

Human Rights and Law Enforcement at Sea:
Arrest, Detention and Transfer of
Piracy Suspects

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Arrest, Detention and Transfer
of Piracy Suspects

by
Anna Petrig



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This book is printed on acid-free paper.

To little Till, Jens and my parents

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There is growing interest in maritime law enforcement, especially in connection with its human rights dimension. However, as regards counter-piracy operations, the legal aspects relating to the human rights of persons subject to arrest, detention and transfer remain under-researched. This is mainly due to the restricted and confidential nature of the factual information necessary to conduct a doctrinal analysis of the pertinent legal provisions and case law. It is only because of first-hand information that I received from a number of experts with

personal knowledge of the arrest, detention and transfer of piracy suspects by virtue of their professional functions or duties that I could conduct the two case studies, which serve as the basis for the ensuing legal analysis. I am incredibly grateful for the experts' availability and willingness to contribute to the project at hand. For confidentiality reasons, I cannot name them individually – however, those individuals who provided me with the necessary information are well aware that the book at hand could not have been realized without their indispensable input.

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Anna Petrig
Basel

List of Abbreviations

Abl.	Amtsblatt der Europäischen Union
App	application
art	article
BBC	British Broadcasting Corporation
c	contra
CAT Committee	Committee against Torture
CAT	Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
CCPR	International Covenant on Civil and Political Rights
CFREU	Charter of Fundamental Rights of the European Union
CFSP	Common Foreign and Security Policy
CJA	Council Joint Action
Comm	Communication
CRC	Convention on the Rights of the Child
CTF	Combined Task Force
CUP	Cambridge University Press
DK	Denmark
Doc	Document
ECHR	Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention of Human Rights)
EComHR	European Commission of Human Rights
ECtHR	European Court of Human Rights
ed	edition / editor
edn	edition
eds	editors
eg	for example / for instance
EMRK	Konvention zum Schutze der Menschenrechte und Grundfreiheiten (Europäische Menschenrechtskonvention)
ETS	European Treaty Series

EU	European Union
EUNAVFOR	European Union Naval Force
FDP	Freie Demokratische Partei
fn	footnote
GASP	Gemeinsame Außen- und Sicherheitspolitik
GG	Grundgesetz für die Bundesrepublik Deutschland
HR Council	Human Rights Council
HRC	Human Rights Committee
ICCPR	International Covenant on Civil and Political Rights
ICJ	International Court of Justice
ICRC	International Committee of the Red Cross
ICTY	International Criminal Tribunal for the Former Yugoslavia
ie	id est
IHT	Iraqi High Tribunal
ILC	International Law Commission
IMAC	International Mutual Assistance in Criminal Matters
IMO	International Maritime Organization
IPBPR	Internationaler Pakt über bürgerliche und politische Rechte
LG	Landgericht
M/S	Motor Ship
n	note
NATO	North Atlantic Treaty Organization
NL	The Netherlands
no / nos	number / numbers
NWV	Neuer Wissenschaftlicher Verlag
OCRTIS	Central Office for the Repression of Drug Trafficking
OEF	Operation Enduring Freedom
OHQ	Operational Headquarters
OJ	Official Journal of the European Union
OPCON	operational control
OUP	Oxford University Press
para / paras	paragraph / paragraphs
PCIJ	Permanent Court of International Justice
PSI	Proliferation Security Initiative
Rep	Reporter
Res	Resolution
RSCAS	Robert Schuman Centre for Advanced Studies
SICO	Special International Crimes Office
SOP	Standard Operating Procedure
StPO	Strafprozessordnung
SUA Convention	Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation

TACON	tactical control
TCN	troop-contributing nation
UDHR	Universal Declaration of Human Rights
UK	United Kingdom
UN	United Nations
UNCLOS	United Nations Convention on the Law of the Sea
UNDP	United Nations Development Programme
UNGA	United Nations General Assembly
UNHCR	United Nations High Commissioner for Refugees
UNICEF	United Nations International Children's Emergency Fund
UNICRI	United Nations Interregional Crime and Justice Research Institute
UNODC	United Nations Office on Drugs and Crime
UNSC	United Nations Security Council
UNSCR	United Nations Security Council Resolution
UNTS	United Nations Treaty Series
UPR	Universal Periodic Review
US	United States
USA	United States of America
v	versus
VCCR	Vienna Convention on Consular Relations
Vol	volume

Introduction

I. Hypothesis: Piracy Suspects Are Holders of International Individual Rights

“[P]irates are common enemies, and they are attacked with impunity by all, because they are without the pale of the law. They are scorners of the law of nations; hence they can find no protection in that law.”¹ This phrase coined by Alberico Gentili, a 16th century scholar, relates to an entirely different type of piracy than what is known today as Somali-based piracy. And yet, Gentili’s perception of piracy suspects as outlaws is reflected to a large extent by the current counter-piracy operations off the coast of Somalia and the region: piracy suspects subject to arrest, detention and transfer are, when seen through the lens of procedural rights and safeguards,² mere objects of decisions and procedures rather than parties with fundamental interests in the issues at stake equipped with procedural means to defend such interests.

As regards the approach to arrest and detention of alleged Somali-based pirates,³ patrolling naval States can, broadly speaking, be divided into two cat-

1 Alberico Gentili, *De iure belli libri tres: The translation of the edition of 1612* (John Rolfe tr, Clarendon Press 1933) 423, para 697.

2 This statement only relates to their status in procedural terms and not to their substantive treatment, ie it does not relate to the manner in which liberty is deprived and detainee treatment (eg mistreatment during this process) or the manner in which a transfer decision is implemented.

3 The notion of “Somali-based pirates” is used in this study as a short and concise way to refer to persons seized by patrolling naval forces off the coast of Somalia and the region on suspicion of piracy or armed robbery at sea. Despite the use of the word “pirate” – without emphasizing each time that they are merely *suspected* of having committed an offence amounting to piracy or armed robbery at sea – it is not yet clear at the time of seizure whether arrested piracy suspects will ultimately be found guilty in terms of criminal law. Put differently, the presumption of innocence obviously applies to them. Furthermore, as a general rule, the notion of “piracy” is used in this study to refer to the criminal phenomenon of Somali-based piracy, rather than the specific offence of piracy. Violence against ships and crews referred to as

egories. A minority of States pursues a “criminal law approach” to deprivation of liberty of piracy suspects. These States apply the ordinarily applicable rules governing arrest and detention on suspicion of criminal activity, including procedural safeguards, to the piracy suspects that they seize. Other States, however, perceive alleged pirates as “extraordinary suspects”. These States take the stance that piracy suspects only enter the door of domestic criminal law – and thus have the relevant rules on arrest and detention on suspicion of criminal activity, including procedural safeguards, applied to them – once the seizing State decides to prosecute them in its own courts. However, as long as the decision whether the seizing State will exercise its criminal jurisdiction over the respective suspect is pending, domestic rules governing deprivation of liberty on suspicion of criminal activity are not applied to him.⁴ If the seizing State ultimately decides not to exercise its criminal jurisdiction over the suspects it intercepted, they will never enter the door of domestic criminal law and are thus unable to follow the judicial avenues leading from that entrance gate. What is more, if the piracy suspects remain detained with a view to their potential transfer after such a negative jurisdictional decision, no specific domestic rules governing this kind of detention generally exist, and the rules on deprivation of liberty with a view to extradition are not applied due to the differing nature of extradition and transfer. As a consequence, any review of their detention pending transfer rarely occurs. Overall, as a general rule, the “extraordinary suspect” approach to deprivation of liberty on suspicion of criminal activity, taken together with the normative gap regarding detention with a view to transfer, inevitably results in piracy suspects being stripped of all procedural safeguards for the entire time they are deprived of their liberty by the seizing State – most importantly, there is no judicial review or control of their arrest and detention possible. In sum, under the “extraordinary suspect” approach to arrest and detention, piracy suspects – similar to the pirates Gentili referred to many centuries ago – do not fall within the protection of law.

Seizing States are only exceptionally willing and able to prosecute piracy suspects they took captive in their own criminal courts. The preferred course of action is to transfer the suspects for prosecution to a third State located in the region prone to piracy. A transfer decision is generally reached through negotiation and cooperation between two States or between a State and EUNAVFOR. Hence, it is not the product of a formalized procedure described in a legal act issued by an administrative and/or judicial body. As a consequence, the potential transferee is not a party to the process that may ultimately result in his transfer. This, in turn, implies that he cannot avail himself of any procedural safeguards

“piracy” potentially fulfils a variety of offence as defined in domestic criminal law, which does not necessarily contain a specific offence of piracy.

4 In the study at hand, only the masculine form is referred to given that thus far no women have been part of pirate attack groups; hence, no female persons have been arrested and detained on suspicion of piracy or armed robbery at sea and ultimately transferred to a third State for prosecution.

– most notably, he is not offered an opportunity to submit reasons against his transfer, that is, to formulate and substantiate a non-refoulement claim. Also, piracy suspects are not granted any possibility to have their transfer decisions reviewed. At best, piracy suspects subject to transfer are informed of the fact that attempts are being made to identify a prosecution venue and/or that transfer is imminent. Another feature of the transfer of piracy suspects is that no individual non-refoulement assessment takes place, which is necessary to determine whether there is a risk that certain human rights of the specific piracy suspect will be violated upon transfer. Rather, actors responsible for transfers take the stance that the principle of non-refoulement is sufficiently protected by concluding transfer agreements with States of the region ready to accept piracy suspects for prosecution, which contain clauses prohibiting ill-treatment and the imposition of the death penalty against transferred piracy suspects and granting various fair trial rights to them. It is argued that such agreements are only concluded if the transferring entity deems the prison conditions and the manner in which criminal cases are investigated and prosecuted by the receiving State to be in line with international human rights law generally and the guarantees protected by the prohibitions of refoulement specifically. Hence, the prevailing view is that this global non-refoulement assessment carried out prior to concluding a transfer agreement renders individual assessments obsolete. When taken as a whole, the characteristics of transfer proceedings are such that piracy suspects are mere objects rather than parties with fundamental interests in the outcome of such procedures armed with procedural tools to effectively formulate and substantiate a non-refoulement claim.

It is submitted here that the “extraordinary suspect” approach to arrest and detention of piracy suspects, and the practice of treating them as mere objects of proceedings involving their transfer, stands in contradiction and defiance of the idea that piracy suspects too are holders of international individual rights, most notably stemming from international human rights law.⁵ Hence, this study

5 This study is based on the assumption that international law as it stands now acknowledges the idea of “international individual rights” (see Anne Peters, ‘Membership in the Global Constitutional Community’ in Jan Klabbers, Anne Peters and Geir Ulfstein (eds), *The Constitutionalization of International Law* (OUP 2009) 171); for a theoretical conceptualization of this idea, see Anne Peters, ‘Das subjektive internationale Recht’ in Peter Häberle (ed), *Jahrbuch des öffentlichen Rechts der Gegenwart* (Mohr Siebeck 2011); on the position of the individual in the international legal system, see Kate Parlett, *The Individual in the International Legal System: Continuity and Change in International Law* (CUP 2011). As regards human rights law specifically, this study rests on the premise that human rights treaties ascribe legal rights to individual human beings themselves and that they are not mere third party beneficiaries – a view notably reflected in HRC, ‘General Comment No. 26: Continuity of Obligations’ in ‘Note by the Secretariat, Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies: Vol I (2008) UN Doc HRI/GEN/1/Rev.9 (Vol. I) para 4, where to Committee stated that “rights

argues that the failure to perceive piracy suspects as *subjects* of the disposition procedure – most notably in matters involving deprivation of liberty and their potential transfer for prosecution – amounts to a violation of various international individual rights with a procedural component. For instance, the “extraordinary suspect” approach to arrest and detention is hardly in line with the right to liberty and security, and it arguably violates the right to consular assistance. Moreover, when piracy suspects are not associated in any way to the proceedings concerning their potential transfer and are not granted individual non-refoulement assessments, such practices appear to be incompatible with the procedural dimension of the non-refoulement principle, procedural minimum safeguards relating to expulsion, and some aspects of what is commonly referred to as fair trial rights.

Furthermore, to consider alleged pirates as “extraordinary suspects” without any procedural protection in terms of arrest and detention and to treat them as mere objects of the transfer decision procedure also conflicts with the idea that every person has “a right to have rights”⁶ – not only under domestic law but also under international law directly⁷ – as required by Article 6 UDHR and Article 16 ICCPR. The use of the word “everywhere” in both provisions points to an extremely broad territorial scope of application.⁸ In light of this, it is suggested that it even applies to persons not subject to a State’s jurisdiction,⁹ while others maintain that its scope of application cannot go beyond the one of the Covenant as a whole, which is predicated on the notion of “jurisdiction”.¹⁰ Even if the lat-

enshrined in the Covenant belong to the people living in the territory of the State party”; see Dinah Shelton, ‘The Status of the Individual in International Law’ (2006) 100 *American Society of International Law Proceedings* 249, 259–60. In doctrine, different terms are used to denote to the concept of international individual rights, notably “rights of individuals in international law” (ibid 259) and “individual rights under international law” (ibid 260).

6 This expression stems from Hannah Arendt, who is quoted by Judge Pinto de Albuquerque in his concurring opinion in *Hirsi Jamaa and Others v Italy* App no 27765/09 (Grand Chamber, ECtHR, 23 February 2012), which is a decision of great relevance in the context of removal of persons intercepted at sea; on the expression coined by Arendt, see also Peters, ‘Membership in the Global Constitutional Community’ (n 5) 158–59.

7 *ibid.*

8 OHCHR, ‘Legal Capacity: Background conference document prepared by the Office of the United Nations High Commissioner for Human Rights’ (Sixth Session of the Ad Hoc Committee) <www.un.org/esa/socdev/enable/rights/ahc6documents.htm> accessed 13 January 2013, 5; attempts to strike it from the Covenant failed during the drafting process of Article 16 International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR).

9 *ibid.*

10 Manfred Nowak, *U.N. Covenant on Civil and Political Rights: CCPR Commentary* (2nd edn, N.P. Engel Verlag 2005) 371, argues that the territorial scope of application of Article 16 ICCPR does not differ from Article 2(1) ICCPR.

ter point of view is adopted, Article 16 ICCPR without a doubt applies to seizing States deciding on the arrest, detention and transfer of piracy suspects.¹¹

In relation to Article 16 ICCPR, the Human Rights Committee has found that “intentionally removing a person from the protection of the law for a prolonged period of time may constitute a refusal to recognize that person before the law” if that person is in the hands of State authorities and efforts of relatives “to obtain access to potentially effective remedies, including judicial remedies ... have been systematically impeded”.¹² In these cases, which involved forced disappearance, the Committee found that in such situations “persons are in practice deprived of their capacity to exercise entitlements under law, including all their other rights under the Covenant, and of access to any possible remedy as a direct consequence of the actions of the State, which must be interpreted as a refusal to recognize such victims as persons before the law”.¹³ This finding suggests that considering piracy suspects as “extraordinary suspects”, with the consequence that they are not granted any of the protections ordinarily available to criminal suspects, is incompatible with the idea behind Article 16 ICCPR – “the right to have rights”. This core idea behind Article 16 ICCPR also appears to exclude the treatment of human beings as mere objects rather than subjects with rights and entitlements. This idea, which the Human Rights Committee confirmed in relation to the marital status of women,¹⁴ must also hold true for piracy suspects who are currently mere objects of transfer proceedings.

Bearing in mind the premise that piracy suspects are holders of international individual rights and that they have a “right to have rights” under Article 16 ICCPR and Article 6 UDHR, we now delve into an in-depth analysis of the arrest, detention and transfer of piracy suspects in light international individual rights with a procedural dimension. Before doing so, however, we will delimit the scope of this analysis – the subject matter analysed and the legal yardsticks applied – and describe the methodology employed in establishing the current practice of arrest, detention and transfer of piracy suspects.

11 On the extraterritorial application of the ICCPR (specifically in the maritime context), see below Part 3/III.A.2.

12 *Kimouche v Algeria* Comm no 1328/2004 (HRC, 10 July 2007) para 7.8, and *Grioua v Algeria* Comm no 1327/2004 (HRC, 10 July 2007) para 7.8; very similar wording is used in *Aouabdia v Algeria* Comm no 1780/2008 (HRC, 19 May 2011) para 7.9.

13 *Kimouche v Algeria* (n 12) para 7.8; *Grioua v Algeria* (n 12) para 7.8.

14 HRC, ‘General Comment No. 28: Article 3 (The Equality of Rights between Men and Women)’ in ‘Note by the Secretariat, Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies: Vol I’(2008) UN Doc HRI/GEN/1/Rev.9 (Vol. I) para 19, where the Committee states that Article 16 ICCPR implies “that women may not be treated as mere objects to be given together with the property of the deceased husband to his family”.

II. Scope of the Study: Disposition in Light of International Individual Rights

A. The Subject Matter Analysed

The subject matter of the present study is the disposition of piracy cases, or more concretely, the “disposition procedure” and “detention during disposition”. The term “disposition procedure” refers to the process following the seizure of piracy suspects, where it is decided whether to release the seized persons or submit the case for investigation and prosecution to either the competent authorities of the seizing State or a third State. Thereby, the focus of the study is the surrender of seized piracy suspects to third States for prosecution. The term “detention during disposition” refers to any form of *de facto* or *de jure* deprivation of liberty of piracy suspects before their release or surrender to the mainland authorities of the seizing State or a third State for criminal prosecution. Thus, a distinction is drawn between the initial arrest of piracy suspects, detention on suspicion of criminal activity, and detention pending transfer. In line with the traditional understanding of the right to liberty,¹⁵ the focus lies on the actual *deprivation* of liberty and whether the minimum procedural safeguards for depriving a person of his liberty, which flow from human rights law, are respected. Neither the manner in which liberty is deprived nor the subsequent treatment of detainees is scrutinized in the study at hand.

A thorough understanding of the current disposition practice is necessary in order to identify relevant human rights issues that may arise in this specific situation. However, at this writing, no comprehensive factual analysis on the disposition of piracy cases exists.¹⁶ Therefore, two disposition schemes have been analysed for the purpose of this study. The first case study describes Denmark’s disposition procedure as an example of a State contributing to the multinational counter-piracy operations of NATO and the Combined Maritime Forces. As will be discussed later in more detail, neither NATO nor the Combined Maritime Forces are involved in the disposition of piracy cases and, if applicable, the transfer of piracy suspects to third States. Rather, in this constellation, disposition takes place under national tasking and authority. The second case study deals with disposition of piracy cases in the multinational context of EUNAVFOR Operation Atalanta. These two case studies thus cover the majority of actors involved in counter-piracy operations off the coast of Somalia and the region.

¹⁵ See, eg, Nowak (n 10) 212–13: the traditional view is that Article 9 ICCPR (right to liberty and security of person) solely relates to the *deprivation* of liberty and whether the procedural minimum guarantees in that respect are observed. The manner in which liberty is deprived (eg mistreatment during this process) is not covered by the right. Detainee treatment is governed by Article 10 ICCPR, which provides that all persons deprived of liberty shall be treated humanely.

¹⁶ As of 29 January 2013.

The disposition schemes of both Denmark and EUNAVFOR are to a great extent formalized, standardized and subject to guidance and rules. This should not belie the fact that, in many cases, patrolling naval States surrender piracy suspects for prosecution to a third State in an *ad hoc* manner, outside any pre-defined procedure and not based on any soft or hard rules. Thus, for example, it is not officially *and* publicly known how all the piracy suspects put on trial in Somaliland, Puntland and south-central Somalia – together prosecuting 223 out of 1,045 piracy suspects¹⁷ – came within the jurisdiction of the prosecuting entities. However, it is assumed that disposition of these cases is often of a *de facto* nature and falls outside any legal scrutiny.

The legal analysis pertaining to detention pending disposition is largely based on the two case studies, which will examine the disposition frameworks of EUNAVFOR and Denmark. The same holds true for the analysis of whether the disposition procedure, ie the process where it is decided whether to prosecute the suspects in the seizing State or transfer them to a third State, is in line with international (human rights) law. As to the specific question of whether the substantive side of the principle of non-refoulement may be violated by transferring piracy suspects to regional States or entities, transfers to Kenya and the Seychelles (thus far the only transfer destinations of EUNAVFOR and Denmark) will be taken into account. However, the emphasis will be on the far more problematic removals to Somalia and its regional entities. Even though the exact features of the disposition procedure preceding surrender for prosecution to Somaliland and Puntland are vague, it suffices for analysis of the substantive side of the principle of non-refoulement that third States *transferred* suspects to these entities.¹⁸

B. The Legal Yardstick Applied

The goal of the study at hand is to analyse whether current disposition practice is in line with the international law norms that bestow persons with individual

17 UNODC, 'Counter Piracy Programme: Support to the Trial and Related Treatment of Piracy Suspects' (July 2012) <www.unodc.org/documents/easternafrika//piracy/UNODC_Brochure_Issue_9_Final_webversion.pdf> accessed 29 January 2013, 16.

18 The latest figures distinguishing between suspects put on trial in Somaliland and Puntland after seizure by own forces and persons *transferred* from third patrolling naval States date from May 2010. The figures are contained in: UNSC, 'Report of the Secretary General on possible options to further the aim of prosecuting and imprisoning persons responsible for acts of piracy and armed robbery at sea off the coast of Somalia, including, in particular, options for creating special domestic chambers possibly with international components, a regional tribunal or an international tribunal and corresponding imprisonment arrangements, taking into account the work of the Contact Group on Piracy off the Coast of Somalia, the existing practice in establishing international and mixed tribunals, and the time and resources necessary to achieve and sustain substantive results' (26 July 2010) UN Doc S/2010/394 (UNSC 'Seven Options Report') para 19.

rights, notably human rights law. Therefore, the ECHR will be one of the legal instruments studied extensively – not only because Denmark as well as the States contributing to EUNAVFOR Operation Atalanta are bound by it – but also because of its well-developed case law and (comparatively) powerful enforcement mechanism. Furthermore, the ICCPR will be given considerable weight since it is a universal instrument and, in some respects, more protective of piracy suspects subject to disposition than the ECHR. What is more, with regard to the principle of non-refoulement, Article 3 CAT will be incorporated into the assessment. Since minors are occasionally seized during counter-piracy law enforcement operations, the CRC will be referenced accordingly, yet without providing a full examination of its respective provisions. The relevant guarantees of the CFREU will be briefly mentioned with regard to disposition taking place within the EUNAVFOR framework, but due to limited practice and case law and that the content of its provisions is greatly inspired by the respective norms of the ECHR, ICCPR and/or CAT, a separate study of the CFREU would be redundant.

Human rights law is no longer considered to be the only source of individual rights in international law. International law norms other than human rights have been recognized as conferring individual rights, sometimes referred to as “ordinary” international individual rights.¹⁹ In the study at hand, the primary analysis will address whether Article 36(1) of the VCCR has attained this status and whether its content could inform the arrest and detention of piracy suspects. A similar analysis will be done for the SUA Convention and Hostage Convention – treaties that are highly relevant to the offenses allegedly committed by Somali-based pirates and both of which contain a provision closely following Article 36(1) VCCR. As a preliminary step, however, it will be determined whether Article 105 UNCLOS or Article 19 of the Convention on the High Seas provides a right not to be surrendered to a third State for prosecution at all.

Even though individual rights may arguably also flow from international humanitarian law, it will be explained in the following why this body of law is not applicable to counter-piracy operations. What is more, due to the very unlikely chance that piracy suspects qualify as refugees, the analysis will be limited to an explanation of why this is the case and a brief mention of the non-refoulement provision under refugee law.

III. Case Studies: Methodology Applied

At the time of writing, a comprehensive factual analysis of the process and decisions that occur following the seizure of piracy suspects, but prior to their release or surrender for criminal prosecution, does not yet exist. Information and data collected by international and supranational organizations and State authorities on disposition of piracy cases is very general, eclectic, and barely covers procedural aspects. Moreover, a comprehensive set of hard rules contained in

¹⁹ See above Peters, ‘Membership in the Global Constitutional Community’ (n 5).

a generally accessible and duly published legal act governing Denmark and/or EUNAVFOR's disposition procedure, from which an understanding of the process could be extracted, does not exist. Rather, to the extent that the process follows rules (and is not subject to *de facto* and *ad hoc* solutions), they are mainly contained in documents not publicly accessible or even classified, such as operation plans, standing operating procedures, or internal directives governing the activities of the respective administrative body. Meanwhile, the procedure for detention during disposition is largely governed by military documents, which are almost always classified, such as rules of engagement and standard operating procedures. What is more, due to the fact that it is the military, rather than the police, conducting law enforcement at sea, several States have concluded that the "ordinary" rules regarding arrest and detention on suspicion of criminal activity are not applicable as such. Further, since transfers differ from extradition by their very nature, the rules on deprivation of liberty pending extradition do not apply either. How these normative gaps are filled in practice (for example, by assuming implied powers or by applying the principles of ordinarily applicable acts) is not explained in literature or any other publicly available document. Finally, case law on disposition, from which an understanding of the relevant procedures could be gained, is still quite limited. In sum, it proved impossible to draw an accurate picture of the disposition schemes of Denmark and EUNAVFOR from the limited information available to the public.

The information necessary to complete the two case studies has therefore mainly been collected by means of conducting expert interviews. The development of expert interviews as a specific and free-standing method of qualitative social research gained momentum in the 1990s,²⁰ and today is one of the prevailing methods used in qualitative, empirical social research.²¹ The author followed the data collection method described in detail by Gläser/Laudel.²² Thereby, an expert is defined as an interview partner who, based on his or her personal expe-

20 Michael Meuser and Ulrike Nagel, 'Experteninterviews und der Wandel der Wissensproduktion' in Alexander Bogner, Beate Littig and Wolfgang Menz (eds), *Experteninterviews: Theorien, Methoden, Anwendungsfelder* (3rd edn, VS Verlag für Sozialwissenschaften 2009) 25.

21 *ibid* 35; Alexander Bogner and Wolfgang Menz, 'Das theoriengenerierende Experteninterview: Erkenntnisinteresse, Wissensformen, Interaktion' in Alexander Bogner, Beate Littig and Wolfgang Menz (eds), *Experteninterviews: Theorien, Methoden, Anwendungsfelder* (3rd edn, VS Verlag für Sozialwissenschaften 2009) 65.

22 Jochen Gläser and Grit Laudel, *Experteninterviews und qualitative Inhaltsanalyse als Instrumente rekonstruierender Untersuchungen* (4th edn, VS Verlag für Sozialwissenschaften 2010); according to Bogner and Menz (n 21) 65, the study by Gläser/Laudel is the only comprehensive description of the expert interview methodology.

rience, has special knowledge of the subject matter analysed which the researcher would not otherwise have access to.²³

The author interviewed eight experts, either meeting them in person or conducting interviews by telephone. The experts were chosen because of their personal, first-hand knowledge of disposition of piracy cases due to their professional functions or duties. Rather than using a standardized questionnaire, which would have been too rigid for the subject matter analysed, guideline-based interviews²⁴ were conducted. The guideline questionnaire was revised and developed during the course of the interviews based on additional knowledge gained during the expert interview phase and depending on the background of each interviewee. Except for one interview, where notes were taken, all interviews were recorded, transcribed and anonymized. With four of the eight interviewed experts, additional exchanges took place by telephone or e-mail in order to verify whether the author accurately depicted the facts and/or to receive additional information before or after the telephone interview. In addition, with one expert, an exclusively written exchange took place. The author also had informal information exchanges on the subject matter analysed with a number of other persons possessing demonstrated knowledge of the topic. This information, however, has only been used when corroborated by information collected during the formal expert interviews, the transcripts and notes of which are on file with the author. Finally, the author had access to a series of classified and/or non-public documents, which have been a major source of the information necessary to describe the disposition practice of EUNAVFOR and Denmark.

In order to allow for an open and frank information exchange and considering that most of the information is not available to the public, the author ensured anonymity to all persons who provided information in any form. Therefore, in the footnotes, information obtained through expert interviews is referred to as “information from expert interview on file with author” and information from the acquired documents, which are confidential or at least not readily available to the public, is referred to as “document on file with author”. Further individualizing the different sources of information – for instance by giving them a distinct, abstract tag, such as mentioning the date of the interview or numbering the non-public or confidential documents – would not have allowed for a sufficient degree of anonymization. To nevertheless abide by a scientific standard, all information collected,²⁵ as well as a document containing the final version of the study with full references to the information collected by the method described above, is on file with the author.

23 Gläser and Laudel (n 22) 12; Bogner and Menz (n 21) 65 and 67–70; see also Meuser and Nagel (n 20) 37–51.

24 This is what Gläser/Laudel refer to as ‘offenes Leitfadeninterview’; on the method, see Gläser and Laudel (n 22) 111–19 and 142–53, and Meuser and Nagel (n 20) 51–52.

25 Documents provided to the author, anonymized transcripts and notes of expert interviews and notes from written exchanges with experts.

Finally, it bears mentioning that the references to domestic law in the two case studies are not meant to provide an exhaustive picture of the relevant municipal legal framework. Rather, the incidental references to domestic law have been included in order to gain a better understanding of disposition of piracy cases, which is governed by a complex interplay of international law, European Union law and domestic law. Moreover, the references highlight the diversity of national responses to disposition of piracy cases, and thus mainly serve to demonstrate how broad the spectrum of possible approaches to disposition is in practice. The references to domestic law and the comparisons of different domestic solutions are therefore in no way meant to be a comparative law study abiding by the relevant methodology.

Part 1 Disposition of Piracy Cases: The Context

I. The Phenomenon: Somali-Based Piracy

Somali-based piracy is a relatively recent phenomenon. Even though the Indian Ocean together with the Persian Gulf was a piracy hotspot between the 15th and 18th centuries, no major pirate activity developed around the Somali coast itself during this period. At most, harbours on the coastline served as stopovers for pirates from other regions. Also, in the following centuries, no noteworthy pirate activity emanated from Somalia.¹ It was only in the last decades of the 20th century that actors from the region began to jeopardize maritime security in the Horn of Africa. In the 1980s and 1990s, ships navigating the area were threatened by politically motivated attacks. On the one hand, the Eritrean People's Liberation Front, which had been fighting for independence from Ethiopia, carried out attacks against ships in order to prevent them from calling port in Ethiopia. These attacks stopped when Eritrea became an independent nation. On the other hand, the Somali National Movement attacked ships in the area surrounding the Somali port of Berbera in their fight against Dictator Siad Barre.² During the same period, armed encounters between Somali and foreign fishermen, allegedly involved in illegal fishing in Somali waters, became more frequent. Also, the first hijackings of merchant ships and yachts coupled with ransom demands occurred.³ This was the beginning of what the present study refers to as "Somali-based piracy". Between 1989 and 2000, the number of pirate attacks off the Somali coast was still quite low as compared to other piracy-prone areas (such as South East Asia). Since 2007, however, a zone comprising the coast off of Somalia, the Gulf of Aden

1 Kerstin Petretto, 'Diebstahl, Raub und erpresserische Geiselnahme im maritimen Raum: Eine Analyse zeitgenössischer Piraterie' <www.maritimesecurity.eu/fileadmin/content/news_events/workingpaper/PiraT_Arbeitspapier_Nr8_2011_Petretto.pdf> accessed 29 January 2013, 20–21.

