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Citation

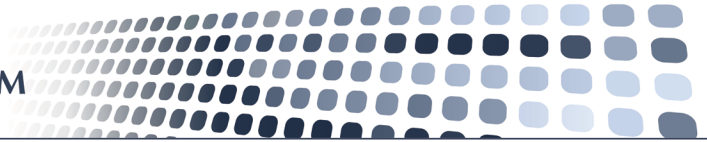
Larik, J. (2011). Operation Atalanta and the protection of EU citizens: Civis Europaeus unheeded? *Perspectives On Federalism*, 3(2), e40-e66. Retrieved from <https://hdl.handle.net/1887/139137>

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Note: To cite this publication please use the final published version (if applicable).



ISSN: 2036-5438

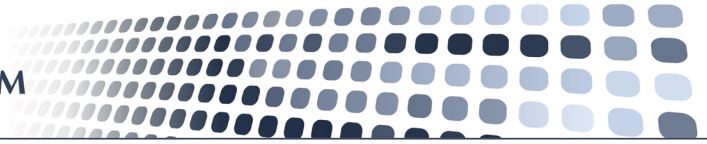
Operation Atalanta and the Protection of EU Citizens: *Civis Europaeus Unheeded?*

by

Joris Larik*

Perspectives on Federalism, Vol. 3, issue 2, 2011



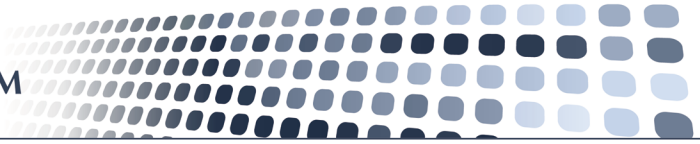


Abstract

This paper critically assesses the EU's anti-piracy operation *Atalanta* in the light of the protection of Union citizens. The main question is to which extent a Union citizen threatened by pirates off the coast of Somalia could rely on the promise of *civis europaeus sum*. The paper discusses the various legal aspects pertaining to the forceful protection of EU citizens in international law, EU constitutional law and the operational parameters of *Atalanta*. It argues that within the particular framework of the international effort to combat piracy, the protection of citizens by military force could be legal. Moreover, the protection of citizens outside the EU forms now one of the legally-binding general objectives of the Union. Yet, this objective is not reiterated in the operational mandate, which creates tension and confusion between the general objective and the CSDP instrument. The paper concludes that the mandate of *Atalanta*, by focussing entirely on universal objectives, is constitutionally incomplete and shows that the external dimension of Union citizenship is still underdeveloped.

Key-words:

Operation EUNAVFOR Atalanta, Common Defence and Security Policy (CSDP), Piracy, Union citizenship, use of force, protection of nationals abroad

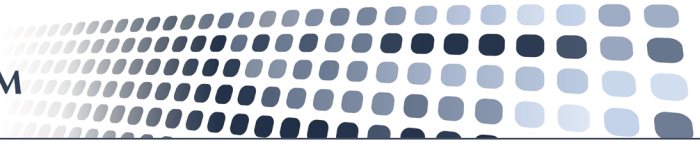


1. Introduction: The *civis europaeus* and the *hostis humani generis*

The ancient Roman dictum '*civis romanus sum*',¹ a pledge of respect for one's rights as a Roman citizen, has remained a powerful concept throughout the centuries. Importantly, the status that it indicates was not just relevant within the Roman Empire, but also carried considerable weight beyond its borders, instilling fear in the 'barbarians' that mistreating a Roman would be answered with severe reprisals. It is this external dimension of citizen protection with which the present contribution is concerned in the context of the European Union, with particular regard to its Common Security and Defence Policy (CSDP) as exemplified through the anti-piracy operation *Atalanta*.

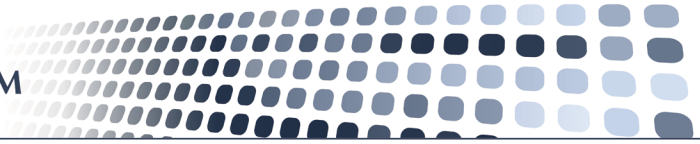
In the modern age, the phrase resurfaced in the context of protecting a nation-state's citizens abroad. As one of the most (in)famous examples, Lord Palmerston evoked in a speech before the British House of Commons in 1850 'the sense of duty which has led us to think ourselves bound to afford protection to our fellow subjects abroad' (reproduced in Francis 1852: 496). Consequently, according to Palmerston, 'as the Roman, in days of old, held himself free from indignity, when he could say *Civis Romanus sum*; so also a British subject, in whatever land he may be, shall feel confident that the watchful eye and the strong arm of England, will protect him against injustice and wrong.' (reproduced in Francis 1852: 496).

Similarly, even though in more aggressive terms, in 1900 Kaiser Wilhelm II told his troops at Bremerhaven (in a speech that would later be known as the "*Hunnenrede*"), before sending them off to China to quell the Boxer Rebellion that 'by its character the German Empire has the obligation to provide help to its citizens whenever they are oppressed abroad' (my translation, original reproduced in Görtemaker 1996: 357). Consequently, in order to avenge the alleged breaches of international law committed by the Chinese, the *Kaiser* instructed his troops to handle their arms in such a way that 'for a thousand years no Chinese will dare even to squint at a German anymore' (my translation, original reproduced in Görtemaker 1996: 357; for other historical examples see Ianniello Saliceti, 2011: 91-92). Already here, it becomes obvious that there are two sides to the concept. Next to the as such laudable idea of the state extending its protection over its citizens wherever they may be to shield them from harm, there is also the negative connotation of disregard for other



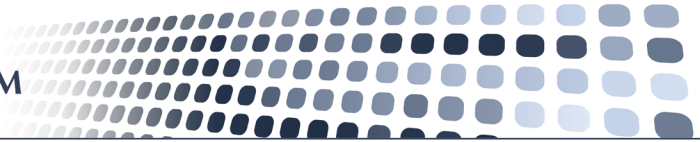
countries' sovereignty, as 'a pretext for intervention' (Gray 2008: 159) and generally a sign of 'imperialism', especially when the use of force is involved.

