



**COUNCIL OF
THE EUROPEAN UNION**

Brussels, 23 February 2009

5348/09

**COSDP 34
PESC 57
COAFR 14
CONUN 4
SOMALIA 2**

LEGISLATIVE ACTS AND OTHER INSTRUMENTS

Subject : Council Decision concerning the Exchange of Letters between the European Union and 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 the possession of EUNAVFOR, from EUNAVFOR to Kenya and for their treatment after such transfer

COUNCIL DECISION 2008/.../CFSP

of

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 the possession of EUNAVFOR, from EUNAVFOR to
Kenya and for their treatment after such transfer

THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty on European Union, and in particular Article 24 thereof,

Having regard to the recommendation from the Presidency,

Whereas:

- (1) On 2 June 2008, the United Nations Security Council (UNSC) adopted Resolution 1816 (2008) calling upon all States to cooperate in determining jurisdiction, and in the investigation and prosecution of persons responsible for acts of piracy and armed robbery off the coast of Somalia. Those provisions were reaffirmed by UNSC Resolution 1846 (2008), adopted on 2 December 2008.
- (2) On 10 November 2008, the Council adopted Joint Action 2008/851/CFSP on a European Union military operation to contribute to the deterrence, prevention and repression of acts of piracy and armed robbery off the Somali coast¹ (operation "Atalanta").
- (3) Joint Action 2008/851/CFSP provides that persons having committed, or suspected of having committed acts of piracy or armed robbery in Somali territorial waters, who are arrested and detained, with a view to their prosecution, and property used to carry out such acts, may be transferred to a third State which wishes to exercise its jurisdiction over the aforementioned persons and property, provided that the conditions for the transfer have been agreed with that third State in a manner consistent with relevant international law, notably international law on human rights, in order to guarantee in particular that no-one shall be subjected to the death penalty, to torture or to any cruel, inhuman or degrading treatment.

¹ OJ L 301, 12.11.2008, p. 33.

- (4) In accordance with Article 24 of the Treaty, the Presidency, assisted by the Secretary-General/High Representative (SG/HR), negotiated an 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 the possession of EUNAVFOR, from EUNAVFOR to Kenya and for their treatment after such transfer.
- (5) The Exchange of Letters should be approved,

HAS DECIDED AS FOLLOWS:

Article 1

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 EUNAVFOR, and seized property in the possession of EUNAVFOR, from EUNAVFOR to Kenya and for their treatment after such transfer, is hereby approved on behalf of the European Union.

The text of the Exchange of Letters is attached to this Decision.

Article 2

The President of the Council is hereby authorised to designate the person(s) empowered to sign the respective letter in order to bind the European Union.

Article 3

This Decision shall take effect on the day of its adoption.

Article 4

This Decision shall be published in the *Official Journal of the European Union*.

Done at Brussels,

For the Council
The President

EXCHANGE OF LETTERS
BETWEEN THE EUROPEAN UNION
AND THE GOVERNMENT OF KENYA
ON THE CONDITIONS AND DETAILED ARRANGEMENT FOR
THE TRANSFER OF PERSONS SUSPECTED OF
HAVING COMMITTED ACTS OF PIRACY
AND DETAINED BY EUNAVFOR, AND SEIZED PROPERTY
IN THE POSSESSION OF EUNAVFOR,
FROM EUNAVFOR TO KENYA AND
FOR THEIR TREATMENT AFTER SUCH TRANSFER

A. Letter from the European Union

Sir,

With reference to my letter dated 14 November 2008 and your letter dated 5 December 2008, I have the honour to confirm the intention of the European Union to conclude with the Government of Kenya an Exchange of Letters with a view to defining the conditions and modalities for the transfer of persons suspected of having committed acts of piracy on the high seas and detained by the European Union-led Naval Force (EUNAVFOR), and seized property in the possession of EUNAVFOR, from EUNAVFOR to Kenya, and for their treatment after such transfer.

This exchange of letters is concluded in the framework of the EU Council Joint Action 2008/851/CFSP 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 coast of Somalia (operation "Atalanta").

