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The Practice of Shared Responsibility in relation to Piracy

*Efthymios Papastavridis**

1. Introduction

The fight against piracy has involved many states and international organisations, whose conduct has given, or may give, rise to cases of shared responsibility under international law.¹ According to Article 101 of the 1982 United Nations (UN) Convention on the Law of the Sea (LOSC),² piracy consists of any of the following acts: ‘any illegal acts of violence or detention, or any act of depredation, committed for private ends by the crew or passengers of a private ship ... and directed: (i) on the high seas, against another ship ... (ii) against a ship, aircraft, persons or property in a place outside the jurisdiction of any State’. As will appear from this chapter, there are several situations in which multiple actors may become responsible for such piracy or, alternatively, in which the responses to piracy trigger shared responsibility.

At the time of the conclusion of the LOSC, the crime of piracy was considered rather obsolete. Nonetheless, incidents of armed robbery against maritime shipping in the Straits of Malacca in the 1990s, but mainly the extraordinary growth in piracy off the coast of Somalia has brought piracy to the fore.³ The European Union, the North Atlantic Treaty Organization (NATO) and individual states sent their argosies to the Gulf of Aden and the Indian Ocean to protect international shipping from piratical attacks, while the UN Security Council (SC) has adopted a series of Resolutions under Chapter VII, authorising entry into Somalia for the purpose of arresting the suspected pirates.⁴ Lately, the theatre of many pirate attacks has

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¹ On the term ‘shared responsibility’ and the relevant definitions see P.A. Nollkaemper and D. Jacobs, ‘Shared Responsibility in International Law: A Conceptual Framework’ (2013) 34 *MIJIL* 359, 366 et seq.

² United Nations Convention on the Law of the Sea, Montego Bay, 10 December 1982, in force 16 November 1994, 1833 *UNTS* 3 (LOSC).

³ See inter alia www.imo.org/mediacentre/resources/pages/piracy-and-armed-robbery-against-ships.aspx.

⁴ On piracy off Somalia see inter alia R. Geiss and A. Petrig, *Piracy and Armed Robbery at Sea. The Legal Framework for Counter-Piracy Operations in Somalia and the Gulf of Aden* (Oxford University Press, 2011); E.

shifted to West Africa, in particular the Gulf of Guinea, which has been condemned by the Security Council⁵ and has sparked the reaction of states in the region.⁶

Numerous international actors take part in counter-piracy operations off Somalia, which inevitably may lead to incidents involving shared responsibility; suffice it to refer to SC Resolution 2077 (2012), which commends the efforts of

the European Union operation ATALANTA, North Atlantic Treaty Organization operations Allied Protector and Ocean Shield, Combined Maritime Forces' Combined Task Force 151 commanded by Denmark, New Zealand, Pakistan, Republic of Korea, Singapore, Turkey, Thailand and the United States, and other States acting in a national capacity in cooperation with Somali authorities ... and the efforts of individual countries, including China, India, Japan, Malaysia, Republic of Korea, and the Russian Federation, which have deployed ships and/or aircraft in the region.⁷

Against this backdrop, scenarios involving the possible shared responsibility of states and/or international organisations may be grouped into the following categories. The first category consists of situations in which two or more states fail to exercise administrative control over vessels having their nationality and being engaged in piracy, as well as in cases that states fail to cooperate in the suppression of piracy, and more particularly in the prosecution of suspected pirates. An example of the former is the controversial *Sea Shepherd Society* case, where the 9th Circuit of the United States Court of Appeals found that the Sea Shepherd Conservation Society, protesting against Japanese research whaling, was criminally liable for piracy.⁸ The ships used were registered in Australia and in the Netherlands, which raises the

Papastavridis, 'Piracy off Somalia: The Emperors and the Thieves of the Oceans in the 21st Century', in A. Abass (ed.), *Protecting Human Security in Africa* (Oxford University Press, 2010), 122.

⁵ See A. Anyimadu, 'Maritime Security in the Gulf of Guinea: Lessons Learned from the Indian Ocean' Chatham House, July 2013, at 5; available at www.chathamhouse.org/sites/default/files/public/Research/Africa/0713pp_maritimesecurity_0.pdf. See also UN Doc. S/RES/2018 (2011) and UN Doc. S/RES/2039 (2012).

⁶ See the 'Code of Conduct concerning the Prevention and Repression of Piracy, Armed Robbery against Ships, and Illegal Maritime Activities in West and Central Africa' that was adopted; SC11091, S/PRST/2013/13 (14 August 2013); available at www.un.org/News/Press/docs/2013/sc11091.doc.htm.

⁷ UN Doc. S/RES/2077 (21 November 2012); preamble.

⁸ In *Institute of Cetacean Research v. Sea Shepherd Conservation Society*, 725 F. 3d 940 (9th Cir. 2013), Judge Kozinski issued an opinion in the context of a request for a preliminary injunction in a civil action under the Alien Tort Statute (28 USC § 1350), entailing that the Sea Shepherds were likely committing piracy under the LOSC (*Sea Shepherd Society* or *Sea Shepherd* case). See the Opinion at <http://cdn.ca9.uscourts.gov/datastore/general/2013/02/25/1235266.pdf>; and D. Guilfoyle's commentary, 'Political Motivation and Piracy: What History Doesn't Teach Us About Law', EJIL:Talk, 17 June 2013.

question whether these states share responsibility for not preventing the alleged commission of piracy.⁹

The second category consists of situations in which counter-piracy operations involve the action of international organisations and their member states. An example is interdiction operations conducted under the aegis of EUNAVFOR Operation ‘Atalanta’¹⁰ or NATO Operation ‘Ocean Shield’.¹¹ These interdiction operations may be followed by the transfer of the suspected pirates by the European Union or individual member states to third countries, such as Kenya, Seychelles, Mauritius or Tanzania, pursuant to bilateral agreements.¹² Thus in this category we may have shared responsibility between these international organisations and their member states, as well as between international organisations and its member states and third states. It is worth noting that some of the convicted pirates return to serve their punishment in Somali prisons according to post-trial agreements with Somali authorities,¹³ which again may give rise to shared responsibility issues.

The third category of cases in which shared responsibility may arise in respect of piracy, concerns joint patrols or ‘combined maritime operations’ involving two or more states. Such operations may take various forms:

⁹ For a similar case see *Castle John and Nederlandse Stichting Sirius v. Nv Marjlo and Nv Parfin* (1986) 77 ILR 537; and commentary by S.P. Menefee, ‘The Case of the Castle John or Green beard the Pirate?’ (1993) 24 CWILJ 1.

¹⁰ On the legal basis of the Operation see www.eeas.europa.eu/csdp/missions-and-operations/eu-navfor-somalia/index_en.htm. See also at <http://eunavfor.eu>.

¹¹ See relevant information at www.mc.nato.int/ops/Pages/OOS.aspx. There may be also ad hoc cases of inter-state cooperation in the exercise of criminal jurisdiction over suspected pirates, like the *Samanyolu* case; see n. 118.

¹² See Exchange of Letters between the EU and the Government of Kenya on the conditions and modalities for the transfer of persons suspected of having committed acts of piracy (6 March 2009); Exchange of Letters between the European Union and the Republic of Seychelles on the Conditions and Modalities for the Transfer of Suspected Pirates and Armed Robbers (2 December 2009); Agreement between the European Union and the Republic of Mauritius on the Conditions and Modalities for the Transfer of Suspected Pirates and Associate Seized Property from the European-led Naval Force to the Republic of Mauritius and on the Conditions of Suspected Pirates after Transfer’ (14 July 2011); and Agreement between the European Union and the United Republic of Tanzania on the conditions of transfer of suspected pirates and associated seized property from the European Union-led Naval Force to the United Republic of Tanzania (11 April 2014). The text of the agreements with Kenya, Seychelles and Mauritius and all relevant information are available at www.eeas.europa.eu/csdp/missions-and-operations/eu-navfor-somalia/background-material/index_en.htm. For the agreement with Tanzania see [http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:22014A0411\(01\)&from=EN](http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:22014A0411(01)&from=EN).

¹³ In 2011, Seychelles signed relevant MOUs with the Transitional Federal Government, with Puntland and with Somaliland. The first transfer of prisoners from a regional prosecuting state was conducted in March 2012. See UN Security Council, ‘Report of Secretary-General pursuant to Security Council Resolution 2020 (2011)’, UN Doc. S/RES/2012/783 (22 October 2012); para. 57.

a) Patrols conducted by two or more states individually, yet in a coordinated manner, and the sharing of information. This occurs for example in the Straits of Malacca and Singapore: to enhance security, Indonesia, Malaysia and Singapore launched the trilateral ‘Malacca Straits Sea Patrol’ in July 2004. Under this arrangement, the participating states conduct coordinated naval patrols, while facilitating the sharing of information between ships and the Monitoring and Action Agency (MAA). Importantly, the participating states conduct coordinated patrols in their respective territorial waters and there is no provision for cross-border pursuit into each of the participating states’ territorial waters.¹⁴

b) A different mode of cooperation involves the authorisation of entry into other states’ territorial waters or airspace for patrolling. For example, in September 2005 the ‘Eyes in the Sky’ was established in the above-mentioned region. The three states donated two planes each for the patrols, which may fly for up to three nautical miles into the twelve-nautical-mile territorial waters of the participating states. Both naval and air patrol schemes came under the umbrella of the Malacca Straits Sea Patrol, in which Thailand joined 2008.¹⁵

A similar *modus operandi* exists in the Mozambique Channel. On 13 December 2011, the governments of South Africa, Mozambique and Tanzania signed a Memorandum of Understanding (MoU) on Maritime Security Cooperation, which provides for combined maritime operations in the territorial waters of each respective country.¹⁶ Military and civilian personnel of each state, including naval assets and aircrafts, have the authority to enter into territorial waters, or even ashore the territory of the other parties, in order to conduct combined operations to quell piracy and armed robbery.

c) In addition to an authorisation of entry to the airspace and the territorial waters of the participating states, the MoU on Maritime Security Cooperation provides in Article 5(2) the possibility of joint patrolling, which might involve the use of ‘ship-riders’. These are law enforcement officers from one state (‘sending state’) aboard another states’ government vessel

¹⁴ See further information at www.mindef.gov.sg/imindef/press_room/official_releases/nr/2008/mar/28mar08_nr/28mar08_fs.html#.VTzVRyHtmko.