Also in the context of the European Union the ancient adage has been drawn upon. Four Advocates General have used the expression '*civis europeus [sic] sum*'.^{II} According to Advocate General Jacobs, who originally introduced the phrase into the vocabulary of the European Court of Justice, a Union citizen is 'entitled to assume that, wherever he goes to earn his living in the European Community, he will be treated in accordance with a common code of fundamental values [...]'.^{III} However, *civis europaeus sum* in these cases concerned the invocation of fundamental rights by Union citizens *within* the EU. The protection of Union citizens abroad is a matter distinct from the legal momentum behind consolidation and incorporation of citizens' rights protection inside the Union's borders.^{IV} Still, the introduction of Union citizenship into the primary law by the Maastricht Treaty already included an explicit external component, *viz.* the protection by the diplomatic or consular authorities of any Member State in third countries for Union citizens whose Member State is not represented (Art. 8c TEU (Maastricht Treaty version); for the post-Lisbon provision, Art. 23 TFEU; see also Art. 46 Charter of Fundamental Rights). Apart from consular and diplomatic protection proper, an innovation by the Lisbon Treaty is the inclusion among the objectives of the Union to 'uphold and promote its values and interests and contribute to the protection of its citizens' in its external relations (Art. 3(5) TEU). The failed Constitutional Treaty did not refer to the protection of citizens abroad as a general Union objective (Art. I-3(4) CT). This novelty was introduced by the French government at the Intergovernmental Conference of 2007 (de Poncins 2008: 75-76). The motivation behind this was, it has been argued, to underline that the Union is not a 'Trojan horse' of globalisation, but instead acts as a shield for its citizens from globalisation's challenges and downsides (Sauron 2007: 30). Moreover, it could be seen as the constitutional concretization of the EU's objective, introduced in Art. 2 of the Maastricht Treaty, 'to assert its identity on the international scene'. One important aspect of this would be the external dimension of Union citizenship, i.e. also 'to reinforce the identity of European citizens throughout the rest of the world', as Ianniello Saliceti puts it, who states furthermore that this had been pursued already as early as 1985 by the 'Adonnino Committee' (2011: 92).



With the introduction and rapid development of the Common Security and Defence Policy (formerly ESDP), the European Union has equipped itself also with military capabilities that can be used to pursue its foreign policy (or ‘external action’, to use the post-Lisbon term).^V The extent to which these capabilities can also be used to pursue the objective of protecting Union citizens abroad will be addressed here in the context of Operation *Atalanta*, the EU’s first naval military operation. Launched on 8 December 2008 (Council Decision 2008/918/CFSP), it will continue at least till December 2012 (Council Decision 2010/766/CFSP, Art. 1(5)). The academic debate surrounding *Atalanta* has thus far focussed on issues pertaining to legal aspects of the detention and prosecution of pirates and/or Law of the Sea issues (Fischer-Lescano and Kreck 2009; Fink and Galvin 2009: 384-385; Naert 2010: 179-191), or the geopolitical implications of the operation (Germond and Smith 2009; Kamerling and van der Putten 2010; Holmes 2010; Larik and Weiler 2011). However, it is argued here that the issue of protection of Union citizens should not be neglected, especially in view of both the unique (one might even say *sui generis*) nature of the concept of Union citizenship as well as of the EU as an actor in matters of international security. International organisations such as NATO do not contain any notion of common ‘citizenship’, whereas for individual countries it is a rather traditional and uncontroversial issue to protect their own nationals, who are bound by a ‘genuine link’ to their state,^{VI} abroad. For some it is even a constitutional objective (Ianniello Saliceti 2011: 97). Consequently, these peculiar features set the EU and Operation *Atalanta* apart from the other actors and their respective deployments in this theatre. Moreover, and in contrast to other CSDP/ESDP operations, *Atalanta* serves as a well-suited case study for the external protection of Union citizens. Whereas former missions were strictly concerned with external objectives that could only indirectly or incidentally affect the security of Union citizens, e.g. peace-keeping operations, police/rule of law missions or security sector reform programmes, *Atalanta* addresses pirate attacks in one of the most heavily-used maritime trade routes in the world, through which also large numbers of ships flying flags of EU Member States and EU citizens pass (Germond and Smith 2009: 587-589).

It is against this backdrop that the novel *civis europaeus* encounters the re-surfacing *hostis humani generis* (as pirates were classically termed). Consequently, the question emerges whether Union citizens abroad can also trust here in the weight of the legal concept of *civis*



europaeus sum. Can they rely on the assets of Operation *Atalanta*, i.e. – to use Palmerston’s imagery – the ‘watchful eye’ and the ‘strong arm’ of the Union to protect them against the threat of pirate attacks? In order to approach this question, the paper will proceed as follows: Section 2 addresses the international law aspects of the of the external protection of citizens by forceful means; section 3 turns to the EU’s constitutional framework and the issue of using the CSDP to pursue the objective of protecting EU citizens aboard; section 4 subsequently scrutinizes to which extent the mandate of Operation *Atalanta* takes this goal into account, observing that in spite of a constitutional objective the operation is not explicitly pursuing the protection of Union citizens. Section 5 points out the implications of this tension between the two. The paper concludes that the mandate of *Atalanta*, by focussing entirely on ‘universal’ objectives and neglecting the *civis europaeus*, is – if not unconstitutional – constitutionally incomplete.

2. International law aspects

The deployment of military forces and the use of force in order to protect a country’s citizens abroad raise first and foremost the question of legality under international law. For the EU the issue to use force for that purpose arises in the context of *Atalanta* with regard to crew members and passengers with Union citizenship who are threatened by pirates in the operation theatre.

In view of the general prohibition imposed on states to use force ‘in their international relations’ under Article 2(4) of the Charter of the United Nations, we have to address first the general parameters of international law in terms of the use of force to protect one’s citizens abroad. Even though International Law Commission (ICL) Special Rapporteur Dugard considered ‘[t]he use of force as the ultimate means of diplomatic protection’ in his 2000 report (International Law Commission 2000: para. 47; see also Gray, 2009: 136-137), this opinion cannot be regarded as the predominant one, and was not even shared by the majority of the ICL members (Gray 2009: 137). The current ILC commentary clearly states that ‘[t]he use of force [...] is not a permissible method for the enforcement of the right of diplomatic protection’ (International Law Commission 2006: 27). Beyond the realm of diplomatic protection, international legal scholarship either discards any notion of forceful citizen protection as an exception to the prohibition to use

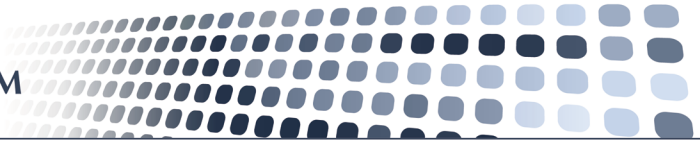


force (Bothe 2004: 604-605), or see merely little support in state practice and legal opinion for it (Gray 2008: 156-160).^{VII}

However, in the present case, we are not dealing with intervention on the territory of another state and/or against foreign state agents, but with pirate attacks – that is non-state actors – on ships within the territorial waters of Somalia or on the high seas. This is, in the first place, regulated by the international Law of the Sea as codified in the United Nations Convention on the Law of the Sea (UNCLOS). The convention provides a definition of piracy (Art. 101 UNCLOS), and allows any state to seize pirate ships on the high seas, arrest the pirates and exercise jurisdiction over them (Art. 105 UNCLOS). Therefore, on the high seas, a state is allowed to use force against pirates without having to invoke any exceptional (and controversial) ‘right’ to protect its own citizens or to exercise a humanitarian intervention (Ronzitti 1985: 137).

