# Legal Problems of Fighting Piracy: The German Perspective

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Piracy off the coast of Somalia has been a growing concern over the last five years. The only proposition agreed upon by all observers is that no easy answer can be found to the rising numbers of attacks on merchant marines. This year rising violence has been a special concern. Abducted seafarers report beatings, simulated drowning, mock executions, and being used as human shields by pirates.[1] Cases of actual killings of hostages have been reported, as in the case of the US American yacht *Quest*, which carried missionaries sailing the waters off the coast of Somalia, all four of whom were killed.[2] The total numbers of attacks are also on the rise. The statistics show that 2011 is headed to become another record year of piracy: 230 attacks, 26 successful hijackings with a total of approximately 450 hostages, including 15 dead, making Somalia the worldwide hot spot of modern-day piracy.[3] Over the years, it has become clear that Somali piracy is no Robin Hood-type crime committed by people merely protecting their resources. In contrast, it is a transnationally organized crime committed by gangs that entertain close-to-professional logistical structures in Somalia itself and have quickly learned to adapt to protective strategies.

One of these strategies has been the deployment of military navies by several countries. In the European Union's Operation ATALANTA,[4] launched in the framework of the European Common Security and Defence Policy (CSDP), the current total strength is 19 ships and airplanes.[5] Germany has currently sent 600 soldiers to the area, while the mandate of the *Bundestag* (the Federal Parliament) allows up to 1400 troops to be

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1 K. HURLBURT, The Human Cost of Piracy, Oceans Beyond Piracy Working Paper, 6.6.2011, *www.oceansbeyondpiracy.org,* 9 et seq.

2 'US Court Sentences Somali Pirates to Life over Attack', AFP, 22.8.2011.

3 International Chamber of Commerce, Commercial Crime Services, Piracy News & Figures, updated on 1.12.2011, *www.icc-ccs.org.*

4 Council Decision 2010/766/CFSP of 7 December 2010 amending Joint Action 2008/851/CFSP on a European Union military operation to contribute to the deterrence, prevention and repression of acts of piracy and armed robbery off the Somali coast, Official Journal of the European Union, 11.12.2010, L 327/49.

5 Current Total Strength of EU-NAVFOR ATALANTA, *www.consilium.europa.eu.*

deployed.[6] Support of ATALANTA and participation in the struggle against piracy in general, however, goes far beyond EU member states. For instance, Norway, Croatia and the Ukraine have provided staff officers or even warships to the European operation, and multinational organizations as well as nation states such as Japan, China, India, Malaysia, Russia and Taiwan are also contributing to the security of merchant navies and vessels of the World Food Programme in the area.[7] This massive undertaking bears immense challenges for all participating nations. An extraordinary operational challenge is the vast area in which pirate groups attack. The EU operation ATALANTA covers a mission area of 2,000,000 square nautical miles, which is the equivalent to ten times the area of Germany.[8] Constitutional barriers to an international deployment of armed forces also represent challenges for some of the participating countries, with Japan and Germany as well-known examples. Similarities in the history of the last century are mainly the reason for these constitutional limitations. Since both Germany and Japan as export nations are extremely dependent on safe maritime transport, both had to find legal solutions to participate in the combat against piracy despite these constraints. Japan adopted a new Anti-Piracy Act, which allows the Japanese Self-Defence Forces to take part in anti-piracy operations overseas under certain fairly strict conditions.[9] In Germany, we have been discussing the possibilities of amending our constitution and creating a legal basis for so-called out-of-area military operations for years. But the necessity to adapt the constitution to new challenges and to adopt a general law on the deployment of German armed forces abroad, which would then include navy anti-piracy operations, has not yet been fully understood by politicians and the German public.

