EUNAVFOR OPERATION ATALANTA OFF SOMALIA: THE EU IN UNCHARTERED LEGAL WATERS?

EFTHYMIOS PAPASTAVRIDIS*

Abstract EUNAVFOR Operation Atalanta has been the first maritime operation of the European Union and it has certainly been successful given the significant decrease of pirate attacks off the Somali coast. However, various issues have been raised concerning its legal basis under international law and its legal framework, including questions of responsibility. These issues are particularly interesting since the EU has a more integrated legal order than other organizations involved in such operations (eg UN, NATO). The present article attempts to address these issues against the background of international and European law. Even though the legal basis of the Operation is clear from a European law perspective, there have been certain misconceptions concerning the legal basis of the Operation under international law. The delineation of the Operation's legal framework requires a careful analysis of the rules applicable to each of its phases and of its addressees, since each phase is subject to different rules which are binding on different actors. Finally, there is an extensive discussion of questions of responsibility, which were heavily influenced by the applicable Rules of Engagement and of the actual conduct of the Operation. The conclusion is that, at least on the high seas, responsibility should primarily rest with the flag States rather than with the EU. However, in most cases the EU is indirectly responsible for violations of international law, except in cases where suspected pirates are transferred to third States pursuant to EU agreements with such States, in which case it bears primarily responsibility.

Keywords: EU Common Security and Defence Policy, human rights, Law of the Sea, piracy, responsibility.

* Part-time lecturer in public international law, Democritus University of Thrace and Research Fellow, Academy of Athens, papastavridis@academyofathens.gr. This article is a revised version of a paper presented at the International Law Association-British Branch Spring Conference (University of Oxford, 12–13 April 2013). I am thankful to Professor Dapo Akande and Professor Antonios Tzanakopoulos for their kind invitation. Also I am indebted to Professor Konstantinos Antonopoulos (Democritus University of Thrace), Dr Panos Merkouris (University of Groningen), Sotirios-Ioannis Lekkas (University of Oxford) and Nikolaos Voulgaris (King's College London) for having read and commented on previous drafts. The usual disclaimer applies.

[*ICLQ* vol 64, July 2015 pp 533–568] doi:10.1017/S0020589315000214

I. INTRODUCTION

On 10 November 2008, the first maritime operation of the European Union (EU) was launched (EUNAVFOR Operation Atalanta) pursuant to the Council Joint Action 2008/851.[1] Its mission was set out in Article 1 as follows:

> The European Union (EU) shall conduct a military operation in support of Resolutions 1814 (2008), 1816 (2008) and 1838 (2008) of the United Nations Security Council (UNSC), in a manner consistent with action permitted with respect to piracy under Article 100 et seq. of the United Nations Convention on the Law of the Sea.[2]

While Operation Atalanta was scheduled only for a year, its mandate has been prolonged on several occasions, most recently until December 2016.[3]

Without doubt, this Operation, along with the concerted efforts of NATO and other States individually, has contributed to the significant reduction of piracy off the coast of Somalia.[4] This does not mean that piracy has become extinct in Africa. On the contrary, in addition to the remaining attacks off the coast of Somalia,[5] there is increased pirate activity off the coasts of Central and Western Africa, especially in the Gulf of Guinea.[6] This has already been condemned by the Security Council[7] and has sparked reaction from States in the region.[8]

[1] On the legal basis of the Operation and its everyday activities see at <http://eeas.europa.eu/csdp/missions-and-operations/eu-navfor-somalia/> and at <http://eunavfor.eu/>.

[2] European Union, Council Joint Action 2008/851/CFSP of November 10, 2008 on a European Union Military Operation to Contribute to the Deterrence, Prevention and Repression of Acts of Piracy and Armed Robbery off the Coast of Somalia, 2008 OJ (L 301) 31–37 (EU). See also European Union, Council Decision, 2012/174/CFSP of 23 March 2013 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, 2012 OJ L 89–69.

[3] On 21 November 2014 the Council of the EU extended the mandate of Operation Atalanta until December 2016; see <http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/EN/foraff/145902.pdf>.

[4] See the most recent Report of the Secretary-General on the situation with respect to piracy and armed robbery at sea off the coast of Somalia, S/2014/740 (16 October 2014) at para 3.

[5] There were reports of 13 incidents of piracy off Somalia reported to the International Maritime Organzation the first three quarters of 2014; ibid.

[6] Pirate activity in the Gulf of Guinea differs to that in the Indian Ocean. Somali pirates focus on kidnap for ransom, capturing vessels and holding their cargo and crew in order to extract money from a shipowner. In the Gulf of Guinea pirates launch attacks primarily from Nigeria, with the aim of stealing cargo, equipment or valuables from a vessel and its crew. Of the 58 incidents of attempted and successful piracy/armed robbery in the Gulf of Guinea that were reported to the International Maritime Bureau (IMB) in 2012, 37 involved the use of firearms. In the first three months of 2013 15 incidents (including three successful hijackings) were recorded. See A Anyimadu, 'Maritime Security in the Gulf of Guinea: Lessons Learned from the Indian Ocean' Chatham House (July 2013) 5; <http://www.chathamhouse.org/sites/files/chathamhouse/public/Research/Africa/0713pp_maritimesecurity_0.pdf>.

[7] See UN Security Council Resolutions 2018 (2011) and 2039 (2012).

[8] See the Code of Conduct concerning the Prevention and Repression of Piracy, Armed Robbery against Ships, and Illegal Maritime Activities in West and Central Africa; S/PRST/2013/13 (14 August 2013); <http://www.un.org/News/Press/docs/2013/sc11091.doc.htm>.

The EU has been instrumental not only in the prevention of piracy at sea but also in facilitating the prosecution of suspected pirates. It is sad but true that the number of prosecutions of arrested pirates have been proportionally low in comparison to the volume of pirate attacks since 2008.[9] The difficulties in prosecuting suspected pirates have been extensively analysed in academic literature.[10] To address the reluctance of EU Member States to prosecute captured pirates the EU has opted to enter into memoranda of understanding with countries in the region, for example Kenya, Seychelles, Mauritius and Tanzania, with a view to transferring suspects over to them.[11] It is also negotiating similar agreements with Mozambique, South Africa and Uganda.[12]

It is submitted that Operation Atalanta, which marks the increasing presence of the EU on the international plane and, *in casu*, in the maritime domain, poses several legal questions: first and foremost, what is the legal basis of the Operation under both international and European law? Other questions include what legal framework is applicable to the Operation? Is the Union bound by the totality of the rules of the law of the sea, including the 1982

[9] As reported by the 2012 Report of the Secretary General, '[a]s at 30 September 2012, according to information available with UNODC, 1,186 individuals suspected of piracy had been prosecuted or were awaiting prosecution in 21 States: Belgium, Comoros, France, Germany, India, Italy, Japan, Kenya, Madagascar, Malaysia, Maldives, Netherlands, Oman, Seychelles, Somalia, Republic of Korea, Spain, United Arab Emirates, United Republic of Tanzania, United States and Yemen'; see UN Security Council, Report of Secretary-General pursuant to Security Council Resolution 2020 (2011)', S/2012/783, 22 October 2012, at para 44. According to the 2013 Report, 'countries in the region supported by the Counter-Piracy Programme continue to receive individuals suspected of piracy for prosecution. In total, 53 suspects remain on remand in Kenya, Mauritius and Seychelles, with the Programme supporting their trials; Report of the Secretary-General on the situation with respect to piracy and armed robbery at sea off the coast of Somalia, S/2013/623, 21 October 2013, at para 45.

[10] See *inter alia* E Kontorovich, 'A Guantanamo on the Sea: The Difficulty of Prosecuting Pirates and Terrorists' (2010) 98 CLR 243; J Ademun-Okede, 'Jurisdiction over Foreign Pirates in Domestic Courts and Third States under International Law' (2011) 17 JIML 121, 124–6. See also the various contributions to Symposium: 'Testing the Waters: Assessing International Responses to Somali Piracy' (2012) 10 JICJ.

[11] See Exchange of Letters between the EU and the Government of Kenya on the conditions and modalities for the transfer of persons suspected of having committed acts of piracy (6 March 2009); 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 (2 December 2009); Agreement between the European Union and the Republic of Mauritius on the Conditions and Modalities for the Transfer of Suspected Pirates and Associated Seized Property from the European-led Naval Force to the Republic of Mauritius and on the Conditions of Suspected Pirates after Transfer (14 July 2011) and Agreement between the European Union and the United Republic of Tanzania on the conditions of transfer of suspected pirates and associated seized property from the European Union-led Naval Force to the United Republic of Tanzania (11 April 2014). The text of the agreements with Kenya, Seychelles and Mauritius and all relevant information are available at <http://www.eeas.europa.eu/csdp/missions-and-operations/eu-navfor-somalia/background-material/index_en.htm>. For the agreement with Tanzania see <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:22014A0411(01)&from=EN>.

[12] See further discussion in D Thym, 'Transfer Agreements for Pirates Concluded by the EU—a Case Study on the Human Rights Accountability of the Common Security and Defence Policy' in P Koutrakos and A Skordas (eds), *The Law and Practice of Piracy at Sea. European and International Perspectives* (Hart Publishing 2014) 167.

United Nations Convention on the Law of the Sea (LOSC)? Moreover, in terms of the law of international responsibility, if there are breaches of relevant international legal obligations in the course of the Operation, will these breaches be attributed to the EU itself or to the Member States? Is there room for dual attribution or for the indirect responsibility of the Union?

Similar questions arise also in cases of transfer of suspected pirates to third States pursuant to the bilateral agreements entered into by the EU. Who bears responsibility for a violation of human rights law? Interestingly, on 11 November 2011, the administrative court of Cologne ruled that Germany and not the EU had violated the prohibition of torture, inhuman and degrading treatment by transferring suspected pirates to Kenya pursuant to the EU–Kenya agreement.[13]

This article addresses these questions and sets out the contours of Operation Atalanta under international law. It argues that the Operation should not be assessed as a single event, but that each of its various phases should be the subject of appraisal in the light of the applicable rules of international law and of international responsibility.

Accordingly, this article will first, briefly discuss the legal basis of the Operation from the perspective of European law. It will then shift its focus to international law and canvass its legal basis and the rules of international law applicable to each phase of the Operation; this will be followed by an analysis of issues concerning international responsibility in each of these phases. Drawing insights from the practice of the Operation per se, the paper will conclude that the EU has entered into chartered, yet muddy, waters.

II. THE LEGAL FRAMEWORK OF OPERATION ATALANTA UNDER EU AND INTERNATIONAL LAW

A. Operation Atalanta as Part of the Common Security and Defence Policy of the Union: The Legal Framework of CSDP Operations under EU Law

Operation Atalanta was the first operation of the European Union in the maritime domain,[14] but not the first mission of the EU within the framework of the Common Security and Defence Policy (CSDP).[15] The number of CSDP missions has been steadily increasing. There have been over 20 CSDP

[13] *Re 'MV Courier'* [2011] 25 K 4280/09 (Verwaltungsgericht Köln, 25. Kammer).

[14] A second operation is about to be officially launched in relation to counter smuggling of migrants in the Mediterranean Sea. On 18 May 2015, the European Union decided to conduct 'a military crisis management operation contributing to the disruption of the business model of human smuggling and trafficking networks'; see art 1 of the Council Decision (CFSP) 2015/778 on a European Union military operation in the Southern Central Mediterranean (EUNAVFOR MED); OJ L 122/31 (19.5.2015) (EU).

