

Summary

The employment of naval forces to prevent terrorism and the proliferation of weapons of mass destruction and to fight against piracy: mandate and operational means

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I. Introduction

1. The legitimacy of maritime interdiction measures (stopping, boarding and controlling a foreign flag vessel, crew and cargo; arrest of suspicious persons on board that ship and seizure of suspicious cargo) has to be evaluated on the basis of different international law provisions, depending on whether they are aimed at international terrorism, the proliferation of weapons of mass destruction (WMD) or acts of piracy.

II. International Terrorism and the Proliferation of Weapons of Mass Destruction

The Fight Against International Terrorism

2. The legality of the participation of German Naval Forces in the Operation "Enduring Freedom" (OEF), based on Art. 51 of the UN-Charter, Art. 5 of the NATO Treaty as well as Security Council Resolutions 1368 (2001) and 1373 (2001) has become increasingly doubtful after the elapse of more than 7 ½ years.

3. The prevention of future terrorist acts can only be justified by the right to self-defence when the commission of such an act of equal intensity (an "armed attack") is instant, overwhelming, and leaves no choice of means and no time for deliberation (*Webster viz. Caroline* formula).

4. The law of naval warfare and maritime neutrality permitting the non-consensual interdiction of merchant vessels flying a neutral flag is not applicable, because an international armed conflict does not exist.

5. The state practice of most OEF participants asking for flag state or at least the master's consent before boarding does not support an alleged change of *opinio iuris* according to which the law of naval warfare and maritime neutrality would also be applicable to the "war on terror".

6. The Security Council Resolutions 1368 and 1373 have to be interpreted in a restrictive manner. Neither expressly nor implicitly do they contain an authorisation for non-consensual interdiction measures.

The Prevention of the Proliferation of Weapons of Mass Destruction

7. Neither the „Interdiction Principles“ adopted within the framework of the U.S. led "Proliferation Security Initiative" (PSI) in 2003 nor Security Council Resolution 1540 (2004) authorise naval forces of willing states to interdict merchant vessels flying a foreign flag without flag state consent.

Unilateral and Multilateral Approaches Concerning Maritime Interdiction Measures

8. Unilateral interdiction measures without flag state consent cannot be justified as counter-measures within the meaning of Articles 49 *et seq.* of the ILC Draft Articles on State Responsibility.

9. The 2005 Protocol to the 1988 Rome Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation confirms the traditional law of the sea principle permitting the visit and search of foreign flag merchant vessels on the high seas only with flag state consent.

III. Piracy

10. Pursuant to Articles 105, 107 of the 1982 UN Convention on the Law of the Sea (UNCLOS), warships of all states may seize pirate ships on the high seas, and arrest the persons and seize the property on board. An obligation to act accordingly does, however, not exist. Equally, such an obligation cannot be derived from Security Council Resolutions 1816 (2008) and 1851 (2008) extending the right to combat piracy in the territorial waters and the land territory of Somalia.

11. Operation Atalanta conducted in support of Security Council Resolution 1816 is in conformity with Articles 11, 14 and 17 TEU. The EU commanders exercise operational control over the participating naval forces.

12. The participation of German naval forces is in conformity with Art. 24 of the German Basic Law (GG). The EU acting within the framework of CFSP/ESDP can be characterised as a “system of mutual collective security” within the meaning of this regulation.

13. By arresting alleged pirates, German naval soldiers act under German jurisdiction and control. Therefore, German basic rights as well as fundamental rights guaranteed in the ECHR and the International Covenant on Civil and Political Rights are applicable.

14. According to the German Federal Constitutional Court, the applicability of the German basic rights provisions can be modified with regard to situations of a trans-boundary nature. In view of the special circumstances related to a detention of alleged pirates on the high seas, the time limit envisaged in Art. 104 para. 3 GG (48 hours) should be interpreted – in conformity with Art. 5 para. 3 ECHR and Art. 9 para. 3 CCPR – in the sense of “as expeditiously as possible under the given circumstances”.

15. Criminal proceedings in Germany would be based on § 316c (attack on air and sea traffic) of the Penal Code (StGB). Pursuant to § 6 (iii) StGB, German criminal law is applicable to such offences under the universality principle, no matter whether German nationals or interests are involved.

16. According to German procedural law, the competent prosecution agency is obliged to institute criminal proceeding, but may suspend these proceedings pursuant to § 153 para. 1 (i) of the German Code on Criminal Proceedings (StPO). Therefore, the *modus operandi* chosen by the Federal Government according to which a working group of representatives of the Foreign Office, the Ministry of the Interior, the Ministry of Justice, and the Ministry of Defence shall decide on the institution of criminal proceedings in Germany is open to question under the separation of powers doctrine.

17. The Agreement on the transfer of persons detained by EU naval forces to Kenya, adopted on March 6, 2009, has the potential to guarantee the implementation of international human rights standards with regard to alleged pirates.

IV. Conclusion

18. International humanitarian law is neither applicable to the deployment of naval forces within the framework of OEF and PSI nor to operations with regard to combating piracy.

19. New unilateral interdiction rights without flag state consent have so far not been accepted. From a political perspective, they are not desirable, because – other than international treaties – they do not provide for a balance of interests involved, namely security interests on the one hand and the interest in unimpeded international commercial transport at sea on the other.

20. If alleged pirates are detained on the high seas and transferred to a third state for prosecution, it must be guaranteed by effective monitoring procedures that their fundamental human rights are protected.