Importantly, in this particular case, the United Nations Security Council (UNSC) has passed a number of resolutions addressing the piracy surge off the Coast of Somalia, which supplement, and in view of the supremacy of the UN Charter to other international agreements partly supplant (Art. 103 UN Charter), the UNCLOS framework. This concerns in particular United Nations Security Council Resolution 1816 (2008) of 2 June 2008 (para. 7),^{VIII} which authorizes states operating under this legal framework to use ‘all necessary means to repress acts of piracy and armed robbery’ (para. 7(b)), i.e. also to use force. Overall, in essence it makes ‘the rules of international law concerning piracy on the high seas applicable also to territorial waters’ of Somalia (Treves 2009: 404).^{IX}

The addition of the term ‘armed robbery’ to the UNCLOS-defined term ‘piracy’ is of some significance, as the latter notion might not always be applicable to modern forms of piracy (e.g. the requirement that always two ships must be involved). Treves points out that the former term is used in the context of the International Maritime Organization (IMO) and supplements the notion of piracy, ‘inspired by the aim of including all acts connected with piracy (such as preparatory acts) and future possible acts involving only one ship’ (Treves 2009: 403). According to the IMO, ‘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.’ (International Maritime Organization 2011: Annex, para. 2.2.)



However, even though the Security Council is acting here under Chapter VII of the UN Charter, the Transitional Federal Government (TFG) of Somalia has to be notified of operations in its territorial waters (United Nations Security Council Resolution 1816 (2008), para. 11),^x which Naert calls ‘a simplified form of consent’ (Naert 2010: 185). While superfluous in view of the powers conferred upon the Security Council under Chapter VII, this could be seen as a supplementary invitation by Somalia for states to intervene in the fight against piracy in its territorial waters, which could serve to preclude illegality of the use of force as covered by such an invitation (Ronzitti 2007: 417). The EU has notified the TFG of Somalia accordingly (See Council Decision 2008/918/CFSP of 8 December 2008, point 4 of the grounds).

One should distinguish here the use of force against pirates from that in a situation of armed conflict between states. As Treves puts it, in contrast to acts of self-defence, counter-piracy should ‘be assimilated to the exercise of the power to engage in police action on the high seas on foreign vessels which is permitted by exceptions to the rule affirming the exclusive jurisdiction of the flag state’ (2009: 413). Similarly, but more accurately, Lubell calls for a ‘law enforcement approach of the scaled use of force’, which recognizes that even though we face here a force level below that of armed conflict, ‘[t]he level of force and types of weapons employed may well rise beyond the usual domestic crime scenarios’ (2010: 225).

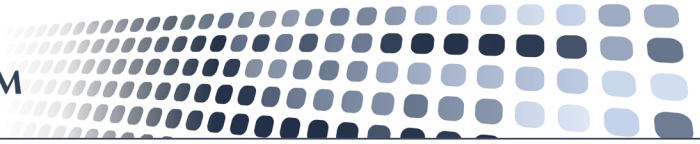
In view of the general authorization to combat piracy by the Law of the Sea and its extension *ratione materiae* (‘armed robbery’) and *loci* (Somali territorial waters) through UN Security Council resolutions (and affirmed by TFG notifications), a state cannot be seen as violating another state’s rights or territorial integrity if it uses force against pirates off the coast of Somalia.^{xi} There is no reason why this conclusion should change when the act of repressing piracy was carried out in a situation where the state’s own citizens were under threat. As was pointed out earlier, states do not have to invoke an exceptional right to protect their citizens to employ forceful measures against pirates. Hence, they can use these measures also to that particular end. As states are under no obligation, but are instead generally authorized to combat piracy, the protection by the (proportionate) use of force of a state’s nationals within these legal parameters is to be considered unobjectionable under international law.^{xii}



As regards the special nature of the EU as an international actor, it follows from the foregoing that in any case its Member States would be allowed to use force against pirates within the particular legal framework concerning Somali piracy. Only in case of overstepping this framework and breaching international law would the question of responsibility between the Member States providing military assets to *Atalanta* and the EU itself arise. After all, the relevant Joint Action states that '[t]he *European Union (EU)* shall conduct a military operation [...] called "Atalanta", not the several Member States (Council Joint Action 2008/851/CFSP, Art. 1(1), emphasis added).

Such questions of international responsibility of the EU notwithstanding (see Naert 2010: 641-644), it seems clear that force by a Member State operating within *Atalanta* could be used to protect a Member State's own citizens. There have been already a number of instances where EU Member States contemplated the use of force or actually resorted to forceful means to protect their citizens against pirates. According to French diplomatic sources, '[o]n three occasions French forces have had to intervene to protect French citizens taken hostage by pirates'. This concerned the vessels *Le Ponant*, *Carré d'As* and *Tanit* (Permanent Mission of France to the United Nations in New York 2009). In early May 2009, a rescue operation by German commandos of the kidnapped freighter *Hansa Stavanger* anchored in a Somali harbour was narrowly aborted for security concerns (Spiegel 2009).

Furthermore, and crucially, this authorization under the international legal framework also covers the protection of non-nationals, which obviously makes sense seeing the often multinational setup of merchant ship crews and the general interest of the international community involved. These non-nationals could therefore also come from other EU Member States. A fitting example here is the rescue mission conducted by Dutch forces from the frigate *Tromp* operating in the framework of *Atalanta*, which also saved German nationals from pirates that had hijacked the *MS Taipan* in April 2010 (EU NAVOR Somalia 2010). This – at least in effect – amounts to an act of an EU Member State's military forces protecting EU citizens from pirates. In view of the foregoing this is to be deemed legal under international law. The extent to which such protection of Union citizens is framed by EU law will be dealt with in the next two sections.



3. EU constitutional law aspects

From the perspective of EU primary law, as was stated in the introduction, the Lisbon Treaty introduced among the objectives of the Union to ‘uphold and promote its values and interests and contribute to the protection of its citizens’ (Art. 3(5) TEU). From the emerging literature on the Union’s objectives as a category of constitutional law,^{xiii} it can be concluded that these are binding obligations that commit the Union and its institutions to actively pursue these objectives within their areas of competence and that frame the use of their discretion accordingly (Calliess 2003: 90-93; Ruffert 2011: 41-44; Reimer 2003: 1000-1007; Kotzur 2005: 314-315; Plecher-Hochstraßer 2006: 105-136; Sommermann 1997: 280-296; Ipsen 1972: 556-563). In this literature, there is general agreement that also the Member States are bound, albeit indirectly, by these objectives by virtue of the duty of cooperation (Art. 4(3) TEU). Of course external relations, and in particular the Union’s Common Foreign and Security Policy (CFSP), of which the CSDP is a component, have certain special characteristics (intergovernmentalism and very limited of jurisdiction of the ECJ, see Art. 24 TEU; and Thym 2010: 330-338; van Elsuwege 2010). However, there are no cogent reasons to suggest that external action-related objectives should be treated in a fundamentally different way from internal policy-related objectives (Larik 2011).