[15] On the Operation Atalanta in general see E Tonelli, 'The EU Fight against Piracy in the Horn of Africa: The External Action at Stake' in G Andreone *et al.* (eds), *Insecurity at Sea: Piracy and other Risks to Navigation* (Giannini Editore 2013) 53 and R Gosalbo-Bono and S Boelaert, 'The European Union's Comprehensive Approach to Combating Piracy at Sea: Legal Aspects' in P

missions in third States, covering aspects of both military and civilian crisis management.[16] Since the Lisbon treaty created a single legal personality for all EU activities, this legal personality covers *inter alia* the activities of the EU in the framework of the common foreign and security policy, including CSDP crisis management operations. But even prior to the Lisbon treaty, it was persuasively argued that the 'Union anyway fulfilled the criteria for an international organization to enjoy international legal personality, set out by the International Court of Justice (ICJ) in 1949'.[17] This assertion was warranted also by the various international agreements concluded by the EU in the context of its European Defence and Security Operations.[18] Therefore, acts of CSDP missions can under certain conditions be attributed to the Union.[19]

As to the legal basis of CSDP operations under EU law, Article 42(1) of the Treaty on the European Union (TEU)[20] provides that the CSDP 'shall provide the Union with an operational capacity drawing on civil and military assets. The Union may use them on missions outside the Union for peace-keeping, conflict prevention and strengthening international security in accordance with the principles of the United Nations Charter'. Article 43 of the TEU adds that these missions

> shall include joint disarmament operations, humanitarian and rescue tasks, military advice and assistance tasks, tasks of combat forces in crisis management, including peace-making and post-conflict stabilisation' and may all 'contribute to fight against terrorism, including by supporting third countries in combating terrorism in their territories.

The basic legal instrument governing each CSDP operation is a Council decision, based on Articles 43 and 28 of the TEU, adopted in accordance

Koutrakos and A Skordas (eds), *The Law and Practice of Piracy at Sea. European and International Perspctives* (Hart Publishing 2014) 81, especially 87–134.

[16] As of October 2014, there are 16 ongoing missions, both military (5) and civilian (11); see <http://www.eeas.europa.eu/csdp/missions-and-operations/index_en.htm>. For a comprehensive review of CDSP missions see F Naert, *International Law Aspects of the EU's Security and Defence Policy* (Intersentia 2010) and P Koutrakos, *The EU Common Security and Defence Policy* (Oxford University Press 2013).

[17] PJ Kuiper *et al.* (eds), *The Law of EU External Relations: Cases, Materials and Commentary on the EU as an International Actor* (Oxford University Press 2013) 1. See 'Reparations for Injuries Suffered in the Services of United Nations' ICJ Reports (1949) 173, 178–9 and P Gautier, 'The Reparation for Injuries Case Revisited: The Personality of the European Union' (2000) 4 Max Planck Yearbook of United Nations Law 331.

[18] See *inter alia* A Sari, 'The Conclusion of International Agreements by the European Union in the Context of ESDP' (2008) 57 ICLQ 53 and RA Wessel, 'The EU as a Party to International Agreements: Shared Competences, Miexed Responsibilities' in A Dashwood and M Maresceau (eds), *Law and Practice of EU External Relations* (Cambridge University Press 2008) 152.

[19] cf pre-Lisbon, the ECtHR had held that 'CFSP decisions are therefore intergovernmental in nature. By taking part in their preparation and adoption each State engages its responsibility. That responsibility is assumed jointly by the States when they adopt a CFSP decision'; *SEGI and Gestoras Pro-Amnistia v 15 States of the European Union*; App No 6422/02 and 9916/02; admissibility decision of 23 May 2002.

[20] Consolidated version of the Treaty on European Union [2012] OJ C 326/13.

with the voting rules laid down in Articles 31 and 42(4) of the TEU. Under Article 28 of the TEU, these decisions of the Council 'shall lay down their objectives, scope, the means to be available to the Union, if necessary their duration, and the conditions for their implementation' and 'shall commit the Member States in the positions they adopt and in the conduct of their activity'.[21]

The decision, which is an act of the Council and not of the Member States jointly, is the successor to the Joint Actions adopted pursuant to Article 14 pre-Lisbon TEU. Such Joint Action, namely Council Joint Action 2008/851, was the legal basis of the EUNAFOR Operation Atalanta as it was established prior to the Lisbon Treaty.

These acts generally set out, *inter alia*, the mission and the mandate, the structure and organization of the operation, including the designation of the commanders, head of mission and headquarters, as well as the command and control relations. They also contain provisions on the status of forces or mission, financial arrangements, participation of third States and on the commencement and termination/duration of the operation. In military operations, there is usually a further Council decision which launches the operation, together with the approval of the Operation Plan and the Rules of Engagement.[22]

The key decision-making body in the CSDP is the Council; however, its work is prepared by several bodies, including the Political and Security Committee (PSC), the EU Military Committee (EUMC), the Political Military Group and the Committee for Civilian Aspects of Crisis Management. The PSC plays the most crucial role, since it exercises, under the responsibility of the Council of the High Representative, 'political control and strategic direction'[23] over CSDP operations. The Council may authorize the PSC to take the relevant decisions concerning the political control and strategic direction of the operations.[24] In practice, the PSC is authorized to amend the planning documents, the Chain of Command and the Rules of Engagement, and the appointment of the Operation/Force Commander or Head of Mission, while the decision-making powers with respect to the objectives and termination of the operation remain vested in the Council.[25]

CSDP operations generally have a status independent of that of the participating States and they are subject to the command and control of the

[21] Art 28, ibid.

[22] For example, EUNAVFOR Operation Atalanta was launched by 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) (2008) OJ L 330/19; see <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2008:330:0019:0020:EN:PDF>.

[23] See Council Doc 11096/03 EXT I (26 July 2006).

[24] Art 38 of the TEU.

[25] See F Naert, 'The International Responsibility of the Union in the context of its CSDP Operations' in M Evans and P Koutrakos (eds), *The International Responsibility of the European Union* (Hart Publishing 2013) 313, 318.

EU bodies. The Union exercises effective control through the Council, the PSC and in particular through the Operation and Force Commanders.[26] In practice, the highest level of military command in EU military operations rests with the Operation Commander. The latter will normally receive operational command over the forces put at his disposal by the participating States via a transfer of authority.[27] The next command level, the highest in the field, is the Force Commander. Not every Member State contributes personnel to each operation, and it is possible to entrust the execution of a particular task to a group of Member States which are willing and have the capability necessary to do so.[28]

Finally, under Articles 37 and 218 of the TEU the EU may conclude international agreements relating to CSDP operations, including agreements on the participation of third States and on the status of forces/missions (SOFAs/SOMAs).[29] Accordingly, in the context of EUNAVFOR Operation Atalanta, the EU has concluded SOFAs *inter alia* with Somalia, Djibouti and the Seychelles and participation agreements with Croatia and Montenegro.[30] Also, as said above, it has concluded transfer agreements with Kenya, the Seychelles, Mauritius and Tanzania.[31]

However, the agreements with Mauritius and Tanzania have been under judicial scrutiny. In its Judgment of 24 June 2014 in Case C-658/11 *Parliament v Council*, the Grand Chamber of the Court of Justice of the EU (CJEU) annulled the Council Decision 2011/640/CFSP of 12 July 2011 on the signing and conclusion of the agreement with Mauritius because of Council's failure to provide the Parliament with the information required under Article 218(10) of the TFEU.[32] As the CJEU underlined in its decision, by failing to do so, the Council had impeded the Parliament in the exercise of its 'domestic scrutiny'.[33] However, the Court maintained the effects of the decision until it was replaced so as not to hamper the conduct of the Operation.[34] On the other hand, on 28 May 2014, the Parliament requested the annulment of the

[26] See Naert (n 16) 515–16.

[27] For the command and control arrangements in military operations see Council Doc 11096/03 EXT I (26 July 2006) 6–7 and 15–16.

[28] Arts 42(5) and 44 of the TEU.

[29] See A Sari, 'The Conclusion of International Agreements by the European Union in the context of ESDP' (2007) 56 ICLQ 53–86 and P Koutrakos, 'International Agreements in the Area of the EU's Common Security and Defence Policy' in E Cannizzaro *et al.* (eds), *International Law as Law of the European Union* (Martinus Nijhoff 2011) 157.

[30] See relevant information at <http://www.eeas.europa.eu/csdp/missions-and-operations/eu-navfor-somalia/background-material/index_en.htm> and discussion in Gosalbo-Bono and Bolaert (n 15) 132–3.

[31] See (n 11).

[32] Case C-658/11 *Parliament v Council*, Judgment of the Court (Grand Chamber) (24 June 2014); <http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:62011CJ0658&from=EN>. See also short commentary in <http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:62011CJ0658&from=EN>.

[33] ibid, para 79.

[34] ibid, para 90.

Council Decision by which the agreement with Tanzania on the transfer of pirates had been concluded.[35]

As regards the responsibility of the Union in this regard, the starting point is Article 340 of the Treaty on the Functioning of the European Union (TFEU),[36] which reads as follows:

> 1. The contractual liability of the Union shall be governed by the law applicable to the contract in question.
> 2. In the case of non-contractual liability, the Union shall, in accordance with the general principles common to the laws of the Member States, make good any damage caused by its institutions or by its servants in the performance of their duties.

The second paragraph is of significance because it establishes the principle of non-contractual liability of the Union, which should be read together with Article 268 of TFEU, according to which the ECJ 'shall have jurisdiction in disputes relating to compensation for damage provided for in the second and third paragraphs of Article 340'. Nonetheless, this is qualified by Article 275 of the TFEU, which provides that, with the exception of its jurisdiction to monitor compliance with Article 40 of TEU and to review the legality of certain Decisions, the ECJ 'shall not have jurisdiction with respect to the provisions relating to the [CFSP] nor with respect to acts adopted on the basis of those provisions'. Consequently, the ECJ does not have the competence to consider actions for damages relating to the conduct of CSDP Operations.

As observed by Naert,

> this does not mean that there is no competent jurisdiction to judge such case. First … there are claims settlement procedures in the host state provided for under SOFAs/SOMAs … . Second, pursuant to Article 19(1), second subparagraph TFEU, 'Member States shall provide remedies sufficient to ensure effective legal protection in the fields covered by Union law'. This is a horizontal provision that also covers CSDP.[37]

This notwithstanding, it is acknowledged that such claims will have to go through national courts, which might prove not so effective.[38] For example, according to the *Foto-Frost* judgment, national courts may consider the validity of a Community act even though they have no jurisdiction to declare a Community act invalid. Only the Court of Justice of the EU, which is

[35] See Case C-263/14, *Parliament v Council* (still pending); see on the application <http://curia.europa.eu/juris/document/document.jsf?docid=154549&doclang=EN>. The author is thankful to the anonymous reviewer(s) for bringing to his attention these cases regarding transfer agreements.

[36] Consolidated version of the Treaty on the Functioning of the European Union [2012] OJ C 326/47.

[37] Naert (n 25) 331.

[38] See further discussion in ibid 331.

https://doi.org/10.1017/S0020589315000214 Published online by Cambridge University Press

responsible for ensuring that EU law is applied uniformly in all the Member States, has the jurisdiction to declare void and invalid an act of a Community institution.[39]

B. Operation Atalanta under International Law: The Legal Basis and the Law Applicable to the Operation

1. The legal basis of the operation

As stated in the Joint Action which established the Operation, '[t]he European Union (EU) shall conduct a military operation in support of Resolutions 1814 (2008), 1816 (2008) and 1838 (2008) of the United Nations Security Council (UNSC), in a manner consistent with action permitted with respect to piracy under Article 100 et seq. of the United Nations Convention on the Law of the Sea'.[40] It seems, therefore, that prima facie the legal basis of the relevant operation lies in these Security Council Resolutions.

Indeed, following the increase in pirate attacks in the Horn of Africa and the advance notification of the Transitional Federal Government (TFG) of Somalia to the Secretary-General of the UN,[41] the Security Council adopted Resolution 1816 (2008) on 2 June 2008 under Chapter VII of the UN Charter, encouraging Member States to cooperate with the TFG to deter acts of piracy and armed robbery at sea and even authorizing entry in the territorial waters of Somalia for this purpose.

The EU responded by launching Operation Atalanta, on 8 December 2008, to offer protection to vulnerable vessels sailing in the area in accordance with UNSC Resolution 1816 (2008).