¹⁵ See also C. Vavro, ‘Piracy, Terrorism and the Balance of Power in the Malacca Strait’ (2008) 4 CNR 13 and C. Raymond, ‘Piracy and Armed Robbery in the Malacca Strait: A Problem Solved?’ (2009) 62 NWCR 31.

¹⁶ Initially, there had been a Memorandum of Understanding on Piracy and Trans-Border Crime between South Africa and Mozambique, signed on 1 June 2011. For more information see www.gov.za/south-africamozambique-signs-memorandum-understanding-mou-piracy-and-trans-border-crime. This MoU was renewed by the MoU of December 2011, with the addition of Tanzania. The text of the agreement was kindly provided by Professor Henri Fouché (on file with the author).

(‘host state’). Such arrangements usually aim at broadening the law enforcement powers that may be exercised by a warship or other government vessel within a third state’s territorial waters or on the high seas vis-à-vis a vessel flying the flag of the sending state. The use of ‘ship-riders’ was encouraged by Security Council Resolutions 1851 and 1897 concerning Somalia, which invited states ‘to conclude special agreements or arrangements with countries willing to take custody of pirates in order to embark law enforcement officials (“shipriders”) from the latter countries, in particular countries in the region, to facilitate the investigation and prosecution of persons detained as a result of operations conducted under this resolution’.¹⁷

Also, it is reported that since September 2011 Benin and Nigeria have commenced joint naval patrols in the Gulf of Guinea with the view of countering pirate attacks.¹⁸ It is not known how these joint patrols are conducted, and whether there has been any official agreement between these two states delineating their corresponding responsibilities.¹⁹

The purpose of this chapter is to make the cartography of the practice relating to the contemporary fight against piracy through the lens of the concept of ‘shared responsibility’. As elaborated by Nollkaemper and Jacobs, this term ‘refers to the responsibility of multiple actors for their contribution to a single harmful outcome’.²⁰ In discussing the potential shared responsibility in this regard, reference will be made to the primary rules governing the fight against piracy, as well as to the secondary rules of international responsibility (sections 2,3 and 4), as applied in the present context and finally, to the processes under which relevant claims have been or could be made (section 5).

To comprehend and assess adequately the questions concerning shared responsibility in counter-piracy operations under the auspices of an international organisation, these operations will be broken down to various phases. The reason is that each phase is subject to different primary rules, involving different actors and calling for the application of different secondary rules. This separation, however, does not mean that each phase is in clinical isolation with the

¹⁷ UN Doc. S/RES/1851 (16 December 2008), para. 3; and UN Doc. S/RES/1897 (30 November 2009), para 6.

¹⁸ See S/RES/2039 (2012), n. 5; para. 6. See also J. Fisher, ‘Nigeria and Benin Mount Patrols as Piracy Soars’, *BBC*, 28 September 2011.

¹⁹ To the knowledge of the author, it is mainly Nigerian forces that patrol Benin’s territorial waters with the consent of the latter.

²⁰ Nollkaemper and Jacobs, ‘Shared Responsibility in International Law’, n. 1; at 367. They further divide instances of shared responsibility into two groups: cooperative responsibility, including shared responsibility *stricto sensu*, and cumulative responsibility; see 367-368.

others; on the contrary, many primary or secondary rules apply to more than one phase of the fight against contemporary piracy.

2. Shared responsibility arising from the lack of due diligence and non-cooperation of flag states

The first category to be discussed concerns situations of ‘inaction’ of flag states in respect of piracy. This ‘inaction’ may be in violation of the obligation of cooperation in respect of piracy, as well as in violation of the general ‘due diligence’ duty of flag states to investigate *a posteriori* the commission of a piratical attack and take the requisite measures. It is true that this scenario hardly gives rise to situations of shared responsibility, yet cases like the *Sea Shepherd* may exceptionally lead to such instances.

2.1 Obligation of cooperation

Flag states are under an obligation according to Article 100 of the LOSC to ‘cooperate to the fullest possible extent in the repression of piracy on the high seas or in any other place outside the jurisdiction of any State’. This may also be effectuated by seizing pirate vessels and arresting pirates on the high seas pursuant to Article 105 of the LOSC.²¹ The obligation of cooperation in Article 100 of the LOSC sets forth an obligation of conduct and not of result,²² which entails that it would be difficult to substantiate a breach of international law,²³ while, on the face of Article 105 of the LOSC, there is no strict obligation to prosecute, but only an entitlement of states.²⁴ Hence, in practice, it is difficult to establish a breach of the respective

²¹ The definition of a ‘pirate ship’ is provided by Article 103 LOSC, n. 2, which sets out that ‘a ship or aircraft is considered a pirate ship or aircraft if it is intended by the persons in dominant control to be used for the purpose of committing one of the acts referred to in article 101’.

²² On this distinction see inter alia R. Wolfrum, ‘Obligation of Result versus Obligation of Conduct: Some Thoughts about the Implementation of International Obligations’, in M. Arsanjani et al. (eds.), *Looking to the Future: Essays on International Law in Honor of W Michael Reisman* (The Hague: Brill, 2011), 363.

²³ See E. Papastavridis, *The Interception of Vessels on the High Seas* (Oxford: Hart Publishing, 2013), 168; and D. Guilfoyle, ‘Combating Piracy: Executive Measures on the High Seas’ (2011) 53 JYIL 149, 161.

²⁴ Article 105 LOSC, n. 2, sets forth that ‘every State *may* seize’ (emphasis added). *Per* the view that there is no such obligation see D. Guilfoyle, ‘Legal Challenges in Fighting Piracy’, in B. Van Ginzel and F.-P. van der Putten (eds.), *The International Response to Somali Piracy: Challenges and Opportunities* (Leiden: Martinus Nijhoff, 2010), 127, 130-31. See also M.D.S. Karim, ‘Is There an International Obligation to Prosecute Pirates?’ (2011) 58 NILR 387, at 394-397.

provisions when, for example, a flag state refuses to take suspected pirates on board its warships or bring them to its port, so as to initiate criminal proceedings.

However, there have been countervailing views that ‘catching and releasing pirates (without prosecuting them) would infringe the article 100 international obligation, at least when the “catch and release” is put in place systematically’.²⁵ Such ‘catching and releasing’ practices have been noticeable off the coast of Somalia²⁶ and have been condemned by the Secretary-General and the Security Council.²⁷ These practices have been coupled with the manifest unwillingness of many states to receive and initiate criminal proceedings against suspected pirates that have been already apprehended.

In this regard ‘shared responsibility’ may arise, i.e. in cases that the interdicting state is unwilling to initiate criminal proceedings and thus requests another state to do so by virtue of the universality principle to no avail. It could then be argued that both states have breached their obligation of cooperation and hence they ‘share’ responsibility for the violation of Article 100 of the LOSC. Assume, for example, in the *Samanyolu* case²⁸ that both Denmark and the Netherlands would have failed to cooperate in the transfer of the pirates in question and they were eventually released. Would this lead to ‘shared responsibility’? If these states systematically did so, probably the answer would be affirmative.

2.2 Lack of due diligence

Besides the obligation of cooperation with respect to piracy, states have a general duty to warrant that their vessels are not to be used for criminal activities at sea. The exclusive jurisdiction that the flag state exercises on the high seas goes hand in hand with the duty to safeguard a minimum *ordre public* in the oceans. This entails that the flag state has the duty to

²⁵ M. del Chicca, ‘International Law and Domestic Law: Solving Some Problematic issues in Order to Effectively Combat Piracy’, in G. Andreone et al. (eds.), *Insecurity at Sea: Piracy and other Risks to Navigation* (Giannini Editore, 2013), 35, 40.

²⁶ See UN Security Council, ‘Report of the Secretary-General on specialized anti-piracy courts in Somalia and other States in the region’, UN Doc. S/2012/50 (20 January 2012), para. 6. It is reported also that ‘over 60% of the pirates apprehended under Operation Atalanta are released, which illustrates the impunity of the pirates’; see H. Tuerk, *Reflections on the Contemporary Law of the Sea* (Leiden: Martinus Nijhoff, 2012), 95.

²⁷ See ‘Report of the Secretary-General on specialized anti-piracy courts’, *ibid.*, at 10 and UN Doc. S/RES/1851 (2008), n. 17: ‘Noting with concern that the lack of capacity, domestic legislation, and clarity about how to dispose of pirates after their capture, has hindered more robust international action against the pirates off the coast of Somalia and in some cases led to pirates being released without facing justice.’

²⁸ See n. 118 and accompanying text.

exercise control over all administrative, technical and social matters concerning ships flying its flag in accordance with Article 94(1) of the LOSC,²⁹ and to monitor that the vessels are not used to the detriment of other ‘users’ of the seas.³⁰ This due diligence obligation includes the duty to conduct an inquiry in case of incidents causing injury or damage to other vessels under Article 94(7) of LOSC. The due diligence obligations of flag states were discussed at length in the ITLOS Advisory Opinion of 2 April 2015 on the Request of the Sub-Regional Fisheries Commission, in which the Tribunal acknowledged that flag states are under such obligations in relation to Illegal, Unreported and Unregulated Fishing (IUU Fishing) within the exclusive economic zone of third states.³¹

Apparently, incidents that may give rise to shared responsibility would involve the breach of the aforementioned due diligence obligation attributed to two or more flag states. The scenario would be that a piratical attack was committed simultaneously by two or more vessels flying the flag of different states and these states failed to discharge their due diligence duty. Inevitably, this is to be assessed *ex post facto*, i.e. after the piratical attack, and it requires proof that even though the authorities of the flag states had been aware of the attack by their vessels or they were informed by other states according to Article 94(6) of the LOSC, they turned a blind eye and did not hold any inquiry concerning the incident.