How, then, do the objectives of upholding and promoting the Union’s values and interests and contributing to the protection of its citizens abroad apply to the piracy surge off the Coast of Somalia? As far as the (economic) interests are concerned, the stakes for the EU are obvious. The strategic economic importance for the EU lies in the fact that the Gulf of Aden is a maritime chokepoint through which 90 percent of merchandise and 30 percent of the energy resources consumed in Europe pass (French Ministry of Defence 2010; also Larik and Weiler: 85-86). Therefore, as French vice-admiral Bruno Nielly puts it, ‘il n’est pas question pour l’Europe de laisser ne serait-ce qu’un tronçon de cette route menacé par un phénomène tel que la piraterie’ and that ‘[l]’Europe, d’abord, y défend ses intérêts’ (French Ministry of Defence 2010). Also Germond calls Operation *Atalanta* ‘the first ever ESDP operation that primarily aims at defending Member States’ interests (that is, providing security to their merchant shipping)’ (2010: 53).^{xiv} In addition, Europe’s fishing industry should not remain unaddressed, which has been very active in the area and

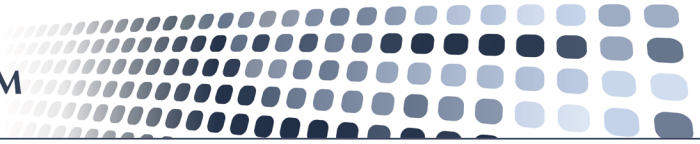


has been criticized frequently for taking advantage of the lack of effective state power in Somalia (Phillips 2009; and generally on illegal fishing Lehr and Lehmann 2007: 12-13). Apart from the economic, there are also wider security concerns such as the pirates collaborating with terrorist groups, and of course the protection of EU citizens (Germond and Smith 2009: 580-581), a matter to which we will return in detail. Therefore, *Atalanta* can definitely be seen as a measure in the pursuit of the Union's interests.

One could also argue that the EU's approach in *Atalanta* is framed to safeguard and promote its values. Examples for this would be the integrated approach that also aims at improving the situation in Somalia itself (above all through the EU Training Mission in Somalia, Council Decision 2010/197/CFSP), even though the effectiveness of this 'comprehensive approach' can be questioned (Sanchez Barrueco 2009). With particular regard to the treatment of captured pirates, safeguard mechanisms to protect their human rights stand out. A prominent illustration of this is that the EU ensures that they will not be subject to the death penalty when tried in third countries (Council Joint Action 2008/851/CFSP, Art. 12(2)). Also multilateral cooperation among the different actors in the region is to be fostered, which, too, can be seen as expressions of European values.^{xv}

But what about the potential contribution of *Atalanta* to the protection of Union citizens, as an objective that is stipulated explicitly next to values and interests, i.e. an objective in its own right? Here, first of all the question needs to be answered whether, and to which extent, the CFSP/CSDP can be used to this specific end. As is also generally agreed concerning constitutionally-codified objectives, they do not as such establish competence (Reimer 2003: 995-996; Calliess 2003: 89-90; Kotzur 2005: 314). Given that the EU remains an entity based on conferred powers (Art. 5(1) TEU), the competence to pursue a Union objective and the procedures to be followed ought to be specified elsewhere in the primary law (Art. 3(6) TEU).

As a preliminary observation, the objective of citizen protection abroad is not explicitly reiterated or linked to competences and procedures in Title V of the TEU or Part Five of the TFEU on external action. With particular regard to the objectives of the CFSP, Art. 23 TEU states that the Union's international action 'shall be guided by the principles, shall pursue the objectives of, and be conducted in accordance with, the general provisions laid down in Chapter 1'. However, Arts. 21 and 22 TEU, which make up this chapter, do not include a specific reference to the protection of citizens. What is made explicit

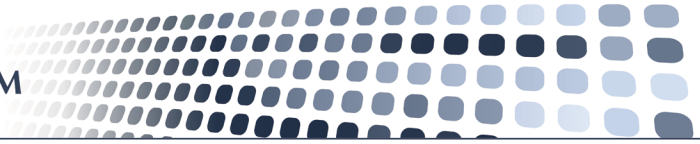


elsewhere is the right of Union citizens ‘to protection by the diplomatic or consular authorities of any Member State, on the same conditions as the nationals of that State’ in third countries in which their Member State of nationality is not represented (Art. 23 TFEU; also Art. 46 Charter of Fundamental Rights). This provision is situated under the heading ‘Non-discrimination and Citizenship’ in the TFEU. This raises the question whether the objective of citizen protection abroad is only to be pursued through diplomatic or consular protection as an external aspect of citizenship and, *a contrario*, not through the CFSP/CSDP.

This would seem too narrow an interpretation. The scope of the CFSP is very broad, as Art. 24(1) states that ‘[t]he Union’s competence in matters of common foreign and security policy shall cover all areas of foreign policy and all questions relating to the Union’s security’.^{xvi} Also, despite the lack of explicit reference to citizen protection there, the general Union objectives found in Art. 3(5) TEU are to guide our interpretation of, and need to be ‘read together’ with, the more specific objectives and provisions that follow in the Treaties (Lenaerts and Van Nuffel 2011: 111; Callies 2003: 91-92; Ipsen 1972: 558). Therefore, the protection of citizens can be regarded as implied under the Union’s ‘fundamental interests’ and ‘security’, which are to be safeguarded under Art. 21(2)(a) through EU external action. Thus, the Union can be deemed generally competent to protect its citizens abroad, including through the CFSP. Of course, this competence, as part of the CFSP, would be of a strictly non-exclusive kind incapable of inhibiting Member States’ own respective competence to protect their nationals abroad (Art. 2(4) TFEU; Eeckhout 2011: 171).

Turning now to the CSDP proper, Art. 42(1) TEU provides that ‘[t]he common security and defence policy shall be an integral part of the common foreign and security policy’. However, citizen protection is not explicitly mentioned here either, as civilian and military capabilities may be used by the Union ‘on missions outside the Union for peace-keeping, conflict prevention and strengthening international security in accordance with the principles of the United Nations Charter’ (Art. 41(1) TEU). That would not as such seem to include the protection of citizens.

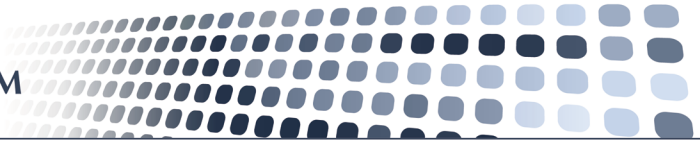
However, the more precise enumeration of the so-called ‘Petersberg tasks’ in Art. 43(1) TEU ‘include[s]’, *inter alia*, ‘humanitarian and rescue tasks’. Even though Union citizens are not mentioned, the notion of ‘rescue tasks’ can only reasonably be understood



as referring also to rescue efforts of one's own citizens. This view finds confirmation when looking at the background of this provision. In the original 1992 Petersberg declaration of the Western European Union (WEU), the French version referred to 'des missions humanitaires ou d'évacuation *de ressortissants*' (Western European Union 1992: 7, emphasis added). This reference reappeared in a more recent factsheet of the now defunct WEU, which stated that 'Battlegroups can be used for the full range of missions and tasks listed in Article 43 of the Treaty on European Union (Petersberg missions)' including, importantly, 'the evacuation of *EU citizens*' (European Security and Defence Assembly/Assembly of WEU 2009, emphasis added). The later omission of this reference to citizens in the Amsterdam Treaty has been interpreted as intending to not a priori exclude third-country nationals from being rescued through EU missions (von Kielmansegg 2007: 632; d'Argent 1998: 391). Any other interpretation would seem to be at odds with the rather wide scope of the CSDP. According to Coelmont (2008: 6), 'apart from collective defence, all kinds of military operations one can at present realistically invent in our global world can all be undertaken in a European context as an ESDP (or CSDP) operation.' Moreover, given the prominent place of the protection of citizens among the general objectives of the Union, a systematic-teleological interpretation of the Treaties would favour the pursuit of this objective by the entire spectrum of external EU policies and capabilities, including those of the CSDP.