2 *ibid* 21; Martin Murphy, *Somalia: The New Barbary? Piracy and Islam in the Horn of Africa* (Columbia University Press 2011) 11.

3 Petretto (n 1) 21.

and the Western Indian Ocean is now *the* piracy hotspot worldwide.⁴ In 2009, the number of attacks carried out by Somali-based pirates for the first time exceeded the total number of piracy attacks committed in all other maritime areas elsewhere in the world.⁵

Pirate attacks off the coast of Somalia, the Gulf of Aden and Indian Ocean emanate almost exclusively from Somali territory. Thus far, no pirate activity has been reported from neighbouring countries, such as Djibouti, Eritrea, Kenya, Tanzania, or from the other side of the Gulf of Aden, such as Yemen.⁶ Since the collapse of Siad Barre's authoritarian socialist rule in 1999, Somalia has been without an effective central government. Currently, the Somali Transitional Federal Government is the internationally recognized government, but its capability to act internationally is arguably greater than its ability to act internally.⁷

Somalia is composed of 18 administrative regions.⁸ In south-central Somalia, many of the administrative regions are under the control of Al-Shabaab, a militant Islamic fundamentalist group that opposes the Somali Transitional Federal Government.⁹ Furthermore, Puntland, which is located in northern Somalia, considers itself an autonomous State within Somalia. The Puntland Constitution affirms that it will contribute to the establishment and protection of a federal Somalia, but reserves the right to review this provision should instability continue or if Somalia fails to agree on a federal State structure.¹⁰ Somaliland, in the north-west of Somalia, declared its independence shortly after the collapse of the Siad Barre regime. However, it has not been recognized as a State by the Somali

4 *ibid* 22.

5 UNODC, 'The Globalization of Crime: A Transnational Organized Crime Threat Assessment' (Vienna, 2010) <www.unodc.org/documents/data-and-analysis/tocta/TOCTA_Report_2010_low_res.pdf> accessed 29 January 2013, 193.

6 Petretto (n 1) 23.

7 UNSC, 'Report of the Secretary-General on the modalities for the establishment of specialized Somali anti-piracy courts' (15 June 2011) UN Doc S/2011/360, Annex II, para 1; Robin Geiss and Anna Petrig, *Piracy and Armed Robbery at Sea: The Legal Framework for Counter-Piracy Operations in Somalia and the Gulf of Aden* (OUP 2011) 13–14.

8 UNSC, 'Report of the Secretary-General on the modalities for the establishment of specialized Somali anti-piracy courts' (n 7) Annex II, para 2.

9 *ibid* Annex II, para 6; Advisory Council on International Affairs (NL), 'Combating Piracy at Sea: A Reassessment of Public and Private Responsibilities' (No 72, December 2010) <www.aiv-advies.nl/ContentSuite/upload/aiv/doc/webversie_AIV_72_ENG%282%29.pdf> accessed 29 January 2013, Annex IV.

10 UNSC, 'Report of the Secretary-General on the modalities for the establishment of specialized Somali anti-piracy courts' (n 7) Annex II, paras 2 and 5.

Transitional Federal Government or by any other State.¹¹ Galmudug has emerged as yet another *de facto* regional entity within Somalia.¹²

Somali-based pirates only use parts of Somalia as the bases of their activity: Puntland and Mudug. Mudug is a region between Puntland and south-central Somalia whose administrative affiliation remains unclear, yet Puntland claims authority over its northern part and Galmudug administers its southern part. From these regions, pirates not only launch their attacks but also detain ships in local harbours such as Hobyo, Garacad and Xabo. No major activities have been reported since 1990 in Somaliland, which is in the north-west of Somalia. Southern Somalia was equally stable in terms of pirate activities until the spring of 2010 when pirates began launching attacks from the region, namely the harbour of Kismayo.¹³

Regarding the actors involved, naval forces estimate that there are about 50 pirate leaders, 300 leaders of pirate attack groups, and approximately 2,500 “foot soldiers”.¹⁴ It is the latter category that is carrying out the actual attacks and could potentially be seized by patrolling naval States and transferred to third States for prosecution in the seizing State. Thus far, all piracy suspects seized by multinational forces claim to be from Somalia.¹⁵ Attack teams are said to be mainly composed of rather poor Somalis, who sometimes possess navigational skills due to their prior work in the informal fishing industry.¹⁶ Generally, they appear to have very little education and would be unable to secure formal employment with any commercial operation or humanitarian agency, except as armed guards.¹⁷ While recruitment initially took place within a certain clan, this practice became less common with the “professionalization” of piracy.¹⁸ Today, pirate leaders seem to be “equal opportunity employers”, recruiting in Somali refugee camps, which shelter approximately 40,000 internally displaced persons at any given time.¹⁹

11 *ibid.*

12 *ibid* Annex II, para 2.

13 UNSC, ‘Report of the Special Adviser to the Secretary-General on Legal Issues Related to Piracy off the Coast of Somalia’ (25 January 2011) UN Doc S/2011/30, para 19; UNODC, ‘The Globalization of Crime’ (n 5) 195; Petretto (n 1) 23.

14 UNSC, ‘Report of the Secretary-General on the modalities for the establishment of specialized Somali anti-piracy courts’ (n 7) Annex I, para 3.

15 UNODC, ‘The Globalization of Crime’ (n 5) 195.

16 Petretto (n 1) 33.

17 International Expert Group on Piracy off the Somali Coast, ‘Piracy off the Somali Coast: Workshop commissioned by the Special Representative of the Secretary General of the UN to Somalia, Ambassador Ahmedou Ould-Abdallah, Nairobi 10–21 November 2008, final report, assessment and recommendations’ (21 November 2008) <www.imcsnet.org/imcs/docs/somalia_piracy_intl_experts_report_consolidated.pdf> accessed 29 January 2013, 17.

18 Petretto (n 1) 32–33.

19 UNODC, ‘The Globalization of Crime’ (n 5) 199.

There is apparently no shortage of willing recruits due to the lack of alternative employment options in a desperate and disorganized society.²⁰ To the contrary, pirate leaders seem to be able “to draw whole communities into their net” – such as the town of Eyl – with the resources they have.²¹

The Security Council has repeatedly expressed “concern about the reported involvement of children in piracy off the coast of Somalia”.²² According to the UN Monitoring Group on Somalia, the age of Somali-based pirates generally ranges from 17 to 32 years of age. However, on occasion, younger persons have been known to participate in pirate operations.²³ The UN Secretary-General noted that during 2010, several cases were documented of children escaping from Al-Shabaab and joining the pirate groups in Puntland.²⁴

Thus far, no main structured alliance between pirates and Al-Shabaab seems to exist. However, on a local level, complicity between the groups has been noted. While the insurgents were initially opposed to piracy, recent pirate activity launched from southern Somalia (namely the harbour of Kismayo), which is an area controlled by Al-Shabaab, points to a growing tolerance of the activity within the insurgent movement. It has been suggested that *ad hoc* arrangements between pirate and Al-Shabaab leaders exists. In exchange for relinquishing a sizeable share of ransom payments (reportedly up to 30 per cent) to Al-Shabaab, its leaders guarantee tranquillity to pirates and mediate when tensions arise between the pirates and insurgents.²⁵

The *modus operandi* of Somali-based pirates, although becoming more sophisticated and professional over time,²⁶ has not fundamentally changed since the phenomenon began in early 2000. They have managed to establish a unique and profitable business model: hijacking vessels and kidnapping their crews for the sole purpose of extorting a large ransom. Since 2008, Somali-based pirates

20 International Expert Group on Piracy off the Somali Coast (n 17) 17.

21 UNODC, ‘The Globalization of Crime’ (n 5) 199.

22 UNSC Res 1950 (23 November 2010) UN Doc S/RES/1950, preambular para 3; UNSC Res 2020 (22 November 2011) UN Doc S/RES/2020, preambular para 3.

23 UNSC, ‘Report of the Monitoring Group on Somalia and Eritrea pursuant to Security Council resolution 1916 (2010)’ (18 July 2011) UN Doc S/2011/433, para 64 and fn 91.

24 UNSC, ‘Report of the Secretary-General pursuant to Security Council resolution 1950 (2010)’ (25 October 2011) UN Doc S/2011/662, para 71.

25 UNSC, ‘Report of the Special Adviser to the Secretary-General on Legal Issues Related to Piracy off the Coast of Somalia’ (n 13) para 24; UNSC, ‘Report of the Monitoring Group on Somalia and Eritrea pursuant to Security Council resolution 1916 (2010)’ (n 23) paras 112–13.

26 UNSC, ‘Report of the Special Adviser to the Secretary-General on Legal Issues Related to Piracy off the Coast of Somalia’ (n 13) para 15.

have taken over 3,000 seafarers hostage.²⁷ The ransom amount demanded has increased steadily since then²⁸ and as of 2011 is estimated to be at almost five million US dollars per vessel and crew.²⁹ Generally, pirate attack groups position themselves in busy shipping lanes and identify targets apparently at random.³⁰ These attack groups usually consist of two or three skiffs, each manned with four to seven persons. Increasingly, attacks are launched from so-called “mother ships”, which are (often previously hijacked) ocean-going vessels able to carry several skiffs, weapons and fuel. This allows for increased autonomy, and they are thus able to carry out attacks far from the Somali coast.³¹ Once a target is identified, they pursue and attack the victim ship from several directions simultaneously. They then board the ship by means of grappling hooks and ladders and take the crew hostage. Only 15 to 30 minutes pass between the first sighting and boarding.³² Most successfully hijacked ships are then brought to a Somali port, which is used as an anchorage site, with no efforts made to conceal them from the public.³³ Thereupon, negotiators are entrusted to procure a ransom from the shipping company in exchange for the release of the hijacked crew and vessel.³⁴

Persons convicted of piracy have repeatedly stated that the reason and motivation³⁵ behind hijacking ships is the need to protect Somalia’s waters and resources from illegal fishing and dumping of waste by foreign-flagged vessels.³⁶

27 Hans-Georg Ehrhart and Kerstin Petretto, ‘The EU and Somalia: Counter-Piracy and the Question of a Comprehensive Approach’ (Study for the Greens/European Free Alliance, Hamburg February 2012) <www.greens-efa.eu/fileadmin/dam/Documents/Studies/Ehrhart_Petretto_EUandSomalia_2012_fin.pdf> accessed 29 January 2013, 4, 8, 33.

28 UNODC, ‘The Globalization of Crime’ (n 5) 199.

29 Anna Bowden and Shikha Basnet, ‘The Economic Cost of Somali Piracy 2011’ (One Earth Future Foundation Working Paper, 2012) <http://oceansbeyondpiracy.org/sites/default/files/economic_cost_of_piracy_2011.pdf> accessed 29 January 2013, 11.

30 UNSC, ‘Report of the Monitoring Group on Somalia and Eritrea pursuant to Security Council resolution 1916 (2010)’ (n 23) para 90.

31 *ibid* paras 89 and 91; UNODC, ‘The Globalization of Crime’ (n 5) 198.

32 UNODC, ‘The Globalization of Crime’ (n 5) 198.

33 *ibid*.

34 UNSC, ‘Report of the Monitoring Group on Somalia and Eritrea pursuant to Security Council resolution 1916 (2010)’ (n 23) para 95.

35 UNSC, ‘Report of the Secretary-General on the protection of Somali natural resources and waters’ (25 October 2011) UN Doc S/2011/661, para 47, referring to interviews conducted with convicted senior pirates. On the difficulty of ascertaining the true motivations of persons engaged in Somali-based piracy, see Petretto (n 1) 15–16 and 28.

36 UNSC, ‘Report of the Secretary-General on the protection of Somali natural resources and waters’ (n 35) para 1; UNSC, ‘Report of the Special Adviser to the Secretary-General on Legal Issues Related to Piracy off the Coast of Somalia’ (n 13) para 12.

Ships are taken hostage by these vigilante groups acting as the *de facto* coast-guard in order to deter them from future incursions and to extract “taxes” either for their illegal cargo or as compensation for their illegal behaviour.³⁷ Since monitoring and reporting mechanisms are lacking, detailed information regarding unlicensed and unregulated fishing off Somalia’s coast is not available. Still, some credible evidence as to the existence of such practices exists.³⁸ Similarly, evidence (albeit not always verified) exists that foreign-flagged vessels have engaged in illegal and uncontrolled degassing and dumping of waste in Somali waters.³⁹ While some argue that these illegal practices have a direct link to the *genesis* of piracy,⁴⁰ there seems to be widespread agreement that *today* these political aims are nothing more than rhetoric. Hijacking vessels and making the release conditional upon ransom payments became an end in itself and personal enrichment is the main driving force behind the endeavour.⁴¹ Despite the alleged link between illegal practices by foreign-flagged ships and piracy, it speaks volumes that since the early 1990s until today foreign-flagged fishing vessels were only very rarely the target of pirate attacks. Rather, since the emergence of the phenomenon, the common *modus operandi* has been to hold *any* kind of ship and/or its crew for ransom. Pirates have even targeted World Food Programme ships carrying humanitarian aid for the Somali population.⁴² In addition, the current reach of pirate attacks goes well beyond Somali waters,⁴³ which proves that the attacks have nothing to do with a desire to protect Somali resources from foreign incursion and exploitation.⁴⁴ What is more, payments made to Somali-based pirates have

37 UNODC, ‘The Globalization of Crime’ (n 5) 196, Petretto (n 1) 28 and 30.

38 UNSC, ‘Report of the Secretary-General on the protection of Somali natural resources and waters’ (n 35) paras 38–45.

39 *ibid* paras 46–48.

40 UNODC, ‘The Globalization of Crime’ (n 5) 196. Others sources state that a nexus between piracy and illegal fishing and waste-dumping respectively has not even been proven today regarding the initial emergence of piracy: UNSC, ‘Report of the Special Adviser to the Secretary-General on Legal Issues Related to Piracy off the Coast of Somalia’ (n 13) para 13; UNSC, ‘Report of the Secretary-General on the protection of Somali natural resources and waters’ (n 35) para 47.

41 UNODC, ‘The Globalization of Crime’ (n 5) 196; UNSC, ‘Report of the Special Adviser to the Secretary-General on Legal Issues Related to Piracy off the Coast of Somalia’ (n 13).

42 Petretto (n 1) 29.

43 UNSC, ‘Report of the Secretary-General on the protection of Somali natural resources and waters’ (n 35) para 63; Kaija Hurlburt, ‘The Human Cost of Somali Piracy’ (One Earth Future Foundation, 6 June 2011) <http://onearthfuture.org/images/imagefiles/HCOP_Paper_FINAL_1.pdf> accessed 29 January 2013, 24.

44 UNSC, ‘Report of the Special Adviser to the Secretary-General on Legal Issues Related to Piracy off the Coast of Somalia’ (n 13) 13.

not become public funds.⁴⁵ Ransom payments are instead used to cover the costs of the criminal venture and the remaining money is distributed to those who participated in one form or another in the attack.⁴⁶ Furthermore, with regard to foreign fishing vessels, a more specific (illegal) mechanism developed: the sale of so-called “approved licenses to fish”. It has been reported that companies in possession of such licenses are able to fish close to the Somali coast without being subject to attacks by Somali-based pirates, thus amounting to some kind of protection racket.⁴⁷

Rather than being a response to illegal foreign activities in Somali waters, attacks by Somali-based pirates against vulnerable ships are nothing more than the most visible component of a new type of organized crime. Somali-based piracy is a criminal phenomenon, which has emerged, grown and now persists in the backyard of what may well be the prototype of a failed State. However, even though various parts of Somalia lack law enforcement agencies capable of effectively suppressing piracy-related activity on land and coastguards that possess the skills necessary to prevent and disrupt pirate attacks, this only partially explains the explosive growth of Somali-based piracy. Other factors such as the geographical location (one of the most important international shipping lanes passes along Puntland) and the nature of the Somali coast (which lends itself to the *modus operandi* of Somali-based pirates) have furthered the emergence and exponential growth of Somali-based piracy. Moreover, the dire economic and humanitarian conditions in Somalia may have contributed to the persistence of the phenomenon despite an unprecedented law enforcement response by the international community.⁴⁸

45 Petretto (n 1) 30.

46 UNSC, ‘Report of the Monitoring Group on Somalia and Eritrea pursuant to Security Council resolution 1916 (2010)’ (n 23) Annex 4.3, para 3.

47 See, eg, the following account provided in *ibid* para 118: “Moreover, the Monitoring Group has learned that since May 2009, four fishing vessels of the Republic of Korea have been frequently and repeatedly observed fishing off the coast of Puntland and delivering their catch to Bosaaso port. Notwithstanding Somali pirate rhetoric claiming to protect Somali marine resources, those vessels operate confidently in Somali waters, broadcasting automatic identification system signals and remaining in visual distance from the shore with slow speed, lowered stern ramp and no obvious precautionary measures. According to information received by the Monitoring Group, the companies operating the vessels have been issued ‘approved licences to fish’ in Puntland territorial waters. None of the vessels has ever reported an attack by Somali pirates – a finding that appears to validate the Monitoring Group’s previous observation that ‘the sale of licences to foreign vessels in exchange for fishing rights has acquired the features of a large-scale ‘protection racket’, indistinguishable in most respects from common piracy.’”

48 On the various factors allowing for and favouring the emergence and professionalization of Somali-based piracy, see Petretto (n 1) 23–28.

II. A Janus-faced Response: Internationalized Policing and Domestic Prosecution

A. The Resolved Response: Internationalized Policing

1. A Comprehensive Policing Framework on the Normative Level

By qualifying the situation in Somalia, one which is exacerbated by incidents of piracy and armed robbery at sea, as a “threat to international peace and security in the region” – rather than focusing on the phenomena of piracy and robbery alone – the UN Security Council established a Chapter VII-based counter-piracy enforcement framework for the Somali territorial waters and mainland.⁴⁹ This was necessary in light of the geographical limitations of the pre-existing counter-piracy rules that conferred enforcement powers *only* for pirate attacks occurring on the high seas. The *ad hoc* legal framework established by the Security Council authorizing enforcement measures in the territorial waters and on the mainland of Somalia thus supplements the pre-existing counter-piracy rules pertaining to the high seas, in particular those stipulated in the UNCLOS and the Convention on the High Seas. In sum, enforcement measures against persons and ships suspected of engaging in piracy or armed robbery at sea are governed by a three-pronged legal regime: a different legal framework applies depending on whether counter-piracy operations are carried out on the high seas, in the territorial waters of Somalia, or on its mainland.

The enforcement powers that may be used against pirates, to wit on the high seas, are, *inter alia*, conferred and governed by the UNCLOS.⁵⁰ In a nutshell, the

49 In UNSC Res 2020, preambular para 27, the justification to base the Resolution on Chapter VII of the UN Charter reads as follows: “*Determining* that the incidents of piracy and armed robbery at sea off the coast of Somalia exacerbate the situation in Somalia, which continues to constitute a threat to international peace and security in the region”; in previous resolutions on piracy, the wording is identical or similar; see UNSC Res 1816 (2 June 2008) UN Doc S/RES/1816, preambular para 12; UNSC Res 1846 (2 December 2008) UN Doc S/RES/1846, preambular para 14; UNSC Res 1851 (16 December 2008) UN Doc S/RES/1851, preambular para 11; UNSC Res 1897 (30 November 2009) UN Doc S/RES/1897, preambular para 14; UNSC Res 1950, preambular para 20; UNSC Res 2015 (24 October 2011) UN Doc S/RES/2015, preambular para 17. Since it is not piracy and armed robbery as such but the situation in Somalia that provided the justification to act under Chapter VII of the UN Charter, Security Council Resolution 2018 pertaining to piracy in the Gulf of Guinea was not based on Chapter VII, see UNSC Res 2018 (31 October 2011) UN Doc S/RES/2018.

50 The Convention on the High Seas (adopted 29 April 1958, entered into force 30 September 1962) 450 UNTS 11, contains counter-piracy rules similar to the United Nations Convention on the Law of the Sea (adopted 10 December 1982, entered into force 16 November 1994) 1833 UNTS 3 (UNCLOS). The analysis at hand, however, is limited to the UNCLOS since the Security Council’s focus is on this treaty as

following enforcement measures are authorized: Article 110 UNCLOS provides a right of visit if reasonable grounds of suspicion exist that a ship is engaged in piracy. The suspected ship may be stopped⁵¹ and boarded in order to verify the ship's right to fly its flag. If suspicion remains after the document check, further examination on board the ship, ie a search of the boat and the crew, may be carried out with all possible considerations.⁵² In cases where the suspicion has been confirmed, ie the vessel is identified as a pirate ship in the sense of Article 103 UNCLOS, the enforcement powers stipulated in Article 105 UNCLOS become available: the pirate ship or a ship taken and controlled by pirates may be seized, persons on board arrested, and property on board seized.⁵³

The enforcement powers provided by UNCLOS only apply on the high seas. For Article 105 UNCLOS, it follows from the introductory sentence: "On the high seas" every State may seize a pirate ship and property on board and arrest the crew. For the right of visit of a ship engaged in piracy as stipulated in Article 110 UNCLOS, this accrues from the words "a warship which encounters on the high seas a foreign ship". By adopting Resolution 1846, the Security Council remedied this geographical limitation and thus paved the way to combat piracy-like attacks occurring in Somali territorial waters, often referred to as "armed robbery at sea". Resolution 1846 authorizes States and regional organizations to enter the territorial waters of Somalia and to use within that area all necessary means to repress acts of piracy and armed robbery at sea.⁵⁴ Even though Resolution 1846 allows the use of "all necessary means", the authorization does not go beyond the enforce-

it stated in various resolutions that "international law, as reflected in the United Nations Convention on the Law of the Sea of 10 December 1982 ... in particular its articles 100, 101 and 105, sets out the legal framework applicable to combating piracy and armed robbery at sea": UNSC Res 1918(27 April 2010) UN Doc S/RES/1918, preambular para 3; UNSC Res 1976 (11 April 2011) UN Doc S/RES/1976, preambular para 8; UNSC Res 2015, preambular para 6; the same wording but without reference to specific provisions can be found in UNSC Res 1816, preambular para 4; UNSC Res 1846, preambular para 4; UNSC Res 1851, preambular para 4; UNSC Res 1897, preambular para 4; UNSC Res 1950, preambular para 6; UNSC Res 2020, preambular para 7.

51 The right to stop a vessel is not explicitly stated in Article 110 UNCLOS. However, the right of visit implicitly comprises the right to stop a ship: ILC, 'Articles concerning the Law of the Sea with commentaries' in 'Report of the International Law Commission covering the work of its eighth session' (23 April–4 July 1956) UN Doc A/3159, 283–84.

52 For further details on the right of visit, see Geiss and Petrig (n 7) 55–58.

53 *ibid* 56.

54 UNSC Res 1846, para 10; the authorization has been renewed by UNSC Res 1897, para 7, and later by UNSC Res 1950, para 7, UNSC Res 2020, para 9, and UNSC Res 2077 (21 November 2012) UN Doc S/RES/2077, para 12. In the following, only Security Council Resolution 1846 is referred to, without each time emphasizing that paragraph 10 of the Resolution has been renewed and is thus still in force.

ment measures stipulated in the UNCLOS. This follows from the authorization in Resolution 1846 specifying that enforcement powers are to be exercised “in a manner consistent with such action permitted on the high seas with respect to piracy under relevant international law”⁵⁵ and the repeated emphasis by the Security Council that the UNCLOS sets out the relevant international law.⁵⁶ Thus, under Resolution 1846, the only permissible enforcement measures are to pursue, stop, board, search and/or seize a pirate ship or a ship taken by piracy, seize the property on board, and/or arrest persons on board.⁵⁷

In adopting Resolution 1851, the Security Council closed the last geographical gap by authorizing the use of counter-piracy measures in Somalia as well. It authorizes States and regional organizations “to undertake all necessary measures that are appropriate in Somalia, for the purpose of suppressing acts of piracy and armed robbery at sea”.⁵⁸ In contrast to Resolution 1846, the enforcement powers authorized for use on the Somali mainland are not in any way linked to or confined by the type of enforcement measures allowed under the UNCLOS regime. Rather, in line with the common understanding of the phrase “all necessary means”, Resolution 1851 authorizes the use of a broad range of measures, including military force.⁵⁹

By establishing an *ad hoc* law enforcement framework pertaining to Somali territorial waters and mainland, which supplements the treaty-based counter-piracy policing powers for the high seas, the Security Council has effectively allowed for unimpeded and comprehensive law enforcement operations against Somali-based pirates.

2. A Truly International Response on the Operational Level

The resolved course of action on the normative level to deter and disrupt pirate activity is mirrored on the operational level. Not only are an unprecedented number of national and multinational missions contributing to the regional law enforcement operation, but the quest to suppress Somali-based piracy and armed robbery at sea has received a truly international response with States around the globe deploying assets and personnel. At present, three multinational counter-piracy missions are deployed to the area prone to Somali-based piracy: the first

55 UNSC Res 1846, para 10; the authorization has been renewed by UNSC Res 1897, para 7, and later by UNSC Res 1950, para 7, and UNSC Res 2020, para 9.

56 See further above in this Section.

57 Geiss and Petrig (n 7) 76–77.

58 UNSC Res 1851, para 6; the authorization has been renewed by UNSC Res 1897, para 7, and later by UNSC Res 1950, para 7, UNSC Res 2020, para 9, and UNSC Res 2077, para 12. In the following, only UNSC Resolution 1851 is referred to, without each time emphasizing that paragraph 6 of the Resolution has been renewed and is thus still in force.

59 Geiss and Petrig (n 7) 83.

naval operation of the European Union, Atalanta, whose mandate was extended for another two years until December 2014;⁶⁰ the NATO Operation Ocean Shield; and the Combined Task Force 151 of the Combined Maritime Forces, which is an international naval coalition⁶¹.⁶² Various national missions, namely from China, India, Iran, Japan, Kenya, Malaysia, Saudi Arabia, South Africa and Yemen have been deployed and complement the efforts undertaken by the multinational missions.⁶³

The strategy of using naval presence and retaliatory force to deter, contain and disrupt pirate attacks has been relatively successful. It has proven effective in the Gulf of Aden where a security corridor was established and along the closely patrolled Somali coastline. In these areas, the number of *successful* attacks by Somali pirates dropped from 50 per cent in 2008 to a mere 12 per cent in 2011. This, however, should not belie the fact that a “crowding out” effect has pushed pirate operations into the Red Sea, the Somali Basin, and up to 1,750 nautical miles off the coast of Somalia into the Indian Ocean.⁶⁴

It is increasingly difficult for national and multinational counter-piracy missions to efficiently patrol the ever-growing area where Somali-based pirates operate, which currently covers approximately 2.8 million square nautical miles.⁶⁵ This explains the strategic shift away from primarily trying to secure the piracy-infected maritime area to also protecting vulnerable objects, either by dispatching law enforcement officials on board merchant ships (so-called Vessel Protection Detachments) or by resorting to the use of private security providers. In 2011, approximately one quarter of the vessels transiting the area where Somali-based pirates were active relied on private security; while this figure is an estimate for the whole year, it is understood that by the end of 2011, this figure was

60 Article 1(5) Council Decision 2012/174/CFSP of 23 March 2012 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 [2012] OJ L89/69 (Council Decision 2012/174/CFSP), amending Article 16(3) Council Joint Action 2008/851/CFSP of 10 November 2008 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 [2008] OJ L301/33 (CJA Operation Atalanta).

61 Combined Maritime Forces, ‘CTF-151: Counter-Piracy’ <<http://combinedmaritimeforces.com/ctf-151-counter-piracy/>> accessed 29 January 2013.

62 UNSC, ‘Report of the Secretary-General pursuant to Security Council resolution 1950 (2010)’ (n 24) paras 39–45.

63 *ibid* para 47; UNSC, ‘Report of the Secretary-General on specialized anti-piracy courts in Somalia and other States in the region’ (20 January 2012) UN Doc S/2012/50, para 9.

64 UNSC, ‘Report of the Secretary-General pursuant to Security Council resolution 1950 (2010)’ (n 24) para 7; UNSC, ‘Report of the Secretary-General on specialized anti-piracy courts in Somalia and other States in the region’ (n 63) para 9.

65 *ibid* para 9.

closer to 50 per cent.⁶⁶ Hiring private armed guards to protect commercial shipping from criminal activity challenges the idea that State coastguards and naval forces are the main providers of security at sea.⁶⁷

While the question how best to protect vulnerable shipping from Somali-based piracy when the operations are plagued by limited personnel and assets is a long-term consideration, one of the current major challenges in day-to-day operations is the issue of what to do with captured piracy suspects. It seems obvious that the ultimate goal of any law enforcement operation is to bring suspects to justice. However, the practical implementation of this basic tenet has proven difficult in the context of counter-piracy operations. The Security Council has repeatedly expressed its concern “over a large number of persons suspected of piracy having to be released without facing justice”.⁶⁸ In early 2011, over 90 per cent of piracy suspects seized by patrolling naval States were released for a variety of reasons, *inter alia*, a failure to identify a jurisdiction willing and able to investigate and prosecute.⁶⁹ This is evidence that internationalized law enforcement at sea is not yet sufficiently coordinated with the criminal prosecution framework. As we will see next, prosecution of piracy suspects remains domestic in nature and has only been realized by a handful of States, mainly those in the region prone to Somali-based piracy.

B. The Muddled Response: Domestic Criminal Prosecution

The Security Council has shown considerable resolve in removing the obstacles to policing operations against Somali-based pirates and has been successful in doing so. The same cannot be said for creating conditions that ensure the criminal prosecution of persons suspected of piracy or armed robbery at sea seized during these operations. The (ambitious) attempt to fundamentally change the established prosecution model, and thus alter the domestic approach followed for centuries with regard to the prosecution of alleged pirates, has failed. The Security Council’s activities have so far had little impact on the substantive and procedural criminal law necessary to properly prosecute piracy suspects.

66 Bowden and Basnet (n 29) 17.

67 Nicolas Florquin, ‘Escalation at Sea: Somali Piracy and Private Security Companies’ in Small Arms Survey (ed), *Small Arms Survey 2012: Moving Targets* (CUP 2012) 204.

