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WIDENING THE HUNTRESS'S REACH:*
LEGAL AND STRATEGIC ASPECTS OF A NEW ATALANTA
MANDATE

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**Operation Atalanta is named after a huntress in Greek mythology.*

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Summary

The Council of the European Union decided to extend the ATALANTA mandate geographically to include Somali coastal territory and internal waters on the 23rd of March 2012 in its Council Decision 2012/174/CFSP. This decision, which still needs the sanction of national parliaments to allow all ATALANTA forces to act accordingly, has been the subject of criticism ever since. This briefing paper examines some of the questions raised in this context. It addresses the challenges against the legality of the new mandate and arrives at the conclusion that it is, in fact, legal under international law with respect to Somali sovereignty and the applicable human rights law. The brief also comments on the strategic drawbacks of the widened mandate. Despite all of these shortcomings, it is the authors conviction, that the new mandate, if implemented carefully, will add to the toolbox of the ATALANTA forces a tool, which will prove to be useful in the struggle against Somali piracy.

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Introduction

When assessing new strategies and approaches to anti-piracy operations, one has to resist the temptation of adopting a “nothing works”-approach. Indeed every policy employed by the international community against piracy off the coast of Somalia has so far been subjected to legitimate criticism. When the Council of the European Union decided to extend the ATALANTA mandate geographically to include Somali land territory and internal waters on the 23rd of March 2012 (Council Decision 2012/174/CFSP), again this new approach was greeted with criticism and concern by commentators of various backgrounds. It is important to highlight what the Council actually decided: it intends for the ATALANTA forces to disable skiffs, arms, gas supplies and other infrastructure of the pirates on shore. It does not however envisage boots on the ground of Somalia. A controversial debate is now ongoing regarding this decision. Some levelled the charge of illegality under international law, some highlighted strategic deficiencies of the EU’s decision (see Archer 2012). This brief seeks to address some of the criticism and develop an understanding of the decision’s consequences.

In short, will the new mandate solve the problem and end piratical attacks on vessels thus ensuring the safety of crews, vessels and cargo? The answer would have to be an emphatical *no*. However, the question if this decision may prove to be a valuable tool in counter-piracy operations would have to be answered with a *yes* of equal emphasis.

On international law - Sovereignty

Concerning the international legality of the new mandate, which still needs to be sanctioned by parliaments, amongst them the German Bundestag, several aspects

seem to be the topic of criticism. A logical first challenge against such operations is the sovereignty of the state in which the operations are conducted. While Somalia is popularly categorized as a failing state, this does not mean it lost its sovereignty (Thürer 2009, para. 12). Despite this, no criticism of the new mandate on the basis of Somali sovereignty has a foundation in international law. First, the Transitional Federal Government of Somalia (TFG) consented to operations on land in general (see SC Resolution 1851, UN Doc. S/RES/1851, op. para 6; Schaller, p. 68 et seqq.; Treves (2009), 406 et seqq.) and to the case at hand, the widening of the ATALANTA mandate (see Council Decision 2012/174/CFSP, preambular para. 9 et seq.). Second, to make assurance double sure, the Security Council explicitly allowed operations on shore for the first time in Security Council Resolution 1851, although subject to the consent of the TFG: “for a period of twelve months from the date of adoption of resolution 1846, States and regional organizations cooperating in the fight against piracy and armed robbery at sea off the coast of Somalia for which advance notification has been provided by the TFG to the Secretary-General may undertake all necessary measures that are appropriate **in** Somalia, for the purpose of suppressing acts of piracy and armed robbery at sea, pursuant to the request of the TFG, provided, however, that any measures undertaken pursuant to the authority of this paragraph shall be undertaken consistent with applicable international humanitarian and human rights law” (SC Resolution 1851, UN Doc. S/RES/1851, op. para 6, emphasis added, see also Treves (2009), 404). This authorization was renewed on the 22nd of November 2011 by SC Resolution 2020 (UN Doc. S/RES/2020 (2011)) for 12 more months. A challenge against the legality of the new mandate on the basis of Somali sovereignty therefore fails.

On international law – Humanitarian Law and Human Rights

Objections may also be raised concerning the actions allowed by the new mandate themselves. There has been some confusion on this point and media jumped quickly on a statement made by *Reinhard Bütikofer*, Vice-President of the Greens/EFA group in the European Parliament, allegedly labeling the new mandate illegal under international law by saying it would be illegal to shoot Somali pirates posing no immediate threat (*Bütikofer* (2012)). These allegations may lead us to examine the legal background a little further, although they prove to be unconvincing at the factual level already, since *Bütikofer* merely states targeted killings would be illegal under the circumstances, a measure the new mandate is not seeking to adopt.

