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Leendert H. Erkelens

CLEER WORKING PAPERS **2014/4**

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CONTENTS

LIST OF TERMS AND ABBREVIATIONS

AFSJ	Area of Freedom, Security and Justice
AG	Advocate General
Art.	Article
BiH	Bosnia and Herzegovina
CFSP	Common Foreign and Security Policy
CSDP	Common Security and Defence Policy
EC	European Commission
ECHR	European Convention on Human Rights
ECJ	European Court of Justice
EDF	European Development Fund
EEAS	European External Action Service
EJIL	European Journal of International Law
EU	European Union
EUISS	European Institute for Security Studies
EULEX	European Union Rule of Law Mission in Kosovo
EUNAVFOR	European Union Naval Force
EUPM	European Union Police Mission
ESDP	European Security and Defence Policy
ESS	European Union Security Strategy
FAC	Foreign Affairs Council (configuration under the Lisbon Treaty)
GAERC	General Affairs and External relations Council (configuration under the Nice Treaty)
HR	High Representative for Common Foreign and Security Policy
IMO	International Maritime Organization
INTERPOL	International Criminal Police Organisation
JHA	Justice and Home Affairs
NCB	Head of the National Central Bureau of INTERPOL in the United Kingdom
PSC	Political and Security Committee of the High Representative for Common Foreign and Security Policy
S-G	The Secretary-General of the United Nations
SHADE	Shared Awareness and Deconfliction Mechanism
TEC	The Treaty on the European Community
TEU (Lisbon)	Treaty on the European Union 2009
TEU (Nice)	Treaty of Nice 2003
TFG	Transnational Federal Government of Somalia
UN	United Nations
UNCLOS	United Nations Convention on the Law of the Sea
UNODC	United Nations Office on Drugs and Crime

UNDOC CPP	United Nations Office on Drugs and Crime Counter Piracy Programme
UNSC	United Nations Security Council
UNSCR	United Nations Security Council Resolution
WFP	World Food Programme

ABSTRACT

In December 2008 the EU launched Atalanta, its first-ever naval operation. The militarily related targets of this operation aimed at combatting piracy off the coast of Somalia are rather clearly formulated. More ambiguity exists with regard to the second part of the operation pertaining to the judicial follow-up of its military activities in terms of capturing and detaining suspects of piracy. This paper critically assesses the EU's anti-piracy operation Atalanta in light of the prosecution of pirates. Though initiated in support of a single legal framework established by the UN Security Council, the Mission seems to be at a crossroads between two different policy areas of the EU. The paper discusses this non-military part of operation Atalanta in light of the EU's policies in the areas of Common Foreign and Security Policy (CFSP), as well as Area of Freedom, Security and Justice (AFSJ). The question as to what extent the operation serves Justice and Home Affairs related law enforcement goals will be investigated. The law enforcement tasks of operation Atalanta appear to be related to the internal dimension of the EU's policies in the Area of Freedom, Security and Justice. Reasons for this conclusion are given and some consequences resulting therefrom in terms of establishing an appropriate legal basis and Union-wide jurisdictional rules regarding judicial assignments and a more uncompromising prosecution policy.

1. INTRODUCTION

In November 2008 the European Union (EU) decided to take military action against acts of piracy and armed robbery committed by Somali pirates.[1] One month later, on 8 December 2008 the EU effectively launched its first naval operation under the framework of the European Security and Defence Policy (ESDP) against acts of piracy off the Somali coast[2], this operation was called 'Atalanta'.[3] EU Naval Force (EUNAVFOR) was dispatched to Somali waters, directed by EU operational headquarters at Northwood (UK) and guided by an operation plan and rules of engagement, both of which were classified documents.[4] Although both documents were kept secret from the general public, according to well-informed sources Atalanta's mandate was 'robust' and included the sinking of ships.[5]

The EU certainly had its own reasons and motives to launch this military operation. Over time, the Council expressed serious concerns over the security situation in Somalia and its negative humanitarian and human rights consequences.[6] Among those concerns also figured the upsurge of piracy attacks off the Somali coast, which were affecting humanitarian efforts, international maritime traffic, and the UN arms embargo imposed on Somalia.[7] However, it was not on the EU's own initiative that an operation aimed at cracking down Somali piracy was launched. The EU created and evolved its policy consis-

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[1] 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 Somali coast*, *OJ* [2008] L 301/33, 12.11.2008. Abbreviated: Atalanta Joint Action.

[2] Council Decision 2008/918/CFSP 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 (Atalanta)*, *OJ* [2008] L 330/19, 9.12.2008. Abbreviated: launch Decision.

[3] Atalanta (Ἀταλάντη = balanced), a Greek mythological princess and ferocious huntress which also should have sailed with the Argonauts in quest for the Golden Fleece. Over time a fair number of (UK, US) warships have been christened 'Atalanta'. This time, an entire military operation was named after the sailing huntress.

[4] The operation plan and rules of engagement were approved under the launch Decision. See *supra* note 2.

[5] See: "'Robust Mandate': EU Authorized to Sink Pirate Ships", *Spiegel Online International*, 15 December 2008, available at: <http://www.spiegel.de/international/world/robust-mandate-eu-authorized-to-sink-pirate-ships-a-596458.html>. Somewhat more officially, the 'robust' profile of the mandate was confirmed by the German Bundeswehr on a webpage providing answers to questions on Atalanta:'Die Einsatzregeln (Rules of Engagement) sehen zur Umsetzung der Aufgaben und Befugnisse der Gemeinsamen Aktion allerdings auch die Anwendung verhältnismäßiger Gewalt vor. Insofern ist Atalanta ein robustes Mandat.' Available at: <http://www.bundeswehr.de/portal/a/bwde/!ut/p/c4/DcqxDYAwDAXRWVjA7unYAmjQD5jIInEQsYjE9ETXvOJ45Z7h1QjXYkg887LrGBqFdgiJWoX4J5S11n6IUS0ZSUFwJJiDzgdRbOtu5XExvq9p-AEFbiVG/>.

[6] Council of the European Union, 'Press release of the 2870th Council meeting of General Affairs and External Relations of 26-27 May 2008', (May 2008), at 11, available at < http://europa.eu/rapid/press-release_PRES-08-141_en.htm?locale=en>.

[7] Ibid., at 13.

tently within the framework of the United Nations (UN) policy towards Somalia as defined by UN Security Council (UNSC) resolutions.

Concerns on the side of the UN and its bodies with regard to acts of piracy off the Somali coast formed an integral part of an overall approach towards the 'situation in Somalia', consisting of an endemic political/military and humanitarian crisis.[8] In order to help to improve the Somali 'situation', the UNSC imposed an arms embargo[9] and deployed several security and humanitarian missions.[10] Incidentally, the UNSC also referred to attacks on ships impeding the delivery of humanitarian supplies to Somalia.[11] As of the beginning of this century, the UNSC started to report more systematically on piracy incidents.[12] Since 2005 the International Maritime Organization (IMO) has been communicating its concerns to the Secretary-General (S-G) of the UN about the increasing number of piracy attacks off the Somali coast.[13] The UNSC took note of the IMO concerns in 2007 and encouraged Member States whose naval vessels were operating in this specific maritime zone to be vigilant to any piracy incidents and to take appropriate action to protect merchant shipping.[14] This resolution was the first UNSC action regarding the specific issue of Somali piracy. Many more were due to follow, calling on States to take specifically defined actions under Chapter VII of the UN Charter. Nevertheless, in every respect the Somali piracy phenomenon kept on deteriorating for a couple of years. The number of (attempted) attacks kept increasing, until 2012. Since then the number of actual and attempted attacks has dropped sharply.[15] In between, the pirates

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[8] Somalia's history has been marked by instability caused by tribal rivalries, the conducting of war externally with Ogaden in the seventies and changing sides from the (former) Soviet Union to the United States. A civil war which started in 1991delivered the final blow to the republic in its original form and left the country without a legitimate central government for years. In 1991 the far most northern part declared itself independent as Somaliland. However, up until today, it has not been recognized by foreign governments. The secession of Puntland followed in 1998, as a State of the Somali Federation. However, de facto it pursues its own politics and policies under the leadership of a President controlled by the national parliament. The political and territorial collapse was accompanied by a disruption of the food distribution, an on-going refugee problem and chronic political instability within the remaining part of Somalia. The situation in Somalia got even worse because large parts of its territory were seized control of by radical Islamic movements like Al-Shabaab, closely connected with Al-Qaeda.

[9] The arms embargo was decided upon by the UNSC in its Resolution 733 (1992), 5th operative paragraph (and confirmed and extended in many more the years thereafter).

[10] UNOSOM-I, the US led UNITAF and UNOSOM-II.

[11] UNSC Resolution 794 (1992), 9th preambular paragraph.

[12] UNSC, 'Report of the Secretary-General on the situation in Somalia' (19 December 2000), para., 34, available at http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N00/785/22/PDF/N0078522.pdf?OpenElement>.

[13] Respectively IMO Resolutions A. 979(24) of 23/11/2005, *Piracy and armed robbery against ships in waters off the Coast of Somalia* and A.1002(25*)* of 29/11/2007 *Piracy and armed robbery against ships operating in waters off the coast of Somalia*.

[14] UNSC Resolution 1772 (20 August 2007), para., 18. This call to be vigilant echoed a statement of the President of the UNSC issued in March 2006 responding to the IMO Resolution of November 2005, *supra* note 13.

[15] Numbers of Actual and Attempted attacks in Somalia, Red Sea and Gulf of Aden locations: In 2006: 22; in 2007: 51; in 2008: 111; in 2009: 218; in 2010: 219; in 2011:237 and in 2012: 75.: See: *ICC – IMB Piracy and Armed Robbery Against Ships Report for the period 1 January 2012 – 31 December 2012*, p. 20 and table 1 at p. 5 and 6 (and former annual reports), available

expanded their area of operation far beyond the limits of the Somali coast.[16] Additionally, they progressed from seizing ships to capturing seafarers while demanding high ransoms in return for their release and changed tactics by misusing seized merchant vessels and fishing boats as inconspicuous bases for their attacks.[17]

2. RESEARCH QUESTIONS

The Atalanta operation in fact consists of two parts. One comprises different types of primarily military actions related to and directed against acts of piracy and armed robbery at sea. The second part relates to overseeing police-like actions and judicial interference directed against the pirates themselves. As it will be seen, the military and criminal justice parts were both formulated within one and the same ESDP framework. (With the entry into force of the Lisbon Treaty, the ESDP was renamed: Common Security and Defence Policy (CSDP)).

Providing security is a constituent element of military action and police and judicial action alike. However, military goals as for example, preventing pirates attacking ships, and a judicial goal like providing justice, are fundamentally different while being instrumental to different goals and objectives. Moreover, methods and measures for conducting both types of action and the norms applicable to military and judicial methods and measures are fundamentally different. Therefore, the general question may be posed as to whether the EU took account of these differences and in particular the legal consequences thereof. To that end, instruments adopted by the Council will be scrutinised. In addition, we will look at considerations of a legal or political nature provided by the EU to tackle piracy off the Somali coast by this double pronged instrument.

Particular attention will be given to actions and decisions taken by the UN Security Council regarding Somali security and piracy problems. The mission of the Atalanta operation and the implementing measures related thereto are derived from and explicitly defined to be in support of the UNSC resolutions (UNSCRs) on Somalia. The concerned UNSC resolutions include similar objectives and push for taking military and judicial action alike. How were these objectives and actions implemented by the EU? And what are the responsibilities and positions of Member States with regard to pursuing these objectives and performing the different Atalanta actions?

Finally, the question will be explored as to whether criminal justice, which is a part of the Atalanta mission, finds a correct legal basis within the ESDP framework. Unmistakably, the UNSC acts with regard to Somali piracy within

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at: <http://www.icc-ccs.org/piracy-reporting-centre/request-piracy-report>. In 2013 the number of attacks dropped even further to 15 incidents. See the ICC website page, available at <http://www.icc-ccs.org/news/904-somali-pirate-clampdown-caused-drop-in-global-piracy-imb-reveals>.

[16] In December 2011 Somali pirates had geographically extended their operational region from the southern part of the Red Sea in the West to 76° East longitude in the Indian Ocean and beyond the East, which is close to the shores of India; see *supra* note 15, ICC – IMB annual report 2011, at. 20.

[17] Ibid., at. 20.

one and the same legal framework of Chapter VII of the UN Charter. All its actions are subsumed under this single legal heading. Effectively, the EU applies an analogous approach, acting also within one single framework, in this case the legal framework is provided for under its ESDP. The EU might have also considered a double pronged instrument to be more effective than different instruments of a single scope, each dealing with specific challenges at hand. A single framework might also help the EU to ensure legal and policy coherence between different foreign policy objectives. However, the question is as to whether the two parts of this EU Decision can rightly be considered to form part of its foreign policy domain and, in particular, its military and security policy area. The EU decided to pursue that strategy. Some consequences of that decision will be investigated and evaluated as well.

3. RESEARCH METHODS

The analytical part of this study looks into the main elements of the relevant legal instruments as taken by the EU with respect to operation Atalanta. Sources like policy documents produced by the EU, by national governments and by relevant international organisations will provide background information and help to explain the decisions as taken. Particular attention will be paid to the relationship between EU decisions and the UNSCRs providing a mandate to State Parties to use all necessary means to repress acts of piracy and armed robbery off the coast of Somalia. Over the years the UN persistently dealt with Somali related problems and the EU acted on these matters within the framework of UNSC policy towards Somalia in general and Somali piracy in particular.

Like all CFSP actions, operation Atalanta is based upon and embedded in the EU Treaties. The EU's decision to deploy an EU Naval Force (EUNAVFOR) actually emerged in a transitional period. One might say 'between Treaties.' The operation started somewhat less than a year before the Lisbon Treaty came into force; already having been signed on 13 December 2007. In the light of the successfully completed negotiations one may assume that the principles and objectives of the Lisbon Treaty would have been recognised and taken into account at the time of adopting the Atalanta decisions (November and December 2008). Besides, most of the follow-up decisions amending the initial decision on the EUNAVFOR mission were taken under the legal regime of the Lisbon Treaty.[18] However, the legal basis was not converted into the Lisbon provisions concerned and the original Joint Action was not repealed. It appears that to a certain extent the military dimension of Atalanta anticipated the Lisbon Treaty, while going beyond the traditional Petersburg-type tasks as enshrined in Article 17(2) of the Nice Treaty. However, formally, the objectives of this mission are still governed by the old TEU.

[18] See *infra* respectively, notes 28, 29 and 30: Atalanta amendments of December 2009, December 2010 and March 2012.

Therefore, it is reasonable to argue that the former Treaty might be taken as a starting point for assessing the objectives of this mission. The structure and main objectives of the Atalanta decisions will be scrutinised and assessed in the light of general principles and objectives applicable to CFSP actions provided by the former TEU[19]. The former TEU provides a list of objectives to be pursued by its actions in the field of international cooperation. On the one hand, EU actions should serve EU-oriented objectives like the safeguarding of its common values, its fundamental interests and its security.[20] At the same time EU actions on the international scene should contribute to goals in the wider world like developing and consolidating democracy and the rule of law, as well as preserving peace and strengthening international security in accordance with the principles of the UN Charter.[21] The EU Security Strategy (ESS) provided the – legally prescribed – overall policy framework for the first 23 EU CSDP missions.[22] Consequently, four more missions were launched, all based upon the Lisbon Treaty. [23] These Treaty based objectives, together with the ESS, will provide guidance for the scrutiny of the concerned EU Decisions.

A distinctive element of the Atalanta decision relates to its provision on the transfer of arrested suspects of piracy to third countries. Based upon this provision many transfer agreements have been concluded. [24] This objective could be seen as aligning with the TEU based CFSP objective to promote international cooperation.[25] But it seems also to anticipate the Lisbon Treaty in applying the obligation to promote multilateral solutions to problems shared with third countries.[26] One of these transfer agreements has become the object of a legal dispute between the European Parliament and the Council and has been dealt

[19] Art. 11(1) Treaty of Nice 2003 (hereafter, TEU (Nice)) '*The Union shall define and implement a common foreign and security policy covering all areas of foreign and security policy, the objectives of which shall be:*

– *to safeguard the common values, fundamental interests, independence and integrity of the Union in conformity with the principles of the United Nations Charter,*
– *to strengthen the security of the Union in all ways,*
– *to preserve peace and strengthen international security, in accordance with the principles of the United Nations Charter, as well as the principles of the Helsinki Final Act and the objectives of the Paris Charter, including those on external borders,*
– *to promote international cooperation,*
– *to develop and consolidate democracy and the rule of law, and respect for human rights and fundamental freedoms.'*

[20] Art. 11(1) TEU (Nice). See *supra* note 19.

