Applicability of Human Rights in Non-War Military Missions: The EU Operation Atalanta

Master Thesis
European Studies

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Abstract

Operation Atalanta, the European response to piracy at the horn of Africa, is a military mission within international waters and the Somali coastline. Since the situation does not meet the criteria for the presence of an international armed conflict, humanitarian law is not applicable. This paper seeks to estimate in how far human rights instruments as the International Covenant on Civil and Political Rights, the European Convention on Human Rights and the European Charta of Fundamental Rights as well as German constitutional law offer an effective system of human rights protection. It seeks to answer questions of extraterritorial application, interdependencies of human rights treaties and enforcement. From a German point of view the protective scope of the different human rights instruments is analyzed comparatively. These constitute an integrative system standard of protection, but reveal a lack of legal basis for international military operations within German national law. Generally comparable standards as in police force operations have to be applied to the present situation taking into account the special circumstances off the coast of Somalia.
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<tr>
<td>AMISOM</td>
<td>African Union Mission in Somalia</td>
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<tr>
<td>BGB</td>
<td><em>Bürgerliches Gesetzbuch</em> (German Civil Code)</td>
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<td>BpolG</td>
<td><em>Bundespolizeigesetz</em> (Federal Police Act)</td>
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<td>BVerfG</td>
<td><em>Bundesverfassungsgericht</em> (Federal Constitutional Court)</td>
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<td>CAT</td>
<td>Convention against Torture</td>
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<td>CEDAW</td>
<td>Convention on the Elimination of All Forms of Discrimination Against Women</td>
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<td>CFR</td>
<td>Charter of Fundamental Rights of the European Union</td>
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<td>CFSP</td>
<td>Common Foreign and Security Policy</td>
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<td>CRC</td>
<td>Convention on the Rights of the Child</td>
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<td>CRPD</td>
<td>Convention on the Rights of Persons with Disabilities</td>
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<td>CSDP</td>
<td>Common Security and Defense Policy</td>
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<td>ECHR</td>
<td>European Convention on Human Rights</td>
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<td>ECJ</td>
<td>European Court of Justice</td>
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<td>ECtHR</td>
<td>European Court of Human Rights</td>
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<td>EU</td>
<td>European Union</td>
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<td>EU NAVFOR</td>
<td>European Union Naval Force</td>
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<td>GG</td>
<td><em>Grundgesetz</em> (German Constitution)</td>
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<td>HRC</td>
<td>Human Rights Committee</td>
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<td>ICCPR</td>
<td>International Covenant on Civil and Political Rights</td>
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<td>ICERD</td>
<td>Convention on the Elimination of All Forms of Racial Discrimination</td>
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<td>ICESCR</td>
<td>International Covenant on Economic, Social and Cultural Rights</td>
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<td>ICJ</td>
<td>International Court of Justice</td>
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<tr>
<td>ICSPCA</td>
<td>International Convention on the Suppression and Punishment of the Crime of Apartheid</td>
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<tr>
<td>MWC</td>
<td>International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families</td>
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<td>NATO</td>
<td>North Atlantic Treaty Organization</td>
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<td>OHCHR</td>
<td>Office of the High Commissioner for Human Rights</td>
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<td>PSC</td>
<td>Political and Security Committee</td>
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<tr>
<td>SG</td>
<td><em>Soldatengesetz</em> (Military Personnel Act)</td>
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<tr>
<td>StGB</td>
<td><em>Strafgesetzbuch</em> (German Criminal Law)</td>
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<td>StPO</td>
<td><em>Strafprozessordnung</em> (Criminal Procedural Law)</td>
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<td>UDHR</td>
<td>Universal Declaration of Human Rights</td>
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<td>UN</td>
<td>United Nations</td>
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<td>UNSCR</td>
<td>United Nations Security Council resolutions</td>
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<td>UZWG</td>
<td><em>Gesetz über den unmittelbaren Zwang bei Ausübung öffentlicher Gewalt durch Vollzugsbeamte des Bundes</em> (Law on the Direct Obligation upon the Use of Force by Federal Law Enforcement Officials of the Federal)</td>
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UZwGBw Gesetz über die Anwendung unmittelbaren Zwanges und die Ausübung besonderer Befugnisse durch Soldaten der Bundeswehr und verbündeter Streitkräfte sowie zivile Wachpersonen (Law on the Application of Direct Force and the Exercise of Special Powers by Bundeswehr Soldiers and Allied Forces or Civilian Security Guards)

WFP World Food Programme
I. Introduction

The coast off the horn of Africa had been piracy-ridden for years, when the United Nations Security Council adopted a resolution 1816 to protect the freedom of the seas. It aims to put in the rights laid down in the United Nations Convention on the Law of the Seas (UNCLOS) concrete terms which allows participating states to take action against any kind of piracy (Blank 2014). The European Union took the United Nations (UN) resolution as an opportunity to realize a common military effort in order to establish itself as a global actor in security policies (Gerstenberger 2011). The EU Council approved a common military operation within the framework of the Common Security and Defense Policy (CSDP) under the title European Union Naval Force (EU NAVFOR) Somalia – Operation Atalanta in December 2008. It included the protection of the World Food program vessels, which were supposed to deliver food supply to the starving population of Somalia, “[t]he deterrence, prevention and repression of acts of piracy and armed robbery at sea off the Somali coast” (EU NAVFOR 2012) and guidance for exposed ships passing the Somali coast. Germany contributes up to 1400 soldiers and various vessels to the Atalanta mission.

Within the EU NAVFOR-mission Atalanta potential human rights violations are conceivable, since it possesses a police-mission like character and might involve detentions and armed confrontations. This lays the grounds for questions concerning possible violations of a variety of fundamental rights (of the pirates) might be violated. Some of the best recognized human rights, as the right to life, the right to get a fair process and many more might be affected. This thesis therefore aims to analyze how the troops involved are bound to human rights instruments in different potential situations and how the rights of the pirates are protected from a German point of view. My essential research question will be:

To which extent and in which way are German soldiers participating in the EU NAVFOR Operation Atalanta bound to human rights?

The field has already been subject of various articles and books. Many resarches focus on the Atalanta mission from a political point of view (see: Germond 2013, McGivern 2009, Riddervold 2011, Trittin 2011). Those articles about the Operation Atalanta related to the field of law often discuss the problems of the legitimacy of the mission itself (see: Hallwood 2013, Gerstenberger 2011,

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1 Approved by the German parliament for the first period 10.12.2008 (Drucksache 16/11337). Last extention of the mandate including the limit for contributing troops to 1200: 22. 5. 2014 until the 31. 5 2015 (Drucksache 17/13111).
König 2009, Roach 2010) or single aspect of human rights protection (Guilfoyle 2010b, Blank 2014). There seems to be a lack of literature on human rights protection in the operation itself. More publications are available on human rights in war and armed conflicts (see: Bothe 2005, Johann 2012, Naert 2010, Roberts 1993, Roguski 2011, Sari et. al.2012, Strutynski 2013). Some authors also released articles on applicability of different human rights instruments, such as the ECHR (Peters 2010), in extraterritorial situations (also see: Gibney 2011, Orakhelashvili 2012, Skogly 2006). Cacciaguida-Fahy (2007) published on the relation between the international law of the seas and human rights. Various authors, such as Wiefelspütz (2008), Werner (2006) and others wrote about the relevance of the German constitution (Grundgesetz) and fundamental rights for the German armed forces (Bundeswehr).

The objective of my master thesis is to develop an overview of the relevant human rights instruments for German soldiers within the scope of the Atalanta mission. There has not been much work on this aspect. The questions whether the police-like mission itself falls within the competence of the Bundeswehr or the Bundespolizei and whether the consent of the Bundestag is legitimate are not part of this thesis. While some authors tackled the relevance of the German fundamental law (Koops 2013), or the European Convention on Human Rights (e.g. see: Bodini 2011), no one has ever given an overview of all these instruments and how they support each other or respectively disturb one another. Fischer-Lescano und Kreck (2009) refer to all of the before mentioned human rights instruments, but do not clarify the question of how these are interdepending. They also just treat the problems of detention and transfer of arrested persons and leave out the surveillance and use of force aspects (ibid.). To fill that gap is the main purpose of my work. I will provide an overview of the existing framework of human rights protection and proceed to display how the different human rights instruments fit together. Following the structure provided by Bodini (2011), who applied the ECtHR decision Medvedyev on the situation present at sea off the coast of Somalia, I try to analyze the different phases of an operation and what kind of human rights might be involved. My analysis is solely juridical and oriented at the legal documents of international and national human rights law. It will not contain philosophical or ethnic concerns. Finally I try to be able to give a German soldier the answer to the question, what kind of human rights instruments he is bound to and how does that affect his actions in the Atalanta mission.

In order to answer the research question I have to determine on which legal ground the Atalanta operation is built upon. This will include, besides European Union (EU) decision to deploy troops, the

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3 ECtHR Medvedyev et al v. France (Grand Chamber, Application no. 3394/03), Judgment of 29 March 2010.
UN security council’s resolution (No. 1816) and the UNCLOS. While the UNCLOS is the general basis for the fight against piracy, the others determine the legal framework for the prevailing situation. This will include a definition of piracy and the scope of the Atalanta mission.

After settling the legal framework I will determine which human rights instruments are potentially applicable. Considerable instruments might be the UN Universal Declaration of Human Rights and the corresponding treaties (ICCPR and others), the European Convention on Human Rights (ECHR) and national fundamental rights. The Charter of fundamental rights of the European Union should also be considered. In order to find out, whether they are applicable I will subsume the relevant formal and substantive requirements for application on the present case.

A main aspect of this research will be the extraterritoriality of human rights treaties, which I will investigate in the following chapter. In addition to the territorial aspects, the question of who is personally bound and who is protected by the respective instruments is tackled here.

The fifth chapter of my thesis will be focused on the question in how far the before mentioned human rights instruments will affect each other generally. It might be possible that the application of one excludes another or – vice versa – implicates its application. I will also analyze, if the international humanitarian law is applicable and if it replaces some of the human rights instruments. This will also be the place to analyze the effect of the UN-resolution or the Convention on the Law of the Seas to the applicability of human rights.

Considering in how far the participating soldiers are bound to human rights, I will determine in a further step which situations are relevant, by answering the question: When and which human rights might potentially be violated? Following Bodini (2011) I will classify these situations in the different phases of the operation. In the first place there is an observation phase (via helicopters, drones etc.) in which privacy rights (e.g. the crew of an uninvolved yacht) might be violated (ibid.). The second phase is the boarding of the pirates’ ship or the one hold hostage by pirates. In this phase actual fighting might take place and basic human rights, as the right to physical integrity, might be affected. A third phase does involve the detention of suspects hence the freedom of the person and the prohibition of arbitrary detention are involved. The fourth phase is related to the procedural rights: Who decides whether they are hold as prisoners, are they protected from torture, or if their right to court hearing is respected.

In this section I will investigate how the formal aspects of the applicability of the different human rights instruments affect the concrete situations. The main aspect will be how far the human rights
protection would differ in certain situations according to the applicable treaties? In order to answer this question I will turn to the situations elaborated in the first place and point out the different degree of protection under the corresponding human rights instruments.

Finally I will examine, in how far existing rights can be enforced in court. What would be necessary to get a trial going? Which court would be competent and what kind of formal obstacles have to be overcome? This chapter will mainly focus on the European Court of Human Rights and the German Constitutional Court (Bundesverfassungsgericht [BVerfG]) as there is no such court for the enforcement of UN human rights instruments. It will also be the place where I will refer to the question under which criminal law and in front of which courts detained persons will be prosecuted.

I will investigate how the general concept of human rights protection can be applied to the case of fighting piracy off the coast of Somalia. There is a clearly defined environment which I will examine: The EU NAVFOR Atalanta mission, defined by the “[d]ecisions by the Council of the European Union in accordance with relevant United Nations Security Council resolutions (UNSCR) and International Law” (EU NAVFOR 2014).

In order to answer the main research question I will rely in many aspects on existing publications. Especially where the applicability of certain instruments is well developed (ECHR & Grundgesetz der Bundesrepublik Deutschland – The German Constitution), these interpretations will be used and set in the adequate context (see: Peters 2010, Bodini 2011, Koop 2013, Fischer-Lescano & Kreck 2009). I will interpret the missing norms and put these analyses together in order to find out how they work together. For defining the situations, relevant for potential human rights violations I will refer to Bodini’s (2011) structure. The chapter on the enforceability of potential breaches of fundamental rights will mainly be realized by reference to comparable precedents (Medvedyev, Al-Skeini or Al Jedda inter alia).

II. Operation Atalanta – its legal basis


The United Nations Convention on the Law of the Sea (UNCLOS) is the codification of the law of the seas. It was signed on December 10th 1982 in Montego Bay (Jamaica) and entered into force 16 November 1994. It codifies partly existing law of the seas (Geneva Conventions on the law of the sea) and large parts of the customary law, which has been applied in international seas for a long period

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ECtHR Medvedyev et al. v. France (Grand Chamber, Application no. 3394/03), Judgment of 29 March 2010.
ECtHR Al Skeini v. United Kingdom (Grand Chamber, Application no. 55721/07), Judgment of 7 July 2011.
ECtHR Al Jedda v. United Kingdom (Grand Chamber, Application no. 27021/08), Judgment of 7 July 2011.
of time. In its articles 100 – 107 piracy is defined and the basic legal framework for fighting piracy is codified. Accordingly piracy is any act of violence or detention (i), committed for private ends (ii), on the high seas or outside the jurisdiction of any state (iii) and committed by the crew of a private craft against another vessel or property or person aboard (iv) (art. 100 UNCLOS).

Somali piracy is committed from boats to vessels (see: req.: iv) and not politically but criminally motivated (req. ii) (Guifoyle2010). Only the territorial limitations (req. iii) are not clearly fulfilled, as the attacks of Somali pirates happen only particularly on the high seas, but to some extend within the coastline of Somalia (EUNAVFOR 2014). As far as these events occur in territorial waters the UNCLOS anti-piracy provisions are not applicable.

If the conditions of art. 100 UNCLOS are met UNCLOS allows any government ship to seize a suspected vessel, detain the persons on board and seize property (art. 105). Weather this includes German soldiers is disputed (Gerstenberger 2011, Arnauld 2009 p. 464, Fischer-Lescano & Kreck 2009 p. 506). Art. 110 Abs. 1 lit a gives ships and aircrafts acting for a nation state the right of boarding a ship engaged in piracy.