68 UNSC Res 1976, preambular para 15; UNSC Res 2015, preambular para 14; UNSC Res 2020, preambular para 5. The problem has not always been equally acute; see, eg, the older resolutions where the Security Council noted with concern that “in some cases” pirates have been released without facing justice: UNSC Res 1851, preambular para 9; UNSC Res 1897, preambular para 8, and UNSC Res 1950, preambular para 11.

69 UNSC, ‘Report of the Special Adviser to the Secretary-General on Legal Issues Related to Piracy off the Coast of Somalia’ (n 13) para 14.

1. Criminal Prosecution of Piracy Suspects Remains on the Domestic Level

The first set of counter-piracy resolutions, adopted by the Security Council in 2008 and 2009,⁷⁰ primarily focused on the suppression of pirate attacks at sea. Criminal prosecution of persons allegedly engaged in piracy or armed robbery at sea merely appeared on the side-lines of this aim. The resolutions contained little more than a call upon all States to enhance interstate cooperation in criminal matters, namely with regard to the determination of jurisdiction, investigation and prosecution.⁷¹ The Security Council further invited all States and international organizations engaged in counter-piracy operations to enter into so-called “shiprider agreements” with countries willing to try suspects before their domestic criminal courts. This idea, however, has never been implemented in practice.⁷² In addition, the resolutions raised the issue of building up the judicial capacity necessary to prosecute piracy suspects. However it was only States party to the UNCLOS⁷³ and SUA Convention⁷⁴ that were urged to build up their *own* judicial capacity, a limitation somewhat difficult to understand against the background that by virtue of customary international law every State is competent to prosecute piracy suspects.⁷⁵ The resolutions further call upon all States to help Somalia (including its regional authorities⁷⁶) strengthen its operational capacity to bring alleged pirates to justice⁷⁷ and to work to enhance the judicial capacity of other States in the region.⁷⁸

70 UNSC Res 1816; UNSC Res 1938 (7 October 2008) UN Doc S/RES/1938; UNSC Res 1846; UNSC Res 1851; UNSC Res 1897.

71 UNSC Res 1816, para 11; UNSC Res 1846, para 14; UNSC Res 1897, para 12. The call is reiterated in subsequent resolutions: UNSC Res 1950, para 12; UNSC Res 2015, para 5; UNSC Res 2020, para 14. In 2011, the Security Council extended the call and urged States and international organizations to share evidence with a view of ensuring effective prosecution of piracy suspects: UNSC Res 1976, para 19; UNSC Res 2020, para 21.

72 UNSC Res 1851, para 3; UNSC Res 1897, para 6. On the correlation between the use of shipriders and the facilitation of prosecution of piracy suspects, see below Part 1/IV/B.

73 UNSC Res 1897, para 14; UNSC Res 1950, para 19.

74 UNSC Res 1846, para 15.

75 Geiss and Petrig (n 7) 143–45 and 148–51.

76 This is important against the background that prosecution of piracy suspects is mainly ensured by the regional entities Somaliland and Puntland rather than central Somalia.

77 Regarding Somalia only, see UNSC Res 1851, para 7; including its regional authorities, see UNSC Res 1897, para 11; the call was later repeated in UNSC Res 1950, para 11 and UNSC Res 2020, para 13.

78 UNSC Res 1851, para 8.

Up until spring 2010, the Security Council's actions concerning the criminal prosecution of piracy suspects were quite minimal. The key factor that ultimately triggered action was the increasing difficulty of the few regional States prosecuting piracy suspects at that time – namely the Somali entities of Puntland and Somaliland, Kenya, the Seychelles and Yemen – to absorb the considerable number of seized persons coupled with the quasi-absent willingness of States outside the region to try suspects.⁷⁹ The turning point was Resolution 1918, adopted in April 2010, where the Security Council stressed the “need to address the problems caused by the limited capacity of the judicial system of Somalia and other States in the region to effectively prosecute suspected pirates”.⁸⁰ As a first remedial step, the Security Council requested that the Secretary-General present a report on alternative options for prosecuting persons suspected of piracy and armed robbery at sea.⁸¹

The debate on alternative prosecution models was launched in a rather open and ambitious manner in July 2010 when the Secretary-General presented its report on seven possible models for the prosecution of piracy suspects.⁸² In addition to the prospect of improving the existing “regional approach” by enhancing UN assistance to States in the region already prosecuting suspects in their ordinary criminal courts, the following options were proposed: a Somali court located in a third State in the region (the so-called “Lockerbie model”); a special chamber acting within the national jurisdiction of a State or States in the region with or without UN participation; a regional tribunal established by a multilateral agreement among regional States with UN participation; a hybrid tribunal based on

79 The first figures on national prosecutions of piracy cases issued by a UN body can be found in UNSC, ‘Report of the Secretary General on possible options to further the aim of prosecuting and imprisoning persons responsible for acts of piracy and armed robbery at sea off the coast of Somalia, including, in particular, options for creating special domestic chambers possibly with international components, a regional tribunal or an international tribunal and corresponding imprisonment arrangements, taking into account the work of the Contact Group on Piracy off the Coast of Somalia, the existing practice in establishing international and mixed tribunals, and the time and resources necessary to achieve and sustain substantive results’ (26 July 2010) UN Doc S/2010/394, para 19 (UNSC ‘Seven Options Report’): as of 20 May 2010, a total of 10 States prosecuted piracy suspects. Among them, Puntland prosecuted the highest number of suspects (208 persons), followed by Kenya (123 persons), Somaliland (100 persons), Yemen (an estimated 60 persons) and the Seychelles (31 persons). In addition, the Maldives, the Netherlands, Spain, Germany, the United States and France prosecuted selected cases where important national interests had been violated.

80 UNSC Res 1918, preambular para 5.

81 *ibid.*, para 4.

82 UNSC ‘Seven Options Report’ (n 79).

an agreement between a regional State and the UN; and finally, a tribunal established by the Security Council pursuant to Chapter VII of the UN Charter.⁸³

The next step was tasking the Special Adviser on Legal Issues Related to Piracy off the Coast of Somalia⁸⁴ with identifying the most viable of the seven options. In his January 2011 report, the Special Adviser on Piracy emphasized the need for a “Somalization” of solutions, one that recognized the “necessity of placing Somalia back at the heart of solutions”. He stated that “it would be futile to envisage a jurisdictional solution that has no connection to Somalia”.⁸⁵ Consequently, he recommended establishing a distinct court system comprised of specialized courts in Puntland and Somaliland respectively and an additional specialized extraterritorial Somali court, potentially located in Arusha, Tanzania.⁸⁶ This system – which has never been implemented as such – even intended to serve a more ambitious purpose that went beyond the prosecution of piracy suspects in accordance with international human rights standards: counter-piracy efforts in general and a specialized court system that would “strengthen the rule of law in Somalia”⁸⁷ and “drive comprehensive reform of the Somali judicial system”.⁸⁸

The ensuing report by the Secretary-General on the implementation of the court system as proposed by the Special Adviser on Piracy brought some disillusionment. Since both the Somali Transitional Federal Government and the Somali regional authorities were opposed to the creation of an extraterritorial court, the “Lockerbie model” was not considered a viable option at that stage.⁸⁹ The creation of specialized anti-piracy courts in Somaliland and Puntland, in juxtaposition, was deemed to be a feasible proposal. However, only if it was understood as not creating *new* structures but as bolstering those courts in Somaliland and Puntland that were already prosecuting piracy suspects,⁹⁰ a condition hardly in line with the court system envisaged by the Special Adviser on Piracy.

In October 2011, the Security Council decided to continue its consideration of specialized anti-piracy courts in Somalia. In addition, it suggested the new (and

83 For an overview of the seven options considered by the Secretary-General, see *ibid* 1–5.

84 The Secretary-General appointed the former French minister Jack Lang to act as his Special Adviser.

85 UNSC, ‘Report of the Special Adviser to the Secretary-General on Legal Issues Related to Piracy off the Coast of Somalia’ (n 13) para 79.

86 *ibid* executive summary, 3.

87 *ibid* proposal 25, 38; see also para 121.

88 *ibid* proposal 25, 38.

89 UNSC, ‘Report of the Secretary-General on the modalities for the establishment of specialized Somali anti-piracy courts’ (n 7) paras 52–55 and para 95.

90 *ibid* paras 7–9 and paras 12–13.

yet already practiced) idea to prosecute pirates in other States of the region.⁹¹ At the request of the Security Council, the Secretary-General issued an implementation report in January 2012 addressing this latest prosecution model.⁹² Therein, he defined the term “specialized anti-piracy court” as “a court operating under national law, with international assistance and with a focus on the prosecution of piracy offenses”.⁹³ Hence, no new institutions should be created in the regional States prosecuting piracy suspects, namely the Somali entities of Puntland and Somaliland, the Seychelles, Kenya and (in the near future) Mauritius. Rather, the detailed implementation proposals in the Secretary-General’s Report were aimed at bolstering the current court system.⁹⁴

In sum, the ordinary criminal courts of regional States shall now play a key role in the criminal prosecution of piracy suspects. This is the approach pursued since the very beginning of the counter-piracy operations in 2008. This result had most likely not been anticipated when the discussion of alternative prosecution models was initially launched in April 2010 since it was the deficiencies of this approach that triggered the whole discussion about alternative prosecution models in the first place.⁹⁵ The criminal prosecution of piracy suspects, as opposed to policing of the sea, will thus remain a domestic matter based on municipal criminal law – as it has traditionally always been.

The international community’s attempt to overcome the traditional model in order to prosecute piracy cases, ie domestic proceedings based on municipal law, has therefore failed. What is more, and as we will see next, the Security Council’s counter-piracy resolutions have thus far had little impact on the municipal law on which piracy prosecution can be based and which is still highly deficient in many jurisdictions.

2. Little Impact of the UNSCR on Domestic Criminal Law

Shortly after deployment of the first counter-piracy missions in late 2008,⁹⁶ the Security Council noted that the lack of domestic legislation to facilitate the cus-

91 UNSC Res 2015, para 16; on the key role of Somalia to play in the prosecution of piracy suspects, see para 1.

92 UNSC, ‘Report of the Secretary-General on specialized anti-piracy courts in Somalia and other States in the region’ (n 63).

93 *ibid* para 3.

94 For these proposals, see *ibid* paras 112–23.

95 See beginning of Part 1/II/B/1.

96 Geiss and Petrig (n 7) 19–24: the Combined Task Force 150 was the first multinational naval force to contribute to counter-piracy efforts off the coast of Somalia, operating from late 2008 to January 2009; the first NATO counter-piracy mission, Operation Allied Provider, took place between 24 October 2008 and 13 December 2008; the European Union-led Operation Atalanta was launched on 8 December 2008 and became operational on 13 December 2008.

tody and prosecution of piracy suspects after their capture had hindered “more robust action” against Somali-based pirates and had even led to the release of suspects without bringing them to trial.⁹⁷ Despite this finding, the impact of its 2008 and 2009 counter-piracy resolutions on the domestic legislation necessary to investigate and prosecute persons suspected of piracy or armed robbery at sea remains very limited. The Security Council simply urged States to *implement* their obligations under the UNCLOS, the SUA Convention, the United Nations Convention against Transnational Organized Crime and other relevant instruments.⁹⁸ Given that the typical *modus operandi* of Somali-based pirates is to take hostages rather than rob ships of their cargo and valuables, it is surprising that the Security Council did not explicitly mention the Hostage Convention. However, the reference to “other relevant treaties to which States in the region are party” encompasses this instrument. What seems more problematic in light of municipal law’s legal loopholes is that the Security Council only urges States *already* party to these instruments to implement the respective obligations, rather than contemplating widespread adherence to these treaties, which namely obligate parties to criminalize the conduct generally fulfilled by attacks carried out by Somali-based pirates.

At the same time as (unsuccessfully) prioritizing the establishment of an alternative prosecution model, the Security Council strengthened its resolve regarding the necessary normative action on the level of domestic criminal law in the spring of 2010. Noting with concern in Resolution 1918 that domestic legal frameworks lack provisions criminalizing piracy and/or procedural norms for the effective prosecution of those involved in the phenomenon,⁹⁹ the Security Council *called upon* all States to enact relevant criminal legislation.¹⁰⁰ Later, in Resolution 1976, it *urged* States to do so and emphasized that penal norms should also cover incitement, all forms of participation in a criminal offence, and in-

97 UNSC Res 1851, preambular para 9; in subsequent resolutions, the Security Council did not discern a ‘lack’ of domestic legislation, but rather noted with concern the “continuing limited ... domestic legislation” for prosecution of piracy suspects: UNSC Res 1897, preambular para 8; UNSC Res 1950, preambular para 11; UNSC Res 2020, para 13.

98 For the implementation of the UNCLOS obligations, see: UNSC Res 1897, para 14; UNSC Res 1950, para 19; concerning the Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation (adopted 10 March 1988, entered into force 1 March 1992) 1678 UNTS 221 (SUA Convention) obligations, see: UNSC Res 1846, para 15; UNSC Res 1851, para 5; UNSC Res 1897, para 14; UNSC Res 1950, para 19. The UN Convention against Transnational Crime and ‘other relevant instruments’ are only mentioned in UNSC Res 1851, para 5.

99 UNSC Res 1918, preambular para 14; the concern was raised again in UNSC Res 1976, preambular para 14; and UNSC Res 2015, preambular para 10.

100 UNSC Res 1918, para 2; the call was reiterated later in UNSC Res 1950, para 13; and UNSC Res 2020, para 15.

choate crimes.¹⁰¹ Following insufficient compliance with its demand, the Security Council then *strongly urged* States in Resolution 2015 to threaten all acts of piracy with punishment under their domestic law¹⁰² and called upon all UN Member States to report to the Secretary-General on the implementation of such measures by the end of 2011.¹⁰³

Ultimately, Somalia and its regional authorities play the key role in the prosecution of piracy suspects.¹⁰⁴ Therefore, the Security Council specifically requested the Somali Transitional Federal Government and Somali regional authorities to adopt a complete set of counter-piracy laws.¹⁰⁵ The criminal and procedural codes in force in Somalia, Somaliland and Puntland at that time were deemed to be “critically out of date, containing numerous inconsistencies and deficiencies”¹⁰⁶ and prosecutions were based on criminal offences other than piracy.¹⁰⁷ An attempt by the UNDP and UNODC to remedy the situation and support the enactment of new piracy legislation in Somalia, Somaliland and Puntland initially seemed successful when consensus on a draft text was reached among the so-called Law Reform Group, comprised of international and Somali legal experts. However, considering that Somalia decided not to adopt the respective law, that Puntland changed the definition of piracy to include illegal fishing, and that Somaliland is still considering its adoption, this attempt to reform the legal framework necessary to prosecute piracy seems to have failed.¹⁰⁸

The Security Council initially focused on domestic norms criminalizing the very commission of an attack at sea. The approach became more holistic over time, taking into account the organized crime nature of Somali-based piracy. In Resolution 1950, the Security Council for the first time urged States to take appropriate action under domestic law to prevent illicit financing of piracy, hinder the laundering of its proceeds,¹⁰⁹ and investigate criminal networks involved in piracy.¹¹⁰ It later emphasized the importance of providing domestic courts with jurisdiction to not only try cases involving suspects caught red-handed at sea, but

101 UNSC Res 1976, para 13.

102 UNSC Res 2015, para 9.

103 UNSC Res 2015, para 11.

104 See above Part 1/II/B/1.

105 UNSC Res 1976, para 23; and UNSC Res 2015, para 7.

106 UNSC, ‘Report of the Secretary-General on the modalities for the establishment of specialized Somali anti-piracy courts’ (n 7) para 14.

107 *ibid* para 14; see also UNSC, ‘Report of the Secretary-General on specialized anti-piracy courts in Somalia and other States in the region’ (n 63) specifically on the legal framework in Somalia (para 12), Puntland (para 14) and Somaliland (para 25).

108 UNSC, ‘Report of the Secretary-General on the modalities for the establishment of specialized Somali anti-piracy courts’ (n 7) para 15.

109 UNSC Res 1950, para 15.

110 UNSC Res 1950, para 16; see also later UNSC Res 2020, para 18.

also “anyone who incites or intentionally facilitates piracy operations, including key figures of criminal networks involved in piracy who illicitly plan, organize, facilitate, or finance and profit from such attacks”.¹¹¹

Overall, the counter-piracy resolutions have so far had little impact on the domestic criminal law necessary to investigate and prosecute piracy suspects and the criminal networks behind Somali-based piracy. The Security Council has not yet succeeded in ensuring that States comprehensively criminalize the phenomena of piracy and armed robbery at sea, let alone in harmonizing or unifying relevant procedural and substantive criminal law, which would facilitate interstate cooperation in the investigation and prosecution of piracy cases.¹¹² Nor has the Security Council provided States with criminal jurisdiction to prosecute armed robbery at sea,¹¹³ to which universal jurisdiction does not apply as it does for prosecution of the crime of piracy under customary international law.¹¹⁴ Finally, the counter-piracy resolutions do not establish a duty to prosecute or extradite persons suspected of piracy and/or armed robbery at sea.¹¹⁵

In sum, the Security Council’s piracy resolutions have brought little originality to the realm of criminal prosecution of persons suspected of piracy and armed robbery at sea. Not only did the attempt to establish a truly novel prosecu-

111 UNSC Res 2015, para 17; UNSC Res 2020, para 16, contains a similar consideration, but specifically with regard to the jurisdiction of the envisaged specialized anti-piracy courts in Somalia and other regional States.

112 On the need to harmonize legislation pertaining to piracy and armed robbery at sea, see: Henri Fouché, ‘Harmonized Legal Framework for Africa as an Instrument to Combat Sea Piracy’ in Anna Petrig (ed), *Sea Piracy Law – Droit de la Piraterie Maritime: Selected National Legal Framework and Regional Legislative Approaches – Cadres juridiques nationaux et approches législatives régionales* (Duncker & Humblot 2010).

113 Geiss and Petrig (n 7) 165–66: the authorizations in UNSC Res 1846, para 10 (as extended), to use “all necessary means to repress acts of piracy and armed robbery at sea” and UNSC Res 1851, para 6 (as extended), to “use, within the territorial waters ... all necessary means” can hardly be interpreted as providing adjudicative jurisdiction for the prosecution of alleged armed robbers at sea. Furthermore, the universality principle, which only exists for acts constituting piracy under international law, has not been extended to crimes committed in territorial waters, ie armed robbery at sea, by virtue of the counter-piracy resolutions.

114 Geiss and Petrig (n 7) 144–45.

115 UNSC Res 1373 (28 September 2001) UN Doc S/RES/1373, adopted post-9/11, eg, stipulates an obligation to either prosecute or extradite alleged terrorists. The wording of the counter-piracy resolutions is much more discretionary and does not amount to a duty to prosecute or extradite. However, States party to the SUA Convention or International Convention against the Taking of Hostages (adopted 17 November 1979, entered into force 3 June 1983) 1316 UNTS 205 (Hostage Convention) are under an obligation to prosecute or extradite by virtue of treaty law if the offence in question matches one of the offences defined in Article 3 SUA Convention or Article 1 Hostage Convention; see Geiss and Petrig (n 7) 166–67.

tion model fall short, but the resolutions did not significantly change the rules necessary to prosecute alleged pirates and armed robbers at sea. What is more, only a handful of (mainly regional) States currently prosecute persons seized in counter-piracy operations off the coast of Somalia and in the Indian Ocean. It can hardly be said that the international community succeeded in establishing conditions that ensure the effective criminal prosecution of piracy suspects in line with international human rights law. This contrasts with the innovations on the level of enforcement jurisdiction, where a comprehensive normative framework for policing has been established and implemented by a truly international effort. In short, the response to the phenomenon of Somali-based piracy is Janus-faced. Bridging the two elements of response – law enforcement and prosecution – has posed considerable difficulties in practice. Various efforts have been undertaken to overcome the discontinuity between internationalized law enforcement and domestic criminal prosecution, thus paving the way to bring alleged wrongdoers to justice and avoid their release without further consequences.

III. Building a Bridge: Interlocking Policing and Prosecution

A. *Discontinuity between Policing and Prosecution*

The natural goal of every law enforcement operation is to bring the alleged offenders to justice. As simple as this may sound, implementation of this basic tenet has proven difficult in the context of counter-piracy operations off the coast of Somalia and the region: internationalized policing and domestic prosecution are not yet perfectly interlocked and coordinated. As compared to a purely domestic situation, where the path from policing to criminal prosecution is paved with a comprehensive set of rules articulating the two elements and the interaction between the competent authorities, policing and prosecution in the counter-piracy context are two relatively separate spheres. While a significant number of States participate in the law enforcement operations against Somali-based pirates and regularly seize piracy suspects during their patrols, these States are generally unwilling and/or unable to prosecute the seized suspects in their domestic courts. Furthermore, the attempt to create an international(ized) prosecution venue – to which seized suspects could be more or less automatically surrendered for prosecution by the seizing State – has failed. Thus, seized piracy suspects do not automatically migrate from the policing sphere into the prosecution sphere. Rather, each time a person suspected of piracy or armed robbery at sea is seized, a jurisdiction willing and able to prosecute has to be identified. In other words, with each seizure, the path to prosecution must be paved anew in a procedure referred to as “disposition”. This holds true despite various political-diplomatic efforts to streamline the transition from policing to prosecution, most notably by concluding transfer agreements.

The effort to identify a jurisdiction willing and able to receive piracy suspects for investigation and prosecution often ultimately fails. As a consequence,

the alleged offenders are released after being disarmed. In this respect, counter-piracy operations differ from other instances where States – alone or in cooperation with others – engage in transnational law enforcement operations, such as in the realm of counter-terrorism where it seems easier to identify a criminal forum willing and able to prosecute apprehended suspects than in the counter-piracy context. This difference can hardly be seen in the legal framework for combating transnational offences, specifically so-called “terrorism”, namely in the existence of a duty to prosecute or extradite persons suspected of having committed terrorist acts. Attacks by Somali-based pirates generally correspond to one of the offences defined by the SUA and Hostage Conventions. They are thus covered by instruments adopted in the 1970s and 1980s for countering terrorist activities, both of which contain a duty to prosecute or extradite. The difference between piracy and other transnational criminal phenomena may instead stem from the fact that counter-piracy operations are the first truly internationalized law enforcement operation, aimed at preventing and repressing an entire criminal phenomenon. Thus, counter-piracy operations cannot be compared to transnational police operations, which are (generally) directed at specific individual(s) who allegedly participated in a past criminal venture or intended to prevent a concrete, imminent criminal act. Rather, counter-piracy operations aim to secure the sea by patrolling and engaging in surveillance activities. The frequent release of suspects because of a failure to identify a criminal forum willing and able to prosecute seized persons could therefore be explained by the fact that States *patrol* piracy-infected areas, rather than pursuing individual suspects who are *wanted* from the very beginning of a law enforcement operation by one or more States.

Arguably, the catch-and-release practice violates the duty to prosecute or extradite stipulated in the SUA and Hostage Conventions.¹¹⁶ Furthermore, prosecuted piracy suspects have argued that the principle of equality and the prohibition of arbitrariness are violated by releasing some piracy suspects despite the existence of a criminal suspicion while prosecuting others. The First Instance Court of Rotterdam, which tried the suspects involved in the attack against the *Samanyolu*, dismissed this defence when it was raised by the defendants. The Court found that the various cases involving attacks by Somali-based pirates were hardly comparable, and even if they were, neither the principle of equality nor the prohibition of arbitrariness would be violated.¹¹⁷ The Court thus shares

116 Since the focus of this study is on the individual rights of piracy suspects during disposition, this issue will not be discussed any further.

117 *Re 'MS Samanyolu'* LJN: BM8116, Judgment (Rotterdam District Court, 17 June 2010), English translation provided by UNICRI, 3; *Re 'MS Samanyolu'* LJN: BM8116, Urteil, Anlage I (Gericht 1. Instanz Rotterdam, 17 June 2010) Übersetzung aus der niederländischen/englischen Sprache; German translation on file with author, 5.

the view of the Human Rights Committee that there is no right to see another person criminally prosecuted.¹¹⁸

The catch-and-release practice has peaked at different times, namely when counter-piracy operations first began and the path to prosecution was not at all cleared. Yet, Kenya's withdrawal from arrangements to take over prosecution of suspects in March 2010 also resulted in more releases. In early 2011, the problem became acute once more. According to the Special Adviser on Legal Issues Related to Piracy off the Coast of Somalia, more than 90 per cent of the pirates apprehended by patrolling naval States were released at that time without being prosecuted for a variety of reasons, namely because a prosecution venue could not be found.¹¹⁹ Cases of repeat offending by suspects previously released for a failure to find a prosecuting State have already been identified.¹²⁰ Obviously, this hampers the (certainly ambitious) goal that the Security Council set for itself: the full¹²¹ and durable eradication¹²² of piracy. In the words of the Special Adviser on Piracy: the impunity resulting from the catch-and-release practice "tends to make the risk-reward ratio for the pirates negligible and to encourage piracy" and that this "highly attractive criminal activity is perceived as a virtually foolproof way of getting rich".¹²³ Whether this can be said in such absolute terms may be left open since the catch-and-release practice certainly does not contribute to the deterrent effect of the counter-piracy operations conducted off the coast of Somalia and the region.

118 In *Kulomin v Hungary* Comm no 521/1992 (HRC, 22 March 1996) para 6.3, a case not involving piracy, the Committee stated: "With respect to the author's complaint that one of the suspects in the case had not been prosecuted and convicted, the Committee observed that the Covenant did not provide for the right to see another person criminally prosecuted."

119 UNSC, 'Report of the Special Adviser to the Secretary-General on Legal Issues Related to Piracy off the Coast of Somalia' (n 13) para 14. Another reason cited for releasing suspects without putting them on trial is insufficiency of evidence: UNSC, 'Report of the Secretary-General pursuant to Security Council resolution 1950 (2010)' (n 24) para 59.

120 UNSC, 'Report of the Special Adviser to the Secretary-General on Legal Issues Related to Piracy off the Coast of Somalia' (n 13) para 14. The problem of repeat offending has also been mentioned by military personnel who have seized piracy suspects. Alleged offenders taken on board the warship for disposition asked, after some time had elapsed, when they would be released and stated that this happened to them when they were previously apprehended: information from expert interview on file with author.

121 See, eg, UNSC Res 1846, preambular para 10.

122 See, eg, UNSC Res 1897, preambular para 13.

123 UNSC, 'Report of the Special Adviser to the Secretary-General on Legal Issues Related to Piracy off the Coast of Somalia' (n 13) para 14.

B. Political-Diplomatic Efforts to Further the Prosecution of Piracy Cases

Various efforts have been undertaken on the political-diplomatic level to build a bridge between policing and prosecution in the counter-piracy context and to overcome the severed system. They have mainly been directed at increasing the number of States ready and able to receive piracy suspects for investigation and prosecution.¹²⁴ The most visible output is the negotiation and conclusion of so-called “transfer agreements”. Various States, as well as the EU, have entered into transfer agreements with regional States in which the latter declare their willingness to accept piracy suspects for prosecution, subject to their consent in each individual case and the fulfilment of specific conditions laid down in the respective agreement. To support States willing to enter into transfer agreements, Working Group 2 of the Contact Group on Piracy off the Coast of Somalia has included a transfer agreement template in its legal toolbox.¹²⁵ The template contains model provisions but does not represent agreed upon and negotiated wording.¹²⁶ Whether or not States have actually been using the template is difficult to say.¹²⁷

Kenya was the first State to conclude a transfer agreement with the European Union in March 2009.¹²⁸ That same year, it also entered into bilateral agreements with the United Kingdom,¹²⁹ the United States,¹³⁰ China,¹³¹ Canada¹³² and

124 Another effort concerns the proper and effective collection of evidence based on the legal requirements of the prosecuting State. Evidentiary templates were elaborated by navies together with authorities of regional States willing to prosecute piracy suspects and circulated among States through the Contact Group on Piracy off the Coast of Somalia. They now seem to be widely used: Douglas Guilfoyle, ‘Piracy off Somalia and the Gap Between International Law and National Legal Systems’ (draft of 1 February 2011; quoted with permission of the author) <http://citation.allacademic.com/meta/p_mla_apa_research_citation/4/1/3/5/2/pages413520/p413520-1.php> accessed 16 May 2013, 22.

125 Information from expert interview on file with author.

126 Information from expert interview on file with author.

127 Information from expert interview on file with author.

128 Exchange of Letters between the European Union and the Government of Kenya on the conditions and modalities for the transfer of persons suspected of having committed acts of piracy and detained by the European Union-led naval force (EUNAVFOR), and seized property in the possession of EUNAVFOR, from EUNAVFOR to Kenya and for their treatment after such transfer [2009] OJ L79/49 (EU-Kenya Transfer Agreement).

129 Foreign & Commonwealth Office (UK), ‘Prisoner Transfer Agreements’ (2 August 2012) <www.fco.gov.uk/en/global-issues/piracy/prisoners> accessed 29 January 2013.

130 David Morgan, *Kenya agrees to prosecute U.S.-held pirates: Pentagon* (Reuters 2009).

131 UNSC, ‘Report of the Secretary-General on the modalities for the establishment of specialized Somali anti-piracy courts’ (n 7) Annex V, para 3.

132 *ibid.*

Denmark.¹³³ However, this achievement in the endeavour to better bridge the gap between enforcement and adjudicative jurisdiction in the context of piracy was only temporary. In March 2010, Kenya gave six months' notice that it would be withdrawing from the agreements it had entered into.¹³⁴ Among the reasons given by Kenya for terminating the agreements was the need to see other States share in the burden.¹³⁵ Despite expiration of the arrangements in September 2010, Kenya has declared its continued readiness to accept piracy suspects for prosecution on an *ad hoc* basis.¹³⁶ As of January 2012, 44 suspects have been accepted by Kenya on a case-by-case basis. In these cases, the provisions of the terminated transfer agreements were applied *mutatis mutandis*.¹³⁷ Meanwhile, efforts to revive the transfer agreements with Kenya are in progress. In March 2012, the UK Secretary of State wrote that an "informal commitment from the Kenyan Government to work to re-establish the transfer agreement with the UK" had been achieved.¹³⁸ As of July 2012, Kenya has received 147 piracy suspects for prosecution.¹³⁹

133 Ministry of Foreign Affairs of Denmark, 'Policy Paper for Denmark's Engagement in Somalia' (August 2009) <www.afrika.um.dk/NR/rdonlyres/4534134B-6930-4357-8209-A2FCD53FA6BF/o/Policy_Paper_Denmark_Somalia_ENG.pdf> accessed 15 April 2012, 17.