[21] Art. 11(1), fifth and third indent of TEU (Nice). See *supra* note 19.

[22] European Security Strategy, *A Secure Europe in a Better World*, adopted by the European Council at its 12 and 13 December 2003 meeting, as laid down in Article 13(2) TEU (Nice) assigning the European Council to decide on common CFSP strategies in areas where the Member States have important interests in common.

[23] The website of the EEAS provides a complete overview, on <http://consilium.europa.eu/eeas/security-defence/eu-operations?lang=en>.

[24] See *infra* chapter 5.2

[25] Art. 11(1) fourth indent of TEU (Nice) . See *supra* note 19.

[26] Art. 21(1) Treaty on the European Union 2009 (TEU Lisbon), second sentence: '*The Union shall seek to develop relations and build partnerships with third countries, and international, regional or global organisations which share the principles referred to in the first subparagraph. It shall promote multilateral solutions to common problems, in particular in the framework of the United Nations.'*

with by the Court of Justice.[27] Some of the arguments put forward by Advocate General Bot in this case are of relevance to the issues at stake in this paper and will be taken into account.

4. OUTLINE OF THE ATALANTA LEGAL INSTRUMENTS

Over time several Joint Actions and Decisions were taken with regard to the military operation Atalanta. The first Atalanta Joint Action (November 2008) relates to the Union's decision to conduct a military operation against piracy off the coast of Somalia in support of the UN Security Council resolutions. This was followed by a Joint Action to get the operation started.[28] With reference to newly adopted resolutions of the Security Council this Joint Action was subsequently amended in December 2009,[29] December 2010,[30] and once more in March 2012.[31] In the latter amendment, the Council extended the mandate of the Operation until 12 December 2014.[32]

These Joint-Actions and Decisions display a legal structure rather similar to prior decisions concerning ESDP operations, the military, as well as the non-military (i.e. civilian) ones. It consists of a legal framework supplemented with references to Council Conclusions and UNSCRs adopted with regard to the international challenge the EU is responding to. The same three TEU provisions are consistently referred to: one providing the direct legal basis for undertaking action concerning a specific international situation by means of a Joint Action/ Decision,[33] a second one on the competences of the Political and Security Committee (PSC) alternatively (under the Lisbon Treaty) of the High Repre-

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[27] ECJ, Case C-658/11 *European Parliament v. Council of the European Union* [2014] ECR I-2025.

[28] See *supra* notes 1 and 2.

[29] Council Decision 2009/907/CFSP of 8 December 2009 *amending 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 coast*, *OJ* L 322/27, 9.12.2009. Abbreviated: Atalanta amendment December 2009

[30] Council Decision 2010/766/CFSP of 7 December 2010 *amending 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 coast*, *OJ* [2010] L 327/49, 11.12.2010. Abbreviated: Atalanta amendment December 2010

[31] Council Decision 2012/174/CFSP of 23 March 2012 *amending 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 coast*, *OJ* [2012] L 89/69, 27.3.2012. Abbreviated: Atalanta amendment Decision 2012.

[32] Moreover Art. 1 of the joint Action 2008/851/CFSP was amended: 'The European Union shall conduct a military operation in support of resolutions 1814 (2008), 1816 (2008), 1838 (2008), 1846 (2008) and 1851 (2008).' See also the consolidated version of the Council Joint Action, available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CONSLEG:2008E0851:20120323:EN:PDF>.

[33] Art. 14 TEU (Nice) respectively Art. 28 TEU (Lisbon) obliges the Union to take decisions on operational actions where the international situation so requires. It's within the Councils' competence to determine the objectives and scope of such an action, as well its duration and the implementing conditions.

sentative (HR) for CFSP with regard to the mission[34], and finally, a provision with regard to the settlement of operating expenditures.[35] In short, this legal framework is connected with competences and finances and of a non-substantive nature.

References in the preambular paragraphs to UNSCRs and to those decisions of the General Affairs and External relations Council (GAERC, Nice configuration) or the Foreign Affairs Council (FAC, configuration under the Lisbon Treaty) are of a substantive nature and clarify the challenges at stake by providing information on existing concerns and possible actions. Through these Security Council Resolutions, the ESPD missions are tightly tied into the general framework of international law guiding the legality of deploying military troops in foreign countries.[36] In principle, the EU avails itself systematically of this UN legal framework in its ESDP missions, thereby implementing the TEU provision to preserve peace and to strengthen international security in accordance with the UN Charter.[37] From a strategic point of view, this principle was secured through close cooperation between the two organisations laid down in a Joint Declaration of 2003 on UN-EU Co-operation in Crisis Management.[38] Later on that year, the ESS repeated elements of this Joint Declaration and corroborated it: '*The United Nations Security Council has the primary responsibility for the maintenance of international peace and security. Strengthening the United Nations, equipping it to fulfil its responsibilities and to act effectively, is a European priority.*'[39]

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[34] Art. 25, TEU (Nice) respectively Art. 43(2) TEU (Lisbon). In conformity with the Lisbon Treaty the HR was provided, together with the Council, responsibility over the Political and Security Committee and later appointed as the primary contact point with the UN and the authorities of all relevant actors. See: Council Decision 2010/437/CFSP of 30 July 2010, amending 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 coast, *OJ* [2010] L 210/33, 11. 8. 2010. The latest Council Decision (2012/174/CFSP) also refers to Art. 42 (4) TEU 'Decisions relating to the common security and defence policy, including those initiating a mission as referred to in this Article, shall be adopted by the Council acting unanimously on a proposal from the High Representative of the Union for Foreign Affairs and Security Policy or an initiative from a Member State. The High Representative may propose the use of both national resources and Union instruments, together with the Commission where appropriate.'

[35] Art. 28 (3) TEU (Nice). The financial arrangement of CFSP missions under the Lisbon Treaty is provided for in the instrument itself.

[36] A. Björkdahl and M. Strömvik, 'EU Crisis management Operations; ESDP Bodies and Decision-making Procedures', Danish Institute for International Studies (DIIS) Report (August 2008); in particular the third paragraph of chapter 4: 'Legal framework', available at <http://subweb.diis.dk/graphics/Publications/Reports%202008/R08-8_EU_Crisis_Management_Operations.pdf>.

[37] TEU (Nice and Lisbon), *supra* resp. notes 19 and 25.

[38] Joint Declaration of 24/09/2003 on UN-EU Co-operation in Crisis Management, first clause: '*The United Nations and the European Union are united by the premise that the primary responsibility for the maintenance of international peace and security rests with the United Nations Security Council, in accordance with the United Nations Charter. Within this framework, the European Union reasserts its commitment to contribute to the objectives of the United Nations in crisis management*.', available at <http://www.eu-un.europa.eu/articles/en/article_2768_en.htm>.

[39] See *supra* note 22 European Security Strategy (ESS), at. 9.

Three different Security Council Resolutions on the situation in Somalia initially provided operation Atalanta with this framework.[40] Elements thereof are summarised in the first three preambles of the Joint Action which establishes operation Atalanta[41] and in the Decision to launch the operation.[42] The Atalanta Amendments of 2009, 2010 and 2012 were connected to newly adopted UNSC resolutions.[43] With a view to a better understanding of the relationship between these Resolutions and the EU decisions concerning operation Atalanta, a brief sketch of UN policy towards Somalia will be provided in the subsequent chapter.

5. THE MILITARY AND JUDICIAL RELATED ELEMENTS OF THE RESOLUTIONS OF THE SECURITY COUNCIL AS IMPLEMENTED BY OPERATION ATALANTA

As mentioned in the previous chapter, before 2008 the UN policy mainly focused on the internal dimension of the situation in Somalia. Only when the activity on the high seas and off the Somali coast reached unprecedented levels, was this policy supplemented by specific anti-piracy measures. Several resolutions were enacted by the UNSC in order to provide a legal framework to combat this phenomenon.[44] The initial two Atalanta decisions were based on three of these resolutions, 1814 (2008), 1816 (2008) and 1838 (2008).[45] Currently, the EU conducts this military operation in support of these three and three additional resolutions.[46] Although the support was unqualifiedly given, only the more military-related elements of the Resolutions' operative paragraphs – 'all necessary means' and the providing of protection to WFP vessels – were summarised in the preambular paragraphs of the first Atalanta instruments.[47] The following section will briefly touch upon these military elements and aspects of their international law contexts, such as the UN Convention on the Law of the Sea (UNCLOS) and the use of force.[48] The jurisdictional elements of the UNSC resolutions will be set out separately in section 5.2.

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[40] UNSCR 1814 (15 May 2008), UNSCR 1816 (2 June 2008) and UNSCR 1838 (7 October 2008).

[41] Atalanta Joint Action, See *supra* note 1.

[42] Council 'launch' Decision,See *supra* note 2.

[43] Successively UNCSR 1897 (2009) in Atalanta amendment December 2009, UNCSR 1950 (2010) in Atalanta Amendment December 2010 and UNSCR 2020 in Atalanta amendment March 2012.

[44] The UNSC adopted over ten resolutions on this topic between the period of 2008 and 2013: 1816 (2008), 1838 (2008), 1846 (2008), 1851 (2008), 1897 (2009), 1918 (2010), 1950 (2010), 1976 (2011), 2015 (2011), 2020 (2011), 2077 (2012), 2072 (2012).

[45] See *supra* note 44.

[46] Art. 1 Atalanta Joint Action; The EU shall conduct a military operation in support of S/RES1814 (2008), S/RES/1816 (2008), S/RES/1838 (2008), S/RES/1846 (2008) and S/RES/1851 (2008)[..]; Council Decision 2012/174/CFSP also refers to S/RES/2020.

[47] See *supra* resp. notes 1 and 2.

[48] As these and other CFSP instruments are referring systematically to and thus legally rely on 'conditions set by international law'.

5.1 The military and protection related elements of the resolutions of the UNSC as implemented by Operation Atalanta

On 2 June 2008 the UNSC passed resolution 1816 (2008) based on an initiative of France and the USA, which presented (co-sponsored by the UK and Panama) earlier in April a draft text for this resolution.[49] Although Resolutions 1814 and 1816 authorised actions under Chapter VII of the UN Charter, they differed significantly with respect to the range of application and the conferred authorisations. Resolution 1814 touched almost only on political, military and humanitarian problems inside Somalia, and supported likewise authorised efforts to tackle those problems by (amongst others) providing protection to the delivery of humanitarian aid through convoys of the WFP. From that point of view, states and regional organisations were called upon to take action to protect shipping involved with the transportation of this aid (operative paragraph 11).

Resolution 1816 on the other hand, concentrated on two Somali piracy related issues. In the first instance, the threat that acts of piracy and armed robbery pose to the delivery of humanitarian aid to Somalia. Secondly, the incidents themselves of attacks upon and hijacking of vessels in the territorial waters and high seas off the coast of Somalia. The Security Council (operative paragraph 1) condemned and deplored all these acts of piracy against vessels in territorial waters and on the high seas off the coast of Somalia and decided (operative paragraph 7) that for a period of six months, states cooperating with the Transitional Federal Government of Somalia (TFG)[50] in the fight against piracy and armed robbery at sea off the coast of Somalia):

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 piracy under relevant international law; and*
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'.*

Under the conditions of advanced notification provided by Somalia to the S-G, states cooperating with Somalia are granted authority to repress piracy in the territorial waters of Somalia using all necessary means in a manner consistent with international law.[51] Shortly after, in October 2008, the Security Council acted again, expressing in Resolution 1838 (2008) its grave concern regarding

[49] BBC, 'UN urged to tackle Somali pirates', 28 April 2008, available at: <http://news.bbc.co.uk/2/hi/europe/7372390.stm>.

[50] The TFG of Somalia was created in 2004 at a conference held in Nairobi, Kenya and became the internationally recognized interim national authority. The TFG was succeeded in 2012 by the Federal Government of Somalia, the internationally recognized government of the Federal Republic of Somalia.

[51] It should be noted that 'all necessary means' refers to enforcement measures under Chapter VII of the UN Charter. It may be questioned whether such an authorisation by the Security Council under Chapter VII is legally needed if the coastal state is already providing it when requested for. See for a critical appraisal: T. Treves, 'Piracy, Law of the Sea, and Use of Force:

the (recent) proliferation of acts of piracy and armed robbery at sea. The Council (operative paragraph 3) recalled that:

> *'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;*'

In addition, Resolution 1846 called on: '*States and regional organisations that have the capacity to do so, to take part actively in the fight against piracy and armed robbery at sea off the coast of Somalia, in particular, consistent with this resolution and relevant international law, by deploying naval vessels and military aircrafts, and through seizure and disposition of boats, vessels, arms and other related equipment used in the commission of piracy and armed robbery of the coast of Somalia, or for which there is reasonable ground for suspecting such use'.*[52]

This was complemented by Resolution 1851, which reiterated the call to deploy naval vessels and authorised states to undertake all necessary measures that are appropriate in Somalia, such as the use of air and land strikes against pirates during hot pursuit. This resolution mainly focused on judicial aspects, which will be discussed in the next paragraph.[53]

Finally, it is relevant also to mention UNCS Resolution 2020 of 2011, which was referred to in the Atalanta amendment Decision of 2012.[54] With respect to the military aspects, this UNSC resolution renewed the authorisations set out by paragraph 10 of Resolution 1846 and paragraph 6 of Resolution 1851.

Taken together, these Resolutions granted states the authority (under the conditions as set out before) to use all necessary means to repress piracy on the high seas off the coast of Somalia, in its territorial waters and on its coastal territory. Although the initial authorisation was only provided for a period of six months (paragraph 7, Resolution 1816), the subsequent resolutions renewed this authorisation.[55] Despite the fact that this measure was meant to be temporary, the authorisation has been renewed ever since.[56]

To a certain extent, this authorisation broadens the scope of the existing narrow international regulatory framework. Rules on maritime jurisdiction are based on the principle that coastal respectively flag states assert exclusive jurisdiction in their coastal waters and on their flag ships. The most obvious exception to this exclusive jurisdiction on flag ships is constituted by anti-piracy rules as primarily governed by the UN Convention on the Law of the Sea

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Developments off the Coast of Somalia', 20 2 *European Journal of International Law* (EJIL) 2009, 399-414.

[52] S/RES/1846 (2008), operative para., 9.

[53] S/RES/1851 (2008), operative para., 6.

[54] See *supra* note 31.

[55] S/RES/1846 (2008), operative paras. 9 and 10.

[56] S/RES/2125 (2013) of 18 November 2013. While noting the primary role of the Somali authorities to fight against piracy, the authorization to continue the international action against piracy off the Somali coast was renewed for another 12 months (operative para., 12). The Somali government was requested (in operative para., 4) to pass a complete set of anti-piracy laws.

(UNCLOS).[57] UNCLOS provides for universal jurisdiction over acts of piracy on the high seas. Article 107 UNCLOS provides that a seizure on account of piracy may be carried out only by (war) ships or aircraft clearly marked and identifiable as being in government service and authorized to that effect. Such a craft has (according to Article 110 UNCLOS) the power to visit any vessel on the high seas if it has reasonable grounds for suspecting the vessel of being engaged in piracy. If these suspicions are not resolved by an inspection of its papers, it may proceed to a further examination on board the ship. Further (according to Article 105 UNCLOS) such (war) ships or aircraft may seize any pirate vessel and may arrest the persons and seize the property on board.[58] This framework of rules is adapted by the UNSCRs in the sense that countries are allowed to enter the Somali territorial waters in a manner consistent with operating on the high seas.