According to the Joint Action, the mandate of the EU naval forces was explicit:

> [*u*]*nder 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 [*inter alia*]: (a) provide protection to vessels chartered by the WFP, including by means of the presence on board those vessels of armed units of Atalanta, in particular when cruising in Somali territorial waters; (b) provide protection, based on a case-by-case evaluation of needs, to merchant vessels cruising in the areas where it is deployed; (c) keep watch over areas off the Somali coast, including Somalia's territorial waters, in which there are dangers to maritime activities, in particular to maritime traffic; (d) take the necessary measures, including the use of force, to deter, prevent and intervene

[39] *Foto-Frost*, Case 314/85, Court of Justice, Judgment of 22 October 1987, para 15. The author is indebted to the anonymous reviewers for the reference to this case.

[40] See EU, Council Joint Action 2008/851/CFSP.

[41] See Letter of 20 November 2008 of the TFG to the Security Council, as referred to at the Preamble of SC Res 1846 (2008).

https://doi.org/10.1017/S0020589315000214 Published online by Cambridge University Press

> in order to bring to an end acts of piracy and armed robbery which may be committed in the areas where it is present.[42]

EUNAVFOR Operation Atalanta was thus called, in cooperation with the other naval assets in the region (NATO Operation Ocean Shield, Combined Task Force 151 and other individual nations),[43] to escort vessels chartered by the UN World Food Program as well as other merchant vessels and to suppress piracy and armed robbery, even within Somalia's territorial waters.

Although this action was triggered by Security Council Resolutions adopted under Chapter VII of the UN Charter,[44] the legal basis of the Operation does not lie in these Resolution(s); rather, the legal basis can be found, on the one hand, in the law of the sea as regards actions undertaken on the high seas and, on the other, in the prior consent of the TFG for the action undertaken within Somalia's territorial jurisdiction. As was explicitly mentioned both in the relevant SC Resolution(s) and in the founding Joint Action, States and international organizations have to act '*in a manner consistent with the action permitted with respect to piracy under Article 100 et seq. of the United Nations Convention on the Law of the Sea*'.[45] Under that treaty, all States are entitled to exercise the right of visit in respect of vessels suspected of being engaged in piracy on the high seas as well as to seize any pirate vessel and even exercise their jurisdiction over the suspected pirates.[46] Hence, as far as action undertaken on the high seas was concerned, States and, *in casu*, the EU were not

[42] ibid, art 2 as corrected by the Corrigendum to Council Joint Action 2008/851/CFSP of 10 November 2008, 2008 OJ EU L 253/18 (25.9.2009) (emphasis added). This mandate has been subsequently amended, most recently by Council Decision 2014/827/CFSP of 21 November 2014 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 EU L 335/19 (22.11.2014). According to this Decision, art 1(3) is replaced by 'In addition, Atalanta may contribute, as a non–executive secondary task, within existing means and capabilities and upon request, to the EU's integrated approach to Somalia and the relevant activities of the international community, thereby helping to address the root causes of piracy and its networks.'

[43] On the other assets in the region and how they coordinated their action see *inter alia* D Guilfoyle, 'Combating Piracy: Executive Measures on the High Seas' (2011) 53 Japanese Yearbook of International Law 149, 155.

[44] On the issue of authorization of Chapter VII powers, the benchmark work is of D Sarooshi, *The United Nations and the Development of Collective Security* (Oxford University Press 1999) 13. See also N Blokker, 'Is the Authorization Authorized? Powers and Practices of the UN Security Council to Authorize the Use of Force by Coalitions of the Willing' 11 EJIL (2000) 541 and L-A Sicilianos, 'Entre Multilatéralisme et unilatéralisme: l'autorisation par le Conseil de sécurité de recourir à la force' 339 RCADI (2008) 9.

[45] See Council Joint Action 2008/851/CFSP and also SC Res 1816 (2008) para 7 (emphasis added).

[46] See arts 105 and 110 of the United Nations Convention on the Law of the Sea, 1833 UNTS 397; entered into force 16 November 1994; as at 7 January 2015, LOSC has 167 parties, including the EU; see at <http://www.un.org/Depts/los/reference_files/chronological_lists_of_ratifications.htm#The United Nations Convention on the Law of the Sea> [hereinafter: LOSC]. On the right of visit in general see D Guilfoyle, *Shipping Interdiction and the Law of the Sea* (Cambridge University Press 2009) and E Papastavridis, *The Interception of Vessels on the High Seas* (Hart Publishing 2013).

vested with any authority or any powers that they did not already have under international law by the Security Council Resolutions.

More significantly, as regards entry into Somalia's territorial waters or the suppression of acts of violence committed therein, it would seem that, on the face of it, the legal basis lay in the relevant SC Resolutions. Indeed, in paragraph 7 of Resolution 1816 (2008), the Council *decided* that:

> For a period of six months from the date of this resolution, States *cooperating with the TFG* [Transitional Federal Government of Somalia] 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:
> (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 (emphases added).

However, this paragraph makes it is clear that these actions (entry and pursuit in Somalia's waters) were authorized by the Security Council pursuant to an advance notification by the TFG. This becomes clearer in paragraph 9, which notes that 'this authorisation has been provided only following receipt of the letter from the Permanent Representative of the Somalia Republic to the United Nations … conveying the consent of that State'. In the light of this, it has been correctly noted that 'the Security Council Resolutions were not strictly necessary, since the Transitional Government could have granted permission for foreign States to conduct law enforcement operations within its waters … without them'.[47] It follows that this consent by Somalia sufficed for States to enter into its territorial waters,[48] which would otherwise have been a violation of its territorial integrity, and to arrest pirates in cooperation with the TFG. According to Article 20 of the Articles on Responsibility of States for Internationally Wrongful Acts (ARSIWA), 'consent by a State to particular conduct by another State precludes the wrongfulness of that act in relation to the consenting State, provided the consent is valid and to the extent that the conduct remains within the limits of the consent given'.[49]

[47] See Chatham House, Briefing Note, 'Pirates and How to Deal with Them', Africa Programme and International Law Discussion Group, 22 April 2009, at 3, < http://www.chathamhouse.org/sites/files/chathamhouse/public/Research/Africa/220409pirates_law.pdf> and T Treves, 'Piracy, Law of the Sea, and Use of Force: Developments off the Coast of Somalia' (2009) 20 EJIL 399, 406.

[48] In Resolution 1851 (2008), the Council went even further and authorized the 'land pursuit' of the pirates in Somalia, again with the consent of the TFG; see SC Res 1851 (2008) para 6.

[49] See art 20 of ILC Articles on Responsibility of States for Internationally Wrongful Acts, UN General Assembly Official Records; 56th Session, Supp No 10 at UN Doc A/56/10 at 31 [hereinafter: ARSIWA].

https://doi.org/10.1017/S0020589315000214 Published online by Cambridge University Press

Hence, there are sound reasons to conclude that the authorization provided by the relevant Resolutions was not legally necessary for the exercise of the right of visit and the seizure of vessels engaged in piracy and armed robbery within Somalia's territorial waters, since the consent of Somalia conveyed by the letter of 9 December 2008 to the UN, prior to the adoption of the Resolution in question, had already provided a sufficient legal basis.[50]

2. *The rules of international law applicable to the Operation*

The international rules applicable to Operation Atalanta and the fight against piracy under international law are mainly those of the international law of the sea and of international human rights law. These rules prescribe the conduct required of the EU and its Member States from the moment that warships encounter a pirate vessel, or a vessel suspected of being engaged in piracy, on the high seas to the moment that the suspected pirates are tried for the crime of piracy *jure gentium*. In discussing the rules governing Operation Atalanta, however, it is important to break down the operation into its various phases since each is subject to different rules, involving different actors and calling for the application of different rules of international responsibility.

At the outset, what is piracy *jure gentium*? Article 101 of LOSC defines piracy as consisting of any of the following acts:

> any illegal acts of violence or detention, or any act of depredation, committed for private ends by the crew or passengers of a private ship … and directed: (a) on the high seas, against another ship … (b) against a ship, aircraft, persons or property in a place outside the jurisdiction of any State.

As this definition makes clear, acts of violence that occur in the territorial or internal waters of the coastal State fall beyond the ambit of the international regulation of piracy *jure gentium*. When such acts occur in the territorial waters or ports of States they are described as 'armed robbery against ships',[51] as, for example, in the territorial waters of States littoral to the Malacca Straits[52] and in the territorial sea of Somalia.

a) Phase I: The right of visit

The first phase of a counter-piracy operation concerns the decision to exercise the right of visit the pirate vessel or the vessel suspected of being engaged in

[50] See also further analysis in Papastavridis (n 46) 178–80.

[51] Armed robbery is defined as 'any unlawful act of violence or detention or any act of depredation or threat thereof, other than an act of piracy, directed against a ship or against persons or property on board such a ship, within a state's jurisdiction over such offences'; IMO, Code of Practice for the Investigation of the Crimes of Piracy and Armed Robbery against Ships, adopted 29 November 2001, Res A922(22), art 2(2)..

[52] On the attacks in the Malacca Straits, see *inter alia* JS Burnett, *Dangerous Waters: Modern Piracy and Terror on the High Seas* (Plume 2003) 9.

piracy. The right of visit is accorded to States as an exception to the right of navigation enjoyed by all States on the high seas (Article 90 of LOSC) and the principle of the exclusive jurisdiction of the flag State on the high seas (Article 92 of LOSC).

Under Article 110 of LOSC, all warships or other duly authorized vessels are entitled to board and search vessels suspected of being engaged in piracy. The only requirement that Article 110 sets out is that there are 'reasonable grounds' to suspect that the vessel has been engaged in piracy, as defined in Article 101. This provision also grants the right to visit stateless vessels, which seems particularly apposite[53] since the majority of the pirate vessels involved in piratical attacks off Somalia, usually dhows or dinghies, are stateless.

However, the legal basis for intercepting pirate vessels or vessels under the control of pirates, shifts from Article 110 to Article 105 of LOSC, which provides that 'on the high seas, or in any other place outside the jurisdiction of any State, every State may seize a pirate ship or aircraft, or a ship or aircraft taken by piracy and under the control of pirates, and arrest the persons and seize the property on board'.[54] Accordingly, as long as there are only 'reasonable suspicions' that a vessel is engaged in piracy the interception will be carried out under Article 110. However, as soon as it is considered to be a 'pirate' vessel, that is, a vessel definitely under the control of pirates, the interception will be carried out on the basis of Article 105 of LOSC.

The right of visit is to be exercised by warships, under both the LOSC and under customary international law. But is the right of visit also enjoyed by international organizations? As far as the EU, and Operation Atalanta, is concerned, the following observations may be made:

The EU is not party to LOSC in respect of Part VII on the high seas. By virtue of Article 4(3) of Annex XI of LOSC,

> an international organization [EU] shall exercise the rights and perform the obligations which its member States which are Parties would otherwise have under this Convention, *on matters relating to which competence has been transferred to it by those member States* [emphasis added].

The Member States have never transferred to the Union competences in respect of piracy *jure gentium*.[55]

As regards customary international law, the EU is not a 'State of registry' of vessels so as to enjoy the respective freedoms of the high seas and the rights that

[53] Stateless vessels are the vessels lacking any claim to nationality under art 91 of LOSC on the basis either of State registration or some other right to fly a State's flag; see further remarks in Papastavridis (n 46) 54.

[54] The definition of a 'pirate ship' is provided by art 103, which sets out that '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 art 101.

[55] See <http://www.un.org/Depts/los/convention_agreements/convention_declarations.htm>.

https://doi.org/10.1017/S0020589315000214 Published online by Cambridge University Press

are accorded to flag States, such as, for example, to exercise jurisdiction over pirate vessels.[56] This, however, does not mean that the EU is not bound by the rules of customary law concerning piracy.