Concluding the UNCLOS gives a general legitimation for official (military) ships to seize pirates on open seas. It is a legal basis for arrests and seizure of property, but does not execute what happens afterwards (transfer, trial and custody). These problems remain unsolved and leave room for disputes. It is also only applicable to situations on the high seas, not on coastal lines where piracy falls within the jurisdiction of national criminal law (art. 86 UNCLOS).

b) UN Security Council Resolutions
The fact that the UNCLOS does not affect the territorial integrity of the coastal waters is the background for the actions undertaken by the UN Security Council (v. Arnauld 2009, Fischer-Lescano & Kreck 2009). After the resolutions 1772 (2007) and 1801 (2008) on the general situation in Somalia called for a principle demand of activity against piracy it requests concrete measures in the following resolutions. According to the competences of art. 39 UN Charter the resolution 1814 (2008)\(^5\) refers to the sovereignty of Somalia creating the legal basis for the fight against piracy within the coastal waters and territory of Somalia in accordance with international law. Res. 1851 extends this competence even to land-based operations\(^6\), but at the same time it guaranteed the territorial integrity and independence of Somalia. The Security Council requests in all decisions acting member


\(^6\) See further: v. Arnauld 2009 p. 461 with extensive references.
states to cooperate with the Somali interim government (e.g. Res.1861). The resolutions of the UN Security Council fill the gap that UNCLOS leaves according to the active commitment against piracy within the coastal waters of Somalia. It combines an authorization of the Somali state with the rights of Chapter VII of the UN-Charter (v. Arnauld 2009). They also refer to the relevance of respecting human rights in this context. 7

c) EU Commission and Political & Security Committee decisions

“As a result, and as part of the Comprehensive Approach to Somalia, in December 2008 the EU launched the European Union Naval Force - Operation Atalanta (EU NAVFOR) within the framework of the European Common Security and Defence Policy (CSDP) and in accordance with relevant UN Security Council Resolutions (UNSCR) and International Law in response to the rising levels of piracy and armed robbery off the Horn of Africa and in the Western Indian Ocean.” (EU NAVFOR 2014, p. 5)

Based on the various resolutions of the UN Security Council the EU NAVFOR Operation Atalanta has been adopted by way of an EU Council Joint Action. It is mandated to protect the vessels of the World Food Programme (WFP) and African Union Mission in Somalia (AMISOM) delivering aid to the people of Somalia; to fight arrest and prevent piracy activities off the Somali coast, to provide protection to civil shipping in the Gulf of Aden on a case by case basis. Additionally the EU NAVFOR shall monitor fishing activities off the coast of Somalia (EU NAVFOR 2014). On 23 March 2012 the EU Council extended the Operation Atalanta until December 2014 and adopted the possibilities given by the UN resolution to operate on Somali territory onshore as well as offshore.

To summarize the EU legal framework it can be said that within the framework of CFSP (Common Foreign and Security Policy) the Council and PSC (Political and Security Committee) transferred the UN resolutions in European Law. It is an operation within the context of the Comprehensive Approach of the EU to fight piracy and at the same time it is tackling the causes of piracy in Somalia (EU NAVFOR 2014). If and in how far this has been successful has to be determined elsewhere.

d) Humanitarian law

Humanitarian law is basically the law of armed conflicts. It determines admissible conduct in times of war. It is constituted by the Geneva Convention of 1949 and its additional protocols of the year 1977.


8 For further information on the Comprehensive Approach to fight Piracy and its roots see: the Councils “Strategic Framework for the Horn of Africa” (Council of the European Union 2011).
In order to benefit from certain rights guaranteed by humanitarian law an affected person needs to get combatant status according to the Geneva Conventions. Whether or not it is applicable is determined by the question if an armed conflict is present or not (Naert 2010, p. 470). The treaty does determine pretty clearly the conditions to be met in order to apply humanitarian law. Armed conflicts could be international (war between states, common art. 2 of the Geneva Convention) or between a national government and organized groups, which is defined as non-international conflict (common art. 3 of the Geneva Conventions). In order to get combatant status a confrontation has to be classified as international armed conflict and the entitled has to be a member of the military forces of a state (art. 43 Additional Protocol I to the Geneva Conventions). When recognized as combatant in terms of the Geneva Conventions the humanitarian law grants certain rights. Combatants might participate in hostilities, are allowed to kill enemy combatants, and have immunity from criminal law (with exception of actions sentenced by international criminal law as regards to war) (Naert 2010, p. 591). Combatants can take enemies into custody as prisoners of war and can be captured as such (Naert 2010, p. 625). To prisoners of war certain special regulations apply, which are distinctive to criminal subjects or civil persons imprisoned.

Neither the UN resolutions nor the EU decision on the Joint actions refer explicitly to the application of humanitarian law (Naert 2010, p. 252). Whether or not Somali pirates can be treated under the provisions of humanitarian law depends on the question whether the situation in and off Somalia can be defined as an international armed conflict (common art. 2 of the Geneva Conventions). Therefore the conflict has to be between two or more states. Pirates are not acting under the command of a government. As the UNCLOS defines anyhow piracy is an act of private participants in criminal activities (art. 100 UNCLOS). There are not nation states confronting each other in the situation of Somalia. It may be a failed state and fights within Somalia take place. Hence this could trigger the application of the law of wars if an “armed conflict not of an international character occurring on the territory of one of the High Contracting Parties” (common art. 3 of the Geneva conventions) takes place. Whether this is a situation of non-international armed conflict can remain unsolved due to the fact that to define if Somali pirates are concerned combatants depends on the presence of an international armed conflict (Kolb & Hyde 2008, p. 69). But even the conditions to meet the definition of armed conflict of non-international character do not seem to apply, as fights happen to take place sporadic and to a limited extent and use of force (see Guilfoyle 2010b). Another argument against the presence of a non-international armed conflict is the fact that piracy takes place on the high seas and not on the territory of a state (as required by the common Art. 3 of the Geneva conventions). The pirates cannot be regarded combatant in a conflict, as there is no organizational degree.
comparable to military structures (Guilfoyle 2010b). They must be seen as criminals active on national and international waters. It would also contradict the provision of UNCLOS declaring pirates ships as private. Thus, Somali pirates are not combatants in the legal sense of the Geneva Conventions and hence the according provisions of humanitarian law are not applicable. Also the UN resolutions that allow the use of force against piracy do not concede the status of combatants to pirates. The simple fact that they have been decided under chapter VII of the UN-Charter does not open space for humanitarian law. Also the application of the law of war would be count-productive, as them the right to take part in hostilities would be granted (see Guilfoyle 2010b, p 7). Rather than trying to enforce political aims pirates pursue economic goals. They do not attack military targets, but private vessels. Hence they are criminals and have to be treated as such.

III. Human Rights Instruments

In the present situation the application of a variety of human rights instruments is conceivable. Consequently the following chapter will proceed to present these human rights instruments. As such the scope of application will be clarified in order to determine whether or not they apply for Operation Atalanta and the participating German soldiers.

a) International Bill of Rights: Universal Declaration of Human Rights & ICCPR

The expression “international Bill of Rights” is a collective term for the Universal Declaration of Human Rights of 1948, and the covenants on human rights. Together these instruments build the basis for human rights protection within the United Nations (see: Buergenthal 2009). In the first Instance human rights have been referred to in the Charter of the United Nations, which however did not define them further. In the follow-up, the Universal Declaration of Human Rights has been developed rather quickly. It got adopted in form of a non-binding declaration in order to get the approval of as many states as possible. Immanently it included the categories of civil and political rights on the one hand and economic, cultural and social rights on the other. It has generally no legal force as it is just a declaration of the UN General Assembly. But it is often referred to as the definition of concrete terms for the human rights mentioned in the UN-Charter and hence has particular legal effect in international law. It can generally be seen as the basis for human rights protection worldwide and as a minimal standard recognized by the community of states.

The two covenants were adopted in 1966, but came into force only ten years later through the ratification of 35 states. Since then the number of participating states is constantly growing. The

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ICCPR includes a number of civil and political rights which go further than the guarantees laid out in the Universal Declaration of Human Rights (UDHR) (as e.g. the right of minorities in art. 27). But in some aspect it falls behind the level of protection of the UDHR – it does not include a right to property, to asylum or nationality. The ICCPR is supplemented by two optional protocols. It includes a derogation clause in art. 4, which allows the suspension of rights in times of public emergencies. However, this regulation excludes some fundamental rights as the prohibition of torture, the right to life and some more. The provisions of the ICCPR have to be complied as an “obligation of results” (Buerghenthal 2009). To enforce the rights of the ICCPR the Human Rights Committee can adopt general and concrete comments and reports. It also includes complaints procedures for State parties and individuals. While there has been no inter-state complaint so far (OHCHR 2014), the individual complains have contributed to develop the protection of the covenant. The committee is not a court as such and their decisions have legal effect by through the principle *pacta sunt servanda* which obligates state parties to implement these decisions. The ICESCR (International Covenant on Economic, Social and Cultural Rights) goes further than traditional human rights pacts and imposes positive obligations to the contracting states. Its social rights are not affected in the situation off the coast of Somalia. Hence it is not subject to further discussions here. The International Bill of Human Rights has been extended by a series of subsequent human rights instruments\(^\text{10}\). These play a subordinate role and also cannot be applied within the scope of this work.

b) European Convention of Human Rights

The ECHR is the European counterpart to the ICCPR. Issued in 1950 the ECHR entered into force in 1953 and is one of the oldest international human rights instruments. It includes the essential freedom rights, but no right to asylum and no economic or social rights, which have been adopted with low protective level in the European social Charter years later. The ECHR is complemented by a series of additional protocols\(^\text{11}\), of which the eleventh established the European Court of Human Rights (ECtHR) in 1998 – the first international court which could take decision binding to contracting states. State complaints are permitted, but the individual complaint has become the essential


\(^{11}\)For a complete overview see: [http://www.echr.coe.int/Pages/home.aspx?p=basictexts&c=#n13739063294958599503665_pointer](http://www.echr.coe.int/Pages/home.aspx?p=basictexts&c=#n13739063294958599503665_pointer).
instrument. The ECtHR now is an important part of European legal reality. It is generally accepted and has contributed to a great extent to the development of human rights law in Europe. Its decisions influence the legal order of the member states, the European Union, and have signal effect worldwide.

c) German Constitution
After World War II and the cruel Nazi-dictatorship the Parlamentarischer Rat developed the Grundgesetz as the constitution for the western part of the divided German nation. Under the immediate impression of the preceding atrocities the fundamental rights gained much more importance than in former German constitutions (Hermann 2008). The human rights protection in the Grundgesetz is based on the human dignity of art. 1 (1) GG. The fundamental rights bind all legislative, executive and judicative authority (art. 20 (3) GG). Hence it is applicable for the Bundeswehr (German armed forces) as part of the executive. The fundamental rights are protected by an eternity clause that guarantees its inviolability of the essential rights of art. 1 and 20 GG, which build the basis for the German democracy (art. 79 (3) GG). The German constitution does provide human rights applicable for everyone and civil rights for German citizens. As social rights are not integrated, it contains only a general welfare state clause (art. 20 (1) GG). The enforcement of the fundamental rights is guaranteed for everyone by the possibility to lodge constitutional complaint at the Federal Constitutional Court (BVerfG) (art. 93 (1) 4a GG). The Federal Constitutional court does participate in knitting the protectoral web of human rights by developing further rights through the interpretation of the Grundgesetz.

d) EU Charter of Fundamental Rights
The Charter of Fundamental Rights of the European Union (CFR) has been proclaimed first in 2000 and codifies the fundamental rights of the European Union. It is structured into six chapters (human dignity, freedom, equality, solidarity, citizens’ rights and justice). It does include fundamental rights as well as civil, political social and economic rights. In large parts it is based on the European Convention on Human Rights, but also includes some additional rights. It got the legal status of primary European Union law with the entry into force of the Lisbon Treaty in 2009. It binds all European institutions and the member states when implementing EU law. As such it binds Germany and its military forces in Operation Atalanta.

12 For example see: BVerfGE 65, 1.
IV. Extraterritoriality

The international humanitarian law, as the minimum of protection in case of war does not apply to the situation off the horn of Africa, therefore pirates cannot be fought and possibly killed as combatants in a situation of war (see Chapter II d)). On the other hand neither do they enjoy protection under the provisions of the Geneva Conventions. Pirates are civilians and are subject to human rights law. Even as criminals, who can be detained and fought using proportional force as argued by Guilfoyle (2010a) who sees them as protected by human rights law. Also the UN resolutions refer to the compliance of human rights in fighting piracy. These resolutions refer to “applicable human rights instruments” (UNSCR 1918, para. 2), which lead to the question which human rights instruments are applicable in the present situation. Seizure of pirates within Operation Atalanta takes place outside the national territory of Germany. Hence it is questionable if the before mentioned human rights treaties and constitutional provisions are applicable rationae loci. All human rights instruments refer to jurisdiction (art. 2 (1) ICCPR, art. 1 ECHR, art. 3 (1) GG, art. 51 CFR) as indicator for the extraterritorial application. While the *Grundgesetz* and the EU Charter of Fundamental Rights simply refer to the acting entity and whether it is attributable to the state (or the EU), the ICCPR and much more the ECHR apply more complex definitions of jurisdiction. Within the ECHR the scope is determined depending on the fact if the acting state has effective control ratione personae or ratione loci. The ICCPR looks at the relationship of nation state and individual person. As neither the humanitarian law nor the provisions of art. 87a GG re applicable none of the derogation clauses apply. (Naert 2010, p. 567 f).

a) ICCPR

The International Covenant on Civil and Political Rights guarantees its rights in article 2 (1) “to all individuals within its territory and subject to its jurisdiction”. There are some uncertainties regarding the question whether the ICCPR questions the subjective elements of being within the territory and within a state’s jurisdiction are cumulative or alternative. Dennis (2005) and Wagner (2009) take a reluctant attitude towards the extraterritorial application of the ICCPR. Based on the wording they see a “dual requirement” (Dennis 2005, p. 122) to apply the ICCPR only to such situations, which are within the territory and at the same time within the jurisdiction of a state being party of the treaty. Besides the wording the reluctant attitude towards an extraterritorial application is based on the historical origin of the treaty, where a majority of the states voted for a restriction on the own national territory (Wagner 2009, p. 22). The United States and Israel do also follow the doctrine that

both requirements have to be present cumulatively in order to apply the ICCPR (Wagner 2009, p. 28 with citations). However a variety of authors\(^{14}\) reject this view. The Covenant establishes the Human Rights Committee as the competent authority for interpreting it (art. 28 ICCPR). As such it has already declared in 1981 in its decision Lopez Burgos v. Uruguay\(^{15}\) that the ICCPR binds a state not only on its own territory. This opinion is underlined by the General Comment No. 31 (§ 10) in which the Human Rights Committee declared the “Covenant [is applicable] to anyone within the power or effective control of that State Party, even if not situated within the territory of the State Party”\(^{16}\). This opinion is also stated by the International Court of Justice (ICJ) in its advisory opinion on the construction of a wall in the occupied Palestine territory\(^{17}\) (ICJ 2004). Dennis (2005) argues that the Court has seen the occupied areas as Israeli territory, fulfilling the territorial requirement and therefore extending the scope of the ICCPR. This can be refused by the reference to the Armed Activities on the Territory of the Congo case\(^{18}\), in which the extraterritoriality of the ICCPR is affirmed again by referring to the so called Wall opinion in a broader context. Even if important and powerful nations as the United States and Israel advocate the limitation of application to the territory of a state party, the majority of the contracting states seem to support the extraterritoriality of the ICCPR (Johann 2012, p. 113 f).