With respect to the second aspect of international law; the authorisation under Chapter VII to possible use of 'necessary means' is associated with the use of military force. Such force might be used while addressing acts of piracy but this neither implies that pirates may be defined as military combatants, nor that this UNSC authorization justifies the application of military force under all circumstances. Briefly stated, force may be used for self-defence and – where necessary – to stop, board and seize a ship suspected of being deployed for acts of piracy.[59] It should be applied in a proportionate way and be preceded by warning signals (flags, shots over the bow etc.). Within this legal framework pirates are defined as criminals to be captured where necessary by using reasonable force and not as combatants who may be lawfully killed in military action.[60] Because there is no armed conflict being fought against the pirates, the law of (inter-) national armed conflict is not applicable.[61]

5.2 Jurisdictional elements of UNSC resolutions as implemented by Operation Atalanta

The definition of pirates as criminals directly leads to the question whether and if so who should start criminal proceedings against arrested suspects of piracy. The UN, as well the EU both refer to UNCLOS as the applicable international legal framework to determine this question, more in particular to Article 105 UNCLOS. This provision prescribes that the courts of the state, which carried out the seizure of pirate vessels *may* decide upon the penalties and may determine the actions to be taken with regard to ship and/or property. In other words, flag states may feel entitled to bring judicial proceedings against suspects

[57] UN Convention on the Law of the Sea of 1982 (UNCLOS) 1982.

[58] Guilfoyle wrote an in-depth study on rules of law enforcement at sea. See: D. Guilfoyle, *Shipping Interdiction and the Law of the Sea*, (Cambridge: Cambridge University Press 2009). In a separate chapter ('*Case Study: piracy off Somalia*', at 61 – 74) Guilfoyle scrutinises in particular the legal dimensions of the UNSC policy towards Somali piracy up until that moment in time.

[59] See Treves, *supra* note 51, at 406.

[60] See Guilfoyle, *supra note* 59*,* at 71.

[61] See Treves, ibid., at 412.

but no exclusive jurisdiction is established by this 'may' provision.[62] Hence, there is no obligation to prosecute pirates under international law. With a view to enhancing the effective application of such a non-obligatory provision, it seems expedient that involved states should consult each other and cast their common understanding concerning specific cases or a shared challenge into a cooperation framework.

In order to overcome some of the problems associated with the prosecution of pirates, the UNSC has called on relevant states in its resolutions (flag states, coastal states, states of nationality of the victims etc.): *'…. 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, consistent with applicable international law including international human rights law, and to render assistance by, among other actions, providing disposition and logistics assistance with respect to persons under their jurisdiction and control, such victims and witnesses and persons detained as a result of operations conducted under this resolution;'*[63]

Moreover, in Resolution 1851 the UNSC seemed to really emphasize law-enforcement. In this Resolution, in which the focus was on investigation and prosecution, the UNSC encouraged, among others, all states and regional organisations fighting piracy off the coast of Somalia to arrange effective shiprider agreements consistent with UNCLOS to increase regional capacity to effectively investigate and prosecute piracy and armed robbery at sea offences.[64]

This call to cooperate in jurisdictional matters and in the investigation and prosecution of suspects of piracy was repeated in the UNSC Resolution 1950 of November 2010[65] and referred to in the Atalanta amendment of December 2010.[66]

The most recent Resolution,[67] also repeated the call to cooperate in determining jurisdiction in operational paragraph 14 and illustrates the Security Council's legalistic approach:

> '*Recognizing the need to investigate and prosecute not only suspects captured at sea, but also anyone who incites or intentionally facilitates piracy operations, including key figures of criminal networks involved in piracy who illicitly plan, organize, facilitate, or finance and profit from such attacks and reiterating its concern over a large number of persons suspected of piracy having to be released without facing justice, reaffirming that the failure to prosecute persons responsible for acts of piracy and armed robbery at sea off the coast of Somalia undermines anti-piracy*

[62] See Treves, ibid., at 402.
[63] S/RES/1816 (2008), operative paras. 11and 14 of S/RES/1846 (2 December 2008).
[64] S/RES/1851 (2008), operative para., 5.
[65] S/RES/1950 (2010) adopted on 23 November 2010, operative para., 12.
[66] See *supra* note 29, preambular para., 4.
[67] More recent resolutions on piracy, such as S/RES/ 2077 (2012) and S/RES/2125 (2013) of 18 November 2013, are not being referred to in the existing EU instruments regarding fighting piracy off the Somali coast.

efforts of the international community and being determined to create conditions to ensure that pirates are held accountable….'[68]

Even so, the resolutions do not prescribe how to proceed after capturing pirates. They simply 'list every conceivable head of jurisdiction, leaving it to the states involved to determine and answer questions of disposition and logistics.'[69] Substantive elements of this UN call to cooperate in determining jurisdiction were not rehearsed in (the preambular paragraphs of) these Atalanta acts. Nevertheless, the call to cooperate makes part of the legal framework of these acts containing detailed references to the concerned UNSC resolutions. Besides, in the Atalanta Joint Action it is provided that the EU shall conduct military operation Atalanta in support of (among others) the UNSC Resolution 1816 (2008) 1846 (2008) and 1851 (2008).[70] The latter resolution seems to focus, especially on investigation and prosecution.

According to the UNSC, cooperation should particularly be strengthened with countries in the piracy region. To that end, the Security Council strongly endorsed an overall policy of enhancing the capacity of relevant countries in the region to combat piracy, including judicial capacity.[71] Whenever possible, suspects of piracy should stand trial in the region and sentenced offenders should be incarcerated there as well. Through the Office on Drugs and Crime (UNODC) the UN also effectively provided support to countries in the region to develop, notably, prison capacity and the training of judicial and prison staff.[72]

Among others, the EU supplemented and provided support to the UN capacity building policy through the conclusion of agreements with countries in the region concerning the transfer of suspects of piracy captured off the Somali coast. The UNSC did not expressly call upon States to do so, but this line of conduct can well be understood in the light of the UNSC call on all States to cooperate in the investigation of and prosecution of persons responsible for acts of piracy and armed robbery.[73]

The EU identified itself with this course of action and concluded transfer agreements with a few countries in the region on taking over suspects of piracy by these countries and bringing them to justice over there. In 2009 the

[68] S/RES/2020 (2011).

[69] D. Guilfoyle, 'Piracy off Somalia: UNSC Resolution 1816 and IMO Regional Counter-Piracy Efforts', *57 International and Comparative Law Quarterly* 2009, at 696.

[70] Art. 1 Consolidated version Atalanta Joint Action 2012. See *supra* note 32.

[71] S/RES/1851 (2008) of 16 December 20008, operative para., 8.

[72] The UNODC website gives an ample overview of its counter-piracy programme, stating 'the counter-piracy programme (CPP) began in 2009 with a mandate to help one country – Kenya – deal with an increase of attacks by Somali pirates. That mandate has now widened and the UNODC CPP is working in six countries in the Somali Basin region-Kenya, Seychelles, Mauritius, Tanzania, Maldives and Somalia. The CPP has proved effective in supporting efforts to detain and prosecute piracy suspects according to international standards of rule of law and respect for human rights.' Avaliable at <http://www.unodc.org/unodc/en/piracy/index.html?ref=menuside>.

[73] See e.g. S/RES/1816 (2008), operative para., 11.

EU approved the transfer agreements with Kenya[74] and the Seychelles[75] through the instrument of an Exchange of Letters with respectively Kenya[76] and Seychelles.[77] In July 2011 the Council approved an Agreement with Mauritius[78] on the conditions and modalities of transferring suspects of piracy to Mauritius, the transfer of associated property seized by EUNAVFOR and the treatment of transferred persons.[79] According to a message of the European External Action Service (EEAS) the EU is still conducting negotiations with the Tanzanian government on such an agreement for the transfer of suspected pirates for prosecution.[80]

The newly established Contact Group on Piracy off the Coast of Somalia (CGPCS) endorsed this course of conduct. Amongst others, the Contact Group stressed the importance of capacity building in Somalia itself and recommended Kenya for its willingness to prosecute transferred suspects of piracy.[81] [82]

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[74] Council Decision 2009/293/CFSP 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 the possession of EUNAVFOR, from EUNAVFOR to Kenya and for their treatment after such Transfer*, *OJ* [2009] L 79/49, 25.3.2009.

[75] 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 for their treatment after such transfer*, *OJ* [2009] L 315/35, 2.12.2009.

[76] *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*, (plus ANNEX) *OJ* L 79/49, (25 March 2009).

[77] *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 for their Treatment after such Transfer* (plus an EU DECLRATION on transfer conditions and modalities), *OJ* [2009] L 315/37, 2.12.2009.

[78] Council Decision 2011/640/CFSP of 12 July 2011 *on the signing and conclusion of the Agreement between the European Union and the Republic of Mauritius on the conditions of transfer of suspected pirates and associated seized property from the European Union-led naval force to the Republic of Mauritius and on the conditions of suspected pirates after transfer*, *OJ* [2011] L 254/3, 30.9.2011.

[79] *Agreement between the European Union and the Republic of Mauritius on the conditions of transfer of suspected pirates and associated seized property from the European Union-led naval force to the Republic of Mauritius and on the conditions of suspected pirates after transfer*, Done at Port Louis (14 July 2011).

[80] Available at <http://eeas.europa.eu/piracy/judicial_cooperation_en.htm>.

[81] Pursuant to operative paragraph 4 of S/RES/1851 (2008), the Contact Group on Piracy off the Coast of Somalia (CGPCS) was established on January 14, 2009. Its main aim was to facilitate discussion and coordination among states and organisations to suppress piracy off the coast of Somalia. The Contact Group regularly informs the UNSC on the progress of its activities. The first meeting was attended by different third states and the EU Member States France, Germany, Greece, Italy, The Netherlands, Spain, the United Kingdom and the European Union itself. See for further information on the CGPCS, available at <http://www.state.gov/t/pm/rls/othr/misc/121054.htm>.

[82] From the 1 January 2014 the European Union assumed for one year the CGPCS chairmanship. See EEAS press release (131223/04) of 23 December 213, available at: <http://eeas.europa.eu/statements/docs/2013/131223_04_en.pdf >.

The UNSC also urged states to prevent the illicit financing of acts of piracy and the laundering of its proceeds. States should cooperate with INTERPOL and Europol to further investigate international criminal networks involved in committing piracy off the Somali coast.[83] Furthermore, they should support such investigations and ensure prosecution proceedings against persons suspected of having committed offences like illegally financing or unlawfully benefiting from pirate attacks.[84] The EU effectively started a cooperation with INTERPOL referring to the UNSC call, although it was about cooperating with regard to transferring personal data of suspects of piracy and not with regard to (their) criminal networks (see section 11).[85] In this regard, it is interesting to note that together with Eurojust, Germany and The Netherlands initiated a joint investigation trying to clamp down on criminal networks related to piracy and their illicit financial activities and proceeds.[86]

In conclusion, there are various jurisdictional elements in the relevant UNSC resolutions stressing the importance of cooperation between participating states, with states in the region and with some international enforcement agencies like Europol and INTERPOL, with a view to the prosecution of arrested suspects. The next chapter will discuss Atalanta's mandate and to what extent these UNSCR elements are forming part of the EU legal framework of the mission.

6. ATALANTA'S MISSION AND MANDATE: INTRODUCTION

The foregoing chapters outlined the general structure of the UNSCRs in relation to Somalia and piracy-related problems. This chapter will analyse the main Atalanta instruments and its overall compliance with the general structure of CFSP operational decisions and, secondly, the main aspects of its substantive embedding in UNSC policy. First, the factual circumstances under which the EU decided to launch operation Atalanta will be dealt with. It is within this context that EU action should be examined. Second, the legal aspects of the EU response to these circumstances will be scrutinised. It will appear that notwithstanding the overall compliancy in some respects, Atalanta decisions differ from the standard legal framework, in particular, pertaining to the specific way the goals and tasks of the mission have been designed. The mission and its tasks differ on certain points from those generally provided to EU (military) missions. Especially, dimensions of the legal basis of the competences awarded to EU NAFVOR Atalanta and ensuing implications will be addressed. Among

[83] S/RES/2020 (2011), operative para., 18.

[84] S/RES/1950 (2010), operative paras. 15, 16 and 17.

[85] S/RES/2077 reiterates this and *Commends* INTERPOL for the creation of a global piracy database designed to consolidate information about piracy off the coast of Somalia and facilitate the development of actionable analysis for law enforcement, and *urges* all States to share such information with INTERPOL for use in the database, through appropriate channels [..].

[86] The European External Action Service, 'The EU fight against piracy in the Horn of Africa', (June 2012), at 3, available at: <http://eeas.europa.eu/agenda/2012/200212_factsheet_piracy.pdf>.

others, notice will be taken of differences between UNSCR 1816 (2008) and the Atalanta mandate and the consequences thereof.

7. MISSION AND MANDATE OF EUNAVFOR WITHIN THE CONTEXT OF EU SECURITY POLICY

The EU itself, as well as many scholars and writers, already pointed out that Atalanta was the first military naval action under the EU flag at sea. Although such a colourful display undoubtedly contributes to the visibility of the EU on the international scene, the goals to be served and the tasks to be fulfilled by this operation do matter more to its visibility. These tasks should be targeted at the challenges and threats linked with (Somali) piracy. The EU just sparsely presented some policy considerations concerning its background view on taking this action. In the ESS of 2003 piracy was seen as a dimension of organised crime[87] and the ESS implementation report of 2008 added to this observation that piracy was the result of state failure and a threat to the world economy which relies on sea routes for 90% of its trade.[88] Somali piracy was similarly shown to have affected the delivery of humanitarian aid to Somalia. The GAERC also underlined these points as sources of its concern regarding Somali piracy in addition to the continued violations of the UN arms embargo.[89] Public information was available at the time, gathered by organisations like the IMO and the UN and might have provided an impetus for EU action in this area.[90] It might further be plausible that (undisclosed) intelligence reports of Member States and of the EU itself at the time of the Atalanta decision gave more detailed – but of course classified – information.

Scholarly literature on piracy already published in the period before the Atalanta decision extensively scrutinises factors linked to the emergence of piracy off the Somali coast. Lehr points to a combination of external factors and circumstances resulting in Somali piracy long before Somalia became a piracy enabling environment.[91] Terrorism in particular is highlighted as a significant security risk linked to piracy. At that moment in time, assessments concerning terrorism risks were related to analyses of maritime terrorist attacks

[87] See ESS (at 5) *supra* note 22.

[88] See p. 8 of the *Report on the Implementation of the European Security Strategy – Providing Security in a Changing World* -, Brussels (11 December 2008) (S407/08).

[89] See Press Release 2870th Council meeting, General Affairs and External Relations, External relations, Brussels 26-27 May 2008, at 11-13.

[90] See IMO, *supra* note 13.

[91] See P. Lehr and H. Lehmann, 'Somalia Pirates' New Paradise', (at 12- 15) in P. Lehr (ed.), *Violence at Sea, Piracy in the Age of global Terrorism* (New York: Routledge 2007), 1-23. Illegal fishing in the EEZ of Somalia since the outbreak of civil war in 1991 proved to be a very disruptive development. Somali fishermen defended themselves and their business by force. Based upon that experience they gradually turned into pirates. The upsurge of piracy since 2005 is linked to the disastrous effects of the December 2004 tsunami hitting Somalia heavily, killing 40.000 – 50.000 people and devastating many villages. Another, political factor might have been a struggle going on at the time between different TFG factions.

in the first half of the decade of the new century (after 9/11)[92] and based upon specific studies of terrorist groups conducting piracy attacks to boost their financial resources.[93] Studies on piracy undertaken after the perceived upsurge of Somali piracy in 2008, present a broader picture of risks and threats. Apart from the threat dimensions as explicitly mentioned in EU documents it is getting clearer that Somali piracy involves direct threats for EU citizens and EU economic interests. EU citizens are at direct risk of becoming victims as sailors continue to be kidnapped by pirates.[94] EU interests concerning its energy security are directly at risk while a comparatively large share of oil imports is transported through this sea area. Directly linked to hijacking oil tankers are the risks of polluting the sea when these ships are attacked by heavily armed pirates.[95] Furthermore, piracy and concomitant organised crime deepens the problems of Somalia and significantly complicates each European undertaking to provide assistance to the Somali people, to enhance the Somali economy and to help strengthen its institutions and its capability to act as an independent state.[96]

This combination of direct and indirect security threats leads Germond and Smith to the conclusion that where other ESDP operations served EU security interests only indirectly, in this case the EU deployed military forces which are now to defend EU Member States' interests both directly (security of its citizens, its maritime trade) and indirectly (stabilising non-EU countries as is mostly the overall objective of other ESDP operations).[97] However it could be argued that operation Atalanta formally fails to provide direct protection to EU citizens. Its mandate does not entail any provision to do so, although since the Lisbon

[92] O.Webb and G. Gerard, *Piracy in Maritime Asia: Current Trends* (in particular 83-84) in: Lehr, Peter, ibid., at 37-94.