Of course, competence to pursue this objective through the CSDP does not dispense of the legal limitations of EU law and international law that will have to be respected in doing so. For instance, a rescue operation of EU citizens from pirates, just like any general anti-piracy action, must respect basic legal principles such as necessity and proportionality, and respect the rights of third parties (e.g. the sovereign rights of third states into whose territorial waters/territory EU citizens may be abducted by pirates and the parameters set by the UN Security Council).

Consequently, the preliminary conclusion is that the EU legal order allows the Union to use the CSDP and the assets of the Member States to pursue the objective of protecting its citizens. Furthermore, as was concluded earlier, the international legal regime in place also authorizes the use of force to that end (n.b. for counter-piracy in general, which includes but is not limited to citizen protection).



The additional question arises, then, whether the EU and its Member States are also under a stricter obligation in this regard. In particular, is there a right of EU citizens to be protected against pirates by the Union? What exists thus far – at most – is the right of EU citizens to protection by the diplomatic or consular authorities of EU Member States in case their Member State of nationality is not represented in a third country.^{xvii} Legislatively, this has been elaborated upon by Decision 95/553/EC on the protection for citizens of the European Union by diplomatic and consular representations. But given the succinctness of the law in this regard it is certainly correct to say that ‘the *acquis* relating to the protection of EU citizens is not well developed’ (Ianniello Saliceti 2011: 97; referring also to European Commission 2006). In any event, the reference to ‘third countries’ would imply that situations on the high seas are not included, nor would be the protection by naval forces as opposed to ‘diplomatic or consular authorities’. Curiously enough though, Ianniello Saliceti discusses in this context the example of an evacuation operation from an area of crisis involving ‘rescue aircraft’ (Ianniello Saliceti 2011: 97). It is doubtful whether the notion of consular and diplomatic protection could be stretched thus far. At least the International Law Commission’s Draft Articles on Diplomatic Protection or the Vienna Convention on Consular Relations do not include this particular type of action,^{xviii} and, *a fortiori* it would appear, acts by military forces on the high seas. At best, chartered civilian aircraft might be considered. Therefore, it can be concluded that any rights under EU law in terms of the *forceful* protection of citizens abroad by *military* means do not exist. In addition, procedurally there is no forum to invoke such rights directly *vis-à-vis* the EU in view of the exclusion of jurisdiction of the ECJ from most of the CFSP (Art. 24(1) TEU and Art. 275 TFEU).^{xix}

4. The operational mandate

Having considered the EU’s constitutional framework, let us now turn to the mandate proper of Operation *Atalanta*, and see to which extent it lives up to the objective of protecting Union citizens. The mandate and operational parameters of are set out in Joint Action 2008/851. Art. 1(1) of the Joint Action characterizes the mission as ‘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 signed in Montego Bay on 10 December 1982 [...] and by means, in particular, of commitments made with third States [...]’ (Council Joint Action 2008/851/CFSP, Art. 1(1))

Art. 1 then proceeds to set out the operation’s basic objectives, of which there were initially two: First, protection of vessels of the World Food Programme (WFP) delivering food aid to displaced persons in Somalia, in accordance with the mandate laid down in UN Security Council Resolution 1814 (2008); secondly, the protection of vulnerable vessels and the deterrence, prevention and repression of acts of piracy and armed robbery off the Somali coast, in accordance with the mandate laid down in UN Security Council Resolution 1816 (2008) (Council Joint Action 2008/851/CFSP, Art. 1(1)). A third objective was introduced on 8 December 2009 by amending Art. 1 of the Joint Action, stating that ‘[i]n addition, *Atalanta* shall contribute to the monitoring of fishing activities off the coast of Somalia.’^{XX} This can be seen as showing awareness of the controversial fishing activities by European vessels and the intention to make clear that *Atalanta* is not there to act as a military shield for the illegal exploitation of Somalia’s maritime resources.

Art. 2 of the Joint Action subsequently provides the specific objectives in the actual operational mandate. Essentially, *Atalanta* shall ‘as far as available capabilities allow’, provide protection to WFP vessels (including by placing armed units on board); provide protection of merchant vessels ‘based on a case-by-case evaluation of needs’; take the ‘necessary measures’, i.e. also the use of force, to combat acts of piracy and armed robbery; detain and transfer piracy suspects for prosecution; ‘liaise and cooperate’ with other relevant actors in the theatre; and, at a later stage, lend assistance to Somali authorities ‘by making available data relating to fishing activities compiled in the course of the operation’.^{XXI}

A specific reference to the protection of Union citizens in the mandate is missing. It is clearly tied to the international legal framework, above all the relevant United Nations Security Council resolutions and the Law of the Sea. Especially the formulation of the mission as one ‘in support of’ UN Security Council resolutions suggests that Operation *Atalanta* functions as an executing arm of the Security Council. The EU is thereby – as the TEU puts it – contributing to ‘multilateral solutions to common problems’ (Art. 21(1), second subpara. TEU) by addressing a threat to international peace and security.



Consequently, it is to this universal end that it protects WFP ships, secures maritime traffic and pursues pirates.

Among the ships that are to be protected, WFP vessels enjoy priority. They are not only mentioned first, but are also given the express possibility to have armed units put on board. Most important, however, is the absence of a reference to ‘a case-by-case evaluation of needs’, which applies to merchant vessels. Among the merchant vessels, no distinction is made between ships sailing under EU Member State flags or those with Union citizens on board and the rest. The presentation of the operation by the Council to the public further highlights this prioritization. Features like the ‘food count’ tables used on the factsheets about the operation, informing us that between the launch of the operation and the end of 2010 about 490000 tons of food have been delivered and ‘on average, more than 1600000’ Somalis have been fed each day (Council of the European Union 2011: 2), foster the impression that this mission is of a primarily, if not exclusively, humanitarian character. A similar ‘EU citizens rescued’ count is nowhere to be found.

5. A mismatch of objectives?

The question now arises as to the relationship between the operational mandate and its specific objectives on the one, and the constitutional objectives of the EU Treaties on the other hand, and how they each frame the discretion of the EU forces assigned to Operation *Atalanta*. Even though, as was concluded earlier, there exist neither court jurisdiction nor individual rights here, objectives are still legally binding and serve as a normative framework for the actors called upon to pursue them.