134 UNSC, 'Report of the Secretary-General on the modalities for the establishment of specialized Somali anti-piracy courts' (n 7) Annex V, para 3.

135 UNSC, 'Report of the Special Adviser to the Secretary-General on Legal Issues Related to Piracy off the Coast of Somalia' (n 13) para 72. Indeed, the number of non-regional States prosecuting piracy suspects and the number of suspects put on trial by them was rather marginal at that time; out of the 738 individuals put on trial, France prosecuted 15 persons, Germany and the Netherlands ten persons each, Spain two persons, Belgium one person, and the US 12 persons: *ibid* para 42.

136 UNSC, 'Report of the Secretary-General on the modalities for the establishment of specialized Somali anti-piracy courts' (n 7) Annex V, para 3; Ministry of Foreign Affairs of Denmark, 'Policy Paper for Denmark's Engagement in Somalia 2011' (March 2011) <<http://kenya.um.dk/en/~media/Kenya/Documents/Policy%20paper%20for%20Denmarks%20engagement%20in%20Somalia%202011.ashx>> accessed 29 January 2013, 21.

137 Information from expert interview on file with author; UNSC, 'Report of the Secretary-General on specialized anti-piracy courts in Somalia and other States in the region' (n 63) para 78.

138 Secretary of State for Foreign and Commonwealth Affairs (UK), 'Tenth Report from the Foreign Affairs Committee of Session 2010–12: Piracy Off the Coast of Somalia, Response of the Secretary of State for Foreign and Commonwealth Affairs' (London, March 2012) <www.official-documents.gov.uk/document/cm83/8324/8324.pdf> accessed 29 January 2013, questions 22 and 23, 14–15.

139 UNODC, 'Counter Piracy Programme: Support to the Trial and Related Treatment of Piracy Suspects' (July 2012) <www.unodc.org/documents/easternafrika//piracy/UNODC_Brochure_Issue_9_Final_webversion.pdf> accessed 29 January 2013, 16.

Also, despite its limited judicial capacity, the Seychelles has entered into transfer agreements with the European Union,¹⁴⁰ the United Kingdom,¹⁴¹ the United States and Denmark.¹⁴² While the island State is willing to receive suspects for prosecution, it is reluctant to enforce the often quite long sentences imposed on pirates convicted by its courts.¹⁴³ As of July 2012, the total number of piracy suspects currently in the Seychelles' criminal justice system was 101. However, the majority are suspects seized by their own domestic authorities rather than persons transferred by other States and EUNAVFOR.¹⁴⁴

In light of the limited capacity of Kenya and the Seychelles to absorb a continuously growing number of apprehended suspects, the Council of the European Union authorized its High Representative in March 2010 to begin negotiations regarding transfer agreements with other States in the region, namely Mozambique, South Africa, Uganda, Tanzania and Mauritius.¹⁴⁵ With respect to Mauritius, the negotiations successfully concluded with the signing of a transfer agreement on 14 July 2011.¹⁴⁶ It is believed that by the end of 2012, the first transfers to Mauritius, whose capacity to receive suspects from third States seems to be closer to that of the Seychelles than Kenya, will take place.¹⁴⁷ While a transfer agreement between Tanzania and the European Union is not imminent,¹⁴⁸ the

140 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 from EUNAVFOR to the Republic of Seychelles and for their Treatment after such Transfer [2009] OJ L315/37 (EU-Seychelles Transfer Agreement).

141 Foreign & Commonwealth Office (UK) (n 129).

142 UNSC, 'Report of the Secretary-General on the modalities for the establishment of specialized Somali anti-piracy courts' (n 7) Annex V, para 5.

143 See below Part 1/III/C.

144 UNODC, 'Counter Piracy Programme' (n 139) 16. As of January 2012, the Seychelles have prosecuted 29 suspects transferred by third States and 41 alleged offenders seized by its own forces; newer figures on the number of suspects seized by their own forces versus transferred persons do not exist: UNSC, 'Report of the Secretary-General on specialized anti-piracy courts in Somalia and other States in the region' (n 63) para 55.

145 Council of the European Union, '3005th Council Meeting, Foreign Affairs' (Press Release, Brussels, 22 March 2010) <www.consilium.europa.eu/uedocs/cms_Data/docs/pressdata/EN/foraff/113482.pdf> accessed 29 January 2013.

146 UNSC, 'Report of the Secretary-General on specialized anti-piracy courts in Somalia and other States in the region' (n 63) paras 82 and 96.

147 Information from expert interview on file with author.

148 Information from expert interview on file with author.

United Kingdom has already succeeded in doing so.¹⁴⁹ In addition, the United Kingdom has also entered into a transfer agreement with Mauritius.¹⁵⁰

A large number of transfers for the purpose of prosecution, which take place between individual States, are not based on transfer agreements as described above. Rather, a criminal law forum is first identified and then the surrender for prosecution is negotiated and organized on a case-by-case basis. Thus, Yemen, India, Somaliland and Puntland, even though they prosecute some of the highest numbers of suspects (together 632 out of 1063 suspects),¹⁵¹ have not yet concluded any transfer agreements with the European Union or patrolling naval States. With regard to Puntland and Somaliland, the Secretary-General has stated that such agreements will not be concluded until the criminal justice system meet the human rights standards generally set forth in the agreements.¹⁵² At the same time, he emphasized that such agreements would be necessary in order to enable the specialized anti-piracy courts in Somaliland and Puntland to receive suspects for prosecution from patrolling naval States.¹⁵³ These statements contrast with the fact that these entities have, in the past, already received suspects from third States in the absence of any such memoranda of understanding. As of May 2010,¹⁵⁴ Somaliland carried out 20 prosecutions following arrest by patrolling naval States (out of a total of 100 prosecutions) and Puntland prosecuted 60 persons following arrest by a third State (out of a total of 208 prosecutions).¹⁵⁵

The political-diplomatic efforts to increase the number of prosecuting States and to enhance the judicial capacity of States already active in the prosecution of piracy suspects are of relative success. Between July 2010 and June 2011, the number of States that have instituted criminal proceedings against piracy suspects has risen from ten to 20. The number of ongoing or completed prosecutions nearly doubled from 528 to 1,011.¹⁵⁶ However, between June 2011 and January 2012, the number of prosecuting States remained stable and the total number of

149 Secretary of State for Foreign and Commonwealth Affairs (UK) (n 138) questions 22 and 23, 14–15; Foreign & Commonwealth Office (UK) (n 129).

150 *ibid.*

151 UNSC, 'Report of the Secretary-General on specialized anti-piracy courts in Somalia and other States in the region' (n 63) para 10.

152 *ibid* para 24 (regarding Puntland) and para 34 (regarding Somaliland).

153 UNSC, 'Report of the Secretary-General on the modalities for the establishment of specialized Somali anti-piracy courts' (n 7) para 32.

154 As of August 2012, these were the only official figures indicating a difference between prosecution of suspects transferred from third States and alleged offenders seized by the prosecuting State's own forces.

155 UNSC 'Seven Options Report' (n 79) para 19.

156 UNSC, 'Report of the Secretary-General on the modalities for the establishment of specialized Somali anti-piracy courts' (n 7) Annex I, para 4.

prosecutions rose insignificantly from 1,011 to 1,063.¹⁵⁷ Also, the contribution of non-regional States to the criminal prosecution of persons suspected of piracy and armed robbery at sea continues to be rather marginal. A majority of suspects are still prosecuted by regional States.¹⁵⁸ Overall, the total prosecution capacity currently allocated to piracy cases does not suffice considering the large number of apprehended suspects. The catch-and-release practice remains a concern, in light of which the Security Council has repeatedly reiterated its call on all States to favourably consider the prosecution of suspected pirates.¹⁵⁹

C. Enforcement of Sentences as a Growing Concern

While the international community initially focused on how to deter and disrupt pirate attacks at sea (the policing element), it later shifted to trying seized suspects in the courts (the criminal prosecution element). Today, the final component of every criminal justice framework – the enforcement of sentences – has at last received greater attention in the international community as a necessary element for countering the phenomenon of Somali-based piracy.

For many States, the enforcement of sentences is a “compelling disincentive” for prosecuting piracy suspects. The lack of long-term imprisonment options seems to have become a major constraint on piracy prosecutions.¹⁶⁰ For instance, the Seychelles is not ready to enforce (the often quite long) sentences it imposes on suspects received for prosecution from third States.¹⁶¹ Therefore, it made transfer agreements contingent on the option to then transfer convicted persons to Somalia for the enforcement of their sentences.¹⁶² In order to do so, the

157 UNSC, ‘Report of the Secretary-General on specialized anti-piracy courts in Somalia and other States in the region’ (n 63) para 10.

158 Out of the 1063 suspects put on trial thus far, Puntland prosecuted 290 individuals, Kenya 143 individuals, India 119 individuals, Yemen 129 individuals, Somaliland 94 individuals, the Seychelles 70 individuals, the Maldives 37 individuals, Oman 22 individuals, south central Somalia 18 individuals, and Tanzania 12 individuals: *ibid* para 10.

159 This call was initially made in UNSC Res 1918, para 2; it has since been repeated in UNSC Res 1950, para 13; UNSC Res 1976, para 14; UNSC Res 2015, para 9; and UNSC Res 2020, para 15.

160 UNSC, ‘Report of the Secretary-General pursuant to Security Council resolution 1897 (2009)’ (27 October 2010) UN Doc S/2010/556, para 52.

161 The following sentence of the EU-Seychelles Transfer Agreement expresses the Seychelles’ intent *not* to enforce sentences of transferred persons: “The EU ... shall provide the Republic of Seychelles with such full financial, human resource, material, logistical and infrastructural assistance for the detention, incarceration maintenance, investigation, prosecution, trial and *repatriation* of the suspected or *convicted pirates and armed robbers*.” (emphasis added).

162 UNSC, ‘Report of the Secretary-General on the modalities for the establishment of specialized Somali anti-piracy courts’ (n 7) Annex V, para 5.

Seychelles entered into a “transfer for enforcement” agreement with the Somali Transitional Federal Government, Puntland and Somaliland.¹⁶³ However, current prison capacity in Puntland is insufficient and the conditions of many facilities are not in line with international human rights standards.¹⁶⁴ With regard to Somaliland, implementation of the agreement at first seemed uncertain after a statement by its authorities called for withdrawal from the memorandum of understanding with the Seychelles and the release of 60 convicted pirates from its Hargeysa prison following the payment of bribes.¹⁶⁵ In light of these facts, the UNODC planned to terminate its counter-piracy work in Somaliland. This position, however, was reconsidered after Somaliland issued a statement reconfirming its commitment to accept transferred prisoners under the agreement with the Seychelles.¹⁶⁶ In early 2012, Somaliland received the first 17 persons convicted by courts in the Seychelles¹⁶⁷ and in December 2012 five convicted pirates were transferred from the Seychelles to Puntland.¹⁶⁸ Similar to Puntland, prison capacity in Somaliland is still very limited and often does conform to international standards.¹⁶⁹ Agreements with Somalia and its regional entities for the transfer of convicted pirates may seem desirable in order to overcome the divide between

163 UNSC, ‘Report of the Secretary-General pursuant to Security Council resolution 1950 (2010)’ (n 24) para 67.

164 The UNDP is currently building a new prison in Qardho (Puntland) with the capacity to hold 266 inmates. At the same time, it is working on the renovation of the Boosaaso Central Prison in Puntland, to which the first transferees may be sent after completion: *ibid* para 67. In addition, the UNODC is building a new prison in Garoowe (Puntland) to host 500 inmates. The facility should be completed in 2013 and will primarily be used to hold convicted pirates repatriated from other jurisdictions: UNSC, ‘Report of the Secretary-General on specialized anti-piracy courts in Somalia and other States in the region’ (n 63) para 22.

165 UNSC Res 1950, paras 67 and 69; UNSC, ‘Report of the Secretary-General on specialized anti-piracy courts in Somalia and other States in the region’ (n 63) para 36.

166 *ibid* para 36.

167 The 22 Somalis were repatriated from the Seychelles to Mogadishu and Somaliland in early 2012 in order to ease overcrowding at the Seychelles Montagne Posse prison: UNODC, ‘Counter Piracy Programme’ (n 139) 6; UNSC, ‘Report of the Secretary-General on Somalia’ (1 May 2012) UN Doc S/2012/283, para 50.

168 Garowe Online, ‘Somalia: Five Convicted Pirates Transferred From Seychelles to Puntland’ (4 December 2012) <<http://allafrica.com/stories/201212050064.html>> accessed 29 January 2013.

169 Even though the UNODC and UNDP have recently completed the construction of Hargeysa prison, it has no space to host prisoners from other jurisdictions. The UNODC is currently revisiting its draft proposal for the creation of additional prison capacity. Somaliland authorities prefer increasing accommodation at existing prisons rather than building new detention facilities, thus the plan is to increase the capacity of the Mandera and Berbera prison by 200 places each and to build a special block for juvenile convicts at Gabiley prison: UNSC, ‘Report of the Secretary-

enforcement of sentences and the criminal prosecution of suspects, but as we will see later they may be problematic in terms of human rights norms.

IV. Paving the Way for Prosecutions: Disposition of Piracy Cases

A. Disposition Post-Seizure

In the counter-piracy operations off the coast of Somalia and the region, a State willing and able to prosecute alleged pirates is generally only identified *after* the interception of a pirate boat and with regard to the concrete individuals seized. The technical term for the post-seizure process where it is determined whether and where to prosecute the alleged pirates is “disposition”. How disposition can be organized will be illustrated later by two case studies that examine the disposition frameworks and procedures of EUNAVFOR and Denmark.¹⁷⁰ The following solely analyses the means by which an alleged pirate can be brought within the jurisdiction of the prosecuting State in cases where the seizing State decides not to prosecute the suspects in its own courts.

There are three potential mechanisms by which to bring a piracy suspect within the jurisdiction of the prosecuting State post-seizure: extradition, deliveries under Article 8 SUA Convention and “transfers”. At the time of writing, extradition has (to the author’s knowledge) only been used in one single and rather unique instance to bring piracy suspects seized at sea within the jurisdiction of the prosecuting State. Further, it is submitted that Article 8 SUA Convention does not provide a legal basis for a seizing State to surrender suspects to a third State. This leaves transfers, the most prevalent means by which to surrender piracy suspects to the prosecuting State.

1. Extradition

The most obvious legal mechanism to bring an alleged offender from the jurisdiction of the State having custody over him to the jurisdiction of the prosecuting State is extradition (including surrender based on the European arrest warrant procedure if two EU Member States are involved). Broadly defined, extradition is a formal process by which a person is surrendered for prosecution by one State to another based on an international treaty, domestic legislation, reciprocity or comity.¹⁷¹ Parties to an extradition process are the requesting and requested State, but also the alleged offender.¹⁷²

General on specialized anti-piracy courts in Somalia and other States in the region’ (n 63) para 32.

¹⁷⁰ See below Part 2.

¹⁷¹ Cherif Bassiouni, *International Extradition: United States Law and Practice* (5th edn, OUP 2007) 1.

¹⁷² *ibid.*

Despite being the traditional and common *modus operandi* to acquire jurisdiction over a criminal suspect in a transnational setting, extradition has thus far never been used to bring piracy suspects seized by a patrolling naval State's warship directly to the prosecuting State. In a singular, albeit special case, piracy suspects were surrendered for prosecution based on the European arrest warrant procedure: the persons suspected of attacking the German-flagged *Taipan*, who were seized by the Dutch frigate *Tromp*, were surrendered by the Netherlands to Germany pursuant to the execution of a European arrest warrant.¹⁷³ However, as a first step and before Germany agreed to receive the suspects for prosecution, the alleged offenders were taken to the Dutch mainland.¹⁷⁴

In situations where the suspects are *directly* transferred from the patrolling naval State's warship to the prosecuting State, involved States are reluctant to resort to extradition. The *Samanyolu* judgment of the First Instance Court of Rotterdam illustrates quite well that the classical means (and rules) for surrendering a person to a third State for prosecution are not applied in the counter-piracy context. After the Netherlands informed the Danish authorities about their willingness to receive the five suspects that allegedly attacked a Dutch-flagged ship and were seized by Danish forces, it issued an arrest warrant for the suspects and a European arrest warrant was sent to the Danish authorities. However, the Danish authorities informed their Dutch counterpart that Danish extradition law would not apply in the present case. As a result, a *de facto* surrender that was not based on any formal proceedings took place.¹⁷⁵

It can be concluded that States do not *per se* exclude the use of extradition in the counter-piracy context. For instance, Article 11 of the Djibouti Code of Conduct mentions extradition alongside the use of handovers.¹⁷⁶ However, to

173 *Re 'Taipan'* LJN: BM6786 (Rechtbank Amsterdam, Internationale Rechtshulpkamer, 4 June 2010); *Re 'Taipan'* LJN: BM6780 (Rechtbank Amsterdam, Internationale Rechtshulpkamer, 4 June 2010); Spiegel Online, 'Auslieferung genehmigt: Deutschland darf somalische Piraten vor Gericht stellen' (4 June 2010) <www.spiegel.de/panorama/justiz/o,1518,druck-698806,00.html> accessed 29 January 2013; BBC News, 'Ten alleged Somali pirates face extradition to Germany' (4 June 2010) <www.bbc.co.uk/news/10239977?print=true> accessed 29 January 2013.

174 Information from expert interview on file with author.

175 *Re 'MS Samanyolu'* (Urteil, Anlage I) (n 117) 6; *Re 'MS Samanyolu'* LJN: BM8116, Urteil [Antrag der Staatsanwaltschaft] (Gericht 1. Instanz Rotterdam, 17 June 2010) Übersetzung aus der niederländischen/englischen Sprache; German translation on file with author, 41.

176 IMO Council, 'Code of Conduct Concerning the Repression of Piracy and Armed Robbery Against Ships in the Western Indian Ocean and the Gulf of Aden' in 'Protection of Vital Shipping Lanes, Sub-regional meeting to conclude agreements on maritime security, piracy and armed robbery against ships for States from the Western Indian Ocean, Gulf of Aden and Red Sea areas' IMO Doc C 102/14, annex, 5 (Djibouti Code of Conduct) <www.imo.org/OurWork/Security/PIU/Documents/DCoC%20English.pdf> accessed 29 January 2013.

date, no piracy suspects have been brought from a seizing State's warship to the mainland authorities of the prosecuting State by resorting to extradition *stricto sensu* or by surrender pursuant to the execution of a European arrest warrant. Rather, they have been brought within the jurisdiction of the prosecuting State by the use of transfers, which will be described later in detail and which fundamentally differ from extradition in many respects.¹⁷⁷

2. Deliveries under Article 8 SUA Convention

In its counter-piracy resolutions, the Security Council mentions deliveries under the SUA Convention as a potential mechanism for bringing piracy suspects within the jurisdiction of the prosecuting State. In Resolution 1846, for instance, the Security Council noted that the SUA Convention "provides for parties ... to accept delivery of persons responsible for or suspected of seizing or exercising control over a ship by force or threat thereof or any other form of intimidation".¹⁷⁸ In the preamble of the Djibouti Code of Conduct, the obligation under the SUA Convention to accept delivery of suspects is similarly mentioned.¹⁷⁹

Indeed, Article 8 SUA Convention provides for so-called "deliveries": the master of a ship of a State Party may deliver to the authorities of any other State Party any person who he has reasonable grounds to believe has committed one of the offences set forth in Article 3 of the Convention.¹⁸⁰ The receiving State shall accept the delivery, unless it has grounds to consider that the SUA Convention is not applicable to the acts giving rise to the delivery. In cases where delivery is refused, the reasons for refusal must be communicated.¹⁸¹ The master of the ship, in

¹⁷⁷ See case studies in Part 2; on the differences between transfers and extradition regarding the non-refoulement assessment, see Part 5/III/B/1/b.

¹⁷⁸ UNSC Res 1846, para 14; identical wording can be found in UNSC Res 1851, preambular para 9; UNSC Res 1950, preambular para 11; and UNSC Res 2020, preambular para 13. This section is based on previous research by the author for Geiss and Petrig (n 7) 187–91.

¹⁷⁹ Preambular para 10 Djibouti Code of Conduct.

¹⁸⁰ Article 8(1) SUA Convention. Most attacks carried out by Somali-based pirates fulfil one of the offences described in Article 3 SUA Convention, namely sub-paragraph 1(a) which defines as an offence any unlawful and intentional seizure or exercise of control over a ship by force or threat thereof or any other form of intimidation; see Geiss and Petrig (n 7) 153–55.

¹⁸¹ Article 8(3) SUA Convention. According to Article 8(5) SUA Convention, the State that has accepted the delivery of a person in accordance with Article 8(3) SUA Convention may, in turn, "request the flag State to accept the delivery of that person". It is not clear whether the term "flag State" means the flag State of the attacked vessel or the flag State of the vessel that delivered the suspect. Common sense would suggest that the former is intended, but the wording of Article 8(1) SUA Convention, which defines the delivering State as the "flag State", would suggest the latter: Douglas Guilfoyle, "Treaty Jurisdiction over Pirates: A Compi-

turn, is obliged to furnish the authorities of the receiving State with any evidence in its possession that relates to the offense.¹⁸²

A situation where the crew of a private ship overpowers piracy suspects and ultimately delivers them to a regional State for prosecution is, thus far, a rather theoretical scenario. However, it may become more likely with the increased use of private security providers on board merchant vessels.¹⁸³ More commonly, piracy suspects are seized by law enforcement officials, who then identify a jurisdiction willing and able to receive the alleged offenders for prosecution. This begs the question of whether the power to deliver persons suspected of SUA Convention offenses to a contracting port State is limited to masters of private vessels or extends equally to commanders of warships, ie law enforcement officials.

One view held in legal doctrine is that Article 8 SUA Convention does not expressly reserve the power to deliver to the master of the attacked ship. Rather, it could also cover delivery from a seizing warship to a receiving State.¹⁸⁴ The Dutch prosecutor, for example, argued in the *Samanyolu* case that Article 8 SUA Convention provided an explicit basis for the handover of suspects from the Danish to the Dutch authorities.¹⁸⁵ Proponents of this view argue that even though Article 2 SUA Convention states that the SUA Convention does not apply to warships, “this provision [Article 2 SUA Convention] was intended to prevent the Convention covering offences against military discipline. Neither the actual language used nor the intent behind it prevents this provision being *applied by* a warship.”¹⁸⁶ Consequently, the commander of a warship deployed in the Gulf

lation of Legal Texts with Introductory Notes’ (Prepared for the 3rd Meeting of Working Group 2 on Legal Issues, Contact Group on Piracy off the Coast of Somalia, Copenhagen, 26–27 August 2009) <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1537272> accessed 29 January 2013, 18, para 45.

182 Article 8(4) SUA Convention.

183 Since currently even patrolling naval States that have access to diplomatic channels are often unable to find a jurisdiction willing to accept the alleged offenders for prosecution, it might be very difficult for a master of a private ship to identify a receiving State. Even if the flag State assisted the private ship that overpowered piracy suspects in negotiating a transfer, this may take considerable time. Since merchant vessels are even less equipped to detain alleged offenders than warships, it seems a more realistic option for the master of a private ship to hand over the alleged offender at sea to a patrolling naval State. Domestic criminal law, as a consequential right to self-defence, generally allows the option to take an offender into custody for the short time span necessary before handing him over to law enforcement officials: Anna Petrig, ‘The Use of Force and Firearms by Private Maritime Security Companies against Suspected Pirates’ (2013) 62 *International & Comparative Law Quarterly* 667, 692.

184 Guilfoyle (n 181) 18, para 42.

185 *Re ‘MS Samanyolu’* (Urteil [Antrag der Staatsanwaltschaft]) (n 175) 82 and 90.

186 Douglas Guilfoyle, ‘Counter-Piracy Law Enforcement and Human Rights’ (2010) 59 *International & Comparative Law Quarterly* 141, 149.

of Aden region could also carry out deliveries of seized piracy suspects based on Article 8 SUA Convention.¹⁸⁷ For various reasons, however, it is submitted here that the power to deliver under the SUA Convention is limited to masters of private ships (victim ships and others) and does not extend to commanders of warships, ie law enforcement officials.

It is true that the wording of Article 8(1) SUA Convention provides the power of delivery to “the master of a ship of a State party” without limiting this power to the master of an *attacked* ship. Regarding the person subject to delivery, Article 8(1) SUA Convention provides the power of delivery over “any person who he [the master of a ship] has reasonable grounds to believe has committed one of the offences set forth in article 3”. Hence, the wording of Article 8 SUA Convention does not limit the power of delivery to the master of an attacked private ship, but allows deliveries by the master of *any* private ship, for so long as it flies the flag of a State party.¹⁸⁸

However, the term “master of a ship” cannot be read as encompassing warship commanders, ie law enforcement officials. This follows from Article 1 SUA Convention which defines the notion of a “ship”, when read together with Article 2(1)(a) and (b) SUA Convention, as excluding warships and law enforcement vessels from the Convention’s scope of application. To limit the power of delivery to masters of private ships is consistent with the subject matter of the SUA Convention, which is not aimed at law enforcement (ie policing), but rather international cooperation in criminal matters. A policing component was only added to the Convention by SUA Protocol 2005, which entered into force on 28 July 2010.¹⁸⁹ The Protocol contains a boarding provision in Article 8bis, which is included after Article 8 SUA Convention on deliveries. In this boarding provision, it is explicitly stated that it applies despite the Article 2 exclusion of warships and law enforcement vessels from the SUA Convention’s scope of application.¹⁹⁰ From

187 Guilfoyle (n 181) 18, para 42.

188 In juxtaposition, Article 9 Tokyo Convention limits the power of delivery to the commander of the aircraft on board which an offense was committed: “The aircraft commander may deliver to the competent authorities of any Contracting State in the territory of which the aircraft lands any person who he has reasonable grounds to believe has committed *on board the aircraft* an act which, in his opinion, is a serious offence according to the penal law of the State of registration of the aircraft.” (emphasis added). On Article 9 Tokyo Convention, see: Robert Boyle and Roy Pulsifer, ‘The Tokyo Convention on Offences and Certain Other Acts Committed on Board Aircraft’ (1964) 30 *Journal of Air Law and Commerce* 305, 342–43.

189 IMO, ‘Status of Multilateral Conventions and Instruments in Respect of which the International Maritime Organization or its Secretary-General Performs Depository or other Function as at 31 March 2012’ (31 March 2012) <www.imo.org/About/Conventions/StatusOfConventions/Documents/Status%20-%202012.pdf> accessed 15 April 2012, 413.

190 Article 8bis(10)(d) SUA Convention: “Any measure taken pursuant to this article shall be carried out by law enforcement or other authorized officials from warships

this statement, it may be inferred that absent such an explicit *caveat*, provisions of the SUA Convention do not apply to warships and law enforcement vessels.

What is more, in Article 8bis, the term “master of a ship” appears several times.¹⁹¹ It is clearly used as a term that is different from “law enforcement or other authorized officials”, which is defined in the very same provision as follows: “For the purposes of this article ‘law enforcement or other authorized officials’ means uniformed or otherwise clearly identifiable members of law enforcement or other government authorities duly authorized by their government.”¹⁹² Thus, from Article 8bis it follows quite clearly that the term “master of a ship” cannot encompass law enforcement officials. The proposition that the term has a different meaning in the preceding Article 8 SUA Convention on deliveries is therefore untenable.

The drafting history of Article 8 SUA Convention also suggests that the “master of a ship” is a person acting in a private capacity. Deliveries of alleged offenders to third States by the captain of a private ship were introduced in the SUA Convention “out of a desire to avoid masters of ships which are far from or which never call at home ports (most notably flag of convenience or land-locked State ships) having to detain alleged offenders on board for long periods – a situation for which few ships are equipped”.¹⁹³ Moreover, it should be borne in mind that Article 8 SUA Convention on deliveries is (loosely) modelled after Articles 9, 13 and 14 of the Tokyo Convention,¹⁹⁴ which are more explicit in their wording and expressly limit the power of delivery to the commander of the aircraft on board which a serious offence was committed.¹⁹⁵

Finally, any suggestion that the Security Council has provided an authoritative interpretation of the Article 8 SUA Convention term “master of a ship” as to also encompass commanders of warships and other law enforcement vessels must be rejected.¹⁹⁶ The Security Council has done nothing more than reiterate

or military aircraft, or from other ships or aircraft clearly marked and identifiable as being on government service and authorized to that effect and, *notwithstanding articles 2 and 2bis, the provisions of this article shall apply.*” (emphasis added).

191 Article 8bis(10)(a)(viii), (d) and (e) 2005 Protocol to the 1988 Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation (adopted 14 October 2005, entered into force 28 July 2010) IMO Doc LEG/CONF.15/21 (2005 SUA Protocol).

192 Article 8bis(10)(e) 2005 SUA Protocol.

193 Glen Plant, ‘Legal Aspects of Terrorism at Sea’ in Rosalyn Higgins and Maurice Flory (eds), *Terrorism and International Law* (Routledge 1997) 86. Consequently, one of the major disadvantages of the delivery provision is seen in the fact that a private person is making a “forum choice”, which may be politically sensitive and have far reaching consequences for the person subject to delivery.

194 *ibid* 86.

195 See the very beginning of this section.

196 See, eg, Guilfoyle (n 181) 18, fn 42.

that States party to the SUA Convention have an obligation to not only criminalize conduct defined in Article 3 SUA Convention under domestic law and establish jurisdiction over such offences, but also to “accept delivery of persons responsible for or suspected of seizing or exercising control over a ship by force or threat thereof or any other form of intimidation”.¹⁹⁷ While the obligation of the receiving State to accept deliveries is stressed, nothing is said about who has the power of delivery, and thus it cannot be maintained that the Security Council provided a different interpretation of Article 8 SUA Convention.

Accordingly, it can be safely concluded that the delivery mechanism of the SUA Convention is only available to the master of a private ship, be it the victim vessel or any other private ship. However, commanders of warships and other law enforcement official cannot make use of this tool as a means to bring about a jurisdictional change in order to prosecute.

3. Transfers

We have seen that in the context of counter-piracy suspects are not surrendered for prosecution as a result of formal extradition proceedings. Furthermore, the rather informal delivery procedure is not available to law enforcement officials. As a result, piracy suspects are currently brought within the jurisdiction of the prosecuting State by means of so-called “transfers”.¹⁹⁸

The notion of “transfer” is not of a technical nature with a precise meaning. Rather, it is an umbrella term referring to the various techniques and procedures used to bring a piracy suspect within the jurisdiction of a third State for prosecution without having to resort to formal extradition proceedings.¹⁹⁹ Depending on the actors involved – for example, whether seizure and arrest has been carried out under national tasking or as part of EUNAVFOR and the identity of the receiving State – the modalities, forms and features of transfers vary considerably. They range from *ad hoc* and *de facto* handovers between law enforcement officials that do not involve any formalized legal procedure to transfers that are more institutionalized and pursuant to eclectic legal norms, such as those carried out

197 UNSC Res 1846, para 14; identical wording can be found in UNSC Res 1851, preambular para 9; UNSC Res 1950, preambular para 11; and UNSC Res 2020, preambular para 13.