Admittedly, it is highly unlikely for such incidents to occur, since pirate vessels are usually stateless vessels and for present purposes we would need the concerted (in)action of two or more states. Nevertheless, such shared responsibility may arise in the case of the *Sea Shepherd Society*,³² if it is proven that attacks, such as the ones against Japanese whaling vessels, designated as ‘piratical’ by the United States courts,³³ have been committed by more than one vessel of the Society, registered in the Netherlands and Australia, and the latter states did not investigate the incidents.

²⁹ See M.H. Nordquist (ed.), *United Nations Convention on the Law of the Sea, A Commentary*, Vol. III (Dordrecht: Martinus Nijhoff, 1985), 135.

³⁰ See also Y. Takei, ‘Assessing Flag State Performance in Legal Terms: Clarifications of the Margin of Discretion’ (2013) 28 *IJMCL* 97, 102.

³¹ *Request for an Advisory Opinion submitted by the Sub-Regional Fisheries Commission (SRFC)*, Advisory Opinion, ITLOS Case No. 21, 2 April 2015, available at www.itlos.org, paras. 16-141.

³² For the activities of the Sea Shepherd Conservation Society see www.seashepherd.org.

³³ See n. 8 and accompanying text.

3. Shared responsibility arising from operations of international organisations in East Africa

The majority of interdiction operations giving rise to incidents of shared responsibility have occurred in the context of multinational operations under the aegis of the EU (EUNAVFOR Operation Atalanta) or NATO (Operation Ocean Shield) off the coast of Somalia, or the West Indian Ocean. The arrangements, especially under the EUNAVFOR Operation Atalanta, involve not only the suppression of piracy at sea, but also the transfer of suspected pirates to third states in the region for prosecution purposes.

The analysis of the practice of shared responsibility will be divided according to the various phases of the operations, namely, first, the decision to board; second, the conduct of the operation as such; third, the pre-detention or the detention phase; fourth, the transfer and trial of the suspected pirates; and fifth, the post-trial phase. Each phase is subject to different primary rules, involving different actors and calling for the application of different secondary rules. Emphasis will be given to the EU and Operation Atalanta, in the context of which there is also the transfer of the suspected pirates to third states. Many of the comments below would also apply to NATO.

3.1 Phase I: the decision to exercise the right of visit

3.1.1 Primary rules

Individual states engaged in the visit of the vessel suspected of being engaged in piracy are subject to several provisions which potentially may trigger shared responsibility. The right of visit is accorded to states as an exception to the right of navigation enjoyed by all states on the high seas (Article 90 of LOSC) and to the principle of the exclusive jurisdiction of the flag state on the high seas (Article 92 of the LOSC). Accordingly, states are under the obligation not to interfere with the navigation of foreign-flagged vessels on the high seas,³⁴ unless the latter are suspected of being engaged in a proscribed activity or the flag state has given its prior consent. These proscribed activities, including piracy, are enumerated in Article 110 of the LOSC. The only requirement that Article 110 sets out is that there are 'reasonable

³⁴ See Memorandum on the Regime of the High Seas, written by the Secretariat, UN Doc. A/CN.4/32 (14 July 1950), reprinted in ILC *Yearbook* 1950/II, 67, 69.

grounds' to suspect that the vessel has been engaged in piracy, as defined in Article 101 LOSC.

For shared responsibility to arise in relation to Operation Atalanta, the key question is whether the EU is bound by the relevant principles of the law of the sea. The EU is not party to the LOSC in respect of Part VII on the high seas. By virtue of Article 4(3) of Annex XI of the LOSC, 'an international organization [EU] shall exercise the rights and perform the obligations which its member States which are Parties would otherwise have under this Convention, *on matters relating to which competence has been transferred to it by those member States*'. The EU member states never transferred competences to the Union in respect of piracy *jure gentium*.³⁵

It also can be observed that the EU is not a 'state of registry' of vessels so as to enjoy the respective freedoms of the high seas and the rights that are accorded to flag states, such as to exercise jurisdiction over pirate vessels.³⁶

This, however, does not mean that the EU is not bound by the rules of customary law concerning piracy. As the European Court of Justice (ECJ) has repeatedly confirmed, the EU must, as a subject of international law, respect international law – both treaty and customary – in the *exercise of its powers*.³⁷ In other words, whether the EU is bound by customary law is contingent upon whether Operation Atalanta falls within the *powers of the EU*. The fact that the EU has competence, even arguably a *sui generis* one,³⁸ in the field of Common Security Defence Policy (CSDP),³⁹ entails by necessary implication, that it has the competence to engage in maritime operations on the high seas, including counter-piracy operations. Hence,

³⁵ See www.un.org/Depts/los/convention_agreements/convention_declarations.htm.

³⁶ In accord is also S. Talmon, 'Responsibility of International Organizations: Does the European Community Require Special Treatment?', in M. Ragazzi (ed.), *International Responsibility Today: Essays in Memory of Oscar Schachter* (Leiden: Brill, 2005), 405, 411.

³⁷ See inter alia: *Anklagemyndigheden v. Poulsen and Diva Navigation*, Case C-286/90, [1992] ECR I-6019, paras. 9-10; *Racke v. Hauptzollamt Mainz*, Case C-162/96, [1998] ECR I-3655, paras. 45-46; *Air Transport Association of America and others v. Secretary of State for Energy and Climate Change*, Case C-366/10, (2012) OJ C 49/7, reprinted in (2012) 51 ILM 535, para. 101. See also A. Giannelli, 'Customary International Law in the European Union', in E. Cannizzaro, P. Plachetti, and R. Wessels (eds.), *International Law as Law of the European Union* (Leiden: Martinus Nijhoff, 2012), 93.

³⁸ Marise Cremona avers that 'it is logically difficult to imagine a type of competence that is neither exclusive, nor shared nor complementary, the CFSP appears to be a type of *sui generis* competence that shares characteristics of both shared and complementary competences'; M. Cremona, 'Defining Competence in EU External Relations', in A. Dashwood and M. Maresceau (eds.), *Law and Practice of EU External Relations* (Cambridge University Press, 2008), 34, 65.

³⁹ See generally P. Eeckhout, *EU External Relations Law*, 2nd edn (Oxford University Press, 2011), Ch. 11, 467; M. Trybus and N. White (eds.), *European Security Law* (Oxford University Press, 2007); S. Blockmans (ed.), *European Union and Crisis Management* (The Hague: Asser Press, 2008).

since Operation Atalanta is *within the powers* of the EU, the latter is bound by the customary law governing such operations, including the obligation to respect the freedom of navigation, as reflected in the LOSC.

It is thus no surprise that Article 2 of the Joint Action 2008/851/CFSP concerning the mandate of the mission expressly refers to the LOSC: ‘Under the conditions set by applicable international law, in particular the United Nations Convention on the Law of the Sea, and by UNSC Resolutions 1814 (2008), 1816 (2008) and 1838 (2008), Atalanta shall, as far as available capabilities allow’.⁴⁰ Practically speaking, this means that the EU is not permitted to order or authorise the interception of vessels that are not engaged in, or suspected of, piracy, nor can it delegate the EU member states with competences that are not provided by the law of the sea.

These rules apply, in principle, also to NATO, which, as a subject of international law, must respect international law in the exercise of its powers, *in casu*, the contribution to the suppression of piracy off the coast of Somalia. However, the mandate of NATO Operation Ocean Shield is quite different than that from Operation Atalanta; suffice it to say that in the present context NATO has only limited operational command on the military assets of the troop contributing nations, and lacks the authority to enter into pirate transfer agreements.⁴¹

3.1.2 Secondary rules

Prima facie, the simple fact that the Operation Atalanta is an EU operation conducted by its member states increases the possibility of incidents giving rise to ‘shared responsibility’. Whether or not that is the case will have to be assessed largely by general international law, as there are no special rules of attribution or responsibility with regard to the EU.⁴² There are

⁴⁰ Article 2 as corrected by the Corrigendum to Council Joint Action 2008/851/CFSP of 10 November 2008, (2009) 2008 OJ L 253/18.

⁴¹ ‘It follows that no NATO commander has full command over the forces that are assigned to him. This is because nations, in assigning forces to NATO, assign only operational command or operational control’; see *Structure for the Command of Maritime Forces, NATO Rules of Engagement*, No. 1211 (on file with the author).

⁴² On the contrary, from the EU perspective, there had been statements that the nature of the legal order of the EU calls for special rules of attribution and responsibility; see e.g. the comments by the European Commission, in UN Doc. A/CN.4/545 (2004), at 18, and UN Doc. A/CN.4/637 (2011), at 7. See also J. D’Aspremont, ‘A European Law of International Responsibility? The Articles on the Responsibility of International Organizations and the European Union’, SHARES Research Paper 22 (2013), ACIL 2013-04, available at www.sharesproject.nl and SSRN.

virtually no specific provisions dealing with responsibility in the context of CSDP operations.⁴³ It will appear that while the general respective rules are not entirely satisfactory, findings of ‘shared responsibility’ may emerge.

3.1.2.1 The legal framework

In order to find whether ‘shared responsibility’ does arise in this respect we have to firstly address whether the EU is exclusively responsible for any ostensible violation of the freedom of navigation in the context of Operation Atalanta. Should this not be the case, then there is ample room for ‘shared responsibility’, either between the EU and its member states or between the latter with third states.

Without dwelling upon the particularities of the legal position of member states in CSDP operations,⁴⁴ it can tenably be argued that member states are not *de jure* organs or agents of the EU under Article 6 of the Articles on the Responsibility of International Organizations (ARIO).⁴⁵ Even under the ‘organic’⁴⁶ or the ‘competence’ model,⁴⁷ it is hard to attribute the acts in question to the EU. On the one hand, EU acts are carried out via the authorities of the member states, which is at variance with the ‘organic model’. On the other hand, the ‘normative control’ exerted by the EU in case of the ‘competence model’ includes the idea that the legality of the member state’s action is ultimately controlled by the EU judiciary, and it is the EU rather than the member state concerned which can remedy the alleged wrongs.⁴⁸ This is not the case with regard to the conduct of CSDP operations, which fall under Article

⁴³ See F. Naert, ‘The International Responsibility of the Union in the Context of its CSDP Operations’, in M. Evans and P. Koutrakos (eds.), *The International Responsibility of the European Union* (Oxford: Hart, 2013), 313, 336.

