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APPREHENSION, ARREST, DETENTION AND TRANSFER OF SUSPECTED PIRATES AND ARMED ROBBERS WITHIN THE LEGAL FRAMEWORK OF THE EUROPEAN SECURITY AND DEFENCE POLICY (ESDP): THE "MANTRA" OF THE EXISTENCE OF A PROPER LEGAL BASE

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Apprehension, arrest, detention and transfer of suspected pirates and armed robbers within the legal framework of the European Security and Defence Policy (ESDP): the "mantra" of the existence of a proper legal base

Jean-Paul Pierini

Abstract

La struttura e il funzionamento, dopo l'entrata in vigore del Trattato di Lisbona, dell'Unione europea e della PESD in particolare, appaiono complessi e tuttora da esplorare. La rapida definizione di un significativo quadro legale (SOFA e accordi per il trasferimento delle persone catturate) per le operazioni di contrasto della pirateria nell'ambito della PESD, ha suggerito l'idea di una maggiore facilità per l'Unione europea, piuttosto che per la NATO e le singole Nazioni partecipanti, di rispettare la *CEDU*. Tale idea è fondamentalmente sbagliata, poiché al di là delle apparenze, le "azioni" dell'Unione europea (come del resto le "azioni comuni", prima dell'entrata in vigore del Trattato di Lisbona) non hanno natura legislativa. Stupisce, inoltre, come avendo riguardo ai tentativi di rafforzare e costruire *efficacy* meccanismi per la cooperazione giudiziaria sotto l'*ex* "terzo pilastro", con un'azione comune (*olim*) e accordi con Stati terzi, si siano potuti attribuire ad un organo dell'Unione europea poteri che eccedono quelli ipotizzati per un'autorità giudiziaria europea.

Structure and functioning of the European Union and specifically the PESD after the entry into force of the Lisbon Treaty are quite complex. The rapid establishment of a legal framework for counter-piracy operations (SOFAs and Agreements on the transfer of apprehended pirates and armed robbers) within the PESD mechanism has suggested the idea that compliance with established human rights mechanism, is easier within the EU rather than within NATO or at National level. Such a suggestions is basically ill founded as beyond the appearance, actions (and joint actions before the entry into force of the Lisbon treaty) may not have the same reach legislative acts have. Having regard to the efforts under the former "third pillar" of the EU, one could wonder that under the former "second pillar", through joint actions and treaties with third States, o EU body has been afforded with powers and attributions exceeding those member States are willing to attribute to an EU judicial authority.)

Keywords

Apprehension - Arbitrary detention - Armed Robbery - Arrest - European Union - ECHR - Extradition - Human Rights - Piracy - Somalia - Transfer - UNCLOS

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Summary: 1. Introduction.- 2. Legal framework for the repression of piracy and armed robbery in a nutshell.- 3. Arrest, detention and transfer of suspected pirates and human rights obligations.- 4. State "non accountability paradigms" in their evolution.- 5. ATALANTA and EU involvement in the repression of piracy: the legal architecture developed for detention and transfer.- 6. Joint actions and agreements adopted by the European Union as a legal basis for detention?.- 7. The current and future relationship between the ECHR and the EU in a nutshell.- 8. Conclusion.

1. Introduction

The aim of this article is to outline the legal implications of apprehension, arrest (as well as "capture" and any other corresponding term), detention and transfer of individuals under the European Union (EU) legal framework.

A short overview of the legal framework for the repression of piracy, the European Union principles and the European Human Rights Convention (ECHR) is provided; references to the Treaty on European Union (TEU), the Treaty on the European Community (TEC) and the recently renamed Treaty on the Functioning of the European Union (TFEU) will be made. As the "pillars-structure" disappeared on 1st December 2009 when the Lisbon Treaty came into force, this paper also takes into account the new legal framework.

The conclusions drawn will demonstrate that with regard to ECHR-obligations States operating within the ESDP legal framework are in exactly the same position as those operating either unilaterally or within the NATO framework.

2. Legal framework for the repression of piracy and armed robbery in a nutshell

The recent recrudescence of piracy and armed robbery along the coasts of Somalia stimulated the United Nations Security Council (UNSC) to adopt a set of resolutions calling States to suppress piracy.