To understand the German constitutional problems properly, the historical background must be taken into account. At the Conference of Yalta in February 1945, the demilitarization of Germany, to be executed after the end of the 2nd World War, was agreed upon.[10] Accordingly, in Potsdam 'the complete disarmament and demilitarization of Germany and the elimination or control of all German industry that could be used for military production'[11] was ordered. However, the beginning Cold War in 1949 quickly led to Germans patrolling the borders in armed fashion.

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6 D. NEUERER, CDU will Anti-Piraten-Kampf drastisch verschärfen, Handelsblatt, 14.7.2011, *www.handelsblatt.de.*

7 See EUNAVFOR Somalia, *http://www.eunavfor.eu/about-us/mission.*

8 Ibid.

9 See M. KAWANO, Legal Problems of Fighting Piracy: The Japanese Perspective (in this volume).

10 Cf. I. COUZIGOU, Yalta Conference (1945), *The Max Planck Encyclopedia of Public International Law* (2010), online edition at *www.mpepil.com*, visited on 13.12.2011; W. BENZ, 'Yalta, Potsdam and the Emergence of the Cold War: An Overview from Germany in the Light of the Latest Research', in: Council of Europe, Crossroads of European Histories: Multiple Outlooks on Five Key Moments in the History of Europe, 2006, 279 et seq.

11 Tripartite Agreement by the United States, the United Kingdom and Soviet Russia concerning Conquered Countries, August 2, 1945*;* quoted part reprinted in: S. WOLFF, The German Question since 1919: An Analysis with Key Documents, 2003, 184.

In 1955, the *Bundeswehr* – the German armed forces – was officially founded, and in 1956 Germany's Basic Law (*Grundgesetz* – GG) was amended to institute a military draft. In 1968, Article 87a GG was inserted as part of the so-called state of emergency amendment (*Notstandsverfassung*), which was primarily concerned with the use of the armed forces within Germany in a state of emergency.[12] To this day, Article 87a GG contains the constitutional basis for the deployment of troops.[13] Its first two paragraphs read:

> (1) The Federation establishes Armed Forces for defence purposes.…
>
> (2) Apart from defence, the Armed Forces may only be used to the extent explicitly permitted by this Basic Law.

Like the corresponding provision in the Japanese constitution, this provision aims at strictly limiting the use of the German armed forces to defence purposes, thus eliminating Germany's capability to wage a war of aggression once again. It also expresses the inspiration of the German people after the 2nd World War to become a peaceful nation within the international community and to abstain from military activities as far as possible.[14] Article 87a has to be interpreted, however, in concordance with Article 24 (2) of the Basic Law. In contrast to Article 87a GG, Article 24 (2) GG was part of the Basic Law since its adoption in 1949:

> (2) For the maintenance of peace, the Federation may enter a system of mutual collective security; in doing so it shall consent to such limitations upon its sovereign powers as will bring about a peaceful and lasting order in Europe and among the nations of the world.

In view of these provisions, it was generally agreed that the German armed forces were permitted to take part in self-defence operations in Germany and within the territories of its NATO allies. There was much political and scholarly debate, however, concerning so-called out-of-area operations, e.g. outside Germany and the treaty area covered by NATO. In its ground-breaking AWACS judgment of 1994 which dealt with the constitutionality of the participation of German troops in UN peace-keeping operations in the Adriatic, Bosnia-Herzegovina and Somalia, the Federal Constitutional Court (*Bundesverfassungsgericht*) stated that Article 24 (2) GG contains a military option.[15] In

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12 See D. KÖNIG, Putting an End to an Endless Constitutional Debate? The Decision of the Federal Constitutional Court on the 'Out of Area' Deployment of German Armed Forces, German Yearbook of International Law 38 (1995), 103 (at 113), with further references.

13 For a comprehensive overview of the textual history, see O. DEPENHEUER, Art. 87a, in: Maunz/Dürig, Grundgesetz, 62. Erg.Lief. 2011.