Furthermore, this exchange of letters does not affect the participant' rights and obligations under international agreements and other instruments establishing international courts and tribunals, and relevant domestic laws and is concluded in full respect of:

- United Nations Security Council Resolutions (UNSCR) 1814 (2008), 1838 (2008), 1846 (2008), 1851 (2008) and successor UNSCRs,
- the 1982 United Nations Convention on the Law of the Sea (UNCLOS), in particular Articles 100 to 107,
- International Human Rights Law, including the 1966 International Covenant on Civil and political Rights, and the 1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

Accordingly, I have the honour to propose, as set out in the Annex to this letter, such provisions defining the conditions and modalities for the transfer of persons suspected of having committed acts of piracy and detained by EUNAVFOR, and seized property in the possession of EUNAVFOR, from EUNAVFOR to Kenya, and for their treatment after such transfer.

I would be grateful if you could confirm, on behalf of the Government of Kenya, your acceptance of those provisions.

This Instrument will be applied provisionally from the date on which it is signed and will enter into force when each of the Participants has completed its own internal procedures. This Instrument will continue to have effect until six months after either participant has given the other Signatory written notification of a decision to terminate the instrument. This Instrument may be varied by mutual arrangement between the Signatories. Termination of this instrument will not affect any benefits or obligations arising out of the application of this Instrument before such termination, including the benefits to any transferred persons as long as they are held in custody or are prosecuted by Kenya.

After the termination of the Operation, as defined in the Annex to this letter, all benefits of EUNAVFOR, as defined in that Annex, under this Instrument may be exercised by any person or entity designated by the State exercising the Presidency of the Council of the EU. A designated person or entity may, *inter alia*, be a diplomatic agent or consular official of that State accredited to Kenya. After the termination of the Operation, all notifications that were to be made to EUNAVFOR under this Instrument will be made to the State exercising the Presidency of the Council of the EU.

Please accept, Sir, the assurance of my highest consideration.

For the European Union

PROVISIONS ON THE CONDITIONS OF TRANSFER OF
SUSPECTED PIRATES AND SEIZED PROPERTY FROM
THE EU-LED NAVAL FORCE TO
THE REPUBLIC OF KENYA

1. Definitions

For the purposes of this Exchange of Letters:

- (a) "European Union-led Naval Force (EUNAVFOR)" means EU military headquarters and national contingents contributing to the EU operation "Atalanta", their ships, aircrafts and assets;
- (b) "Operation" means the preparation, establishment, execution and support of the military mission established by EU Council Joint Action 2008/851/CFSP and/or its successors;
- (c) "EU Operation Commander" means the Commander of the Operation;
- (d) "EU Force Commander" means the EU Commander in the area of operations as defined within Article 1(2) of EU Council Joint Action 2008/851/CFSP;

- (e) "national contingents" means units and ships belonging to the Member States of the European Union and to other States participating in the operation;
- (f) "Sending State" means a State providing a national contingent for EUNAVFOR.
- (g) "Piracy" means piracy as defined in Article 101 of UNCLOS;
- (h) "Transferred person" means any person suspected of intending to commit, committing, or having committed, acts of piracy transferred by EUNAVFOR to Kenya under this Exchange of Letters.

2. General principles

- (a) Kenya will accept, upon the request of EUNAVFOR, the transfer of persons detained by EUNAVFOR in connection with piracy and associated seized property by EUNAVFOR and will submit such persons and property to its competent authorities for the purpose of investigation and prosecution.
- (b) EUNAVFOR will, when acting under this Exchange of Letters, transfer persons or property only to competent Kenyan law enforcement authorities.

- (c) The Signatories confirm that they will treat persons transferred under this Exchange of Letters, both prior to and following transfer, humanely and in accordance with international human rights obligations, including the prohibition against torture and cruel, inhumane and degrading treatment or punishment, the prohibition of arbitrary detention and in accordance with the requirement to have a fair trial.

3. Treatment, prosecution and trial of transferred persons

- (a) Any transferred person will be treated humanely and will not be subjected to torture or cruel, inhuman or degrading treatment or punishment, will receive adequate accommodation and nourishment, access to medical treatment and will be able to carry out religious observance.
- (b) Any transferred person will be brought promptly before a judge or other officer authorised by law to exercise judicial power, who will decide without delay on the lawfulness of his detention and will order his release if the detention is not lawful.
- (c) Any transferred person will be entitled to trial within a reasonable time or to release.
- (d) In the determination of any criminal charge against him, any transferred person will be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law.