198 Sometimes, the term “handover” is used instead of “transfer”; see, eg, Article 11 Djibouti Code of Conduct.

199 In the counter-piracy context, the term “transfer” is also used to refer to a jurisdictional change with a view of enforcing a sentence; see, eg, UNSC Res 1950, preambular para 14; UNSC Res 1976, paras 20–21; UNSC Res 2015, paras 7–8; and UNSC Res 2020, preambular para 19. The present analysis is limited to transfers for prosecution and only deals with post-conviction transfers on the sidelines.

by Denmark or within the EUNAVFOR framework, as will be described later in more detail.²⁰⁰

B. Anticipated Disposition by Using Shipriders

Currently, a State willing and able to receive piracy suspects for prosecution is identified after the seizure and with regard to the specifics of each individual case. Instead of disposition post-seizure, a jurisdictional choice could also be made before a pirate boat is seized and its crew arrested, namely by using shipriders. Shipriders are, put simply, law enforcement officials from one State embarked on a law enforcement vessel of another State. If piracy suspects were arrested by law enforcement officials from a State willing to prosecute piracy suspects, who are embarked on the warships of a third patrolling naval State, the alleged offenders would immediately come within the jurisdiction of the prosecuting State. Thus, by embarking shipriders, the jurisdictional choice is made before the seizure of a specific boat and thus disposition is anticipated. What is more, because the suspects are arrested and detained under the shiprider's authority, ie an official of the later prosecuting State, there is no need to bring the suspect within the jurisdiction of the prosecuting State post-seizure by means of extradition or transfer.

The idea of using shipriders for this purpose is not foreign to the counter-piracy debate. The Security Council has repeatedly invited States and regional organizations engaged in counter-piracy operations off the coast of Somalia to enter into shiprider agreements with regional States. These agreements would allow for law enforcement officials from States of the region to be embarked on law enforcement vessels of patrolling third States.²⁰¹ Similarly, the Djibouti Code of Conduct²⁰² – a soft law instrument aimed at intensified regional cooperation in the prevention and repression of piracy²⁰³ – contains a provision on “embarked officers”.²⁰⁴

Traditionally, shipriders are used to overcome jurisdictional hurdles in law enforcement operations.²⁰⁵ Embarked officers can legitimately take enforcement

200 See below Part 2.

201 UNSC Res 1851, para 3; and UNSC Res 1897, para 6.

202 Djibouti Code of Conduct.

203 For more information on the Djibouti Code of Conduct see, Geiss and Petrig (n 7) 48–51.

204 Article 7 Djibouti Code of Conduct.

205 See, eg, the United States Model Maritime Agreement for counter-drug operations: Joseph Kramek, ‘Bilateral Maritime Counter-Drug and Immigrant Interdiction Agreements: Is This the World of the Future?’, Appendix B: U.S. Model Maritime Agreement 152 (U.S. Model Maritime Agreement) (2000) University of Miami Inter-American Law Review 152.

measures in the territorial waters of their home State²⁰⁶ or against ships flying the flag of their home State.²⁰⁷ Alternatively, they can authorize on-the-spot enforcement actions by officials belonging to the vessels the shipriders are accompanying. In the context of counter-piracy, however, the primary purpose of shiprider agreements is not the extension of enforcement powers. Regarding the crime of piracy, which can *per definitionem* only be committed on the high seas,²⁰⁸ international law already allows every State to take enforcement measures.²⁰⁹ As to attacks committed against ships and their crew within the territorial waters of Somalia, commonly referred to as armed robbery at sea, the counter-piracy resolutions of the Security Council provide States with comprehensive law enforcement powers.²¹⁰ Thus, as for countering attacks by Somali-based pirates carried out on the high seas or in the territorial waters of Somalia, there is no need for additional law enforcement powers.

In the context of piracy, shipriders are thus far understood as a means by which to bring an alleged offender directly within the jurisdiction of the prosecuting State, ie as a method to enable and facilitate the exercise of adjudicative jurisdiction. This specific rationale not only follows from the language of the Security Council resolutions encouraging shiprider agreements,²¹¹ but also from statements by the UNODC, such as the following: “Shiprider arrangements ... would enable a law enforcement official from, for example, Djibouti, Kenya, Tanzania or Yemen, to join a warship off the coast of Somalia as a ‘ship-rider,’ arrest the pirates in the name of their country, and then have them sent to their national court for trial.”²¹²

206 According to Article 2 UNCLOS, the sovereignty of the coastal State extends beyond its land territory to the territorial sea. Consequently, the coastal State has exclusive enforcement jurisdiction in this part of the ocean and third States are generally not allowed to take enforcement measures within the territorial sea of third States, absent express consent of the host State: Malcolm Shaw, *International Law* (6th edn, CUP 2008) 650–51.

207 According to Article 92(1) UNCLOS, ships are, save in exceptional cases, subject to the exclusive enforcement jurisdiction of the State whose flag they fly: Douglas Guilfoyle, *Shipping Interdiction and the Law of the Sea* (CUP 2009) 16.

208 Article 101(a) UNCLOS.

209 This exception to the exclusive flag State jurisdiction set forth in Article 92(1) UNCLOS is foreseen in Articles 105 and 110 UNCLOS; see above Part 1/II/A/1.

210 See above Part 1/II/A/1.

211 UNSC Res 1851, para 3, and UNSC Res 1897, para 6, both encourage shiprider agreements “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”.

212 UNODC, ‘Annual Report 2009: Covering Activities in 2008’ <www.unodc.org/documents/about-unodc/AR09_LORES.pdf> accessed 29 January 2013, 17. See also UNODC, ‘UNODC Proposes Measures to Stop Piracy in the Horn of Africa’

Through the seizure and arrest of piracy suspects by embarked officials from “countries willing to take custody of pirates”,²¹³ the alleged offender would come within the prosecuting State’s jurisdiction from the very moment of apprehension.

The use of shipriders requires the adoption of implementing arrangements.²¹⁴ In order to facilitate this task, Working Group 2 of the Contact Group on Piracy off the Coast of Somalia added a template of such shiprider agreements to its legal toolbox.²¹⁵ The purpose behind the use of shipriders in the counter-piracy context – as a means to anticipate a jurisdictional choice that paves the way for future criminal prosecution in the State of the embarked officer – suggests the adoption of shiprider agreements similar to the United States Model Maritime Agreement Concerning Cooperation to Suppress Illicit Traffic by Sea. This model agreement foresees that embarked officers will take law enforcement measures, such as the search and seizure of property, detention of persons and use of force, under the law of their own State.²¹⁶ If acting under their own law, the suspect would be detained and property seized exclusively under this law and on behalf of the shiprider’s jurisdiction. This would require that embarked officers have the domestic legal authority to take law enforcement measures extraterritorially. However, in some legal systems, coastguards or police officers do not currently have the power to, for example, carry out an arrest outside their national waters.²¹⁷

The use of shipriders would not only render post-seizure disposition obsolete, but it would also eliminate the need for a jurisdictional change since the suspects would come within the jurisdiction of the prosecuting State upon their

(Press Release, Vienna, 16 December 2008) <www.unodc.org/unodc/en/press/releases/2008-12.16.html> accessed 29 January 2013: “A third, and more realistic option, proposed by UNODC is for the pirates to be tried in the region, having been arrested by local policemen. ‘I encourage ‘ship riders’ to be deployed on warships operating off the Horn of Africa in order to arrest pirates and bring them to justice in neighboring countries,’ said Mr. Costa [the Executive Director of United Nations Office on Drugs and Crime].” Support for this rationale can also be found in International Expert Group on Piracy off the Somali Coast (n 17) 26: “Where a shiprider arrangement is in place, transfers of suspects from sea to shore are straightforward: they remain subject to the jurisdiction of the shiprider’s government throughout.”

213 UNSC Res 1851, para 3; UNSC Res 1897, para 6.

214 Guilfoyle, ‘Piracy off Somalia and the Gap Between International Law and National Legal Systems’ (n 124) 14, referring to Guilfoyle, *Shipping Interdiction and the Law of the Sea* (n 207) 91.

215 Contact Group on Piracy off the Coast of Somalia, ‘Chairman’s Conclusions: 4th Meeting of Working Group 2 on Legal Issues’ (Copenhagen, 26–27 November 2009) <www.marad.dot.gov/documents/WG2-4th_Meeting_chair-conclusions-November_26-27-2009-mtg.pdf> accessed 29 January 2013, Annex, List of WG 2 Accomplishments.

216 Articles 5(d) and 6(c) U.S. Model Maritime Agreement (n 205).

217 Guilfoyle, ‘Piracy off Somalia and the Gap Between International Law and National Legal Systems’ (n 124) 14.

apprehension by an official of that State. In addition, it would also permit forensic work, such as the gathering of evidence, to be carried out by officials from the later prosecuting State, people familiar with the respective domestic legal requirements. This, in turn, improves the chance that evidence will be admissible in subsequent criminal proceedings. Despite these obvious advantages, the use of shipriders may not be without drawbacks, namely compromising legal certainty and circumventing human rights obligations.²¹⁸ Yet, the use of shipriders in the context of counter-piracy has not been implemented in practice, despite the fact that it has been encouraged by the Security Council and the preliminary framework is already sketched out on paper.²¹⁹ Therefore, it still holds true that the jurisdiction willing to try the seized piracy suspects is only identified post-seizure and if a jurisdictional change is necessary achieved by means of transfers.

V. Conclusions on Disposition of Piracy Cases: The Context

The response of the international community to Somali-based piracy is Janus-faced. On the law enforcement level, ie policing, there has been a rather successful response. The Security Council has established a comprehensive *ad hoc* law enforcement framework for the Somali territorial waters and mainland, which complements the pre-existing counter-piracy enforcement provisions pertaining to the high seas. This legal framework allows for unimpeded policing operations and exhaustive enforcement measures to be taken against Somali-based pirates. What is more, the call to durably eliminate piracy off the coast of Somalia and the region has been heeded by an unprecedented number of actors. States from all over the world and three multi-national missions currently implement the counter-piracy law enforcement framework off the coast of Somalia and in the Indian Ocean. The criminal prosecution response to piracy has been less straightforward. To date, it has failed at the (ambitious) attempt to overcome the domestic approach followed for centuries with regard to prosecuting the crime of piracy. Moreover, the Security Council's counter-piracy resolutions have also had a very limited impact on the substantive and procedural criminal law norms necessary to suppress the phenomenon of Somali-based piracy.

When viewing counter-piracy operations as being of law enforcement character, the most obvious goal is to bring seized suspects to justice. However, in the context of Somali-based piracy, it seems difficult to realize this basic tenet – first

218 For a detailed account of the legal problems that could potentially arise from the use of shipriders in the counter-piracy context, see Geiss and Petrig (n 7) 90–94.

219 The author has not come across any evidence that shipriders have been used in the counter-piracy operations off the coast of Somalia and/or in the region. Law enforcement officials from regional States have been embarked on the warships of patrolling naval States, not to take law enforcement measures against piracy suspects or to approve the use of such measures, but rather within the framework of so-called “key leader engagements”: information from expert interview on file with author.

and foremost because the policing and prosecution elements are not perfectly interlocked and coordinated. States policing the piracy-prone areas and seizing alleged pirates are only seldom ready to prosecute them in their own courts. At the same time, the attempt to create an international(ized) piracy tribunal, to which suspects could automatically be submitted for criminal prosecution, has failed. Rather, each time a suspect is seized, the path to criminal prosecution must be paved anew by identifying a State willing and able to exercise its criminal jurisdiction over the seized suspects. Disposition of piracy cases does not always end successfully: a large number of suspects have been ultimately released because of a failure to identify a criminal forum willing to receive them for prosecution. Various efforts on the political-diplomatic level to better bridge the policing and prosecution elements have been undertaken, most notably by concluding transfer agreements with regional States.

Currently, the criminal forum for prosecution of piracy suspects is identified post-seizure. The idea of using shipriders in order to anticipate this jurisdictional quest has not yet been implemented in practice. Therefore, in cases where the disposition yields that the suspects be prosecuted in a State other than the seizing State, a jurisdictional change must be obtained. Deliveries as foreseen in Article 8 SUA Convention, specifically designed to bring suspects who have committed unlawful acts against ships from the seizing ship to the mainland authorities of the prosecuting State, are only an option for masters of private ships. In other words, law enforcement officials cannot use this tool to bring piracy suspects within the jurisdiction of the prosecuting State. Extradition, which seems to be the most obvious legal mechanism to obtain a jurisdictional change in order to prosecute, has thus far never been used to bring a piracy suspect from the seizing warship directly within the jurisdiction of the prosecuting State. Rather, the use of transfers is the prevalent means to put the alleged pirates in the hands of the State willing and able to initiate criminal proceedings against them. The following is an in-depth description of two disposition frameworks: the disposition practice of Denmark as an example of how disposition can take place in an interstate setting and the disposition framework of EUNAVFOR as the sole multinational mission pursuing a detain-and-transfer strategy.

Part 2 **Disposition of Piracy Cases: The Practice**

In order to identify human rights issue that may arise during disposition of piracy cases, two disposition schemes will now be presented: firstly, Denmark's disposition framework as an example of disposition of piracy cases taking place in an interstate setting and, secondly, EUNAVFOR's disposition practice, which serves as an example of disposition occurring within a multinational setting.

I. Disposition in an Interstate Setting: Denmark

A. Counter-Piracy Missions

Denmark was one of the first countries to contribute to the international counter-piracy efforts. Already in 2008, a Danish vessel acting in a national capacity was escorting World Food Programme ships carrying emergency aid to Somalia.¹ Denmark does not participate in the EU-led Operation Atalanta because of its defence opt-out.² However, it contributes to the multinational counter-piracy missions of NATO and the Combined Maritime Forces.

1 Ministry of Foreign Affairs of Denmark, 'Policy Paper for Denmark's Engagement in Somalia 2011' (March 2011) <<http://kenya.um.dk/en/~media/Kenya/Documents/Policy%20paper%20for%20Denmarks%20engagement%20in%20Somalia%202011.ashx>> accessed 29 January 2013, 14; Ministry of Foreign Affairs (DK) and others, 'Strategy for the Danish counter-piracy effort 2011–2014' (Ministry of Foreign Affairs, May 2011) <http://um.dk/~media/UM/English-site/Documents/Politics-and-diplomacy/Pirateristrategi_2011_ENG_WEB.PDF> accessed 29 January 2013, 15.

2 Forsvarsministeriet (Danish Ministry of Defence), 'EU – The Danish Defence Opt-Out' (16 December 2011) <www.fmn.dk/eng/allabout/Pages/TheDanishDefenceOpt-Out.aspx> accessed 29 January 2013: The "Danish defence opt-out" refers to the fact that Denmark does not participate in the development and implementation of EU decisions and actions that have defence implications, and thus, does not contribute to EU military operations. The Danish defence opt-out dates back to the negative popular vote on the Maastricht Treaty (Treaty on European Union [1992] OJ C191), whereupon the Edinburgh Agreement was negotiated between the EU and

Denmark currently³ takes part in (and temporarily commanded) NATO's third counter-piracy mission, Operation Ocean Shield,⁴ which was approved by NATO on 17 August 2009 and was recently extended until the end of 2014.⁵ Denmark's participation in NATO's Operation Ocean Shield is based on decision B59, passed by the Danish Parliament in 2009.⁶ The NATO mission follows a deter-and-disrupt strategy and operates a catch-and-release scheme. Unlike the EU, NATO has not yet concluded any transfer agreements for the purpose of prosecution. It is therefore impossible to detain and transfer piracy suspects within the NATO framework.⁷ In other words, NATO's mandate does not cover the arrest and detention of suspects with a view to conduct a criminal prosecution. If a State contributing to NATO nevertheless decides to arrest and detain suspects with a view to prosecute in its domestic courts or in order to transfer them to a third State for prosecution, it must do so in its national capacity.⁸ Thus, while vessels contributing to NATO do not revert back to national control when they disrupt pirate activity,⁹ detention and disposition decisions can only be made while acting in a national capacity.¹⁰ In cases where Denmark seizes suspects while participating in NATO's Operation Ocean Shield, the disposition procedure – ie where the decision is made whether to release, prosecute in Danish courts or transfer to third States for prosecution, including arrest and detention during disposition – takes place within a national framework.¹¹ Piracy suspects held on board a

Denmark, which allows Danish opt-outs in four areas, including defence, and was adopted by the Danish people in 1993.

- 3 NATO, 'Operation Ocean Shield' (March 2012) <www.aco.nato.int/page208433730.aspx> accessed 29 January 2013; As of 15 March 2012, five States (Denmark, Italy, the Netherlands, the US and Turkey) have provided naval assets to the mission, which are supported by maritime patrol aircrafts.
- 4 Ministry of Foreign Affairs of Denmark (n 1) 14; Ministry of Foreign Affairs (DK) and others (n 1) 15.
- 5 NATO, 'Counter-Piracy Operations: Operation Ocean Shield – ongoing' (3 May 2012) <www.nato.int/cps/en/SID-EE2054EC-68460D72/natolive/topics_48815.htm> accessed 29 January 2013.
- 6 Folketinget (Danish Parliament), 'B 59 Forslag til folketingsbeslutning om dansk militært bidrag til NATO's Operation Ocean Shield som led i den internationale indsats mod pirateri ud for Afrikas Horn' (Vote no 170, Session 2009–10) <www.ft.dk/samling/20091/beslutningsforslag/b59/34/170/afstemning.htm#dok> accessed 29 January 2013; this proposal was adopted by the Danish Parliament on 17 December 2009; *ibid*; Ministry of Foreign Affairs (DK) and others (n 1) 15.
- 7 Information from expert interview on file with author.
- 8 Information from expert interview on file with author.
- 9 Information from expert interview on file with author.
- 10 Information from expert interview on file with author.
- 11 However, NATO is informed about the outcome of the disposition procedure: information from expert interview on file with author.

Danish frigate are therefore, until released or surrendered to a third State, under Danish authority and control.¹²

Since 2008, Denmark has also at various times contributed to the Combined Maritime Forces' counter-piracy efforts.¹³ It participated in Coalition Task Force 150, whose mission is to promote maritime security in general,¹⁴ and currently commands the Coalition Task Force 151,¹⁵ which was established specifically to counter Somali-based piracy.¹⁶ The focus of the Combined Maritime Forces lies on the disruption of pirate activities and capacity building in the region.¹⁷ Similar to NATO, it did not adopt a transfer for prosecution policy and did not enter into any transfer agreements.¹⁸ The detention of piracy suspects seized by a ship contributing to the Combined Maritime Forces' counter-piracy operations and disposition of their cases would thus also take place within a national framework. Since Denmark is not currently contributing any ships to the mission,¹⁹ this case is of a theoretical nature and will not be discussed any further.

B. Legal Framework

During disposition, it is first decided whether the piracy suspects should be immediately released for a lack of evidence or detained while the determination is made whether to bring them to the Danish mainland for investigation and trial or surrender them to a third (usually regional) State for prosecution. If neither of the prosecution options can be realized, the suspects are released after being disarmed.

As we have seen, NATO's mandate does not cover arrest and detention with a view to prosecute and potentially transfer to third States for prosecution. Therefore, disposition of piracy cases involving suspects seized by Danish forces falls entirely within its national capacity and is governed by Danish law and practice. With the exception of the transfer agreements entered into with Kenya and the Seychelles and parliamentary decision B59 approving Denmark's participation in NATO's Operation Ocean Shield, Denmark did not adopt any legislation specifically regarding Somali-based piracy. Rather, arrest, detention, investiga-

12 Information from expert interview on file with author.

13 Ministry of Foreign Affairs (DK) and others (n 1) 15.

14 Combined Maritime Forces, 'CTF-150: Maritime Security' <<http://combinedmaritimeforces.com/ctf-150-maritime-security/>> accessed 29 January 2013.

15 Combined Maritime Forces, 'Denmark assumes command of Combined Task Force 151' (12 January 2012) <<http://combinedmaritimeforces.com/2012/01/12/denmark-assumes-command-of-combined-task-force-151-bahrain/>> accessed 29 January 2013.

16 Combined Maritime Forces, 'CTF-151: Counter-Piracy' <<http://combinedmaritimeforces.com/ctf-151-counter-piracy/>> accessed 29 January 2013.

17 *ibid.*

18 Information from expert interview on file with author.

19 Information from expert interview on file with author.

tion and the decision to prosecute in domestic courts or transfer to a third State are subject to the general rules of Danish law.²⁰ However, as we will see later, this special context – especially the fact that it is the military rather than the police enforcing the law off the coast of Somalia and that the suspects are held far from the Danish mainland on board a Danish frigate – not only questions the applicability of some of these general rules, but also whether their content can be strictly observed. In order to understand these context-specific issues, an overview of the Danish rules generally applicable to investigation, prosecution and surrender for prosecution, and the potentially applicable substantive criminal law provisions, will first be presented.

1. Rules Criminalizing Piracy and Armed Robbery at Sea

Denmark's substantive criminal law comprehensively criminalizes acts related to the criminal phenomena of piracy and armed robbery at sea. The most pertinent provision is the first paragraph of Section 183a of the Danish Criminal Code (*straffeloven*),²¹ which stipulates that “[a] person who takes control of ... a ship ... or interferes with its manoeuvring, by using unlawful coercion ... shall be liable to punishment for any term extending to imprisonment for life”.²² Other potentially relevant offences in the Danish Criminal Code are those relating to terrorism,²³ homicide,²⁴ acts of violence²⁵ and deprivation of liberty²⁶.²⁷ Furthermore, a provision on attempts covers inchoate crimes.²⁸ Finally, participation in the commis-

20 Danish Maritime Authority, ‘Note: Danish national legislation with regard to offences related to piracy’ (17 April 2009) <www.un.org/Depts/los/LEGISLATION-ANDTREATIES/PDFFILES/DNK_national_legislation_piracy.pdf> accessed 29 January 2013, 5.

21 Danish Criminal Code: *Straffelov nr. 126 af 15. april 1930*, in the version of publication (lovbekendtgørelse) Nr. 1062 of 17 November 2011. The Danish Criminal Code has been translated in its entirety into German by Karin Cornils and Vagn Greve, *Das dänische Strafgesetz – Straffeloven vom 15. April 1930 nach dem Stand vom 1. Mai 2009: Deutsche Übersetzung und Einführung von Karin Cornils (Freiburg) und Vagn Greve (Kopenhagen)* (Karin Cornils and Vagn Greve trs, 3rd edn, Duncker & Humblot 2009); an English translation of the provisions relevant to piracy can be found here: Danish Maritime Authority (n 20).

22 English translation provided in: Danish Maritime Authority (n 20) 1.

23 Sections 114–114g Danish Criminal Code.

24 Section 237 Danish Criminal Code.

25 Sections 244–246 Danish Criminal Code.

26 Section 261 Danish Criminal Code.

27 Danish Maritime Authority (n 20) 1.

28 Section 21 Danish Criminal Code; Cornils and Greve (n 21) 18–20.

sion of an offence, namely through instigation, counselling or procurement, is also punishable under Danish criminal law.²⁹

2. Arrest, Detention and Investigation in the Counter-Piracy Context

Generally, the investigation and prosecution of criminal cases is governed by the Danish Administration of Justice Act (*retsplejelov*),³⁰ namely by its fourth book on the administration of criminal justice what is commonly known as criminal procedure.³¹ The administration of criminal cases can be roughly divided into three phases: investigation, indictment and trial.³²

With regard to the investigation, it must be noted that in Denmark, the police and prosecution service are amalgamated in one body.³³ Thus, whenever an investigation takes place, it is within the prosecution as well.³⁴ As a general rule and subject to some exceptions,³⁵ the investigation of criminal cases is the responsibility of the police and is conducted autonomously; hence, the police are not obliged to consult with the prosecutorial service regarding matters of investigation.³⁶ There is an exception with regard to cases involving serious economic crimes, for which a central prosecutorial service (*Statsadvokaten for Særlig Økonomisk Kriminalitet*, Serious Fraud Office) has been set up, which investigates such crimes in close cooperation with the police.³⁷ The same holds true for the Special International Crimes Office (SICO, *Statsadvokaten for Særlige*

29 Section 23 Danish Criminal Code; Cornils and Greve (n 21) 20–21.

30 Retsplejelov nr. 90 af 11. april 1916, in the version of publication (lovbekendtgørelse) Nr. 1063 of 17 November 2011. An English translation of parts of the Danish Administration of Justice Act can be found in: *The Principal Danish Criminal Acts: The Danish Criminal Code, The Danish Corrections Act, The Administration of Justice Act (Excerpts)* (Marlene Frese Jensen and others, 3rd edn, DJØF Publishing Copenhagen 2006).

31 *ibid* 117; Eurojustice, ‘Country Report Denmark’ <www.euro-justice.com/member_states/denmark/country_report/> accessed 29 January 2013, 73: The Danish Administration of Justice Act governs criminal and civil cases and consists of five books. The first book lays down, *inter alia*, the organization of the courts, the prosecution service and the police; the second book contains common provisions for civil and criminal cases, such as a chapter on witnesses. The third book is on civil administration of justice, while the fourth book deals with administration of criminal justice. The last book contains concluding and transitional provisions. The act is subdivided into Chapters 1–95 and Sections 1–1043, both of which are continuous in numbering.

32 Cornils and Greve (n 21) 30.

33 Information from expert interview on file with author; Eurojustice (n 31) 75 and 78.

34 Information from expert interview on file with author.

35 For the exceptions, see Eurojustice (n 31) 76–78.

36 Cornils and Greve (n 21) 30; Eurojustice (n 31) 76.

37 Cornils and Greve (n 21) 30.

Internationale Straffesager), another central prosecutorial authority established on 1 June 2002 to investigate, in close cooperation with the police, serious international crimes committed abroad, such as genocide, war crimes, crimes against humanity and acts of terrorism.³⁸ It is the Director of Public Prosecutions who assigns piracy cases to the competent prosecutor. In the past, he has assigned piracy cases to the Special International Crimes Office, but also to other prosecutorial services.³⁹

There is a key difference with regard to the initial investigation of piracy cases and other criminal offences. Rather than the police working in close cooperation with the prosecutor, it is the military that is responsible for law enforcement off the coast of Somalia and the region and, thus, for the *initial* investigation of piracy cases. Thereby, the military is not acting as the long arm of the police, but as an independent State actor.⁴⁰ Furthermore, there are no officials belonging to the police or prosecutorial service on board Danish military vessels deployed in the Gulf of Aden and the Indian Ocean.⁴¹

The fact that the Danish military, rather than the police and prosecutors, is enforcing the law off the coast of Somalia has major implications with regard to the applicable legal framework. The most important legal source that commonly governs the investigation of criminal cases is the law of criminal procedure contained in the fourth book of the Danish Administration of Justice Act. Part 2 deals with investigation and preparation of the case before indictment. It lays down general rules for the investigation phase, such as the purpose of investigation, rights of the accused and his defence counsel, and the settlement of disputes regarding the legality of police investigative measures.⁴² It further regulates specific types of investigative measures, such as interrogation, invasion of the body, searches, seizure, and disclosure and examination of the suspect's personal history.⁴³ Another important aspect that it covers is the deprivation of liberty through arrest⁴⁴ or by ordering detention on remand. For both measures it stipulates, *inter alia*, the permissible grounds, maximal lengths and the right to a legal review.⁴⁵ However, even though the military carries out investigative acts covered by the

38 Special International Crimes Office (DK), 'The Assignment' <www.sico.ankl.dk/page26.aspx> accessed 29 January 2013 (Special International Crimes Office (DK)); Cornils and Greve (n 21) 30–31; Eurojustice (n 31) 76.

39 Danish Maritime Authority (n 20) 5; Special International Crimes Office (DK) (n 38); information from expert interview on file with author.

40 Information from expert interview on file with author.

41 Information from expert interview on file with author.

42 Chapter 67 Danish Administration of Justice Act.

43 See, eg, Chapters 68, 72, 73, 74, 75 and 75a Danish Administration of Justice Act.

44 Chapter 69 Danish Administration of Justice Act.

45 Chapter 70 Danish Administration of Justice Act.

Danish Administration of Justice Act's material scope of application, it does not fall within the act's personal scope of application.⁴⁶

A considerable normative gap arises given the fact that Danish investigation laws do not apply to Danish military forces involved in counter-piracy missions off the coast of Somalia and the region. This gap is filled by having recourse, to the extent possible, to other legal bases.⁴⁷ For instance, it has been suggested that even though the Danish Administration of Justice Act does not apply as such, its *principles* should nevertheless be followed.⁴⁸ Furthermore, international law, namely Article 105 UNCLOS, is cited as a legal basis for the exercise of enforcement powers, particularly the arrest and detention of piracy suspects. Also, the Danish Parliament's decision B59, which approved Denmark's contribution to NATO's Operation Ocean Shield,⁴⁹ is understood as supplying a national warrant for enforcement measures against piracy suspects.⁵⁰

However, parliamentary decision B59 is not very explicit in terms of the enforcement and investigative powers granted to the military. Sections I and II of the parliamentary decision describe the framework and context within which NATO's Operation Ocean Shield (and thus the Danish contribution) will take place and what assets will be deployed. Regarding enforcement powers, nothing more than a wholesale reference to the relevant UN Security Council resolutions on piracy and the clarification that Denmark will not engage in any land operation (as permitted by Security Council Resolution 1851) can be found in these sections. Section III is more on point: its introductory sentence recalls that the Danish naval contribution is subject to international law. It then refers to the counter-piracy provisions of the UNCLOS and repeats the enforcement measures they explicitly and implicitly authorize: the seizure of pirate ships or ships taken by piracy and under the control of pirates, and the seizure of weapons and other piracy paraphernalia, including the seizure of such items as evidence. Further, parliamentary decision B59 states that, if necessary, seized objects may be disposed of. What is more, ships can be boarded with the consent of the flag State. Section III of the decision further emphasizes that the provisions of UNCLOS allow for the detention of persons. Lastly, it states that the Danish contribution of military troops may use force in self-defence and the defence of others. With regard to transfers, it stipulates that until NATO has the relevant legal arrangements in place, including transfer agreements with States of the region (which it does not currently have), the handling of piracy suspects seized and held by

46 Information from expert interview on file with author.

47 Information from expert interview on file with author.

48 Information from expert interview on file with author.

49 See above Part 2/I/A.

50 Information from expert interview on file with author.

Danish forces shall be in line with, *inter alia*, the transfer agreement concluded between Kenya and Denmark on 9 July 2009.⁵¹

Compared with parliamentary decision B59, the Danish Administration of Justice Act is much more explicit and detailed in terms of the enforcement powers that may be used against piracy suspects. The Danish Administration of Justice Act sets out in great detail the enforcement measures the police may take and the respective requirements and safeguards, but parliamentary decision B59 contains only a general reference to international law and merely repeats the counter-piracy enforcement powers enshrined (in a rudimentary way) in Article 105 UNCLOS.⁵² If all concrete investigative measures taken by the Danish military against piracy suspects are to be based on parliamentary decision B59, its reference to broad categories of enforcement powers (ie arrest, detention, and seizure of persons and property) must be understood as implicitly allowing for more multifaceted investigative measures.⁵³ Another major difference between parliamentary decision B59 and the Danish Administration of Justice Act is that the latter guarantees an array of rights to the person subject to investigation and his defence counsel – parliamentary decision B59 is silent in that respect. Against this background, international human rights law is of considerable importance in order to constrain the rather broad enforcement powers and provide procedural safeguards to persons subject to enforcement measures. There seems to be broad consensus that Danish military forces engaged in counter-piracy operations are bound by human rights law and international law on the whole.⁵⁴ The general view is that piracy suspects come under Danish jurisdiction in the sense of the jurisdictional clauses of major human rights treaties, namely the ECHR, when piracy suspects are taken on board a Danish frigate (or arguably even earlier, when they are still on board their skiff).⁵⁵

3. Exercise of Danish Criminal Jurisdiction over Piracy Suspects

As will be discussed later in detail, it is the competent prosecutor (for example, from the Special International Crimes Office) who determines whether there is Danish prescriptive and adjudicative criminal jurisdiction⁵⁶ in a particular pi-

51 Folketinget (Danish Parliament) (n 6); Section IV of the parliamentary decision includes a threat assessment and Section V is on financial implications of the contribution; they are not relevant to the exercise of enforcement powers against piracy suspects.