[93] R.C. Banloi, 'The Abu Sayyaf Group: Threat of Maritime Piracy and Terrorism'; and: J. Chen, 'The Emerging Nexus between Piracy and Maritime Terrorism in Southeast Waters: A Case Study on the Gerakan Aceh Merdeka (GAM)', in: P. Lehr, *supra* note 90, respectively at 121-138 and 139-154.

[94] For an in-depth analysis of the risks and consequences of piracy victimisation for seafarers in the Indian Ocean and Gulf of Aden, see: K. Hurlburt (lead author), 'The Human Cost of Somali Piracy', Oceans Beyond Piracy, 6 June 2011; project of One Earth Future available at <http://oceansbeyondpiracy.org/about>, and the report available at <http://oceansbeyondpiracy.org/sites/default/files/human_cost_of_somali_piracy.pdf>; The Atalanta mission does not provide for a mandate to protect (EU) citizens on board of merchant and other ships off the coast of Somalia.

[95] See: Germond, Basil and M. E. Smith, 'Re-thinking European Security Interests and ESDP: Explaining the EU's Anti-Piracy Operation', *30 Contemporary Security Policy* 2009, 573 -593. A chapter on 'The EU and the Threat of Piracy' 579-580 provides an overview of six different threat dimensions.

[96] See e.g.: *Somalia Joint Strategy Paper for the period 2008 – 2013*, which presents the strategic framework for the co-operation of the European Commission (EC) with Somalia under the 10th European Development Fund (EDF). This strategy systematically refers to a 'viable security situation' in Somalia as a pre-condition for implementing this €215.8 million European development programme focussing on governance, education, economic development and food security. However, any analysis of the actual security threats is not provided. See website available at <http://ec.europa.eu/europeaid/where/acp/country-cooperation/somalia/somalia_en.htm>.

[97] See Germond and Smith, *supra* note 95, at 587.

Treaty, it is one of the Union's foreign policy objectives to protect EU citizens abroad.[98]

8. LEGAL ASPECTS OF THE MILITARY PART OF ATALANTA'S MISSION AND MANDATE

The Atalanta Joint Action provides the legal basis for the Union's reaction to the factual circumstances as set out before. The EU decided to launch this naval operation with the twin Mission to provide protection to WFP vessels and to suppress Somali piracy. This 'Mission' (Article 1, Atalanta Joint Action) got formalised in a separate Mandate provision (Article 2) and one following provision. This is a rather unique breakdown deviating from the standard formulation in EU instruments for military missions. Normally the mission of a military operation is laid down in a single article under the heading 'Mission'. These Mission clauses mostly specify objectives and tasks in a rather general and open way.[99]

The Atalanta Joint Action is providing much more detailed instructions to this military operation. These instructions were developed even further by three new Council Decisions of 8 December 2009 (Atalanta amendment December 2009),[100] 7 December 2010 (Atalanta amendment December 2010)[101] and 23 March 2012 (Atalanta amendment March 2012),[102] all three amending the original Atalanta Joint Action. The consolidated version provides for a clear overview of the current status of the Atalanta Joint Action and will therefore be used as starting point for our inquiries.[103]

Article 1 of Atalanta concerning the 'Mission' provides for the main objectives and determines the area of operation. It prescribes – in accordance with UNSC Resolution 1814 (2008) – the protection of the vessels of the WFP delivering food aid to displaced persons in Somalia. Protecting the WFP vessels was taken up by the EU as one the main tasks of the mission of operation Atalanta. Secondly, Atalanta is charged with providing protection for vulnerable vessels

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[98] Art. 3(5) TEU, first sentence. Joris Larik argues that providing such protection by military force would be a legal principle of this anti-piracy operation and critically appraises the absence of such an objective in the Atalanta mandate, in J. Larik, 'Operation Atalanta and the protection of EU Citizens: Civis Europeaus unheeded?', 3 2 *Perspectives on Federalism* 2011, 40-66.

[99] See Art.1 of the EUFOR Libya mission (*OJ* [2011] L 89/17, 5.4.2011); see Art. 1 of EUFOR Chad *OJ* [2007] L 279/21, 23.10.2007; see operation ALTHEA (military operation in Bosnia and Herzegovina (BiH), *OJ* [2004] L 252/10, 28.7.2004. ALTHEA's mission also entails tasks laid down in the General Framework for Peace in BiH); see Art. 1 of the EUTM (*OJ* [2013] L 46/27, 19.2.2013). The Joint Action concerning the EUSEC DR Congo mission (*OJ* [2005] L 112/20, 3.5.2005), deviates slightly though not genuinely from this pattern, while providing in two articles for the establishment of the Mission (Art. 1) and its objectives (Art. 2: "Mission Statement"). But it entails no such specific provisions concerning measures, tasks and certain rules of implementation as provided for by the Atalanta Joint Action.

[100] See *supra* note 29.

[101] See *supra* note 30.

[102] See *supra* note 31.

[103] See consolidated version Atalanta Joint Action, available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CONSLEG:2008E0851:20120323:EN:PDF>.

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 Resolutions 1846 (2008) and 1851 (2008). Protecting vulnerable vessels and repressing piracy and armed robbery off the coast of Somalia became the second main task of the mission of operation Atalanta.

A third objective was added by the Atalanta amendment December 2009 providing that the mission should also contribute to the monitoring of fishing activities off the Somali coast.[104] Finally, the Atalanta amendment of March 2012 changed the area of operations of the forces deployed from 500 nautical miles off the coast of Somali to the Somali coastal territory and internal waters, and the maritime areas off the coast of Somalia and neighbouring countries within the region of the Indian Ocean.[105] All three objectives forming part of the provision regarding the Mission of the operation are to be executed by military means.

Tasks and possible measures of the operation are further specified in Article 2 of the Atalanta Joint Action on the 'Mandate' and a specific clause (Article 12) pertaining to the implementation of one specific subtask concerning the transfer of persons arrested at sea.

Depending on its capabilities this Mandate charges Atalanta with taking specific measures or accomplishing specific tasks with a view to fulfilling these objectives, e.g. armed units of Atalanta may be positioned on board of WFP vessels, including when sailing in Somalia's territorial and internal water.[106] Furthermore, merchant vessels shall be provided protection on a case-by-case evaluation of needs.[107] Further, it is explicitly stated that force may be used as

[104] See *supra* note 29, Art. 1.

[105] See Art. 1(2) Atalanta Joint Action.

[106] Art. 2(a) Atalanta Joint Action

[107] Art. 2(b) Atalanta Joint Action. Such a military protection is also effectively provided to WFP vessels. See e.g. the brief report (May 10, 2011) on the training of an Estonian Vessel Protection Detachment (VPD). The detachment comprises ten troops. They are able to conduct boarding missions of suspected pirate boats as well as to deploy onto World Food Program vessels whilst being escorted by EU NAVFOR., available at <http://eunavfor.eu/french-naval-ship-embarks-an-estonian-vessel-protection-detachment/>. Moreover, taking armed Atalanta units on board of merchant vessels is not foreseeable. Together with the case-by-case approach this implies that the level of protection between WFP vessels and (other, including EU) merchant ships may differ markedly although this is rather understandable, given the specific Atalanta task to provide protection to WFP vessels. According to recent EUNAVFOR reports (March 2013) this line of action is still pursued. See: 'EU Naval Force: Estonian Vessel Protection Detachment Operating on a French Vessel', available at: <http://devnew.eunavfor.eu/eu-naval-force-estonian-vessel-protection-detachment-operating-on-a-french-vessel/>. However, this line of action also points to the very fact that not only sailors as EU citizens remain unheeded (Joris Larik, *supra* note 98) but that also their ships are less protected by Atalanta than WFP ships. In specific cases Member States themselves are taking preventive measures to provide extra protection to merchant vessels by deploying their own military through Vessel Protection Detachments (VPD) on board of vessels flying their flag. See e.g. the letter of the Dutch Minister of Defence of 15 March 2011 to the Second Chamber of Dutch Parliament (ref. nr.: BS/2011008212) regarding (translated): 'Deploying *Vessel Protection Detachments* (VPD's) on maritime transports'. Afterwards, the Dutch Government decided to extend this protection policy by means of deploying VPD's on Dutch merchant vessels, see Press 11.10.2011: 'The Netherlands increases its protection of merchant

a measure to deter, prevent and bring to an end acts of piracy and armed robbery.[108] Atalanta gets also a specific assignment to *liaise* and *cooperate* with other organisations and States active in the region to combat piracy, in particular with the 'Combined Task Force 151.'[109]

All of these operational elements relate to the military dimension of the Atalanta Mandate and fit rather neatly within the framework of the Security Council Resolutions this Joint Action is in support of. This twin qualification might not be unconditionally attached to another important operational element of the Mandate concerning the arrest, detention and transfer of persons (being suspected of) having committed acts of piracy.

9. LEGAL ASPECTS OF THE CRIMINAL JUSTICE PART OF ATALANTA'S MISSION AND MANDATE

9.1 **Introduction**

The competence to accomplish tasks in the area of criminal justice is laid down in Article 2(e) of the Atalanta Joint Action and reads as follows:

> 'Article 2 MANDATE: *Under the conditions set by applicable international law, in particular the United Nations Convention on the Law of the Sea, and by UNSC Resolutions 1814 (2008), 1816 (2008) and 1838 (2008), Atalanta shall, as far as available capabilities allow*:[110]
> *(..)*
> *(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 intending, as referred to in Articles 101 and 103 of the United Nations Convention on the Law of the Sea, to commit, committing or having com-*

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vessels of the Kingdom', available at: <http://www.government.nl/documents-and-publications/press-releases/2011/10/07/the-netherlands-increases-its-protection-of-merchant-vessels-of-the-kingdom.html >.

[108] Art. 2(d) Atalanta Joint Action.

[109] *Liaise* according Art. 2(f) Atalanta Joint Action, and also *cooperate* according to Art. 1 Atalanta amendment December 2009. Actually the UNSCR 1816 (2008) encourages to 'coordinate' efforts with other forces (op. par. 2). The Dutch government in a letter to parliament relates that a *Shared Awareness and Deconfliction* (SHADE) mechanism has been established between the maritime forces of multilateral organizations (NAVO, Atalanta and the American led Coalition Maritime Forces (CMF)) together with individual nations active with their navies off the coast of Somalia. Besides, the maritime activities of these three multilateral naval forces are entirely coordinated and common operation concepts have been agreed upon. See: *Regeringsreactie op AIV-advies over piraterijbestrijding (reply of the Government to the recommendations of the Advisory Council on International Affairs (AIV) with regard to combatting piracy)*, letter of 1 April 2011 to the Chairperson of the Second Chamber of Dutch Parliament, available at: <http://www.rijksoverheid.nl/documenten-en-publicaties/kamerstukken/2011/04/01/regeringsreactie-op-aiv-advies-over-piraterijbestrijding.html>. The March 2012 amendment updated the 'Combined Task Force 150' to 'Combined Task Force 151'.

[110] NB This is the revised text of the *chapeau* of Art. 2 of the Atalanta Joint Action which was corrected through a Corrigendum to Council Joint Action 2008/851/CFSP of 10 November 2008, *OJ* [2009] L 253/18, 25.9.2009.

mitted, 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;'[111]

In other words, in Article 2(e) it is provided that – alongside its military tasks – EUNAVFOR Atalanta is assigned also with tasks to arrest, detain and transfer pirates or suspects of piracy and to seize their vessels as well as any of their goods on board. Specific rules regarding the transfer of arrested and detained suspects are laid down in Article 12 of the Joint Action. This provision opens with the preliminary statement that these transfers shall be performed on the basis of on the one hand the acceptance by Somalia of the exercise of jurisdiction by Member States or third States and on the other hand on the basis of Article 105 UNCLOS. Under these conditions:

1. '... [P]ersons suspected of intending….shall be transferred:
- to the competent authorities of the Member State or of the third State participating in the operation, of which the vessel which took them captive flies the flag, or
- if that State cannot, or does not wish to, exercise its jurisdiction, to a Member State or any third State which wishes to exercise its jurisdiction over the aforementioned persons and property.
2. Persons suspected of intending, as referred to in Articles 101 and 103 of the United Nations Convention of the Law of the Sea, to commit, committing or having committed acts of piracy or armed robbery who are arrested and detained, with a view to their prosecution, by Atalanta in the territorial waters, the internal waters or the archipelagic waters of other States in the region in agreement with these States, and property used to carry out such acts, may be transferred to the competent authorities of the State concerned, or, with the consent of the State concerned, to the competent authorities of another State.
3. No persons referred to in paragraphs 1 and 2 may be transferred to a third State unless 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, torture or to any cruel, inhuman or degrading treatment'.[112]

An EU answer to the Security Council's call to cooperate in jurisdictional matters might be considered to be given by Article 12 of the Atalanta Joint Action. The original Article 12 was amended by a Council decision of March 2012, so as to include the transfer of arrested or detained persons suspected of intend-

[111] The underlined part of this provision was added afterwards by Art. 1(1) of the Atalanta amendment December 2010. This specification renders account to Art. 101 UNCLOS providing a definition of piracy (see *infra note* 112) and Art. 103 UNCLOS defining what should be considered as a pirate ship or aircraft. (See *infra note* 113).

[112] Art. 12(1) Atalanta Joint Action.

ing, as referred to in Articles 101[113] and 103[114] of the United Nations Convention of the Law of the Sea, to commit an act of piracy or armed robbery. Moreover, the area of operation was extended as to include the territorial internal and archipelagic waters of other states in the region.[115]

Although the amendment of Article 12 was provided for by the Council Decision of March 2012, neither the decision itself, nor the Council meeting records[116] provide a clear line of reasoning as to why or on which basis Article 12 was amended. The decision does refer to UNSC Resolution 2020, which recognises the need to investigate and prosecute not only suspects captured at sea, but also notably, urges States to cooperate in determining jurisdiction, and in the investigation and prosecution of all persons responsible for acts of piracy and armed robbery (operative paragraph 14).[117]

Whether these rules are genuinely fulfilling the substance of the Security Council call is another question which shall be scrutinised in section 11.1.

9.2 **Substantive features of the criminal justice tasks**

These are all law-enforcement tasks pursued by the police within the framework of a judicial mandate. The performance of these tasks of arresting, detaining and transferring pirates (or suspects of piracy) must serve a specific objective. They have to be performed in view of prosecutions potentially brought by relevant states. This objective underlines the judicial character of these tasks. The wording '*potentially*', as entailed in this provision, implies that the commander in charge does not need to have made certain beforehand whether

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[113] Art. 101 UNCLOS *Definition of 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).'

[114] Art. 103 UNCLOS, *Definition of 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. 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.'

[115] See Art. 12 consolidated version Atalanta Joint Action.

[116] 3130th Foreign Affairs Council meeting, Brussels (30 November and 1 December 2011) available at <http://www.consilium.europa.eu/ueDocs/cms_Data/docs/pressData/EN/foraff/126518.pdf> and 3149th Foreign Affairs Council meeting, Brussels (27 February 2012) available at <http://www.consilium.europa.eu/ueDocs/cms_Data/docs/pressData/EN/foraff/128226.pdf>.

[117] In general, operative paragraph 4 of S/RES/2020 recognises the need to investigate and prosecute not only suspects captured at sea, but also anyone who incites or intentionally facilitates piracy operations.

Para., 5 calls upon states to cooperate also, as appropriate, on the prosecution of pirates for taking hostages.

Para., 14 calls upon states to cooperate in determining jurisdiction and in the investigation and prosecution of all persons responsible for acts of piracy.

prosecution will be initiated against potential perpetrators. On the other hand, under the mandate provided these tasks shall be performed only with a view to a potential prosecution. However, this means that even if it has not been established beforehand whether a relevant state may initiate a criminal procedure, the chain of acts made up of arresting and detaining (and – later on – transferring) pirates or suspects has to be qualified as a chain of acts embedded within the framework of (procedural) criminal law of a relevant state.

