361, 362, 459, 460 and 486.

29. In most of its Resolutions related to the situation in SOMALIA, more particularly in the major Resolutions on the fight against maritime piracy ([55]), the Security Council declared to act pursuant to chapter VII of the Charter of the United Nations and its decisions which grant foreign States permission to access SOMALIA's territorial waters under certain conditions were and are valid only for a temporary period of time. That said, it could however not be contested that the Security Council not only interprets the MONTEGO BAY Convention but also broaden its scope. This may be seen as an expression of the Security Council's will to act as "legislator". Without SOMALIA's consent to draft this evolution towards a new international scheme for the fight against maritime piracy in this part of the world, it would have been difficult to legitimate the action led by foreign States only on the basis of the text of the MONTEGO BAY Convention ([56]). I think that a justification based on a kind of "absolute power" of the Organization of the United Nations only derived from Articles 2, § 6, and 103 of the Charter of the United Nations would not have been sufficient. I mention that Article 2, § 6 states that the organization of the United Nations shall ensure that all states which are not Members of the United Nations act in accordance with the evoked Principles so far as may be necessary for the maintenance of international peace and security. Article 103 provides that in the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail. These provisions presuppose that the Resolutions adopted by the Security Council are founded on a legal basis which is in accordance with the international law. And, regarding SOMALIA, we are only indirectly in the presence of a State "responsible" for a threat to the international peace and security; we are in the presence of a State "responsible" for a threat to the international peace and security only because it is a "defaulting" state and not an "assailing" state. Resorting to SOMALIA's consent seems wise to me. On the same lines, it is also to be noticed that SPAIN suggested to blockade the pirates' harbours. This strategic option is logical: why covering the Indian Ocean whereas an action aiming at blockading the pirates'harbours might be as efficient? As a blockade is first and foremost an act

([55]) See above, nr 16 and 26.
([56]) See C. LALY-CHEVALIER, "Lutte contre la piraterie maritime et droits de l'homme", Rev. b. dr. intern. 2009-1, p. 19 (however comp. pp. 18 and 21).

of war, no Resolution of the Security Council has gone that far. Stopping entries in and departures from harbours is not just the use of force.

30. One question that is obviously interesting but goes beyond the inevitably limited framework of this Speech is to know, as regards the fight against maritime piracy, whether the Resolutions of the Security Council are only meant for the states or if they also directly concern addressees which are no state, i.e. individuals.

At first sight, I personally incline to opt as a rule for the second solution. The solution seems logical to me since it comes to the fight against pirates, i.e. individuals.

In a general way, the growing intervention of the Security Council resulted in the tendency to abandon the intervention of Member States. The Resolutions of the Security Council are also more or less directly addressed to non-state entities: the intergovernmental entities, the rebel movements, the national liberation movements, the peoples, the civil population, the NGOs, the *de facto* authorities, the international community, the private trade companies, the political parties, the international staff, the refugees, the displaced persons and even the individuals. This practise would originate on the one hand, in the complexity of the situations the Security Council has to face frequently, and on the other hand, in the concern for reaching more or less directly the different non-state actors to encourage them to contribute to the maintenance of the international peace and security.

If individual are the cause of troubles that threaten the international peace and security, it is difficult to see why the Security Council could not also directly address these individuals and also wage a direct action against them on the basis of Articles 39([57]) and 2, §7, *in fine*, of the Charter of the United Nations([58]). According to the abovementioned Article 2, §7, *in fine*, the principle of non-intervention in matters essentially within the national competence of a State does not infringe at all on the implementation of the coercive measures provided for in chapter VII of the Charter.

([57]) See above, nr 28 and 29.
([58]) See TSHIBANGU KALALA, Les Résolutions de l'O.N.U. et les destinataires non étatiques, Collection Droit international, Bruxelles, Groupe DE BOECK – Editions Larcier, 2009, nr. 30 and 187.

Section 3. – Some civil aspects of the maritime piracy related to international maritime traffic and the United Nations.

§ 1. - An issue related to the definition of maritime piracy.

31. Acts of maritime piracy as they are now also defined by the Belgian legislation of 30 December 2009 may also have consequences under civil law([59]). In this respect, we think of the consequences of piracy on ongoing carriage contracts or to the effects of piracy concerning insurance. One crucial point of this issue consists in knowing which definition piracy gets within the framework of the transportation law and the maritime insurance law. Indeed, it is not because of the fact that piracy has recently been defined in the law of 30 December 2009 on the fight against maritime piracy that piracy is identically qualified by the legal instruments related to maritime transports or maritime insurance. This is the reason why it seems useful to examine if the notion of piracy is mentioned in the transportation law and in the maritime insurance law and, if the answer is positive, to study its use. Moreover, it is also crucial to bear in mind that, in this respect, there is also a certain margin for manoeuvre for the freedom of contract. In principle, indeed, the parties (carriers, insurers, …) can make provision for exemption clauses in the individual contracts.