As the ECJ has repeatedly confirmed, the EU, including the Communities, must, as subject of international law, respect international law—both treaty and customary—in the *exercise of its powers*.[57] In other words, whether the EU is bound by customary international law depends on whether Operation Atalanta falls within the *powers of the EU*. It is submitted that the fact that the EU has competence, even, arguably, a *sui generis* one,[58] in the field of CSDP,[59] entails, by necessary implication, that it has the competence to engage in maritime operations on the high seas, including counter-piracy operations. Hence, since Operation Atalanta is *within the powers* of the EU, it is bound by the rules of customary international law which govern such operations, including the obligation to respect the freedom of navigation, as reflected in the LOSC.

It is thus no surprise that Article 2 of the Joint Action 2008/851/CFSP concerning the mandate of the mission expressly refers to the LOSC: '[u]nder the conditions set by applicable international law, in particular the United Nations Convention on the Law of the Sea'.[60]

It follows that the EU should respect the fundamental principle of the freedom of navigation as well as the provisions regarding piracy *jure gentium* and the jurisdiction afforded to States to counter piracy on the high seas under customary international law, and as reflected in LOSC. Accordingly, the EU

[56] In accord is also S Talmon, 'Responsibility of International Organizations: Does the European Community Require Special Treatment?' in M Ragazzi (ed), *International Responsibility Today: Essays in Memory of Oscar Schachter* (Brill 2005) 405, 411. cf the European Parliament Resolution of 10 May 2012 on maritime piracy, P7_TA-PROV(2012)0203, noting that, 'on the high seas, according to international law, in all cases, including actions taken in the fight against piracy, the national jurisdiction of the flag state applies on the ships concerned, as well as to the military staff deployed on board', para 30.

[57] See *inter alia:* Case C-286/90 *Poulsen and Diva Navigation* [1992] ECR I-6019, paras 9–10; Case C-162/96 *Racke* [1998] ECR I-3655, paras 45–46; Case C-366/10, *The Air Association of America*, Judgment of December 2011, para 101. See also A Giannelli, 'Customary International Law in the European Union' in E Cannizzaro, P Plachetti and R.Wessels (eds), *International Law as Law of the European Union* (Martinus Nijhoff 2012) 93.

[58] Marise Cremona avers that 'it is logically difficult to imagine a type of competence that is neither exclusive, nor shared nor complementary, the CFSP appears to be a type of *sui generis* competence that shares characteristics of both shared and complementary competences'; M Cremona, 'Defining Competence in EU External Relations' in A Dashwood and M Maresceau (eds), *Law and Practice of EU External Relations* (Cambridge University Press 2008) 34, 65. For a contrary opinion, namely that CFSP competence as such is lacking, as Member States merely use the Union to exercise their own competences. C Hermann, 'Much Ado about Pluto? The Unity of the Legal Order of the European Union Revisited' in M Cremona and B de Witte, *EU Foreign Relations Law – Constitutional Fundamentals* (Hart Publishing 2008) 20–51.

[59] See generally P Eeckhout, *EU External Relations Law* (2nd edn, Oxford University Press 2011) ch 11; M Trybus and N White (eds), *European Security Law* (Oxford University Press 2007); S Blockmans (ed), *European Union and Crisis Management* (Asser Press 2008).

[60] Art 2 as corrected by the Corrigendum to Council Joint Action 2008/851/CFSP of 10 November 2008.

may order or authorize the interception of vessels only when they are engaged in or suspected of being engaged in piracy, as defined in Article 101 of LOSC, and delegate to the Member States only competences explicitly provided under the law of the sea, such as under Article 105 of LOSC. Needless to say, these provisions also bind the Member States individually.

b) Phase II: The conduct of the interception

The next phase of a counter-piracy operation concerns its modus operandi, ie the conduct of the interception. This phase follows the decision to exercise the right of visit over vessels suspected of being engaged in piracy or pirate vessels and concerns the boarding and the search of the vessel. It is to be distinguished from Phase I because it involves different primary rules.

The boarding warship or the other 'duly authorized state vessel' should, in principle, abide by the modus operandi laid down in Article 110(2)–(3) of LOSC:

> [t]he warship may proceed to verify the ship's right to fly its flag. To this end, it may send a boat under the command of an officer to the suspected ship. If suspicion remains after the documents have been checked, it may proceed to a further examination on board the ship, which must be carried out with all possible consideration.

In addition, the interdicting State may, in principle, use force but only in strict accordance with the requirements of necessity and proportionality. The use of force in the course of the exercise of the right of visit is subject to the rules governing law enforcement at sea, as set out in international jurisprudence and as provided in each State's Rules of Engagements.[61]

Moreover, human rights law, such as the right to life, is also applicable.[62] Arguably, both States and the EU are bound by the right to life. The *Charter of Fundamental Rights of the European Union* (2000),[63] which guarantees the right to life in Article 2, is considered as primary EU legislation.[64]

It is trite that the protection of human rights, *in casu* the right to life, extends to persons under the jurisdiction of State parties to the pertinent treaties. Thus, it is necessary to establish whether a situation falls within the State's 'jurisdiction'

[61] See eg the ITLOS, *M/V 'SAIGA' (No 2)* (Saint Vincent and the Grenadines v Guinea) case, 1 July 1999, para 155 and ITLOS, *Virginia G case* (Panama v Guinea-Bissau) (Case No 20), Judgment of 14 April 2014, para 362. For further discussion see Papastavridis (n 46) 68–73.

[62] See art 6 of the International Covenant on Civil and Political Rights, 19 Dec 1966, 999 UNTS 171 (ICCPR). See also art 2 of the Convention on the Protection of Human Rights and Fundamental Freedoms, 4 November 1950, 213 UNTS 221 (ECHR).

[63] Charter of Fundamental Rights of the European Union (2000/C 364/01) <http://www.europarl.europa.eu/charter/pdf/text_en.pdf>.

[64] On 1 December 2009, with the entry into force of the Treaty of Lisbon, the Charter was given binding legal effect on the EU institutions and on national governments equal with the EU Treaties. See art 6 of TEU.

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before the obligations in these instruments become applicable. The controversial issue of the extraterritorial application of human rights obligations is beyond the scope of this article;[65] it suffices to note that maritime interception operations, in general, should be conducted in accordance with fundamental human rights, as has been confirmed by a series of judgments of the European Court of Human Rights concerning enforcement powers on the high seas.[66]

c) Phase III: Pre-detention and detention

The next phase of the operation following the boarding and search of the vessel concerns the detention or the decision to detain the suspected pirates. It is common practice in the context of Operation Atalanta for suspected pirates to be 'pre-detained', or held for 48 hours, during which time the Commanding Officer of the capturing warship will decide whether to detain with a view to transferring them for purposes of prosecution or to release them due to lack of evidence.

LOSC does not address this phase, but only stipulates in Article 105 that those on board a pirate vessel may be arrested by the seizing vessel and may be subsequently tried by any State before whose courts they are brought and be subject to penalties imposed by its laws.[67] This pre-detention and detention phase is, however, governed by international human rights law as the suspected pirates are under the jurisdiction of the State concerned. The rights to be respected and protected during this phase include:

a) the prohibition of torture, degrading and inhumane treatment,[68] including the prohibition of non-refoulement under Article 33 of the Refugee Convention (1951) and under customary international law.[69] Accordingly, no suspected pirate should be subject to

[65] See *inter alia* M Milanović, *Extraterritorial Application of Human Rights Treaties: Law, Principles and Policy* (Oxford University Press 2011).

[66] See *inter alia, Medvedyev and Others v France* App No 3394/03 (ECtHR, 10 July 2008), confirmed by the Grand Chamber in its judgment of 29 March 2010; *Hirsi Jamaa and Others v Italy* App No 27765/09 (ECtHR, Grand Chamber Judgment of 23 February 2012). See also E Papastavridis, 'European Convention of Human Rights and the Law of the Sea: the Strasbourg Court in Unchartered Waters?' in M Fitzmaurice and P Merkouris (eds), *The Interpretation and Application of the European Convention of Human Rights: Legal and Practical Implications* (Martinus Nijhoff 2013) 117, 122.

[67] On the 'universal jurisdiction' established by art 105 and its contested relevance see *inter alia* E Kontorovich and S Art, 'An Empirical Examination of Universal Jurisdiction for Piracy' (2010) 104 AJIL 436.

[68] See eg art 3 of ECHR, art 7 ICCPR and art 3 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 10 Dec 1984, 1465 UNTS 85 (hereinafter: CAT).

[69] Art 33(1) reads as follows: '1. No Contracting State shall expel or return ("*refouler*") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion'; see Convention Relating to the Status of Refugees (adopted 28 July

torture, degrading and inhumane treatment or to be sent, transferred or released to go to a country, where he or she is likely to face persecution, other ill-treatment or torture.[70]

b) the right to liberty and security. Under Article 5 of the ECHR, detention must be in accordance with a procedure prescribed by law, which must be accessible, foreseeable and must afford legal protection to prevent arbitrary interferences of the right to liberty. Safeguards relating to the right to liberty include: informing the persons detained of their rights, allowing them to contact a lawyer and bringing them before an appropriate judicial authority within a reasonable time[71]

The relevance of the right to liberty in the present context was affirmed on 4 December 2014 in the first judgments of the European Court of Human Rights concerning piracy off Somalia in the cases of *Ali Samatar and Others v France*[72] and *Hassan and Others v France.*[73] The applicants in both cases were arrested and subsequently prosecuted by the French authorities for acts of piracy that were committed against the French cruise ship *Ponant* and the French yacht *Carré d'As* in 2008 respectively. Relying on Article 5 section 1 (right to liberty and security), the applicants in the case of *Hassan and Others* alleged that their detention by the French military authorities from 16 to 23 September 2008 had no legal basis, while in both cases, relying on Article 5 section 3 (right to liberty and security), the applicants complained that they had not been 'brought promptly before a judge or other officer authorised by law to exercise judicial power' after their arrest by the French army in Somali territorial waters.

With respect to the first claim, the Court held that while the arrest was lawful pursuant to SC Resolution 1816 (2008), the French legal system in force at the relevant time did not provide sufficient protection against arbitrary interference with the right to liberty and had therefore been a violation of Article 5 section 1. Also, the Court found a violation of Article 5 section 3 on account of the fact that on their arrival in France, the applicants had been taken into police custody rather than being brought 'promptly' before a French legal authority.[74]

1951, entered into force 22 April 1954) 189 UNTS 137. See in general C Wooters, *International Legal Standards for the Protection from Refoulement* (Intersentia 2009).

[70] See *inter alia Soering v UK* (1989) 98 ILR 270, at para 88; *Ahmed v Austria* (1997) 24 EHHR 278, at paras 39–40, *Saadi v Italy*, App No 37201/06, Judgment of 28 February 2008, at para 125 and *M.S.S. v Belgium and Greece*, App No 30696/09, Grand Chamber, Judgment of 21 January 2011 at para 344ff .

[71] See also *Medvedyev* case, para 80 and *Malone v UK* Series A No 82 (ECtHR, 2 August 1984) para 67 and *Vassis and Others v France* (App No 62736/09), Judgment of 27 June 2013, at paras 52–62.

[72] *Ali Samatar and Others v France* (App Nos 17110/10 and 17301/10), Judgment of 4 December 2014.

[73] *Hassan and Others v France* (App Nos 46695/10 and 54588/10), Judgment of 4 December 2014.

[74] See also in this repsect *Vassis and Others v France* (n 71).

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It is true that both these cases concerned incidents that occurred prior to the launching of Operation Atalanta in 2009. Nevertheless, the findings of the Court will inevitably inform the conduct of the operation by the EU and its Member States. Specifically, it is necessary that all Member States have in place procedures that are in full compliance with the requirements of Article 5 of ECHR as well as ensuring that they are diligent in bringing suspected pirates promptly before the competent judicial authorities.

d) Phase IV: Transfer and trial

The next phase concerns the transfer of the suspected pirates to the third State, their actual trial and, if proven, conviction. The applicable primary rules are as follows:

a) Article 105 of LOSC, which permits the assertion of legislative and enforcement jurisdiction over piracy *jure gentium*.
b) International human rights law, including the right to life, the prohibition of torture, inhuman or degrading treatment or punishment, the prohibition of *non-refoulement* and the right to a fair trial.[75] At the minimum, the right to fair trial includes the right to be heard by a competent, independent and impartial tribunal, the right to a public hearing, the right to be heard within a reasonable time, the right to counsel and the right to translation.[76]
c) Bilateral Transfer Agreements: The transfer of the suspected pirates to States, such as Kenya, Seychelles and Mauritius, is governed by bilateral agreements with the EU.