⁴⁴ On this issue see F. Naert, *International Law Aspects of the EU’s Security and Defence Policy* (Antwerp: Intersentia, 2010); A. Sari and R. Wessel, ‘International Responsibility for EU Military Operations: Finding the EU’s Place in the Global Accountability Regime’, in B. van Vooren, S. Blockmans, and J. Wouters (eds.), *The EU’s Role in Global Governance* (Oxford University Press, 2013), 126.

⁴⁵ Articles on the Responsibility of International Organizations, ILC Report on the work of its sixty-third session, UNGAOR 66th Sess., Supp. No. 10, UN Doc. A/66/10 (2011) (ARIO).

⁴⁶ By ‘organic model’ it is meant simply that the organisation can be shown to have been acting by its organs; see P.J. Kuiper and E. Paasivirta, ‘EU International Responsibility and its Attribution: From the Inside Looking out’, in M. Evans and P. Koutrakos (eds.), *The International Responsibility of the European Union* (Oxford: Hart, 2013), 49.

⁴⁷ According to the ‘competence model’ the responsibility should basically lie where the competence is. This approach responds to the core of EU activities in the internal market; see *ibid.*, 54.

⁴⁸ See *ibid.*, 55 and also F. Hoffmeister, ‘Litigating against the European Union and its Member States-Who Responds under the ILC’s Draft Articles on International Responsibility of International Organizations? (2010) 21 EJIL 723, 741.

275 Treaty on the Functioning of the European Union (TFEU) providing that, subject to two exceptions that are not relevant here, the ECJ ‘shall not have jurisdiction with respect to the provisions relating to the [Common Foreign and Security Policy] nor with respect to acts adopted on the basis of those provisions’.⁴⁹

Also, it is contested whether they are *de facto* organs, i.e. being under the ‘effective’ control of the EU under Article 7 of the ARIIO. In applying this criterion in the present context, it has been argued that the EU does indeed exercise ‘effective control’, in the sense of Article 7 ARIIO in the context of CSDP missions.⁵⁰ As Wessel and Den Hertog maintain, it is tempting to apply the effective control argument *mutatis mutandis* to CSDP missions.⁵¹ After all, these missions may be under the operational control of the EU through CSDP bodies: indeed, the overall control over the conduct of EU missions rests with the Council. In particular, it is for the Council to launch and terminate operations, to determine their mandate, to appoint the Operational and Force Commanders and to approve key documents, such as the Operation Plan and the Rules of Engagement (ROE). Moreover, acting under the authority of the Council, the Political and Security Committee (PSC) exercises political control and strategic direction of EU missions.⁵²

This notwithstanding, as Wessel and Den Hertog acknowledge, ‘attribution to the international organization is no rigid rule ... a case-by-case analysis and application of the “effective control” concept is crucial’.⁵³ Thus, reference should be made to the actual *modus operandi* of Operation Atalanta in order to shed light upon the factual question whether the Union does exercise effective control over the ostensible wrongful conduct.

⁴⁹ Article 275 of the Treaty on the Functioning of the European Union, (2012) OJ C 326/47 (TFEU).

⁵⁰ Sari and Wessel, ‘International Responsibility for EU Military Operations’, n. 44, 21. *Cf.* the view of Kuijper and Paasivirta that the EU ‘may feel more comfortable with the “effective” control test’, Kuiper and Paasivirta, ‘EU International Responsibility and its Attribution’, n. 46, 54.

⁵¹ See R.A. Wessel and L. den Hertog, ‘EU Foreign, Security and Defence Policy: A Competence-Responsibility Gap?’, in M. Evans and P. Koutrakos (eds.), *The International Responsibility of the European Union* (Oxford: Hart, 2013), 339, 351.

⁵² Sari and Wessel, ‘International Responsibility for EU Military Operations’, n. 44, 18.

⁵³ See Wessel and Den Hertog, ‘EU Foreign, Security and Defence Policy’, n. 51, 351.

3.1.2.2 The *modus operandi* of Operation Atalanta

It is apparent from the Operational Order for EUNAVFOR Operation Atalanta,⁵⁴ the ROE of the Operation,⁵⁵ the Flow Chart,⁵⁶ as well as the everyday practice that in principle member states retain a wide margin of discretion in their decision to intercept suspected vessels. For example, they retain the freedom to shift to national ‘Operational Control’ (OPCON), whenever they consider it appropriate. France, a major contributing nation, has appended a caveat to the ROE stating that the implementation of the latter would always require the prior agreement of national authorities, implying that this may entail shifting to national OPCON.⁵⁷ Greece has also appended a caveat, stating that it does not authorise the boarding by a Greek unit.⁵⁸ Such caveats are usually appended to the ROEs of EU Operations and underscore the lack of normative control by the EU in the present context.

In practice, what happens is the following: warships of the member states encountering a vessel suspected of being engaged in piracy may proceed to a ‘peaceful approach’ of the vessel.⁵⁹ They may also ‘divert’, ‘harass’, ‘ride off’, or ‘fire warning shots’ in the vicinity of a suspected pirate vessel or ‘obstruct’ the boarding of a merchant vessel.⁶⁰ All these measures are authorised at the national level and there is no need for any authorisation by the EUNAVFOR. Should the member state consider that there is need for further action, including the right of visit, the ROE provide as follows: ‘If the Master of the vessel is co-operative and the *EU Force Commander authorises the boarding*, a boarding party should be dispatched to the vessel. If found or suspected to be in violation of the rules, the Operation Commander should be informed’.⁶¹ If the Master does not acknowledge communications or continuously refuses to co-operate in allowing boarding to take place, then the boarding is to

⁵⁴ ANNEX C TO OP ATALANTA EU OHQ SOP LEGAL 001, 26 March 2009 (on file with the author).

⁵⁵ RULES OF ENGAGEMENT IMPLEMENTATION MESSAGE FOR OPERATION ATALANTA (ATALANTA OHQ ROEIMPL001) (on file with the author).

⁵⁶ See Flow Chart, in ANNEX C TO OP ATALANTA EU OHQ SOP LEGAL 001, n. 54.

⁵⁷ See MatrixRoE Atalanta (13 September 2009) (on file with the author).

⁵⁸ Ibid.

⁵⁹ According to the EUNAVFOR, Operation Order, ‘When the Scene of Action Commander (SAC) of the intercepting unit determines that a vessel should be boarded (Series 17 apply), the active cooperation of the Master or the individual in control of the vessel of the intercepted vessel should be sought. The Master should be informed of the following: a. The intention to board; b. The authority under which the boarding is taking place; c. The purpose of the boarding; d. That no harm will be done to the vessel, crew or cargo and that he/she should slow or stop to facilitate the embarkation of a boarding party’; OPERATION ORDER FOR EUROPEAN UNION NAVAL FORCE OPERATION ATALANTA COUNTER PIRACY IN THE GULF OF ADEN AND SOMALI BASIN (Version 1, 17 December 2008); ANNEX E APPENDIX 1 OF REFERENCE D (on file with the author). See also Papastavridis, *The Interception of Vessels on the High Seas*, n. 23, 59.

⁶⁰ For these terms see *ibid.*, ANNEX E APPENDIX 2 OF REFERENCE D.

⁶¹ ROE 171, n. 55 (emphasis added).

be regarded as ‘non cooperative’. ‘It is then for the FHQ [Force Headquarters] to determine boarding capabilities across the force, both amongst MS and 3rd State TCNs [Troop Contributing Nations], in order to establish the availability of teams that are able to take down a mother ship, or other pirate vessels where the vessel to be boarded is deemed non cooperative’.⁶² In that case only, the Force Commander may order a member state to dispatch units in the area of the operation to contribute to the boarding.

In addition, ‘if the Master is expected to, or has stated that he will, use force to prevent the boarding party ... then any subsequent boarding is to be regarded as “opposed” and appropriate measures may be taken’; the authorisation is given then by the Operation Commander, but, very significantly, under ROE 173, ‘opposed boarding will only be executed and conducted according to the executing States Rules and regulations and *with its approval*’.⁶³ Similarly, the use of minimum force to secure the release of vessels personnel taken by pirates is authorised by the Operation Commander; however, ‘the release operation can only be launched *with the consent of the flag State* of vessels being released’.⁶⁴ Of course, all the above ROEs would not apply should the member states decide, in the meantime, to revert to national OPCODE, as the French units do.

In conclusion, the assessment of whether the right of visit should be exercised is made by the Commanding Officers of the member states, which have also the authority to decide all the necessary pre-boarding measures, such as diversion or the firing of the warning shots. The EU Force Commander comes into play later and either *authorises* the boarding in cases of ‘unopposed boarding’ or *directs* the dispatch of the military units and *authorises* the boarding in cases of ‘non-cooperative boarding’. The EU Operation Commander, on the other hand, *authorises* the boarding in cases of ‘opposed boarding’ with the consent of the member state, as well as *authorises* the use of force in order to free a vessel under piracy attack with consent of the flag state.

⁶² ROE 172, *ibid.*; see also ANNEX E APPENDIX 1 OF REFERENCE D, n. 59, para. 9.

⁶³ ROE 173, *ibid.* (emphasis added).

⁶⁴ ROE 336, *ibid.* (emphasis added); ANNEX E APPENDIX 1 OF REFERENCE D, n. 59, para. 9.

3.1.2.3 Shared responsibility in the context of EUNAVFOR Atalanta

It follows from the foregoing *modus operandi* that the EU neither enjoys an exclusive decision-making authority, nor has the effective ‘operational’ control over the boarding as such in all cases. In particular, in the cases of opposed boardings, or boardings to release vessels held by pirates, the authorisation of the EU is contingent upon the consent of other states. Hence, the assertion that the conduct in question should be attributed in all cases solely to the EU pursuant to Article 7 of the ARIO is not warranted.