The criminal justice nature of these tasks was emphasised and in fact deepened by the Atalanta amendment of December 2010. According to this amendment, new provisions were needed in the light from the first two years of experience in order to allow for the collection of physical characteristics of suspects of piracy (e.g., fingerprints) and for the transmission of certain personal data to INTERPOL. The collection and subsequent transmission of this personal data will help to facilitate the identification and traceability of these suspects and their possible prosecution. The processing of this data should be carried out in accordance with Article 6 TEU.[118] Both new elements (collection of data and transmitting these to Interpol) were laid down in two new provisions inserted in the mandate clause. According to the new provision on the collection of personal data Atalanta shall: '*(h) collect, in accordance with applicable law, data concerning persons referred to in point (e) related to characteristics likely to assist in their identification, including fingerprints;*'[119] In this instance 'applicable law' consists of the Charter of Fundamental Rights of the EU and the European Convention on Human Rights and Fundamental Freedoms as provided in Article 6 TEU.[120]

The following new provision stipulated that these personal data as collected by Atalanta consist of: '*personal data concerning persons referred to in point (e) related to characteristics likely to assist in their identification, including fingerprints, as well as the following particulars, with the exclusion of other personal data: surname, maiden name, given names and any alias or assumed name; date and place of birth, nationality, sex; place of residence, profession and whereabouts; driving licenses, identification documents and passport data.*'[121]

These data shall be then transmitted by Atalanta to INTERPOL for the purpose of circulating them via the INTERPOL's channels and checking them against INTERPOL's databases.[122] To that end an arrangement was concluded between the EU Operation Commander and the Head of the National Central Bureau (NCB) of INTERPOL in the UK.[123]

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[118] Atalanta amendment (December 2010), preambular para., 7. See *supra* note 30.

[119] Ibid., Art. 1(2) (h).

[120] Ibid., ensuing from preambular para., 7.

[121] Ibid., Art. 1(2) (i), first indent.

[122] Ibid., First para., of Art. 1(2) (i).

[123] Ibid., First para., of Art. 1(2)(i). The arrangement between the European Union Naval Force (EUNAVOR), Operation Atalanta, and the Serious Organised Crime Agency (SOCA), as the National Central Bureau (NCB) of the International Criminal Police Organisation (INTERPOL) was concluded on 23 April 2012.

A copy of this arrangement was obtained upon request at the General Secretariat of the Council.[124] For the most part, the text is similar to Article 2(i) of the consolidated version of the Joint Council Action.[125] However, the agreement is adding three new elements, not mentioned in the Joint Council Action.[126] Firstly, that EUNAVFOR will forward personal data together with any data extracted from mobile telephones and GPS devices in the possession of suspected pirates (second indent). Secondly, once INTERPOL has received the information, it will store, manage and transmit the data according to its own rules on controlling information (third indent). And finally (first indent), the agreement indicates that EUNAVFOR is transmitting these data only to INTERPOL personal. It seems that the data might not be transmitted directly by Atalanta to other interested parties. In other words, INTERPOL is becoming the single channel through which these personal data will be transmitted to interested states.

Overall, these new tasks are clearly expanding Atalanta's criminal law competences. Secondly, it has become evident that these expansions are made both explicitly, through the amendments of the Council Joint action, and implicitly, through agreements such as concluded between the EU and INTERPOL. Finally, rather striking differences are to be noted between the legally provided new tasks and the above mentioned agreement, especially with regard to the delivery of data extracted from mobile telephones and GPS devices in the possession of suspected pirates. On this point the agreement with INTERPOL seems to be at odds with the Joint Action.[127] The instrument entails no provision

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[124] On 2 May 2012 access was granted, upon the author's written request, by the General Secretariat of the Council of the European Union to the arrangement concluded between Interpol and the EU Operation Commander as referred to in Art. 1(2)(i) of Council Decision 2010/766/CFSP.

[125] Consolidated version Council Joint Action 2008/581/CFFSP of 10 November 2008.

[126] The arrangement states that: '*The provisions defining the conditions and modalities for sharing the above mentioned data is as follows:*

- *EUNAVFOR only transmits data and does not store any information after its transmission to INTERPOL;*
- *EUNAVFOR will forward personal data (as defined above) together with any data extracted from mobile telephones and GPS devices in the possession of suspected pirates;*
- *Interpol will store and manage data in accordance with its own rules on controlling information and access to INTERPOL files, on the basis that these rules do not infringe the basic rights of the people concerned, as mentioned in the INTERPOL Constitution, which refers to the Universal declaration of Human Rights; as per Article 2(1) of the INTERPOL Constitution which states members are – "to ensure and promote the widest possible mutual assistance between all criminal police authorities within the limits of the laws existing in the different countries and in the spirit of the Universal Declaration of Human Rights.'*

[127] Another question is whether the arrangement between the Atalanta Operational Headquarters and INTERPOL has been procedurally correctly concluded. Though the (amended) Atalanta Joint Action gives the permission to the EU Operation Commander to do so, it could be argued that the concerned 'arrangement' should have been brought about through Lisbon rules on concluding international agreements with States and international organisations (Art. 37 TEU) and accomplished in accordance with the operational rules thereto, as laid down in Art. 218 TFEU. The permission given to the EU Operation Commander is not principally dissimilar to the permission granted to other EU agencies and bodies like Europol or the future European Public Prosecutor to may establish international agreements, which though also have to be accomplished in accordance with the new Treaty based procedures.

on the transfer of data from mobile telephones while enumerating the specific personal data which may be transmitted '*with the exclusion of other personal data'*. Besides, it goes without saying that gathering information from mobile telephones and GPS devices requires a firm legal basis, which seems not to be present here.

In summary, over time the judicial competences and duties of Atalanta have been expanded and deepened. In view of possible prosecutions also a specified range of personal data has to be collected (and until their transmittance also temporarily stored) by Atalanta and transmitted to INTERPOL. This data is needed to help facilitate the identification and traceability of suspects of piracy in view of a possible prosecution. The whole collection shall be carried out in accordance with the EU Charter of Fundamental Rights and the European Convention on Human Rights.

9.3 **Procedural features: the missing link**

All in all: the original chain of Atalanta tasks of arresting, detaining and transferring suspects of piracy is extended with the inclusion of person's suspected of intending to commit acts of piracy and the collection of their personal and digital data and transmitting these to INTERPOL. These tasks are to be pursued by Atalanta in view of a possible prosecution. Two observations can be made at this point, a brief observation regarding the legal nature of these tasks and implied competences, and a somewhat more elaborated one regarding procedural aspects (the 'missing link').

The mandate to exercise the judicial Atalanta tasks is not of an obligatory nature. Its practical implementation (apart from conditions under international law) is actually dependent upon two different conditions. Firstly, as stated in the *chapeau* of Article 2 Atalanta Joint Action, the mission's capabilities have to be taken into account. Only as far as these allow have the different actions under its mandate to be brought in practice. What the factual implications are hereof for the daily conduct of the mission makes no part of this scrutiny. It suffices to remark that it is very much to the Mission itself and under its control to determine what seems to be achievable with the capabilities which have been handed over.

The other, second factor limiting the obligatory nature of the mandated judicial tasks pertains to the very fact that the transfer of suspects of piracy to a Member State or (any) third state has been made subject to their wish to exercise their jurisdiction. Article 12 of the Atalanta Joint Action provides on the one hand that (under certain international law conditions) the above meant suspects *shall* be transferred. However, all states mentioned are free to exercise their jurisdiction in each specific case and to see whether they will accept a transfer or not. And in the end, when no State can be found at all, a required transfer will not be accomplished. It is quite evident that this factor remains very much out of reach of EUNAVFOR commanders, as it cannot be controlled by them. In that respect this provision will not always or even mostly result in the mandated assignment.

In summary, the performance of all mandated assignments are subject to the capabilities of the mission. In addition to that, the judicial task of transferring suspects is subject to the willingness of States to accept them. In that sense this specific assignment has been casted in a fundamentally different, non-obligatory way compared to the other mission assignments. The Union could have opted to put it on the same footing e.g. by deciding that all captured suspects should be handed over to a court of a Member State (in accordance with the rules agreed specifically to that end). It would have genuinely increased the effectiveness of the operation and brought this special assignment within the centre of gravity which the other assignments form part of.

The second observation concerns the question according to which criminal procedure these tasks are executed by the Atalanta Operation. According to international law, in particular UNCLOS, the (procedural) criminal law rules of the flag state are applicable regarding the factual arrest and detention of pirates or suspects of piracy. This may be inferred from the provision that the courts of the state which carried out the seizure of pirate vessels may decide upon the penalties and may determine the actions to be taken with regard to ship and/or property.[128] This provision also implies that in principle suspects could only be transferred to the courts of participating EU Member States and not to third states while they are not involved in performing the seizure. This conclusion arises from the *a contrario* reasoning that the courts of the 'seizing' state *may* decide upon penalties etc. – thereby infringing upon the exclusive flag state jurisdiction regarding the pirate's vessel. However, non-participating states are ruled out while not being specifically referred to in this UNCLOS provision. In this instance EUNAVFOR is the authority detaining and transferring suspects of piracy (and collecting plus transmitting their personal data) and could at least be regarded as the 'seizing' authority.

Although the mission consists of war ships assigned by Member States to EUNAVFOR, these war ships are flying the EU flag and not (primarily) of the concerned Member State.[129] In other words, in this instance the flag state virtually is an international organisation, in this case the EU. However, even if the EU might not be looked upon that way, no such phenomenon as (harmonised) EU law on criminal procedure exists according to which commanders of the EUNAVFOR (war) ships have to proceed. So it seems that a legal gap exists between the jurisdictional tasks and competences of EUNAVFOR and EU rules on how to proceed while exercising these tasks.

First, one could question whether this gap might be closed by the formula of Article 2(e) Atalanta Joint Action stating that the arrest, detention and transfer of suspects will take place '… *in view of prosecutions potentially being brought by the relevant States under the conditions in Article 12,...*' Second, transfer conditions are mentioned in paragraph 1 of Article 12 of the Atalanta

[128] Art. 105 UNCLOS, second sentence.

[129] In accordance with Art. 42(1) TEU the Member States are providing (civilian and military) capabilities enabling the Union to perform tasks ensuing from CSDP missions outside the Union. To that end the third paragraph of Art. 42 obliges Member States to make such capabilities available to the Union.

Joint Action. Firstly, transfers shall be performed on the condition of Somalia's acceptance of the exercise of jurisdiction by (involved) Member States or third states; secondly, on the basis of Article 105 UNCLOS.[130]

Does this 'fall back' formula provide a secure base for EUNAVFOR's judicial dealings with suspects of piracy? Not effectively; the EU itself is in charge; EUNAVFOR effectively performs a transfer to the competent authorities of a Member State or a third state. This is even the case when a Member State whose ship is flying the flag is actively engaged with its officers in arresting a suspect of piracy. According to the concerned Council decision, it is also EUNAVFOR which is gathering personal data of varying sorts of suspects of (persons intending to commit) acts of piracy and transferring to those data to EUROPOL. Therefore, this formula cannot abrogate the constitutionally determined powers of the EU *vis-à-vis* its Member States as ensuing from this mandate. Besides, the reference to relevant states provides no certainty on the practical question of which state will effectively bring a prosecution in respect of an arrested suspect. In the majority of cases no criminal proceedings at all are initiated and arrested persons are being sent home or returned to their boats.[131] In such instances, the fall back argument is devoid of any reference. For this reason alone, a set of common (minimum) procedural rules might be considered mandatory.

The very fact that the EU is a contracting party to/full member of UNCLOS does not change much with respect to this state of affairs.[132] The EU is a Party only in as far as competences (in this instance relevant to UNCLOS) are conferred upon it by its Member States. The EC Declaration concerning these competences does not cover any relevant piracy provision derived from Part VII on the High Seas.[133] Thus, the EC and now the EU as its legal successor

[130] Art. 12(1) Atalanta Joint Action on the Transfer of persons arrested and detained with a view to their prosecution. See chapter 9.1. (*Nota Bene*: The text of the first indent has been revised; it was corrected through the Corrigendum of 25 September 2009, and Council Decision of March 2012. See consolidated version *supra* note 103.)

[131] The Washington Post reported on March 15, 2011 that the Cmdr. Paddy O'Kennedy of the European Union Naval Force had stated that only 93 suspected pirates had been sent to court out of 770 pirates detained by EU NAVFOR since it began keeping records in December 2008. That amounts to 12%, available at <http://www.washingtonpost.com/wp-dyn/content/article/2011/03/15/AR2011031502891.html>. On 24 January 2012 the spokesman of EU NAVFOR has been asked in writing for a confirmation and update of these figures. No response has been received ever after. In June 2012 the EEAS reported that: '*Prosecution and detention of piracy suspects is a key component of the overall fight against piracy. Over 1,000 suspects are currently being prosecuted in 20 countries, including EU Member States*.' See *supra* note 89, at 2.

[132] Council Decision of 23 March 1998 *concerning the conclusion by the European Community of the United Nations Convention of 10 December 1982 on the Law of the Sea and the Agreement of 28 July 1994 relating to the implementation of Part XI thereof*, *OJ* [1998] L 179/1, 23.6.1998.

[133] See p. 126 -131 for the text of the Commission Declaration concerning the competence of the EC regarding matters governed by UNCLOS; attached to the: *Commission proposal for a Council Decision concerning the Conclusion by the European Community of the United Nations Convention of 10 December 1982 concerning the Law of the Sea and the Agreement of 28 July 1994 on the application of Part XI thereof*, *OJ* [1997] L 155/1, 23.5.1997, available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:1997:155:0001:0133:EN:PDF>.

is not a Party with regard to UNCLOS provisions bearing relevance to piracy (in particular UNCLOS Articles 95 – 107).

Neither could this legal gap be bridged by referring to the EU Charter and the ECHR as applicable law as provided in the Atalanta amendment of December 2010.[134] The Charter and the Human Rights Convention are setting conditions concerning, among others, the right to liberty and security and the right to a fair trial and, therefore, may not be considered to substitute the substantive rules regarding those rights.

It may be concluded that, legally, EUNAVFOR needs a set of shared rules on criminal procedure and substantive nature to enable it to exercise its mandate to arrest, detain and transfer suspects of piracy, as well as to collect their personal data and transmit it to INTERPOL. Furthermore, the Union needs a legal basis to be empowered to adopt such rules. So the question remains open as to whether CFSP provisions will also entail the necessary powers to adopt jurisdictional rules and rules concerning criminal procedure to arrest and prosecute suspects for intending to commit acts of piracy.

The fact alone that there are no EU-wide criminal procedures on piracy was confirmed in a seminar report of the European Institute for Security Studies (EUISS).[135] Therefore, according to this report, any action against suspects of piracy is taking place in a national criminal procedure framework, increasing the complexity at the operational level of the Atalanta mission. This leads to incoherent situations and actions not commensurate with the EU dimension of EUNAVFOR. It is recommended in this EUISS report to push for a swifter and stronger harmonisation of Member States' criminal codes regarding piracy.

In this way, the legal necessity of having (and applying) common (minimum) rules is complemented by considerations of a practical nature to have established such rules on the EU level. Taking both arguments together, an opportunity would be created to strengthen the EU response towards fighting piracy by adopting such rules, making the EU operation legally less vulnerable and in practice more effective.

In the next section the question of whether an appropriate legal basis for establishing the competence to exercise the above-mentioned judicial tasks may be considered to be laid down in the Atalanta Joint Action itself will be scrutinised.

10. THE LEGAL BASIS OF THE EUNAVFOR MANDATE: TESTING ITS LIMITS

According to the Treaty, the Council shall take the necessary decisions whenever an international situation requires action by the Union.[136] It may be stated

[134] See *supra* note 30.

[135] D. Helly, 'Lessons from Atalanta and EU counter-piracy policies', EUISS Seminar Report (23-24 March 2011) and (Brussels 17 June 2011), 6-7: 'Legal issues' available at <www.iss.europa.eu/uploads/media/Atalanta_report.pdf>. (The EUISS is an agency of the European Union, operating under the CFSP.)

[136] Art. 14 TEU (Nice) respectively Art.28 TEU (Lisbon). See *supra* note 33.

that such a requirement is established and defined by a combination of instruments such as the European Security Strategy, UNSC resolutions and assessments of the Council itself regarding such an international situation. An overview of these instruments pertaining to the piracy challenge off the Somali coast was presented in the preceding sections. Apparently, on this basis the EU deemed that action was required to address the piracy problem off the Somali coast and decided to go for a Union military operation legally based upon Article 14 TEU (Nice) in particular.