These rules bind, in principle, both the States involved in the transfer and trial of the suspected pirates, including the States to which the latter are transferred, and the EU, when the transfer is attributable to it. It goes without saying that the EU will bear *ex contractu* responsibility for the violation of the transfer agreements, which it has concluded.

III. INTERNATIONAL RESPONSIBILITY

Having identified the relevant primary rules governing each phase of EUNAVFOR Operation Atalanta, it is time to assess the application of secondary rules of international responsibility in relation to them.[77] This

[75] Under art 14 of the ICCPR, 'in the determination of any criminal charge, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law'.
[76] See also art 6 of ECHR.
[77] On the distinction between 'primary' and 'secondary' rules see A Cassese, *International Law* (2nd edn, Oxford University Press 2005) 244 and U Linderfalk, 'State Responsibility and the Primary-Secondary Rules Terminology' (2009) 78 NordJIntlL 53.

analysis of the rules on responsibility demonstrates that cases of international responsibility, including shared responsibility,[78] may arise in this context, although each incident will require careful scrutiny. As with the primary rules, the analysis of the secondary rules will follow each phase of the counter-piracy operation. First, however, the general and pivotal question of the attribution of the acts of the Member States to the EU will be considered. Finally, a specific case giving rise to international responsibility arising from the Operation will be discussed.

A. *The Question of the Attribution: Member States* de jure *or* de facto *Organs of the EU?*

In applying the rules of international responsibility in the context of Operation Atalanta, it is evident that the most perplexing, yet most important, question is whether the allegedly wrongful conduct is to be attributed to the EU itself or to the Member States. The answer turns on the application of the general rules of attribution, since no special rules of attribution exist for the EU.[79] Such general rules of attribution have been recently drafted by the International Law Commission (ILC) and included in the Articles on the Responsibility of International Organizations (ARIO).[80] These rules are set out, mainly, in Articles 6 and 7 of the ARIO.[81] With respect to the status of these articles as a matter of international law, being the work of the ILC, they constitute either codification or progressive development of international law.[82] In any case, since there is no other codification of rules on attribution of wrongful conduct to international organizations, they serve well as a point of reference for the assessment of the responsibility questions at hand.

Thus, according to Article 6 of ARIO,

[78] For the term 'shared responsibility' see A Nollkaemper and D Jacobs, 'Shared Responsibility in International Law: A Conceptual Framework' (2013) 34 MichJIntlL 359, 366ff.

[79] Notwithstanding the inclusion of art 64 of ARIO on *lex specialis*, there are virtually no provisions dealing specifically with responsibility in the context of CSDP operations. See Naert (n 25) 336.

[80] See arts 4–9 of the Draft Articles on the Responsibility of International Organizations (2011); ILC Report, Sixty-Third Session, UN Doc A/66/10 (2011) 50–170 [hereinafter: ARIO] In resolution 66/100 of 9 December 2011, the General Assembly took note of the Articles on the Responsibility of International Organisations, the text of which was annexed to the resolution.

[81] Rules on the attribution of conduct to international organizations are also included in art 8 ('excess of authority or contravention of instructions') and art 9 ('conduct acknowledged and adopted by an international organization as its own').

[82] See art 1(1) of the Statute of the International Law Commission, adopted by the General Assembly in resolution 174(II) of 21 November 1947, available at <http://legal.un.org/ilc/texts/instruments/english/statute/statute_e.pdf>. At least, there is certainty with respect to the attribution of acts of agents of international organization under art 6 according to the ICJ, 'Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights', Advisory Opinion, ICJ Reports 1999, 88–9, para 66.

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> the conduct of an organ or agent of an international organization in the performance of functions of that organ or agent shall be considered an act of that organization under international law, whatever position the organ or agent holds in respect of the organization.

Without dwelling upon the particularities of the legal position of Member States in CSDP operations,[83] it can be argued that Member States function neither as organs nor as agents of the EU in the context of these operations.[84] In general, there are two models that may serve as the basis for the attribution of the acts of Member States to the organization concerned under Article 6, these being the 'organic' or the 'competence' model.[85]

The 'organic model' means simply that the organization can be shown to have been acting through its organs. However, in the context of CSDP operations, 'the EU acts are carried out via the authorities of its Member States, instead of the EU itself, having its own administrative presence in its Member States', which is at variance with the 'organic model'.[86]

According to the 'competence model', responsibility should basically lie where there is competence.[87] A key concept of this model, however, is that the EU must exert 'normative control', in the sense that the legality of the Member States' action is ultimately controlled by the EU judiciary and it is the EU rather than the Member State concerned which can remedy the alleged wrongs.[88] This is not the case with regard to the conduct of CSDP operations, since the ECJ lacks jurisdiction.[89]

A further question concerns *de facto* organs, that is, bodies which are under the 'effective' control of the EU for the purposes of Article 7 of the ARIO, which provides that

> [t]he conduct of an organ of a State or an organ or agent of an international organization that is placed at the disposal of another international organization shall be considered under international law an act of the latter organization if the organization exercises effective control over that conduct.

[83] See in this regard A Sari and R Wessel, 'International Responsibility for EU Military Operations: Finding the EU's Place in the Global Accountability Regime' in B Van Vooren, S Blockmans and J Wouters (eds), *The Legal Dimension of Global Governance: What Role for the EU*? (Oxford University Press 2013) available also at <http://www.utwente.nl/mb/pa/research/wessel/wessel88.pdf>.

[84] See eg Case T-271/10 R, *H v Council and Commission*, Order of the President of the General Court, 22 July 2010, para 20. In accord are Sari and Wessel ibid, 23.

[85] PJ Kuijper and E Paasivirta, 'EU International Responsibility and its Attribution: From the Inside Looking out' in M Evans and P Koutrakos (eds), *The International Responsibility of the European Union* (Hart Publishing 2013) 35, 49.

[86] ibid.

[87] This approach responds to the core of EU activities in the internal market; see ibid, at 54.

[88] See ibid, at 55 and also F Hoffmeister, 'Litigating against the European Union and its Member States – Who Responds under the ILC's Draft Articles on International Responsibility of International Organizations?' (2010) 21 EJIL 723, 741.

[89] See art 275 TFEU.

On this basis, the criterion for attributing conduct either to the contributing State or to the international organization is based on the 'effective', in the sense of factual, control that is exercised over the specific conduct of the organ or agent placed at the receiving organization's disposal.[90] There are various views as to what amounts to 'effective control' for the purposes of attributing the conduct of Member States to an international organization. For example, according to Tzanakopoulos what matters is the 'normative effective control', this meaning that 'Member States of an international organization are under the effective normative control of the latter when they have no discretion or no "margin of appreciation" in the implementation of a binding normative act of the organization'.[91]

On the other hand, it is arguable that the 'effective control' criterion not only requires that the international organization exerts 'operational control', but also exercises actual 'command' over the Member State's personnel. In other words, in the context of multinational operations, the crucial question might be whether a State retains 'full command' over its personnel, even though the operational control is vested with another authority, be it an international organization or a State. According to the recent judgment of the Grand Chamber of the European Court of Human Rights in the *Jaloud v The Netherlands* case (20 November 2014),[92] the fact that the Netherlands had retained such command was decisive for the Court's finding that it exercised jurisdiction[93] and that its troops were not placed 'at the disposal' of any foreign power for the purposes of attribution.[94]

This 'full command' criterion was relevant in the factual matrix of that case, since the violation under scrutiny concerned the investigation conducted subsequent to the killing of the applicant's son, over which only the Netherlands retained 'command' and 'control'. In more general terms, however, the 'full command' criterion should not be of such decisive character, for it is highly unlikely that national contingents in such multinational operations would delegate the 'command' of their units to the international organization or another State. Thus 'effective control' should rather have the meaning of 'operational control' or, more aptly, it should

[90] See the ARIO Commentary to art 7, at 19–26.

[91] A Tzanakopoulos, *Disobeying the Security Council* (Oxford University Press 2011) 40.

[92] ECtHR, *The Case of Jaloud v The Netherlands* (App No 47708/08), Grand Chamber, Judgment of 20 November 2014. See also short commentary of the case at <http://www.ejiltalk.org/jaloud-v-netherlands-new-directions-in-extra-territorial-military-operations/>.

[93] According to the Court, '[having retained full command] the respondent Party is therefore not divested of its "jurisdiction", within the meaning of Article 1 of the Convention, solely by dint of having accepted the operational control of the commander of MND (SE), a United Kingdom officer'; ibid, para 143.

[94] 'the Court cannot find that the Netherlands troops were placed "at the disposal" of any foreign power, whether it be Iraq or the United Kingdom or any other power, or that they were "under the exclusive direction or control" of any other State', para 151.

respond to the question of who has the decision-making authority for each and every act or omission that may be in violation of international law.

In the context of the present enquiry, it has been argued that the EU does indeed exercise 'effective control', in the sense of Article 7 in the context of CDSP missions.[95] As Wessel and Den Hertog maintain, it is tempting to apply the effective control argument *mutatis mutandis* to CSDP missions.[96] After all, these missions may be under the operational control of the EU through CDSP bodies: indeed, overall responsibility for the conduct of EU missions rests with the Council; it is for the Council to initiate and terminate operations, to determine their mandate, to appoint the Operational and Force Commanders and to approve key documents, such as the Operation Plan and the Rules of Engagement. Moreover, acting under the authority of the Council, the Political and Security Committee (PSC) exercises political control and strategic direction of EU missions.[97]

This notwithstanding, and as Wessel and Den Hertog acknowledge, 'attribution to the international organization is no rigid rule … a case-by-case analysis and application of the "effective control" concept is crucial'.[98] Thus, reference should be made to the actual modus operandi of the Operation Atalanta in order to shed light upon the factual question whether the Union does exercise effective control over the ostensible wrongful conduct.

B. Responsibility Arising from the Decision to Visit the Suspected Vessels

Firstly, responsibility arising from the decision to board pirate vessels or vessels suspected of being engaged in piracy in the context of Operation Atalanta will be assessed; particular consideration is given to whether the decision to board the suspected pirate vessel should be attributed to the EU itself or to the Member State whose flag the boarding warship flies.

1. The rules of engagement of Operation Atalanta

It is readily apparent from the Operational Order for the EUNAVFOR Operation Atalanta,[99] the Rules of Engagement (ROE) of the Operation,[100]

[95] Sari and Wessel (n 83) 21. cf the view of Kuijper and Paasivirta that the EU 'may feel more comfortable with the "effective" control test', (n 83) at 54.

[96] See R Wessel and L den Hertog, 'EU Foreign, Security and Defence Policy: A Competence-Responsibility Gap?' in M Evans and P Koutrakos (eds), *The International Responsibility of the European Union* (Hart Publishing 2013) 351.

[97] Sari and Wessel (n 83) 18.

[98] See Wessel and den Hertog (n 96) 351.

[99] ANNEX C TO OP ATALANTA EU OHQ SOP LEGAL 001, DATED 26 MARCH 2009 (on file with the author).

[100] RULES OF ENGAGEMENT IMPLEMENTATION MESSAGE FOR OPERATION ATALANTA (ATALANTA OHQ ROEIMPL001) (on file with the author).

https://doi.org/10.1017/S0020589315000214 Published online by Cambridge University Press

the Flow Chart[101] as well as the everyday practice that, in principle, Member States retain a wide margin of discretion in their decision to intercept suspected vessels: For example, it is telling that they retain the freedom to shift to national 'Operational Control' (OPCON) whenever they consider it appropriate. In addition France, a major contributing nation, has appended a caveat to the Rules of Engagement stating that their implementation would always require the prior agreement of national authorities, implying that this may entail shifting to national OPCON.[102] Similarly, Greece has also appended a caveat stating that it does not authorize boarding by a Greek unit.[103] Such caveats are usually appended to the ROEs of EU Operations and underscore the lack of normative control by the EU in the present context.