Especially relevant for the present case is the official opinion of the Federal Republic of Germany. The German government responded to a request of the Human Rights Committee: “Wherever its police or armed forces are deployed abroad, in particular when participating in peace missions, Germany ensures to all persons they will be granted the rights recognized in the Covenant, insofar as they are subject to its jurisdiction” (United Nations 2005). Even though it is still controversial if the requirements of article 2 (1) ICCPR have to be complied cumulatively or alternatively, the point of view of the competent Human Rights Committee has to be considered as relevant. Hence the extraterritorial applicability of the ICCPR is given. Especially in the case of German soldiers acting abroad the comment of the German government clearly recognizes the extraterritorial applicability as long as the affected persons fall under its jurisdiction (United Nations 2005). This aspect of jurisdiction needs to be considered as well in order to determine the relevance of article 2 (1) ICCPR. Under the Covenant jurisdiction is not defined by the place of action, but by the question if a human


\(^{16}\) General Comment No. 31 [80] Nature of the General Legal Obligation Imposed on States Parties to the Covenant, 26 May 2004.(UN Doc. CCPR/C/21/Rev.1/Add.13. § 10).

\(^{17}\) In the following: Wall Opinion.

rights violation results from the relationship of state and individual\(^\text{19}\). The Human Rights Committee defines “subject to its jurisdiction” (art. 2 (1)) General Comment No. 31 § 10 as “anyone within the power of or effective control of that State Party”\(^\text{20}\). Therefore the Human Rights Committee explained the Covenant would cover “all conduct by its [the contracting state] authorities or agents [...]” (United Nations 2010, § 5). Here it is obvious that the Human Rights Committee sees a cause and effect relation as sufficient for opening the scope of the ICCPR. If any action of a contracting states effects a person concerned the ICCPR is principally applicable.

b) ECHR

Art. 1 ECHR defines the scope of the ECHR with the guarantee to respect the rights to “everyone within their [the parties of the convention] jurisdiction”. Here no territorial element is codified. Anyhow there has been much case law\(^\text{21}\) and discussion about the extraterritorial application and defining jurisdiction mentioned in art. 1 ECHR.

Basically, the possibility of extraterritorial application is recognized ever since. Yet the European Commission of Human Rights did recognize such a possibility, only in such a case when a state exercises authority over someone\(^\text{22}\). The court adopted the argument, but complemented existence of jurisdiction by the question whether or not a state has effective control over a territory\(^\text{23}\). Wagner (2009), who tries do deny any extraterritorial application of human rights treaties with rather weak arguments, refers to the Bankovic decision\(^\text{24}\) in order to substantiate his arguments based on historical documents originated in the development progress of the ECHR. While the Bankovic decision, who’s concepts the ECHR later altered, is a valid argument against the extraterritorial application of the ECHR, the texts referred to by Wagner are of limited impact due to the fact that they are taken out of the development process before a decision on the final text has been made and


\(^{20}\) General Comment No. 31 [80] Nature of the General Legal Obligation Imposed on States Parties to the Covenant, 26 May 2004 (UN Doc. CCPR/C/21/Rev.1/Add.13).

\(^{21}\) For a complete overview of the ECHR case law on extraterritoriality see: [http://www.echr.coe.int/Documents/FS_EXTRA-TERITORIAL_JURISDICTION_ENG.pdf](http://www.echr.coe.int/Documents/FS_EXTRA-TERITORIAL_JURISDICTION_ENG.pdf).

\(^{22}\) European Commission on Human Rights M. v Denmark (Application no. 17292/90), Decision from 14 October 1992; European Commission on Human Rights Ilich Sanchez Ramirez v. France (Application no. 59450/00), Decision from 24 June 1996.

\(^{23}\) ECtHR Loizidou v. Turkey (Application no. 15318/89), Judgment of 23 March 1995; ECtHR Cyprus v. Turkey (Grand Chamber, Application no. 25781/94), Judgment of 10 May 2001.

\(^{24}\) ECtHR Banković et al. v. Belgium et al. (Grand Chamber, Application no. 52207/99), Judgement of 19 December 2001.
just represent certain opinions in the committee drafting the ECHR. The Bankovic decision reduced the broad recognition of extraterritoriality to some extent. It set limits by rejecting exercise of jurisdiction in the territory of the then Federal Republic of Yugoslavia. The Court based its argument on the fact that on Yugoslavian territory the state Yugoslavia executes exclusive authority. Other forms of jurisdiction on foreign territory were exceptional and its execution has to be examined on case by case basis. Normally the approval of the affected state would be necessary to exercise jurisdiction on its territory. This has to be rejected due to the reference to the case by case decision and the subsequent ruling of the ECtHR (Fischer-Lescano & Kreck 2009). In the aftermath of the Bankovic decision the court turned back to a broader recognition of extraterritorial jurisdiction and therefore applicability of the ECHR. In its further decision the ECtHR expanded the established classification of jurisdiction corresponding to the factors territorial control and effective authority over a certain person (Naert 2010, p. 548 f.). In the Isa v. Turkey decision the court declared that states could “be held accountable for violation of the Convention rights and freedoms of persons who are in the territory of another State but who are found to be under the former State’s authority and control”.

This control is interpreted broadly as in the present case the use of force or in other cases detentions and totally detached from territorial aspects. The cases Saddam Hussein v. Coalition Forces and Al-Skeini and others v. The United Kingdom confirmed this concept. While the Al-Skeini case did confirm the argument that extraterritorial jurisdiction does not only arise in situations of physical control of an area it also based the application on the fact that the United Kingdom exercised state like power. This seems difficult to apply for Operation Atalanta, but as it also strengthened the argument of jurisdiction being depended on the exercise of “physical power and control over the person in question”.

Relevant for the situation off the coast of Somalia the court decided in two cases on situations on the high seas. In Hirsi Jamaa and others v. Italy the court did not only strengthen the effective control principle to determine “jurisdiction” according to art. 1 ECHR, but also applied the principle of international law that a ship normally is under exclusive control of the state under whose flag it is

25 ECtHR Ben El Mahi v. Denmark (Application no. 5853/06), Decision on admissibility of 11 December 2006.
27 ECtHR Issa et al. v. Turkey (Application no. 31821/96), Judgment of 16 November 2004 (71).
28 ECtHR Saddam Hussein v. Coalition Forces (Albania et al.) (Application no. 23276/04), Decision on admissibility 14 March 2006.
29 ECtHR Al-Skeini et al. v. The United Kingdom (Application no. 55721/07).
30 ECtHR Al-Skeini et al. v. The United Kingdom (Application no. 55721/07), para. 136. At least for capture and detention Krieger (2012, p. 53) sees the ECHR still applicable in Operation Atalanta.
31 ECtHR Hirsi Jamaa et al. v. Italy (Application no. 27765/09), Judgment of 23 February 2012.
sailing. The Court also decided that the crew of an intercepted vessel is at the latest from the point of boarding under the effective control of the engaged state. Based on the case law Peters (2010) pronounces a case by case view at which the extraterritorial application of the ECHR remains an exception. She sees the need for strict limits of different legal systems, but also recognizes the need for an effective system of human rights protection, where no state could exclude human rights obligations by simply acting outside its territory (ibid.). This opinion is rather convincing as the ECHR is a regional human rights instrument and a universal application would contradict this character of the convention. An exclusion of extraterritorial application would neither be an acceptable solution as the member states act increasingly international. Especially in military operations in the context of international security (EU, NATO, UN) and in the case of dealing with refugees extensive human rights protection has to be guaranteed.

Applied to Operation Atalanta, the before mentioned means, that the European Convention on Human Rights is applicable if German troops execute jurisdiction in terms of art. 1 ECHR. The ECtHR has established the formula that jurisdiction within the meaning of art. 1 ECHR is given when a “Party [...] exercises effective control of an area outside its national territory.” Later on the Court added the jurisdiction ratione personae, which has been called for by the literature in times of the Bankovic decision (Naert 2010 p.547 with further citations). Onboard of ships under the flag of a state party to the Convention territorial jurisdiction is given. In those cases where German troops intercept a vessel or use force against pirates they execute effective control and hence exercise jurisdiction. They are bound to the ECHR. Onboard of the German military vessels German law is the exclusively applicable legal order and hence detained pirates are under German jurisdiction and insofar protected by the ECHR. In the case Behrami and Saramati the ECtHR did not apply the ECHR on soldiers of the KFOR as it attributed its actions not to the respective nation states but to the UN. It explained that view by creating a chain of legitimatio via the Security Council decisions and attributing effective control to the UN. This view has to be rejected (Milanovic 2011, 149 f. with further references). The Al-Jedda case proved that the concept developed in the Behrami and Saramati case is not applicable for the KFOR.

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32 ECtHR Medvedyev et al. v. France (Application no. 3394/03), Judgment of 29 March 2010.
35 ECtHR Agim Behrami and Bekir Behrami v. France (Application no. 71412/01); ECtHR Ruzhdi Saramati v. France, Germany and Norway (Application no. 78166/01), para. 134.
36 ECtHR Agim Behrami and Bekir Behrami v. France (Application no. 71412/01); ECtHR Ruzhdi Saramati v. France, Germany and Norway (Application no. 78166/01), para. 134.
Saramati case does not apply as the UN Security Council does not exercise effective control or ultimate authority (see Bodini 2011, p. 834). Hence the concept of a case-by-case decision remains in place (Krieger 2012, p. 54). Concluding the Operation Atalanta is a case where extraterritorial application of the Convention has to be recognized broadly.

c) German Grundgesetz

There is no norm within the fundamental law that declares the extraterritorial validity of German constitutional law explicitly (see Wagner 2009; Wiefelspütz 2008; Herdegen 2013, in Maunz/Dürig, GG Art. 1). But according to art. 3 (1) GG the Grundgesetz determines that all authority of the state is bound to the fundamental rights. This is also valid for extraterritorial situations. The Constitutional Court (BVerfG) put that in concrete terms, defining that it the Grundgesetz is applicable in any case when public authority established by the Grundgesetz is acting. This is the main difference to international treaties – the applicability of the Grundgesetz is determined ratione personae and the territorial element plays a lesser role than for example in the ECHR (Quelle?). The German armed forces (Bundeswehr) are part of the executive authority and hence bound to the fundamental rights of the Grundgesetz (see Werner 2005). This view is also supported by the dominating opinion in the legal literature (Wiefelspütz 2008 with further references). This normative is based on national law and hence independent of the question whether any action is attributable to an international system of collective security, as it might be relevant in the context of the ICCPR or the ECHR (Weingärtner 2008). The international law is not generally opposed to the extraterritorial application of national fundamental rights as long as the sovereignty of other nation states is respected (Wiefelspütz 2008, p. 100 with further references). International law can set territorial limits for national law, but the limitation of human rights in favor of the sovereignty does not seem to be in accordance with actual developments in public international law discussions as the emerging concept of the Responsibility to Protect (see: International Commission on Intervention and State Sovereignty 2001). In German domestic law, the relationship between the fundamental Law and international law is based on the commitment of the fundamental Law to international law (codified in art. 23 – 25 GG and established by the German federal Constitutional Court). This principle does not mean that German fundamental rights are applied in any situation worldwide, which is often meant by the critical expression “Grundrechtsimperialismus” (Quelle 121 Yousif s.25). The conclusion that could be

37 ECHR Al Jedda v. The United Kingdom (Grand Chamber, Application no. 27021/08), Judgment of 7 July 2011.
38 BVerfGE 61, 127 (137); for extraterritorial effects: BVerfGE 6, 290 (295).
39 German translation: “Völkerrechtsfreundlichkeit”.
40 BVerfGE 112, 1, further references in Yousif (2007, p. 25).
41 Could be translated as: Imperialism of (German) fundamental rights.
drawn from the commitment to international law is that the Grundgesetz is not applicable extraterritorial, has to be rejected. The demand of German fundamental rights does not mean that other (domestic) rights lose their validity (see below) (Yousif 2007; Fischer-Lescano & Kreck S. 485; Weingärtner S. 88). As Yousif (2007) concludes correctly there are no requirements for the application of the Basic Law in addition to the jurisdiction. However the scope and level of protection might adopt in extraterritorial situations. Certain rights can only be claimed where there is a special relation to the German legal system (beneficial rights) (Yousif 2007, p. 213). Other rights might be interpreted in accordance with the special circumstances present in situation outside German territory. This flexibility in applying fundamental rights in extraterritorial situations is broadly recognized in the legal literature and requests the correct view of interpreting the rights on a case by case basis, where the level of protection might be lower in situations abroad depending on the actual possibility to influence the situation (Yousif 2007, p. 107; Werner 2005, p. 108 f.).

Accordingly the extraterritorial scope of the Grundgesetz is not to be called into question, but the degree of protection might be adopted to the special circumstances in extraterritorial situations.

d) EU Charter of Fundamental Rights

The EU Charter of Fundamental Rights is “addressed to the institutions and bodies of the Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing Union law” (art. 51 CFR). In the Operation Atalanta no institution or body of the Union is acting, but the military forces of the participating member states are implementing EU law. The term jurisdiction within the context of the CFR is also determined by the acting entity and not the place of action. The Atalanta mission is based upon a series of Council decisions and decisions of the Political and Security Committee. These decisions are based on the TFEU and hence the member states do execute Union law and thereby are bound to the Charter of Fundamental Rights of the European Union (see: Fischer-Lescano & Kreck 2009, p. 491).