14 For a comparison of the legal provisions in Japan, Germany and the USSR, see L.F. DAMROSCH, Constitutional Control of Military Actions: A Comparative Dimension, AJIL 85 (1991), 92 (99 et seq.). She speaks of 'the basic antiwar philosophy behind the two clauses' (i.e. the Japanese 'Renunciation of War' clause and its German equivalent), at 99.

15 BVerfGE 90, 286 (345 et seq.).

the Court's opinion, the permission to enter a collective security system includes the authorization to fulfil all the tasks typically arising from membership in such a system. Accordingly, it allows the use of the armed forces within the framework of collective security systems, e.g. peace-keeping operations based on Security Council resolutions. The decision to deploy troops is, however, not left to the government. Since the armed forces have to be firmly integrated into the democratic constitutional order, the German *Bundestag* has to give its prior explicit consent to such a mission.[16]

Taking a closer look at the structure of this legal regime under the Basic Law, it becomes apparent that the German armed forces may be used *first* and foremost for defence purposes (i.e. individual and collective self-defence), and *secondly* in those cases in which the Basic Law explicitly permits its use, including the use within the framework of a 'system of mutual collective security' in accordance with Article 24 (2) GG. What at first sight seems to be a sensible compromise – weighing a country's need to defend itself and the political sensitivity of troop deployment abroad, while giving credit to the value of international cooperation – has in fact caused fierce political debates and, what is worse, has proven to be a minefield of legal insecurity on numerous occasions. There are several controversial issues in the debate, the most important of which I will now take up one by one.

The *first* issue concerns the scope of application of Article 87a GG. When it was introduced in the German Basic Law in Part VIII on the 'Enforcement of Federal Laws and the Federal Administration', the systematic structure of the Basic Law suggested that it was intended to govern the use of the *Bundeswehr* within the German borders.[17] It was certainly inconceivable at that time that German armed forces were once again to be deployed in other countries to conduct combat operations, a taboo that was broken only much later with Germany's participation in the NATO humanitarian intervention in Kosovo in 1999. Does the historic intention of the drafters lead us to conclude that Article 87a GG covers only the use of the armed forces within German territory, and that, as a consequence, out-of-area deployment is subject to international law only?[18] Or do we draw from the inclusive wording of this article that it governs out-of-area deploy-

16 The need for explicit parliamentary consent was elaborated by BVerfGE 90, 286 (384 et seq.) and is not expressly stipulated in the Basic Law; see DEPENHEUER, supra note 13, para. 143; for more details, see KÖNIG, supra note 12, 124 et seq.; M. ZÖCKLER, Germany in Collective Security Systems: Anything Goes?, EJIL 6 (1995), 274 (at 282 et seq.).

17 See EPPING, in: BeckOK, Art. 87a GG, para. 18 et seq.

18 See G. NOLTE, Bundeswehreinsätze in kollektiven Sicherheitssystemen, ZaöRV 54 (1994), 652 (655 with further references); R. WOLFRUM, Terrorismus-Bekämpfung auf See, HANSA 140 (2003), 12 (14 et seq.) is of the opinion that in view of its main objective, namely to prevent acts of aggression against other states, Art. 87a GG is not applicable to the fight against piracy; see also R. WOLFRUM, Fighting Terrorism at Sea: Options and Limitations under International Law, in: Frowein, et al. (Hrsg.), Negotiating for Peace, Liber Amicorum Tono Eitel, 648 (656 et seq.); M. ALLMENDINGER / A. KEES, Störtebekers Erben, NZWehrR 2008, 60 argue for a restrictive interpretation in this specific case relying on the fact that anti-piracy operations were clearly not in the minds of the drafters.

ments as well?[19] The German Federal Constitutional Court evaded this question in its AWACS judgment of 1994,[20] considering Article 24 (2) GG the only relevant constitutional basis for the out-of-area deployment of German troops under UN control.[21] Accordingly, it did not touch upon the controversial question whether Article 87a GG is applicable to out-of-area operations. In contrast, the German Federal Administrative Court (*Bundesverwaltungsgericht*) is of the opinion that each deployment of the German armed forces is regulated by Article 87a GG, and that Article 24 (2) GG is a provision explicitly allowing out-of-area operations.[22] The wording as well as the object and purpose of Article 87a GG point to a broader interpretation of its scope, i.e. out-of-area operations are within its scope of application.