Once the necessary conditions are fulfilled, virtually no restrictions are imposed on the powers of the Council regarding the main elements of the action it is intending to deploy. On this basis, the Council is free to decide on the objectives and scope of the Union's operational action and the means to be made available to the Union. The Council is also free to decide upon the necessary duration and the conditions for the implementation of its Joint Actions/ Decisions. Therefore this provision entails rather extensive competences.

Legally such a decision, resulting in a competence of the Union to act with regard to the defined international situation, must fit into the scope of application of the concerned Treaty provision. As described, the necessary conditions enabling the Union to take this specific decision were fulfilled. Subsequently, the Council unanimously took the decision to act on the basis of Article 14 TEU. The title, preamble paragraphs, and Mission provisions are all related to the conducting of a foreign and security operation, which may be defined as the capacity to execute a military operation in a predefined theatre of operations, in order to contribute to the deterrence, prevention and repression of acts of piracy. This main objective fits perfectly well into the field of application of Article 14 TEU (see preceding sections 9 and 10).

Actually, this is a standard procedure for decisions regarding CFSP missions, so there is nothing remarkable about it. However, the question remains open whether the mandate to have to arrest, detain and transfer suspects of and persons intending to commit acts of piracy, collect their personal data and transmit it to INTERPOL, all in view of possible prosecutions to be brought up against them, falls within the competence as conferred upon the Union. Particularly, if in accordance with this procedure and Article 14 TFEU (Nice 28 TEU – Lisbon) this instrument falls exclusively under CFSP competences. Assigning these tasks to the operation Atalanta implies that the Union avails itself of the criminal justice competence to arrest, detain and transfer criminal suspects and to collect and transmit (to INTERPOL) their data. In practice, military and judicial staff of Member States forces and authorities will execute these tasks. However, Member States supplying the Union with the necessary means to conduct this operation like warships, crew and Head Quarter facilities are participating in the operation on behalf of the Union, i.e. not acting by themselves as sovereign states. The Joint Action even commits Member States in positions they want to adopt and in the conduct of (other) international activity of theirs.[137]

[137] Art. 14(3) TEU (Nice), respectively Art. 28(2) TEU (Lisbon).

Consequently, the Union and not Member States' authorities are executing these criminal justice tasks. Therefore, the Union is in need of a legally provided Treaty basis to enable it to perform these criminal justice tasks. These tasks are, as already set out before, directed against actors of piracy not against acts of piracy as such. And these tasks are not of a military nature aiming at deterring, preventing and repressing acts of piracy but about arresting the pirates themselves and handing them over to justice. Undoubtedly, the proper discharge of these tasks may help to strengthen the deterrence and prevention of acts of piracy. It may in itself be considered as an instrument of repression, too. Nevertheless, these tasks are not serving military or general security objectives falling within the CFSP realm but are of a more judicial nature, particularly while they have to be executed in view of criminal prosecution proceedings. So the question may be raised as to whether Article 14 TEU is a valid legal basis, capable of providing the Union with the necessary powers to perform an assignment of such a judicial nature.

It could be argued that these tasks are being performed under the conditions set by relevant international law and by the resolutions of the UN Security Council.[138] All these references form an essential part of the legal framework of EU decisions like this (see section 4). However, a Security Council calls upon participating states to cooperate in establishing jurisdiction and prosecution does not confer any power on the Union – as an autonomous legal order – neither to conduct CFSP tasks in general, nor criminal justice tasks in particular. These Security Council resolutions provide an indispensable legal backing for a specific undertaking putting it within the framework of the international legal order. But it will not provide the Union with the competence to initiate such a criminal justice (nor a military) undertaking on the international scene. This must be derived from the Treaty conferring such a specific competence on the Union. Similarly, UNCLOS, providing competences regarding arresting and detaining pirates, is not capable of changing the division of competences between the Union and its Member States.

An alternative hypothesis could be put forward that the criminal justice part of the Atalanta Mandate represents a logical and unavoidable corollary of the military action itself. Under these circumstances, combating acts of piracy will lead to holding and arresting pirates. Therefore, both types of tasks are inextricably connected with each other.

Undoubtedly, in practice such a line of events may be expected to occur. And so it does of course, though apparently in most cases not.[139] Theoretically, all pirates could be sent home without further notice since, legally, nothing in the Atalanta Joint Action prevents EUNAVFOR from releasing (all)

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[138] As provided in the *chapeau* of Art. 2 Atalanta Joint Action: '*Under the conditions set by applicable international law, in particular the United Nations Convention on the Law of the Sea, and by UNSC Resolutions 1814 (2008), 1816 (2008) and 1838 (2008), Atalanta shall, as far as available capabilities allow*:'. This is the text as amended by: *Corrigendum to 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 Somali coast*, *OJ* [2009] L 253/18, 25.9.2009.

[139] See *supra* note 131.

captured pirates. As set out in section 9.3, it is allowed to carry out all its actions in the light of available capabilities. Secondly, though EUNAVFOR is in principle obliged to transfer all captured suspects, it has been legally rendered dependent upon the willingness of Member States and third states to cooperate. As demonstrated, other options could have been considered in order to make the mission legally less dependent from such willingness. In this respect, the connection between the judicial tasks and all other elements of Atalanta's mission have only been loosely established, if at all.

However, sending captured pirates home would run contrary to the very idea of an effective approach to the piracy problem and would be in striking contrast with the Security Council call for cooperation on jurisdictional matters between all parties involved.

Consequently, one could maintain that combating acts of piracy will lead to holding and arresting pirates. And this corollary could explain a possible subsumption of the criminal justice part under the CFSP competence, as established by the Atalanta Joint Action. It could be argued that Article 14 TEU provides the Union with the competence entailing the equal execution of both tasks because they are inextricably interconnected and it is deemed necessary to attain the main objective of this Joint Action. In other words, along this line of reasoning, the criminal justice tasks fall within the centre of gravity of the Joint Action.

According to Article 14 TEU, Article 28 (Lisbon Treaty) respectively, it is up to the Union to decide on the scope and objectives of a joint action. The provision itself entails no genuine limits on this competence provided that it remains applied within the constitutionally determined boundary lines of the Union's CFSP, as set out in Article 11 TEU. Therefore, the scope and objectives of the joint action should be subsumed under or derived from these Treaty based CFSP objectives.[140] Specifically, the objectives of preserving peace and strengthening international security in accordance with the principles of the UN Charter[141] could be referred to. These objectives could comprise criminal justice actions deemed necessary for attaining the pre-established targets of an operation. Are precedents available to help underpin such a line of reasoning?

The EU has conducted several CFSP operations involving criminal justice oriented measures. For example, the European Union Police Mission (EUPM) in Bosnia and Herzegovina (BiH) should establish sustainable policing arrangements under BiH ownership in accordance with best European and international practice, and thereby raising current BiH police standards.[142] In addition to these key mission tasks, the operation should help promote the development of the criminal investigative capacities of BiH, enhancing police-prosecution cooperation and strengthening police-penitentiary system cooperation. In sum-

[140] Art. 11(1) former TEU; see *supra* note 19.

[141] Art. 11(1), fifth and third indent of the TEU (Nice); see *supra* note 19.

[142] See second preliminary para. of the Council Joint Action of 11 March 2002 *on the European Union Police Mission OJ* [2002] L 70/1, 13.3.2002); renewed by the Council Decision 2009/906/CFSP of 8 December 2009 *on the European Union Police Mission (EUPM) in Bosnia and Herzegovina (BiH)*, *OJ* [2009] L 322/22, 9.12.2009.

mary, unlike the Atalanta mission the EUPM mission offers no means of exercising criminal justice tasks whatsoever.

Another, far more stretching example seems to be the European Union Rule of Law Mission in Kosovo (EULEX).[143] The main objective of this mission is to ensure the correct functioning of rule of law institutions (including customs) with the view of maintaining and enhancing the rule of law and preventing political interference. This may be done – where necessary – by exercising in a limited way executive tasks e.g., – in consultation with the international civil authorities – reversing or annulling of operational decisions taken by the competent Kosovo authorities. In summary, among others, the mission should ensure the correct functioning of the Kosovo rule of law institutions. However, the mission was endowed with the additional competence to reverse or annul decisions taken by the competent authorities, in consultation with the relevant international civilian authorities in Kosovo.[144] On the basis of Article 14 TEU in particular, the Union has been providing itself in this instance with the competence to interfere directly and authoritatively in rule of law processes enforced by other, non-EU authorities. But it seems this Union competence lies in the middle of the main objective of the EULEX mission and does not entail a criminal justice competence to arrest and detain individual persons suspected of having committed a certain crime. In other words, the operational competence of EULEX turns out to differ significantly from the competence laid down in the Atalanta mandate.

Further scrutiny of these and other cases would stretch the limits of this study. In summary, it may be concluded that though all EU operations were and are contributing to Treaty based CFSP objectives, criminal justice competences did not form part of their respective mission statements. Such a competence provided to EUNAVFOR through the Atalanta Joint Action looks rather singular. As already suggested, providing such a competence to the Union on this foundation could be justified by pointing to the strong interconnection with the main objective of operation Atalanta and asserting the indispensability of its implementation to enable the Union to help attain the main objective of its CFSP action. An interpretation along this line would make this criminal justice task part of the centre of gravity of the operation's main mission while fitting into the rather large scope of Article 14 TEU and being in accordance with main CFSP objectives of the Union. However, legally EUNAVFOR appears not to be obliged at all to conduct transfers, nor is it acting accordingly in daily practice. In that respect, the judicial tasks and ensuing transfer seem only to be loosely connected to the other tasks. Not only because other elements of its mandate have to be executed (under the proviso of sufficient capabilities) but also while pirates, captured during the performance of the military and

[143] Council Joint Action 2008/124/CFSP of 4 February 2008 *on the European Union Rule of Law Mission in Kosovo, EULEX KOSOVO*, *OJ* [2008] L 42/92, 16.2.2008.

[144] Ibid., Art. 3(b): '*ensure the maintenance and promotion of the rule of law, public order and security including, as necessary, in consultation with the relevant international civilian authorities in Kosovo, through reversing or annulling operational decisions taken by the competent Kosovo authorities';.*

security tasks, are not necessarily and intrinsically seen as suspects of having committed a crime to be handed over to justice.

11. THE VALIDITY OF THE LEGAL BASIS

In view of the clear-cut judicial powers a distinct legal basis would have been proper and justified. Never before has the Union enjoyed such far stretched judicial powers in the CFSP area. The judicial Atalanta tasks differ fundamentally from the military assignments. In view of these differences, the working hypotheses examined in the preceding section 10 do not seem to be tenable. However, the Council (GAERC) did not take any initiative over time to reconsider the validity of its decisions.

11.1 **Standstill of the Council**

In principle, a review of the legal basis of the Atalanta mission should be conducted in accordance with the principles and objectives of the former TEU. As we have seen, on the basis of the Lisbon Treaty different provisions of the Atalanta Joint Action were amended over time. Its legal basis though remained the same (Article 14 former TEU; see section 3). So, legally speaking, the instrument has not been put on a Lisbon footing and its legal basis still has to be interpreted in pre-Lisbon terms.

At the time of the adoption of the original Atalanta Joint Action both policy areas, CFSP and AFSJ alike, made part of the pre-Lisbon TEU. According to this Treaty, these areas were governed dominantly by intergovernmental procedures and kept almost 'unaffected' by judicial scrutiny of the European Court of Justice or by any effective powers on the side of the European Parliament.[145] They were viewed as two of the so called three 'pillars'; the third one being common policies based upon the *acquis communautaire,* falling within the remit of the Community and the Treaty on the European Community (TEC). The Community powers and its *acquis* were protected by Article 47 (former) TEU against possible spill-over effects of the less integrated, intergovernmental CFSP and AFSJ pillars.[146] It stipulated that nothing in the TEU shall affect the Treaties establishing the European Communities. Varying on the pillar image: '... *Article 47 TEU aimed to compartmentalize the Community, on the one hand, and the CFSP (as well as Police and Judicial co-operation in Criminal Matters) on the other.*'[147] A similar delimitation provision regulating relations

[145] AFSJ policies and its concomitant powers, instruments and rules on review and democratic control are entailed in Title VI TEU (Nice) on: '*Provisions on police and judicial cooperation in criminal matters*.'

[146] See for an in-depth and comprehensive analysis on (the constitutional development of) inter pillar relations and differences: R.A. Wessel, 'The Constitutional Unity of the European Union: The Increasing Irrelevance of the Pillar Structure?', in: J. Wouters, L. Verhey and Ph. Kiiver (eds.), *European Constitutionalism Beyond the EU Constitution* (Antwerpen: Intersentia 2009) 283-306.

[147] P. Eeckhout,'The EU's Common Foreign and Security Policy after Lisbon: From Pillar Talk to Constitutionalism', in A. Biondi, P. Eeckhout and S. Ripley (eds.), *EU Law after Lisbon*, (Oxford: Oxford University Press 2012) 269.

between the CFSP and AFSJ pillars was not foreseen. In view of the aim of Article 47, demarcation of these pillars would not be necessary while they were belonging to the same compartment. Both institutionally and procedurally, there was no interference between the two. In other words, the Council was in the position as the single effective institution with regard to CFSP and AFSJ policies to decide rather independently on the legal basis of a certain (joint) action or decision in these areas without any decisive interference from other institutions. Neither legal nor institutional forces were triggering the (initiative taking GAERC) Council to start looking across its configurational borders. A triggering mechanism like an infringement procedure initiated for reasons of trespassing the borders of its Treaty based powers could not be successfully conducted.

The conclusion may be drawn that, at the time, legal and institutional conditions like these seemed not to be conducive to considering whether a chosen legal basis in the area of CFSP was genuinely fit for purpose, especially when the concerned provision, viz. Article 14 TEU (old), entails a large scope with regard CFSP joint actions. Though theoretically reached, this conclusion appears not to be (immediately) falsified by empirical data. Scrutiny of Press Releases on the results of Council meetings and Council Conclusions does not provide evidence that the legal basis issue and/or legal questions related to the judicial tasks ensuing from the Atalanta Joint Action were discussed any further by the Justice and Home Affairs Council configuration (JHA) nor (any further) by GAERC. Of course, many discussions have been conducted by GAERC / FAC on Atalanta / EUNAVFOR. It turns out that over time the Council considered the judicial tasks as of growing importance for the success of this mission. Thereto it consistently emphasised the importance of the contributions of third countries in the area of detention and prosecution of suspects of piracy and the transfer agreements concluded to that end with those countries. And it recommended the work of the UN CGPCS to seek sustainable solutions for the prosecution of suspected pirates.[148] Besides these references to external judicial endeavours on the international scene, references can be traced regarding internal coordination and cooperation between the GAERC / FAC and the JHA actors (almost exclusively on the level of preparatory working groups and committees). Statements are made that ESDP missions contribute to the EU's internal security. Further, the concerned cooperation relates to e.g. the sharing of information between ESDP missions and e.g. EUROPOL.[149] But

[148] See for 'contributions of third countries', point 25 of the 2774th GAERC meeting of 17 November 2009 and e.g. the conclusions 23 and 24 of the Council Conclusions on CSDP drawn by the 3009th Foreign Affairs Council meeting of 26 April 2010. And see for 'the work of UN CGPCS', point 26 of the 2774th GAERC meeting and conclusion 25 of the 3009th Foreign Affairs Council meeting.

[149] See e.g. point 54 of the 2774th GAERC meeting of 17 November 2009 (*supra* note 148) on *Cooperation between ESDP and JHA*, and conclusion 44 on *Cooperation between CSDP and JHA* in Council Conclusions on CSDP drawn by the 3009th Foreign Affairs Council (*supra* note 148).

issues of a more fundamental nature seem not to have been tackled across the borders of both Council (GAERC and JHA) configurations.[150]

Empirically, no evidence could be found that refutes the conclusion already theoretically drawn that the legal basis issues and/or legal questions related to the judicial tasks ensuing from the Atalanta Joint Action were discussed across borders of the GAERC / FAC configuration by the JHA Council configuration. Cross border dealings remained limited to general statements and co-operation on pragmatic affairs. This conclusion was also confirmed in an interview conducted with a high level, authoritative source from the Council General Secretariat, who stated that '...neither the operation Atalanta nor its juridical and, in particular, judicial rules ever have been discussed in the JHA-area. The issue has always been and still is a second pillar affair. It's part of the CFSP and never left that resort'.[151] Within the framework of these legal and institutional conditions, the Council managed the Atalanta mission strictly as a security and defence affair, and therefore in conformity with the overall duty to conduct a military operation. Most probably, though this was not investigated, by keeping the handling of the mission within a single resort contributed to more efficient and less time consuming decision making procedures. A practical though not unimportant side effect, considering in particular the need to get the operation started rapidly.

