

A Charter for Boarding¹

The German Government Contracts out Counter-Piracy Operations

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On high seas, ashore and in the air: In recent years, the various federal governments in Germany have failed to turn the armed forces into another law enforcement agency. In an attempt to nevertheless extend the state monopoly on the use of force, the current Merkel government comes up with a new idea: Neither the police nor the military are to protect German vessels against so-called piracy. Instead, ship owners are to hire and to pay private security and military companies to protect their interests. Such a move, the government hopes, will allow for killing three birds with one stone: save money, circumvent parliamentary oversight and create a new policing force – challenges included.

Since the Middle Ages and until the early 20th century, privateering, i.e. state-commissioned piracy has not only been a common method of warfare being even codified in international law, but also was of considerable military and economic importance. It was not until the Hague Convention of 1907 that international law prohibited state-led piracy. Self-evidently, piracy was not to disappear but what merely has been created was a new offense. It is an open secret that even in the 1990s, for instance, parts of the state apparatus in the southern Chinese provinces participated in captures or even commissioned pirate attacks. Similar allegations have been reproached against India, Indonesia and the Philippines. Currently in the limelight though is Somalia, held liable for the majority of piracy attacks, at least in the last four years.

Piracy is regulated by international law. Under article 15 of the Convention on the High Seas of 1958 and according to article 101 of the Convention of the Maritime Law of 1982, piracy is any unlawful act of violence, detention, or looting on the high seas by a crew or passengers of a private ship for private purposes against another ship. If it is not two or more vessels or if the acts are committed in national waters, it is by definition not piracy but (armed) robbery (1). Responsible in both cases are the national police (not the military), in Germany on the basis of the Federal Maritime Responsibilities Act of 1965 and on the regulations of the federal police and customs. German-flagged ships are German sovereign territory where German laws apply.

¹ The paper is based on a German version from September 2011, published here: Eick, Volker 2011: "Freibrief zum Entern? Bundesregierung vergibt Piraterie-Bekämpfung an Private." *analyse & kritik*, 41 (564): 7, http://www.akweb.de/ak_s/ak564/32.htm.

State Protection too Complicated and too Expensive?

In the summer of 2011, the federal government has decided to allow the third largest merchant fleet in the world to protect its vessels with private security and private military companies and not, as the Basic Law has it, to offer protection by the German police. The argument is impressive, it is: State protection is legally too complicated and economically too expensive.

The German army can not be used on cargo ships to combat pirates, since Article 87a of the Basic Law basically limits the tasks of the armed forces to national defense. As one of the few exceptions, only the assistance in an emergency and during acute danger is conceivable (2). The last two federal governments have failed to change the Basic Law in ways that would allow for an extended deployment of the army on German soil. In particular, the federal government had failed, in 2006, to assert an Aviation Security Law at the Federal Constitutional Court, and therefore, did not even submit the planned Sea Security Law that was meant to allow for the use of military forces on ships.

Given these experiences, the federal government now is well aware that the protection against and the capture of pirate ships and the respective arrests of pirates are police duties (3), but still it is not willing to deploy police. Instead, ship owners should mandate private security and military companies (4).

This is a legally contested move. In addition, private security companies do only have the so-called everyman's rights and the right of self-defense at their disposal; joining in is the householder's rights of the ship owners conferred upon the private security companies. The exercise of sovereign authority shall, according to Article 33 paragraph 4 of the Constitution, "as a rule, be entrusted to members of the public service who stand in a relationship of service and loyalty defined by public law," and therefore, cannot simply be privatized (5). In essence, private security companies do not hold sovereign rights. The only legal basis for the government's decision to allow for the deployment of private security companies therefore is simply § 34a of the Commercial Code; the code though, neither includes job descriptions or codes of conduct. Further, German private security guards are neither trained nor equipped for tasks against pirates.

How the federal police should be able to certify foreign companies, as suggested by the government and what criteria should be applied for such a certification process is unclear; likewise, certification systems are also absent internationally. Given that the power of order over the private security forces would rest in the hands of the shipmaster (and not the police somewhere in a

harbour), liability issues are also unclear as the captain could be liable for prosecution (6).