The *second* issue refers to the concept of 'use' or 'deployment' (*Einsatz*) of the armed forces. It is generally agreed that merely technical, logistical and humanitarian support for UN or other operations does not fall under the term 'deployment'.[23] Apart from these cases, the meaning of the term 'deployment' is not clear. Let me use the case at hand as an example: Is the operation against Somali pirates such a deployment of troops, or could it be argued that piracy is a crime, and actions against piracy are law enforcement actions that are distinct from military actions, while Article 87a GG covers military actions only? This position has been taken by some scholars who strictly distinguish between genuinely military and law enforcement action.[24] This seems to be the same line of argument taken to distinguish law enforcement action under the Japanese Anti-Piracy Act from the use of (military) force in the sense of Article 9 of the Japanese constitution. Taking into consideration the legislative history and the objective of Article 87a GG – namely, the regulation and control of any kind of enforcement action by the German armed forces as part of the executive power[25] – it seems, however, preferable to see law enforcement actions conducted by the military included in the term 'deployment'. This argument is even more convincing when military means are used.[26]

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19 See EPPING, in: BeckOK, Art. 87a GG, para. 18

20 BVerfGE 90, 286 et seq.

21 See KÖNIG, supra note 12, 117 et seq.

22 BVerwG, NVwZ-RR 2007, 257 (259).

23 See KÖNIG, supra note 12, 111.

24 See U. FASTENRATH, Zur Verfassungsmäßigkeit unilateraler Pirateriebekämpfung durch die Deutsche Marine, in: Hestermeyer/König et al. (eds), Coexistence, Cooperation and Solidarity, Liber Amicorum Rüdiger Wolfrum, vol. 2, 2012, 1935 (1944 et seq.); M. STEHR, UN-Resolution 1816 – neue internationale Dimension der Pirateriebekämpfung, citation in K. BRAUN / T. PLATE, Rechtsfragen der Bekämpfung der Piraterie im Golf von Aden durch die Bundesmarine, DÖV 2010, 203 (at 205, footnote 14).

25 BVerwG, NVwZ-RR 2007, 257 (260); M. SCHULTZ, Die Auslandsentsendung von Bundeswehr und Bundesgrenzschutz zum Zwecke der Friedenswahrung und Verteidigung, Völker- und verfassungsrechtliche Analyse unter besonderer Berücksichtigung der Entscheidung des Bundesverfassungsgerichtes zum Einsatz deutscher Streitkräfte vom 12. Juli 1994, 1998, 160 et seq.; EPPING, in: BeckOK, Art. 87a, para. 17; M. BOTHE, Völkerrecht und Verfassungsrecht, FAZ v. 30.06.2008, 9.

26 DEPENHEUER, supra note 13, para. 102 et seq.

The *third* issue regards the notion of 'defence' (*Verteidigung*). How should this concept be interpreted and where do we draw the line? The German navy operating in ATALANTA may be seen as defending vital German commercial interests and the security of supply chains. It seems, though, extremely doubtful whether Article 87a GG can really be interpreted to mean that the German armed forces can be deployed to protect German trade interests all over the world. However, could it be 'defence' to assist a German-flagged merchant vessel being attacked by a pirate skiff? Is the attack on a German-flagged vessel not at least similar to an attack on the country itself? The object and purpose of Article 87a GG – to restrict the use of the armed forces to defence operations in order to prevent a resurgence of German militarism after the 2nd World War – imply a rigid interpretation of the term 'defence' that reduces it to situations covered by the provision on individual and collective self-defence, as codified in Article 51 of the UN Charter. In this context, let me point out that we do not have an authorization comparable to that in Article 82 of the Japanese Self-Defence Forces (SDF) Act, which allows SDF measures abroad to protect vessels flying the Japanese flag or being otherwise closely connected to Japanese interests.