Whether the Council could have operated otherwise within its CFSP remit remains to be seen. In view of the judicial assignments the Council could have opted to broaden the EU NAVFOR's mission e.g. by stipulating in Article 1 of the Atalanta Decision that the EU should not only conduct a military but also an operation implementing other CFSP objectives related to its judicial assignments. To that end, it especially could have considered qualifying the Atalanta mission as a rule of law operation. Rule of law operations present a significant component of the EU's actions on the international scene.[152] Under the former TEU the developing and consolidating of democracy and the rule of law, and

[150] See also: 'Note from the Counter-Terrorism Coordinator (CTC) to the EU Council / European Council; *EU Action Plan on Combating Terrorism*'; Brussels, 9 December 2011 (17594/1/11, REV 1, LIMITE). Especially the chapter on : *Maritime Security* (p. 18), regarding cooperation between the Commission and Member States with a view to ensuring that EU-flagged ships are applying in full the Best-Management Practices (BMP) on measures for self-protection and the prevention of piracy and armed robbery. To help them achieve that goal EU NAVFOR identifies non-compliant ships and informs the Commission about them, available at: <http://www.eumonitor.nl/9353000/1/j4nvgs5kjg27kof_j9vvik7m1c3gyxp/vivca4izhqzy/f=/17594_1_11_rev_1.pdf>. The EU NAVFOR assignment to identify non-compliant ships and inform the Commission about these, seems to be a new one and forms no part of formally assigned tasks.

[151] The interview took place on February, 18th 2011 and was conducted by telephone. The source stated that: '.....neither the operation Atalanta nor its juridical and in particular judicial rules ever have been discussed in the JHA-area. The issue has always been and still is a second pillar affair. It's part of the CFSP and never left that resort. "*It has been mentioned only in the corridors.*"' Several times the source emphasised that the whole issue was regarded as highly '*sensitive*' and never left the second pillar. The written text of the interview has been authorised by the interviewee.

[152] See website of the European External Action Service for an overview of missions and operations, available at <http://www.eeas.europa.eu/csdp/missions-and-operations/index_en.htm>.

respect for human rights and fundamental freedoms is defined as a 'pure'[153] policy objective among other specifically defined objectives of the EU's CFSP.[154]

However, supplementing the mission of the EUNAVFOR operation with a rule of law objective pertaining to the remit of CFSP competences would have required corresponding rule of law actions on the international scene. Generally speaking, such actions comprise institution and capacity-building measures in the concerned third country or region with the view of strengthening the rule of law and developing and consolidating democracy. A comparison of the nature and scope of those rule of law actions with the Atalanta judicial assignments does reveal a striking difference. In fact, the entire chain of judicial tasks like arresting and detaining suspects of (persons intending to commit) acts of piracy, transferring them to a EU or a third state and transmitting their personal data to INTERPOL are to be performed by EUNAVFOR and not by third countries. Third countries are targeted only as possible partners with a view to prosecuting the before mentioned suspects on the basis of transfer agreements.[155] Although – to a certain extent – these transfer agreements are serving rule of law objectives, it cannot be concluded that the previously identified main elements of the judicial part of the operation could be regarded that way.

In brief, over the time the Council increasingly emphasised the importance of the judicial elements of the Atalanta mission. Nevertheless, it did not endeavour to reconsider the legal basis of the Atalanta mission. Legal and institutional conditions framed the decision making procedures within the CFSP remit. Most probably, practical and efficiency oriented reasons strengthened the Council's resolve to keep the decision making within the GAERC (FAC) sphere of competence.

11.2 **The legal basis in the light of AG Bot's Opinion**

In *EU Parliament v. and Council*[156] regarding the conclusion of a transfer agreement with the Republic of Mauritius[157], among others the question was raised as to whether the EUNAVFOR judicial assignments to transfer suspects of piracy and their properties to this State with a view to prosecution could legally fall within the CFSP remit. As set out before, the transfer to third states shall be conducted within the framework of transfer agreements to be concluded with the concerned third states.[158] The Atalanta Joint Action remains silent with regard to (equivalent) rules – as decided on by the Union – pertaining to the transfer by the Union of these suspects to EU Member States.

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[153] L. Pech, 'Rule of law as a guiding principle of the European Union's external action', 3 C*LEER Working Papers* 2012, at 12, available at <http://www.asser.nl/upload/documents/2102012_33322cleer2012-3web.pdf>.

[154] Art. 11(1) TEU (Nice), see *supra* note 19.

[155] Art. 12 Atalanta Decision.

[156] See *supra* note 27.

[157] See *supra* note 79.

[158] Art. 12(3) Atalanta Joint Action: see *supra* note 112.

The EP challenged the Mauritius agreement claiming that it does not relate exclusively to the CFSP. It is also linked to other policy areas like judicial co-operation in judicial matters not governed by intergovernmental procedures but- under the Lisbon Treaty – by the ordinary legislative procedure. Therefore, it was argued that this agreement should have been concluded after obtaining the consent of the Parliament.[159] In its judgement, the Court pointed to the fact that the EP also stated that the Mauritius agreement was legally based on Article 37 TEU and did not enter any further into substantive aspects of the case. It confined its judgement to a procedural issue. It decided that the concept 'exclusively' applied in paragraph six, second sentence, of Article 218 TFEU on the power of the Council to may conclude international agreements was of an immaterial nature. Article 218(6) TFEU is laying down a single procedure regarding all fields of activity of the Union. It establishes a symmetry between the procedures for adopting EU measures internally and adopting international agreements. In this way it is guaranteed that the EP and the Council enjoy the same powers in relation to a given field of policy and keeps the institutional balance preserved between both institutions (see paragraph 56 of the judgement).

However, some questions and answers as provided by AG Bot in this court case touch upon material issues regarding the legal basis for detaining and transferring suspects and are of relevance within the context of this paper. Though the relevance should be interpreted cautiously, given the legal context did change with the entering into force of the Lisbon Treaty.

In his Opinion, AG Bot strongly supports the view that the judicial tasks of the Union and EUNAVFOR under this Agreement are falling within the CFSP area and more particularly, under the Common Security and Defence Policy (CSDP). He points to the fact that Article 43(1) TFEU is stipulating that the Union may make use not only of military, but also civilian means to perform its legally defined external action tasks. Even if it were thought that the transfer and prosecution of suspects do not, by their nature, constitute military tasks, it is clear that the CSDP is not limited to the use of military means but may apply civilian means as well.[160] Notwithstanding, AG Bot acknowledges that the boundary between the area of CFSP and the external dimension of the area of FSJ has to be clarified, since both policy areas are serving Treaty based security objectives.[161] The question is which security interests and the protection thereof are falling within the CFSP remit and which within the scope of AFSJ. He demonstrates that in parallel with the internal AFSJ competences, the external AFSJ related competences should also serve aims related to furthering freedom, security and justice inside the Union as laid down in the Treaties: *'an area of*

[159] See Action brought on 21 December 2011 – *European Parliament* v *Council of the European Union*, in Case C-658/11, see *supra* note 27.

[160] Opinion of Advocate General Bot in ECJ, Case C-658/11, *European Parliament v. Council of the European Union* [2014] ECR I-2025 (points 95 till 98).

[161] Idem point 107: 'The objectives of safeguarding the security of the Union and strengthening international security are assigned to the Union as objectives of the Union's external action under Article 21(2)(a) and (c) TEU. At the same time, ensuring a high level of security is also an objective of the AFSJ in accordance with Art. 67(3) TFEU.'

freedom, security and justice without internal frontiers, in which the free movement of persons is ensured in conjunction with appropriate measures with respect to external border controls, asylum, immigration and the prevention and combating of crime'.[162]

AG Bot maintains that in this sense the Mauritius Agreement does not conform with the objectives related to internal security of the AFSJ, the reason for which it also does not fit within the external dimension of AFSJ. As stated, he emphasises that this action is forming part of a UNSC framework and seeks above all, to combat a threat against international peace and security. The judicial cooperation activities as laid down in the Agreement are serving these objectives and are to be defined as civilian tasks in accordance with the CSDP heading of the TEU. In favour of this point of view, he argues that in preceding international EU missions the traditional AFSJ instruments have also been mobilised. It should further be noted that the disputed Agreement not only covers activities of a judicial nature, but includes many other components like the training of investigators and providing financial, technical and logistical assistance to a third state. AG Bot underscores that these components seek to ensure the protection of human rights and the consolidation of the rule of law which are among the objectives of the CSFP.

The question of whether or not this specific Agreement has to be adopted in conformity with Lisbon Treaty procedures, as advocated by the Parliament, shall not be dealt with here. It falls outside the scope of this paper. But the following observations could be made. Firstly, the substantive differences existing between the Atalanta Joint Action and the Mauritius Agreement should be taken into account. The Atalanta Joint Action empowers EUNAVFOR to arrest, detain, and transfer suspects of piracy to EU Member States and to third states and to collect their private belongings and personal data (which have to be transmitted to Interpol). These powers are not provided for by the Agreement. The Agreement defines only the conditions and modalities for the transfer of these suspects, their property, and the concerned judicial documents and records etc. in relation to – in this case – Mauritius. Secondly, the Agreement stipulates criminal procedural law and other conditions under which the suspects shall be treated, as to be applied by Mauritius, not by the EU. Finally, the Agreement determines that EUNAVFOR shall provide assistance to Mauritius with a view to the investigation and prosecution of transferred persons.

In other words, the actual exercise of the specific judicial powers, as provided for by the Atalanta Joint Action, is not a constituent element of the Mauritius Agreement. This Agreement is laying down only the conditions of exercising the power of transfer of suspects, their belongings and personal data, for the purpose of (further) investigation and prosecution, within the framework of a relationship to be established with a specific third state. These conditions are even not substantively affecting these powers. Upon acceptance by Mauritius of these transfer conditions EUNAVFOR shall transfer the suspects (as laid down in the Atalanta Joint Action) and shall provide Mauritius all neces-

[162] Art. 3(2) TEU.

sary assistance. In other words, the Agreement is not laying down any new judicial powers. In this regard, EUNAVFORs' transfer of competence as such is not at stake. The Agreement is of a horizontal nature and exhibiting salient features of an international agreement.[163]

However, AG Bot's method of reasoning to discern whether or not a legal act contributing to CFSP/CSDP objectives, though including also AFSJ components is falling exclusively in the CFSP remit could be applied as well to the question whether or not the judicial assignments of the Atalanta Mission are legally falling within CFSP boundaries. To start with, AG Bot concedes that the transferring (and prosecuting, sic) of suspects of piracy does not constitute a military activity. He is of the opinion that in the sense of Article 43(1) TEU this activity could be defined as a 'civilian' one. No further definition is given of the concept 'civilian', though he refers to 'civilian' missions conducted under the CSDP to reform the security sector of third countries. And according to AG Bot those missions were not considered to be related the AFSJ.[164]

For the sake of argument, one could firstly accept that judicial powers to arrest, detain etc. as exercised by EUNAVFOR could fall under the definition of the use of 'civilian' means.[165] Secondly, together with AG Bot, one could argue that the CFSP objectives laid down in the Lisbon Treaty essentially correspond to those assigned under the former Treaty.[166] However, the question remains as to whether these tasks and included powers therewith are falling within the CFSP scope or the external dimension of the AFSJ. He emphasises that the distinction between both dimensions is not always clear. The development of crimes somewhere in the world may pose a threat to both the internal security of the Union and the concerned region. Quoting from the Stockholm Programme of 2010 he asserts that 'Addressing threats, even far away from our continent, is essential to protecting Europe and its citizens'.[167] This point of view is very much similar to the analyses of direct and indirect threats for both the Union and its citizens, as presented in this paper, leading up to the decision at the start of this mission (see section 7). However, AG Bot assesses the importance of these security threats differently from the one proposed in this paper. He is stating that the EU action is forming part of an international cooperation initiative launched by the UN Security Council and seeking above all to combat a threat to international peace and security. On the basis of this assessment AG Bot concludes that (though neither the Atalanta mission nor its legal base are under discussion in this court case), this action (read the Atalanta mission) must be adopted within the CFSP framework. And because

[163] All reasons for which probably the Opinion of AG Bot could be supported that this Agreement is an Agreement based upon genuine CFSP objectives, executed by civilian means and not being related to the internal dimension of the AFSJ.

[164] See AG Bot, *supra* note 161, point 105.

[165] The former TEU does not provide for the use of 'civilian' means or missions making use of civilian capabilities and – to our knowledge – other military or civilian missions did not entrust EU representatives and executors with the specific power to arrest etc., persons suspected of having committed a crime (see section 10),

[166] Art. 11(1) former TEU. AG Bot ibid., point 87.

[167] See AG Bot, *supra* note 161, point 113.

the Mauritius Agreement forms part of this action it does not, in his opinion, cover a situation with a sufficient link to the construction of the AFSJ.[168]

11.3 **Comments and conclusions on account of AG Bot's Opinion**

Commenting on AG Bot's analysis and the outcome thereof, it should first be stated again that the Mauritius Agreement should not be absorbed by the Atalanta Mission, and it cannot be confirmed that the Mauritius Agreement legally forms part of the Atalanta Mission. As set out before, the Atalanta Joint Action entails provisions to transfer suspects of piracy either to Member States' competent authorities or to a third state which wishes to exercise jurisdiction. However, without separate international agreements, separately adopted by the Council no such transfers to third states can be performed. The Agreements as such are not providing the legal basis to EUNAVFOR to exercise these competences. In other words, no direct link as perceived by AG Bot should be made between the Atalanta mission and the Mauritius Agreement. Besides, both actions at the international scene are serving different goals. Contrary to AG Bot's assumption that EUNAVFOR is seeking above all to combat threats to international peace and security, it can be safely concluded that it is as much providing protection against essential security threats to both the EU and its citizens and protecting commercial and human interests vital to them. The Mauritius Agreement should not be assessed accordingly. The Agreement is serving more or less exclusively CFSP objectives like: 'consolidate and support democracy, the rule of law, human rights and the principles of international law'.[169] These goals are falling within the CFSP remit. The reciprocal requirements of criminal procedural law rules (to be applied by Mauritius) and assistance commitments which have to be complied with by the Union and EUNAVFOR (in support of the Mauritius judiciary and its penitentiary system), are also supportive of those CFSP objectives.

Therefore, in its external relations, through the conclusion of transfer agreements (among others with Mauritius), the Union is managing to establish one overall, more or less homogenous framework – contributing to CFSP goals – for transfers of piracy suspects to relevant third states (see chapter 5.2).[170] However, this tentative conclusion regarding the legal positioning of these agreements and ensuing rule of law actions within the CFSP remit is not guiding for the issue at stake here.

The second comment pertains to the fact that beyond any doubt, actions directed at CFSP objectives like the safeguarding of the Union's fundamental interests and security can serve both internally as well externally linked purposes.[171] However, within the CFSP context, the concept of security should

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[168] Ibid., points 115 and 116.

[169] Objectives laid down in Art.21(2)(b) TEU and – in the same vein – Art. 11(1), 4th indent, former TEU.

[170] See *supra* resp. notes 77 till 82.