§ 2. - Piracy in a certain number of legal instruments from the transportation law.

32. In Belgium, when dealing with the carriage of goods under bill of lading, a number of international treaties should first be taken into account. There is indeed the International Convention for the Unification of Certain Rules of Law relating to Bills of Lading, done at Brussels on 25 August 1924([60]) - the “Hague Rules” – amended by the Protocol of Brussels of 23 February 1968([61]) – the “Visby Rules” – and by the Protocol of

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([1]) I thank Bernard INSEL, lecturer at the University of Brussels, for his advises in the documentation research prior to drafting this section. Regarding the definition of the act of maritime piracy in the Belgian law of 30 December 2009 on the fight against maritime piracy, see above, nr. 16.

([60]) *M.B.*, 1st June 1931.

([61]) Law of 29 August 1978 approving the Protocol done at Brussels on 23 February 1968 amending the International Convention for the Unification of Certain Rules relating to Bills of Lading, done at Brussels on 25 August 1924, *M.B.*, 23 November 1978.

Brussels of 21 December 1979([62]). In this regard, a particular attention should be paid to the transposition of these instruments to the Article 91 of the maritime law. Even if Belgium is neither part to the United Nations Convention on the Carriage of Goods by Sea – the "Hamburg Rules"([63]) – nor to the recent "Rotterdam Rules"([64]), we will also briefly examine if piracy is also governed by these legal instruments.

33. The notion of piracy or maritime piracy does not appear as such in the "Hague-Visby Rules". Their Article 4.2 provides that neither the carrier nor the ship shall be responsible for loss or damage arising or resulting from: c) perils, dangers or accidents of the sea or other navigable waters, e) acts of war, and f) act of public enemies. The question thus arose to know if piracy can fall within one of the aforesaid provisions so that neither the carrier nor the ship would be responsible for resulting damage. Article 91, A, § 4, 2., of the maritime law – which reproduces almost literally the text of the "Hague-Visby Rules"([65]) – states that neither the carrier nor the ship will be responsible for loss or damage arising or resulting notably from: c) perils, dangers or accidents of the sea or other navigable waters, e) acts of war, and f) act of public enemies. The question to know if, and to what extent, piracy may fall within one of these provisions did not always lead to unequivocal answers.

34. Indeed, we could note, notably by referring to the book by Smeesters and Winkelmolen([66]), that even if the

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([62]) Law of 17 August 1983 approving the following international Acts: a) Protocol amending the International Convention relating to the Limitation of the Liability of Owners of Sea-going Ships of 10 October 1957; b) Protocol amending the International Convention for the Unification of Certain Rules relating to Bills of Lading of 25 August 1924, as amended by the amending Protocol of 23 February 1968 done at Brussels on 21 December 1979, *M.B.*, 22 November 1983.

([63]) United Nations Convention on the Carriage of Goods by Sea, done at Hamburg on 31 March 1978. The "Hamburg Rules" came into force on 1st November 1992, but so not in Belgium.

([64]) United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea, adopted by the General Assembly of the United Nations on 11 December 2008 and opened to signature at Rotterdam on 23 September 2009. See also above, nr.8.

([65]) Following the law of 28 November 1928 aiming at coordinating the Belgian legislation with the International Convention for the Unification of Certain Rules relating to Bills of Lading done at Brussels on 25 August 1924, *M.B.*, 11 January 1929.

([66]) C. SMEESTERS et G. WINKELMOLEN, *Droit Maritime et Droit Fluvial*, II, Bruxelles, Larcier, 1933, nr. 694. In the same way, also: G. VAN BLADEL, *Connaissements et règles de La Haye. Commentaire de la loi du 28 novembre 1928*, Bruxelles, Larcier, 1929, nr. 325.

meaning of the notion “acts of public enemies” as provided in Article 91, A, § 4, 2., f), of the maritime law, is particularly vague, it was however admitted that it includes pirates. But simple thieves, even bearing weapons, would not fall within this category([67]). The same point of view is to be found by De Weerdt who mentions that the aforesaid point f) is usually understood as referring to pirates and that individuals grouped in an association with the aim of attacking persons or properties are also part of this category but not the authors of simple acts of robbery with violence committed by isolated individuals. Moreover, De Weerdt writes in this regard that the maritime carrier is exempted from his *“aansprakelijkheid wanneer een gewapende bende aan boord van het vaartuig klimt (translation: responsability when an armed group goes aboard the vessel). Dit is een daad van piraterij waarvan het bewijs geleverd wordt door het scheepsjournaal en het logboek behoudens tegenbewijs (translation: This is an act of piracy, the evidence of which is provided by the ship’s log and the logbook except for evidence to the contrary) ([68]).”*

35. Smeesters and Winkelmolen mention however that according to the Anglo-Saxon doctrine, piracy is usually considered as one of the perils of the sea([69]) whereas in Belgium, it is rather the view according to which it is a matter of public enemies that prevails. *“We think that pursuant to the Belgian law, pirates always have to be put among public enemies, as they always were considered as hostes humani generis. Moreover, with regard to the hesitations of the English doctrine concerning the scope of the expression reproduced in our law, we think that we have to be extremely cautious. We think that individuals grouped in an association with the aim of attacking persons or properties should be considered as public enemies. Indeed, these criminals make an attempt on public security. Neither the single theft nor the armed robbery, which is perpetrated by one or more isolated individuals, are done by public enemies.* The carrier can

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([67]) F. STEVENS, *Vervoer onder cognossement*, Bruxelles, Larcier, 2001, nr. 398.