States shall repress piracy in accordance with the United Nations Convention on the Law of the Sea of 10 December 1982 (UNCLOS), assuming that they have adopted an appropriate domestic legislation. UNSC Resolutions cannot amend domestic law in the sense of an "extension clause", or extend the regime of jurisdictional links under domestic law with regard to acts taking place in territorial waters of a foreign sovereign State. Armed robbery is to be repressed in Somali territorial waters by the Somali Federal Transitional Government (TFG) as it would be the case on high seas.

The reference to UNCLOS prevents any attempt to identify the Law of Armed Conflict (LOAC) as the legal framework – even if the Unites States are perhaps evaluating the extension of their legal doctrine in respect of illegal combatants and "drone-warfare" to pirates and armed robbers. Counter-piracy operations are pure law enforcement operations. The only reference to LOAC can be found in respect to operations on Somali land territory.

Although short of implementation measures under domestic law, States have mostly shown the willingness to participate in the international crusade against piracy and – with some

* This paper has been drafted relying on the readers' widest comprehension for the "principle of non attribution"; it reflects the personal views and/or opinions of the author only and does definitely not intend to reflect the views or opinions of the Italian MOD, the Navy the EO or NATO. Any comment or clarification is welcome and can be sent to the author's email address (pierini.jeanpaul@libero.it).

exceptions – at the same time demonstrated the unwillingness to punish pirates within their own legal systems.

National legal problems related to counter-piracy operations, range from the constitutional prohibition of conducting law enforcement operations by military forces to absence of legal provisions for arrest and detention as well as of respective review mechanisms.

The agreements on transfer of detainees support the participating States in their efforts to deter and disrupt piracy without getting directly involved in the punishment of pirates.

The EU has shown its willingness to support member States by concluding an agreement with Kenya and Seychelles under *ex* article 24 TEU (now article 37) for the transfer of captured pirates and armed robbers.

The recent development represented by the Kenyan decision to no longer accept pirates captured by the EU coalition due to the impact of such transfer on its judicial and prison system (perhaps also determined, as a response to the ICC Pre-trial Chamber's decision to authorize the prosecutor to investigate into the 2008 deaths), led to a new strategy consisting in the destruction of pirate equipments and the release of pirates, whilst EU is focussing on new "partners" willing to accept the transfer of pirates (Republic of Mauritius and still Tanzania). On the other side NATO, is aiming too at the conclusion of agreements for the transfer of captured suspect pirates and armed robbers in the attempt to "fill the gap" with the EU.

The Security Council on his own is involved with the issue of the possible options in the prosecution and imprisonment of pirates and armed robbers and the perspective of "splitting" prosecution and imprisonment; the later to be carried out in Somalia and its territorial entities without Statehood (Somaliland and Puntland) thanks to the efforts of UNODC.

3. Arrest, detention and transfer of suspected pirates and human rights obligations

The ECHR may have an "exotic flavour" in several of the States cooperating in the fight against piracy which include Cina, Japan, Korea, Iran, the United States and Canada; but arguments raised in Europe were taken into consideration in U.S. District Courts and in positions adopted by the U.S. Supreme Court .

All EU Member States (and in the future maybe the EU) are party to the ECHR . Russia is too, but taking into consideration the attitude of Russia towards the "territorial application" of the ECHR, one could argue that the outreach of the Convention wasn't a concern to those supporting the "die at Sea policy" in respect of released pirated abandoned without supplies and fuel at Sea. Nevertheless, the human rights implications for the apprehension, detention and transfer of pirates and armed robbers are the following:

a) piracy and armed robbery must be criminalized under domestic law ;

b) deprivation of liberty must be established by law and carried out in accordance with such law (art. 5, para 1, ECHR) . This means that provisions with regard to deprivation of liberty must exist under the domestic law of the apprehending, arresting or detaining State, and that those provisions must be applied correctly. States have shown a tendency to interpret the ECHR decision *Medvedyev v. France* as supporting the argument that authority to detain may be inferred from an international agreement in force, if such agreement is sufficiently precise, like UNCLOS;

c) *ex officio* judicial review must be granted and the individual must be brought without delay before an independent judge (art. 5, para. 3, ECHR). Even when asserting the individual is detained for extradition [like] purposes, the individual must be granted the right to (minor) challenge the detention. Taking into account the circumstance of the detention, the right to ex officio judicial review (or the minor right to challenge the detention) can be postponed, but it cannot be annihilated, nor deferred to the authorities of the receiving State;

d) fair trial guarantees concur with guarantees established by article 6 of the ECHR.