52 On the counter-piracy law enforcement powers conferred by the UNCLOS, see above Part 1/II/A/1.

53 Information from expert interview on file with author.

54 Information from expert interview on file with author.

55 Information from expert interview on file with author.

56 In the following, it is simply referred to as the exercise of “jurisdiction”, without each time emphasizing that prescriptive and adjudicative is at stake, rather than en-

racy case, ie whether Denmark is competent to prosecute the case in its criminal courts. Thereby, the prosecutor is required to apply the jurisdictional rules laid down in the Danish Criminal Code. Jurisdiction cannot be established outside these rules.⁵⁷

Chapter 2 of the Danish Criminal Code lays out the conditions under which Denmark's authorities are competent to prosecute a case pursuant to Danish criminal law in Danish criminal courts.⁵⁸ In 2008, these jurisdictional rules were the subject of major reform.⁵⁹ With regard to the phenomena of piracy and armed robbery at sea, the flag State principle stipulated in Article 6(3) of the Danish Criminal Code, which provides criminal jurisdiction over any act committed "on board a Danish ship ... which is outside the territory of another state", is potentially relevant. Whether the words "on board a Danish ship" encompass the boarding and hijacking of a Danish-flagged victim ship – the classical *modus operandi* of Somali-based pirates – was subject to discussion in the case relating to the attack of the Danish-flagged *Elly Mærsk*.⁶⁰ If a Danish national or resident has been the victim of a pirate attack, the passive personality principle could provide for jurisdiction.⁶¹ Further, Denmark has jurisdiction over extraterritorial acts regardless of the perpetrator's nationality "where the act is covered by an international provision under which Denmark is obliged to have criminal jurisdiction",⁶² such as Article 6(1) SUA Convention.⁶³ Moreover, a specific jurisdictional provision exists with regard to acts covered by Section 183a of the Danish Criminal Code, which criminalizes – as explained above – taking control of a ship through the use of unlawful coercion.⁶⁴ For this jurisdictional basis to apply, the nationality of the victim ship is irrelevant. However, the alleged offender must, at the time he is charged, either possess Danish nationality, have

forcement jurisdiction, when describing the deliberation process in which the seizing State decides whether to prosecute the piracy suspects its forces took captive in its domestic criminal courts.

57 Information from expert interview on file with author.

58 Cornils and Greve (n 21) 10.

59 *ibid* 10. For an overview of all jurisdictional rules under Danish Criminal Law, see *ibid* 10–13.

60 *Re 'MV Elly Mærsk'* U.2011.3066H, Tfk2011.923/1 (Højesteret – Supreme Court of Denmark, 2 August 2011) (Dansk straffemyndighed for forsøg på at kapre dansk skib i internationalt farvand).

61 Article 7a(1) and (2) Danish Criminal Code if the offense is committed in the territorial waters of a third State and Article 7a(3) Danish Criminal Code for offenses committed on the high seas.

62 Article 8(5) Danish Criminal Code.

63 Article 6(1) SUA Convention obliges States to establish jurisdiction over offences defined in Article 3 SUA Convention based on the flag State principle, the territoriality principle and the active personality principle.

64 Article 8b Danish Criminal Code.

his residence or abode in Denmark, or be present in Denmark. Whether the requirement of presence in Denmark could be fulfilled when the suspect is being held on board a Danish frigate on the high seas and how this provision relates in terms of priority to the one providing jurisdiction if an international rule requires Denmark to prosecute the offence⁶⁵ was also discussed in the *Elly Mærsk* case.⁶⁶ It should be noted that the mere fact that a Danish warship or State vessel seizes a suspect on account of piracy and armed robbery at sea does not establish Danish criminal jurisdiction.⁶⁷

With regard to the application of these jurisdictional rules by the prosecutor, no difference exists as compared to any other offence. By contrast, as we will see later, some rules of the Danish Administration of Justice Act,⁶⁸ namely those relating to deprivation of liberty on suspicion of criminal activity and the legal review of such deprivation within a specific time frame,⁶⁹ are not always strictly followed as long as piracy suspects are not brought onto Danish mainland.⁷⁰

4. Transfer of Piracy Suspects

Thus far, Denmark has not agreed to extradite alleged pirates seized by its forces or to surrender them pursuant to execution of a European arrest warrant in order to bring them to a third State for prosecution; the primary reason being that the respective suspects have not been on Danish mainland.⁷¹ Rather, as it holds true for other actors involved in law enforcement operations against Somali-based pirates, Denmark brings the suspects within the jurisdiction of the prosecuting State by means of so-called transfers.⁷²

The legal framework governing these transfers is not readily obvious.⁷³ Since the mandate of NATO's Operation Ocean Shield does not cover transfers with a view to prosecute and detention pending transfer, the issue is not covered by

65 Article 8(5) Danish Criminal Code.

66 *Re 'MV Elly Mærsk'* (n 60).

67 Danish Maritime Authority (n 20) 5.

68 As opposed to the initial investigation carried out by the military, the applicability of the Danish Administration of Justice Act as such is not in question once the case has fallen within the purview of prosecution service: information from expert interview on file with author.

69 See below Part 2/II/D/2/a.

70 Information from expert interview on file with author.

71 Information from expert interview on file with author; *Re 'MS Samanyolu'* LJN: BM8116, Urteil [Antrag der Staatsanwaltschaft] (Gericht 1. Instanz Rotterdam, 17 June 2010), Übersetzung aus der niederländischen/englischen Sprache; German translation on file with author, 41.

72 For a concrete example, see above Part 1/IV/A/1.

73 Information from expert interview on file with author.

regulations stemming from the NATO chain of command.⁷⁴ Rather, it is subject to national law and practice. Denmark has not enacted any specific national legislation regulating transfer procedures.⁷⁵ The transfer agreements concluded by Denmark with Kenya and the Seychelles respectively do not define by whom, following what procedure and based on what criteria the decision to transfer piracy suspects to third States must be made. Also, the guidance issued to Danish forces deployed in the Gulf of Aden and Indian Ocean, such as national standard operating procedures or rules of engagement, do not regulate the transfer procedure in detail. Rather, these military documents and the transfer agreements pertain to the practical implementation of a concrete transfer decision and stipulate, *inter alia*, documentary requirements to be observed when transferring piracy suspects.⁷⁶ While parliamentary decision B59 is interpreted as implicitly allowing for transfers,⁷⁷ it does not contain rules describing by whom and how a decision to transfer must be made. Moreover, the reference by the First Instance Court of Rotterdam to Article 105 UNCLOS, on which the transfer of five suspects from Denmark to the Netherlands was based according to the Danish authorities, is not helpful. At most, the provision does not *prohibit* transfers and thus implicitly allows them to be carried out,⁷⁸ but it does not in any way describe the rules to be followed when deciding on a transfer. In sum, neither Danish soft law nor hard law describes in a detailed manner the procedure to be followed and the criteria to be applied when issuing a transfer order.

C. Disposition Procedure

Thus far, the Danish disposition procedure has rarely resulted in the exercise of Denmark's criminal jurisdiction over a piracy case.⁷⁹ What is more, the relatively few cases ultimately investigated and prosecuted in Denmark were not pursued to the point of acquittal or conviction. Instead, the cases were terminated at an earlier stage, mainly because further investigation indicated that there was little prospect of conviction in light of the available evidence.⁸⁰

74 Thus, the situation is different from a contribution to a "classical" NATO operation, which is governed by the conduct of hostilities rather than the law enforcement paradigm, and where detention and transfer of detainees is covered by the NATO mandate and, therefore, by regulations issued by the organization: information from expert interview on file with author.

75 Information from expert interview on file with author; Danish Maritime Authority (n 20) 5.

76 Information from expert interview on file with author.

77 Information from expert interview on file with author.

78 See below Part 5/I.A.

79 Information from expert interview on file with author.

80 Information from expert interview on file with author.

In many instances, the disposition procedure results in the decision that Denmark has no jurisdiction over the case and it is then evaluated whether the suspects can be transferred to a third State for prosecution. Denmark may also opt to transfer piracy suspects even though it would have criminal jurisdiction over them. This holds true especially if a regional State is concurrently competent to prosecute the case since Danish authorities perceive regional criminal prosecution and enforcement of sentences as the preferred solution. It is argued that the criminal phenomenon should be tried in the region given its regional roots and the fact that virtually all alleged offenders come from Somalia. The regional entities conducting the investigation, prosecution and imposition of enforcement sentences would also be better apt to take the suspects' or convicts' familial and cultural ties into account. Given Denmark's political, diplomatic and financial efforts, in terms of capacity building and bolstering the judiciary and prison system in regional States prosecuting piracy cases, there is a preference that piracy suspects are prosecuted in those States rather than in Denmark.⁸¹

In case Denmark cannot or does not wish to exercise its criminal jurisdiction over seized piracy suspects and their transfer to a third State for prosecution cannot be realized for any number of reasons, the release of the suspects after disarmament is generally the only remaining solution. The question of release was discussed publicly for the first time when, in September 2008, suspected pirates were set free after a week in Danish custody because no State willing and able to prosecute them could be identified.⁸²

With this background in mind, Denmark's approach to the disposition of piracy cases involving suspects seized by Danish forces will now be described. Specifically, the focus will be on how decisions are made regarding whether to immediately release suspects after capture or, alternatively, whether to detain them for the purpose of prosecution in a Danish court or the more likely scenario that Denmark enters negotiations to transfer the suspects to a third State.

1. Assessment by the Inter-Ministerial Coordination Organ

Upon seizure of persons suspected of piracy, the captain of the Danish ship, supported by his legal adviser, assesses on an elementary level whether there is sufficient evidence for a successful prosecution.⁸³ If this initial assessment of evidence yields the result that there is a prospect of conviction, the Danish Ministry of Defence is notified through the chain of command about the apprehension of the

81 Information from expert interview on file with author.

82 Birgit Feldtmann, 'Should we rule out criminal law as a means of fighting maritime piracy? An essay on the challenges and possibilities of prosecuting Somali pirates' in Ulrika Andersson, Christoffer Wong and Helén Örnemark Hansen (eds), *Festskrift till Per Ole Träskman* (Norstedts Juridik 2011) 182.

83 Information from expert interview on file with author.

suspects.⁸⁴ In cases where the suspicion cannot be upheld after the initial assessment of evidence or if the evidence is insufficient for the purpose of prosecution, the suspects are immediately released.⁸⁵

Upon notification of the apprehension of piracy suspects, the Ministry of Defence requests the Danish Ministry of Foreign Affairs to convene an inter-ministerial coordination organ, comprised of representatives from the Ministry of Foreign Affairs, the Ministry of Justice, the Ministry of Defence, and the Danish Defence Command.⁸⁶ The prosecutorial authorities, here the Director of Public Prosecutions, do not participate in the coordination organ,⁸⁷ which assembles relevant actors at the ministerial level⁸⁸ in order to consider and discuss the following three alternatives: prosecute the case in Denmark, transfer the suspects to a third State for prosecution or – if prosecution cannot take place at all because of, for example, a jurisdictional matter or lack of evidence – release of the suspects. Thus, the coordination organ is not a formally established body or officially summoned task force. Rather, it must be understood as an *ad hoc* coordination organ, which allows for all relevant ministries to be assembled in order to present the facts of the specific case and to discuss its disposition.⁸⁹

The coordination organ can be convened within a short amount of time and its first meeting generally takes place soon after interdiction of a ship suspected of piracy by Danish forces.⁹⁰ After the representatives of the Ministry of Defence and the Danish Defence Command present the facts of the case, the coordination organ considers whether Denmark has criminal jurisdiction over the seized suspects according to the jurisdictional rules of the Danish Criminal Code.⁹¹ If Denmark has jurisdiction in the abstract and the coordination organ considers it opportune that the suspects are prosecuted in Denmark (which may be answered in the negative if another State has a stronger link or prosecution in the region seems possible),⁹² the Ministry of Justice turns the case over to the Director of Public Prosecutions. He, in turn, allocates the case to the competent prosecutorial authority, such as the Special International Crimes Office.⁹³ Sending a case

84 Information from expert interview on file with author.

85 Information from expert interview on file with author.

86 Information from expert interview on file with author.

87 The Parliament is not represented in the inter-ministerial coordination organ, which decides based on legal rather than political criteria: information from expert interview on file with author.

88 Information from expert interview on file with author.

89 Information from expert interview on file with author.

90 Information from expert interview on file with author.

91 Information from expert interview on file with author.

92 Under Danish criminal law, the principle of opportunity rather than the principle of legality is followed; see below Part 2/I/C/2.

93 Information from expert interview on file with author.

from the coordination organ via the Ministry of Justice and the Director of Public Prosecutions respectively to, for example, the Special International Crimes Office takes mere minutes.⁹⁴

If the coordination organ concludes that Denmark has no criminal jurisdiction over the seized suspects or does not wish to exercise it, the option of transferring the suspects to a third State for prosecution is considered. In this scenario, the Ministry of Foreign Affairs starts evaluating possible transfer options and initiates negotiations with third States.⁹⁵

2. Decision Whether to Exercise Danish Criminal Jurisdiction

Unlike “ordinary” criminal cases where the police and prosecutors work under the same authority and where the prosecutor is informed about ongoing or completed initial investigations through formal and informal lines of communication within that same body,⁹⁶ cases arising in the context of piracy are quite different. As we have seen, in the realm of piracy, the case and information relevant to prosecution must first be transferred from the seizing frigate through the chain of command to the Ministry of Defence. If the inter-ministerial coordination organ concludes that Denmark is competent to prosecute the seized suspects and should exercise its criminal jurisdiction, the case is handed over to the competent prosecutor via the established hierarchy, that is, the Ministry of Justice and the Director of Public Prosecutions.⁹⁷

However, once the case is in the hands of the prosecutor, the rules of the game are the same as in any other criminal case: it is the prosecutor who decides whether to prosecute a piracy suspect in Denmark by applying the jurisdictional rules of the Danish Criminal Code. In other words, the coordination organ’s finding that prosecution in Denmark is possible does not affect the prosecutor’s competence to decide whether to prosecute a suspect.⁹⁸ Thus, despite the coordination organ’s initial finding that Danish jurisdiction exists and that Denmark should prosecute the case in its domestic courts, he is free to draw a different

94 Information from expert interview on file with author. See, eg, the case of *Re ‘MV Elly Mærsk’* (n 60).

95 Information from expert interview on file with author. On how, by whom, and in the application of what criteria the decision to transfer is made, see below Part 2/I/C/3.

96 Eurojustice (n 31) 78.

97 Thus far, the Special International Crimes Office only investigated and prosecuted cases turned over to it by the inter-ministerial coordination organ via the Ministry of Justice and the Director of Public Prosecutions. Alternatively, they could investigate and prosecute cases without the involvement of the inter-ministerial coordination organ, eg, if victims report a case directly to the police and prosecutorial authorities respectively, it would be a private reporting that initiates the criminal case: information from expert interview on file with author.

98 Information from expert interview on file with author.

conclusion. Moreover, he may also dismiss the case if further investigation determines that a conviction is unlikely, due to insufficient evidence for example.⁹⁹

The prosecutor's decision whether Denmark possesses criminal jurisdiction is based on law, ie the jurisdictional rules laid down in the Danish Criminal Code, and is thus not driven by political considerations.¹⁰⁰ However, unlike many other European States, the Danish prosecutor is not bound by the principle of legality in criminal procedure.¹⁰¹ Rather, the principle of opportunity applies.¹⁰² As a result, the prosecutor is not obliged to prosecute every criminal case brought to his attention, but may waive prosecution in certain cases by exercising his discretion.¹⁰³

3. Decision Whether to Transfer to a Third State for Prosecution

a) *How a Transfer Decision Comes About*

If the inter-ministerial coordination organ decides that Denmark has no criminal jurisdiction in a specific case or should not exercise it, the option of surrendering the suspects to a third State for prosecution is considered.¹⁰⁴ We have seen that no explicit and comprehensive set of soft or hard rules exists describing by whom, how and based on what criteria the decision to transfer must be made.

In practice, if the coordination organ considers that transferring the seized suspects to a third State is a feasible option in a case submitted to it, the Ministry of Foreign Affairs starts evaluating possible transfer options and initiates nego-

99 Information from expert interview on file with author.

100 Information from expert interview on file with author.

101 The principle of legality in criminal procedure obliges the prosecutorial authorities to initiate and conduct criminal proceedings within the limits of their competence if they possess information about an offence or sufficient cause for suspicion; it is, eg, the guiding principle for prosecutorial authorities in Switzerland (Article 7 of the Swiss Criminal Procedure Law): Ulrich Sieber, Susanne Forster and Konstanze Jarvers (eds), *National Criminal Law in a Comparative Legal Context: General limitations on the application of criminal law* (Duncker & Humblot 2011) 120. It must be distinguished from the substantive criminal law principle of legality whose content is expressed by the Latin maxim *nullum crimen, nulla poena sine lege*, which means "no offense and no sanction without a law": *ibid* 119. This maxim is stipulated in Section 1 of the Danish Criminal Code. Also, the principle of legality in criminal procedure must be distinguished from the constitutional principle of legality, which means that all State activity must be based on and limited by law: *ibid* 118.

102 Information from expert interview on file with author; Eurojustice (n 31) 87; Cornils and Greve (n 21) 31.

103 For a detailed account of the principle of opportunity as applied within the Danish criminal justice system, see Eurojustice (n 31) 85–88.

104 Information from expert interview on file with author.

tiations with those States.¹⁰⁵ This generally starts by sending a diplomatic note to the State identified as a possible transfer destination, stating that a seizure of suspects took place and informing them of Denmark's intention to transfer. An evidence package is included with the diplomatic note and an exchange on evidentiary matters often takes place.¹⁰⁶

If the third State agrees to receive the suspects for investigation and prosecution, the practicalities of the transfer decision's implementation are dealt with in an *ad hoc* manner.¹⁰⁷ Depending on where the persons are seized and to which State they are brought, different challenges regarding the physical handover of the suspects arise, the solutions to which may be time-consuming. Thus, in the case of the five suspects transferred to the Netherlands, the suspects were taken to a port in Bahrain and ultimately flown to the prosecuting State. This required not only the consent of Bahrain, but also the consent of all States the plane flew over.¹⁰⁸

For transfers taking place pursuant to transfer agreements, these memoranda of understanding contain isolated minimum requirements regarding the implementation of a decision to transfer persons detained by Danish forces to a third State. For example, the Denmark-Kenya Transfer Agreement¹⁰⁹ stipulates that any transfer must be subject to a document signed by both parties¹¹⁰ and Denmark is obliged to hand over detention records for each transferee.¹¹¹ Furthermore, Danish forces are only allowed to transfer persons to competent Kenyan law enforcement officials.¹¹² If transfers take place outside the framework of transfer agreements, no such general implementation rules exist.

b) Features of the Transfer Procedure

We have seen that it is the inter-ministerial coordination organ that makes the initial assessment of whether Denmark can and should exercise its criminal jurisdiction or whether a transfer for prosecution should be considered. In the lat-

105 Information from expert interview on file with author.

106 Information from expert interview on file with author.

107 Information from expert interview on file with author.

108 *Re 'MS Samanyolu'* LJN: BM8116, Urteil, Anlage I (Gericht 1. Instanz Rotterdam, 17 June 2010), Übersetzung aus der niederländischen/englischen Sprache; German translation on file with author, 6; *Re 'MS Samanyolu'* (Urteil [Antrag der Staatsanwaltschaft]) (n 71) 41.

109 The transfer agreement concluded between Denmark and Kenya is no longer in force, but its rules are still applied if piracy suspects are surrendered for prosecution by Danish forces to Kenya: see above Part 1/III/B.

110 Article 6(2) Denmark-Kenya Transfer Agreement (on file with author).

111 Article 6(1) Denmark-Kenya Transfer Agreement (on file with author).

112 Article 3(2) Denmark-Kenya Transfer Agreement (on file with author).

ter case, it is the Ministry of Foreign Affairs that evaluates possible transfer options and initiates negotiations with third States.

The decision of whether to transfer and to which State is a matter of negotiation and mutual agreement between the surrendering and receiving States, which have recourse to diplomatic channels, rather than a decision issued by a Danish administrative or even judicial body in a formalized procedure defined in a duly published legal act.¹¹³ Moreover, the decision to transfer is not subject to any administrative or judicial review in Denmark before it is implemented. Hence, the person to be surrendered for prosecution has no legal remedies available by which to challenge the transfer decision before its implementation and thus prevent removal for prosecution.¹¹⁴ Further, it is important to note that the individual is not in any way associated with the transfer decision procedure and is not a party to it. He is simply informed of the intention to transfer or that a transfer will take place.¹¹⁵ In this respect, transfers differ considerably from extradition.

An individual non-refoulement assessment, ie whether there is a real risk that certain human rights of a specific piracy suspect will be violated in the receiving State upon transfer,¹¹⁶ does not take place.¹¹⁷ Rather, the idea is that the concluding of transfer agreements with Kenya and the Seychelles respectively, which stipulate a series of rights the suspect is entitled to in the receiving State during investigation, prosecution and detention,¹¹⁸ is sufficient in terms of ensuring the principle of non-refoulement. Such agreements would only be concluded if Denmark deemed the prison conditions and the manner in which criminal cases are investigated and prosecuted by the receiving State as being in line with international human rights law generally and the guarantees protected by the prohibition on refoulement specifically. This general assessment into the human rights standards of the receiving State would make an individual non-refoulement assessment with regard to a specific transferee obsolete. It is argued that the transfer agreements explicitly mention the various rights regarding prisoner treatment and fair investigations and trial to be granted to the transferee by the receiving State. In addition, where such punishment still exists under domestic law, the respective transfer agreement would prohibit imposition of the death penalty upon a transferee. In short, rather than conducting an inquiry into whether the principle of non-refoulement is observed when transferring a specific person to a particular destination (the individual non-refoulement assessment), an assessment with regard to a whole country and all persons potentially

113 Information from expert interview on file with author.

114 Information from expert interview on file with author.

115 Information from expert interview on file with author.

116 On the substantive side of the principle of non-refoulement, see below Part 5/I/B.

117 Information from expert interview on file with author.

118 See below Part 5/II/B/1/b on the respective guarantees contained in the transfer agreements.

transferred to it in the future is undertaken through the concluding of a transfer agreement with that State (a global non-refoulement assessment).¹¹⁹

While Denmark's transfer agreement with the Seychelles is still in force, the one concluded between Denmark and Kenya expired in September 2010. However, Denmark has still been able to transfer persons to Kenya since that date.¹²⁰ In these cases, Denmark provides Kenya with a note basically reflecting the content of the terminated transfer agreement and thus also the guarantees pertaining to the piracy suspect's treatment and rights. However, an individual non-refoulement assessment does not take place.¹²¹

Usually Denmark transfers suspects to Kenya and the Seychelles with whom it has concluded transfer agreements.¹²² However, there have been situations where piracy suspects seized by Danish forces have been transferred to, for example, the flag State of the vessel victim to the pirate attack, such as the Netherlands.¹²³ Denmark has not concluded transfer agreements with these States, yet there is no individual non-refoulement assessment conducted in these cases. However, some States are *per se* excluded as receiving States, even if they have strong links to a particular case, due to their poor human rights record.¹²⁴

Denmark does not consider it impossible in principle that a piracy suspect could raise a non-refoulement claim by virtue of international human rights law. However, it is argued that piracy suspects subject to transfer would have to take the initiative on their own. This presupposes knowledge about the *existence* of such a right, which suspects seized by Danish forces thus far do not seem to possess. Since persons subject to transfer are not actively informed about the existence of the prohibition of refoulement and the procedural safeguards available to secure the right, the situation where a piracy suspect subject to transfer raises a non-refoulement claim on his own has not yet occurred in practice.¹²⁵

Thus far, Denmark has not requested diplomatic assurances from receiving States with regard to the individual piracy suspects Denmark has transferred to them, for example as pertaining to the non-imposition of the death penalty or the prohibition of torture and other forms of ill-treatment. Rather, the provisions of the transfer agreements, which pertain to the treatment of the transferee in the receiving State, are deemed sufficient even though they are not understood as being diplomatic assurances.¹²⁶ Taking the example of Kenya, piracy suspects trans-

119 Information from expert interview on file with author.

120 Ministry of Foreign Affairs of Denmark (n 1) 21; information from expert interview on file with author.

121 Information from expert interview on file with author.

122 Information from expert interview on file with author.

123 See above Part 1/IV/A/1.

124 Information from expert interview on file with author.

125 Information from expert interview on file with author.

126 Information from expert interview on file with author.

ferred by third States are generally held in the Shimo-la-Tewa prison in Mombasa for detention on remand.¹²⁷ The prison, which has been subject to major reforms and refurbishment undertaken within the framework of the UNODC Counter Piracy Programme,¹²⁸ is certainly above average for Kenya. However, Denmark does not request assurances from Kenya guaranteeing that a specific transferee will be detained in that prison upon transfer. Rather, it is *assumed* that transferred suspects are detained in the Shimo-la-Tewa prison during investigation. While the assumption is that suspects will be detained there pre-trial (which seems indeed to be current practice), it remains unknown at the time of transfer where the sentence will be enforced if the suspect is convicted. Some transferees have been sent to other Kenyan prisons for the enforcement of their sentences.¹²⁹

4. Post-Transfer Phase

a) *Tracing and Monitoring*

Considering that no individual non-refoulement assessment takes place, that no diplomatic assurances are issued, and that some aspects relating to the situation in which the transferee will find himself – eg the detention facility – are assumed rather than ascertained and ensured, the monitoring of the situation post-transfer seems essential.¹³⁰

The tracing and monitoring provisions contained in the Denmark-Kenya Transfer Agreement are similar to those contained in the transfer agreements concluded between the European Union and Kenya and Mauritius respectively.¹³¹ Denmark is granted access to any person transferred to Kenya and has a right to question transferees.¹³² Further, according to a provision in the transfer agreement, international and national humanitarian agencies have the right to visit persons who have been transferred based on this agreement.¹³³ Therefore, Kenya is under an obligation to notify Denmark of the transferred person's place of detention, any deterioration of the transferee's physical condition, and any allegations of improper treatment.¹³⁴ Moreover, Kenya must keep records on, *inter*

127 Information from expert interview on file with author.

128 UNSC, 'Report of the Secretary-General on specialized anti-piracy courts in Somalia and other States in the region' (20 January 2012) UN Doc S/2012/50, para 70.

129 Information from expert interview on file with author.

130 Information from expert interview on file with author.

131 See below Part 2/II/B/6/a on issues relating to the interpretation of these provisions.

132 Article 6(6) Denmark-Kenya Transfer Agreement (on file with author).

133 Article 6(7) Denmark-Kenya Transfer Agreement (on file with author).

134 Article 6(6) Denmark-Kenya Transfer Agreement (on file with author).

alia, the location of the transferee's detention and any significant decisions made during prosecution and trial.¹³⁵

b) Re-Transfer by the Receiving State

As previously discussed, Denmark usually transfers suspects to the Seychelles or Kenya for prosecution, unless the exceptional situation arises where the flag State of the victim ship agrees to receive the alleged pirates for prosecution. While these States are willing to prosecute transferred piracy suspects, they are not necessarily ready to enforce the potentially long sentences imposed in case of conviction. This is true especially for the Seychelles, which made its consent to receive piracy suspects for prosecution contingent upon the option to transfer convicted persons to Somalia for enforcement of their sentences.¹³⁶ In order to do so, the Seychelles entered into a transfer for enforcement agreement with Somalia and its regional entities.¹³⁷ Thus, situations of re-transfer – ie where suspects are transferred by Denmark to a regional State and thereupon, if convicted, sent to Somalia for enforcement of their sentences – seem very real.

It appears that under the transfer for enforcement arrangement between the Seychelles and Somalia, Denmark's consent to transfer a convicted pirate to Somalia or one of its regional entities is not required.¹³⁸ With regard to Kenya, the transfer agreement stipulates that Kenyan law enforcement authorities may not re-transfer any person to any other State for *prosecution* without the prior written consent of Denmark.¹³⁹ However, the agreement does not contain an analogous provision for transfers of pirates to third States for enforcement of their sentences as pronounced by Kenyan criminal courts. Thus, it seems that the condition of Denmark's consent is – at least *de jure* – unnecessary in order for the prosecuting regional State to transfer convicted pirates, who have been surrendered to it by Danish forces for prosecution, to Somalia for enforcement of their sentences.

135 Article 6(4) Denmark-Kenya Transfer Agreement (on file with author).

136 UNSC, 'Report of the Secretary-General on the modalities for the establishment of specialized Somali anti-piracy courts' (15 June 2011) UN Doc S/2011/360, Annex V, para 5; see above Part 1/III/C.