In practice, what happens is the following: warships of the Member States which encounter a vessel suspected of being engaged in piracy may proceed to a 'peaceful approach' of the vessel;[104] they may also 'divert', 'harass', 'ride off', or 'fire warning shots' in the vicinity of a suspected pirate vessel or 'obstruct' the boarding of a merchant vessel.[105] All these measures are authorized at the national level and there is no need for any authorization by EUNAVFOR. Should the Member State consider that there is need for further action, including exercising the right of visit, the Rules of Engagement provide as follows.

'If the Master of the vessel is co-operative and the *EU Force Commander authorises the boarding* (emphasis added), a boarding party should be dispatched to the vessel. If found or suspected to be in violation of the rules, the Operation Commander should be informed' (ROE 171). If the Master does not acknowledge the communication or continuously refuses to cooperate in allowing the boarding to take place, then the boarding is to be regarded as 'non cooperative'. 'It is then for the FHQ [Force Headquarters] to determine boarding capabilities across the force, both amongst MS [Member States] and 3rd State TCNs [Troop Contributing Nations], in order to establish the availability of teams that are able to take down a mother ship,

[101] See Flow Chart, ANNEX C TO OP ATALANTA EU OHQ SOP LEGAL 001, DATED 26 MARCH 2009 (on file with the author).

[102] See MatrixRoE Atalanta (13.09.2009) (on file with the author).

[103] ibid.

[104] According to the EUNAVFOR, Operation Order, 'When the Scene of Action Commander (SAC) of the intercepting unit determines that a vessel should be boarded (Series 17 apply), the active cooperation of the Master or the individual in control of the vessel of the intercepted vessel should be sought. The Master should be informed of the following: a. The intention to board; b. The authority under which the boarding is taking place; c. The purpose of the boarding; d. That no harm will be done to the vessel, crew or cargo and that he/she should slow or stop to facilitate the embarkation of a boarding party'; OPERATION ORDER FOR EUROPEAN UNION NAVAL FORCE OPERATION ATALANTA COUNTER PIRACY IN THE GULF OF ADEN AND SOMALI BASIN (Version 1 Dated 17 Dec 2008); ANNEX E APPENDIX 1 OF REFERENCE D (on file with the author). See also Papastavridis (n 46) 59.

[105] For these terms see OPERATION ORDER FOR EUROPEAN UNION NAVAL FORCE OPERATION ATALANTA COUNTER PIRACY IN THE GULF OF ADEN AND SOMALI BASIN (Version 1 Dated 17 Dec 2008); ANNEX E APPENDIX 2 OF REFERENCE D.

or other pirate vessels where the vessel to be boarded is deemed non co-operative' (ROE 172).[106] It is only in such cases that the Force Commander may order a Member State to dispatch units in the area of the operation in order to contribute to the boarding.

In addition, 'if the Master is expected to, or has stated that he will, use force to prevent the boarding party […], then any subsequent boarding is to be regarded as "opposed" and appropriate measures may be taken'; the authorization is then given by the Operation Commander, but, very significantly, under ROE 173, 'opposed boarding will only be executed and conducted according to the executing States' Rules and regulations and *with its approval*' (emphasis added). Similarly, the use of minimum force to secure the release of vessels personnel taken by pirates is authorized by the Operation Commander; however, 'the release operation can only be launched *with the consent of the flag State* of vessels being released' (ROE 336).[107] Of course, all the above ROEs would not apply should the Member States decide, in the meantime, to revert to national OPCON, as the French units do.

In conclusion, the assessment of whether the right of visit should be exercised is made by the Commanding Officers of the Member States, who also have the authority to decide all necessary pre-boarding measures, such as diversion or the firing of the warning shots. The EU Force Commander comes into play later and either, first, '*authorizes*' the boarding in cases of 'unopposed boarding' or second, *directs* the dispatch of the military units and *authorizes* the boarding in cases of 'non-cooperative boarding' (emphasis added). The EU Operation Commander, on the other hand, *authorizes* the boarding in cases of 'opposed boarding' with the consent of the Member State as well as *authorizes* the use of force in order to free a vessel under piracy with consent of the flag State (emphases added).

2. Application of the secondary rules to the decision to visit the suspected vessels

It follows from the foregoing modus operandi that the EU enjoys neither an exclusive decision-making authority, nor does it have the effective 'operational' control over the boarding as such in all cases, let alone 'full command' of the Member States' units.[108] In particular:

a) in cases of 'unopposed' and 'non-cooperative' boardings, it is the EU Force Commander that 'authorizes' the boarding on the basis of information given by the Commanding Officer. Thus it seems that the EU exercises 'effective control', in the sense of 'operational control', over the acts and omissions of the Member States in this regard. However, there is no certainty whether this 'authorization' suffices to attribute the decision to board the vessel solely to the EU.

[106] See also ibid ANNEX E APPENDIX 1 OF REFERENCE D, para 9.
[107] ibid (emphasis added).
[108] See (n 93) and accompanying text.

https://doi.org/10.1017/S0020589315000214 Published online by Cambridge University Press

On the one hand, if we adopt the position of Messineo, 'the transfer of attribution from a state or an International Organization to an international organization should occur every time that the transferred organ is both functionally integrated in the receiving organization and has ceased to be so with regards to the sending state or International Organization'.[109] This seems not to be the case here. From the perspective of the *Jaloud* case,[110] it is clear that Member States do retain the 'full command' over their units. Hence, from this viewpoint, it seems that this conduct cannot be attributed solely to the EU.

Alternatively, it might be argued that this is a case of 'dual attribution', ie attribution both to the EU and to the Member State involved, since the Member State continues to retain command of the warship concerned. According to the ILC, dual attribution of conduct, ie attribution to both the international organization and to the Member State should not be precluded.[111] This possibility was also left open by the European Court of Human Rights in the recent *Al Jedda* case[112] as well as by the Dutch Courts in the *Mustafić and Nuhanović* cases.[113]

On the other hand, focusing solely on the conduct under scrutiny here, namely the decision to board the vessel, it is hard to escape the conclusion that the 'decision-making authority' for this act is the EU. If Member States do not revert to national operation control (eg French units), the ostensibly wrongdoing conduct will be under the 'effective control' of the EU Force Commander and thus attributable to the EU. It is the author's view that this is an example of an instance in which the application of the rules of attribution set out in Article 7 in the ARIO do not lead to a very satisfactory outcome.

[109] F Messineo, 'Multiple Attribution of Conduct', SHARES Research Paper No 2012–11, available at <www.sharesproject.nl> and also in PA Nollkaemper and I Plakokefalos (eds), *Principles of Shared Responsibility: An Appraisal of the State of the Art* (CUP 2014) 41.

[110] See *Jaloud v The Netherlands* case (n 92).

[111] 'Although it may not frequently occur in practice, dual or even multiple attribution of conduct cannot be excluded. Thus, attribution of a certain conduct to an international organization does not imply that the same conduct cannot be attributed to a State; nor does attribution of conduct to a State rule out attribution of the same conduct to an international organization'; ARIO Commentary, 16.

[112] 'The Court does not consider that, as a result of the authorization contained in Resolution 1511, the acts of soldiers within the Multinational Force became attributable to the United Nations or – more =importantly, for the purpose of this case – ceased to be attributable to the troop contributing nations': see *Al-Jedda v United Kingdom*, (App No 27021/08), Grand Chamber, Judgment of 7 July 2011, at para 80.

[113] It found that Dutch peacekeepers were under the effective control of authorities in The Hague, rather than the UN, and that attribution could potentially be to both the UN and The Netherlands; Court of the Appeal in The Hague, *Mustafić and Nuhanović*, LJN Br0132, 5 July 2011, at 5.3. See also A Nollkaemper, 'Dual Attribution: Liability of the Netherlands for Conduct of Dutchbat in Srebrenica' (2011) 9 JICJ 1143–57. On 6 September 2013, the Dutch Supreme Court affirmed the Court of Appeal's strong approach to dual attribution, holding that it was possible that both The Netherlands and the UN had effective control over the same wrongful conduct and that attributing the conduct to The Netherlands did not in any way determine whether the UN also had effective control (para 3.11.2). The Judgment is available at <http://www.rechtspraak.nl/Organisatie/Hoge-Raad/OverDeHogeRaad/publicaties/Documents/12%2003324.pdf>.

b) Dual attribution, however, may arise in the case of 'opposed boarding' in which both the EU Operation Commander and the Member State will decide to board the suspected vessel. It may also arise in cases in which the boarding is co-decided by the EU Operation Commander and the flag State of the vessel under suspicion of piracy. In such cases, joint responsibility, in the sense of co-authorship of the decision to board, may arise should the suspicions which gave rise to the boarding prove unwarranted.

3. *'Indirect responsibility' of the EU*

In any event, the responsibility of the EU and its Member States may arise on a different basis: even though a certain act may not be directly attributed to the EU, the EU may incur 'indirect responsibility',[114] ie responsibility 'in connection with acts of States', for the conduct in question.[115]

Under Chapter IV of ARIO, an organization may be held responsible if it aids or assists a State in committing an internationally wrongful act (Article 14), or if it directs and controls a State in the commission of such an act (Article 15), or if it coerces a State or another organization to commit an act that would, but for the coercion, be an internationally wrongful act (Article 16). Moreover, under Article 17, an international organization can be held internationally responsible if it circumvents one of its international obligations; either by adopting a decision binding member States to commit an act that would be wrongful if it had committed the act itself (Article 17(1)); or by authorizing member States to commit an act that would be internationally wrongful it if had committed the act itself, but in the latter case only if the act in question is committed because of that authorization (Article 17(2)).

In the present context, it is easy, first, to exclude the provision on '*coercion*' due to lack of any form of coercion on the part of the EU. As regards Article 17 (2) of the ARIO,[116] it is true that it speaks of 'authorization' to be given to Member States, and this is what actually occurs in case of boardings under scrutiny. Nevertheless, the application of this provision to the present case should not be lightly presumed: firstly, it cannot be considered as reflective of customary international law,[117] secondly, it has been criticized for setting out a primary rather than a secondary rule since its application is not contingent on

[114] The term 'indirect responsibility' is credited to Ago, see Roberto Ago, Special Rapporteur, *Eighth report on State responsibility*, 1979 (A/CN.4/318 and Add.1 to 4), para 2–3.

[115] See Chapter IV of ARIO and accompanying commentary.

[116] Under art 17(2) of ARIO, '[a]n international organization incurs international responsibility if it circumvents one of its international obligations by authorizing member States or international organizations to commit an act that would be internationally wrongful if committed by the former organization and the act in question is committed because of that authorization'.

[117] See N Nedeski and PA Nollkaemper, 'Responsibility of international organizations "in connection with acts of States"', SHARES Research Paper 08 (2012), ACIL 2012–05, at 8; <www.sharesproject.nl>.

https://doi.org/10.1017/S0020589315000214 Published online by Cambridge University Press

the existence of an international wrongful act.[118] More importantly, it would not be applicable here since the act in question, namely visiting the suspected vessel, is not 'committed because of that authorisation', in the words of the respective provision, but because it is permitted by Article 110 of the LOSC.[119]

On the other hand, the provisions of Article 15 of the ARIO concerning 'direction or control' could be applicable in a specific case where military units have been directed to the scene of the operation in order to conduct a 'non-cooperative boarding'. Article 15 requires 'actual direction of an operative kind' on the part of the organization,[120] which does occur in this specific context.[121] Thus the EU could incur 'derivative/indirect responsibility' pursuant to Article 15, along with the individual responsibility of the Member State which conducted the hypothetically unlawful boarding, in addition to its own alleged direct responsibility for the co-authorship of the act itself. Additionally, if the warship of a Member State directed to the scene by the EU Force Commander assists the warship that conducts the boarding, it may also be held responsible for 'aid and assistance' pursuant to Article 16 of ARSIWA. It is noteworthy that the ARIO recognizes that the 'derivative' responsibility of the international organization is without prejudice to the responsibility of the State that commits the act in question (Article 19).