([68]) I. DE WEERDT (réd.), Zeerecht. Grondbeginselen van het Belgisch Privaatrechtlijk Zeerecht, Anvers, ETL, 2003, nr. 740-740bis.

([69]) In the same way notably: Circular 008/2008 de The Charterers P&I Club (London): http://exclusivelyforcharterers.com/2008%20008%20Piracy.pdf. Other references have also underlined this point of view regularly adopted in the Anglo-Saxon world, which considers piracy as a peril of the sea even if other authors also consider pirates as being public enemies too. In this sense: M. HARVEY, “Piracy: High Seas, Violent Theft, and Private Ends”, http://esvc000873.wic005u.server-web.com/docs/Harvey_paper.pdf.

be exempted from the consequences of these thefts according to the terms of littera g ([70]) These authors also reproduce the laconic discussion begun on the occasion of the adoption of the notion of "public enemies" during the drafting work of the Brussels Convention: *"What is the meaning of the expression 'act of public enemies', which was then mentioned under the letter g, asked Lord Phillimore at the Hague Conference. – Pirates? Sir Norman Hill answered: Milord, this is taken out of the Harter Act, of the Canadian Act and of the Australian Act. I do not know.*
Lord Phillimore. - This can mean pirates.
Sir Norman Hill. - This can mean pirates. I guess so.
The President. - It is not easy to know what this means. Is (g) accepted? Accepted ([71])."

36. The above already clearly suggests that it will not be easy to distinguish a simple theft or a barratry from an act of piracy as the first does not seem to be considered as acts of public enemies([72]) in our country but well in the second case. It also results from an arrest of the Court of Cassation of 13 April 1956 that such facts are not considered as perils of the sea under Belgian law - and this, contrary to what is claimed at least partially by the Anglo-Saxon doctrine. It indeed follows from this arrest that if perils, dangers and accidents of the sea, being inherent to any carriage by sea, are due to the vicissitudes of navigation, which are not necessarily unpredictable, they now must be of such a nature, in order to give rise to an exemption from liability, that the carrier is unable to preserve the

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([70]) C. SMEESTERS et G. WINKELMOLEN, *Droit Maritime et Droit Fluvial*, II, Bruxelles, Larcier, 1933, nr. 694.

([71]) C. SMEESTERS et G. WINKELMOLEN, *Droit Maritime et Droit Fluvial*, II, Bruxelles, Larcier, 1933, nr. 694, with a cross-reference to the *Rapport de la Conférence de La Haye*, 1921, 153-154. See also: G. MARAIS, *Les transports internationaux de marchandises par mer et la jurisprudence en droit comparé. Loi du 9 avril 1936*, Paris, Librairie générale de droit et de jurisprudence, 1949, 155-156 mentioning that it is quite strange to formulate rules without knowing the exact sense of them.

([72]) The question to know if a theft on board the ship – for example when it is alongside the quay in the harbour – may fall within the scope of letter q) of Article 91A, § 4, 2° of the maritime law – as Smeesters and Winkelmolen (see the previous footnote) seem to suggest it - has however no sure answer. Anyway, it results form a judgement of the commercial court of Antwerp that a theft on board a ship is not a ground of exemption for the maritime carrier in the sense of Article 91A, § IV, 2°, q), of the maritime law and that this is certainly the case if the shipowner knows the harbour well and is thus supposed to be aware of the risk of theft – in the present case in Lagos. See: Comm., Antwerp, 10 March 1993, *RHA* 1993, 367. It also seems obvious that it could not be further qualified of piracy.

goods transported against the aftermath of these events([73]). It has been written that this case law, in particular the arrest of 13 April 1956, has as consequence that the maritime carrier who intends to invoke this basis to be exempted from his liability, will have to provide a triple evidence: extremely unfavourable weather conditions, the causal connection between the facts put forward and the damage caused, and the absence of fault on his part([74]), which clearly shows that under Belgian law, a connection with weather conditions is mandatory. It then appears that under Belgian law, the application of this ground of exemption from the liability of the maritime carrier is not admitted in the event of piracy([75]).