- (e) Any transferred person charged with a criminal offence will be presumed innocent until proved guilty according to law.
- (f) In the determination of any criminal charge against him, every transferred person will be entitled to the following minimum guarantees, in full equality:
 - (1) to be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him;
 - (2) to have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choice;
 - (3) to be tried without undue delay;
 - (4) to be tried in his presence, and to defend himself in person or through legal assistance of his own choice; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it;
 - (5) to examine, or have examined, all evidence against him, including affidavits of witnesses who conducted the arrest, and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;

- (6) to have the free assistance of an interpreter if he cannot understand or speak the language used in court;
- (7) not to be compelled to testify against himself or to confess guilt.

- (g) Any transferred person convicted of a crime will be permitted to have the right to his conviction and sentence reviewed by or appealed to a higher tribunal in accordance with the law of Kenya.

- (h) Kenya will not transfer any transferred person to any other State for the purposes of investigation or prosecution without prior written consent from EUNAVFOR.

4. Death penalty

No transferred person will be liable to suffer the death sentence. Kenya will, in accordance with the applicable laws, take steps to ensure that any death sentence is commuted to a sentence of imprisonment.

5. Records and notifications

- (a) Any transfer will be the subject of an appropriate document signed by a representative of EUNAVFOR and a representative of the competent Kenyan law enforcement authorities.

- (b) EUNAVFOR will provide detention records to Kenya with regard to any transferred person. These records will include, so far as possible, the physical condition of the transferred person while in detention, the time of transfer to Kenyan authorities, the reason for his detention, the time and place of the commencement of his detention, and any decisions taken with regard to his detention.
- (c) Kenya will be responsible for keeping an accurate account of all transferred persons, including, but not limited to, keeping records of any seized property, the persons physical condition, the location of their places of detention, any charges against him and any significant decisions taken in the course of his prosecution and trial.
- (d) These records will be available to representatives of the EU and EUNAVFOR upon request in writing to the Kenyan Ministry of Foreign Affairs.
- (e) In addition, Kenya will notify EUNAVFOR of the place of detention of any person transferred under this Exchange of Letters, any deterioration of his physical condition and of any allegations of alleged improper treatment. Representatives of the EU and EUNAVFOR will have access to any persons transferred under this Exchange of Letters as long as such persons are in custody and will be entitled to question them.
- (f) National and international humanitarian agencies will, at their request, be allowed to visit persons transferred under this Exchange of Letters.

- (g) For the purposes of ensuring that EUNAVFOR is able to provide timely assistance to Kenya with attendance of witnesses from EUNAVFOR and the provision of relevant evidence, Kenya will notify EUNAVFOR of its intention to initiate criminal trial proceedings against any transferred person and the timetable for provision of evidence, and the hearing of evidence.

6. EUNAVFOR Assistance

- (a) EUNAVFOR, within its means and capabilities, will provide all assistance to Kenya with a view to the investigation and prosecution of transferred persons.
- (b) In particular, EUNAVFOR will:
 - (1) hand over detention records drawn up pursuant to Paragraph 5(b) of this Exchange of Letters;
 - (2) process any evidence in accordance with the requirements of the Kenyan competent authorities as agreed in the implementing arrangements described in Paragraph 9;
 - (3) endeavour to produce statements of witness or affidavits by EUNAVFOR personnel involved in any incident in relation to which persons have been transferred under this Exchange of Letters;
 - (4) hand over all relevant seized property in the possession of EUNAVFOR.

7. Relationship to other rights of transferred persons.

Nothing in this Exchange of Letters is intended to derogate, or may be construed as derogating, from any rights that a transferred person may have under applicable domestic or international law.

8. Liaison and disputes

- (a) All issues arising in connection with the application of these provisions will be examined jointly by Kenyan and EU competent authorities.
- (b) Failing any prior settlement, disputes concerning the interpretation or application of these provisions will be settled exclusively by diplomatic means between Kenyan and EU representatives.

9. Implementing arrangements

- (a) For the purposes of the application of these provisions, operational, administrative and technical matters may be the subject of implementing arrangements to be approved between competent Kenyan authorities on the one hand and the competent EU authorities, as well as the competent authorities of the Sending States on the other hand.

