

Combat Against Piracy – Focussing International, European and German Constitutional Law

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Abstract

The recent rise of piracy and armed robbery at sea off the coast of Somalia has been closely followed by a great deal of public awareness and media. Even though the phenomenon of piracy is not new to the world, the dramatic increase in piratical activities has triggered a broad discussion on the subject within Germany as well as abroad. The United Nations Security Council has issued various resolutions to tackle the situation, the European Union has put into operation the common action ATALANTA and a number of states including Germany have sent warships to the region, all in order to repress and persecute acts of piracy and other criminal acts directed against international navigation.

While the participating navies ensued on their task to secure and monitor vast areas of oceans space around the Horn of Africa, here in Germany a variety of questions arose to the legality of the whole operation and in particular to the way the German Armed Forces are conducting it at the moment. At the International Law level, Human Rights accomplishments have to be weighed against the preservation of the freedom of navigation and the security of international shipping lanes. Are the guarantees contained in the European Human Rights Convention even applicable to the *hostes humani generis* who prey on their victims on the high seas far beyond the grasp of governmental authorities? And if so, which restrictions may lawfully imposed? In the treaty of Lisbon, the European Union has undergone substantial structural changes. Are the Unions competencies as regards its common foreign and security policy affected by these changes, and if so, how? And finally, at the constitutional level, there is for historical reasons an overall lack of certainty when it comes to the deployment of armed forces. Can the armed forces be used to combat piracy at all or does the constitution determine the federal police to be the competent authority?

In order to shed some light on this tangle of complex realities ruled by interacting and overlapping legal orders, 25 experts with different scientific and practical backgrounds gathered at the European University Viadrina in Frankfurt (Oder) to discuss for two days the matter at hand. Not only renowned legal experts and members of the relevant governmental branches were on the list of speakers, but also two excellent researchers on the field of social and political science. Since there is little use in debating the legal aspects of a problem without proper knowledge of the underlying circumstances and facts, the lectures given by Markus Höhne and Marco Bünte marked an excellent beginning for the conference.

Markus Höhne pointed out, that the combination of a destabilized or non-existent government, a bad economic situation and the detrimental effects of international fishing and waste dumping have made piracy to the most attractive business for the inhabitants of the shoreline. Marco Bünte drew some interesting conclusions by comparing the situation in Africa to the piracy problem in Indonesia. Even though, in his view, the background setting in Indonesia is totally different, making the business of piracy more expensive in terms of security measures could be part of the solution to prevent locals from embarking on piratical activities. Wolff Heintschel von Heinegg followed up to present the framework for combating piracy provided by International Law. He made clear the distinction between Humanitarian

Law and the policing powers assigned to warships when targeting pirates by the United Nations Convention on the Law of the Sea. Gert-Jan van Hegelsom and Eckardt Menzel introduced the European Unions perspective and gave interesting insights in the planning process and operative aspects of the ATALANTA mission. Especially the treatment of persons detained in the course of the mission was subject to lively discussion. In last lecture for the first day, Andreas Zimmerman showed that the detention of pirates by German Armed Forces equates to an arrest and therefore requires a court order to be lawful under the constitution. This too was heavily debated.

The next day, Arndt Sinn continued by addressing the criminal responsibility of German soldiers when engaged with pirates. He pointed out several approaches of justification for the actions involved in fighting and arresting pirates on the high sea, while not always enjoying the approval of his listeners. Thomas Bothe spoke for the German Federal Police and its part in the fight against piracy. Even though the police units would heavily depend on platforms provided by other services, they are specifically trained for a variety of piracy-based scenarios. In the following, Dieter Wiefelspütz explained the historical background and the current implementation of parliamentary control over the armed forces in Germany. Heinrich Wolff completed the picture summarizing the constitutional rules framing the use of the armed forces in counter-piracy operations.

At the end of the conference all agreed that this had been fruitful and productive meeting. In particular the idea of bringing experts from different sciences to one table proved to be a success, providing everyone with a more holistic view on the matter. While quite a few points could be clarified, other questions remain or were born out of discussion: How could the European Union adopt its policies in order to dry out the economic roots of piracy? How must the decision-making mechanisms in the European Union be tailored to balance the interests between member state parliaments and effective response options for the operatives? And finally, how can the constitutional antinomy between the rule of law demanding every arrest to be reviewed by a judge within 48 hours and the necessities of the high seas best be solved?

In view of the short time available at this single event and bearing in mind the number of issues still unresolved, many participants expressed their support and appreciation if this meeting could be extended on a more regular basis, an idea received with sympathy by the organizers.