V. Interdependencies of Human Rights Instruments

Opposed to national law international law is not defined by a clear hierarchy of norms. In national law primacy of constitutional law etc. is explicitly stated. In international law only some basic principles as Lex posterior derogat legi priori or Lex specialis derogat legi generali or some special norms (art. 103 UN Charter or art. 53 VCLT). Particularly art. 103 UN-Charter is relevant for the

42 BVerfGE 31, 58; 92, 26.
43 BVerfGE 31, 58; 92, 26.
present issue complex. It determines that the obligation inherent to the Charter prevail to any other international law. The inherent limit is the *ius cogens* (Naert 2010, p. 585; Wagner 2005 p. 39). Member states are obliged to comply with UN Security Council resolutions according to Chapter of the VII UN-Charter on the basis of art. 25 UN-Charter. Accordingly UN resolutions can derogate other international norms including human rights treaties insofar as they are not part of the *ius cogens* (Naert 2010, p. 585). Nowadays it is recognized principally that human rights are part of the *ius cogens* of international law (Geiger 2013, p. 362 f.; Van der Wilt 2011 with further citation; Meron 1986). Nonetheless it remains unclear which human rights and which form are meant. The qualification of being *ius cogens* is only given for those rights which are essential for the whole international community (Herdegen 2013, in Maunz/Dürig, GG Art. 1 Abs. 2 rectial. 30 f.). Generally interpretation can be rather broad as the international community recognizes human rights standards largely. The corresponding view of Meron (1986) and others (Herdegen 2013, in Maunz/Dürig, GG Art. 1 Abs. 2 rectial. 33 with further references) is that only certain rights, such as the prohibition of torture and inhuman treatment can be seen as *ius cogens*. The same is true for at least a minimal protection against arbitrary detention and the right to life (Tomuschat 2008, p. 38; Herdegen 2013, in Maunz/Dürig, GG Art. 1 Abs. 2 rectial. 33) One might deduce the essence of those rights as *ius cogens*, which is in all the essential human rights treaties commonly determined as non-derogable. Hence they prevail all treaty law and can only be derogated by other peremptory norms (art. 53 VCLT, art. 103 UN-Charter). The meaning of this conflict has not to be stressed to far as the overriding power of *ius cogens* norms is limited as Van der Wilt (2012) constitutes accurately with reference to the avoidance techniques. Its relevance is limited to the conflict of human rights and UN Security Council resolutions. In how far this might derogate the individual rights is examined in chapter VI. But as the UN Security Council resolutions determine the application of human rights to the fight against piracy off the coast of Somalia it supports the validity of human rights instruments rather than displacing them. But at the same time the resolution might be the ground for interference in human rights. While the relationship of German constitutional law to international and European law is well established (see for example: Dörr, Grote & Marauhn 2013; Geiger 2013),

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45 There is no accordance of the cited authors whether or not the *ius cogens* is the only limit to the provision of art. 103 UN Charter. Wagner sees the limit utterly, while Naert does not see the limit bound to the *ius cogens*.

46 Form Germany: BVerfGE 89, 155.


the correlation of the different international human rights instruments is debated to a lesser extent (Van der Wilt 2011). Generally there is no hierarchy in international law, it is rather seen as a “horizontal system” (Van der Wilt 2012, p. 13). Anyhow some authors recognize supremacy of human rights to other international treaties (Wet & Van der Wilt 2012), but the relationship of different human rights instruments remains uncertain.

Even though the Universal Declaration of Human Rights as such has no binding force it has unfold effect on international and national jurisprudence. It is recognized as customary law, fundamental principle of international law and the minimal standard of human rights protection recognized by the community of states (Tomuschat 2008, p. 38). This does not mean that it is automatically ius cogens and hence the UDHR also is only non-derogable according to art. 103 UN-Charter as its provisions are part of the ius cogens (ibid.). Basically the treaties include clauses specifying the principle of the advantageous solution. Such clauses are art. 53 ECHR, art. 52 and 53 CFR. For the ICCPR art. 5 (2) defines that other fundamental or human rights might not be restricted with reference to the ICCPR.

In German law international treaties are incorporated by a special transformation act according to art. 59 (2) GG. Art. 25 (1) GG establishes that the general rules of public international law are part of federal law. Generally the Grundgesetz is based in its relation to human right treaties as the ECHR and the ICCPR on the principle of the commitment to international law (Völkerrechtsfreundlichkeit). The principle derived from different norms as art. 24 (3), 25 and 59 (2) GG means essentially the harmonization of national and international law and aims at peaceful cooperation of states (Bleckmann 1996 p. 140; Pieroth & Schlink 2010, p. 17 with further citation). Accordingly the German law has to be interpreted as far as possible in the light of international law. However German law cannot be derogated by the UN-Charter or the resolutions of the Secuirty Council (Fleck 2008, p. 184). In the case of the ECHR this has also validity for constitutional law. Hence the ECHR is applied as „Auslegungshilfe für die Bestimmung von Inhalt und Reichweite von Grundrechten und rechtsstaatlichen Grundsätzen des Grundgesetzes, sofern der Schutz der Grundrechte nicht weiter geht (vgl. Art. 53 EMRK)“ (Meyer-Ladewig & Petzold 2005) The ECHR stipulates in its art. 53 that the convention shall not diminish the scope of any human rights instrument. This is why the ECHR is often referred to as a minimal standard of human rights protection in Europe (Frowein 2009). It shall guarantee that the human rights level of protection does not fall back behind its regulations.

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50 BVerfGE 111, 307.
51 BVerfGE 74, 358 (370).
convention leaves room for a higher degree of protection within national constitutions. In the case of the German *Grundgesetz* this might be norms as the extensive protection of human dignity (art. 1 (1) GG) or the more detailed codification of property rights (art. 14 GG).

The European Charter of Fundamental Rights is integrated in a European system of fundamental rights. These are based on national rights guaranteed by the diverse constitutions, the rights of the ECHR and the CFR itself. Together these treaties and laws build a European system of fundamental rights protection. Art. 52 and 53 CFR regulate the relationship of the CFR to national constitutions and other human rights instruments (especially the ECHR). Art. 52 (3) CFR declares for according rights the scope and condition of the ECHR as applicable. The CFR adopts for the corresponding rights the ECHR provisions entirely, ensuring that the level of protection does not fall below that of the ECHR (Grabenwarter 2006, p. 208 f.). The CFR allows further protection (art. 52 (3)), but prohibits that it is used to reduce or limit the scope of any other human rights instrument (art. 53). The CFR does not adopt higher standards of protection, but simple does not affect these (Grabenwarter 2006, p. 209). It is a clause of that favors the highest level of protection. It does not stipulate a hierarchy of human rights norms, but emphasizes expressly the special significance of the ECHR for the human rights protection in Europe (von Danwitz 2006, in Tettinger/Stern EuGrCh, Art. 53, recital 20). Hence the CFR integrates into a system of human rights protection and is only applicable if there is no higher level of protection. Grabenwarter (2006, pp. 209 f.) sees conflicts only in “multipolar fundamental rights relations”. As the CRF is incorporated in primary European Union Law by the treaty of Lisboa the basic principles of European Union Law and its relation to national law are applicable. Art. 6 TEU does bind the European Union and its organs (in Operation Atalanta MS are acting as such) not only to the CFR and ECHR, but since the decision Nold52 of the ECJ also to international human rights treaties insofar that they have to be considered in interpreting European fundamental rights.

The ICCPR (and other covenants) do bind Germany to grant its rights within its jurisdiction. In German jurisdiction they haven’t yet played an important role so far. They are formally integrated as mentioned before by art. 59 (2) GG with the force of a federal law, as any international treaty. The concept of commitment to international law of the *Grundgesetz* does apply to the ICCPR as well. Hence the German law has to be interpreted as far as possible in accordance with the ICCPR. This is the only logical adoption of the concepts developed by the German Federal Constitutional Court (BVerfG) in the *Görgülü*-decision for the ECHR.53 Compared to the European and national instruments

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52 ECJ, J. Case 4-73, Nold, Kohlen- und Baustoffgroßhandlung v Commission of the European Communities.

the possibilities might be restricted, but it is the fundamental norm of human rights protection worldwide and as such always has to be considered.

Concluding these relations it can be said that in principle the concept of favorable solution is inherent in all human rights instruments. Applied on the conjunct of treaties always the norm with the highest level of protection prevails. The international system of human rights protection is not dominated by a competitive environment, but determined by integrative network of standards of protection.

Another aspect that could restrict the application of human rights could be the application of humanitarian law on Operation Atalanta. Even in international armed conflicts the international community recognizes that human rights are not *ipso facto* suspended (Johann 2012, p. 263). No norm codifies the replacement of human rights by the law of war (Johann 2012). The international humanitarian law is prohibitive and hence does not allow the use of force, but tolerates it by not prohibiting it (Johann 2012). This form of negative codification does not compete with the positive law of human rights – and where norms do not compete the *lex specialis* concept is not applicable (Johann 2012). It might only influence the interpretation of human rights law in the light of humanitarian law (Johann 2012). While some norms can be interpreted easily in accordance with the law of war others have strict regulations concerning their limitations (see for example art. 2 & 5.1 ECHR). Most of the treaties do imply a clause that derogates and adopts certain rights in the case of war (e.g. art. 15 ECHR, art. 4 ICCPR). These often are only applicable in situations *threatening the life of the nation* (e.g. art. 15 ECHR). While this certainly applies to defensive war situations it will not be the case for military operations overseas (Johann 2012) and respectively not to the special case of Operation Atalanta. But as there is consensus on the inapplicability of humanitarian law on the situation off the coast of Somalia due to the missing presence of an international armed conflict in terms of the Geneva conventions, the rules for derogation of human rights are not applicable in the situation of fighting piracy there. Johann (2012) for example does see even the applicability of human rights in armed conflicts as guaranteed according to the principle of *pacta sunt servanda*. He finds a practicable solution that allows killing in fighting by the reference to the norms of derogation inherent in human rights treaties (Johann 2012), while other authors rely on the *lex specialis derogat legi generali* clause. No matter which arguments build the basis for the relationship between human rights and humanitarian law, the applicability on the anti-piracy operations is not given. The Atalanta operation is not a situation of armed conflict in the sense of the Geneva Conventions (Blank 2014). And even if humanitarian law could be applicable, the derogation norms would leave sufficient room for applying human rights anyhow. The interpretation of human rights in the light of the law of war might be a template for interpreting human rights instruments in accordance with the special
situation determined by the Operation Atalanta. But anyhow as we have determined before (Chapter II d)) humanitarian law is not applicable.

VI. Human Rights affected

Following Bodini this analysis will be arranged according to the “typical anti-piracy operational scenario” (2011, p. 834). It usual sequence of events can be described as “(A) surveillance; (B) boarding; (C) capture and detention; (D) trial; and (E) punishment” (ibid.). This classification is best suited to examine the possible human rights violations according to the legal interest protected. According to these phases one can determine which norms of the relevant human rights instrument are of interest for the applicability to the Atalanta mission. In this paper Bodini`s structure will be applied, but with some changes: In this the related rights will be preliminary determined. In phase A) mainly privacy rights are affected, while in phase B) rights related to the physical integrity might also be involved, due to the potential use of force. In phase C) the right to liberty will be the most concerned legal interest. To phases D) mainly procedural right will be applicable. Interesting is the involvement of the right to property, which may be applicable to boats, weapons and other property of the pirates that might be left behind or destroyed. This will be treated in part E). It also might be a good concept to arrange the examination according to the involved rights themselves. But the classification of these rights might differ from treaty to treaty. The process will therefore be chronologically analyzed while identifying the applicable rights and norms. A respective application will be outlined in the following.

a) Surveillance: The Right to Privacy

1. Overview

In order to fight piracy effectively surveillance is needed. Weather it is the radar control of a certain area of the sea, monitoring suspicious boats via drones, helicopters or other means as wiretapping audio and digital communication. All these measures are taken in order to be well prepared in the case of intercepting a pirate`s boat or a captured vessel. It aims at having an informational advantage and make boarding as safe as possible for the involved troops and potential hostages. It is also needed in order to determine whether a detected boat is mercantile, private, a fisher boat or used for piracy.

All these activities might violate the right to privacy, which is codified in all human rights instruments relevant for this work. The Universal Declaration of Human Rights protects the privacy under its article 12 (respectively art. 17 (1) ICCPR). The European Convention on Human Rights does contain a similar norm under article 8 and the Charter of Fundamental Rights of the European Union protects
the right to privacy in the articles 7 and 8. In the German Fundamental Law no literally codification of
the right to privacy can be found. Anyhow it is inherent, and the Constitutional Court
(Bundesverfassungsgericht) has acknowledged it in a prominent decision as “Right to informational
self-determination”\textsuperscript{54} and derives it from art. 2 (1) in conjunction with art. 1 (1) GG.

2. ICCPR

In order to interfere in the right to privacy, a series of requirements has to be met according to art.
17 ICCR. The ICCPR does not have as rigorous restrictions as the ECHR, but the interference has to be
lawful and not arbitrary (art. 17 (1) ICCPR). It needs to be in accordance with the national legal order
(art. 17 (2) ICCPR). Anyhow some authors see the interpretation of art. 17 as wide\textsuperscript{55} (Nowak, in
Nowak 2005, CCPR, art. 17). The measure needs a justifying legal objective, which can be inter alia
the protection of another right of equal rank (Nowak, in Nowak 2005, CCPR, art. 17, recital 12 et
seq.). Personal correspondence is also protected under art. 17 ICCPR and is subject to the same
limitations.

Any surveillance activities as monitoring with technical equipment are an act of interference in the
privacy rights of pirates (or other suspected and hence monitored persons and watercrafts). The aim
to have an informational advantage in order to protect the allied forces is a sufficient legal objective
to legitimate interferences, due to the limited intensity of air surveillance (etc.) which is not even
categorized as being in very much in secret (because aircrafts observing on open sea are noticed
easily).

3. ECHR

The level of protection of the right to privacy in the European Convention on Human Rights is higher
than the corresponding right in the ICCPR. The reason for this is mainly the increased demand of
reasons for justification. It also demands accordance with the principles of the rule of law, but also
requires a formal legal authorization. In art. 8 (2) ECHR legitimate justifications are exhaustively
listed. Actions undertaken by the participating troops in Operation Atalanta will normally fall under
the “prevention of crime” or “protection of rights and freedoms of others” (actual or potential
victims) clauses. It is permissible to weight up the right of privacy against legitimate rights of others\textsuperscript{56}
(Eser 2012, in Löwe Rosenberg, StPO, Vol. 11, Art. 8 EMRK/Art. 17,23,24 IPBPR recital 55). In the law

\textsuperscript{54} BVerfGE 65, 1.
\textsuperscript{55} This opinion is mainly, but not solely based on the obligation for the treaty parties to protect the privacy of
its inhabitants against interference on the part of third actors.
\textsuperscript{56} ECtHR Hatton and others v. The United Kingdom (Application no. 36022/97).
of the ECHR, observations do not require an exclusive decision by a judge\textsuperscript{57}. However, the infringement in the privacy rights has to be in accordance with the common standards of democratic societies and the usage of such measures has to be required and proportional (Esser 2012, in Löwe Rosenberg, StPO, Vol. 11, Art. 8 EMRK/Art. 17,23,24 IPBPR recital 54 et seqq.; Grabenwarter 2014). A legal authorization might be art. 2 (c) Council Joint Action 2008/851/CFSP of 10 November 2008. If applied to Operation Atalanta the ECHR, will most likely permit the surveillance activities undertaken by the \textit{Bundesmarine}, as the infringement of rights is not to heavy (see above) and the conflicting rights, as the safety of the involved troops and potential and actual victims will normally outweigh these rights (also see Bodini 2011, p. 835).