Further questions are arising: Firstly, heavy weapons are prohibited on German vessels but might be deemed necessary. Secondly, the government's announcement that the Federal Criminal Police will review the legality of weapons to be used on vessels leaves open the answers to the questions, where and how this could be done. Thirdly, even if these issues could be resolved in a constitutionally sound way – for which, in the light of previous practices, there is little evidence (and not even hope) – international legal issues remain: private security companies are neither allowed to board an enemy ship nor are they permitted to liberate hijacked vessels. Fourthly, the equipment with weapons may lead to an escalation of confrontations; several incidents have been reported already.

Fifthly, it is totally unclear how the use of such forces could be monitored, reviewed and may be prosecuted. Sixthly, the federal police, based on a certification system, would be to decide not only for the federal but also for state level and the respective ship owners which security companies are to be perceived as acceptable and therefore sacrosanct. If the German parliament agrees on the plans, it hands over the reins of control-power over the monopoly of force, for an informed examination of the newly emerging commercial-maritime security environment is hardly possible. Seventhly, the federal police, as the executive power, extend its monopoly on the use of force, insofar as it ultimately takes over legislative decision-making authority,

while, at the same time, the profit-oriented private security industry might be interested in the continuation of a perceived piracy threat – because it is (the construction and marketing of) ‘threat’ where the money comes from.

Among the world’s busiest trade routes with approximately 90,000 annual passages are the Straits of Malacca and the area around the Gulf of Aden, where some 30,000 ship movements per year are registered. In these two areas in particular, several hundred piracy cases are reported per year; in 2009 for instance, only 35 cases of piracy have been reported out of Somali waters (7). In the early 1990s, only 100 attempted or successful piracy cases were reported annually on a worldwide scale. This changed with the Asian economic crisis beginning in 1997, when the numbers, especially in the Straits of Malacca, initially doubled – only to quadruple in the aftermath of the Tsunami that, in December 2004, hit, among other areas, the coasts of India, Sri Lanka, and the Philippines. Since 2007, the most piracy-affected area is the Gulf of Aden.

| Attempted and Successful Acts of Piracy and Armed Robberies at Sea | | | | | | | | | | | | | | |
|--|------|------|------|------|------|------|------|------|------|------|------|------|------|------|
| year | 1998 | 1999 | 2000 | 2001 | 2002 | 2003 | 2004 | 2005 | 2006 | 2007 | 2008 | 2009 | 2010 | 2011 |
| attacks | 210 | 309 | 471 | 370 | 383 | 452 | 330 | 266 | 241 | 282 | 306 | 397 | 489 | *266 |

Source: International Chambers of Commerce, own illustration; *as of July 2011.

Today, countries such as China and South Korea, Pakistan and India, Russia and even Iran jointly patrol the main waterways in the Indian Ocean and Gulf of Aden with military forces. One of the first coordinated counter-measures to piracy was the ReCAAP initiative based on a cooperation agreement signed by 16 Asian countries in 2004. Since November 2008, military vessels, coordinated by the European Union, patrol the coastline of Somalia to protect the deliveries of World Food Programme (Operation Atalanta); in January 2009, the United States formed a new ‘coalition of the willing’ (Combined Task Force 151), and, since November 2009, the NATO also patrols maritime areas (Ocean Shield). The total costs of the operations are estimated to be around €1.5 billion annually.

Good Business Opportunities for Private Security

Apart from these governmental actors, ship owners and governments deploy private security and military companies to protect their vessels since some time already (8). While it is known that most of these companies are based in the U.S. and Great Britain, reliable figures on their scope and scale are missing. What is known though is that today *Xe Services*, the successor of *Blackwater*, operates an armed vessel ready to escort merchant ships.

Another private military company, *Saracen International* trains one thousand combatants on behalf of the quasi-government in the semi-autonomous Somali-region of Puntland to become an anti-pirate militia; however,

members of the quasi-government are suspected of being personally involved in the piracy business (9). The French company *Secopex* rents out eleven escort ships armed with snipers for US\$12,000 to 30,000 per day (10), while the British-American company, *BritAm Defense Ltd.* trains military and police officers from several countries to combat piracy in its subsidiary located in Singapore. Among German suppliers of anti-piracy equipment and services are the Munich-based company *Result Group* and *International Security Network, Inc.* According to a study published in June 2011, out of 100 German ship owners surveyed, 27 confirmed their vessels to be protected by private military companies.