In assessing the different categories of ‘boardings’, the following comments are in order. First, in the cases of ‘unopposed’ and ‘non-cooperative’ boardings, it is the EU Force Commander that ‘authorises’ the boarding on the basis of information given by the Commanding Officer. Thus it seems that the EU exercises an ‘effective control’ over the acts and omissions of the member states in this regard. However, there is no certainty whether this ‘authorisation’ suffices in order to attribute the decision to board the vessel solely to the EU. If we adopt the position of Messineo, ‘the transfer of attribution from a state or an international organisation to an international organisation should occur every time that the transferred organ is both functionally integrated in the receiving organisation and has ceased to be so with regards to the sending state or international organisation’.⁶⁵ This seems not to be the case here. Hence, it is probably a case of ‘dual attribution’, i.e. attribution both to the EU and the member states, since there is no doubt that the member states continue to retain the command of the warship concerned.

Second, it is clear that dual attribution may arise in the case of ‘opposed boarding’, in which both the EU Operation Commander and the member state will decide to board the suspected vessel. Also, it may arise in cases in which the boarding is co-decided by the EU Operation Commander and the flag state of the vessel under piracy attack. In such cases, shared responsibility in the sense of co-authorship may arise.

In any event, shared responsibility of the EU and its member states may arise on a different basis. Even though a certain act may not be directly attributed to the EU, the EU may incur

⁶⁵ F. Messineo, ‘Attribution of Conduct’, in P.A. Nollkaemper and I. Plakokefalos (eds.), *Principles of Shared Responsibility: An Appraisal of the State of the Art* (Cambridge University Press, 2014), 60, 93-94.

‘indirect responsibility’,⁶⁶ i.e. responsibility ‘in connection with the act of a State or another international organization’, for the conduct in question.⁶⁷

In particular, Article 15 ARIO concerning ‘direction or control’ could be applicable in the specific case of the direction of military units to the scene of the operation in order to conduct a ‘non-cooperative boarding’. Article 15 requires ‘actual direction of an operative kind’ on the part of the organisation,⁶⁸ which actually occurs in this specific context.⁶⁹ Thus, the EU could incur ‘derivative/indirect responsibility’ pursuant to Article 15, along with the individual responsibility of the member state, which conducted the hypothetically unlawful boarding, and besides its own alleged direct responsibility for the co-authorship of the act itself. Additionally, if the warship of the member state, which was directed to the scene by the EU Force Commander, assists the warship that conducts the boarding, it may also be held responsible by virtue of Article 16 of the Articles on Responsibility of States for Internationally Wrongful Acts (ARSIWA).⁷⁰ Noteworthy is that the ARIO recognises that the ‘derivative’ responsibility of the international organisation is without prejudice to the responsibility of the state that commits the act in question (Article 19 ARIO).

Article 15 is not, however, applicable in cases of simple authorisation by the EU Force Commander to board the vessel, as there is no ‘actual direction of an operative kind’. In such cases, besides holding the EU responsible as co-author of the alleged wrongful act, it may be possible to hold the UN responsible pursuant to Article 14 of the ARIO, i.e. ‘aid or assistance’.⁷¹ Should the planning of the operation as a whole, and the explicit authorisation

⁶⁶ The term ‘indirect responsibility’ is credited to Ago, see R. Ago, Special Rapporteur, ‘Eighth report on State responsibility’, UN Doc. A/CN.4/318 and Add.1 to 4 (1979), paras. 2-3.

⁶⁷ See Chapter IV of the ARIO, n. 45, and accompanying Commentary, Commentary to the Articles on the Responsibility of International Organizations, ILC Report on the work of its sixty-third session, UNGAOR 66th Sess., Supp. No. 10, UN Doc. A/66/10 (2011) (ARIO Commentary).

⁶⁸ As the ILC mentions in the ARIO Commentary, *ibid.*, quoting the ARSIWA Commentary to Article 15 ARSIWA, n. 70, ‘the term “controls” refers to cases of domination over the commission of wrongful conduct and not simply the exercise of oversight, still less mere influence or concern’, and that ‘the word “directs” does not encompass mere incitement or suggestion but rather connotes actual direction of an operative kind’; at 38.

⁶⁹ Wessel and Den Hertog are in accord of the application of this provision generally in the context of Common Foreign and Security Policy (CFSP) operations: ‘Situations in which Member States are directed or controlled by the Union form the foundation of the CFSP’; Wessel and Den Hertog, ‘EU Foreign, Security and Defence Policy’, n. 51, 355.

⁷⁰ Articles on Responsibility of States for Internationally Wrongful Acts, ILC Yearbook 2001/II(2) (ARSIWA).

⁷¹ See ARIO Commentary, n. 67, 36-37; and A. Reinisch, ‘Aid or Assistance and Direction and Control between States and International Organizations in the Commission of Internationally Wrongful Acts’ (2010) 7 IOLR 63.

on the part of the EUNAVFOR, be considered as facilitative of the wrongful decision to board the vessel, then the EU could be held responsible for complicity.⁷²

Finally, there might be shared responsibility in the form of ‘aid or assistance’ by third non-EU member states that assist member states in the conduct of the interception operation. Very often, naval or air assets of other states, conducting individual operations or under the aegis of NATO Operation Ocean Shield and Combined Task Force 151, provide assistance in boarding operations of Operation Atalanta.

In conclusion, Operation Atalanta reveals the difficulties in applying the existing secondary norms, especially in the context of the EU operations. Indeed, as Wessel and Den Hertog recognise, ‘the complex nature of CSDP decision-making and implementation calls for a case-by-case analysis which is to take account of the special position Member States have in conducting EU military missions’.⁷³ Such case-by-case analysis can result not in a ‘competence-responsibility gap’, as the above authors insinuate, but in rather solid assertions concerning shared responsibility, even against the background of a not entirely satisfactory matrix of secondary rules adopted by the International Law Commission.

3.2 Phase II: the boarding and searching of the vessel

The next phase of counter-piracy operation concerns the conduct of the interdiction as such. This phase concerns the boarding and the search of the vessel.

3.2.1 Primary rules

The possibility that boarding and search of a vessel triggers shared responsibility may be grounded on several obligations. The boarding warship or the other ‘duly authorized state vessel’ should, in principle, abide by the *modus operandi* laid down in Article 110(2)-(3) of the LOSC. In addition, the interdicting state may, in principle, use force but in extreme

⁷² See V. Lanovoy, ‘Complicity in an Internationally Wrongful Act’, in P.A. Nollkaemper and I. Plakokefalos (eds.), *Principles of Shared Responsibility in International Law: An Appraisal of the State of the Art* (Cambridge University Press, 2014), 134.

⁷³ Wessel and Den Hertog, ‘EU Foreign, Security and Defence Policy’, n. 51, 357.

moderation and in strict accordance with the requirements of necessity and proportionality. The use of force in the course of interception operations is corollary to the right of visit, and is subject to the rules governing law enforcement at sea, as set forth by international case law and in each state's ROE.⁷⁴

Moreover, human rights law, such as the right to life, will apply in this context.⁷⁵ Arguably, both states and the EU are bound by the right to life. The European Convention on Human Rights (ECHR) as well as the Charter of Fundamental Rights of the European Union,⁷⁶ which guarantee the right to life in Article 2, are considered primary EU legislation.⁷⁷

3.2.2 Secondary rules

As this chapter proceeded above, it is apt prior to the assessment of the potential 'shared responsibility' in relation to the conduct of the interception as such to refer to the actual ROE of Operation Atalanta.⁷⁸ Accordingly, should the Commanding Officer (CO) of the warship receive the authorisation by the EU Force Commander (FC) to board the vessel, the CO will conduct the operation in accordance with the ROE already authorised by the EU organs. The EU official message for the Implementation of the ROEs states that 'force is authorized for use in certain circumstances ... *in accordance with national law on the use of force in self-defence* and the extant ROE profile, which is drawn from the regulations and limitations within UNCLOS [LOSC] and pertinent UNSCRs [UN Security Council Resolutions]'.⁷⁹

It is thus apparent that the operational control rests with the member state rather than with the EU Force Commander. More importantly, it is observed that in cases of 'opposed boarding',

⁷⁴ See e.g. *The M/V 'SAIGA' (No. 2) Case (Saint Vincent and the Grenadines v. Guinea)*, Merits, ITLOS Case No. 2, (1999) 38 ILM 1357, para. 155. For further discussion see Papastavridis, *The Interception of Vessels on the High Seas*, n. 23, 68-73.

⁷⁵ See Article 6 of the International Covenant on Civil and Political Rights, New York, 19 December 1966, in force 23 March 1976, 999 UNTS 171 (ICCPR). See also Article 2 of the Convention for the Protection of Human Rights and Fundamental Freedoms, Rome, 4 November 1950, in force 3 September 1953, 213 UNTS 221 (ECHR).

⁷⁶ ECHR, *ibid.*; Charter of Fundamental Rights of the European Union, (2012) OJ C 326/391.

⁷⁷ On 1 December 2009, with the entry into force of the Treaty of Lisbon, the Charter was given binding legal effect on the EU institutions and on national governments equal with the EU Treaties. See Article 6 Consolidated version of the Treaty on European Union, (2012) OJ C 326/13 (TEU).

⁷⁸ As regards NATO and Operation Ocean Shield, suffice to reiterate that a NATO member state retains exclusively the control on the conduct of the operation and thus it is difficult to speak of shared responsibility of NATO and its member states.

⁷⁹ EU official message for the Implementation of the ROEs, n. 55, (emphasis added).

which may result in the loss of life, it is required that the member state gives its consent. In practice, the CO will only inform the FC or the EU Operation Commander at the end of the operation. Significantly, the member state retains also the exclusive authority in relation to criminal or discipline matters that may arise in the course of the operation.

In light of the foregoing, it is submitted that the EU lacks any operational, i.e. effective, control of the law-enforcement operation conducted by the member state, with the consequence that the latter should not be considered as a ‘*de facto* organ’ of the EU (Article 7 ARIO). The comments made above on the possibility of the derivative responsibility of the EU, as well as on the possibility of the complicity or joint responsibility of third states, in case they assist in the operation, are also relevant here.