Article 15 is not, however, of significant assistance in the cases of simple authorization by the EU Force Commander to board vessels as there is no 'actual direction of an operative kind'; in such cases, the most pertinent provision seems to be Article 14 of the ARIO, ie 'aid or assistance'.[122] Consequently, even if such conduct were not to be attributed to the EU, which this author believes should be the case, the EU would be responsible for 'aid or assistance', since the planning of the operation as a whole and the explicit authorization on the part of the EUNAVFOR are certainly facilitative of the wrongful decision to board the vessel.

In conclusion, there is certainly some difficulty in applying the existing secondary norms in the context of the EU operations. Indeed, as Wessel and

[118] See Tzanakopoulos (n 91) 48; C Ahlborn, 'The Rules of International Organizations and the Law of International Responsibility', SHARES Research Paper 02 (2011), ACIL 2011–03, at <www.sharesproject.nl>.

[119] Otherwise, France could not shift to national control, if the right of visit was based only on the authorization of EUNAVFOR.

[120] As the ILC mentions in the ARIO Commentary, quoting the ARSIWA Commentary to art 15 ARSIWA, 'the term "controls" refers to cases of domination over the commission of wrongful conduct and not simply the exercise of oversight, still less mere influence or concern', and that 'the word "directs" does not encompass mere incitement or suggestion but rather connotes actual direction of an operative kind', at 38.

[121] Wessel and den Hertog are in accord of the application of this provision generally in the context of CFSP operations: 'Situations in which Member States are directed or controlled by the Union form the foundation of the CFSP', (n 94) at 355.

[122] See ARIO Commentary, at 36–7 and A Reinisch, 'Aid or Assistance and Direction and Control between States and International Organizations in the Commission of Internationally Wrongful Acts' (2010) 7 IOLR 63.

den Hertog recognize, 'the complex nature of CSDP decision-making and implementation calls for a case-by-case analysis which is to take account of the special position Member States have in conducting EU military missions'.[123] Such case-by-case analysis can result not in a 'competence-responsibility gap', as the above authors suggest, but in rather solid assertions concerning international responsibility, despite the not entirely satisfactory matrix of secondary rules adopted by the ILC. Thus, it is suggested that the EU and the Member States may well both incur responsibility for co-authorship of the ostensible wrongful boarding, and, in addition, the EU may incur 'indirect' responsibility for aiding and assisting or for directing and controlling the conduct of the Member States.

C. Responsibility Arising from the Conduct of the Interdiction

As regards responsibility arising from the actual boarding and search of the pirate vessel or the vessel suspected of being engaged in piracy in the course of EUNAVFOR Operation Atalanta (Phase II), the following observations can be made: should the Commanding Officer (CO) of the warship receive authorization from the EU Force Commander (FC) to board the vessel, the CO will conduct the operation in accordance with the Rules of Engagement (RoEs) already authorized by the EU organs. However, the EU official message concerning the Implementation of the RoEs states that 'force is authorized for use in certain circumstances …, *in accordance with national law on the use of force in self-defence* and the extant Roe profile, which is drawn from the regulations and limitations within LOSC and pertinent UNSCRs [UN Security Council Resolutions]'.[124] It is thus readily apparent that the operational control rests with the Member State rather than with the EU Force Commander. More importantly in cases of 'opposed boarding', which may result in the loss of life, the Member State is required to give its consent. In practice, the CO will only inform the Force Commander or the Operation Commander at the end of the operation. Significantly, the Member State also retains exclusive authority in relation to criminal or discipline matters that may arise in the course of the operation, ie the 'full command'.

In light of the foregoing, it is submitted that the EU lacks any operational, ie effective control of law-enforcement operations conducted by Member States, with the consequence that the latter should not be considered as 'de facto organs' of the EU for the purposes of Article 7 of the ARIO. The comments made above regarding the possibility of the indirect/derivative responsibility of the EU as well as on the possible complicity of third States should they assist in the operation, are also relevant here.

[123] Wessel and den Hertog (n 95) 357.
[124] See (n 100) (emphasis added).

In addition, there might be responsibility arising from separate wrongful acts: a primary rule applicable to the present operational Phase is the right to life, enshrined in both the ECHR and the EU Charter of Fundamental Rights, which binds directly the EU organs. Therefore, it could be argued that the EU bears responsibility separate from, or parallel with, Member States for failing to meet the positive obligation of safeguarding the right to life in the course of a maritime interception operation.[125] This involves a wrongful conduct, in the form of an omission, separate from the wrongful conduct of the Member State, eg the disproportionate use of lethal force against suspected pirates, which is attributed directly to the latter State.

D. Responsibility Arising from the Pre-Detention/Detention of Suspected Pirates

There are good reasons which militate against the responsibility of the EU for the ostensible violations of human rights in this Phase of an operation. As explicitly provided in the Guidance to EUNAVFOR, 'the decision as to whether an individual suspected of piracy or armed robbery at sea may be detained *rests with the Commanding Officer* (emphasis added). When making this decision he should seek legal advice from both national authorities and from the EU OHQ as necessary'.[126] It is apparent that seeking advice from the EU Operation Headquarters does not suffice to attribute the conduct to the EU. In addition, according to OPLAN, 'decision either to transfer either to release has to be made within 48 h after CO's decision to detain';[127] thus, again, it is the Commanding Officer, that is, the Member State, who has the decision-making authority to release the detainees or to transfer them for the purposes of prosecution.

Furthermore, the Guidance to EUNAVFOR provides that 'while the day to day supervision of detainees may fall to a number of personnel within a TCN vessel, *ultimate responsibility for the proper treatment of detainees remains with the Commanding Officer* until the release of the detainee or the transfer to another appropriate authority for prosecution'.[128] Thus, the 'ultimate control', or, in the words of ARIO, 'effective control' rests with the Member State. Accordingly, any breaches of human rights, eg the prohibition of

[125] As held in the landmark case of *Osman v United Kingdom* (1998), art 2 requires States not only to restrain from causing death, but also to take measures to protect the lives of individuals within their jurisdiction; *Osman v United Kingdom*, App No 87/1997/871/1083, Grand Chamber Judgment of 28 October 1998, 29 EHRR 245.

[126] See OP ATALANTA EU OHQ STANDARD OPERATING PROCEDURE: HANDLING OF DETAINEES / SUSPECTED PIRATES / ARMED ROBBERS AT SEA AND EVIDENCE COLLECTION, OP ATALANTA EU OHQ, SOP LEGAL 001, DATED 26 MARCH 2009, at para 2.2 (on file with the author) [hereinafter: Guidance to EUNAVFOR] (emphasis added).

[127] See Flow Chart (n 101).

[128] Guidance to EUNAVFOR (n 126), para 2.4 (emphasis added).

torture or inhuman or degrading treatment or punishment under Article 3 of ECHR, would be attributed to the Member State.

At this point, it is noteworthy that the Guidance to EUNAVFOR includes various safeguard provisions which are only applicable to detainees and not to suspected pirates in the pre-detention phase.[129] Nevertheless, those in pre-detention do come under the jurisdiction of the interdicting States and *ergo* within the purview of ECHR. The reason for this is merely that there is no need for the formal detainment of the persons concerned to be considered as subject to the protection of the Convention, since the cornerstone criterion is the existence of sufficient control of these persons by the organs of a State party to the Convention. Thus the Member States concerned would be held responsible for any human rights violation during this phase. On the other hand, it is highly unlikely that the EU would incur responsibility in this respect, for the simple reason that it lacks any jurisdiction over the persons concerned.

E. Responsibility Arising from the Decision to Transfer or Release the Suspected Pirates

It is suggested that both the EU and its Member States incur responsibility under certain circumstances. There are four courses of action available to Commanding Officers under EUNAVFOR operational control, namely:

> a) To transfer the detained person to the competent authority of the TCN making the capture (in which case national legal advice is required and the OpCdr needs to be informed); b) to transfer the detained individual to the competent authority of a Member State (a bilateral agreement and national legal advice will be required and OpCdr informed); c) to transfer the detained individual to the competent authority of a Third State with whom the EU has an agreement after decision from the OpCdr, d) To release the individual, if there is no or insufficient evidence to suggest that they are pirates or armed robbers, 'or despite the initial intention transfer to Third State it proves not to be possible, for whatever reason'.[130]

It is submitted that situations (a) and (d) would engage the responsibility of the Member State, while situation (b) could engage the responsibility of both Member States involved, though for separate wrongful acts. Finally, situation (c), which paradoxically is very rare in practice,[131] would, first and foremost, engage the responsibility of the EU and the State to which the persons are

[129] See ibid, Enclosure 8 to Annex B. It has anonymously been reported to the author that the persons under the present circumstances are not considered to enjoy the full protection of human right treaties; on the contrary, they are perceived to be *persones extra juridicates* (communication with the author, 5 April 2013) (emphasis added).

[130] Guidance to EUNAVFOR (n 125) at para 3.

[131] It is reported also that 'over 60% of the pirates apprehended under Operation Atalanta are released, which illustrates the impunity of the pirates'; see H Tuerk, *Reflections on the Contemporary Law of the Sea* (Martinus Nijhoff 2012) 95.

transferred, whilst the Member State may only be held responsible for complicity or for another wrongful conduct, ie chain *refoulement*, namely causing a person to return to another place from which *refoulement* occurs subsequently.[132]

In more detail, and as noted above, decisions to transfer detainees to Kenya, Seychelles, Mauritius and Tanzania are made by the EU Operation Commander in accordance with the terms of the EU agreements with the respective States. These agreements are not 'mixed agreements' but are concluded exclusively by the EU pursuant to Article 3(2) of the TFEU.[133] It follows therefore that any breach of these agreements or of relevant human rights obligations would be attributable to the EU under Article 6 of ARIO, in addition to the State-party concerned. Thus, if, for example, Kenya uses evidence against suspected pirates before its domestic courts that is obtained by torture, the responsibility for this wrongful act would rest not only with Kenya, but also with the EU for having transferred the persons concerned to a State where they have faced the risk of torture or of evidence obtained by torture being been used in proceedings against them in violation of their right to a fair trial (Article 19 para 2 of the EU Charter of Fundamental Rights and Articles 3 and 6 of ECHR).[134]

A Member State who facilitates transfers to the competent authorities of third States (eg Kenya) would not be liable for the transfer as such: this is attributed to the EU, since the Member State would be acting for *for the benefit and under the authority* of the EU in this regard.[135] However, the Member State could be found responsible under Article 58 of ARIO for aiding or assisting the EU in the commission of the wrongful act.[136] In addition, ex hypothesi, it could also be found in violation of its positive obligations under Article 3 of ECHR, in the sense that it knowingly allowed the transfer of the suspected pirate by the EU to a State where the latter faced the risk of torture or other inhuman or degrading treatment or punishment.[137]

It should be noted that there is another State which might be held responsible in the context of transfers pursuant to EU agreements, this being Djibouti. Djibouti is the 'host State' for many of the land-based activities of Operation

[132] See J Crawford and P Hyndman, 'Three Heresies in the Application of the Refugee Convention' (1989) 1 IJRL 155, 171.

[133] Art 3(2) of the TFEU reads as follows: 'The Union shall also have exclusive competence for the conclusion of an international agreement when its conclusion is provided for in a legislative act of the Union or is necessary to enable the Union to exercise its internal competences, or insofar as its conclusion may affect common rules or alter their scope'. See further discussion in Wessel and den Hertog (n 95) 344.

[134] cf the *Othman (Abu Qatada) v the United Kingdom* case (App No 8139/09), ECHR (Fourth Section), Judgment of 17 January 2012.

[135] cf R Ago, 'Third Report on State responsibility' UNYBILC (1971-II) 271 (emphasis added).