137 UNSC, 'Report of the Secretary-General pursuant to Security Council resolution 1950 (2010)' (25 October 2011) UN Doc S/2011/662, para 67.

138 Information from expert interview on file with author.

139 Article 4(8) Denmark-Kenya Transfer Agreement (on file with author).

D. Arrest and Detention during Disposition

1. Detention Pending Jurisdictional Decision

a) Arrest by Danish Military on Suspicion of Criminal Activity

Law enforcement operations against Somali-based pirates are conducted by Danish military forces without any Danish police officials or prosecutors on board Danish warships. The capture and arrest of persons suspected of engaging in piracy or armed robbery at sea is thus carried out by the Danish military. The same holds true for detention of piracy suspects during the period where the inter-ministerial coordination organ considers the case, ie decides whether to release the seized suspects, hand the case over to the Danish prosecutor, or work towards a transfer to a third State. Responsibility for detention only changes hands if the Danish prosecutor decides that Denmark is to exercise its criminal jurisdiction over the seized suspects. Up until this point, however, arrest and detention of piracy suspects is carried out by Danish military forces based on a suspicion that they committed a criminal offence.

b) Normative Gaps

According to the Danish Constitution and international human rights law,¹⁴⁰ a person shall be deprived of his liberty only where it is warranted by law.¹⁴¹ The Danish Administration of Justice Act exhaustively regulates how to proceed in cases where a person suspected of having committed an offence is deprived of his liberty. However, we have seen that the Act's personal scope of application does not cover the Danish military, the authority actually detaining the piracy suspects seized. In other words, the Act does not apply as such if the Danish military carries out a (*de facto*) arrest of piracy suspects or detains them on remand.¹⁴² However, one view held is that the *principles* of the Danish Administration of Justice Act can still apply¹⁴³ with the *caveat* that some rules (especially those setting firm time limits regarding review of the legality of arrest and detention) may not always be strictly followed due to the specificities of piracy cases, namely that the suspects are held on board a warship far from the Danish mainland.

In order to determine what these principles could be, an overview of the rules regarding deprivation of liberty on suspicion of criminal activity as contained in the Danish Administration of Justice Act must be provided. Firstly, the Act stipulates the grounds on which a person can be arrested: the police can

140 Regarding international human rights law, see below Part 4/I.

141 Article 71(2) Danish Constitution.

142 See above Part 2/I/B/2.

143 Information from expert interview on file with author.

arrest a person if reasonable grounds of suspicion exist that they committed a criminal offence, if arrest is necessary to prevent additional criminal offences, to secure the suspect's temporary presence, or to prevent contact with others¹⁴⁴ – ie grounds that are generally fulfilled in cases where piracy suspects are caught red-handed. If these grounds are no longer present, the person must be released.¹⁴⁵ The Danish Administration of Justice Act also allows premises to be searched in order to seek and apprehend a suspect not yet in custody.¹⁴⁶ This provision would be relevant, for example, to the search of an intercepted mother ship. Furthermore, it is required under the Act that the arrest is carried out in a proportional manner.¹⁴⁷ In terms of the arrestee's rights, the Act stipulates that the arrestee must be informed of the charges and the time of arrest.¹⁴⁸ Additionally, within 24 hours of arrest, the arrestee shall be brought before a judge if still in the State's custody.¹⁴⁹ If the arrest is made for an offence for which detention on remand is allowed and the person cannot be immediately released, the court can decide to keep the person under arrest temporarily if it is unable to rule on detention on remand promptly (due to insufficient information for example).¹⁵⁰ As a general rule, however, a person whose arrest is upheld shall, if he is not released earlier, be brought before a judge within 72 hours of the court's initial review of the legality of the arrest. Thereby, the court decides whether the person should be released, detained on remand, or be subject to a more lenient measure; the latter option hardly seems possible in cases where piracy suspects are seized at sea.¹⁵¹ With regard to detention on remand, the Act stipulates that where a substantiated suspicion exists that a suspect committed an offence of a certain gravity, the suspect can be detained on remand to, *inter alia*, prevent his flight, the commission of further offences and collusion.¹⁵² The court decides detention on remand by issuing an order. An important condition with regard to piracy is that the hearing may be held without the accused being present. However, in cases where a pre-trial detention order is issued *in absentia*, the person must be brought before the court within 24 hours of his arrival in Denmark. The accused has the right to be represented by counsel at the court hearing and shall have the oppor-

144 Section 755(1) Danish Administration of Justice Act.

145 Section 760(1) Danish Administration of Justice Act.

146 Section 759(1) Danish Administration of Justice Act.

147 See, eg, Section 758(1) Danish Administration of Justice Act.

148 Section 758(2) Danish Administration of Justice Act.

149 Section 760(2) Danish Administration of Justice Act. See also Section 71(3) Danish Constitution; English translation available at: Denmark – Constitution, Axel Tschentscher ed, 'International Constitutional Law'.

150 Section 758(4) Danish Administration of Justice Act.

151 Section 758(5) Danish Administration of Justice Act; see also Section 71(3) Danish Constitution.

152 Section 762(1) Danish Administration of Justice Act.

tunity to confer with a defence counsel before the hearing. Further, he must be informed of his right to appeal the decision.¹⁵³

In addition to applying the principles of the Danish Administration of Justice Act, the procedural safeguards in relation to deprivation of liberty stipulated in Section 71 of the Danish Constitution could apply in the situation at hand. The provision stipulates, *inter alia*, that any person who is taken into custody shall be brought before a judge within 24 hours. Furthermore, where the person taken into custody cannot be released immediately, the judge must decide within three days (at the latest) whether the person shall be committed to prison.¹⁵⁴ It further grants a right to appeal the decisions of the judge relating to arrest and pre-trial detention.¹⁵⁵

Most commonly, however, it is assumed that the power to arrest and detain is based on international law directly,¹⁵⁶ namely Article 105 UNCLOS.¹⁵⁷ This has also been decided by the Dutch First Instance Court in Rotterdam in the *Samanyolu* case regarding the five suspects transferred to the Netherlands by Denmark when inquiring into the legal basis of the detention by Danish military forces.¹⁵⁸ Next to international law, parliamentary decision B59 approving the Danish contribution to NATO's Operation Ocean Shield has been invoked as a possible legal basis for arrest and detention by Danish forces at sea.¹⁵⁹ However, as we have seen above,¹⁶⁰ the decision only refers to and repeats what international law, and namely Article 105 UNCLOS, stipulates. The latter provision explicitly allows for the arrest of piracy suspects and implicitly permits their detention with a view to prosecute. However, Article 105 UNCLOS does not spell out the procedural safeguards a person arrested and detained based on suspicion of piracy benefits from.

c) *Missing Procedural Safeguards*

In sum, it is generally acknowledged that Danish counter-piracy missions do not take place in a legal void and that international law applies – namely general human rights law. However, the specific and explicit rules governing arrest and detention of piracy suspects by Danish military forces remain somewhat unclear. Even though it is suggested that the principles of the Danish Administration of

153 Section 763 Danish Administration of Justice Act.

154 Section 71(3) Danish Constitution.

155 Section 71(4) Danish Constitution.

156 Information from expert interview on file with author.

157 On Article 105 see above Part 1/II/A/1.

158 See below Part 4/I/B/2/c.

159 Information from expert interview on file with author; *Re 'MS Samanyolu'* (Urteil [Antrag der Staatsanwaltschaft]) (n 71) 41.

160 See above Part 2/I/B/2.

Justice Act may apply, which comprehensively regulates deprivation of liberty on suspicion of criminal activity, in practice, piracy suspects arrested and detained by the Danish military do not benefit from any procedural safeguards in relation to their deprivation of liberty. Namely, piracy suspects are not brought before a judge to review the legality of their arrest, nor does a judicial body order their detention on remand while they are deprived of their liberty by Danish military forces. Rather, it is commonly understood in Denmark that the right to have the legality of arrest and detention reviewed by a court only arises once the Danish prosecutor decides that the piracy suspects in question will be prosecuted in Danish criminal courts. In the period before – ie in between the arrest on suspicion of criminal activity by Danish military forces and the Danish prosecutor’s decision that Denmark exercise its criminal jurisdiction over the suspects – piracy suspects seized by Danish forces and held on board a Danish warship do not benefit from any procedural safeguards relating to their arrest and detention, nor is a judicial review of their deprivation of liberty conducted.¹⁶¹

2. Detention after a Positive Jurisdictional Decision

a) *Competent Bodies and Ordinarily Applicable Rules*

Once the inter-ministerial coordination organ turns a case over to the competent prosecutor (eg the Special International Crimes Office) via the established hierarchy, the Danish legal framework governing deprivation of liberty on suspicion of criminal activity is considered to apply to piracy suspects. In other words, once the Danish prosecutor decides to prosecute the case in Denmark, the piracy suspects finally enter the door of Danish criminal law. We have seen that the most important set of rules in relation to arrest and detention of persons suspected of having committed an offence are contained in the Danish Administration of Justice Act.¹⁶² That the act applies to the Danish prosecutor when dealing with piracy suspects is uncontested. However, the fact that the suspects are held on board a Danish frigate far from the Danish mainland, and that the prosecutor and investigators do not have immediate access to the crime scene, may challenge the strict observance of some rules regarding deprivation of liberty.¹⁶³ This holds true especially with regard to the provisions stipulating rather strict time limits regarding the review of arrest and detention.

161 Information from expert interview on file with author.

162 See namely Chapters 69 and 70 Danish Administration of Justice Act on arrest and detention on remand.

163 See above Part 2/I/B/3.

b) *Procedural Safeguards*

In cases where the Danish prosecutor decides to submit specific piracy suspects for prosecution in Danish criminal courts, ie to exercise Danish criminal jurisdiction over them, the right to challenge the legality of their deprivation of liberty before a court applies.¹⁶⁴ However, the question remains whether the right must be granted to suspects while they are held on board a Danish frigate or only once they are brought to the Danish mainland. No rules exist that answer this question specifically with regard to piracy suspects.¹⁶⁵ Arguably, the general rule that someone arrested abroad need not be brought before a judge until arrival in Denmark can be applied. This would allow review of the legality of arrest only after the alleged pirate arrives on Danish mainland.¹⁶⁶ Furthermore, the situation of piracy suspects held on board Danish warships has been compared to the situation of persons arrested abroad pursuant to a Danish extradition request. In the realm of extradition, the suspect arrested abroad is only brought before a judge once he is physically present in Denmark.¹⁶⁷ However, the comparison may not be absolutely accurate since in the realm of extradition, foreign authorities arrest and detain on behalf of Denmark, while in cases of piracy, the Danish navy carries out the arrest and the suspects are therefore in the hands of Danish authorities from the very moment of their seizure. Whether or not an obligation exists under Danish law to bring the suspects before a Danish judge while on board a Danish frigate, prosecutorial authorities aim to have the legality of detention reviewed before the suspects are physically brought to the Danish mainland.¹⁶⁸

A practical example where the legality of deprivation of liberty was reviewed by a judge while the suspects were still on board a Danish frigate is the *Elly Mærsk* case: on 30 December 2010, at around 8:00 a.m. Danish time, five persons were caught red-handed by the Danish frigate *Esbern Snare* while allegedly attempting to hijack the Danish-flagged *Elly Mærsk*. The Special International Crimes Office, which was informed about the seizure shortly before midnight on the same day, successfully applied for an *in absentia* detention on remand order, issued by a court of first instance in Copenhagen on 31 December 2010.¹⁶⁹ This was possible because under Danish law a court hearing sanctioning arrest or detention on remand may be held *in absentia*.¹⁷⁰ The piracy suspects deprived of their liberty

164 Information from expert interview on file with author.

165 Information from expert interview on file with author.

166 Sections 764 and 767 Danish Administration of Justice Act; information from expert interview on file with author.

167 Information from expert interview on file with author.

168 Information from expert interview on file with author.

169 Feldtmann (n 82) 179; information from expert interview on file with author; *Re 'MV Elly Mærsk'* (n 60).

170 Information from expert interview on file with author; Section 764 Danish Administration of Justice Act; *Re 'MV Elly Mærsk'* (n 60).

were represented by a counsel at the hearing.¹⁷¹ The suspects held on board the Danish frigate could communicate with their counsel by means of video link and through the assistance of an interpreter.¹⁷² Appeals against the detention order were lodged but remained unsuccessful before the court of second instance as well as the Danish Supreme Court.

In some cases, it seems difficult to respect the 24-hour deadline to review the legality of arrest and the three-day deadline to order detention on remand after the initial review of arrest.¹⁷³ Especially for the latter, the prosecutors may not be in possession of the information necessary to apply for pre-trial detention; they may not have enough of the facts needed to determine what kind of offences the suspects allegedly committed until one or even two weeks have passed.¹⁷⁴ This is an example of a problem of a more general nature that Danish military, police and judicial officials meet when dealing with piracy cases: due to practical and logistical constraints, it seems sometimes impossible or at least difficult to implement the generally applicable rules, such as the Danish Administration of Justice Act.¹⁷⁵

3. Detention Once a Transfer Option Comes into Play

a) *Detention by Danish Military Forces Pending Transfer*

As previously discussed, once the Danish prosecutor decides to prosecute specific piracy suspects in Denmark, the police and prosecutor respectively become responsible for their arrest and detention. In other words, from this very moment, the suspects are considered to enter the door of Danish criminal law and the Danish authorities generally competent to deprive a person of their liberty on suspicion of criminal activity are equally responsible for alleged pirates held on board a Danish frigate. However, before the decision that Denmark exercises its criminal jurisdiction over specific suspects is made, it is the military that carries out the initial arrest and detains suspects on board the frigate. What is more, the military *remains* responsible for detention if the inter-ministerial coordination organ decides that Danish criminal jurisdiction does not exist or that it should not be exercised in the particular case and that the suspects should thus be transferred to a third State for prosecution. Up until the physical surrender of piracy suspects to the prosecuting third State, it is therefore the Danish military detaining the suspects with a view to transfer them.

171 Information from expert interview on file with author; *Re 'MV Elly Mærsk'* (n 60).

172 Information from expert interview on file with author.

173 Information from expert interview on file with author.

174 Information from expert interview on file with author.

175 Information from expert interview on file with author.

b) Normative Gap

A normative gap also exists with regard to this phase and type of detention, ie where piracy suspects are held by the Danish military with a view to surrender them to a third State for prosecution. Despite being comparable to detention pending extradition – where the suspects are held by Denmark in order to secure their later surrender for criminal prosecution in another State – Denmark considers extradition legislation (including the rules governing surrender pursuant to execution of a European arrest warrant)¹⁷⁶ as inapplicable to the transfers of piracy suspects.¹⁷⁷ As a consequence, the rules on deprivation of liberty contained in the legal framework pertaining to extradition do not apply to detention of piracy suspects with a view to transfer them, despite having the same function and purpose as detention pending extradition, which is the securing of a later surrender for prosecution.

It remains unclear which legal framework allows and governs detention during this period. The Rotterdam court prosecuting the suspects transferred by Denmark to the Netherlands argued that Article 105 UNCLOS implicitly allows for detention on remand by Denmark. In light of Article 100 UNCLOS, which establishes a duty on all States to cooperate in the repression of piracy, Article 105 UNCLOS would have to be read as also allowing for pre-trial detention to facilitate criminal proceedings in another State, ie detention on remand by Denmark on behalf of the Netherlands.¹⁷⁸ Interestingly enough, the Rotterdam court qualified the detention of piracy suspects on board the Danish frigate as pre-trial detention by Denmark on behalf of the Netherlands, ie the State ultimately prosecuting, rather than as detention pending transfer by Denmark.¹⁷⁹ However, even if detention were qualified as detention on remand, a normative gap still exists since the Danish Administration of Justice Act containing the main rules governing pre-trial detention does not apply *ratione personae* to the Danish military.

176 See, eg, Article 12 Council Framework Decision on the European arrest warrant and the surrender procedures between Member States [2002] OJ L190/1 (EU Decision on the European arrest warrant): “When a person is arrested on the basis of a European arrest warrant, the executing judicial authority shall take a decision on whether the requested person should remain in detention, in accordance with the law of the executing Member State.”

177 See above Part 2/I/B/4.

178 *Re ‘MS Samanyolu’* (Urteil, Anlage I) (n 108) 8; *Re ‘MS Samanyolu’* LJN: BM8116, Judgment (Rotterdam District Court, 17 June 2010), English translation provided by UNICRI, 5.

179 On the legal qualification of this construction in light of Article 5(1) Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) (1950) 213 UNTS 221 (ECHR), see below Part 4/I/B/2/c.

c) *Missing Procedural Safeguards*

Where Denmark decides not to prosecute but rather seeks for transfer, piracy suspects held on board a Danish frigate do not benefit from the right to be brought promptly before a *Danish* judge for review of the legality of their arrest or detention.¹⁸⁰ Rather, it is considered sufficient if piracy suspects are brought promptly before a judge once the transfer is completed, ie in the receiving State.¹⁸¹ Thereby, Denmark does not make any distinction whether the suspects are transferred to a regional State, namely Kenya or the Seychelles,¹⁸² or another State, such as the Netherlands.¹⁸³ Furthermore, not only does the right to be brought promptly before a judge not apply, but at no point does Denmark provide the opportunity for *habeas corpus* proceedings in relation to deprivation of liberty. One reason for not providing such procedural safeguards is that doing so could create the perception that Denmark is exercising its criminal jurisdiction despite its decision not to.¹⁸⁴

E. *Conclusions on Disposition in an Interstate Setting: Denmark*

With regard to arrest and detention of piracy suspects, a major difference exists regarding whether Denmark decides to exercise its (prescriptive and adjudicative) criminal jurisdiction over the suspects or not. As soon as Denmark decides to exercise its criminal jurisdiction, piracy suspects enter the door of Danish criminal law. This has as a consequence that their deprivation of liberty then follows the ordinary rules applicable to arrest and detention on suspicion of criminal activity and is dealt with by the generally competent authorities. In terms of the competent authorities, from that moment on deprivation of liberty falls within the prosecutor's purview and is no longer dealt with by the military.¹⁸⁵ Further, the generally applicable rules, namely the provisions on pre-trial detention stipulated in the Danish Administration of Justice Act, are applied to the cases. The only issue that may arise is whether the specific context – ie that the

180 Information from expert interview on file with author.

181 Information from expert interview on file with author.

182 Information from expert interview on file with author.

183 Information from expert interview on file with author; see the following case where suspects detained by Danish forces and ultimately transferred to the Netherlands did not have the opportunity to have the legality of their detention reviewed by a Danish judge: *Re 'MS Samanyolu'* (Judgment) (n 178); *Re 'MS Samanyolu'* (Urteil, Anlage I) (n 108).

184 Information from expert interview on file with author.

185 Since piracy suspects deprived of their liberty remain physically on board the Danish frigate at this point, the handling and treatment of detainees is still the responsibility of the Danish military. However, as explained above, this study is limited to *deprivation* of liberty and whether the procedural safeguards have been respected and does not focus on detainee treatment.

suspects are far from the Danish mainland and that the prosecutor has access to neither the suspects nor the crime scene – allows for the strict observance of all of these rules. The question of whether the substance of certain rules must be modified to meet the specificities of the situation is mainly discussed in relation to the rather rigid time frames within which, according to Danish law, legal review of the arrest and detention must take place.

The situation is quite different for the phase *before* the Danish prosecutor decides to prosecute the alleged pirates in Denmark and also if the inter-ministerial coordination organ makes the decision that Denmark should *not* exercise its criminal jurisdiction over the suspects, but that they should be transferred for prosecution to a third State. In both cases, it is the Danish military that (*de facto*) arrests and detains piracy suspects.

Regarding the phase *before* Denmark decides whether it is willing and able to exercise its criminal jurisdiction, it is the military that arrests and detains piracy suspects on suspicion of criminal activity. While the Danish Administration of Justice Act governing arrest and detention on suspicion of criminal activity does not apply as such to the Danish military, it is argued that its *principles* could be applied to piracy suspects deprived of their liberty by the Danish navy. It is further held that arrest and detention during this phase could be governed by Article 105 UNCLOS or parliamentary decision B59. In addition, there is broad consensus that human rights law applies to piracy suspects held on board a Danish frigate. While Article 105 UNCLOS and parliamentary decision B59 are silent in terms of procedural safeguards – especially concerning review of the legality of deprivation of liberty – human rights law and the Danish Administration of Justice Act, whose principles are meant to apply, provide piracy suspects with an array of procedural safeguards. Nevertheless, pending Denmark's decision on whether or not to exercise its criminal jurisdiction over the suspects, they do not benefit from any of these procedural safeguards, and, most importantly, the legality of their deprivation of liberty is not reviewed.

In cases where Denmark decides that it cannot or does not wish to exercise its jurisdiction and that the suspects should be transferred to a third State, they remain under the authority of the military and the prosecutorial authorities do not step in at all. The alleged pirates are now detained in order to secure a possible surrender for prosecution to a third State. Since the extradition legal framework does not apply despite the fact that transfers have the same purpose and function as extradition, no specific rules governing detention are available for this phase. In practice, detained piracy suspects remain stripped of procedural safeguards relating to their detention and cannot avail themselves to *habeas corpus* proceedings regarding their deprivation of liberty. Rather, it is deemed sufficient that the suspects are brought before a judge in the receiving State, ie after completion of the transfer.

In sum, piracy suspects seized by Danish forces and over whom Denmark decides not to exercise its criminal jurisdiction do not benefit from procedural safeguards, and notably the right to have the legality of their arrest and detention

reviewed by a court, throughout the entire period of their deprivation of liberty. It should be noted that in between seizure of suspects by Danish forces and their surrender to a third State, a considerable period of time may elapse. In extreme cases, this was up to 30 and even 40 days.¹⁸⁶ While it is argued that alleged pirates have the possibility to challenge the legality of their arrest and detention before the authorities of the receiving State, a foreign judge may have limited possibilities to review an arrest and detention carried out by Denmark. For example, in the *Samanyolu* case, the Dutch court only reviewed the ECHR-compatibility of the Danish detention in order to determine whether there would be any Dutch responsibility in case Denmark violated Article 5 ECHR.¹⁸⁷

II. Disposition in a Multinational Context: EUNAVFOR

A. Mission, Command Structure and Mandate

In order to contribute to the deterrence, prevention and suppression of acts of piracy and armed robbery at sea off the coast of Somalia, the EU established the European Naval Force Somalia – Operation Atalanta within the framework of the Common Security and Defence Policy.¹⁸⁸ Launched on 8 December 2008,¹⁸⁹ Operation Atalanta was initially scheduled for a period of one year only but its term was later extended by the Council of the European Union, most recently until 12 December 2014.¹⁹⁰ The composition and size of Operation Atalanta is

186 In the case of the piracy suspects seized by Danish forces on 2 January 2009 and physically handed over to the Netherlands on 10 February 2009, 40 days elapsed between arrest and transfer: *Re 'MS Samanyolu'* (Judgment) (n 178); for other cases, see: Charlotte Aagaard, Camilla Stampe and Laura Sørensen, 'Danmark overtræder konventioner i piratjagt' (25 September 2011) <www.information.dk/280246> accessed 29 January 2013.

187 *Re 'MS Samanyolu'* (Urteil, Anlage I) (n 108) 10; further, the Dutch prosecutor argued that a Dutch judge could only review the legality of the detention under international law because he cannot apply Danish law and the Danish detention could not be measured by Dutch law.

188 Council Joint Action 2008/851/CFSP of 10 November 2008 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 [2008] OJ L301/33 as amended several times, latest by Council Decision 2012/174/CFSP of 23 March 2012 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 [2012] OJ L89/69 (CJA Operation Atalanta).

189 Council Decision 2008/918/CFSP of 8 December 2008 on the launch of a European Union military operation to contribute to the deterrence, prevention and repression of acts of piracy and armed robbery off the Somali coast (Atalanta) [2008] OJ L330/19 (Council Decision 2008/918/CFSP).

190 Article 16(3) CJA Operation Atalanta.

constantly changing, and participation is open to third, non-EU States.¹⁹¹ Thus far, Norway contributed to Operation Atalanta with a frigate in 2009, Croatia and Ukraine have provided staff to the EUNAVFOR Operational Headquarters, and a Participation Agreement was concluded with Montenegro and Serbia allowing these States to contribute naval officers to the operation.¹⁹²

The chain of command of Operation Atalanta is comprised of various levels: the EU Operation Commander¹⁹³ commands the operation from the EUNAVFOR Operational Headquarters located in Northwood, United Kingdom.¹⁹⁴ He is responsible for planning and conducting Operation Atalanta in cooperation with the political and military authorities of the EU.¹⁹⁵ While the EU Operation Commander's main tasks are of a strategic-political nature and the operational component plays a lesser role, the EU Force Commander's activities pertain to the day-to-day operations. Specifically, the EU Force Commander exercises command and control over all forces deployed in the Joint Operation Area and is responsible for the planning, orchestration and execution of military activities.¹⁹⁶ The EUNAVFOR Force Headquarters are located in theatre on board the flagship¹⁹⁷ and rotate between the vessels of the troop-contributing States every four months.¹⁹⁸ Lastly, each troop-contributing nation designates a TCN Commanding Officer, who exercises full command¹⁹⁹ over their respective vessel(s).²⁰⁰ In terms

191 Article 10 CJA Operation Atalanta.

192 European Union Naval Force Somalia – Operation Atalanta, ‘EU Maritime Operation against piracy: (EU NAVFOR Somalia – Operation ATALANTA)’ (26 March 2012) <www.consilium.europa.eu/eeas/security-defence/eu-operations/eunavfor-somalia/factsheets?lang=en> accessed 29 January 2013, 2.

193 Article 3 CJA Operation Atalanta.

194 Article 4 CJA Operation Atalanta.

195 Articles 6 and 7 CJA Operation Atalanta; EUNAVFOR, ‘Chain of Command’ <<http://eunavfor.eu/chain-of-command-2/>> accessed 15 April 2012.

196 *ibid.*

197 EUNAVFOR, ‘Operation Atalanta: Media Information’ (10 April 2012) <www.eunavfor.eu/wp-content/uploads/2012/04/20120410_EUNAVFOR_Media_Brochure.pdf> accessed 29 January 2013; information from expert interview on file with author.

198 EUNAVFOR (n 197) 10.

199 According to Blaise Cathcart, ‘Command and Control in Military Operations’ in Terry Gill and Dieter Fleck (eds), *The Handbook of the International Law of Military Operations* (OUP 2010) 237, “full command” is generally defined as “[t]he military authority and responsibility of a commander to issue orders to subordinates. It covers every aspect of military operations and administration and exists only within national services.” The definition also applies to EUNAVFOR Operation Atalanta: information from expert interview on file with author.

200 Information from expert interview on file with author. If a State contributes to EUNAVFOR with troops rather than a vessel, as Malta has done eg, the troops remain under Malta’s full command: information from expert interview on file with author.

of command and control, it must be noted that only the operational control²⁰¹ is delegated to EUNAVFOR.²⁰² In juxtaposition, full command and operational command²⁰³ remain with the respective troop-contributing State.²⁰⁴

Some States that are contributing vessel(s) to EUNAVFOR, such as France and Spain, prefer to revert back to national control if specific situations arise, namely if the victim ship flies their national flag or if the pirate attack involves other important State interests.²⁰⁵ In cases where a State contributing to EUNAVFOR reverts back to national control – which can be done very informally by sending a message to the EUNAVFOR Operational Headquarters²⁰⁶ – arrest, detention and disposition are carried out under national authority and within a national capacity.²⁰⁷ Other contributing States understand their mandate (for political and/or legal reasons) as being limited to a contribution to EUNAVFOR and therefore reverting back to national control is not an option. For instance, all German assets deployed to Operation Atalanta thus far remain under the operational control of EUNAVFOR, including for the arrest and detention of piracy suspects and disposition of their cases.²⁰⁸

The mandate of Operation Atalanta, which is described in Article 2 CJA Operation Atalanta, encompasses, *inter alia*, a disrupt and deter component. The

201 According to Cathcart (n 199) 238, “operational control” is generally defined as “[t]he authority delegated to a commander to direct forces assigned so that the commander may accomplish specific missions or tasks which are usually limited by function, time, or location.” The definition also applies to EUNAVFOR Operation Atalanta: information from expert interview on file with author.

202 Information from expert interview on file with author.

203 According to Cathcart (n 199) 237–38, “operational command” is generally defined as “[t]he authority granted to a commander to assign missions or tasks to subordinate commanders, to deploy units, to reassign forces, and to retain or delegate operational and/or tactical control (OPCON and/or TACON) as the commander deems necessary.” The definition also applies within EUNAVFOR Operation Atalanta: information from expert interview on file with author.

204 Information from expert interview on file with author.

205 Information from expert interview on file with author.

206 Information from expert interview on file with author.

207 Information from expert interview on file with author.

208 Information from expert interview on file with author; Deutscher Bundestag, ‘Antwort der Bundesregierung auf die Kleine Anfrage der Abgeordneten Hans-Christian Ströbele, Agnes Malczak, Dr. Frithjof Schmidt, weiterer Abgeordneter und der Fraktion BÜNDNIS 90/DIE GRÜNEN: Einsatz der Bundesmarine gegen Piraten und Massnahmen zur Vermeidung bzw. Eindämmung der Piraterie’ (Drucksache 17/1287, 29 March 2010) question 24(a). In the context of the hijacking of the German-flagged *Hansa Stavanger*, Germany deployed additional assets; while the supply ship *Berlin* was initially under national authority, a transfer of authority to EUNAVFOR later took place; thus, the reverse situation is practiced: *ibid* questions 23(d) and 24(d), 11–12.

mission is allowed to take the necessary measures, including the use of force, in order to deter, prevent and bring an end to acts of piracy and armed robbery at sea.²⁰⁹ In addition, the mandate covers law enforcement measures with a view to prosecute piracy suspects in criminal courts. As far as operational capabilities allow, Operation Atalanta shall “in view of prosecutions potentially being brought by the relevant States ... *arrest, detain and transfer* persons suspected of intending ... to commit, committing or having committed acts of piracy or armed robbery in the areas where it is present”.²¹⁰ Arrests, detentions and transfers with a view to prosecute,²¹¹ ie disposition and detention of suspects during disposition of piracy cases, are therefore covered by the mandate of Operation Atalanta.

B. Disposition Procedure

1. Legal Framework

The mandate of Operation Atalanta covers the arrest and detention of persons suspected of intending to commit, committing, or having committed acts of piracy or armed robbery in EUNAVFOR's operational area and the transfer of seized suspects for the purpose of prosecution.²¹² Thus, unlike NATO and the Combined Maritime Forces, EUNAVFOR has its own transfer policy and practice. Unless States contributing to EUNAVFOR revert back to national control for the seizure of piracy suspects, EUNAVFOR plays a main role in the disposition procedure.