37. The question to know which directives should be taken into account to interpret the different grounds of exemption arises naturally as we are confronted with these different approaches between Belgium and – at least partly – the Anglo-Saxon doctrine. As these grounds are mentioned in the 'Hague-Visby Rules', the fact that they are rules of conduct, has to be taken into account in their interpretation even if these rules are almost totally incorporated in Article 91 of the maritime law. The ruling given by the court of commerce of Antwerp of 11 January 1993 is interesting in this respect. Indeed, it considers that, even if the Hague Rules slightly differs from Article 91, international treaty law prevails over domestic law. *(translation: The 1924 Convention aims at unifying certain rules of law related to bills of lading. This international agreement cannot be interpreted by the court of law of a Member State. The Court of Cassation says that the interpretation of an international convention aiming at unifying the law cannot be effected with reference to the domestic law of one of the contracting States. When the text needs to be interpreted, this interpretation has to be based upon elements belonging to the Convention such as, a.o., its purpose, its object and context, its preliminary documents. It is useless to draw up a Convention aiming*

([73]) Cass. 13 April 1956, (*Bull. et Pas.,* 1956, I, 856); Comp. Cass. 9 September 1983, R.G. 3845, *Pas.* 1984, nr. 15.

([74]) R. ROLAND, M. HUYBRECHTS et S. ROLAND, "Overzicht van rechtspraak. Scheepvaartrecht (1968-1975)", *TPR* 1976, (81) 144. the other case law mentioned in it points out that this ground of exemption is linked to weather conditions insofar that, at least under Belgian law, such a ground could not be taken into account in the event of piracy.

([75]) See for example Antwerp 21 September 1977, *RHA* 1979-80, 53; Comm., Antwerp, 11 January 1993, *RHA* 1993, 95; High Court Australia, 22 October 1998, *Eur. Vervoerr.* 1999, 958.

at carrying out an international legislation if the latter has to be subject to the interpretation of the courts of law of each State according to notions belonging to their own domestic law (Cass. 27 January 1977, Pas. 1977, 574)([76])*).*

38. Article M, paragraph 2 of the Protocol of Signature of the Convention of Brussels of 25 August 1924 also holds that the High Contracting Parties may give effect to this Convention either by giving it the force of law or by including in their national legislation in a form appropriate to that legislation the rules adopted under this Convention. Belgium opted for the second option of this alternative and opted for Article 91 of the maritime law. Moreover, the same article provides that the contracting parties may expressly reserve the right to prescribe that in the cases referred to in paragraph 2(c) to (p) of Article 4 the holder of a bill of lading shall be entitled to establish responsibility for loss or damage arising from the personal fault of the carrier or the fault of his servants which are not covered by paragraph (a). The lack of uniformity which has emerged is precisely due to the fact that the Convention of Brussels enabled the contracting parties to transpose the relevant rules into their national legislation. This also undoubtedly resulted in the various interpretations of the exceptions to the responsibility of the carrier concerning acts of piracy. "*Thus, the Hague Rules have given a certain amount of liberty to the Contracting States to deviate from the agreed rules when incorporating them into national maritime codes. Many Contracting States have in fact done so, and the result has been a lack of uniformity not only from country to country but even within the same country*([77])*."* That is why Article 3 of the Hamburg Rules also provides that in *"the interpretation and application of the provisions of this Convention regard shall be had to its international character and to the need to promote uniformity*."

39. Contrary to the 'Hague-Visby Rules', the Hamburg Rules do not contain any detailed list of cases in which the carrier is exempted from his liability. Within the framework of the Hamburg Rules, there are only three cases in which the carrier benefits from an exemption from his responsibility([78]), i.e. cases regarding live

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([76]) Comm., Antwerp, 11 January 1993, *RHA* 1993, 95.
([77]) Article-by-Article Comments on the Hamburg Rules, *Eur. Vervoerr.* 1992, (585) 593.
([78]) A. WANIGASEKERA, "Comparison of Hague-Visby Rules and Hamburg Rules",

animals, change of route to save life or property at sea, and fire([79]). The reason for which there was no wish to use a long list of this type - contrary to the list of exceptions to the liability of the carrier mentioned in the 'Hague-Visby Rules' – had to do with the position in force within the UNCITRAL (United Nations Commission on International Trade Law) according to which the list of exceptions in the 'Hague-Visby Rules' was not properly drawn up. "*This technique of listing rules and exceptions has caused many difficulties which, even today, cannot be considered resolved despite repeated testing in the courts. This structure emerged because the drafters of the Hague Rules essentially incorporated in article IV, clauses taken from bills of lading in use at the beginning of the twentieth century. From time to time new exemptions had been added to them without attention being paid to whether or not they were legally necessary([80]).*" In the event of piracy, we thus have to call on the general rule held in Article 5.1 of the Hamburg Rules which indeed provides that the carrier "*is liable for loss resulting from loss of or damage to the goods, as well as from delay in delivery, if the occurrence which caused the loss, damage or delay took place while the goods were in his charge as defined in article 4, unless the carrier proves that he, his servants or agents took all measures that could reasonably be required to avoid the occurrence and its consequences.*" But the Hamburg Rules have not encountered the success that was hoped for insofar as many countries prominent in maritime transport did not accept these rules([81]); the Hamburg Rules never entered into force in Belgium either.