[136] See ARIO Commentary, 90.

[137] See *inter alia Soering v UK* (1989), 98 ILR 270, at para 88; *M.S.S. v Belgium and Greece*, App No 30696/09, Grand Chamber, Judgment of 21 January 2011, at para 344ff.

Atalanta[138] and through which suspected pirates are transferred to third States. Hypothetically, Djibouti would incur parallel responsibility for allowing violations, for example, of the principle of *non-refoulement* occurring in its territory.

F. RESPONSIBILITY OF THE EU AND MEMBER STATES IN PRACTICE: THE MV COURIER *CASE*

At this point, it is appropriate to consider and discuss questions of responsibility arising from the *MV Courier* case before the German courts concerning Operation Atalanta, and, more specifically, its first interdiction operation.

According to the relevant EUNAVFOR press release:

> [o]n 3 March 2009, the German warship RHEINLAND PFALZ, which joined the EU NAVFOR ATALANTA counter-piracy operation on 8 February, successfully fended off a pirate attack on the German owned MV COURIER as it transited through the Gulf of Aden. On receiving the alarm call the German frigate, helped by the American CTF 151 destroyer MONTEREY, launched helicopters to assist the besieged vessel […] The pirates abandoned their attack soon after the helicopters arrived "on scene" and the RHEINLAND PFALZ's Sea Lynx pursued one of the two escaping skiffs for over 10 miles, firing warning shots to stop the vessel before the warship closed in to board and search it […] A total of nine suspects were arrested and a large amount of fuel, weapons and ladders were discovered and confiscated.[139]

Following the arrest and transfer to Kenya pursuant to the EU agreement, the Kenyan Court of First Instance held in *Mohamed Hashi and 8 Others* that 'Kenyan Courts are not conferred with or given jurisdiction to deal with any matters arising or which have taken place outside Kenya'.[140] As the crime concerned was not committed in territorial waters within the jurisdiction of Kenya under section 5 of Kenyan Penal Code,[141] the Court ordered the immediate and unconditional release of the applicants from custody.[142] This decision was appealed by the Prosecutor and on 12 November 2010, the High Court of Kenya decided not to release the prisoners until further notice,

[138] See Agreement between the European Union and the Republic of Djibouti on the status of the European Union-led forces in the Republic of Djibouti in the framework of the EU military operation Atalanta (3.2.2009) OJ L 33/43 available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2009:033:0043:0048:EN:PDF>.

[139] See EUNAVFOR Press Release (4 March 2009) available at <http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/esdp/106500.pdf>.

[140] See *Re Muhamud Hashi and 8 Others v Republic*, [2009] KLR Misc App No 434 of 2009; available also at Lloyd's List (8 November 2010) 17.

[141] The section provides: '[t]he jurisdiction of the courts of Kenya for the purposes of this Code extends to every place within Kenya, including territorial waters; see <http://www.kenyalaw.org/Downloads/GreyBook/8.%20The%20Penal%20Code.pdf>.

[142] See *Re Muhamud Hashi and 8 Others v Republic*, at 33. See also A Odeke, 'Somali Piracy: Jurisdiction over Foreign Pirates in Domestic Courts and Third States under International Law' (2011) 17 JIML 121, 139.

while the Court of Appeal overruled the decision of the Court of First Instance and convicted them for piracy.[143]

In the meanwhile, the applicants initiated proceedings in Germany complaining that their arrest and their transfer applicants had been in violation of the German Constitution, the ECHR and the ICCPR. On 11 November 2011, the administrative court of Cologne held Germany accountable for transferring the complainant to Kenya in violation of the principle of *non-refoulement*.[144] It stated that the conditions of detention at the Shimo-La-Tewa prison at the time of the transfer, namely the overcrowding, poor sanitary facilities, shortage of water for hygiene and pest infestation in combination with high temperatures amounted to inhuman and degrading treatment.[145] However, those parts of the complaint relating to the arrest and detention at sea did not convince the Court: It held that the initial arrest was lawful since Article 105 LOSC provided a sufficient legal basis for arresting piracy suspects on the high seas.[146] Furthermore, the Court found that the complainant's detention on board the German frigate was in accordance with the procedural safeguards flowing from the right to liberty. Most importantly, it did not find a violation of the right to liberty even though the complainant was not brought before a German judge while detained on board the German frigate for more than a week. Rather, it decided that the right to be brought before a judge was respected because the complainant was taken before a Kenyan judge upon his transfer.[147]

Interestingly for our purposes, Germany argued before the administrative court of Cologne that acts taken by Germany while contributing to EUNAVFOR were not attributable to the German State because a transfer of authority to the European Union had taken place. While the Court left the issue open as regards the arrest and detention, it decided the question of attribution regarding the part of the complaint which related to the transfer. It opined that Germany had played a decisive part in the decision to transfer the suspect and so the violations in relation thereto were attributable to Germany.[148]

Without discussing this case in detail, it is suggested that in light of the assertions made above in respect of the responsibility of the EU or the

[143] See the decision of the Kenyan Court of Appeal on 18 October 2012; <http://piracylaw.files.wordpress.com/2012/10/kenya-hashi-appeal-opinion.pdf>.

[144] *Re 'MV Courier'* (n 13). As of 25 May 2013, the case was still pending at the appellate level: *Re 'MV Courier'*, 4 A 2948/11 (Oberverwaltungsgericht Münster). See commentary of the case in C Kress, Die moderne Piraterie, das Strafrecht und die Menschenrechte Gedanken aus Anlass der deutschen Mitwirkung an der Seeoperation ATALANTA in D Weingärtner (ed), *Die Bundeswehr als Armee im Einsatz* (Nomos 2012) 95 and A Petrig, 'Arrest, Detention and Transfer of Piracy Suspects: A Critical Appraisal of the German *Courier* Case Decision' in G Andreone *et al.* (eds), *Insecurity at Sea: Piracy and other Risks to Navigation* (Giannini Editore 2013) 153.

[145] ibid, paras 59–77.

[146] ibid, paras 31–36.

[147] ibid, paras 37–50.

[148] ibid, paras 32, 38, 52–59.

Member State in connection with the transfer of suspected pirates, the transfer in question was made under the authority of the EU pursuant to the relevant agreement with Kenya. Thus, from the moment the German Commanding Officer under the instructions of the German Government decided to delegate the responsibility for Hashi and others to the EU Operation Commander, Germany was acting as an organ or agent of the Union; it follows that if the wrongful conduct in question is the ultimate decision to transfer or release the suspected pirates, it is the EU and not Germany that should be held responsible. Even though it was the German authorities that initially decided not to prosecute and to send the suspected pirates to Kenya,[149] the legal basis was the EU–Kenya agreement and thus the EU had the final decision-making authority.[150]

As discussed above, Germany could only be found responsible for complicity or for another internationally wrongful act, ie the breach of its positive obligation under Article 3 of the ECHR to ensure that the suspected pirates would not be transferred to a State, *in casu* Kenya, where they were at risk of being subjected to torture, inhuman or degrading treatment or punishment. In the author's opinion, the decision of the Court of Cologne did not adequately address the ground on which Germany was responsible and it is up to the appeals' court to shed more light on this.

In more general terms, the *MV Courier* case underscores the 'responsibility-gap' of the Union in the context of CSDP operations. It is unfortunate that the Court of Justice of the European Union does not have any jurisdiction with respect to the provisions relating to CFSP, 'nor with respect to acts adopted on the basis of those provisions'.[151] Accordingly, any claim arising from the conduct of the EU in the course of the Operation Atalanta can only be submitted to national courts. This is certainly decisive in holding the Member States primarily liable for any wrongful conduct committed in the course of the Operation Atalanta; otherwise, we have to accept a responsibility regime barren of any processes for implementation and enforcement. As Naert concludes, 'in cases where the EU is responsible under international law, EU law may nonetheless require the involvement of Member States courts and may provide that a Member State will ultimately pay compensation or be responsible for answering a claim'.[152]

[149] As Petrig reports, 'the competent German prosecutorial authorities opened an investigation and issued arrest warrants against all nine intercepted persons on 6 March 2009. On the following day, however, the prosecutorial authority discontinued the investigation according to Section 153c of the German Code of Criminal Procedure. This decision was taken after the inter-ministerial decision-making body informed the prosecutorial authorities about its finding that the suspects should be transferred to Kenya pursuant to the transfer agreement concluded between the European Union and Kenya on 6 March 2009'; see A Petrig (n 144) 155.

[150] It is also telling that the relevant EUNAVFOR Press Release of 11 March 2009 refers to an *EU* handover of suspected pirates to Kenya (on file with the author). This was also confirmed in the communication between the German OHQ and the EUNAVFOR FC (on file with the author).

[151] See art 275 of TFEU and further comments in Eeckhout (n 58) 497.

[152] Naert (n 25) 337.

https://doi.org/10.1017/S0020589315000214 Published online by Cambridge University Press

The situation may change to a certain extent should/when the EU finally accedes to the ECHR.[153] It will then be possible that both the Member State involved and the EU may become co-respondents in a case before the Strasbourg Court. As provided for in the 2013 Draft Accession Agreement, the relevant application would have to be filed against the Member State, to which the act is attributed and the EU may then join as co-respondent.[154] However, Opinion 2/13 on this Draft Agreement delivered by the CJEU on 18 December 2014 postponed, for the time being, any progression towards the EU acceding to the ECHR.[155]

IV. CONCLUDING REMARKS

EUNAVFOR Operation Atalanta has been the Union's first maritime operation and it has certainly been successful in view of the significant decrease of pirate attacks off the Somali coast. However, it has brought to the fore a variety of issues concerning its legal basis under international law, the applicable legal framework and its responsibility. These issues are even more interesting in the case of the EU, since the Union possesses a more integrated legal order than other organizations undertaking such operations, such as the UN and NATO. Inevitably, the allocation of responsibility between the EU and its Member States has proved the most perplexing issue, exacerbated by the lack of clearly established rules and clear-cut answers.

The present article has attempted to address these issues against the background of international and European law. Even though the legal basis of the Operation is clear from a European law perspective, there have been certain misconceptions concerning the legal basis of the Operation under international law. In particular, the Operation is conducted under the rules of the law of the sea and pursuant to the consent of the TFG and it is not mandated as such by the relevant Security Council Resolutions. Additionally, the delineation of the Operation's legal framework requires a careful analysis of the rules applicable to each of its phases and of its addressees, since each phase is subject to different rules binding different actors.

Finally, there has been an extensive discussion of questions responsibility for which were heavily influenced by the applicable Rules of Engagement and of the actual conduct of the Operation. The conclusion has been that, at least on the

[153] See art 6(2) of TFEU.

[154] On 5 April 2013, negotiations of the 47 Council of Europe Member States and the EU finalized the draft accession agreement of the EU to the ECHR. For the text of the draft agreement see <http://www.coe.int/t/dghl/standardsetting/hrpolicy/Accession/Meeting_reports/47_1(2013)008rev2_EN.pdf> and a short commentary in SHARES Briefing Paper – A New Framework for Allocating International Responsibility: the EU Accession to the European Convention on Human Rights (2014), <www.sharesproject.nl>.

[155] The Opinion identified problems in the draft agreement with regard to the compatibility with EU law of the EU's accession to the ECHR . See Court of Justice of the EU (Full Court) Opinion 2/2013 (18 December 2014) at <http://curia.europa.eu/>.

high seas, responsibility should primarily rest with the flag States rather than with the EU. However, in most cases the EU is indirectly responsible for violations of international law, except in cases where it has authorized the interdiction of the suspected pirate vessel, in which case it is jointly responsible or when the suspected pirates are transferred to third States pursuant to EU agreements with such States, in which case it bears primarily responsibility. Finding the Member States primary responsible is also dictated by the simple fact that the ECJ lacks jurisdiction over the activities in the context of CSDP operations; thus, even if in the future the Union is to be found co-respondent before the Strasbourg Court, the courts of the Member States serve as the 'first port of call' for any legal action.