In addition, there might be another case of shared responsibility arising from separate wrongful acts. A primary rule applicable at the present phase is the right to life, enshrined in both the ECHR and the EU Charter of Fundamental Rights, which binds directly the EU organs. It could be argued that the EU bears separate or parallel responsibility for failing to meet the positive obligation of safeguarding the right to life in the course of the interception operation in question. This involves a wrongful conduct, in the form of omission, separate from the wrongful conduct of the member state, e.g. the disproportionate use of lethal force against suspected pirates, which is attributed directly to the state. Such parallel responsibility can be recognised, as above, for the state of Somalia in the cases that the interception occurs in its territorial waters pursuant to its authorisation.

3.3 Phase III: pre-detention and detention

The next phase of the operation concerns the detention or the decision to detain the suspected pirates. It is common practice, at least in the context of Operation Atalanta, that the suspected pirates will be ‘pre-detained’ or held for 48 hours prior to the decision of the Commanding Officer of the capturing warship. This ‘pre-detention’ will be followed by a decision either to detain them in order to transfer them for prosecution or to release them due to lack of evidence.

3.3.1 Primary rules

The LOSC does not address this phase, but only stipulates in Article 105 that those on board a pirate vessel may be arrested by the seizing vessel. This pre-detention and detention phase is subject to international human rights law. Given that the suspected pirates are under the jurisdiction of the states concerned, the human rights in need of protection at the present phase are the prohibition of torture, degrading and inhumane treatment,⁸⁰ the prohibition of *non-refoulement* under Article 33 of the 1951 Refugee Convention and customary law,⁸¹ and the right to liberty and security. Under, for example, Article 5 of the ECHR, any detention must be in accordance with a procedure prescribed by law, which must be accessible, foreseeable and must afford legal protection to prevent arbitrary interferences of the right to liberty. Safeguards relating to the right to liberty include: ‘informing the persons detained of their rights, allowing them to contact a lawyer and bringing them before an appropriate judicial authority within a reasonable time’.⁸²

The relevance of the right to liberty in relation to piracy was affirmed on 4 December 2014 in the first judgments of the European Court of Human Rights (ECtHR or Court) concerning piracy off Somalia in the cases of *Ali Samatar and others v. France*⁸³ and *Hassan and others v. France*.⁸⁴ The applicants in both cases were arrested and subsequently prosecuted by the French authorities for acts of piracy that were committed against the French cruise ship *Ponant* and the French yacht *Carré d’As* in 2008 respectively. Relying on Article 5(1) ECHR (right to liberty and security), the applicants in the case of *Hassan and others* alleged that their detention by the French military authorities from 16 to 23 September 2008 had no legal basis, while in both cases, relying on Article 5(3) ECHR (right to liberty and security), the applicants complained that they had not been ‘brought promptly before a judge or other

⁸⁰ See e.g. Article 3 of ECHR, n. 75; Article 7 ICCPR, n. 75; and Article 3 of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, New York, 10 December 1984, in force 26 June 1987, 1465 UNTS 85 (CAT).

⁸¹ Article 33(1) 1951 Refugee Convention reads as follows: ‘1. No Contracting State shall expel or return (“*refouler*”) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion’; see Convention relating to the Status of Refugees, Geneva, 28 July 1951, in force 22 April 1954, 189 UNTS 137 (1951 Refugee Convention). See in general C. Wooters, *International Legal Standards for the Protection from Refoulement* (Antwerp: Intersentia, 2009).

⁸² See also *Medvedyev and others v. France*, App. No. 3394/03 (ECtHR, 29 March 2010), para. 80; and *Malone v. the United Kingdom*, App. No. 8691/79 (ECtHR, 2 August 1984) para. 67.

⁸³ *Ali Samatar and others v. France*, App. Nos. 17110/10 and 17301/10 (ECtHR, 4 December 2014).

⁸⁴ *Hassan and others v. France*, App. Nos. 46695/10 and 54588/10 (ECtHR, 4 December 2014).

officer authorised by law to exercise judicial power’ after their arrest by the French army in Somali territorial waters.

With respect to the first claim, the Court held that while the arrest was lawful pursuant to SC Resolution 1816 (2008), the French legal system in force at the relevant time did not provide sufficient protection against arbitrary interference with the right to liberty and had therefore been a violation of Article 5(1) ECHR. Also, the Court found a violation of Article 5(3) ECHR on account of the fact that on their arrival in France, the applicants had been taken into police custody rather than being brought ‘promptly’ before a French legal authority.⁸⁵

3.3.2 Secondary rules

Having regard to the ROE of Operation Atalanta, there are good arguments against the attribution of the alleged wrongful conduct to the EU. As explicitly provided in the Guidance to EUNAVFOR, ‘the decision as to whether an individual suspected of piracy or armed robbery at sea may be detained *rests with the Commanding Officer*. When making this decision he should seek legal advice from both national authorities and from the EU OHQ as necessary’.⁸⁶ It is apparent that seeking advice from the EU Operation Headquarters does not suffice to attribute the conduct to the EU. In addition, ‘according to OPLAN [Operational Plan], the decision either to transfer either to release has to be made within 48h after CO’s decision to detain’;⁸⁷ thus, again it is the Commanding Officer, that is, the member state who has the decision-making authority to release or to transfer the detainees for prosecution purposes.

Furthermore, the Guidance to EUNAVFOR provides that ‘while the day to day supervision of detainees may fall to a number of personnel within a TCN vessel, *ultimate responsibility for the proper treatment of detainees remains with the Commanding Officer* until the release of the detainee or the transfer to another appropriate authority for prosecution’.⁸⁸ Accordingly, any breach of human rights, e.g. the prohibition of torture or degrading treatment under

⁸⁵ See also in this respect *Vassis and others v. France*, App. No. 62736/09 (ECtHR, 27 June 2013).

⁸⁶ See OP Atalanta EU OHQ Standard Operating Procedure: Handling of Detainees/Suspected Pirates/Armed Robbers at Sea and Evidence Collection, OP Atalanta EU OHQ, SOP LEGAL 001, 26 March 2009, at para. 2.2 (emphasis added) (on file with the author) (Guidance to EUNAVFOR).

⁸⁷ See Flow Chart, n. 56.

⁸⁸ Guidance to EUNAVFOR, n. 86, para. 2.4 (emphasis added).

Article 3 of ECHR, would be attributed to the member state. It follows that the shared or parallel responsibility of the EU in these cases, even in cases of omission to prevent the wrongful conduct, would be highly unlikely, since it has no effective control or competence, *ergo* jurisdiction, over the persons concerned. Similar conclusions can be drawn for detentions effectuated in the context of NATO Operation Ocean Shield.

3.4 Phase IV: transfer and trial

The next phase concerns the transfer of the suspected pirates to third states in the region (Kenya, Seychelles, Mauritius and Tanzania) and the actual trial and conviction of them.

3.4.1 Primary rules

The applicable primary rules consist of the following. First, Article 105 of the LOSC, which permits the assertion of legislative and enforcement jurisdiction over piracy *jure gentium*; second, international human rights law, including the prohibition of torture, degrading and inhumane treatment and the prohibition of *non-refoulement*, as well as the right to fair trial,⁸⁹ and third, Bilateral Transfer Agreements. The transfer of the suspected pirates to the above-mentioned states is governed by bilateral agreements with individual states and the EU.

The aforementioned primary rules bind, in principle, both the states involved in the transfer and trial of the suspected pirates, including the states to which the latter are transferred, and the EU. Moreover, the EU will bear *ex contractu* responsibility for the violation of the transfer agreements, which it has concluded.

3.4.2 Secondary rules

According to applicable Rules of Engagement, which inform us on the attribution of conduct under scrutiny, there are four courses of action available to Commanding Officers under EUNAVFOR operational control, namely:

⁸⁹ See for example Article 14 of the ICCPR, n. 75, and Article 6 of the ECHR, n. 75.

a) transfer the detained person to the competent authority of the TCN making the capture of the individual (national legal advice required and OpCdr needs to be informed); b) transfer the detained individual to the competent authority of a member state (a bilateral agreement and national legal advice will be required and OpCdr informed); c) transfer the detained individual to the competent authority of a third state with whom the EU has an agreement after decision from the OpCdr; d) release the individual, when there is no or insufficient evidence to suggest that they are pirates or armed robbers, or despite the initial intention transfer to a third state proves not to be possible, for whatever reason.⁹⁰

Incidents under (a) and (d) would engage the responsibility of the member state; incidents under (b) could engage the responsibility of both member states involved, though, for separate wrongful acts and; finally, incidents under (c), which paradoxically are very rare in practice, would engage solely the responsibility of the EU and the state to which the persons are transferred, and not of the member state. The decision to transfer suspected pirates to Kenya, Seychelles and Mauritius is made by the EU Operational Commander, and it is effectuated by virtue of an EU agreement with the respective states. Such agreements are not ‘mixed agreements’, but they are concluded exclusively by the EU pursuant to Article 3(2) of the TFEU.⁹¹

It follows that any breach of the above agreement or of human rights law in these cases would be attributable, besides the member state concerned, to the EU under Article 6 of the ARIO. Thus, if, for example, Kenya uses evidence against suspected pirates before its domestic courts that are obtained by torture, the responsibility for this wrongful act would rest, indubitably, with Kenya, but also with the EU for having transferred the persons concerned to a state where they have faced torture, or where evidence obtained by torture has been used (Article 19(2) of the EU Charter of Fundamental Rights and Articles 3 and 6 of the ECHR).⁹² The member state facilitating the transfer to the competent authorities of the third state (e.g. Kenya) would not be liable for this transfer as it acts for *for the benefit and under the authority* of the EU.

It should be noted that another state may be held responsible in the context of transfers pursuant to EU agreements. This is Djibouti, which is the ‘host state’ for many of the land-

⁹⁰ Guidance to EUNAVFOR, n. 86, para. 3.

⁹¹ Article 3(2) of the TFEU, n. 49, reads as follows: ‘The Union shall also have exclusive competence for the conclusion of an international agreement when its conclusion is provided for in a legislative act of the Union or is necessary to enable the Union to exercise its internal competences, or insofar as its conclusion may affect common rules or alter their scope.’