40. Finally, as far as the recent 'Rotterdam Rules' are concerned, I note that the notion of 'piracy' is this time expressly mentioned in it. Indeed, pursuant to Article 17.3, the carrier "*is also relieved of all or part of its liability pursuant to paragraph 1 of this article if, alternatively to proving the absence of fault as provided in paragraph 2 of this article, it proves*

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http://www.juliusandcreasy.com/inpages/publications/pdf/comparison_of_hague_and_hamburg-AW.pdf.

([79]) See Article 5 of the 'Hamburg Rules'.

([80]) Article-by-Article Comments on the Hamburg Rules, *Eur. Vervoerr.* 1992, (585) 597-598.

([81]) See H. HONKA, "United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea. Scope of Application and Freedom of Contract", text presented during a colloquium held in Rotterdam on 21st September 2009 on the occasion of the opening for signature of the 'Rotterdam Rules' on 23 September 2009. The texts of the different contributions can be consulted via: http://www.rotterdamrules2009.com/cms/index.php.

that one or more of the following events or circumstances caused or contributed to the loss, damage or delay: (…) c) War, hostilities, armed conflict, piracy, terrorism, riots, and civil commotions." These 'Rotterdam Rules' are however not entered into force yet; besides, our country has not signed them also because of the fact that the Belgian maritime law is currently under review. This emerges from the answer of Etienne Schouppe, Secretary of State, to the parliamentary question asked by the Member of Parliament Kristof Waterschoot on 21st October 2009 during a meeting of the Commission on Infrastructure, Communication and Public Enterprises: (translation: I can assure you that Belgium has not signed this convention. *We support a simplification and even a harmonization of the international transport contracts but for the moment, it is not yet clear for us if the Rotterdam Rules really give an answer to the conditions as we see them. As you know, this takes place just when we are carrying out a complete review of the Belgian maritime law. We are actively busy with it. That is prepared. I hope that it will be completed in the course of the coming months. In the new Code that is prepared, a full title will be dedicated to the issues examined in the new convention, especially the agreement on maritime transport. Moreover, the new convention has an impact on other potential issues to be settled in the new Belgian Code such as for example the multimodal transport and the handling of goods. The convention as it was drawn up, i.e. the Rotterdam Rules will also have to be further examined in the light of the modernization of our maritime law as it currently exists([82]).)*

§ 3. - Piracy in a certain number of legal instruments of maritime insurance.

41. Concerning the place of piracy within the instruments of maritime insurance, I propose to focus our attention on the legal instruments which are relevant to our country. We will more particularly examine the maritime law as well as the terms and conditions of the Marine

([82]) Chambre des Représentants, Compte rendu intégral avec Compte rendu analytique traduit des interventions, CRIV 52 COM 666, p. 2; the translated analytical report of the answer of Etienne Schouppe is the following: *(translation: the Belgian delegation attended the signing ceremony in Rotterdam in September 2009 but we do not signed the Rotterdam Rules, precisely for we doubt that this treaty would effectively result in a harmonization and a simplification of the maritime transport contracts. We are currently reviewing the Belgian maritime law and we will undoubtedly examine these matters within this framework. We will examine to which extent this new Code and the Convention affect each other, for example regarding multimodal transport and cargohandling operations.)*

Insurance Policy of Antwerp of 1st July 1859 and the one of 20 April 2004.

42. Concerning the maritime law, the article 201 is particularly relevant. The first paragraph of this article indeed holds that insurers bears the risks of all losses and damage which accrue through storm, wreck, stranding, boarding, forced changes of route, voyage or vessel, through jettison, fire, explosion, plunder, and generally through all other perils of the sea. Its second paragraph however holds that in the event of the insurers having taken upon themselves the risks of war, they are answerable for all damage and loss which accrue to the things insured by hostilities, reprisals, declaration of war, detention by the order of a Power, interference by any Governments recognized or not recognized, and in general by all accidents and fortunes of war. So to speak, the first paragraph of Article 201 of the maritime law deals with what we can call the maritime risks whereas its second paragraph concerns the risks of war as Articles 202 and 203 of the same law do([83]). Besides, this provision corresponds to Article 19 of the law of 11 June 1874 containing the Titles X and XI, Book I, of the Commercial Code (Insurance in general – some terrestrial insurance in particular) which holds that the insurance does not include the risks of war and the losses or damage caused by riots unless otherwise agreed. Unless special agreement, the risks of war thus remain outside the object of the insurance([84]). Considering the fact that the risks of war remain in principle outside the insurance, the question is raised to know how this notion can be defined and differentiated from perils of the sea; indeed, if the intervention of the insurer is limited to the perils of the sea or if the risks of war are covered by another insurer, it will be necessary to proceed to such a delimitation([85]) and to determine to which notion a act of piracy would belong.