As a starting point, it is important to assess which legal regime is applicable to counter-piracy operations on land. Human rights will generally apply. However, humanitarian law, if applicable, prevails as *lex specialis* (ICJ, Nuclear Weapons Case, para. 25; *Dederer* (2010), para. 5). In Somalia there is a non-international armed conflict ongoing (*Neumann/Salomon* (2011), 166 et seq.; *Alasow* (2010), 133 et seq.). As such, the humanitarian law of non-international armed conflicts generally applies. The UN expert on the situation of human rights in Somalia *Mona Rishmawi* stated already in 1999: “*international humanitarian law relating to non-international armed conflict applies in the whole territory of Somalia, irrespective of whether a specific area is engulfed in active fighting or not.*” (UN Doc. E/CN.4/1999/103 of 18 February 1999, para. 33). Yet it is important to stress that an important focus of this legal regime is personal not geographical. While the determination of an existing armed conflict needs geographic borders, within those borders the right to operate against the enemy only applies to the State and non-State actors who are parties to the conflict,

while other parties that are taking no active part in the hostilities have no such right and are subject to protection under international humanitarian law (see common Art. 3 of the 1949 Geneva Conventions)¹.

The drafting of Security Council resolution 1851 shows an unfortunate lack of precision with regard to the applicable rules. Unavoidably, the question arises what the Security Council meant when it referred to the “*applicable international humanitarian [...] law*” with regard to counter-piracy operations. *De lege lata* these operations are not subject to the law of armed conflict as the pirates are clearly no party to the conflict (*Neumann/Salomon* (2011), 166 et seq.; *Guilfoyle* (2010), 144; *Schaller* (2010), 67 et seq.). One possible reading would be to restrict the allowable actions under the resolution to those actions allowed by the general principles of the law of armed conflict with regard to civilians (*Kontorovich* (2009)). This would however effectively mean to limit allowable counter-piracy actions to self-defense and actions against pirates taking up arms and actively participating in the armed conflict, actions unrelated or at least distant to the pirates’ everyday activities. Thus this interpretation proves to be an illogically restrictive reading of a resolution which on its face sought to authorize the use of all necessary measures against pirates and not to disallow them. Another reading would be to see in this reference effectively a decision of the Security Council to regard the pirates as legitimate targets under international humanitarian law and allow all actions against them which this legal regime deems permissible (*Heintschel von Heinegg* (2010), 67). However, contrary to this position, the wording clearly suggests

¹ The Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (1979) is not applicable for Somalia although its threshold would be exceeded, since Somalia is not a party to the protocol.

that the Security Council sought to restrict the scope of allowable actions under the resolution by the reference to humanitarian law rather than widening it (“*however, that any measures undertaken pursuant to the authority of this paragraph shall be undertaken consistent with applicable international humanitarian and human rights law*”, SC Resolution 1851, UN Doc. S/RES/1851, op. para 6). Consequently, most commentators give the “humanitarian law”-reference only minor weight and see in it a statement clarifying that “the exercise of enforcement jurisdiction vis-à-vis pirates is subject to certain legal restraints” (Geiß (2009), 140) or interpret it as a “savings clause” (Guilfoyle (2010), 144; cf. Schaller (2010), 67 et seq.) with which the Security Council sought to address or possibly preempt a development in which the pirates would need to be regarded as insurgents. Absent such a development, the law of armed conflict remains inapplicable to counter-piracy operations. Thus this reference under the current circumstances does not restrict the actions permissible under the resolution.

Consequently, human rights law remains as a yardstick of actions pursuant to Resolution 1851 and the new ATALANTA mandate as such. In this regard, the clear intention of the mandate seems to be to enable the EU forces operating off the coast of Somalia to disrupt pirate logistics by targeting pirate paraphernalia. It is not the intention of the EU to target pirates themselves by airstrikes, so questions surrounding targeted killings as law enforcement measures do not need to be addressed here (for this see Schaller (2012), 20 et seqq.). While mere property falls under the protection of certain human rights treaties, it is by far not universally protected, being outside the scope of the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights due to ideological disputes in the mid 1960s (Kriebaum/Reinisch (2009), para. 7). Admittedly, this does not

mean that the right to property should not be regarded in counter-piracy operations at all, but the standard for justification of interference with property rights will not be prohibitive in these constellations (in general Kriebaum/Reinisch (2009)). It is most likely that operations to disable pirate equipment will regularly fulfil this standard, as they are not arbitrary infringements and will generally meet proportionality requirements.