[171] Art. 21(2)(a) TEU 'safeguard its [EU] values, fundamental interests, security, independence and integrity', or – in the same vein – Art. 11(1) 1st indent TEU (Nice).

especially be understood in terms of taking action on the international scene against external threats to the Union as a whole. In accordance with the distinction drawn up by AG Bot, this security concept is quite different from the internal security concept of the Union which is falling exclusively within the scope of the AFSJ. For example, protecting militarily international shipping lanes off the Somali coast by EUNAVFOR can be regarded as safeguarding the external security interests of the Union. But providing the assistance and security to vessels – and their crews – sailing under the flag of an EU Member State is first and foremost a matter of internal security, even though vessels and crews are found far outside of EU territories. In that sense EUNAVFOR is not combating only threats against international peace and security (e.g. through the protection of WFP vessels and international shipping lanes) but is contributing to the external security of the EU, as well and thirdly, to the internal security of the EU and its Member States. Serving the objectives of international and Union wide security falls within the CFSP scope. However, the third objective falls within the AFSJ. EUNAVFOR actions are directly serving the latter objectives as well. According to AG Bot's method of reasoning the Atalanta Joint Action is, therefore, fulfilling objectives partly falling within the scope of CFSP and partly related to the internal dimension of the AFSJ. Both remits are not to be assimilated, one way or the other. If, with a view to choosing a legal basis, one would prefer to do so, the question of which of these security interests should take precedence should be answered unequivocally. It seems both are of equal importance not at least also while, if internal security interests would not have been that important to the EU, Member States could have refrained from taking international action through Union instruments. An alternative approach would have been at their disposal. EU Member States are contributing actively in the NATO counter piracy mission Ocean Shield. In support of the concerned UNSCRs this mission too is providing protection to vessels in the Gulf of Aden and off the Horn of Africa and helping to increase the general level of security in the region.[172] Through this mission external security threats to the Union are thwarted as well. Without an EU mission, Member States could even have pooled their capabilities through the alternative provided by NATO, most probably thereby raising the overall effectiveness of their efforts in helping to secure their external security and international peace and security. In this way, UN objectives regarding promoting security and combating piracy in this area could equally have been supported.

All in all, in differing ways and through different instruments both areas of CFSP and AFSJ contribute and advance security and the security interests of the Union. Questions regarding the legal basis of acts entailing objectives derived from both areas and/or making use of instruments being part of both areas should be solved through an assessment of the type of security interests. Applying AG Bot's method of reasoning, it might be concluded that the Atalanta Joint Action entails objectives furthering security interests in both areas. On the one hand, the Atalanta mission is specifically contributing to interna-

[172] See NATO website, available at <http://www.mc.nato.int/ops/Pages/OOS.aspx>.

tional peace and security and to safeguarding the Union against external threats. On another hand, it could be demonstrated that this operation is also contributing to enhancing the internal security of the Union especially through the protection of EU vessels and their crews. Therefore, the legal basis of this Joint Action should also be chosen in respect of competences conferred upon the Union to ensure a high level of internal security.

11.4 **Reconsidering the legal basis**

The preceding analyses and considerations may lead to the overall conclusion that the range of judicial tasks and ensuing competences as laid down in the Atalanta Joint Action are primarily performed with a view to enhancing the internal security of the Union. This conclusion applies even more so while objectives related to both policy areas covered by this Action are neither legally nor in fact closely connected with each other. Its judicial part is constituted in a less obligatory way (see chapter 10) and its military actions are neither necessarily nor systematically followed by judicial action (see chapter 9.3). In other words, the judicial tasks and related competences are not inextricably linked to the CFSP objectives of this Joint Action and not genuinely located in the centre of gravity of its CFSP related objectives.

Apart from this conclusion, it could also be ascertained that not the (effectively participating) Member States but the Union bears the primary responsibility for the conduct of all mission tasks, including the judicial assignments. EUNAVFOR has been entrusted with the authority to perform all previously identified judicial assignments and can be regarded as the 'seizing' power.

Notwithstanding, the fact that these tasks can also be performed in view of prosecutions potentially brought by third states, they are all to be executed by Union officials or under its supervision. However, no advance knowledge is available to them about the state of destination, nor whether a suspect will be released or transferred at all. Judicial decisions concerning specific individual cases are also not made subject to the flag of the vessel threatened or attacked by a suspect. The Atalanta Joint Action does not categorize suspects (e.g. between those having threatened or attacked EU vessels or other vessels) and does not make their transfer subject to such types of categorisation. Theoretically, all suspects could be handed over to Member States' courts. In other words, the Union needs its own procedural rules governing the powers to perform these tasks. Union officials cannot be enabled to act as the extended arm of Member States or third states applying – according to circumstances – their respective rules with regard to the arrest and detention etc. of suspects.

However, such jurisdictional rules have not been established and cannot be found in the CFSP area either. They are not related to its main objectives but to police and judicial cooperation in criminal matters.[173] In other words, they are pertaining to the internal dimension of the AFSJ and the development of common action among the Member States in order to provide citizens with a

[173] See chapter 9 and *supra* note 138.

high level of safety.[174] In particular could be thought of EU rules ensuring on the one hand the competence of EU officials to may arrest and transfer suspects of maritime piracy and collect private data, and on another hand, the compatibility between the criminal procedures of EU Member States necessary to improve EU cooperation.[175] Rules preventing conflicts of jurisdiction should supplement those criminal procedural rules.[176] Fulfilling this requirement could have resulted in an instrument provided with a dual legal basis, one related to the necessary powers for acting in conformity with objectives of the CFSP area and the other to AFSJ policy. Under the former TEU this dual legal basis would not have been subject to the Article 47 TEU test while both areas were forming part of the same legal compartment, the TEU, governed by the same legal and legislative procedures.[177] Consequently, it would not have run counter to established ECJ jurisprudence.[178] And by applying a way of reasoning analogous to ECJ jurisprudence it could be asserted that this dual legal basis would have been effectively and legally possible: '...*a measure which simultaneously pursues a number of objectives or which has several components, without one being incidental to the other, the Court has held, where various legal bases of the EC Treaty* [(in the concerned Atalanta case: various legal bases of the EU Treaty)] *are therefore applicable, that such a measure will have to be founded, exceptionally, on the various corresponding legal bases*….'.[179] However, with regard to establishing necessary rules governing its internal judicial competence and cooperation on piracy, the Union abstained from acting.[180]

Taking into account all of these considerations, no genuine powers seem to be found within the CFSP remit to pursue the above-mentioned specific judicial assignments. Transfers of piracy suspects to third countries, based on international agreements do constitute an exception to this conclusion. This conclusion in no way amounts to stating that the judicial follow up actions of the military mission should be disregarded and not performed. On the contrary, as has been established, these actions are necessary in view of implementing UNSCRs and in making the mission more effective. It is argued only that a separate legal basis, and probably an additional instrument to enable performance of these actions, are needed to complement the Atalanta Decision.

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[174] Art. 29 former TEU, first paragraph: 'Without prejudice to the powers of the European Community, the Union's objective shall be to provide citizens with a high level of safety within an area of freedom, security and justice by developing common action among the Member States in the fields of police and judicial cooperation in criminal matters and by preventing and combating racism and xenophobia.'

[175] Art. 31(1)(c) TEU (Nice).

[176] Art. 31(1)(d) TEU (Nice).

[177] See P. Eeckhout, *supra* note 151.

[178] ECJ, Case C-300/89, *Commission of the European Communities* v. *Council of the European Communities*, [1991] ECR I-02867, paras. 17-21.

[179] ECJ, Case C-91/05, *Commission of the European Communities* v. *Council of the European Union*, [2008] ECR I-03651, para. 75.

[180] Under the Lisbon Treaty a remedy for this legal vacuum could be founded on Art. 82 TEU. Probably a new legal instrument would be needed in order to provide for a separate legal base remedying this vacuum.

A distinct legal basis, outside the CFSP sphere, would also be justified by being helpful in clarifying the nature and scope of the needed powers. It would have contributed to providing answers to questions regarding the delineation and supplement of these powers to those of the Member States' judicial authorities. Finally, a distinct legal basis would also be justified to help clarify the applicable rules for the enforcement of EUNAVFOR's judicial mandate. Defining the rules of enforcement would have amounted to setting the (minimum) rules of criminal procedure applicable to EUNAVFOR's way of exercising this mandate. The need for such a set of rules has been set out in the preceding section 11.

In conclusion, the absence of a distinct legal basis qualifying the specific chain of actions exercised by EUNAVFOR under its judicial mandate might be considered to have led to the absence of common (minimum) rules of criminal procedure applicable to this chain of actions. All of this is needed to be able to lawfully transfer piracy suspects to third countries (on the basis of international agreements) and EU Member States alike.

Secondly, without a proper legal basis it is hard to challenge at the ECJ whether judicial decisions are rightly taken by EUNAVFOR pursuing the above mentioned chain of criminal justice tasks. Now, in concrete cases, it seems accepted that national judicial authorities take all responsibility for pursuing these tasks.[181] Moreover, in accordance with Article 276 TFEU, the ECJ has no jurisdiction to review the validity of or proportionality of operations carried out by the Member States' police or other law-enforcement services. Therefore suspects of piracy are barred from recourse to the ECJ.

In general, the ECJ cannot assert jurisdiction with respect to CFSP provisions nor with respect to acts based upon those provisions. However, in accordance with Article 275 TFEU the Court has jurisdiction to review the legality of decisions providing for restrictive measures against natural or legal persons taken on the basis of a CFSP instrument. In other words, a positive judicial decision regarding the Union's competence in this matter would open up the door to judicial redress through the ECJ. Such a decision needs to be acquired, e.g. through a preliminary ruling asked for by a national judge on the scope and validity of this act of the Union. Depending on the outcome, a basis could be created to provide a remedy through the ECJ for suspects of piracy to challenge decisions as taken by EUNAVFOR regarding their detention, transfer and transmittal of personal data.

12. SUMMARY AND CONCLUSIONS

Fighting maritime piracy poses military and legal challenges. In many respects, fighting piracy off the Somali coast pre-eminently exposed those challenges to

[181] According to a seminar report of the EUISS judicial actions against suspects of piracy are taken place in a national criminal procedure; see *supra* note 135.

the post-modern world.[182] Somalia, as a failed state belonging to the pre-modern world, was not able to exercise the monopoly of power over its territory, enabling the upsurge of maritime piracy off its coast.[183,184] The international community, assembled under the UN aegis and its Security Council faced up to this challenge and took a range of decisions aimed at providing protection to convoys of the World Food Programme (WFP) sailing to Somalia and to implement effective measures to crack down on acts of piracy off the Somali coast and those threatening the provision of humanitarian aid. Since 2008, the UNSC has issued resolutions authorising states to fight against piracy and armed robbery on the high seas, in the territorial waters of Somalia (with advance notification to its Transitional Federal Government, TFG) and in Somalia itself. To that end, states were legally empowered to use 'all necessary means' under Chapter VII of the UN Charter to provide protection to WFP and commercial vessels and to fight against pirates. Within the same framework, the UNSC also called on 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.

Concerns about the disturbing consequences of Somali piracy for the provision of humanitarian aid, as well for (its) commercial shipping using sea routes through these waters prompted the EU to launch its first maritime military operation, called Atalanta, against these acts of piracy. In accordance with the Treaty based rules and commitments undertaken by the EU towards the UN, the EU availed itself of the UNSC legal framework which was also enacted due to initiatives and efforts made by France and the UK as the members of the Security Council. Accordingly, the EU decided to implement both main objectives, viz the fight against Somali piracy with military means (the military part), and a criminal law part consisting of the detention, investigation and collection of personal data of suspects of piracy and armed robbery (through criminal law instruments), and their transfer to relevant states (by means of international agreements) in view of prosecutions potentially being brought against them.

Seemingly akin to the UN approach, the EU adopted a single instrument comprising both parts. Without much of a debate regarding possible differences of the scope and objectives of both parts, the Council considered acting towards piracy off the Somali coast as a matter falling entirely within the remit of its Common Foreign and Security Policy (CFSP). Consequently it adopted in November 2008 a Joint Action, a pre-Lisbon CFSP instrument. An EU naval force (EU NAVFOR), called Atalanta, with a 'robust' mandate was dispatched to the Somali waters, directed by the EU operation Commander based at EU naval Headquarters in the UK.

Though in all respects supportive of the relevant UNSC resolutions, the question might be raised as to whether, according to the EU's legal system,

[182] R. Cooper, *The breaking of nations; Order and chaos in the twenty-first century* (London: Grove Press 2004), revised edition.

[183] Ibid., at 16.

[184] On Somalia as providing an 'enabling environment' for acts of piracy, see Lehr, Peter, Hendrick Lehmann, (p.11), see *supra* note 91.

both parts should have been subsumed under the CFSP. A close examination of both parts made clear that the military dimension of the Atalanta operation seems very much in conformity with relevant international law, especially UNCLOS, and fully fits into constitutionally provided CFSP objectives. The Joint Action is primarily designed as a military instrument entailing a Mission statement defining the action, rather one-dimensionally as a military operation pursuing military related objectives only. Under this overall heading, a mandate subsequently also provides for tasks fitting within the criminal law part. Over time and largely in harmony with the gradual expansion of the criminal law objectives of the UNSC resolutions, the Atalanta criminal law objectives got extended too. Through a cooperation arrangement with INTERPOL, even sensitive personal data from suspects of piracy but also from persons intending to do so, extracted from their mobile phones and GPS devices, could apparently be collected by EU NAVFOR and transmitted to the international police organisation. The question was posed whether this arrangement was established in a legally correct way, procedurally and from a substantive point of view. The Joint Action stipulated that personal data other than that enumerated was to be excluded.

The main question regarding the criminal law part, however, pertains to whether this part of the action has been rightly subsumed within the CFSP area and the competences and procedures ensuing there from. In this regard, the Union acted in a twofold way. One way, by establishing agreements with third states on the transfer of suspects of piracy. And secondly, by way of EUNAVFOR acting as a judicial authority empowered to arrest, detain and collect personal data of criminal suspects in view of a potential prosecution which might be brought against them in Member States' courts or in those of third states. Generally speaking, the concluding of international agreements, and most probably also the concerned agreements on the transfer of criminal suspects, falls within the scope of CFSP objectives. Yet this could not be asserted with regard to the criminal law competences needed to act as a judicial authority. In this regard it is a unique mission. No Union mission ever before has been entrusted with such competences.

The military and judicial objectives certainly are closely linked. Both are in support of constitutionally provided CFSP objectives, such as helping to preserve peace and strengthening international security. Inserting them both into a single CFSP instrument contributes to enhancing the overall coherence of this policy area and is an efficient way of acting on the international scene. However, it could not be concluded that the above-mentioned criminal law measures are incidental to the military ones. Neither legally, nor practically, did it appear that military action has to necessarily and/or systematically be followed by judicial action. Besides, though both types of measure are in support of strengthening international security, the mission also helps to safeguard external and internal security interests of the Union itself. Internal security is directly related to the providing of assistance and safety to vessels and their crews sailing under the flag of an EU Member State. It appears that no method is available to determine unequivocally which of these security interests should

take precedence. Consequently, the Joint Action should be legally based also on competences conferred upon the Union in the Area of Freedom, Security and Justice (AFSJ).

Further, it could be ascertained that acts such as arresting persons as criminal suspects, detaining them and the gathering of their personal (sensitive) data, with a view to prosecuting them are all tasks to be performed by the Union (viz. EUNAVFOR). No powers enabling their exercise are conferred on the Union within the CFSP area (not in the Pre-Lisbon nor Lisbon treaties). Nor could it be ascertained that previous or current EU missions have been entrusted with these powers. Besides, such measures are in support of the internal safety of the Union. The concerned suspects can and are handed over to the EU Member States' judicial authorities and they are prosecuted in view of the safety of the Union in general and the concerned Member State in particular. Both reasons point into the direction of also needing a legal basis derived from the AFSJ. Under the pre-Lisbon legal system this could have been done through inserting a dual legal basis in one instrument, and under Lisbon rules, through adopting a second legal instrument in connection with a Common Security and Defence Policy (CSDP) instrument.

The consequence of pursuing this one-way approach in an area lying at the cross roads of the CFSP and the AFSJ seems to be that the Union failed to provide itself with the necessary competences to conduct the defined chain of judicial acts. The Union is the principal actor and bears the primary responsibility for ensuring that criminal law cases against suspects of piracy are handled in accordance with minimum rules, including guaranteeing fundamental freedoms and human rights, and are subsequently handed over to Member States' prosecutorial authorities. This twin track approach is needed with a view to transferring these suspects to third countries as well. The defined chain of judicial acts are preceding these transfers and constitute an indispensable condition. The same minimum rules are needed to ensure that these are performed in an equally proper way. These additional requirements are not to be regarded as providing new obstacles to comprehensive EU external action but instead, as forming part of a horizontal approach involving different strands of EU policy.[185] The fulfilment of these requirements would have lead also to a less compromising counter piracy policy and the combating of maritime pirates could have been more effectively conducted.

[185] S. Blockmans and M. Spernbauer, 'Legal Obstacles to Comprehensive EU External Security Action', 18 *European Foreign Affairs Review* 2013, 7–24.