43. It emerges from the Marine Insurance Policy of Antwerp of 1st July 1859 that piracy is not considered as a risk of war in the sense of the above-mentioned provision of the maritime law and that it is therefore covered. Indeed, pursuant to Article 1 of the Marine Insurance Policy of Antwerp of 1st July 1859, the underwriters shall pay to the extent of their respective

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([83]) I. DE WEERDT (red.), Zeerecht. Grondbeginselen van het Belgisch Privaatrechtlijk Zeerecht, Anvers, ETL, 2003, nr. 445.
([84]) C. DIERYCK, *Zeeverzekering en averijvordering*, Bruxelles, Larcier, 2005, nr. 175.
([85]) See C. DIERYCK, *Zeeverzekering en averijvordering*, Bruxelles, Larcier, 2005, nr. 175.

subscriptions all damage and loss resulting from *"tempest, shipwreck, stranding, fortuitous collision, forced putting in at a port of distress, forced change of route, voyage and vessel, jettison, fire, looting, capture and molestation of pirates, perils of the sea during the quarantine, negligence of the master and the crew, barratry of the Master and in general for all accidents and perils of the sea. Underwriters are not liable for war risks unless the policy otherwise provides. In this case, it is understood that they are liable for any damage and loss resulting from war, hostilities, reprisals, arrests, capture, molestation by any government, friend or enemy, recognized or not recognized, and in general, from all accidents and perils of the war."* It has been noticed that the *"risk of piracy has always been ranked among the maritime risks covered.* However, the content of the notion of piracy has evolved([86])." Insofar as Article 1 of the Marine Insurance Policy distinctly mention looting on the one end, and capture and molestation of pirates on the other end, it has been concluded that if the policy only covers looting, piracy would not be covered([87]).

44. It has been noticed by other authors that as time goes by, unlike Article 1 of the Marine Insurance Policy of Antwerp of 1st July 1859, piracy has been considered as a risk of war([88]). So, this is the way to understand the "All risks" clause; this clause is not part of the Antwerp policy and was drawn up as a distinct clause on 28 March 1952 by the "Vereniging van transportverzekeraars van Antwerpen" at that time (Association of the marine insurers of Antwerp) and was deposited on 27 October 1952 to the Chamber of Commerce of Antwerp([89]). Pursuant to this clause, the risks of war, strike, riots and piracy are covered by the insurer only if expressly agreed so. If these risks are effectively covered, then the clause of 1st July 1976 on risks of war for maritime transport applies. Its Article 1 indeed holds that by means of an express convention and against

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([86]) C. DIERYCK, "La police maritime d'Anvers (1859)", *TBH* 2000, (529) 534.

([87]) R. DE SMET, *Droit maritime et droit fluvial belges*, Bruxelles, Larcier, 1971, II, nr. 743; R. DE SMET, *Traité théorique et pratique des assurances maritimes*, Paris, Librairie générale de droit et de jurisprudence, 1959, I, nr. 248 with referral to the Court of Appeal of Brussels: Brussel 2 April 1941, *RHA* 1941, 244.

([88]) P. WILDIERS, *Transportverzekering*, Anvers, Editions Lloyd Anversois, 1975, nr. 28a. Also compare with: P. WILDIERS and M. CAETHOVEN, *Manuel pratique des assurances maritimes*, Anvers, Editions Lloyd Anversois, sine dato, nr. 31.

([89]) P. WILDIERS, *Transportverzekering*, Anvers, Editions Lloyd Anversois, 1975, nr. 56.

"*ad hoc*" prime, the policy covers risks of war without any threshold pursuant to the provisions of the Antwerp policy and the Belgian law. "*Zij dekt insgelijks de risico's van oorlog zonder veklaring, burgeroorlog, omwenteling, muiterij, opstand of daaruit ontstane burgerlijke onlusten, alsmede die van zeeroverij, mijnen, torpedo's, bommen of ander oorlogstuig, zelfs zonder dat een oorlogsfeit zich voordoet*", says the Dutch text.

45. On 1st October 1986, the "Royale Association Belge des Assureurs Maritimes" (Royal Belgian Association of Marine Insurers) launched a new "All-risks clause" which contains a slight adaptation of the clause of 28 March 1952. Piracy is no longer mentioned in it as a risk which is only covered pursuant to an express provision with this aim in such a way that the damage and losses caused by capture and molestation of pirates as provided for in Article 1 of the Marine Insurance Policy of 1859, are covered([90]). Piracy appears so as a maritime risk which is covered. On the other hand, in the English insurance law, it appears that the damage or losses undergone as a result of an act of piracy are covered as "*marine risks*" in the policy provided by the "Institute Cargo clauses" A but not by the "Institute Cargo clauses" B and C([91]). Therefore, in the English insurance law, piracy was firstly a covered risk, then it was no longer covered for a while before being covered again by the "Institute Cargo Clause" as "all-risks clauses"([92]).