Once it is settled that (1) Article 87a GG applies to out-of-area operations, (2) the troops are actually deployed in the sense of Article 87a GG, and (3) the operation against Somali pirates is not for defence purposes, an explicit permission in the Basic Law is needed according to Article 87a (2) GG. Since the German armed forces act within an international framework, Article 24 (2) GG is pertinent; as already mentioned, this allows military operations that form part of a 'system of mutual collective security'. Determining what kind of international military cooperation is covered by this term, though, has proven to be challenging. For decades, scholars of constitutional law fought over the correct meaning of this term. Many were of the opinion that only classical collective security systems are covered, i.e. systems to deter and combat the use of force by one member of the system against other members. Defence alliances targeted at the use of force by external aggressors would have been left out.[27] In the AWACS judgment, the Constitutional Court chose the more extensive interpretation that covers both kinds of security systems.[28] Nowadays, it is agreed that the United Nations – and thus actions based on Security Council resolutions – as well as NATO form such a system.[29] A different question that seemed settled before but has arisen again by an *obiter dictum* in the German Constitutional Court's judgment on the Treaty of Lisbon, however, is whether the EU can already be characterized as a 'system of mutual collective security'. Whereas the German government and parliament implicitly acknowledged the EU as a collective security system, the Constitutional Court and some scholars seem to raise

27 For details, see KÖNIG, supra note 12, at 112 et seq.; ZÖCKLER, supra note 16, at 276 et seq.
28 BVerfGE 90, 286, at 347 et seq.; confirmed by BVerfGE 104, 151, at 209 et seq.; 121, 135, at 157.
29 BVerfGE 90, 286, at 349 et seq.

some doubts.[30] In view of the development of the Common Security and Defence Policy in the Treaty of Lisbon, a good argument can be made, however, in favour of the European Union having already grown into a 'system of mutual collective security' in the sense of Article 24 (2) GG.[31]

Moreover, it is a topic of debate which provisions of the Basic Law can serve as explicit permissions in the sense of Article 87a (2) GG. This issue is especially relevant in cases where collective action has not yet been agreed upon. Before Operation ATALANTA was started in December 2008, there was a lot of discussion over whether the German navy could take unilateral action against Somali pirates on the basis of Article 25 GG, which states that 'the general rules of public international law constitute an integral part of federal law'. This provision has been interpreted to mean that in all cases in which customary international law permits military action, the German armed forces may be deployed.[32] This would certainly allow unilateral military action against piracy, which can be based on a customary international law regime (codified in Article 100-107 UNCLOS). Can the very general reference in Article 25 GG, however, be taken to fulfil the requirement set up by Article 87a (2) GG – *explicit* permission? The wording as well as the object and purpose of Article 87a (2) GG are not in favour of such a broad interpretation. Therefore, unilateral action against piracy by the German navy cannot be based on Article 87a (2) in connection with Article 25 GG.[33]

As if matters were not complicated enough, an underlying principle of the use of military force is the separation between police powers and military action. It guarantees that police powers and military actions are strictly separated. This doctrine is a response to the practice of paramilitary police units in the Third Reich. It is another contentious debate among legal scholars whether the separation doctrine (*Trennungsgebot*) applies to out-of-area operations or whether it is only applicable to the internal use of the

30 BVerfGE 123, 267, at 361: 'Auch wenn die Europäische Union zu einem friedenserhaltenden regionalen System gegenseitiger kollektiver Sicherheit im Sinne des Art. 24 Abs. 2 GG ausgebaut würde…' (translation: Even if the European Union were to be further developed into a peacekeeping regional system of mutual collective security within the meaning of Article 24(2) of the Basic Law…); see M. TRÉSORET, Seepiraterie, 2011, 551.