4. State "non accountability paradigms" in their evolution

The applicability of mechanisms developed by the ECHR in order to deny the jurisdiction *ratione personae* will be assessed in the event of human rights breaches.

The "*Saramati* paradigm", in which the UN is being held accountable, requires a resolution by the UNSC specifically authorizing detention or at least authorizing «any necessary means» in order to fulfil a certain task: a reporting mechanism up to the UNSC; conditions of "effective control" by the International Organization. A neglected aspect of the issue is represented by the existence of a residual discretion and capability of States to fulfil the mandate in compliance with international Human Rights standards.

The *Saramati* decision influenced the case *Al-Jedda v. Secretary of State for Defence* rendered by the UK House of Lords. The international framework for responsibility of the international organization has been defined more precisely and the House of Lords affirmed that there must be a limit in the compression of human rights and considered that some human rights violation cannot be held compatible with a UNSCR mandate (e.g. torture, inhumane and degrading treatment, discrimination and so on).

The *Saramati* decision must have impressed the U.S. District Courts facing the issue of habeas relief on application of U.S. citizens detained in Iraq by the MNF-I. At a later stage, the U.S. Supreme Court held in *Munaf and Geren v. Genger* that U.S. Courts have habeas jurisdiction under 28 U.S.C. 2241 and that MNF-I is under a non-interrupted, fully and exclusively responsible U.S. Chain of Command.

Munaf and Geren influenced the legal arguments used in the *Al Saadoon & Mufdhi* case in domestic courts. The applicants later brought a claim in Strasbourg and the ECHR based its admissibility of 30 June 2009 decision considering «detention on behalf of Iraqi authorities» as a matter of cooperation with Iraqi judicial authorities. In its admissibility decision, the ECHR seems to overrule *Saramati* when, in order to affirm its jurisdiction *ratione personae*, it argued that based on the CPA Regulation 17, premises (i.e. also prison facilities) were inviolable and under the exclusive jurisdiction of the U.K. The later definitive decision by the Grand Chamber affirmed that the applicants were within the jurisdiction of the U.K. but left the question open if the decision is to be considered a mere (extraterritorial) development of *Soering,* applicable to death penalty cases only or, at the opposite, if *Saramati* has to be considered definitively overruled as to the imputability of the violation. Perhaps the incoming decision of Grand Chamber in the joint cases of *Al Skeini and Al Jedda* will cast more light on the issue. The questions posed by the decision are really slippery and still open to outcomes confirming *Saramati,* as well as adhering to the approach of the ECJ in *Kadi.*

In any case, one could try to speculate since now, how and to which extent the paradigm of non-accountability could work with regard to authorized counter-piracy operations as the UNSC Resolution does not require a unified command for the mission, identifies the proper legal framework in the UNCLOS and contains a "human rights" compliance clause.

5. ATALANTA and EU involvement in the repression of piracy: the legal architecture developed for detention and transfer

Issuing the Joint Action 2008/851/CFSP of 10 November 2009, the EU Council decided to conduct the military operation ATALANTA sustained by UNSCR 1814, 1816 and 1838. The goal was to support the activities of member States deploying military assets in theatre, with a view to facilitating the availability and operational action of those assets.

Article 2, lit. e), defined the mandate of the mission, established that in order to allow the exercise of jurisdiction by States willing to do so, ATALANTA shall allow to arrest, detain and

transfer persons suspected of having committed acts of piracy and/or armed robbery as well as seize pirate vessels and goods under the control of pirates or armed robbers.

Based on article 12 Joint Action, arrested and detained pirates and/or armed robbers may be transferred for prosecution to the authorities of «the Member State or of the third State participating in the operation, of which the vessel which took them captive flies the flag» ; if such State decides not to exercise its jurisdiction it will be transferred to the authorities of any other State willing to exercise its jurisdiction provided that human rights requirements are fulfilled (article 13). Subsequently an OPLAN for ATALANTA was developed and approved on 1 December 2008.