46. Within the framework of the above-mentioned remarks, it is of course necessary to keep in mind that it is not impossible that a capture or an act of piracy can take place with the agreement of any State which grants pirates permission to "rush upon" the enemy vessels – by granting a "letter of mark" (or "letter of marque and reprisal") – in which case this is a risk of war or a peril of the sea([93]).

47. Regarding the new Cargo Insurance Policy of Antwerp of 20 April 2004, it should be firstly noticed that it is only an insurance covering goods or an insurance against material damage; the Marine Insurance Policy of 1st July 1859 however is both an insurance for goods and an

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([90]) I. DE WEERDT (red.), Zeerecht. Grondbeginselen van het Belgisch Privaatrechtlijk Zeerecht, Anvers, ETL, 2003, nr. 447.
([91]) I. DE WEERDT (red.), Zeerecht. Grondbeginselen van het Belgisch Privaatrechtlijk Zeerecht, Anvers, ETL, 2003, nr. 447.
([92]) C. DIERYCK, *Zeeverzekering en averijvordering*, Bruxelles, Larcier, 2005, nr. 177.
([93]) C. DIERYCK, *Zeeverzekering en averijvordering*, Bruxelles, Larcier, 2005, nr. 192.

insurance for the body of the vessels. Pursuant to Article 6 of the Policy of 20 April 2004, in case of free of particular average insurance, the insurers shall pay: *"all total material loss resulting from tempest, shipwreck, stranding, collision, forced putting in at a port of distress, forced change of route, voyage and/or vessel or ship, jettison, fire, looting, capture and molestation of pirates, perils of the sea during the quarantine, negligence of the master and the crew, barratry of the Master and in general for all accidents and perils of the sea."* It also appears - pursuant to Article 1 of the Marine Policy of 1st July 1859 – that looting, capture and molestation of pirates constitute a maritime risk.

48. Finally, it is not devoid of interest to take a look at the abandonment and at the faculty of proceeding to it in case of maritime piracy. Article 222 of the maritime law holds that abandonment – this term means that, in case of major damage, the person insured transfers the thing insured in return for the payment of the insured value of this thing - may be effected in the event of seizure, of wreck, of stranding with injury; of unseaworthiness through peril of the sea, in the event of detention by a foreign Power, in the event of loss or deterioration of the insured property, if deterioration or loss amounts to not less than three fourths. In addition, there is also the possibility that abandonment may be effected in the event of detention on the part of the Government after the voyage has begun. Regarding the matter we are dealing with, the case of the seizure is interesting; if the seizure is carried out by the armed forces of a State or by corsairs at its service, this is considered as a risk of war([94]). However, the seizure may also be effected by pirates who, in other words, do not act in the service of a State, in which case this is considered as a normal risk. Pursuant to Article 243 of the maritime law, no time limit has to be taken into consideration regarding the abandonment in the event of capture by pirates; the periods of time provided in Article 243 of this law, after which the abandonment may be effected, only apply in the event of seizure by pirates or enemies([95]). Even if, within the framework of Article 222 of the maritime law, the capture may concern both situations, i.e. the capture by pirates or the capture by the armed forces of a State, the Cargo

([94]) C. DIERYCK, *Zeeverzekering en averijvordering*, Bruxelles, Larcier, 2005, nr. 188.
([95]) R. DE SMET, *Traité théorique et pratique des assurances maritimes*, Paris, Librairie générale de droit et de jurisprudence, 1959, I, nr. 535.

Insurance Policy of Antwerp of 20 April 2004 expressly limits abandonment to the event of a capture by pirates([96]). Indeed, Article 12.2 of the Policy of 20 April 2004 holds that, without departing from the provisions of Article 11 of the above-mentioned policy([97]) and by way of derogation from the provisions of the Code of Commerce([98]), abandonment can only be put forward in the following cases: capture by pirates (…).

49. At the same time, it clearly appears – and this applies to all the civil aspects of maritime piracy, regarding simple carriage contracts or insurance issues – that the parties are in principle always free to contract as they intend to.

Section 4. – Conclusion.

50. In the opening statement on the priorities of the Belgium Presidency of the European Union (July-December 2010) that he presented on 9 March 2011 during the common meeting of the Commission of national Defense of the House of Representatives, of the External Relations and Defense Commission of the Senate and of the Federal advisory committee on European Affairs, Mr Peter DE CREM, Minister of Defense, declared that “(translation) the operations (…) off the SOMALI coast (the ATALANTA operation) will be pursued, (that) by the end of this year, we will participate again, by holding the force deputy commander role, in operations with a frigate, together with FRANCE, (… that) the (…)'ATALANTA' operation is a contribution of the European Union to the fight against piracy off the SOMALI coast, (that) this operation is very successful (…) and recognized as such within the region, by the N.A.T.O. as well as by other third countries which also participate in this operation."
Despite the coalitions of States within the framework of the N.A.T.O. (CTF 150) and the European Union (EUNAVFOR – ATALANTA) and the interventions of national navies, we however have to admit that piracy off the SOMALI coast is not yet fully contained.