31 See, e.g., S. SCHMAHL, Die Bekämpfung der Seepiraterie, AöR 136 (2011), 44 (84); BRAUN / PLATE, supra note 24, at 207 et seq.; D. KÖNIG, Der Einsatz von Seestreitkräften zur Verhinderung von Terrorismus und Verbreitung von Massenvernichtungswaffen sowie zur Bekämpfung der Piraterie: Mandat und Eingriffsmöglichkeiten, in: Andreas Zimmermann et al., Moderne Konfliktformen – Humanitäres Völkerrecht und privatrechtliche Folgen, Berichte der Deutschen Gesellschaft für Völkerrecht 44 (2009), 203 (231 et seq.), with further references.

32 J. FROWEIN, Deutschlands Marine darf schon jetzt Piraten verfolgen, Spiegel Online, 26.11.2008, available at *http://www.spiegel.de/politik/deutschland/0,1518,592618,00.html.*

33 This conclusion is shared by SCHMAHL, supra note 31, at 83; BRAUN / PLATE, supra note 24, at 206; S. SCHIEDERMAIR, Piratenjagd im Golf von Aden, AöR 135 (2010), 185 (215 et seq. and footnote 173); A. FISCHER-LESCANO, Bundesmarine als Polizei der Weltmeere, Völker-, europa- und verfassungsrechtliche Grenzen der Pirateriebekämpfung, NordÖR 2009, 49 (53).

German armed forces. If this principle were rigidly applied to out-of-area operations, then their actions would be strictly constrained to military measures.[34] Accordingly, it has been argued that the German navy is not competent to arrest pirate suspects and transfer them to states in the region, such as Kenya and the Seychelles, for detention and prosecution. Such measures are clearly in the realm of law enforcement and fall within the competence of the German federal police (*Bundespolizei*), which acts in maritime areas beyond the territorial sea as a coast guard.[35] Currently, however, it is not adequately equipped to combat piracy off the Somali coast. This seems to be more or less the same situation as in Japan. In order to enable the German armed forces to participate in multilateral military operations in the framework of a collective security system, the better argument can be made for not applying the separation doctrine to out-of-area operations. Otherwise, the mandates for international cooperative actions which usually do not distinguish between police and military powers cannot be fulfilled.[36] In the case of combating piracy, an additional argument against the applicability of this doctrine is Germany's obligation under Article 100 of the UN Convention on the Law of the Sea to 'cooperate to the fullest possible extent in the repression of piracy on the high seas'.

To sum up, the German navy is only allowed to operate against Somali pirates within a system of mutual collective security – namely, within the EU Operation ATALANTA, as authorized by the *Bundestag*. Apart from assistance in the case of an imminent attack (Art. 98 UNCLOS), unilateral action is not permitted. One of the practical consequences is that the German navy may not free vessels that are already in the hands of pirates outside of the operational area of ATALANTA, because parliamentary consent is restricted to action within this area. This case arose when the German-flagged vessel *Taipan* was seized by Somali pirates outside of the ATALANTA area. Fortunately, the Netherland's navy was closer to the vessel and up for the task of freeing the ship, but this example shows the negative consequences of the current legal situation. It would have been a breach of the Constitution had the German navy freed the *Taipan* – a vessel of the German merchant marine. In conclusion, under current constitutional law the German navy is able and equipped to operate against pirates, but is bound by constitutional shackles, whereas the German federal police is competent by law to operate, but does not have the means to do so – a paradoxical situation.

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34 Ibid., at 54 et seq.; A. FISCHER-LESCANO / T. TOHIDIPUR, Rechtsrahmen der Maßnahmen gegen Seepiraterie, NJW 2009, 1243 (1246); SCHMAHL, supra note 31, at 88 et seq.; BRAUN / PLATE, supra note 24, at 208 et seq.