The first capture of suspected pirates was carried out by a German frigate whose military personnel lacked law enforcement powers and whose domestic law afforded the individual with the right to ex officio judicial review of the detention or apprehension within the subsequent day. Soon after the apprehension, the contributing State declared not to be willing to prosecute the apprehended individuals and that they were detained under "European laws", meaning something in between EU legal sources, ECHR's "justified delay" in granting judicial review and authority to detain granted directly by UNCLOS based (*a contrario*) on the *Medvedyev* decision.

This was perhaps the "legal turning point" of the operation: detention became alternatively a "national responsibility" – if an appropriate legal basis for a detention was given under domestic law - or an "EU driven detention", in case such legal basis was missing or the State in question "somehow" decided not to exercise its jurisdiction.

Transfer of detainees to States willing to prosecute the suspects was implemented as a EUNAVFOR competence despite some initial uncertainties in transfer procedures of detainees to Kenya (e.g. notification of the transfer provided to Kenya by the State making the capture).

Apparently, the EU direct accountability (or non accountability) does not need to go through a "*Saramati* lookalike paradigm": detention for transfer purposes and the transfer itself are alleged to be directly imputed to EUNAVFOR. Besides, ECHR compliance and the legal basis for detention as required by its article 5, para. 1, ECHR are asserted to exist.

6. Joint actions and agreements adopted by the European Union as a legal basis for detention?

Joint Actions are the formal instruments by which EU Member States decided to establish an operational step within their (former) inter-governmental cooperation , but not an appropriate legal basis in order to establish a mechanism for arrest, detention and transfer of detainees. With the entry into force of the Lisbon Treaty on 1st December 2009, article 24 of the Treaty on European Union, replacing the former article 11, clearly defines the ambit of the Common Foreign and Security Policy (CFSP) which «shall be defined and implemented by the European Council and the Council acting unanimously, except where the Treaties provide otherwise» and state that «the adoption of legislative acts shall be excluded».

The legal basis for acting in Somali territorial waters is the UNSC resolutions dealing with piracy and armed robbery off the coast of Somalia and refer primarily to UNCLOS (as implemented by Contributing States) and the consent of Somalia to the exercise of (executive) jurisdiction in Somali territorial waters. There is no higher authorization which refers to detention as an implicit "tool" for countering piracy.

The (former) EC has accessed the UNCLOS because the EC exercised some of its "exclusive competencies" in matters incidentally covered by UNCLOS like fishery. Some new competencies of the EU under the Lisbon Treaty will benefit from the accession to UNCLOS, like neighbourhood relations, but the repression of piracy has not become an exclusive EU competence.

Member States may transfer their own competencies to the EU to empower the EU to exercise jurisdiction in respect of pirates and armed robbers through appropriate bodies. Though, such a step would require an amendment of the Treaty on European Union and/or the Treaty on the Functioning of the European Union. States are not prevented from transferring such competences by the ECHR, but the transfer implies the existence *in concreto* of guarantees at least equivalent to those established under the ECHR .

Article 5, para 1, ECHR requires legal certainty and such certainty may be granted by law and even by States jurisprudence. A Joint Action is not an international agreement nor an appropriate legal base. However, it could be asserted that UNCLOS directly establishes a proper and sufficiently precise legal basis enabling States, to capture and detain pirates.

In my view, Article 105 of UNCLOS and the provision that the apprehending State "may" apply its laws, though not obliged to do so, represents an intrinsically contradictory element, weakening the assertion that article 105 provides itself legal certainty as to the existence of a cause for detention.

The authorization vis-à-vis other States to capture pirate vessels and its crew and to apply its own criminal laws needs to be supported by proper and adequate provisions under domestic law in order to grant legal certainty.

Additionally, if detention powers are to be exercised directly by the EU, the standards developed under article 5, para. 1, ECHR would require the conferral of competence to be assisted by the same degree of legal certainty.

Agreements concluded by the European Union may well be internationally binding under the Treaty on the European Union even if national constitutional constraints and procedures are neglected. Though, this does not per se prevent a scrutiny of the Treaty on the European Union under national constitutional rules if, for example, the subject matter of an agreement is covered by a "*caveat*" requiring a formal ratification by law. This may happen if the agreement covers issues pertaining to the freedom of the individual.

«As long as», «so lange» and similar expressions are, on the other side, the paradigm adopted to justify the enduring "self restraint" of constitutional Courts in exercising their control in respect of acts of the EC, subject to the existence of a substantially equivalent framework of guarantees provided by the European Court of Justice (ECJ) and the (European) Court of First Instance; guarantees which does not extend to the ESPD.