4. Grundgesetz
The inviolacy of the home is explicitly codified in art. 13 GG, and from art. 2 (1) in conjunction with art. 1 (1) GG personal rights can be deduced\textsuperscript{58}. In case of vessels on the open seas art. 13 GG most probably will not be applicable, but the personal rights provide protection against observations without legal cause. The corresponding right has been deprived by the \textit{Bundesverfassungsgericht} from art. 2 (1) GG as right to informational self-determination\textsuperscript{59}. Any interference in this right has to be justified on a legal basis\textsuperscript{60}. UN resolution 1851 para 2 explicitly allows surveillance access and searching of pirates vessels. In combination with art. 105 UNCLOS, which has been adopted as formal law by the \textit{Bundestag} via a transformation act\textsuperscript{61}, might be the legal basis for surveillance measures taken within Operation Atalanta. whether it is sufficiently precise to meet the requirements of clarity of the legal reservation (art. 20 (3) GG) is not been answered beyond doubt (Fleck 2008, p. 184)The norms regarding surveillance according to German criminal procedural law can be applied at least analogous as it is not the place to determine whether German armed forces are competent or not\textsuperscript{62}. Also the need for information in order to protect the substantial rights of the German soldiers will be a proportional cause for interference in the right to privacy. The protective scope is not as broad as art. 8 ECHR (Marauhn/Thorn 2013, in Dörr/Grote/Marauhn, EMRK/GG, Kap. 16 recital 16).

\textsuperscript{57} ECHR Kennedy v. The United Kingdom (Application no. 26839/05).
\textsuperscript{58} BVerfGE 54, 148 (153).
\textsuperscript{59} BVerfGE 90, 255.
\textsuperscript{60} BVerfGE 65, 1 (43 f.).
\textsuperscript{61} BGBl 1995/1.
\textsuperscript{62} Conceivable is the application of the norms of book 8 of the StPO (§§ 474 – 495). Also the Bundespolizeigesetz – BpoG might be applicable analogous. Here Unterabschnitt 2 Besondere Befugnisse Teil 1 Datenerhebung (§§21 – 28) would be relevant.
5. EU Charter of Fundamental Rights
Art. 7 CFR is almost literally art. 8 (1) ECHR, but it does not assume the restrictive provisions of art. 8 (2) ECHR. It only applies the general justification clause of art. 52 (1) CFR. Anyhow due to the proximity art. 52 (3) CFR does codify the scope and meaning of both corresponding norms. As Jarass (Jarass 2013, in Jarass, EuGrCH, Art. 7 recitals 13-16) argues, the limitations of art. 8 (2) ECHR go further than those of art. 52 (1) CFR and hence build (in accordance with art, 52 (3) CFR) the limitations for the interference in the right of privacy protected by the CFR. The scope of art. 8 CFR is quite narrow as the data have to be clearly determinable to a single person (Jarass 2013, in Jarass, EuGrCH, art. 8 recital 5). This does not apply to situations on open seas where often not even the identity of a ship is obvious. In the context of Operation Atalanta and relevant surveillance the protection of privacy according the CFR does only go as far as the protection of art. 8 ECHR (see also Marauhn/Thorn 2013, in Dörr/Grote/Marauhn, EMRK/GG, Kap. 16 Rn. 9 with further citations).

6. Interim Conclusion I
While the ICCPR and the ECHR include literal codifications of the right to privacy the Grundgesetz does only deprive such a right from its general personal rights norm (art. 2 GG). The degree of protection according to the ECHR is the most intense among the listed. Under art. 7 CFR the right to privacy is protected according to the codification in the ECHR. Anyhow in the concrete situation the infringement of the privacy rights will be justified by the consideration with the need for protection of the involved troops. This applies to all human rights instruments.

b) Interception & Boarding: The Rights to Physical Integrity

1. Overview
Intercepting and boarding a ship is the core of any anti-piracy operation. Searching a seized vessel might raise questions of privacy rights violations, since it is private property. Hence the before mentioned privacy rights of the different legal sources might be effected as well (see: chapter III. a).

The violation of privacy rights is an aspect of the boarding phase that has to be respected, but the most compelling juridical question might occur because the boarding itself might involve the use of force. Any legal basis for the Operation Atalanta (UN Res. Council decision, UNCLOS) legitimate the use of force63.

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“The first obvious question is whether, in order to stop a pirate vessel, the military can simply fire at her, putting the lives of the people on board at risk or, on the contrary, should take all steps in order to avoid unnecessary harm” (Bodini 2011, p. 836).

Generally long distance weapons fired at a ship not being involved in any fighting or attacking a private vessel will not be justifiable under any human rights treaty. But onboard confrontations might call for some detailed consideration. Boarding a vessel does in many involve cases rescuing hostages held on board a vessel (see: Bodini 2011, p. 836). Hostage liberation with the aid of lethal weapons generally does involve certain risks for hostages and kidnappers alike. This is true for any rescue, no matter if it happens onshore or offshore. Hence, the same kind of balancing of interests should be used as a standard – especially though the involved troops are well trained Special Forces. In applying human rights to this kind of situation one always has to weight up whether the use of force is a breach of law or justified according to the principles of proportionality.

The right to life is explicitly codified in all considered instruments (art. 3 UDHR & Art. 6 ICCPR, art. 2 ECHR, art. 2 (2) GG, art. 2 Charter of Fundamental Rights of the European Union). However, the right to physical integrity is not as distinctly regulated in each of them. German Fundamental Law and the Charter of Fundamental Rights of the European Union do have such an explicit norm in its art. 2 (GG) and 3 (CFR), respectively. The European Convention on Human Rights does not have a literally reference to a right to physical integrity (Richter 2013, in Dörr/Grote/Marauhn, EMRK/GG, Kap. 9 recital 30). But, in its recent decisions the ECtHR recognizes such a right (Richter 2013, in Dörr/Grote/Marauhn, EMRK/GG, Kap. 9 recital 31). It is based, depending on the gravity of the intrusion, on either art. 3 ECHR or art. 8 ECHR. It is not interpreted according to the wording and hence became an independent right (Richter 2013, in Dörr/Grote/Marauhn, EMRK/GG, Kap. 9 recital 30). The Universal Declaration of Human Rights does include the integrity of the body in art. 3. It is not as expressive, as in the EU Charter, but generally recognized as such (see: Rehof 1999, p. 89; Schmitz 2012, p. 233). The International Covenant on Civil and Political Rights is applied in the same manner: art. 6 (1) (Right to Life) implies the protection of physical integrity (Schmitz 2012, p. 233).

2. ICCPR
In the case of boarding captured ship or fighting pirates attacking a ship potential use of force of the participating troops is probable. Leading to the killing or injuring of pirates or hostages. The circumstances onboard of a captured vessel are particularly dangerous for the involved troops and

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64 ECtHR V.C. v. Slowakia (Application no. 18968/07), Rep. 2011, §§ 106-120.
civil victims or hostages. The situation of freeing hostages also cannot be compared to situations in Germany onshore. The circumstances are unclear, the boarding cannot be planned in sufficient detail as e.g. a situation in a German city. In addition, pirates might be less willing, and able to negotiate with military troops than a misguided bank robber. Pirates are also potentially armed heavily and hence pose more risk to anybody involved. But anyhow the cause of death of involved human beings would be an interference in art. 6 ICCPR.

Art. 6 ICCPR protects the right to life and sets the relatively broad limitations of prohibiting arbitrary killing. This does not mean that only causing the death of a person on purpose could violate art. 6 ICCPR (Nowak, in Nowak 2005, CCPR, Art. 6 recital 12). In this context non-arbitrary killing means that it has to be in accordance with national legislation and the rule of law. If this is the case, has to be decided on a case by case basis as possible justifications are not enumerated explicitly (see Esser 2012, in Löwe Rosenberg, StPO, Vol. 11, Art. 2 EMRK/Art. 6 IPBPR recital 19). Any deprivation of the right to life has to be justified on the base of a formal law even if it is not literally determined in art. 6 (Nowak, in Nowak 2005, CCPR, Art. 6, recital 15). This could be certain norms in German national law UZwG 32StGB (see below). Art. 2 (d) Council Joint Action 2008/851/CFSP of 10 November 2008 explicitly includes the use of force into all necessary means in order to prevent acts of piracy or bring them to an end. Whether the Council decision can be referred to as formal law is uncertain. But as adopted by the German parliament the UNCLOS possess the status of a federal German law. Art. 105 UNCLOS also implicitly allows the use of force to seize pirates’ vessels (see v. Arnauld 2009, p. 466). It authorizes the use of force only as far as needed in order to realize the seizure of the vessel (Fischer-Lescano 2009, p. 51). The UN resolutions confirm this competency (“necessary means”) and extend it to the Somali coastal waters recalling the need to respect human rights. The resolutions generally prevail over other international law according to art. 103 in combination with art. 25 UN-Charter (see above). But in the present case the right to life is ius cogens and hence is not derogable. Anyhow they put the regulations of art. 105 UNCLOS in concrete terms and extend its application. They also require a test of proportionality as it prohibits „excessive use of force“. At boarding pirate’s vessels the consideration has to be measured according to the same criterions as police operations at home. Most likely the test of proportionality at home would leave lots of room for the use of force due to the specific circumstances of fighting heavily armed pirates within the limited space of a vessel (see above). It can be assumed that the standards for proportionality and the requirements for the legal basis that are set by the ECHR and/or the ECtHR respectively apply to the

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ICCPR as well (Esser 2012, in Löwe Rosenberg, StPO, Vol. 11, Art. 2 EMRK/Art. 6 IPBPR recital 28). Even in the case of military operations in times of war the live of civilians is protected entirely by the ICCPR and has to be considered in any phase of such operations (Esser 2012, in Löwe Rosenberg, StPO, Vol. 11, Art. 2 EMRK/Art. 6 IPBPR recital 22). Humanitarian law does also protect civilians and non-combatants in situations of war. Anyhow we have seen that it does not apply to the situation off the coast of Somalia.

The physical integrity is not explicitly protected under the Covenant. Art. 7 ICCPR offers a certain degree of protection, but generally aims at protection against torture (Esser 2012, in Löwe Rosenberg, StPO, Vol. 11, Art. 3 EMRK/Art. 7 IPBPR recital 24). A genuine protection of the right to physical integrity cannot be extracted from the ICCPR.

3. ECHR

The ECHR offers protection against the use of force under articles 2 & 3. Protection against unlawful killing is guaranteed under art. 2 ECHR. In contrast to art. 6 ICCPR it codifies a fundamental prohibition of intentional (implicitly unintentional as well) killing. The ECHR does go further in so far that it prohibits not only arbitrary killing, but killing as such with the exceptions of its art. 2 (2). The protective scope of both provisions is the same, only the grounds for justification differ. Art. 2 (2) ECHR determines the restriction to the before mentioned protective norm. It is pretty clear and there is a series of according case law that determines the legality of lethal force (see Bodini 2011, p. 837). Generally the death of a human being can only be justified as consequence of the use of direct coercion it is never acceptable if the use of force aims at killing someone (Esser 2012, in Löwe Rosenberg, StPO, Vol. 11, Art. 3 EMRK/Art. 7 IPBPR recital 14). In the case of onboard fighting generally the protection of the life of participating troops will most likely be under threat. Especially because the circumstances are particularly dangerous as space at ships is limited and troops boarding a vessel face potentially resolute pirates heavily armed with automatic weapons etc.. Hence the application of art. 2 (2) a) ECHR will be admissible. As art. 2 (2) a) ECHR justifies the killing of a person already in cases where a person is protected “from unlawful violence” the situation of an armed fight taking place on a ship justifies the use of lethal force. The special danger (due to the constrained space and the heavily armed enemies) for the involved troops and for (potential) victims of the pirates onboard of a ship will reduce the demand for a test of proportionality, which is generally high in cases related to the right to life. In the case of piracy especially the provision under lit b) will be applicable in those cases when pirates are arrested. If pirates resist detention the use of force is

68 In practice both treaties will lead to comparable results. See Esser 2012, in Löwe Rosenberg, StPO, Vol. 11, Art. 2 EMRK/Art. 6 IPBPR recital 19 with further citations.
legitimated. If it causes the death of the suspect it might be justified. The detention itself and the use of force have to have a legal basis (see chapter VI c) and need to meet the requirement of essentiality (Esser 2012, in Löwe Rosenberg, StPO, Vol. 11, Art. 2 EMRK/Art. 6 IPBPR recital 56). Art. 2 ECHR does not stipulate expressly a law as basis, but applies strict measure to the case by case test of proportionality (Meyer-Ladewig 2011, in Meyer-Ladewig. EMRK, Art 2 recital 38). But as the heavily armed pirates are expected to fight back intensively in most cases the justification usually will be based on the safeguarding the life of participating soldiers or involved thirds (lit a)). The ECtHR also demands a formal investigation any killing of a person in cases of military or police missions.

As the ECHR does not codify explicitly the right of physical integrity, it has to be derived from the prohibition of torture according to art. 3 ECHR. However the ECtHR demands a certain intensity of the ill-treatment. Hence in the case of fighting piracy the legitimate use of force in order to enforce an arrest or to reinforce the legal order would need excessive use of violence in order to open the scope of art. 3 ECHR. The provision aims mainly at the prohibition of torture related to the enforcement of information by the use of violence (Bank 2013, in Dörr/Grote/Marauhn, EMRK/GG, Kap. 11, recital 46). The norm sets high limits for the presence of interference, but leaves little room for justification. If the threshold of art. 3 ECHR is exceeded little can justify the infringement (Bank 2013, in Dörr/Grote/Marauhn, EMRK/GG, Kap. 11, recital 107). Also art. 8 ECHR offers certain degree of protection the integrity of the person as far as art. 3 does not apply in its function as omnibus clause (Alleweldt 2013, in Dörr/Grote/Marauhn, EMRK/GG, Kap. Kap. 10 recital 116).