At this point, it is worth drawing an analogy from Ianniello Saliceti’s example for the application of the principle of non-discrimination in the context of an evacuation operation of EU citizens (see *supra* section 3). He suggests that non-discrimination in such a case requires to ‘take onboard an equal number of distressed EU citizens of each nationality’ in a rescue operation by aircraft (Ianniello Saliceti 2011: 97).^{xxii} In this example, it seems to be implied that first EU citizens would have to be rescued, leaving only any potential spare seats for third country nationals. Even though it is difficult to agree with such a strict application of equality *among* EU citizens, it reveals nonetheless the assumption



that the objective of citizen protection frames the discretion of the actors in a particular situation.

Let us assume then a situation in which an *Atalanta* warship receives distress calls from several vessels being attacked by pirates. On one ship, there are a number of EU citizens present, on the others not. There are no other military capabilities available. For the warship, the distance to the distressed ships is about the same, and given time constraints, only one ship can be helped, leaving the others at the mercy of the pirates. It is a hypothetical example, but given the vastness of the area covered and the relatively little number of warships available,^{xxiii} it is not entirely far-fetched. In such a situation, depending on the features of the other ships, the mandate of *Atalanta* and the objectives of Art. 3(5) TEU, in particular with regard to the protection of citizens, might be at odds.

As was pointed out, the mandate of Joint Action 2008/851 prioritizes WFP ships, and provides as criterion to choose among merchant vessels a case-by-case evaluation of need. Thus, assuming there was a WFP ship among the distressed vessels, the operational mandate would unequivocally point to the WFP ship to be rescued, abandoning the EU citizens on the other ship to their fate. The general objectives of the Union, however, explicitly emphasize the protection of citizens in the EU's external action. This shifts the balance, if not towards favouring the ship with EU citizens onboard, at least to a less clear-cut priority structure. The result is a (also morally difficult) choice between either promoting the universal/altruistic value of ensuring the flow of humanitarian aid to the suffering population of Somalia or pursuing the self-interested objective of protecting one's own citizens.

What if, alternatively, the choice was between a cargo ship (with no crew members who are EU citizens) and a yacht with EU citizens? The mandate's case-by-case criterion is of little use here, as the need is equal in this example. Consequently, the mandate gives no further guidance, leaving it up to the commander of the warship to decide.^{xxiv} Art. 3(5) TEU, in turn, frames it as a choice between safeguarding the EU's interest in safe maritime trade by helping the cargo vessel and contributing to citizen protection by helping the yacht. Though it is as such also an open choice, the explicit reference to citizens as opposed to the wide notion of 'interest' might tilt the balance towards EU citizens.

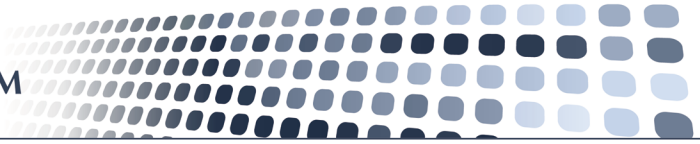
Arguably, for a nation-state, the choice to give priority to its own citizens in both cases would not be objectionable. Universal and economic objectives are not to be



discounted, but in this particular case they could not be served in view of the imperative of protecting one's own nationals first. Charity, so to say, begins at home. As Bowett points out (1986: 45), states 'will be placed under extreme political pressure to act to protect the safety of their nationals abroad' and cannot 'lightly refuse such protection when it lies within [their] powers to afford it'. Hence, one could imagine the domestic political outrage for a case in which the national military failed to prevent the kidnapping of nationals by pirates when it had the chance to do so. In the EU context, however, this is a more delicate matter. From a Member State perspective, helping another Member State's nationals is at the outset an act of altruism (e.g. the Dutch navy rescuing the German crew from the *MS Taipan*). But the fact that both of them are EU Member States with loyalty obligations towards the Union, and by virtue of the over-arching concept of Union citizenship, it becomes a self-serving act from the perspective of the outside, non-EU world.^{xxv}

How can this tension between the Joint Action and Art. 3(5) TEU be resolved? Even though CFSP/CSDP acts are not qualified as 'legislative acts' (Art. 24(1), second subpara. TEU), they are binding and the primacy of the primary law as *lex superior* applies (on the legal nature of CFSP acts and the hierarchy of norms see Wessel 1999: 198-204; Gosalbo Bono 2006: 341-47). The introduction of Union objectives of general application (Art. 3 TEU) by the Lisbon reform bolsters this conclusion. This means that in the absence of a clear conflict, the secondary instrument, i.e. the Joint Action here, must be interpreted in conformity with the primary law. Hence, the objectives of the operation as set out in the mandate cannot be interpreted in such a way that the pursuit of any of the constitutional objectives as set out in Art. 3(5) TEU is undercut. Thus, Operation *Atalanta's* mandate is not to be construed as neglecting the protection of Union citizens altogether. Given its total absence from the mandate, there is in any event potential for disorientation or misunderstanding in critical situations where clear guidance from the legal framework would be highly desirable.

One may think about plausible reasons for the conspicuous absence of citizen protection in the mandate. One possible explanation may be the participation of third countries in the operation. To date, Norway, Croatia, Ukraine and Montenegro have contributed to *Atalanta* (Council of the European Union 2011: 2; see also e.g. Council Decision 2010/199/CFSP). Therefore, one might consider it inappropriate to mandate these countries to help protect EU citizens. Here, the same logic applies: It would



challenge the priority of protecting their own nationals (or interests) by committing themselves to *Atalanta*. Then again, it would not be inconceivable to simply add the protection of citizens of participating countries to the mandate as well. As we have seen, the ‘Petersberg task’ of rescue operations in Art. 43(1) TEU is deliberately left open to rescuing third-country nationals as well.

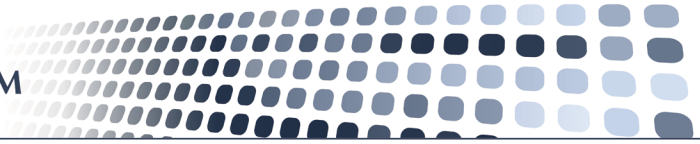
Another reason might be the political sensitivity of European countries regarding the issue of using military force to save their own nationals (and, *a fortiori*, other EU citizens). Therefore, the emphasis is put on the multilateral framework and universal objectives. Germany would be at the forefront of such considerations. It should be recalled that Federal President Köhler resigned from office in mid-2010 following protracted criticism for a statement that for a country like Germany, it might be necessary to also defend its interests such as free trade routes by force (for a reproduction of the original quote see Mandalka 2010). Subsequently, Foreign Minister Westerwelle tried to clarify Germany’s stance in a speech before the *Bundestag* on Operation *Atalanta* in November 2010. Regarding the protection of national interests (*Interessenwahrnehmung*) he underlined that the entire operation had as its rationale the guarantee of delivery of humanitarian aid, and only as a secondary goal there was also the protection of international maritime traffic (German Foreign Office 2010). As he put it, ‘foreign policy that is committed to humanitarian values can, may, even must also take into account one’s own interests.’^{xxvi} However, he then softened this reference to the ‘own interests’ by stating that freedom of movement on the high seas is a common interest of the international community and that Germany was acting under a mandate of the UNSC (German Foreign Office 2010). While we see here that the pursuit of the national interest is still a contentious issue, the protection of citizens did not figure as controversial in the discussion. It was rather the tension between economic and universal humanitarian considerations. As was mentioned earlier, the German government had planned and only narrowly avoided carrying out an operation of German special forces to rescue the partly German crew of the kidnapped container ship *Hansa Stavanger*.^{xxvii}