A remaining question regards casualties. While the EU has committed itself to the protection of life by intense military reconnaissance and by using precise weaponry in conducting the operations, it is an unfortunate fact that the occurrence of human harm can never be precluded entirely. Such harm may affect the legality of the specific action by which it is caused. In this regard, there may be investigations by the authorities of the acting states. However, it is quite clear that such an event will not affect the legality of the new mandate itself, although it cannot be stressed enough that the forces should do everything in their power to prevent loss of life and the occurrence of harm in general from happening.

A word on strategy

While the legal analysis proves to be favorable to the widened mandate, the strategic assessment turns out to be less enthusiastic. It is by now common knowledge that pirates will adapt their tactics to new approaches by the counter-piracy forces. The recent years have been testament to this fact: attacks by multiple skiffs as an answer to evasive maneuvers and private security, rising brutality against hostages in response to prolonged ransom negotiations, the use of hostages as human shields on motherships to prevent attacks by the counter-piracy forces, the list goes on and on (see also Petretto (2012), 29 et seq.). Consequently, it seems likely that the pirates will adapt to the new mandate as

well e.g. by using human shields, or relocating to safer ground - by moving inland. Such relocation will certainly ensue should the details of the new mandate, the operation plan or the mandates of the national parliaments become public. Unfortunately, it seems as if the German Bundestag will only decide on a mandate when it publicly specifies the maximum distance the German forces are allowed to go inland under the new ATALANTA mandate. This makes relocation a very efficient option for Somali pirates and is to be regretted, especially because the European Union has fought hard to keep these specifics secret during the negotiations, because of the obvious adverse implications a public disclosure would have.

Another justified fear is the relocation of pirate groups to *al-Shabaab* controlled regions. Reports suggest that at least some pirate groups are already deliberating such a move, in order to be better protected against any future operations by the EU forces (*Adan/Beerdhige* (2012)). Operations against pirates in these regions will prove to be more difficult than in the rest of Somalia given the military struggle between the *al-Shabaab* and the pro-government forces. Moreover, it has been a common practice of the pirates operating from regions under the control of insurgents to pay as “protection money” a portion of the ransom payments (*Kolb/Salomon/Udich* (2011), 112 et seq.). Consequently, driving the pirates to *al-Shabaab* controlled regions may contribute to the *Shabaab*'s endeavours to further destabilize the region.

Another justified strategic concern relates to the trauma the international community has had to suffer during the UN missions in Somalia, which resulted in the infamous *Black Hawk Down* incident. The concern is twofold: First regarding the safety of the soldiers participating in these missions, especially since there have been rumors that shoulder-held missile launchers from Libya, which may pose a significant threat

to helicopters have found their way to Somali pirates (*Roelf* (2012)). Second concerning the militarization of the situation and the perception of partisanship of the forces, the latter of which having been a key cause for the failure of the prior UN missions (cf. *Spilker* (2008), 21 et seq.). These lessons need to be learned. It is already a difficult task to convince the Somali population that the pirates are not protecting Somali interests and the EU forces are not in the region to merely safeguard their own economic interests by protecting illegal fishing activities (see *Ehrhart/Petretto* (2012), 36). This will not be made easier when force is used on shore and helicopters effectively smoke pirate camps out, in the worst case targeting the camps of fishermen by mistake.

However, these well-founded fears and the flexibility of the pirates should not prevent the realization of the new mandate. As stated in the introduction, a “nothing works”-approach would be nothing less than a capitulation of the international community to criminal gangs. Depending on how it will be implemented, the new mandate will contribute to putting a higher pressure on the pirate networks. Seeing that Somali piracy aims at maximizing profit, the abstract pressure posed by military forces able and willing to operate against piracy on shore and certainly the destruction of logistics and supplies will affect the cost-benefit calculation of the pirates (*Ehrhart/Petretto* 2012: 32 et seq., 47). In conclusion, while the new mandate has strategic drawbacks, it will in specific instances enable the ATALANTA forces to do what needs to be done in order to disrupt pirate activities where they emanate from.

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