4. Grundgesetz
The right to life and physical integrity is protected in the Grundgesetz by art. 2 (2). Generally it protects against all kind of violations by any state authority and imposes the duty to protect as far as possible. Requirements for justification are strict. As the famous decision about the Luftsicherheitsgesetz reveals the protection of human life in combination with the dignity of human beings is protected on extremely high level (even compared with other human right provisions). On the legitimacy of final and fatal shots fired by the police to save lives the Federal Constitutional Court requests strict requirements as it has to be the ultima ratio in order to protect an equal right (generally the life of a hostage) (Horn 2010, in Stern/Becker, GG, Art. 2 recital 123 with further

71 BVerfGE 39,1 (42).
72 BVerfGE 115, 118.
Generally a formal law is required as legal basis for justification (art. 2 (2) GG. Within the German legal order the UZwG\textsuperscript{73}, the UZwGBw\textsuperscript{74}, the right to self-defense according to § 32 StGB and the Soldatengesetz (SG) are potential provisions providing the legal ground for the use of force. On the international level art 105 UNCLOS, the UN resolutions and Council decisions might build the required law for powers of intervention. The right to self-defense (§ 32 StGB) merely regulates the relations of citizens to one another and hence cannot be the legal ground for interference in human rights by state authorities (Yousif 2007, p. 172). The UZwGBw does regulate the use of force including firearm action, but it is limited in its scope to guarding facilities of the armed forces (§ 2 UZwGBw). Hence it is only applicable to a situation where vessels of the Bundesmarine are attacked by pirates, which seems unlikely to happen. The Soldatengesetz does not explicitly codify the use of force and the general § 7 SG is not precise enough in order to justify infringements in art. 2 GG (Yousif 2007, p. 173). A legal ground for the interference in art. 2 GG might be the consideration of the international legal norms. As described in chapter VI a) art. 105 UNCLOS is a parliamentary law and can be together with the UN resolutions and the Council decisions the enabling clause for the use of force. It remains uncertain if these international provisions meet the requirement for clarity according to the constitutional demands in German law. But as the use of force is regulated on the basis of general clauses in German national law as well and the concepts of the UZwG might be applicable analogous as well (due to the police-like character of the mission) the overall analysis indicates that a legal basis for justification is given. As the UZwG lists exhaustively to whom it applies analogy is not possible. Anyhow a test of proportionality and consideration of goods has to be applied. As mentioned before the Operation Atalanta is not a situation of war, but has more police-like character and the same standards have to be applied. As there is no explicit codification of the use of force in such situation\textsuperscript{75} for German soldiers (Youssif 2007) the laws for protection of properties of the Bundeswehr (UZwGBw) and the law of use of force for German federal officers (UZwG) might be considered as measure. The German constitutional Court generally sets high limits to the infringement of the right to life and physical integrity. Due to the before mentioned particular circumstances in the fight against piracy (heavily armed pirates from a totally distinct cultural sphere onboard of vessels)

\textsuperscript{73} Gesetz über den unmittelbaren Zwang bei Ausübung öffentlicher Gewalt durch Vollzugsbeamte des Bundes

\textsuperscript{74} Gesetz über die Anwendung unmittelbaren Zwanges und die Ausübung besonderer Befugnisse durch Soldaten der Bundeswehr und verbündeter Streitkräfte sowie zivile Wachpersonen – law on the use of force by federal law enforcement officers.

\textsuperscript{75} The only regulation of the use of force are the Rules of Engagement (ROE). As these are not public and do only poses the legal power of orders they do not fulfill the requirement as legal basis.
justification due to the special danger for involved troops is likely to be achieved easier than it would be the case within usual police operations on German territory.

5. Charter of Fundamental Rights of the European Union
The EU Charter of Fundamental Rights does codify the right to life (art. 2) and integrity of the person (art. 3) explicitly and separately. Generally interferences in the right to life are excluded (see Jarass 2013, in Jarass, EuGrCH, Art. 2 recital 7). Under the limitations of art. 2 (2) ECHR the interference might be legitimated according to art. 52 CFR, if the legitimacy of the objective and the proportionality (according art. 52 (1) CFR) are respected.

If soldiers injure pirates, or a member of the crew of a captured vessel, due to the use of force needed to detain pirates or free hostages a violation of art. 3 CFR is conceivable. Justification of such interference in the physical integrity might be covered by art. 52 (1) CFR. The general requirements of acting to achieve a legitimate goal and the proportionality have to be fulfilled in order to permit such actions. The detention of pirates or rescue of hostages are such legitimate goals, a consideration of the involved rights has to be made on a case by case basis. It likely will lead to justified action in the same cases as in national law.

6. Interim Conclusion II
All examined human rights treaties protect the right to life on a rather high level, but due to the demanding and dangerous situation off the coast of Somalia the death of pirates in consequence of fighting taking place onboard will be justifiable in most conceivable cases. However killing should only be the consequence and not the aim of the use of force. Legal ground for this infringement for the ICCPR is the conjunction of art. 105 UNCLOS in combination with the Security Council resolutions. The ECHR does not require a legal ground as it determines strict specifications at what point an infringement might be legitimated. The CFR is applied in a comparable way. The provisions of the Grundgesetz might be justified on the basis of an overall interpretation of the legal concepts, but no law stipulates the use of force explicitly. Regarding the right to physical integrity the Grundgesetz and the European Charter on Fundamental rights contain an explicit codification, while the others deduce it particularly from the norms protecting against torture.

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76 See also: ECJ, Case. 112/00 – Schmidberger, v. Austria (80).
c) Arrest and Detention: Prohibition of Arbitrary Arrest

1. Overview

Persons who are under suspicion of criminal activities might be arrested. This is the case on board of intercepted vessels, too. After boarding it and potential fighting, identified pirates might be arrested. As in any other situation of detention these are subject to certain rights. Generally any person has the right to free movement which is restricted by an arrest and codified in all present legal documents (art. 9 UDHR, art. 9 (1) ICCPR, art. 5 (1) ECHR, art.2 (2) GG, art. 6 CFR). It is recognized by national and international courts as one of the “core rights” with especially “high rank” within the hierarchy of rights ([Dörr 2013, in Dörr/Grote/Marauhn, EMRK/GG, Kap. 13 recital 1 with further references). Any arrest or detention needs a legal basis. This requirement is codified in art. 9 (1) ICCPR, art. 104 GG and art. 5 (1) ECHR. Revision by a judge within in a short period of time is required as well, as the art. 9 (4) ICCPR, art. 104 GG, and art. 5 (4) ECHR demand. These habeas corpus provisions shall protect the suspect from abuse of powers by the involved authorities (Bodini 2011, p. 832). Especially the last aspect raises problems when a suspect is detained thousands of kilometers away from the seat of the court having jurisdiction. It also raises the question, which legal entity can be classified as competent for the authorization of deprivation of freedom. But also the legal basis and legitimacy might cause questions in applying human rights, as the question which procedural norms are applied. In the context of detention as well the right to get informed of the accusations in a way that the suspect understands it (language, terms used) is protected. This raises questions, if troops abroad need legal advisers, speaking the native language of the arrestee at all times. Violations of the rights of captured persons might lead to lasting problems in the subsequently trial (see Bodini 2011, p. 840).

2. ICCPR

Art. 9 ICCPR protects the classical freedom of movement, which means the right to choose ones whereabouts freely. The concept behind this norm is to protect the persons within the scope of the ICCPR from arbitrary arrest which has no legal basis on the part of the respective state (Esser 2012, in Löwe Rosenberg, StPO, Vol. 11, Art. 5 EMRK/Art. 9 IPBPR recital 8). The ICCPR implies the requirement of a legal basis in national law for any detention. In the case of detaining pirates within the framework of Operation Atalanta the scope of art. 9 are affected. As pirates detained by military forces are under the effective control of those and are not free to go where they want this certainly
applies to the situation present (see Esser 2012, in Löwe Rosenberg, StPO, Vol. 11, Art. 5 EMRK/Art. 9 IPBPR recital 13 with further references to the Medvedyev case of the ECtHR•77).

These infringements might be justified by § 127 StPO (German code of criminal procedure) or art. 105 UNCLOS and the resolutions of the UN Security Council. These might build the demanded legal ground. Art. 105 UNCLOS gives any state the right to seize pirates’ ships and arrest the pirates. This right can be seen as exception according to art. 9 (1) ICCPR being “on […] grounds and in accordance with such procedure as are established by law”. This could be problematic, where the UNCLOS is not applicable (as in coastal waters) (v. Arnauld 2009, p. 459). But here the UN resolutions do close the gap of applicability as they extend the competency to fight piracy to Somali coastal waters and provides for arrests. On the basis of art. 103 UN–Charter they obtain the power to deprive even human rights law. Art. 12 of the Council Joint Action 2008/851/CFSP of 10 November 2008 is a quite precise provision determining details on arrest and the transfer of an arrested person in Operation Atalanta. The UN resolutions are not as precise but do determine detention as a goal of the Operation Atalanta and go beyond the clause of “all necessary measures”. Even though it does not determine all details of the arrest, it refers to the respect of human rights. The demand for the legal basis have to be applied less strict in international law as the provisions do not refer to democratic requirements and the legislative process is not as clearly determined (Fischer-Lescano & Kreck 2009, p. 473). It remains unclear if it complies with the demands of for a sufficient legal basis, but definitely conceivable (contrary opinion: Fischer-Lescano 2009, v. Arnauld 2009). Applying § 127 StPO, which gives everyone the right to arrest suspects seems to be more difficult. As the applicability of German procedural law on board of ships (even under German flag) is not given as it is only applicable territorial (see: v. Arnauld 2009, p. 465; Fischer-Lescano & Kreck 2009, p. 499 f.). Its application also is excluded as the § 127 StPO is an exception of the state monopoly on the use of force and here the Bundeswehr acts as executive authority (Ibid.). Also the restriction for to a short period of time might be problematic. Hence § 127 StPO cannot justify the deprivation of the right to liberty according to art. 9 ICCPR. If the UN Resolutions are sufficiently determined in terms of foreseeability and clarity to be seen as justification “established by law” as presupposed by art. 9 (1) ICCPR is difficult to decide. Fischer-Lescano & Kerck (2009, p. 502) argue that the resolutions according to art. 25 UN–Charter only regulate the relations between states and not between states and individuals. Hence the individual rights are not affected and the resolutions are not sufficiently precise. Anyhow they don’t even go beyond the scope of art. 105 UNCLOS (Fischer-Lescano & Kreck 2009, p. 502). As the

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resolutions include detentions of pirates as legitimate means in the fight against piracy\(^78\) they support the outcome of justifying detentions in consequence. The right to liberty and security according to art. 9 (1) ICCPR can be deprived in accordance with the UNCLOS and art. 12 Council Joint Action 2008/851/CFSP, which do legitimate the arrest of pirates on high seas.

Art. 9 (2) ICCPR gives any person arrested the right to be immediately (“at the time of arrest”) informed of the reasons for the arrest. This provision aims to help the detained person to dispel any uncertainties regarding the reasons for the detention and give him the chance to make effective use of legal remedies (Esser 2012, in Löwe Rosenberg, StPO, Vol. 11, Art. 5 EMRK/Art. 9 IPBPR recital 172). There is only short delay accepted. The reasons for arrest have to be declared “at the time of arrest” and charges against the detained person have to be communicated “promptly”. This does only allow delay of a couple of hours\(^79\) but this provision definitely does not allow to wait until the arrested is transferred to a harbor or even the home country of the military vessel, as the HRC denied already acceptance of a delay of three days\(^80\). In some cases it can be obvious to the detained what the reasons for his detention are, which is most likely if a pirate is detained onboard of a captured vessel or in succession of a fight against military forces. This might mean, that he can’t claim a violation of his rights from art. 9 (2) ICCPR, but does certainly not dispense the obligation to inform for the participating officers (Esser 2012, in Löwe Rosenberg, StPO, Vol. 11, Art. 52 EMRK/Art. 9 IPBPR recital 190).

The right of any suspect to be brought before a judge promptly is codified in art. 9 (3) ICCPR. The judge has to decide on the lawfulness of the detention. Art. 9 (3) ICCPR also allows “other officer authorized by law to exercise judicial power” to take this decision. Who this might be is not clearly determined. In the present case the judge or other legal officer may steam from the detaining nation or another to which the detained person is transferred, as long as the transfer and process meets the requirements of the relevant human rights treaties (more on this in chapter VI d)). The requirement of promptness in this context is not to be interpreted as strictly as in art. 9 (2) ICCPR. The ECtHR has accepted longer period of time in different cases under “wholly exceptional circumstances” as


present on high seas. In a similar case on the detention of a drug smuggler, the ECtHR accepted of 16 days as the material circumstances made impossible to bring the detained before a judge in a shorter period of time. As the ECHR provision is so close to the ICCPR and the circumstances on high seas are extraordinary the requirement of promptness is preserved as long as the detained is presented without undue delay to a judge or competent officer.

3. ECHR
The principle behind art. 5 ECHR is the same as in the case of art. 9 ICCPR. It is a norm that guarantees that imprisonment is based on certain legal basis and in accordance with procedural norms. It only targets at the question whether the imprisonment is legal, but not at the circumstances of prison sentences (for this see below) (Esser 2012, in Löwe Rosenberg, StPO, Vol. 11, Art. 5 EMRK/Art. 9 IPBR recital 9). While art. 9 ICCPR guarantees certain procedural rights and a general legal reservation the ECHR expands this guarantee by determining a definitive list of legal reasons for justifications of imprisonments (art. 5 (1)). Hence the provisions of the ECHR leave fewer margins for legislative freedom. In the present case the application of art. 5 (1) lit. c) ECHR would be accurate. The arrest of pirates aims to bring pirates before a judge. The legitimating law could be besides the most likely not applicable § 127 StPO (see above) the art. 105 UNCLOS or art.12 of the Council Joint Action 2008/851/CSP of 10 November 2008. In the Medvedyev decision the ECtHR has indicated that these could be sufficient legal basis in terms of foreseeability and clarity (see Bodini 2011, p. 832). The Behrami and Saramati case did expel the responsibility for actions within international operations to the international organizations, but at the same time emphasized the relevance of the UN Security Council resolutions. Accordingly consulting them for justification seems to be appropriate. Hence the right of liberty according to art. 5 (1) normally would not be infringed as long as the principle of proportionality is respected.