In other Member States, such controversies do not seem to arise at all either. The Swedish foreign ministry, for instance, also puts the protection of WFP ships first, whereas the presence of naval forces ‘is also seen to make it easier for merchant shipping in the area, including vessels that fly the Swedish flag and that sail in the area’ (Ministry of



Foreign Affairs of Sweden 2010). Here, the protection of Swedish ships serves as an indirect motivation. More explicit is the Spanish government's stance. The ministry of defence points out that 'the problem of piracy represented not just a threat to international maritime security, but also to national interests in the area, represented by the fishing activities of the Spanish tuna fleet in the Indian Ocean.'^{xxviii} For the Spanish government, the protection of Spanish vessels and fishermen and WFP ships appear side by side as motivation for sending warships to that area (Spanish Ministry of Defence 2010). As was mentioned earlier, the French already have a history of using force to rescue their nationals from pirates captured by Somali pirates.

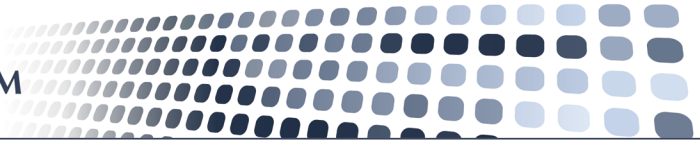
Thus, neither third country participation nor political sensitivity seem to explain the absence of citizen protection from the mandate of *Atalanta* in a plausible way. To the contrary, a look at the national stances of EU Member States rather indicates that the forceful protection of nationals is not controversial. But this equally shows that citizen protection, especially in the realm of security policy, is still seen from a strictly national viewpoint, which remains thus far unaffected by the concept of 'Union citizenship'. The elevation of the protection of EU citizens abroad to a constitutional objective of the Union does not seem to have altered this. Illustrative is here again the example mentioned at the outset, i.e. the rescue of German crew members of the hijacked *MS Taipan* by Dutch troops from the frigate *HNLMS Tromp* operating in the framework of *Atalanta*. Not even the Operation itself regarded this as an act of protecting EU citizens by CSDP assets. Instead, the press release by *Atalanta* on the successful rescue operation limited itself to stating that 'EU NAVFOR HNLMS Tromp retakes pirated MV Taipan', thus identifying the warship as part of the EU operation (EU NAVFOR Somalia 2010). Also in the national media of both countries it was not portrayed in a European perspective (NRC Handelsblad 2010; Spiegel 2010). Especially telling was the angle taken by an Associated Press reporter who subtitled his article on the incident: 'Dutch marines sidestep EU bureaucracy to rescue German container ship from Somali pirates' (Corder 2010). From this viewpoint, the EU does not appear as the actor or even facilitator for the Member States to act, but as an obstacle to achieving the goal of mutual protection of nationals.



6. Conclusion: *Civis europaeus in foro interno, externo barbarus*

The discussion of this encounter between the *civis europaeus* and the *hostis humani generis* off the coast of Somali yields the following observations. First, in this particular setting, international law allows the protection by the use of force of victims of piracy by virtue of the Law of the Sea and the special regime imposed by the UN Security Council. Within this particular framework, states are allowed to use force *also* for the purpose of protecting their own citizens from pirates. Secondly, the concept of ‘Union citizenship’ gives us a new perspective to look at the challenge for the Member States to protect jointly their citizens abroad. The altruistic objective of protecting a foreigner is transformed into the Union’s constitutionally entrenched self-interest to protect *its own* citizens. Union citizenship has now an explicit external dimension, which goes beyond diplomatic and consular assistance, and indeed also extends to the CFSP/CSDP. Thirdly, the mandate of Operation *Atalanta* clearly prioritizes the pursuit of universal objectives, above all the protection of WFP ships, and otherwise lumps together all merchant ships, making no reference to Union citizens at all. Therefore, fourthly, while the notion of EU citizenship looms large in the primary law and in the Union’s internal sphere, it is conspicuously absent in the implementing acts of the operation. This creates tension which in extreme situations can lead to putting the protection of Union citizens in the back seat. Whereas this would be politically highly controversial in a national setting, the salience of this issue appears not to have surfaced at the Union level.

In view of these observations, it can be concluded that there is a widening gap between the powerful notion of Union citizenship within the Union and its present weakness outside of it. Internally, the development of Union law makes it increasingly difficult to construe nationals from different Member States as proper ‘foreigners’. The phrase *civis europaeus sum* carries weight *in foro interno*. Externally, we see that the *cives europaei* might receive consular assistance in case, for instance, they get jailed, are hospitalized or lose their passport. However, in the face of pirate attacks in the troubled waters off the Somali coast, *civis europaeus sum* remains thus far a call that falls on deaf ears.



* PhD candidate, European University Institute. The author would like to thank Professors Francesco Francioni and Natalino Ronzitti for their helpful comments in the process of writing this paper. An earlier version of it appeared in Larik Joris and Moraru Madalina (eds), *Ever-Closer in Brussels – Ever-Closer in the World? EU External Action after the Lisbon Treaty*, EUI Working Papers Law 2011/10, 129-144. Responsibility for any remaining shortcomings rests of course with the author.

^I For an early example from the New Testament, see Acts of the Apostles 22:29.

^{II} Those opinions are: ECJ, Case C-168/91 *Konstantinidis v Stadt Altensteig*, Opinion of AG Jacobs, 1993 ECR I-01191, para. 46; which was later taken up in ECJ, Case C-380/05, *Centro Europa*, Opinion of AG Poiares Maduro, 2008 ECR I-00349, para. 16; ECJ, Case C-228/07 *Jörn Petersen*, Opinion of AG Ruiz-Jarabo Colomer, 2008 ECR I-06989, para. 16; and ECJ, Case C-34/09 *Zambrano*, Opinion AG Sharpston of 30 September 2010, nyr, para. 83.

^{III} Case C-168/91 *Konstantinidis*, Opinion of AG Jacobs 1993 ECR I-01191, para. 46. It also appears as the heading for the chapter on Union citizenship in a textbook on EU constitutional law (Rosas and Young 2011: 128).

^{IV} For a pertinent example of this momentum notice the ECJ's judgement in ECJ, Case C-34/09 *Zambrano*, Judgement of 8 March 2011, nyr, which concerned a situation lacking any kind of transnational element, but was based solely on the status as a Union citizen. Note also Arts. 20-22 TFEU and Arts. 39-45 Charter of Fundamental Rights on the rights of EU citizens within the Union.

^V For a recent overview see Webber, 2011. Following the entry into force of the Lisbon Treaty, the Union's CSDP institutional structure has been moved to the European External Action Service (EEAS), see Council Decision 2010/427/EU, Annex.

^{VI} For a discussion of the difficult transferability of the 'genuine link' of nationality to the EU context under international law, see Vigni, 2011.