The maritime industry is of global significance as more than 90 percent of the world trade are transported by vessels. The annual turnover of the world fleet of roughly 55,000 vessels is 5,700 (!) billion €. With 3,700 merchant ships, Germany owns the third largest fleet measured in gross registered tons, only surpassed by the fleets of Japan and Greece. By owners' nationality Germany even has the largest fleet in the world (ahead of China and the U.S.). As impressive as the numbers seem to be at first sight and even so international fora and the media are keen to address the issue of piracy, if one puts those numbers into perspective and throws a closer look at the statistics, the post-colonial phenomenon of piracy becomes less striking in politico-economic terms even for a seafaring nation such as Germany.

This becomes even more obvious if one takes into consideration that only 445 ships sail under the German flag (11). Consequently, police protection at an outside estimate would only encompass these ships. Bearing in mind that around 60 percent of reported piracy cases take place in ports (and, therefore, do not qualify as piracy) the numbers are even less impressive. Further to be considered is the fact that only in around half of the cases pirates enters vessels. Thirdly and finally, in only about one-tenth of the cases a ship is actually kidnapped, statistically about 45 cases a year (12).

A few Pirates – and the Basic Law Gone

In the face of 30,000 passages annually such a number is, despite the regional concentration, rather negligible. Putting primary (ransom, insurance rates, etc.) and secondary piracy damages (macro-economic consequences for the region concerned) in relation to the generated turnover of the industry, a similar picture arises. According to various estimates, the annual damages caused by piracy on a worldwide scale accrue to an amount between seven and 16 billion Euros, i.e. 0.12 to 0.28 percent of the industry's total turnover (13). Hence, the question arises what is at stake. As comes as no surprise, money is an issue.

In an attempt to save taxes German ship owners refuse to bring back their fleets under the German flag (14), monies the government fails to capture. In

turn, it becomes clear, the government defies proprietors' demands for state protection; this is already interesting. But there is something more disturbing as, en passant, the federal police, as the representative of the state's monopoly of force and the government's law enforcement 'iron fist,' keelhaul this monopoly by allowing ship owners to deploy private security companies. Now rid of any meaningful democratic control, the state extends this monopoly not only to the detriment of the parliament but to its own benefit and to that of profit-oriented security and military companies.

To say the least, it is simply impressive how a handful of *dhow*s and *skiffs*, called by NATO a "localized nuisance" (15), suffice to let go the rule of law overboard.

Notes

(1) Strictly taken, neither the UN-backed 'Operation Atalanta,' nor other operations in national waters against offenders can be called anti-piracy activities.

(2) Antwort der Bundesregierung auf die Kleine Anfrage der Fraktion der SPD (Drs 17/6715), 2011.

(3) The government of Lower Saxony holds for a different approach, calling for naval protection by the German armed forces, see *Berliner BehördenSpiegel*, April 1, 2011.

(4) *Frankfurter Allgemeine Zeitung*, August 19, 2011.

(5) Kendra Briken and Volker Eick, "Recht und billig? Wachschatz zwischen Niedriglohn und Ein-Euro-Jobs." *Kritische Justiz*, 44 (1), 2011.

(6) Alessandro Scheffler, "Piracy: Threat or Nuisance?" *NATO Defense College, Resarch Paper 56*, 2010.

(7) *Hamburger Abendblatt*, August 16, 2011.

(8) Carolin Liss, "Privatizing Anti-Piracy Services in Strategically Important Waterways." *GraSPP Working Paper Series* (University of Tokyo), October 2009.

(9) *New York Times*, August 8, 2011.

(10) *Frankfurter Allgemeine Zeitung*, April 28, 2009; April 20, 2011.

(11) *Frankfurter Allgemeine Zeitung*, April 27, 2011.

(12) George Ad. Psarros et al., "On the success rates of maritime piracy attacks." *Journal of Transport Security*, 4 (4), 2011.

(13) Anna Bowden, *The Economic Cost of Maritime Piracy*, 2010.

(14) *Frankfurter Allgemeine Zeitung*, April 27, 2011.

(15) John Patch, "The Overstated Threat." *Proceedings Magazine*, 134 (12), 2008.