Bearing in mind the prohibition to adopt "legislative acts" within the ESDP (new articles 24 and 31), agreements the Union concluded within the ESPD framework will have no substantive direct effect and will require implementation through legislative acts by the Union – if the subject matter competence has been conferred to it – or by the Member States, if such competence is retained as in all matters involving deprivation of liberty .

There are also limits to the content of agreements which may be negotiated by the EU: agreements may not be used to establish or enhance powers and amend principles established under the TEU. This point is less obvious than it may appear, taking into account that the agreement with Kenya contains references to persons captured and detained by the European Naval Force (EUNAVFOR) and provisions on the transfer of the detainee upon request by EUNAVFOR (art. 2). The agreements concluded between the EU and Kenya and Seychelles does expressively not affect the participants rights and obligations under any law, this includes domestic law … and human rights obligations.

Having regard to the efforts under the former "third pillar" of the EU, one could wonder that under the former "second pillar", through joint actions and treaties with third States, o EU body has been afforded with powers and attributions exceeding those member States are willing to attribute to an EU judicial authority.

7. The current and future relationship between the ECHR and the EU in a nutshell

Reciprocal relationships between the ECHR and the EU are indeed complicated and are still in a metamorphosis. This relationship may be defined as follows:

a) conflicts between obligations under the ECHR and the EU are addressed primarily by article 351 TFEU , expressively preserving obligations member States have entered prior to 1 January 1958;

b) under article 6, para. 2, TEU, the "Union" shall respect fundamental rights, as guaranteed by the ECHR and «as they result from the constitutional traditions common to the Member States» (para. 3), as general principles «of the Union's law»;

c) when States confer competences to the Union, until the Union itself is bound and obliged by the ECHR, such States remain liable if the competencies are conferred in the absence of guarantees equivalent to those established under the ECHR (see: Bosporus v. Ireland, prefiguring EU accession to the ECHR); a requirement which necessarily takes into account the different levels of involvement of the ECJ;

d) since the entry into force of the Lisbon Treaty «the Union recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union of 7 December 2000, as adapted at Strasbourg, on 12 December 2007, which shall have the same legal value as the Treaties […]». These rights include the right to security and liberty and the right to an effective remedy. The addressees of the Charter are «the institutions and bodies of the Union» and Member States, but only when implementing Union law (art. 51);

e) with the entry into force of the Lisbon Treaty, article 6, para 2, TEU has been rephrased and now reads: «The Union shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms. Such accession shall not affect the Union's competences as defined in the Treaties». This accession will be possible following the entry into force of Protocol 14 ECHR the 1st of June 2010. The Protocol annexed to the Lisbon Treaty deals specifically with the structure of the "accession agreement" to the ECHR, in order to establish a competence (accountability) sharing between the EU and its member States. The agreement on accession shall be concluded unanimously by the Council (Art. 218 TFEU) and shall also be approved by all 47 existing contracting parties to the ECHR in accordance with their respective constitutional requirements. The Council shall obtain the consent of the European Parliament for concluding the agreement on the EU accession and the European Parliament to be fully informed of all stages of the negotiations. Currently EU bodies are still confronting with what looks to become a legal minefield.

8. Conclusion

The legal basis for apprehension, arrest, detention and transfer of suspected pirates or armed robbers is primarily a matter of domestic laws implementing UNCLOS even under ESPD framework.

EU member States remain bound by the ECHR when participating in the anti-piracy crusade and the current EU framework does not provide for any EU direct responsibility which can justify non-accountability of contributing States under ECHR for apprehension, arrest, detention and transfer of suspect pirates and/or armed robbers.

The development represented by the entry into force of the Lisbon Treaty is only apparent. The role of the EJC is limited to situations in which the CFSP invades other EU spheres of competence within the so called "border control competence". This hampers the "effective remedies principle" (art. 47 Charter).

Even the future EU accession to the ECHR must necessarily comply with the asset and powers of the EU. Accordingly, States will remain accountable under the ECHR for those

powers and competences retained by them and - in the author´s view - also for all those competences conferred to the EU or exercised through the EU for which the competence to adopt effective remedies has not been transferred.