⁹² Cf. the case of *Othman (Abu Qatada) v. the United Kingdom*, App. No. 8139/09 (ECtHR, 17 January 2012).

based activities of EUNAVFOR Operation Atalanta⁹³ and through which the suspected pirates are transferred to third states. Hypothetically, Djibouti would incur parallel responsibility for allowing violations, for example, of the principle of *non-refoulement* occurring in its territory.

3.5 Phase V: post-trial transfer

The last phase concerns the post-trial transfer of convicted pirates from states that have tried Somali pirates, such as Seychelles, to prisons built in Somalia. In 2011, Seychelles signed transfer Memoranda of Understanding with the Transitional Federal Government, with Puntland and with Somaliland,⁹⁴ while ‘the first transfer of prisoners from a regional prosecuting State was conducted in March 2012. Seventeen convicted pirates arrested by the Seychelles Coast Guard and tried in Seychelles were transferred to a prison in Hargeisa, “Somaliland”, constructed by UNODC’.⁹⁵

It is apparent that the prohibition of *non-refoulement* and the prohibition of torture, degrading and inhumane treatment, as enshrined in the human rights treaties binding Somalia and Seychelles and under customary law, will be applicable.

4. Shared responsibility arising from joint patrols or combined maritime operations

In this section, questions of shared responsibility arising from ‘joint patrols’ or ‘combined maritime operations’, including ship-riders arrangements, will be addressed. As has been referred to in the Introduction, such patrols are taking place in the Gulf of Guinea, in Mozambique and in the Straits of Malacca and they take various forms, namely cooperative action, authorisation to enter into the airspace or the territorial waters of the parties to the respective agreement and ‘joint patrolling’. Unfortunately, the details of these operations or

⁹³ See Agreement between the European Union and the Republic of Djibouti on the status of the European Union-led forces in the Republic of Djibouti in the framework of the EU military operation Atalanta (2009) OJ L 33/43.

⁹⁴ It is very interesting that Seychelles has entered into MoUs with Somaliland and Puntland, which are not recognised state entities; however, this issue is beyond the scope of the present chapter.

⁹⁵ See UN Security Council, ‘Report of Secretary-General pursuant to Security Council Resolution 2020 (2011)’, UN Doc. S/2012/783 (22 October 2012), para. 57; and C. Massarella, ‘UN Security Council Resolution 1976 (2011) and Efforts to Support Piracy Prosecutions’ (2011) 26 IJMCL 679, 680.

whether there has been any claim arising from the latter are not known to the author. Since the primary rules governing the operations in question are the same with those governing the previously-discussed category, the discussion will be focused on the potential shared responsibility arising from the various forms of ‘joint/combined operations’.

4.1 Patrols conducted by two or more states individually yet in a coordinated manner and the sharing of information

As regards the combined patrols in the Straits of Malacca, it has been stated that they are conducted individually, albeit there is enhanced cooperation and sharing of information between the participating states.⁹⁶ Besides the interdicting state, the other states may be held liable for aiding and assisting, in the sense of informing and facilitating the interdiction in question.

4.2 Authorisation of entry into other states’ territorial waters or airspace for patrolling

Authorisation to enter into the airspace of other states parties is granted in the context of the ‘Eyes in the Sky’ operation in the Straits of Malacca,⁹⁷ as well as in the Mozambique Channel with respect to both the airspace and the territorial waters of the contracting parties.⁹⁸

As regards, first, the Mozambique Channel, the relevant agreement is silent on the ROE and the operational plan of the operations. From the face of the agreement it is inferred that, on the one hand, many interdictions will take place by a single military unit in the territorial waters of another state party on the basis of the agreement; in that case, the ‘member of the Party or Parties will remain under the direct command and control of respective Commanding Officers’ (Article 5(1) of the MoU).⁹⁹

Hence, if the sending party is acting on its own, it will incur individual responsibility for any violation that may occur, for example, of the right to life, whereas the coastal state will be

⁹⁶ See n. 14/15.

⁹⁷ See n. 15.

⁹⁸ See n. 16.

⁹⁹ Ibid.

held, in parallel, responsible for the omission to prevent the said conduct in defiance of its positive obligations under international human rights law. With respect to a potential detention and arrest of the suspected pirates, there is no information in the agreement, but it is assumed that the primary jurisdiction rests with the territorial state. ‘Shared responsibility’ will arise only in the case of transfers between the respective states of the suspected pirates, involving the violation of the prohibition of torture, degrading or inhumane treatment.

In respect of ‘air surveillance’, for example in the Straits of Malacca, it is difficult to envisage an interdiction operation by aircrafts. Arguably, ‘shared responsibility’ would arise in the case that both states have contributed to the harmful outcome, e.g. unnecessary and disproportionate use of lethal force: the territorial state ‘directly’ by interdicting the suspect vessel and the state of the registry of the aircraft ‘indirectly’ by ‘aiding and assisting’ the former, namely by providing information and other support to it.

4.3 Joint patrolling, including the use of ‘ship-riders’

Under the MoU on Maritime Security Cooperation in the Mozambique Channel, there is another form of cooperation, involving ‘joint patrolling’ and potentially the use of ship-riders.¹⁰⁰ According to Article 5(2) of the MoU, ‘all aspects of command and control ... will be dealt with by the Commanding Officers of the Members of the Receiving Party’. Similar schemes of ‘joint policing’ are also in place in the Gulf of Guinea. In this context shared responsibility will arise, first, when there is co-authorship of the wrongful act in question, e.g. of the unlawful interdiction or the unlawful use of force. Such co-authorship could give rise to the shared responsibility *stricto sensu* (joint responsibility) of the states involved in these joint patrols.

When the element of the ship-rider is involved, the following comments are in order. When the command and control of the operation, including the competence to decide whether to intercept the suspected vessel, rests with the ‘receiving party’, there is cogency in favour of the application of Article 6 of the ARISWA in respect of the decision for the interdiction *per se*. Is there any room for shared responsibility in such operations at the right of visit phase? If

¹⁰⁰ Ibid.

it is accepted that the strict terms of Article 6 apply in this case, there will hardly be any.¹⁰¹ Otherwise, it could be argued that there would be responsibility for ‘aiding or assisting’, namely a responsibility for a separate wrong.¹⁰² Accordingly, should the boarding itself prove to be unfounded, the sending party may also be held responsible for assisting in the commission of such breach, provided that it had knowledge of the breach in question and assisted in this regard. Also, arguably the decision to detain or to release the suspected pirates, and thus the responsibility e.g. for *refoulement*, rests solely with the sending state of the ship-rider; the flag state of the warship can only separately be held liable either for mistreating the suspected persons (prohibition of torture and degrading and inhumane treatment) or for assisting or aiding the ship-rider (Article 16 of the ARSIWA).

5. Processes

5.1 Potential judicial fora and legal bases

In assessing the processes and in particular the judicial *fora* to which claims concerning shared responsibility could be submitted on the basis of the applicable rules of international law, the following comments are in order:

Firstly, as Article 110(3) of the LOSC provides, should the suspicions on which the boarding of the vessel prove to be unfounded, and provided that the ship boarded has not committed any act justifying them, the boarding or seizing state is liable to compensate the state of nationality of the vessel concerned. Thus, while a boarding might have been justified under Article 110(1) of the LOSC, because a ‘reasonable ground’ for suspicion existed, the boarding state might still have to pay compensation under certain conditions, i.e. for a lawful activity, causing damage (strict liability).¹⁰³ On the other hand, Article 106 LOSC provides for the

¹⁰¹ See Messineo, ‘Attribution of Conduct’, who perceives the application of Article 6 as an exception of the default rule of dual attribution, n. 65, 32.

¹⁰² On the idea that ‘aid or assistance’ gives rise to a separate wrong, see P.A. Nollkaemper, ‘Joint Responsibility between the EU and Member States for Non-Performance of Obligations under Multilateral Environmental Agreements’ SHARES Research Paper 05 (2011), ACIL 2011-14, at 8; available at www.sharesproject.nl.

¹⁰³ See further discussion in P. Wendel, *State Responsibility for Interferences with the Freedom of Navigation in Public International Law* (Berlin: Springer, 2007), 113-115.

'liability' of the seizing state for any damage caused by the seizure of the suspected pirate vessel without adequate grounds.¹⁰⁴

To the knowledge of the author, there has been no such case. In principle, this is an inter-state dispute. However, it has been argued that a private entity (e.g. the ship-owner) can also claim compensation on the basis of Article 110(3) of the LOSC.¹⁰⁵ In any case, it is noteworthy that the content of the primary rule concerned here points towards the responsibility of the intercepting state.

Secondly, with respect to claims concerning human rights, these will initially have to be submitted to national courts, e.g. before French courts in the *Ali Samatar and Hassan* cases or the German courts in the *Hashi and others* case, and eventually they may end up before the ECtHR as the *Ali Samatar and Hassan* cases.

Particularly, as regards EUNAVFOR Operation Atalanta, it is possible in the future that both the member state involved and the EU may be found co-respondents in a case before the Strasbourg Court, when the EU becomes party to the ECHR.¹⁰⁶ This will be facilitated by the co-respondent mechanism provided for in the Draft Accession Agreement.¹⁰⁷ The relevant application, however, has inevitably to be filed against the member state, to which the act is attributed, and then the EU may join as co-respondent.

As was stated in the Explanatory Report of the Draft Agreement,

[u]nder EU law, the acts of one or more Member States or of persons acting on their behalf implementing EU law, including decisions taken by the EU institutions under the TEU and the TFEU are attributed to the Member State or member States concerned. In particular, where persons employed or appointed by a Member State act in the framework of an operation pursuant to a decision of the EU

¹⁰⁴ 'Where the seizure of a ship or aircraft on suspicion of piracy has been effected without adequate grounds, the State making the seizure shall be liable to the State the nationality of which is possessed by the ship or aircraft for any loss or damage caused by the seizure'; Article 106 LOSC, n. 2.

¹⁰⁵ See Wendel, *State Responsibility for Interferences with the Freedom of Navigation*, n. 103, 178.

¹⁰⁶ See Article 6 (2) of TFEU, n. 49.