According to art 5 (2) ECHR the arrested person has to be advised in a language and with words that he is able to understand. In so far the European Convention goes beyond the requirements of the ICCPR (Esser 2012, Art. 5 EMRK/Art. 9 IPBR recital 192). This leads to the rather controversial question whether this requires interpreters of all possibly spoken languages, besides Arabic in Somalia speak Somali and the Benaadir dialect. (Bodini 2011, p.840). According to Bodini (Ibid.) at

81ECtHR Medvedyev et al v. France (Grand Chamber, Application No 3394/03), Judgment of 29 March 2010.
83 ECtHR Medvedyev et al v. France (Grand Chamber, Application No 3394/03).
84 ECtHR Agim Behrami and Bekir Behrami v. France (Application no. 71412); ECtHR Ruzhdi Saramati v. France, Germany and Norway (Application no. 78166/01).
least interpreters for Arabic, if not even for all languages are present onboard of the Operation Atalanta vessels.

The requirement for assessing the legality of the imprisonment codified in art. 5 (3) ECHR corresponds to great extend with those of the Covenant on Civil and Political Rights (art. 9 (3)) (Esser 2012, Art. 5 EMRK/Art. 9 IPBR recital 199). Additionally the Medvedyev case doe is an ECtHR case referring to the ECHR. Hence there is no difference in applying art. 5 (3) ECHR to the before mentioned application of art. 9 (3) ICCPR.

4. German Grundgesetz
The protection of personal liberty is guaranteed by the Grundgesetz on the basis of art. 2 (2) and art. 104. GG puts the guarantees of art. 2 (2) GG in concrete terms. The degree of protection offered by the Grundgesetz goes beyond the standard of the respective international treaties as the requirements on the legal basis are more severe than in international law. Due to the before mentioned reasons § 127 StPO is neither applicable as legal basis for justification. Neither the UN resolutions nor the Council Joint Actions are parliamentary laws as required by the Grundgesetz (Fleck 2008, p. 184). Even though the UNCLOS has been transferred into German national law via a transformation act adopted by the Bundestag it does not comply with the demands of a sufficient legal basis (v. Arnauld 2009, p. 505). Hence finding a legal basis for the justification of detentions according to the Grundgesetz seems doubtful (see also Fischer-Lescano & Kreck 2009).

5. EU Charter of Fundamental Rights
The art. 6 of the Charter of Fundamental Rights of the European Union reproduces art. 5 ECHR literally. Hence the legal effect complies with the standard of the ECHR (see also art. 52 (3) CFR).

6. Interim Conclusion III
The protection against arbitrary arrest is one of the core rights related to Operation Atalanta. All treaties and the Grundgesetz protect it explicitly. The ICCPR permits detention on the bases of the international law determining the Operation Atalanta. The ECHR offers a coherent set of regulations. The corresponding norm in the CFR is art.6 corresponds with art. 5 ECHR. Whereas the Grundgesetz provides the need for a more detailed legal basis and hence justification seems questionable. The requirements for a review of the detention resemble each other in the ICCPR, ECHR and CFR.

85 BGBl 1995/1.
86 BVerfGE 56, 1 (12).
d) Trial and Punishment: The Procedural Rights

1. Overview

The aspect of where, how and under which law the trial will be held is one of the most complex and contestable related to the fight against piracy. Generally all human rights instruments concede procedural rights expressing the rule of law principle (Grabenwarter & Pabel 2013, in Dörr/Grote/Marauhn, EMRK/GG, Kap. 14, recital 8.). The essential one is that for a fair trial. Art. 10 and 6 ECHR codify this guarantee similarly to art. 103 GG, art. 10 UDHR, art. 14 (1) ICCPR and art. 47 (2) CFR. The German Grundgesetz acknowledges certain aspects as the right not to be sentenced, but by a judge (art. 101 (1) & 104 (2) GG). The procedural rights include a variety of special aspects, which are defined more or less in detail in the different treaties. These include the right to hearing in accordance with the law, the principles of non-retroactivity of penalties – *nulla poena sine lege* (art. 11 (1) UDHR, art. 15 (1) ICCPR, art. 49 (1) CFR, art. 7 ECHR and art. 103 (2) GG) and *ne bis in idem* (art. 14 (2) ICCPR, art. additional protocol of the ECHR No. 7, art. 50 CFR, art. 103 (3) GG) and the right to defense (art. 14 (3) & 6 (3) ECHR, art. 48 (2) CFR). In some of the instruments these specific rights derive from the right for a fair trial while others define them in more detail. The procedural rights are of great relevance, as the ECtHR and the German Constitutional Court require exhaustion of remedies as admissibility requirement (see: Borowoski 2012, p. 268).

The punishment in piracy cases involves certain aspects distinct to the average process, as possibility of extradition or deportation (Bodini 2011, p. 841). In this context the general aspects of the non-refoulement principle in states where the sentenced person’s life would be under real risk (art. 19 CFR)\(^{87}\). This aspect is of special relevance due to the fact that Somalia must be considered as unsafe\(^{88}\).

Due to the complexity of the topic of fair trial, it cannot be handled in detail and in full. Especially as the major part of the trials takes place in Kenya and Mauritius (Guilfoyle 2010a) and this is not the place for an evaluation of the legal system of these states. The transfer of detained pirates to Kenya, Mauritius and Djibouti is based on art. 12 Council Joint Action 2008/851/CFSP and the exchange of letters between the UE and the respective states\(^ {89}\). In this case the EU and Germany are obliged to get confirmation of the country where the proceedings take place that the rule of law is applied –

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\(^{88}\) ECtHR *Sheek v. The Netherlands* (Application no. 1948/04), Rep. 2007.

\(^{89}\) The exchange of letters with Mauritius as legal basis is be declared for invalid by the ECI due to missing involvement of the parliament according to Judgment of the Court (Grand Chamber) of 24 June 2014 — European Parliament v Council of the European Union (Case C-658/11). Anyhow it is still applied as long as no new agreement has been adopted.
this has happened with the exchange of letters with the respective states. The transfer for Kenya for process and the trials themselves seem to work and meet standards of the rule of law (Naert 2010, p. 190). But within Germany or Europe this topic involves too many aspects to cover within this paper.

2. ICCPR

Already the UDHR provided the guarantee for a fair trial in art. 10. Art. 14 ICCPR is a further development of these ideas. It provides a list of the essential procedural rights as the access to an impartial tribunal (art. 14 (1) ICCPR) of presumption of innocence (art. 14 (2) ICCPR) and the prohibition of double jeopardy (art. 14 (7) ICCPR). Art. 15 ICCPR determines the *nulla poena sine lege* principle. It goes even beyond these principles according to the rule of law and includes detailed regulations on publicity (art. 14 (1) ICCPR), the principle of “equality of arms” (art. 14 (3) ICCPR), timescales (ibid.), and so on. In the context of piracy off the horn of Africa the essential provision besides the access to an impartial tribunal are the right to an interpreter (art. 14 (3) f) ICCPR) and to be informed on the charges in a way he can understand (art. 14 (3) a) ICCPR).

3. ECHR

The ECHR contains a relatively high number of procedural rights. Biased by the Anglo-American legal system these differentiated rights are expressly codified in art. 6 (fair trial), art. 7 (*nulla poena sine lege*) and art. 13 (right to effective remedy) ECHR and expanded by art. 2 (right of appeal in criminal matters), art 3 (right to compensation for wrongful conviction) and art. 4 (prohibition of double jeopardy) of the 7th Prot. ECHR. Especially relevant in the present case is art. 6 (1) ECHR. According to this norm anyone facing a criminal charge has the right to an independent and impartial tribunal. As the scope cover any criminal charge and the ECHR is applicable in the situation off the coast of Somali, art. 6 (1) ECHR does also guarantee any pirate detained in this context an independent tribunal. This might also be a tribunal other than of the nation state realizing the arrest. As long as the detained does not face a real risk of being violated in his human rights (Guilfoyle 2010a, p. 153). In this case the same standards have to be applied as related to the non-refoulement provisions.

Art. 6 ECHR provides the accused person a series of detailed rights as e.g. a fair hearing and legal assistance (art. 6 3) ECHR). These have to be guaranteed as a whole for the pirates as well. This includes interpreters and any other necessary assistance to understand the ongoing procedure. As

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90 Art. 11 UDHR added the presumption of innocence for criminal proceedings.


92 This can aspect cannot be discussed here in detail. For more information with further citation see Guilfoyle 2010a.
the ECHR does not determine the competences of a court, but grants protection to the pirates the realization of these procedural rights has to be secured when detained pirates are transferred for trial to states outside the scope of the ECHR.

4. German Grundgesetz

Compared with the ECHR the Grundgesetz has a relatively low extent of expressly regulated procedural rights (Grabenwarter & Pabel 2013, in Dörr/Grote/Marauhn, EMRK/GG, Kap. 14, recital 9). Derived from art. 20 (3) GG (Rule of law), art. 19 (4) GG and the universal civil rights and liberties (particularly human dignity) the procedural rights in German constitutional law follow the principles of justice and equity (Grabenwarter & Pabel 2013, in Dörr/Grote/Marauhn, EMRK/GG, Kap. 14, recital 13). Those rights codified in international human rights treaties not immanent to the Grundgesetz are laid down by German sub-constitutional law (StPO, GVG, JGG). Explicitly codified are the right to fair hearing (art. 101 (1) GG) and the independence of the judge (art. 97 GG). The Grundgesetz does ensure the procedural rights for anyone, independent from the fact whether he is resident or not. Hence these procedural guarantees also apply to the Somali pirates if they are subject to German criminal proceedings. The only case of a trial against piracy in Hamburg has shown that such a process respecting the procedural rights generally is possible, but poses a series of difficulties.

5. EU Charter of Fundamental Rights

The procedural rights established by art. 47-50 CFR do not elaborate on the details, but essentially establishes the same rights as the ECHR. It also includes the essential procedural rights as the general access to an impartial tribunal (art. 47 CFR) of presumption of innocence (48 (1) CRF), nulla poena sine lege (art. 49 CRF) and the prohibition of double jeopardy (art. 50 CFR). In accordance with art. 52 CFR the protection goes as far as the scope of the ECHR.

6. Interim Conclusion IV

All human rights treaties offer a variety of procedural rights. These are essential for civilized nation states as they represent the core of the rule of law. Especially the ECHR has a high standard of protection. The CFR and ICCPR regulations are less detailed, but also protect all essential aspect of a fair trial. In the Grundgesetz most regulations are not as explicit but can be deprived. The regulations on sub-constitutional level are detailed and more than sufficient. Anyhow the concrete application of the fair trial in the situation at the Gulf of Aden is unclear and often no state declares an interest in

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93 BVerfGE 40 98.
enforcing the law (Bundeswehr 2014). But this seems to be less often the case than in other comparable situations (Naert 2010, p.189). The trial in Hamburg has shown that a process in Europe is possible, but disproportionally complex and expensive\textsuperscript{95}. The courts proceedings in neighboring countries seem to be the best solution, but involve its own problems. For example the control of fair proceeding is outside the control of European nation states. The demanding topic of the transfer and process in countries as Kenya cannot be solved here.

e) Further Affected Human Rights: The Protection of Property

1. Overview
In military missions against piracy a couple of legal interests and rights are affected. An aspect which has not been covered in the previous examinations is the relevance of property rights. The pirate’s vessels and equipment generally is left behind, destroyed or formally confiscated when pirates are detained (Bodini 2011, p. 842). The vessels might be damaged when stopped. This is especially relevant due to the fact that generally intercepted vessel are captured by pirates but owned by shipping companies. The raised juridical problems relate to the property rights of the human rights instruments (art. 17 UDHR, art. 14 GG, art. 17 CFR) and are solved in accordance with its justification and evaluation fulfillments. But it is not too simple to solve this aspect, because not every human rights treaty codifies the right to material property. Neither of the Civil and Social Pacts includes the right to property. For the European Convention the adoption took only place in the first additional protocol (art. 1). This unclear juridical situation leads to a variety of uncertainties and interpretation difficulties (Banning 2002).

2. ICCPR
Art. 17 UDHR provides the right to property and the guarantee not to be arbitrary deprived of this property. The ICCPR itself does not contain any reference to the protection of the right to property.

3. ECHR
In the original text of the Convention the right to property was missing as well. It has been codified in art. 1 of the 1\textsuperscript{st} Port ECHR and differs from national legislation insofar as it is “less predefined by private law the guarantees under national law” (Wegener 2007, p. 132). It protects all acquired rights and as such the property of the pirates in form of ships weapons etc. falls within the scope of the provision. If soldiers damage property of the pirates or leave it behind on the open seas after a confrontation took place interference in the right to property took place. These interferences might be justified by law or if the infringement lies within “public interest” or is justified by the general

\textsuperscript{95} LG Hamburg, 19.10.2012 - 603 Kls 17/10.
principles of international law (art. 1 (1) 1<sup>st</sup> Prot. ECHR). As the public interest is interpreted broadly in this context (Wegener 2007) the need for detention and the associated boarding and potential fighting will justify potential damage to the pirates’ property. At least balancing the rights to physical integrity of the involved force and potential hostages will disclose the justification of the infringement. Principally the deprivation of property related to a criminal act can be legitimized by the principle of *producta et instrumenta sceleris* (Esser 2012, in Löwe Rosenberg, StPO, Vol. 11, 1. ZP, recital 1148 & 150). In German criminal law this is codified in art. 74 StGB. Thus the StGB allows the seizure of arms and other equipment used for a crime (Redeker & Busse 2008, r. 262). Also the UN resolutions explicitly allow the confiscation and destruction of arms, boats and other tools used for the act of piracy<sup>96</sup>. If the involved forces do leave behind pirates vessels or equipment this will arguably be justified by the simple argument of practicability. Troops boarding a vessel with speedboats will hardly be able to carry along a boat in addition to potential detained pirates.

4. German Grundgesetz

The protection of property in the *Grundgesetz* corresponds essentially to the ECHR provision. The scope of art. 14 GG is broad and the applicability to the situation obvious. The deprivation of property is interference within the right to property and might be justified by law or test of proportionality comparable to the justification of the ECHR provision. At this point the codification of the *producta et instrumenta sceleris* principle in art. 74 StGB is of particular importance. Also the rights established in art. 105 UNCLOS in combination with the UN resolutions, which explicitly request seizures contribute to the legitimation.

5. EU Charter of Fundamental Rights

Art. 17 CFR does have a different wording than art. 1 1<sup>st</sup> Prot. ECHR, but is based on this provision (see Explanations to the Charter) (Esser 2012, in Löwe Rosenberg, StPO, Vol. 11, 1. ZP, recital 4, Wollenschläger 2014, in Peers/Hervey/Kenner/Ward, CFR art. 17 (1) recital 5). Hence the scope and meaning goes as far as the ECHR clause (according to art. 52 (3) CFR).