35 Cf. § 6 (1) of the Federal Police Act (*Bundespolizeigesetz*), which states in translation: 'Without prejudice to the competence of other authorities or the armed forces, the federal police takes those measures at sea outside the territorial sea to which the Federal Republic of Germany is entitled under international law. This does not apply to measures that are assigned by federal law to other authorities or agencies or that are reserved solely for warships.'

36 See also SCHIEDERMAIR, supra note 33, at 217.

To solve these pressing issues, a constitutional amendment seems necessary to clarify the tasks of the *Bundeswehr*, which have certainly changed significantly in recent years, and to give legal certainty to political decision-makers, military personnel and alliance partners. This conclusion has been agreed upon by many, yet it remains politically extremely controversial, as mainly conservative politicians are pushing for a package deal and also want to extend the mandate of the *Bundeswehr* within German borders, e.g. in the case of a terrorist attack. In addition to a constitutional amendment, the competencies of the federal police and the German armed forces need to be clarified by national legislation and adjusted to meet the realities of today's multilateral missions. Perhaps Japan's new Anti-Piracy Act could serve as a role model for the urgently needed German legislation in this field.

The last issue I want to mention is whether new legislation is needed permitting German soldiers to arrest pirate suspects and transfer them to third countries for criminal proceedings. Under German constitutional law, each state act that restricts basic rights, such as the right to liberty, of the person concerned, has to be authorized by legislation. Since such legislation does not exist, it has been argued that the mandate given to the German navy by the *Bundestag* is sufficient. This mandate refers to the pertinent Security Council Resolutions, the Council Joint Action adopted by the EU and to the 1982 UN Convention on the Law of the Sea. Article 105 UNCLOS states that 'every State may seize a pirate ship…or a ship…under the control of pirates, and arrest the persons and seize the property on board. The courts of the State which carried out the seizure may decide upon the penalties to be imposed….' It is far from clear, though, whether this provision allows the capturing state to transfer pirate suspects to a third state.[37] Consequently, it is doubtful whether the mandate can be regarded as a sufficient authorization in this respect.[38] Therefore, a good argument can be made that specific legislation is needed to authorize such arrests and transfers.

One final remark: It is in good order in a democratic society to have controversial political debates and ask for parliamentary authorization before deploying the armed forces out-of-area, but it is certainly beyond that democratic process to burden military personnel with the accusation that the operation they are conducting and in which they

37 Against this proposition, E. KONTOROVICH, International Legal Responses to Piracy off the Coast of Somalia, ASIL Insights, Vol. 13 (2), 6.2.2009; A. FISCHER-LESCARNO / L. KRECK, Piraterie und Menschenrechte, AVR 47 (2009), 481-524 (514). In favour of it, J.A. ROACH, Countering Piracy off Somalia: International Law and International Institutions, AJIL 104 (2010), 397-416 (404); A. VON ARNAULD, Die moderne Piraterie und das Völkerrecht, AVR 47 (2009), 454-480 (469). For a general evaluation of the legal issues of such transfers, see R. GEIß / A. PETRIG, Piracy and Armed Robbery at Sea, 2011, 186 et seq.

38 The Administrative Court of Köln left this question unanswered when it rendered its judgment on the legality of the transfer of piracy suspects to Kenya on 11. November 2011 (Az. 25 K 4280/09) and refers only to Art. 105 UNCLOS; concerning this question, see also R. ESSER / S. FISCHER, Festnahme von Piraterieverdächtigen auf Hoher See – Geltung des § 127 StPO im Rahmen der Operation Atalanta, ZIS 13/2009, 771-783; FISCHER-LESCARNO / KRECK, supra note 37, 502 et seq.

might put their lives at risk is in fact a breach of the German Constitution. It is the responsibility of the German government and the legislature to remedy this unacceptable situation.