¹⁰⁷ The final version of the Draft Agreement is included in the Council of Europe, Final report to the CDDH, 47+1(2013)008rev2, Strasbourg, 10 June 2013. See also the relevant discussion in 'SHARES Briefing Paper – A New Framework for Allocating International Responsibility: the EU Accession to the European Convention on Human Rights (2014)', available at www.sharesproject.nl. See also the relevant discussion in C. Eckes, 'EU Accession to the ECHR: Between Autonomy and Adaptation' (2013) 76 MLR 254.

institutions, their acts, measures and omissions are attributed to the Member State concerned. Attribution to a Member State does not preclude the EU from being responsible as a co-respondent.¹⁰⁸

Thirdly, it must be reiterated that the Court of Justice of the EU does not have any jurisdiction with respect to the provisions relating to its Common Foreign and Security Policy, ‘nor with respect to acts adopted on the basis of those provisions’.¹⁰⁹ Accordingly, any claim arising from the conduct of the EU in the course of EUNAVFOR Operation Atalanta can be submitted only to national courts. This is certainly decisive in holding the member states primarily liable for any wrongful conduct committed in the course of Operation Atalanta; otherwise, we have to accept a responsibility regime without processes for implementation and enforcement. As Naert concludes, ‘in cases where the EU is responsible under international law, EU law may nonetheless require the involvement of Member States courts and may provide that a Member State will ultimately pay compensation or be responsible for answering a claim’.¹¹⁰

Finally, the EU transfer agreements do not provide for any judicial avenue for claims arising out of the application of these agreements. On the other hand, the relevant Status of Forces Agreements (SOFAs) with the respective countries call for the amicable settlement of claims. If such settlement cannot be achieved, it is provided for example in Article 15 of the EU-Seychelles agreement as follows:

3. the claim shall be submitted to a claims commission composed on an equal basis of representatives of EUNAVFOR and representatives of the Host State. Settlement of claims shall be reached by common agreement.

4. Where no settlement can be reached within the claims commission, the dispute shall: (a) for claims up to and including EUR 40 000, be settled by diplomatic means between the Host State and EU representatives; (b) for claims above the amount referred to in point (a), be submitted to an arbitration tribunal, the decisions of which shall be binding.¹¹¹

¹⁰⁸ Draft Agreement, *ibid.*, para. 23.

¹⁰⁹ See Article 275 of TFEU, n. 49, and further comments in Eeckhout, *EU External Relations Law*, n. 39, 497 et seq. Actually, the Court of Justice has only limited jurisdiction, which does not cover crisis management operations, such as Operation Atalanta.

¹¹⁰ Naert, ‘The International Responsibility of the Union in the Context of its CSDP Operations’, n. 43, 337.

¹¹¹ Article 15 of the Agreement between the European Union and the Republic of Seychelles on the status of the European Union led forces in the Republic of Seychelles in the framework of the EU military operation Atalanta, (2009) OJ L 323/14.

5.2 Shared responsibility cases

Cases involving the responsibility of two or more states or international organisations for a harmful outcome concerning piracy have been the exception rather than the rule. A proceeding in which ‘shared responsibility’ was invoked was before the German Administrative Court of Cologne in 2011.

Following the arrest by the German warship RHEINLAND PFALZ of nine pirates in the Gulf of Aden on 8 February 2009,¹¹² they were transferred to Kenya pursuant to the EU-Kenya agreement. The applicants, Mohamed Hashi and eight others, initiated also proceedings in Germany complaining that their arrest and transfer had been in violation of the German Constitution, the ECHR and the ICCPR. On 11 November 2011, the Administrative Court of Cologne found Germany in violation of the principle of *non-refoulement* for transferring the complainants to Kenya.¹¹³ The Administrative Court stated that the conditions of detention at the Shimo-La-Tewa prison at the time of the transfer, namely the overcrowding, poor sanitary facilities, shortage of water for hygiene and pest infestation, in combination with high temperatures, amounted to inhuman and degrading treatment.¹¹⁴

Interestingly for our purposes, Germany argued before the Administrative Court of Cologne that acts taken by Germany, while contributing to EUNAVFOR, were not attributable to the state because a transfer of authority to the EU had taken place. While the Court left the issue open regarding arrest and detention, it decided the attribution question regarding the transfer part of the complaint. It opined that Germany played a decisive part in the decision to transfer the suspects and that the violations in relation thereto were attributable to Germany.¹¹⁵

Without discussing this case in detail, in light of the assertions made above, the transfer of the suspected pirates in cases like *Hashi* is made under the authority of the EU pursuant to the

¹¹² See EU NAVFOR – Atalanta prevents hijacking, Press Release, 4 March 2009; available at www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/esdp/106500.pdf.

¹¹³ *Re ‘MV Courier’* [2011] 25 K 4280/09 (Verwaltungsgericht Köln, 25. Kammer); paras. 2-9. As of 10 December 2014, the case was still pending at the appellate level: *Re ‘MV Courier’*, 4 A 2948/11 (Oberverwaltungsgericht Münster). See commentary of the case in C. Kress, ‘Die moderne Piraterie, das Strafrecht und die Menschenrechte Gedanken aus Anlass der deutschen Mitwirkung an der Seeoperation ATALANTA’, in D. Weingärtner (ed.), *Die Bundeswehr als Armee im Einsatz* (Baden-Baden: Nomos, 2012), 95; and A. Petrig, ‘Arrest, Detention and Transfer of Piracy Suspects: A Critical Appraisal of the German *Courier* Case Decision’, in G. Andreone et al. (eds.), *Insecurity at Sea: Piracy and other Risks to Navigation* (Giannini Editore, 2013), 153, at 153.

¹¹⁴ *Re ‘MV Courier’*, *ibid.*, paras. 59-77.

¹¹⁵ *Ibid.*, paras. 32, 38, 52-59.

relevant agreement with Kenya. From the moment the German Commanding Officer under the instructions of the German government decided to delegate the responsibility for Hashi and others to the EU Operation Commander, Germany was acting as an organ or agent of the EU. It follows that if the wrongful conduct in question had been the ultimate decision to transfer or release the suspected pirates, it was the EU and not Germany that should be held responsible. Even though it were German authorities that initially decided not to prosecute and send the suspected pirates to Kenya,¹¹⁶ the legal basis was the EU-Kenya agreement, and thus the EU had the final decision-making authority.¹¹⁷ This does not mean that Germany did not incur any responsibility whatsoever; on the contrary, it could be held liable in parallel with the EU for the breach of a positive obligation of *non-refoulement*, since it was aware of the conditions in Kenya.

Issues of shared responsibility in relation to the transfer of suspected pirates and their trial have also been raised in the *Samanyolu* case in the Netherlands.¹¹⁸ In this case concerning criminal charges against 5 Somali pirates, the Rotterdam District Court had to address the procedural bars to prosecution arising from the application of the LOSC and Articles 5 and 6 of ECHR. In more detail, it was alleged that the detention of the suspected pirates by the Danish vessel *Absalon* since 2 January 2009, and the transfer to the Dutch authorities after a considerable length of time (on 10 February 2009) were in violation of Article 105 of the LOSC, the right to liberty and security, and the right to fair trial. The District Court dismissed these allegations, holding that the transfer was permissible under Article 105 of the LOSC and the 1988 SUA Convention.¹¹⁹ As far as the prerequisite of ‘promptness’ enshrined in Article 5(3) of the ECHR was concerned, very interestingly the Court, even though it did not have jurisdiction to discuss the responsibility of Denmark in this regard, held that both Denmark

¹¹⁶ As Petrig reports, ‘the competent German prosecutorial authorities opened an investigation and issued arrest warrants against all nine intercepted persons on 6 March 2009. On the following day, however, the prosecutorial authority discontinued the investigation according to Section 153c of the German Code of Criminal Procedure. This decision was taken after the inter-ministerial decision-making body informed the prosecutorial authorities about its finding that the suspects should be transferred to Kenya pursuant to the transfer agreement concluded between the European Union and Kenya on 6 March 2009’; see Petrig, ‘Arrest, Detention and Transfer of Piracy Suspects’, n. 113, 155.

¹¹⁷ Telling is also the fact that the relevant EUNAVFOR Press Release of 11 March 2009 refers to an *EU* handover of suspected pirates to Kenya (on file with the author). This was also confirmed in the communication between the German OHQ and the EUNAVFOR FC (on file with the author).

¹¹⁸ *Samanyolu*, ECLI:NL:RBROT:2010:BM8116 (17 June 2010); a summary in English is available at www.unicri.it/topics/piracy/database/Netherlands_2010_Crim_No_10_6000_12_09%20Judgment.pdf. The author is indebted to Dr. Anna Petrig for bringing this case to his attention.

¹¹⁹ Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation, Rome, 10 March 1988, in force 1 March 1992, 1678 UNTS 201 (SUA Convention).

and the Netherlands were accountable for such a violation.¹²⁰ Nevertheless, due to the exceptional circumstances of the present case, the Court held that the violation of Article 5(3) of the ECHR was not of such nature that should result in the Public Prosecutor being barred in that case.¹²¹

6. Conclusions

The practice of shared responsibility in respect of piracy is wealthy of incidents concerning the commission, but most importantly, the suppression of piracy. There are numerous different primary rules of international law governing this practice, including the law of the sea and human rights law, as well as numerous international actors, i.e. states and international organisations that are involved in the suppression of piracy. It is almost evident that piracy *jure gentium* and armed robbery will remain at the forefront of international concern, while there will be an increasing number of cases concerning shared responsibility for violations, especially of human rights law, in the present context that will reach domestic and international courts.

¹²⁰ '[A] time span of 40 days between the apprehension and the presentation to a Judge brings about a violation of this article of the Convention. The question then to be dealt with is whether the authorities of the Netherlands would be accountable for this violation, and whether this violation should result in the Public Prosecutor being barred in this criminal case ... In this exceptional case in which the Danes and the Dutch have worked closely together it would not be correct to hold only the Danes accountable for compliance with the stipulations of the ECHR as long as the suspects had not been transferred', n. 118, at 6.

¹²¹ *Ibid.*, 7.