6. Interim Conclusion V

While the ICCPR does not include a norm protecting private property at all the ECHR (n its 1<sup>st</sup> additional protocol) and CFR acknowledge such a right. However the demands for interference are not too high. The same is true for the *Grundgesetz*. As the confiscation and destruction of arms, boats and other instruments used for piracy helps to prevent more crimes and finds a legal basis in

international and German law the application of this provisions appears to be applicable in a realistic manner.

VII. Enforceability of Human Rights

Besides substantive legal provisions, the enforceability of human rights according to the different regimes plays a crucial role. It differs considerably and is more pronounced within national law than on the international level. But within Europe a strong legal system has been established. A variety of instruments can be identified, from report and fact-finding missions to inter-state and individual complaints. The applicable instruments are essential to determine the degree of protection that a treaty can offer to an applicant.

a) ICCPR

According to the ICCPR the competent body for the enforcement of human rights is the Human Rights Committee (HRC). Established by the ICCPR (art. 28), it is constituted by 18 members elected by the state parties for a period of four years (art. 29 ff.). The members are elected because of their personal and professional qualifications and not as representatives of their home countries. The competencies of the HRC are limited to the publishing of an annual report on the activities of the committee to the General Assembly (art. 45 ICCPR). Furthermore the HRC has the competence to develop so called General Comments on the interpretation of the Covenant (art 40 (4) ICCPR). Besides the obligatory state reports (art. 40) and General Comments the ICCPR provides facultative complaints procedures. The inter-state application (art. 41) enables state parties to issue complaints concerning other states. The individual complaints procedure gives the individual the right to initiate a procedure against nation states (established by the Optional Protocol to the International Covenant on Civil and Political Rights from 19.12.1966). Germany has agreed to the applicability of both appeal’s procedures. It is non-legally binding (Esser 2012, in Löwe Rosenberg, StPO, Vol. 11, HRC Verfahren/Verfahren UN, recital 360) and the missing interests of other state parties make the application of the inter-state appeal improbable. More likely is the occurrence of individual complaints on the part of the pirates adversely affected by the actions of German soldiers. It allows claiming violations of the ICCPR before the committee, which gives the affected state the possibility to express its view. The individual complaints procedure demands a series of requirements. The domestic legal path has to be exhausted (art. 5 (2) b) OP-ICCPR) and the claim must “not being


Incorporation of the Optional Protocol to the International Covenant on Civil and Political Rights into German law: BGBl. 1992 II p. 1247.
examined under another procedure of international investigation or settlement” (art. 5 (2) a) OP-ICCPR). In concrete terms this means that no national or international proceedings are currently held on the same matter in dispute. As the proceeding before the HRC has no legally binding effect it is most likely that the appellant took legal action in another court proceeding. The HRC communicates its view affirming or denying the complaint. Its decisions have no legally binding effect, but have impact through its publicity (Nowak, in Nowak 2005, CCPR, art. 5, recital 33 e seq.). The procedure before the HRC cannot help to enforce the rights of the appellant effectively. It is unlikely that the formal requirements are even met and as the decisions (views) of the committee do not have legally binding affected, even a successful complaint will not help to end an infringement or eliminate possible consequences of the rights violation.

b) ECHR
The procedural regime of European human rights protection has been developed over decades before it has reached the present degree of regulation (for more details see: Bates 2011). Nowadays it has been established as a system with a proper human rights court, its own legal tradition and a juridical procedure comparable to national constitutional law (ibid.). The individual complaint is the most important remedy within the legal system established by the convention and it’s protocols. The convention also provides the possibility of inter-stat applications. The individual complaint requires among others the following conditions of admissibility (art. 35 ECHR). The national legal remedies have to be exhausted and the ECtHR has to be competent ratione materiae, ratione tempori, ratione loci and ratione personae. While the competence ratione loci is discussed in detail in the chapter IV on Extraterritoriality, the competence according rationae materiae is elaborated in Chapter VI, all actions within Operation Atalanta are within the temporal application of the ECHR. Any case relevant for this work will consider the actions of German soldiers, which opens the scope of the ECHR according to the precondition ratione persone. Here, the main question will be if national remedies are exhausted (art. 35 (1) ECHR). As we are considering activities of German officials the competent legal system would be the German. The applicant would have to pass every successive stages of appeal, including the Bundesverfassungsgericht, within the German system before he has the possibility to claim a violation of his rights before the ECtHR. This makes the generally effective system of protection within the scope of the ECHR difficult to apply. But if the complainant is able to call a case before the ECtHR he will have an effective control of potential infringements of his rights protected under the ECHR. Judgements of the ECtHR obligate convicted states to refrain from any

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98 The other requirements concerning the appellant, form, time limits and repeating prohibitions cannot be discussed in this context. They have no particular importance for the scope of this work (for further information on these see: Esser 2012, in Löwe Rosenberg, StPO, Vol. 11, Verfahren EGMR recital 107 et seqq.).
possible continuation of human rights violation (art. 46 ECHR) and grant the applicant a “just satisfaction” (art. 41 ECHR).

c) German Grundgesetz
In German national law the according instrument to state a violation of the rights granted by the Grundgesetz is the constitutional complaint. The Bundesverfassungsgericht decides on the complaint if the conditions of admissibility according to art. 93 (1) No. 4a GG & §§ 13 Nr. 8a, 90 ff. BVerfGG are met. The requirements resemble mainly those of the ECHR. As the pirates are claiming to be infringed in their rights by German soldiers the “act of public authority” requirement is fulfilled. The Grundgesetz also provides the need for exhaustion of remedies. Hence in order to claim the violation of human rights violation before an international or constitutional court the complainant has to take legal measures to the general jurisdiction. If the complaint is permissible the Bundesverfassungsgericht examines the merits of the application.

d) EU Charter of Fundamental Rights
A particular legal remedy to claim the violation of rights codified in the CFR is missing (Lenaerts & Gutiérrez-Fons in Wollenschläger 2014, in Peers/Hervey/Kenner/Ward, CFR art. 17 (1) recital 55.07 et seqq.). The basic instrument of defense against rights violations by member states according to the Charter are the legal remedies of national law (Jarass 2013, in Jarass, EuGrCH, Einleitung recital 71). In the present case we have seen that Germany is implementing EU law (Decisions) and hence a person willing to claim to be violated in its rights of the CFR has to take legal action according to German procedural law. The ECJ may be requested for a preliminary ruling according to art. 267 (4) TFEU. Anyhow the ECJ does not possess jurisdiction on the CSDP (Naert 2010, 655).

VIII. Conclusion
The Operation Atalanta is based on a complex mixture of national, European and international law. In the presented context, the protection of human rights is arranged within an interconnected structure. For German soldiers a series of human rights instruments are relevant. National fundamental rights of the Grundgesetz, the European Convention on Human Rights, the European Charter of Fundamental Rights and the UN Bill of Rights in form of the International Covenant on Civil and Political Rights all play a role. Although we have seen that there have been certain objections concerning the applicability of the instruments.

Different human rights instruments possess different requirements concerning their application. But in the end most of them do refer to the term of jurisdiction – even if the scope might differ between the instruments themselves. Generally jurisdiction does mean that state authority has a certain
degree of control over the involved people or territory. As the territorial rules may only apply to such situations on vessels under the flag of the respective state, it has to be differentiated in most situations whether German soldiers have authority over the pirates. In situation of arrest and imprisonment this can easily be affirmed. Situations where troops have to use force – e.g. intercepting, boarding or actual fighting – have also been subsumed under these provisions. Generally, it can be concluded that the human rights treaties are applicable according to the respective provisions on extraterritoriality in Operation Atalanta.

As we have seen, the different instruments include norms which always guarantee that the treaty with the highest degree of protection is applicable. There is no considerable conflict of these norms as they all aim in the same direction and are meant to safeguard human rights as much as possible. As there is much literature on the application of human rights in times of war and the relation to humanitarian law, the situation off the coast of Somalia is quite different. Even though military units in form of the German navy are deployed, humanitarian law of war is not applicable to the situation. Operation Atalanta takes place in an environment of UNSC-resolutions under Chapter VII of the UN-Charter and within the scope of the CSDP of the EU. Still, it is not a situation of an armed international conflict, as the military forces do not face the army of another nation state. Hence, the possible derogation of human rights norms does not apply to Operation Atalanta.

The possible human rights violations German soldiers might face range from violation of privacy rights, over those related to physical integrity to procedural rights. The different treaties have diverse requirements and boundaries for interferences in these rights. Generally, as the situation is similar to police operations, the limits are relatively high. According to the Grundgesetz are applicable, the Bundeswehr has to adopt its measures. It is not a situation of war and human rights are practicable almost in the same way as they would be within German territory. Even if it was be a situation of war, and humanitarian law could be applied, this would not mean the total derogation of human rights. Nevertheless, they have to be interpreted according to the special situation. As the situation in Somalia is rather critical and many people have not much of a choice but to get involved in piracy, the cultural background leads to a determination that is unlikely to be the same as criminals in German display. Also the expectation what happens after detention might lead to more desperate fighting. Pirates are often heavily armed with
automatic weapons or RPGs. Potential fights take place onboard of vessels, in an unknown environment, which is restricted in space. The overall consideration of the circumstances will lead to a notably decreased demand for tests of proportionality.

The protection of the right to privacy is regulated in all treaties, even though the Grundgesetz does not explicitly protect it, it still recognizes such a right. All treaties offer a practical structure for infringements and justifications. Concerning the right to life all human rights instruments set high standards. The clauses for justification however differ considerably. While the CFR and ICCPR require a simple consideration of rights, the ECHR lists possible justifications exhaustively. In the Grundgesetz a clearly determined legal base is required. Whether the applicable norms meet the requirements of art. 20 (3) GG remains unclear. The right to physical integrity is only explicitly protected under the Grundgesetz, while the other human rights instruments deprive it from the right to torture or life. Here, neither the protective scope nor possible interference is determined sufficiently. Regarding the rights which offer protection against arbitrary arrest the justification of infringements differs. While the ECHR and the CFR have internal grounds for justification, the ICCPR and the Grundgesetz require a legal basis. For the ICCPR the justification on the basis of art. 105 UNCLOS and the UN resolutions seems admissible it seems to be unclear for German constitutional law. As the case of detained pirates onboard of the frigate Rheinland-Pfalz has shown the application of German criminal and procedural law leads to strange results. The protection of property is not codified within the ICCPR. All other treaties offer such a right and the legitimation for interference based on the German criminal law is sufficiently detailed. The procedural rights are protected under all treaties and differ only in the exact characteristics.

Some procedural rights have to be restricted when detentions take place on the open seas, thousands of kilometers away from national courts. Hence, the rights to be presented to a judge within short notice and others have to be adapted to these circumstances. In addition some interference in other rights might be justified a little easier than it would be the case in police missions on German territory (see v. Arnauld 2008).

It can be said that human rights do apply to Operation Atalanta and justification clauses have to be measured against the rule of law and all measures used have to be proportional. The UN-Charter VII provisions, Security Council resolutions and other frameworks as the Council decisions might help to justify certain actions, but the national legislation determining the legal base for the operation is

poor. Unclear remains whether the international norms including the UN resolutions are sufficiently precise in order to serve as legal basis for an intrusion in human rights and particularly the fundamental rights of the Grundgesetz. There are no explicit laws that set concrete instructions for the use of force and other means in deployment abroad. As long as the state of defense according art. 87a GG is not declared by the Bundestag, the usual federal German law applies solely. German soldiers can only hold on to the Rules of Engagement (ROE), which in turn only have the legal rank of orders and not law. Additionally the ROE are not public and hence cannot serve as legal basis for justification. This difficult situation leads to unsatisfactory results particularly for the soldiers themselves. In addition, the resolutions and other international law could regulate the operations in more detail in order to achieve a higher degree of legal certainty. It seems that the political will to create the desperately needed regulation is missing.

The different treaties offer an extensive protection of human rights. The scope of protection differs in several aspects, but as we have seen in chapter V, the principle of favorable solution is inherent to all instruments. Consequently the norm with the highest degree always prevails. Hence, even where certain instruments lack protection another applies.

The ICPR does not include an effective system of enforcement. The HRC can only adopt legally non-binding decisions. The enforceability of fundamental rights is well developed in German constitutional law and the ECHR system. Here any human rights violation can be claimed with effective legal protection if remedies are exhausted. Together they build an effective two-stage system. The CFR introduces European Union law as an additional level of protection, but the CSDP is excluded from the jurisdiction of the ECJ and hence does not participate to the enforcement of human rights.

Promoting human rights is an essential part of the German foreign policies. This also has to be reflected by any action of German officials abroad. German soldiers are acting as such. They have to guarantee human rights to anyone, even if the legal situation would not obligate them to, because he, who wants to promote human rights in the world has to be a role model in meeting human rights provisions himself.

Soldiers deployed to the Horn of Africa are supposed to get adequate legal training in order to be prepared for the complex legal situations in which they could find themselves. In accordance with German law it is even possible that sending the Bundespolizei would be more adequate to the situation. However, there still remains a series of legal uncertainties related to the fight against piracy.
Especially the question what happens to arrested pirates seems to remain unsolved. In many cases pirates are just released. Also those cases where pirates are handed over to Kenyan officials in order to take them to court leaves space for a series of human rights questions. Are the trials there fair, can we guarantee the respect for human rights in African prisons and so on? The law suit in a German court against pirates that captured a German vessel and were detained by Dutch military has shown that a trial respecting the procedural rights is possible\textsuperscript{100}. But it also displayed how complex this topic is and it is almost not realistic to proceed like this with all pirates.

In order to solve these moral dilemmas the root causes of piracy have to be fought in Somalia. This will happen with military force neither onshore nor offshore. Here the only chances are politics, development aid and diplomacy. But as long as the situation off the coast of Somalia is that dangerous the employment of international navies is the best way to protect trade routes. And even if the German public did not want to hear that when the former Bundespräsident said „dass im Zweifel, im Notfall auch militärischer Einsatz notwendig ist, um unsere Interessen zu wahren, zum Beispiel freie Handelswege“ (Köhler 2010), he was right. But if we deploy our troops we should be sure that human rights are protected and that when we fight for human rights we respect human rights.

Even though Operation Atalanta is seen as a success and confrontations happen less often than in the first years of the mission (Bundeswehr 2014) the topic remains important as military operations take place with increasing frequency outside the scope of the Geneva Conventions. Here clear legal basis is needed. This is in the interest of all parties concerned. A high level of human rights protection has to be a matter for a civilized nation, but soldiers send abroad need clear guidance for their actions as well.

\textsuperscript{100} LG Hamburg, 19.10.2012 - 603 KLs 17/10.
References