^{VII} But see Ronzitti (2007: 416-417), who concludes that it might constitute a distinct exception to the prohibition to use force based on customary international law and points to changing opinion and practice of states that were traditionally opposed to such an exception.

^{VIII} See United Nations Security Council Resolution 1816 (2008) of 2 June 2008, S/RES/1816 (2008), para. 7.

^{IX} For incursions even onto Somali soil, note United Nations Security Council Resolution 1851 (2008) of 16 December 2008, S/RES/1851 (2008), para. 6.

^X See also the more recent United Nations Security Council Resolution 1897 (2009) of 30 November 2009, para. 8, which affirms the necessity of the consent of the TFG.

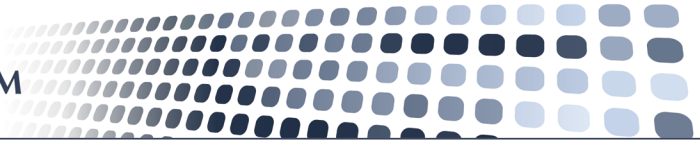
^{XI} Of course, general principles and basic human rights are to be observed, i.e. ensuring that the use of force is 'unavoidable, reasonable and necessary' (Treves 2009: 414; also Lubell 2010: 225-226). In other words, the principle of proportionality can be applied here by analogy.

^{XII} See also already Ronzitti, 1985: 137. Given this express authorization, the arguably more far-fetched line of argumentation according to which pirate attacks could be deemed an armed attack by non-state actors triggering the right to self-defence will be omitted here. See in detail on this 9/11-related discussion Gray, 2008: 193-253; Lubell, 2010: 29-36; and on protection of nationals as a form of self-defence Bowett, 1986. In the EU context, note that the mutual assistance clause (Art. 42(7) TEU) only applies '[i]f a Member State is the victim of armed aggression on its territory', which therefore does not cover attacks on citizens abroad.

^{XIII} Of course, the constitutional approach to EU law remains a matter of on-going debate (Martinico 2009; Martinico 2011) and one should certainly refrain from unreflecting 'constitutional labeling' (Avbelj 2008: 26). However, it seems beyond doubt, and sufficient for the present purposes of this paper, to point out that the EU primary law today fulfils most of the functions a national constitution would fulfil in a national legal order (in detail Calliess 2011).

^{XIV} The reference to Member State interests, however, detracts from the notion of (autonomous) EU interests that are to be defended. As the world's leading trade power, it may well be assumed here that the EU is also defending *its* interest in secure maritime trade, not just that of the individual Member States. Germond and Smith (2009: 587-589) therefore refer more accurately to the interests of both the Union and its Member States, which are more directly at stake in *Atalanta* than in previous CSDP/ESDP missions.

^{XV} Liaising with other organisations is part of the mandate, Council Joint Action 2008/851/CFSP, Art. 2(f); for the practice of the EU as promoter of coordination between the most important actors see Larik and



Weiler, 2011: 93-97. Compare this in particular with Art. 21(2), second subpara. TEU.

^{XVI} This includes also 'the progressive framing of a common defence policy that might lead to a common defence'. However, as was pointed out above, protection of EU citizens against pirates is not to be construed as collective/common defence. On the broadness as well as ill-defined nature of CFSP competence (Art. 2(4) TFEU), see Sari, 2011.

^{XVII} See further the contribution by Madalina Moraru to this special issue.

^{XVIII} Art. 1 of the ILC Draft Articles on Diplomatic Protection (see also *supra* section 2 on the debate within the ILC); and Art. 5 Vienna Convention on Consular Relations.

^{XIX} Art. 24(1) TEU and Art. 275 TFEU. The two exceptions provided, i.e. patrolling the border between CFSP and other Union competences (Art. 40 TEU) and the legality of restrictive measures (Art. 275 TFEU), would not apply in the present case.

^{XX} Art. 1(3) of the Joint action as amended by Council Decision 2009/907/CFSP, Art. 1.

^{XXI} Council Joint Action 2008/851/CFSP, Art. 2. Council Decision 2009/907/CFSP added the words 'and cooperate' to point (f) and added point (g) on data transfers.

^{XXII} Arguably, this is somewhat reminiscent of Noah's Arc and the divine instruction to save 'two of every kind' (Genesis 6:19). Also, whether the EU law principle of equal treatment can overrule humanitarian considerations ('women and children first') or practical effectiveness ('first come, first served') can be questioned.

^{XXIII} The area of operation of *Atalanta* is about 2 million square nautical miles, i.e. an area comparable to twice that of the Mediterranean, and is being patrolled by about a dozen *Atalanta* warships and two to four reconnaissance aircraft. Even by adding the deployments of the other navies, the dispersion remains very thin.

^{XXIV} Among the merchant vessels, according to Sanchez Barrueco (2009: 221), the wording 'on a case-by-case' basis 'might suggest that ships carrying a European flag would prevail but to date this assumption has not proven to be correct.'

^{XXV} For an interesting discussion of the transformation of *bonum commune* to *bonum particulare* depending on the point of view, see Isensee, 2010: 8-9 and 19-22.

^{XXVI} 'Eine Außenpolitik, die humanitären Werten verpflichtet ist, kann und darf, ja muss auch die eigenen Interessen im Blick behalten.' (my translation, German Foreign Office 2010).

^{XXVII} It should be noted that whereas the rescue team formed part of the German Federal Police, it was stationed on a US navy vessel, which was escorted by German warships. Historically, one could also recall here the rescue by German special forces of the kidnapped aircraft *Landsbut* in 1977, which, coincidentally, took place on Somali soil as the plane had landed on the airport of Mogadishu (Ronzitti 1985: 79).

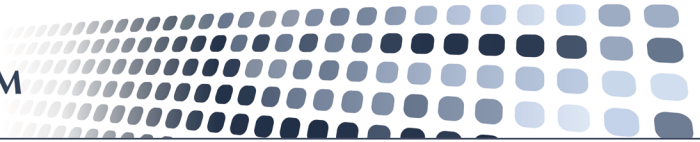
^{XXVIII} '[...] el problema de la piratería en Somalia representaba, no sólo una amenaza para la seguridad marítima internacional, sino también para los intereses nacionales en la zona, representados por la actividad pesquera de la flota atunera española en el Índico.' (my translation, Spanish Ministry of Defence 2009).

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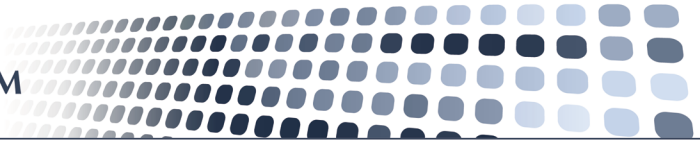
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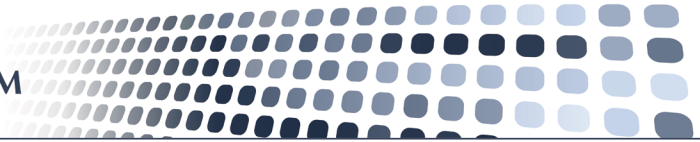
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