51. Honesty requires to say that western ships had to be boarded so that SOMALI recovers a visibility which has

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([96]) See Commentaar van de Polant-Commissie bij de Antwerpse Goederenverzekeringspolis van 20 april 2004, *RHA* 2004, (195) 232.
()Article 11 of the Policy of 20 April 2004 provides notably for the exclusion of war risks from all insurance cover. See specially Article 11.2.5.i of this policy.
([98]) This point concerns Article 222 of the maritime law.

been much lost for many years, and so that the European citizen becomes aware that, in this region of the world, ships carry containers of toxic products to drop them on shores or to dump them off the coast at sea, and that SOMALI territorial waters, which are very rich in tuna, were overexploited by European or Asian fishing vessels([99]).
Somali piracy is not unrelated to this dramatic situation and to years of war during which local populations sank into informal economy, away from any State authority, as the existence of Somali fishermen notably became more and more precarious([100]).

52. Today, the European citizen becomes hopefully aware of the consequences induced by the bankruptcy of a State which has to be rebuilt thereafter. Let this be a lesson to the whole world. In the case of SOMALIA in particular, piracy will probably not be eradicated from the SOMALI coasts by the sole use of force. The solution can probably only be global, i.e. law and order, of course – this is essential – but also humanitarian, political, institutional and supported by the development cooperation([101]).

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The three friends who left us in the course of the previous judicial year had in common their competence

([99]) See C. BRAECKMAN, "La mafia des déchets a précédé celle des pirates", Le Soir, 21 April 2009, p. 3; Question of Ms Karine LALIEUX to the Deputy Prime Minister and Minister of Foreign Affairs and Institutional Reform on "l'exploitation étrangère des ressources marines de la SOMALIE" (translation: the foreign exploitation of SOMALIA's marine resources)(n° 20681), Compte rendu analytique, Ch. Repr., Commission des Relations extérieures, sess. 2009-2010, séance du mercredi 31 mars 2010, Après-midi, p. 25.
([100]) See C. BRAECKMAN, "La mafia des déchets a précédé celle des pirates", Le Soir, 21 April 2009, p. 3; Question of Ms Karine LALIEUX to the Deputy Prime Minister and Minister of Foreign Affairs and Institutional Reform on "l'exploitation étrangère des ressources marines de la SOMALIE" (translation: the foreign exploitation of SOMALIA's marine resources)(n° 20681), Compte rendu analytique, Ch. Repr., Commission des Relations extérieures, sess. 2009-2010, séance du mercredi 31 mars 2010, Après-midi, p. 25.
([101]) See A. LELARGE, "2 La SOMALIE entre anarchie et piraterie", Journ. dr. intern. April-May-June 2010, nr. 2/2010, p. 474.

unanimously recognized, and their good mood: the emeritus section president José DE PEUTER, the honorary Advocate General Philippe GOEMINNE and the honorary Chief Secretary of the Prosecutor's office Jozef VAN ROY.

The section president DE PEUTER was readily ironical with himself about "the emperor of HERENTALS". He was used to that sense of humour: "(translation) Our colleague and friend Mr so-and-so is the Flemish from Wallonia; he always talks to me in Dutch". He was always cheerful and friendly. Even his written notes contained cabalistic signs that naturally drove the reader to start up a conversation with him, which was always friendly.

The Advocate General GOEMINNE kept smiling even during the long years of his bitter fight against the disease. His voice, which previously sounded somewhat as a drum when he raised his voice in Dutch, however became gradually weaker. If his dreams of faraway journeys came true, unfortunately he has never been able to achieve his project of comic periodical depicting some of us, as his state of health brought an untimely end to his presence in the Court.

Cheerful coach for his assistants within the Secretariat of the Prosecutor's office of the Court of Cassation, the Chief Secretary VAN ROY brought the same commitment as player-coach towards all those who, during the lunch break, shared with him the taste for table tennis games. Being called for help as translator at the hearing or acting as perpetual secretary for the general prosecutor DUMON, he was always there.

The section president DE PEUTER, the advocate general GOEMINNE and the chief secretary VAN ROY would not understand that notwithstanding the complex political situation that we face, we would not pursue our missions wholeheartedly.

To conclude, I would also like to pay homage to Madam BRANDON, magistrate at the Justice of the Peace and to Mr BELLEMANS, clerk of the Court, both tragically deceased.

For the King, I claim that the Court should: pursue its works in the course of the judicial year that begins.

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