- (b) Implementing arrangements may cover, *inter alia*:
- (1) the identification of competent law enforcement authorities of Kenya to whom EUNAVFOR may transfer persons;
 - (2) the detention facilities where transferred persons will be held;
 - (3) the handling of documents, including those related to the gathering of evidence, which will be handed over to the competent law enforcement authorities of Kenya upon transfer of a person;
 - (4) points of contact for notifications;
 - (5) forms to be used for transfers;
 - (6) provision of technical support, expertise, training and other assistance upon request of Kenya in order to achieve the objectives of this Exchange of Letters.

B. Letter from the Republic of Kenya

Sir,

I have the honour to acknowledge receipt of your letter dated ... 2009 and its Annex regarding the conditions and modalities for the transfer of persons suspected of having committed acts of piracy on the high seas and detained by the European Union-led naval Force (EUNAVFOR), and seized property in the possession of EUNAVFOR, from EUNAVFOR to Kenya, and for their treatment after such transfer, which reads as follows:

"With reference to my letter dated 14 November 2008 and your letter dated 5 December 2008, I have the honour to confirm the intention of the European Union to conclude with the Government of Kenya an Exchange of Letters with a view to defining the conditions and modalities for the transfer of persons suspected of having committed acts of piracy on the high seas and detained by the European Union-led Naval Force (EUNAVFOR), and seized property in the possession of EUNAVFOR, from EUNAVFOR to Kenya, and for their treatment after such transfer.

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Furthermore, this exchange of letters does not affect the participant' rights and obligations under international agreements and other instruments establishing international courts and tribunals, and relevant domestic laws and is concluded in full respect of:

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- International Human Rights Law, including the 1966 International Covenant on Civil and political Rights, and the 1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

Accordingly, I have the honour to propose, as set out in the Annex to this letter, such provisions defining the conditions and modalities for the transfer of persons suspected of having committed acts of piracy and detained by EUNAVFOR, and seized property in the possession of EUNAVFOR, from EUNAVFOR to Kenya, and for their treatment after such transfer.

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After the termination of the Operation, as defined in the Annex to this letter, all benefits of EUNAVFOR, as defined in that Annex, under this Instrument may be exercised by any person or entity designated by the State exercising the Presidency of the Council of the EU. A designated person or entity may, *inter alia*, be a diplomatic agent or consular official of that State accredited to Kenya. After the termination of the Operation, all notifications that were to be made to EUNAVFOR under this Instrument will be made to the State exercising the Presidency of the Council of the EU.

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2. General principles

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- (c) The Signatories confirm that they will treat persons transferred under this Exchange of Letters, both prior to and following transfer, humanely and in accordance with international human rights obligations, including the prohibition against torture and cruel, inhumane and degrading treatment or punishment, the prohibition of arbitrary detention and in accordance with the requirement to have a fair trial.

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 - (3) to be tried without undue delay;
 - (4) to be tried in his presence, and to defend himself in person or through legal assistance of his own choice; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it;
 - (5) to examine, or have examined, all evidence against him, including affidavits of witnesses who conducted the arrest, and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;

- (6) to have the free assistance of an interpreter if he cannot understand or speak the language used in court;
- (7) not to be compelled to testify against himself or to confess guilt.
- (g) Any transferred person convicted of a crime will be permitted to have the right to his conviction and sentence reviewed by or appealed to a higher tribunal in accordance with the law of Kenya.
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- (d) These records will be available to representatives of the EU and EUNAVFOR upon request in writing to the Kenyan Ministry of Foreign Affairs.
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 - (4) points of contact for notifications;
 - (5) forms to be used for transfers;
 - (6) provision of technical support, expertise, training and other assistance upon request of Kenya in order to achieve the objectives of this Exchange of Letters.
- "

I have the honour to confirm, on behalf of the Government of the Republic of Kenya, that the content of your letter and of its Annex are acceptable to the Government of the Republic of Kenya. As set out in your letter, this instrument will enter into force provisionally from the date of signature of this letter and will enter into force when each of the Signatories has completed its own internal procedures.

Please accept, Sir, the assurance of my highest consideration.

For the Government
of the Republic of Kenya