The procedure by which it is decided whether to submit piracy suspects for prosecution to the mainland authorities of the seizing State or rather to submit a request for transfer to a third (regional) State is characterized by a complex interplay between various bodies and authorities, namely EUNAVFOR's Operational and Force Headquarters, the TCN Commanding Officer whose ship carried out the seizure, the mainland authorities of the seizing State, and third States potentially willing to receive the suspects for prosecution in case the seizing State decides not to exercise its criminal jurisdiction over the persons seized. No set of hard rules exists that comprehensively describes the disposition procedure and allocates the tasks and decisions to be made between the different actors involved. As we will see later, neither Article 12 CJA Operation Atalanta nor the

²⁰⁹ Article 2(d) CJA Operation Atalanta.

²¹⁰ Article 2(e) CJA Operation Atalanta (emphasis added).

²¹¹ The notion of ‘transfer’ as used in the description of EUNAVFOR's mandate and laid down in more detail in Article 12 Council Decision 2008/918/CFSP, to which we turn later, not only encompasses transfers to third States for prosecution, but also bringing suspects from the vessel of the seizing State to its mainland authorities. On the reasons behind this terminology and why a transfer is deemed necessary, see below Part 2/II/B/2.

²¹² Article 2(e) CJA Operation Atalanta.

various transfer agreements regulate the disposition of piracy cases.²¹³ Rather, the course of action to be taken post-seizure is described in classified military documents, the most important of which is EUNAVFOR's Standard Operating Procedure including its annexes regulating the detention and transfer of piracy suspects and the collection of evidence.²¹⁴

In addition, where these rules designate that the seizing State's national authorities are competent to make a specific decision during disposition or where they stipulate that the TCN Commanding Officer should seek national advice – mainly for the decision of whether to prosecute the case in the seizing State's courts – national law and practice is pertinent. Needless to say, these domestic rules and the ways by which to proceed post-seizure differ between the various States contributing to Operation Atalanta.

2. Article 12 CJA: Possible Outcomes of Disposition

Within the EUNAVFOR framework, disposition can have the following outcomes: suspects are either transferred to the mainland authorities of the seizing State for prosecution or to a third State, most likely a State located in the region prone to piracy. In cases where it is decided not to prosecute the suspects – for example, because further investigation suggests that the prospects of conviction are minimal or because no prosecution venue can be found – the suspects are ultimately released.

Article 12 CJA Operation Atalanta enumerates the various transfer options. Initially, the provision only covered transfers of piracy suspects seized in Somali territorial waters or on the high seas. Its scope of application was extended considerably in March 2012 and now encompasses transfers of suspects apprehended in Somali internal waters or in territorial, internal or archipelagic waters of States other than Somalia.²¹⁵ The amended provision reads as follows:

213 As we will later see in detail in Part 5/II/B/1/b, the transfer agreements concluded between the EU and regional States mainly aim at guaranteeing that the transferred person is treated humanely, that he is accorded certain rights during investigation and prosecution, that he is detained in humane conditions and that he is not subjected to the death penalty, in short: that transfers do not violate the substantive side of the refoulement prohibition. In addition, transfer agreements set forth what kind of assistance and support EUNAVFOR provides to the respective prosecuting regional State.

214 Document on file with author.

215 Article 12(2) CJA Operation Atalanta, as amended by Article 1(3) Council Decision 2012/174/CFSP of 23 March 2012 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 [2012] OJ L89/69 (Council Decision 2012/174/CFSP).

Article 12 – Transfer of persons arrested and detained with a view to their prosecution

1. On the basis of Somalia's acceptance of the exercise of jurisdiction by Member States or by third States, on the one hand, and Article 105 of the United Nations Convention on the Law of the Sea, on the other hand, persons suspected of intending, as referred to in Articles 101 and 103 of the United Nations Convention of the Law of the Sea, to commit, committing or having committed acts of piracy or armed robbery in Somalia's territorial or internal waters or on the high seas, who are arrested and detained, with a view to their prosecution, and property used to carry out such acts, shall be transferred:
 - to the competent 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, or
 - if that State cannot, or does not wish to, exercise its jurisdiction, to a Member State or any third State which wishes to exercise its jurisdiction over the aforementioned persons and property.
2. Persons suspected of intending, as referred to in Articles 101 and 103 of the United Nations Convention of the Law of the Sea, to commit, committing or having committed acts of piracy or armed robbery who are arrested and detained, with a view to their prosecution, by *Atalanta* in the territorial waters, the internal waters or the archipelagic waters of other States in the region in agreement with these States, and property used to carry out such acts, may be transferred to the competent authorities of the State concerned, or, with the consent of the State concerned, to the competent authorities of another State.
3. No persons referred to in paragraphs 1 and 2 may be transferred to a third State unless the conditions for the transfer have been agreed with that third State in a manner consistent with relevant international law, notably international law on human rights, in order to guarantee in particular that no one shall be subjected to the death penalty, to torture or to any cruel, inhuman or degrading treatment.

The transfer options covered by Article 12 CJA Operation *Atalanta* can roughly be divided into two categories depending on where the suspects were seized.

The first category of transfers pertains to suspects apprehended in Somalia's internal or territorial waters or on the high seas and is regulated by Article 12(1) CJA Operation *Atalanta*. Within this category, two different scenarios are envisaged. The first indent of Article 12(1) CJA Operation *Atalanta* describes the situation where the seizing troop-contributing State decides to prosecute the suspects in its own domestic courts. According to the view of the EU (and also some States contributing to Operation *Atalanta*), arrest and detention of piracy suspects is carried out under the authority of EUNAVFOR. Therefore, even if the seizing State physically arrests and detains the suspects, an extra theoretical step – the transfer from EUNAVFOR to the seizing State – is necessary in order to bring

the suspects within the criminal jurisdiction of the seizing State.²¹⁶ For this reason, the notion of “transfers” in the first indent of Article 12(1) CJA Operation Atalanta is also used to denote the surrender of suspects to the mainland authorities of the seizing State.²¹⁷ The second indent of the provision provides that if the seizing State cannot or does not wish to exercise its jurisdiction – which is more likely than not in practice – the suspect shall be transferred to an EU Member State or any third State willing and able to exercise its jurisdiction.

The second category of transfers, regulated by Article 12(2) CJA Operation Atalanta, concerns piracy suspects apprehended by EUNAVFOR in the territorial, internal or archipelagic waters of States other than Somalia. Under this provision, there are two possible options for the transfer of persons seized in those geographical areas by States contributing to EUNAVFOR and acting with the consent of the territorial State: the suspects may be transferred to the authorities of the State in whose waters the seizure took place or, alternatively, a transfer to the competent authorities of another State may take place, which necessitates the consent of the State where the seizure occurred.²¹⁸ As of August 2012, no transfers based on (the newly introduced) paragraph 2 of Article 12 CJA Operation Atalanta had taken place.²¹⁹ Therefore, the study at hand will not consider this option any further, but rather focuses on transfers based on the first paragraph of Article 12 CJA Operation Atalanta: the transfer of suspects seized in Somali waters or on the high seas.

3. Steps Following Interdiction of a Boat Suspected of Piracy

When boarding or coming alongside a boat suspected of engaging in piracy, the first course of action is to carry out a security sweep of the vessel in order to ensure that there is no security threat to the boarding team.²²⁰ If suspicion remains after securing the vessel, the boarding team undertakes appropriate steps to preserve the “crime scene” until the evidence collection team arrives. In general, the boarding team notes where the alleged pirates were originally positioned on the vessel, any possible interaction between them, and any evidence that was disposed of.²²¹ Once the evidence collection team arrives, its main tasks are to take photographs and seize relevant property.²²² Furthermore, by questioning

216 Since human rights jurisdiction and criminal jurisdiction are two different concepts, a State may have jurisdiction in the sense of the jurisdictional clauses of human rights treaties (such as Article 1 ECHR or Article 2(1) ICCPR) even though the suspects are still outside the reach of its criminal jurisdiction.

217 Information from expert interview on file with author.

218 Article 12(2) CJA Operation Atalanta.

219 Information from expert interview on file with author.

220 Document on file with author.

221 Document on file with author.

222 Document on file with author.

persons on board, the team attempts to gather information such as their name, age, nationality, city of residence, clan, languages spoken and role on the vessel.²²³ If there is suspicion that some of the persons are victims rather than piracy suspects, they must be questioned more thoroughly. While the questions are case-specific, they are generally intended to paint a picture of what happened on board the suspect vessel prior to arrival of the law enforcement vessel. The information must be supplied on a voluntary basis.²²⁴ As a general rule, the suspects are not taken on board the law enforcement vessel during this phase. However, in special situations – for example, where the situation on board the skiff is no longer secure because it was damaged during interception or because of overturned fuel barrels – the seized persons are taken on board the warship.²²⁵

The TCN Commanding Officer of the seizing ship is responsible for the collection of evidence and its initial assessment.²²⁶ The task is carried out by military specialists with a background in forensic work, such as members of the military police,²²⁷ or by officials specifically trained for this assignment prior to their deployment with Operation Atalanta.²²⁸ It is common practice to designate a boarding witness charged with personally witnessing all key aspects of the boarding and an operational witness responsible for observing the entire piracy incident, each of whom write a witness statement on their observations.²²⁹ Generally, the EUNAVFOR Operational Headquarters are consulted regarding evaluation of the collected evidence.²³⁰ Ultimately, the results yielded by the initial collection of evidence are transmitted to the EUNAVFOR Operational Headquarters.²³¹

223 Document on file with author.

224 Document on file with author.

225 Information from expert interview and document on file with author.

226 Information from expert interview on file with author.

227 Information from expert interview on file with author.

228 Since Operation Atalanta is a law enforcement mission and military staff is generally trained for conduct of hostilities rather than policing and forensic tasks, persons deployed with Operation Atalanta usually receive specific training before going on mission: information from expert interview on file with author.

229 Also, if in later criminal proceedings, testimony in person rather than via video link or in written form is required, they will serve as a witness. By appointing specific crew members with the task of witnessing the whole or key parts of the piracy incidence, only few persons must attend a potential trial, which, in turn, helps to maintain the operational capability of the respective warship: information from expert interview on file with author. In person testimony was previously required for prosecutions taking place in Kenya, however, pursuant to a January 2012 decision by the Magistrates Court, civilian witnesses who are afraid to appear in person can give testimony via video link: UNSC, 'Report of the Secretary-General on specialized anti-piracy courts in Somalia and other States in the region' (n 128) para 60.

230 Information from expert interview on file with author.

231 Information from expert interview on file with author.

If the suspicion that the seized person committed an offence cannot be sustained after the initial assessment of evidence or if, despite the suspicion, there is no realistic prospect of conviction,²³² the individual is released as soon as it is safe and reasonably practicable to do so.²³³ If the suspicion can be upheld, it is the TCN Commanding Officer who decides to detain the suspect.²³⁴ At this point, the various transfer for prosecution options described in Article 12(1) CJA Operation Atalanta come into consideration.

4. Decision by Seizing State Whether to Prosecute Domestically

a) Seizing State's Priority to Prosecute

Article 12(1) CJA Operation Atalanta establishes a jurisdictional hierarchy among different States competent to try a piracy case in their domestic courts. It gives the seizing State the priority to prosecute the suspects it took captive. This precedence of the *forum deprehensionis* over other competent States in instigating criminal proceedings against piracy suspects follows from the wording of Article 12(1) CJA Operation Atalanta: piracy suspects shall be transferred to a State other than the seizing State only if the latter “cannot, or does not wish to, exercise its jurisdiction”.²³⁵

The authorities of the seizing State decide whether to prosecute the seized piracy suspects in their domestic criminal courts autonomously.²³⁶ The procedure by which it is decided whether to prosecute the alleged pirates in the courts of the seizing State is governed by the respective troop-contributing State's municipal law and practice. The procedure followed therefore varies among the different States contributing to Operation Atalanta, as we will see next in the examples of Germany and Spain.

b) The Examples of Germany and Spain

When a German vessel contributing to Operation Atalanta seizes piracy suspects, and they are not immediately released after an initial assessment of evidence, Germany must decide whether to exercise its criminal jurisdiction over the cap-

232 Various jurisdictions criminalize conspiracy to commit piracy. Thus, eg, it is theoretically possible to indict for conspiracy to commit piracy under Kenyan law; however, in practice, this charge is very difficult to prove: information from expert interview on file with author. Therefore, third States are generally not willing to receive this type of case for prosecution.

233 Document on file with author.

234 Document on file with author. See below Part 2/II/C/2.

235 See introductory words of Article 12(1) second indent CJA Operation Atalanta; confirmed by information from expert interview on file with author.

236 Information from expert interview and document on file with author.

tured persons. Similar to Denmark, an inter-ministerial decision-making body (*ressortübergreifendes Entscheidungsgremium*) has been established in Germany in order to decide on the disposition of piracy cases, namely to make a preliminary finding on whether to prosecute specific piracy suspects in German criminal courts.²³⁷ The body is comprised of representatives of the Federal Foreign Office, the Federal Ministry of Justice, the Federal Ministry of the Interior and the Federal Ministry of Defence.²³⁸ The latter ministry, because of its connection to naval operations,²³⁹ coordinates the inter-ministerial decision-making body.²⁴⁰ As to the concrete composition of this *ad hoc* body,²⁴¹ all that is known is that high-level representatives of these ministries (*leitende Vertreter dieser Ministerien*) are dispatched to it.²⁴² Guidelines describe the procedure and criteria on which it decides whether, in the view of the German Federal Government, the exercise of domestic criminal jurisdiction over piracy suspects is warranted in a concrete case.²⁴³ These guidelines were agreed upon by the ministries participating in the inter-ministerial decision-making body,²⁴⁴ and have been amended and refined over time.²⁴⁵ The non-disclosure of these guidelines to the public and uninvolved divisions of the administration²⁴⁶ is explained by their nature: these guidelines are internal instructions on how to proceed regarding a specific matter falling within the competence of a specific unit of the administration (*dienstliche Richtlinien, die verwaltungssinternes Handeln betreffen*), which are generally not publicly accessible.²⁴⁷

According to these guidelines, the Ministry of Defence convenes the inter-ministerial decision-making body in cases where piracy suspects seized by a German vessel contributing to Operation Atalanta are not immediately released.²⁴⁸ The body then decides whether the case features a genuine link to Germany that warrants the exercise of its criminal jurisdiction over the suspects.²⁴⁹ If the inter-ministerial decision-making body concludes that Germany has jurisdiction over the case and should actually exercise it, the competent

237 Document on file with author.

238 Document on file with author; *Re 'MV Courier'* 25 K 4280/09, Urteil (Verwaltungsgericht Köln, 25. Kammer, 11 November 2011) para 58.

239 Information from expert interview on file with author.

240 Information from expert interview on file with author.

241 Information from expert interview on file with author.

242 Document on file with author; *Re 'MV Courier'* (n 238) para 58.

243 Information from expert interview on file with author.

244 Information from expert interview on file with author.

245 Information from expert interview on file with author.

246 Document on file with author.

247 Information from expert interview on file with author.

248 Information from expert interview on file with author.

249 Information from expert interview on file with author.

prosecutorial services are contacted.²⁵⁰ They are informed that, according to the German Federal Government's view, the case features a genuine link to Germany, ie that the State has an interest in prosecuting the seized suspects.²⁵¹

Thereupon, the competent prosecutorial service²⁵² makes the ultimate decision on whether to prosecute the case in Germany.²⁵³ Under German criminal law, the actual offence of piracy does not exist.²⁵⁴ In terms of substantive criminal law, the most pertinent provision is Section 316(c) of the German Criminal Code, which incorporates, *inter alia*, the offences defined in Article 3 SUA Convention.²⁵⁵ Furthermore, other offences, such as taking hostages,²⁵⁶ abduction for the purpose of blackmail²⁵⁷ and (aggravated) robbery,²⁵⁸ are relevant in light of the *modus operandi* of Somali-based pirates.²⁵⁹ Regarding pirate attacks, Germany's crimi-

250 Information from expert interview on file with author.

251 Information from expert interview on file with author; Deutscher Bundestag, 'Antwort der Bundesregierung auf die Kleine Anfrage der Abgeordneten Birgit Homburger, Dr. Rainer Stinner, Elke Hoff, weiterer Abgeordneter und der Fraktion der FDP: Strafverfolgung von Piraterieverdächtigen' (Drucksache 16/12927, 8 May 2009) 4.

252 In cases where the victim ship flies the German flag, Section 10 of the German Code of Criminal Procedure stipulates that the courts in whose district the ship's home port is located is primarily competent. If the attack is carried out against a ship not flying the German flag, Section 10(a) of the German Code of Criminal Procedure designates the courts of Hamburg as competent. For an English translation of the German Code of Criminal Procedure, see: German Code of Criminal Procedure (StPO) (Duffet B and Erbinger M trs (original) Müller-Rostin K tr (updated) 2011.)

253 Information from expert interview on file with author.

254 Claus Kreß, 'Die moderne Piraterie, das Strafrecht und die Menschenrechte: Gedanken aus Anlass der deutschen Mitwirkung an der Seeoperation ATALANTA' in Dieter Weingärtner (ed), *Die Bundeswehr als Armee im Einsatz: Entwicklungen im nationalen und internationalen Recht* (Nomos 2010) 98.

255 Robert Esser and Sebastian Fischer, 'Strafvereitelung durch Überstellung von Piraterieverdächtigen an Drittstaaten?' (2010) 5 *JuristenZeitung* 217, 217; Kreß (n 254) 98.

256 Section 239(b) German Criminal Code; for an English translation see: German Criminal Code (Bohlander M tr, 2012).

257 Section 239 German Criminal Code.

258 Sections 249 and 250 German Criminal Code.

259 Christian Schaller, 'Die strafrechtliche Verfolgung von Piraten' in Stefan Mair (ed), *Piraterie und maritime Sicherheit: Fallstudien zu Afrika, Südostasien und Lateinamerika sowie Beiträge zu politischen, militärischen, rechtlichen und ökonomischen Aspekten* (Stiftung Wissenschaft und Politik, Deutsches Institut für Internationale Politik und Sicherheit 2010) 91; Deutscher Bundestag, 'Antwort der Bundesregierung auf die Kleine Anfrage der Abgeordneten Hans-Christian Ströbele, Agnes Malczak, Dr. Frithjof Schmidt, weiterer Abgeordneter und der Fraktion BÜNDNIS 90/DIE GRÜNEN' (n 208) 6, question 16.

nal jurisdiction can potentially be based on the flag State principle,²⁶⁰ the passive personality principle,²⁶¹ or the universality principle applicable to offences covered by Section 316(c) of the German Criminal Code^{262, 263} These jurisdictional rules are complemented by Section 153(c) of the German Code of Criminal Procedure, according to which the prosecutor may dispense with prosecuting a criminal offence committed abroad under certain circumstances. This provision, which provides the prosecutor with a procedural means to contain the rather far-reaching penal power as conferred to Germany under the jurisdictional rules,²⁶⁴ applies to cases allegedly involving an attack by Somali-based pirates.²⁶⁵ In cases where the German prosecutor decides to prosecute the case in domestic courts, the German Ministry of Defence informs the EU Operation Commander about this decision.²⁶⁶ However, as we will see next, this has not yet occurred in practice. Rather, in the cases submitted thus far to the inter-ministerial decision-making body, it decided not to prosecute the suspects in German courts, whereupon the EUNAVFOR Operational Headquarters tried to transfer the suspects to regional States.

Since spring 2010, the inter-ministerial decision-making body has not been convened.²⁶⁷ Before, however, it considered various cases where German troops contributing to EUNAVFOR arrested and detained piracy suspects.²⁶⁸ In all the cases submitted to it, the inter-ministerial decision-making body decided that prosecution of the piracy suspects in Germany was not warranted and thus gave way to the transfer option. In three cases, transfers to Kenya were negotiated and implemented: the nine suspects who allegedly attacked the *Courier*, which flies the flag of Antigua and Barbuda but is owned by a German shipping company, the seven persons who allegedly committed unlawful acts against the German war-

260 Section 4 German Criminal Code.

261 Section 7(1) German Criminal Code.

262 Section 6(3) German Criminal Code.

263 Esser and Fischer, 'Strafvereitelung durch Überstellung von Piraterieverdächtigen an Drittstaaten?' (n 255) 217–218; Deutscher Bundestag, 'Antwort der Bundesregierung auf die Kleine Anfrage der Abgeordneten Birgit Homburger, Dr. Rainer Stinner, Elke Hoff, weiterer Abgeordneter und der Fraktion der FDP' (n 251) 5.

264 Michael Bohlander, *Principles of German Criminal Procedure* (Hart Publishing 2010) 69.

265 Esser and Fischer, 'Strafvereitelung durch Überstellung von Piraterieverdächtigen an Drittstaaten?' (n 255) 218; Deutscher Bundestag, 'Antwort der Bundesregierung auf die Kleine Anfrage der Abgeordneten Birgit Homburger, Dr. Rainer Stinner, Elke Hoff, weiterer Abgeordneter und der Fraktion der FDP' (n 251) 5.

266 Information from expert interview on file with author.

267 Information from expert interview on file with author.

268 Deutscher Bundestag, 'Antwort der Bundesregierung auf die Kleine Anfrage der Abgeordneten Hans-Christian Ströbele, Agnes Malczak, Dr. Frithjof Schmidt, weiterer Abgeordneter und der Fraktion BÜNDNIS 90/DIE GRÜNEN' (n 208) 5.

ship *Spessart*, and the seven persons suspected of attacking the *Cap St. Vincent* were all transferred to Kenya for prosecution.²⁶⁹ In one case, the inter-ministerial decision-making body opted for a transfer rather than German domestic prosecutions, yet the EU Operation Commander decided not to issue a request to Kenya because the prospects of conviction were deemed to be too uncertain. Since Germany was not ready to prosecute the suspects despite the impossibility of a transfer to Kenya, the four suspects were eventually released.²⁷⁰ While in the end none of these cases were prosecuted in German criminal courts, it so happened that the German prosecutor conducted initial investigations while the inter-ministerial decision-making body was still engaged in the decision-making procedure. In the cases of *Courier* and *Spessart*, the prosecutor even issued an arrest warrant (*Haftbefehl*).²⁷¹ Thus, in practice, a certain overlap can exist between the inter-ministerial decision-making body's final political determination on whether German criminal prosecution is warranted in a specific case and investigation of the case by the competent German prosecutorial authorities.²⁷² In the *Courier* case, the prosecutor terminated the case by applying Section 153(c) of the German Code of Criminal Procedure after the Ministry of Defence, based on the decision by the inter-ministerial decision-making body, communicated that a transfer rather than home prosecution was envisaged.²⁷³

In doctrine, controversial views exist regarding the necessity of an inter-ministerial decision-making body deciding whether domestic prosecutions are

269 *ibid* 5; regarding the suspects that allegedly attacked the *Courier*, see *Re 'MV Courier'* (n 238) paras 2–5.

270 Deutscher Bundestag, 'Antwort der Bundesregierung auf die Kleine Anfrage der Abgeordneten Hans-Christian Ströbele, Agnes Malczak, Dr. Frithjof Schmidt, weiterer Abgeordneter und der Fraktion BÜNDNIS 90/DIE GRÜNEN' (n 208) 5; Arbeiten in Krisengebieten, 'Aktuelle Lage in Somalia: Atalanta: Ressortübergreifende Entscheidung' (14 September 2009) <www.arbeiten-in-krisengebieten.de/vb/archive/index.php/t-281-p-2.html?s=e8e22424357fe6440b8453629074foee> accessed 29 January 2013.

271 Esser and Fischer, 'Strafvereitelung durch Überstellung von Piraterieverdächtigen an Drittstaaten?' (n 255) 220; on the issuance of arrest warrants under German criminal procedural law, see: Bohlander (n 264) 75–80.

272 Esser and Fischer, 'Strafvereitelung durch Überstellung von Piraterieverdächtigen an Drittstaaten?' (n 255) 220; *Re 'MV Courier'* (n 238) para 4.

273 *ibid* para 4. See Esser and Fischer, 'Strafvereitelung durch Überstellung von Piraterieverdächtigen an Drittstaaten?' (n 255) discussing whether by transferring a suspect to a third State *before* the German prosecutor terminates the investigations in a concrete case, the German government representatives or troops are liable for the offence of "assistance in avoiding prosecution or punishment" defined in Section 258 of the German Criminal Code. He argues that the offence has to be interpreted narrowly in order to allow for increasingly internationalized criminal prosecutions, and criminal liability based on Section 258 of the German Criminal Code should be denied in such cases.

warranted or not, thus giving way to a transfer to a third State. Some argue that it is unnecessary (at least legally speaking) to have a separate body decide whether a case features a genuine link to Germany, especially for attacks that fall under Section 316(c) of the German Criminal Code to which the universality principle applies.²⁷⁴ It has also been alleged that the body is problematic in terms of separation of powers.²⁷⁵ The fact that a federal body (the inter-ministerial decision-making body) issues a quasi-binding determination on whether German prosecutions are warranted to a State body could be seen as problematic in light of the established allocation of competences (*Bundesstaatsprinzip*) between the federation (*Bund*) and States (*Länder*).²⁷⁶ Others argue that giving some weight to the Federal Government's views on whether criminal prosecutions should take place in domestic or foreign courts cannot be criticized *per se*. However, arguably, this could also be done by establishing general criteria defining which cases should be prosecuted in German courts instead of deciding on a case-by-case basis. These criteria could be applied directly by the actors in theatre, ie the German military personnel deployed to counter piracy off the coast of Somalia and the region, which would be less time-consuming.²⁷⁷

Unlike Germany and Denmark, Spain has not set up an *ad hoc* mechanism to make preliminary findings on whether to prosecute piracy suspects seized by its forces in domestic criminal courts. Rather, if a Spanish ship contributing to EUNAVFOR seizes piracy suspects, the Spanish Commanding Officer contacts the Spanish Ministry of Defence. The Ministry, in turn, contacts a judge of the *Audiencia Nacional* who makes the decision whether to prosecute in Spanish domestic courts.²⁷⁸

In theory, the Spanish judge decides whether to prosecute in domestic courts autonomously and independently from the Government. However, even if not officially admitted, it appears that politics do have some influence on the decision of whether to prosecute the piracy suspects in Spain or to transfer them to a third State instead. It is thus suggested that the rule of law would be better

274 Doris König and others, 'Piraterie und maritimer Terrorismus als Herausforderungen für die Seesicherheit: Objektive Rechtsunsicherheit im Völker-, Europa- und deutschen Recht: PiraT-Arbeitspapiere zur Maritimen Sicherheit Nr. 7' (Juli 2011) <www.maritimesecurity.eu/fileadmin/content/news_events/workingpaper/PiraT_Arbeitspapier_Nr7_2011_07.pdf> accessed 29 January 2013, 32.

275 Doris König, 'Die Bekämpfung von Terroristen und Piraten: Ist der Einsatz der deutschen Marine im Rahmen von OEF, PSI und Operation Atalanta mit dem Völkerrecht vereinbar?' [2009] Rechtspolitisches Forum (Legal Policy Forum) 30.

276 König and others (n 274) 32–33.

277 Kreß (n 254) 115–16. Loosing time may be a problem in light of the deadlines imposed by domestic and/or international law within which legal review of deprivation of liberty must take place.

278 Information from expert interview on file with author.

respected if the Spanish Commanding Officer could directly contact the judge of the *Audiencia Nacional* rather than through the Ministry of Defence.²⁷⁹

c) **Transfer to the Seizing State for Prosecution**

According to the first indent of Article 12(1) CJA Operation Atalanta, a transfer is also necessary if the seizing State decides to exercise its criminal jurisdiction over the suspects. This is due to the fact that, according to the prevailing view, seizure and arrest of piracy suspects is carried out under the authority of EUNAVFOR. Thus, officials of the respective troop-contributing State physically apprehending and holding the suspects take these measures pursuant to EUNAVFOR's mandate and not within a national capacity. Therefore, legally speaking, the suspects must be brought from the EUNAVFOR sphere into the national (seizing State's) sphere, which is achieved by means of a transfer. Hence, in addition to the physical transfer of the suspects from the seizing ship to the mainland of the seizing State, a "jurisdictional change" must be brought about.²⁸⁰ This is reflected by the first indent of Article 12(1) CJA Operation Atalanta, which states that persons suspected of piracy, who are arrested and detained with a view to prosecute, "shall be transferred ... to the competent 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".²⁸¹

In practice, if the seizing State decides to prosecute the suspects in its domestic courts, nothing more than informing the EU Operation Commander of the exercise of jurisdiction is necessary.²⁸² An agreement on the conditions of the transfer is not required.²⁸³

5. **Decision to Transfer to a Third State**

We have seen that according to Article 12(1) CJA Operation Atalanta, the seizing State is given priority to exercise its criminal jurisdiction over the piracy suspects it seized. In theory, the EUNAVFOR Operational Headquarters would therefore only initiate the procedure intended to lead to a transfer to a third State *after* the seizing State decided not to prosecute the persons it took captive in its own criminal courts. In practice, however, these procedures occur in parallel, not consecutively. Thus, the seizing State informs the EU Operation Commander, who is charged with evaluating whether to submit a transfer request to a regional

279 Information from expert interview on file with author.

280 Information from expert interview on file with author; see also above Part 2/II/B/2.

281 Article 12(1) CJA Operation Atalanta.

282 Information from expert interview and document on file with author.

283 This follows from Article 12(3) CJA Operation Atalanta; information from expert interview on file with author.

State, of the arrest of piracy suspects immediately after seizure. The EUNAVFOR Operational Headquarters, in order to save time, thereupon initiates the procedure by which it is decided whether to request a transfer to a regional State.²⁸⁴ Despite these parallel efforts to find a State willing and able to prosecute the suspects, it may take several days until it becomes clear whether and to which jurisdiction a transfer can take place.²⁸⁵ During this time, the suspects are generally kept on board the seizing State's vessel.²⁸⁶

With this in mind, the standard procedure followed when deciding whether to submit a request for transfer to a third State, which is not an EU Member State, will be described next. It may happen in some cases that this standard procedure is not strictly followed. However, the main features of the transfer decision procedure discerned seem to be valid for all transfers carried out under the umbrella of EUNAVFOR.

a) Focus on Transfer to Regional States

Article 12(1) CJA Operation Atalanta provides for two kinds of transfers to third States, ie a State other than the seizing State: transfers to an EU Member State or transfers to any other third State.

The situation where an EU Member State, which is not the seizing State, is willing to receive the suspects for prosecution seems likely only if the attack in question violated important national interests of its own,²⁸⁷ namely because the attack was allegedly carried out against its own nationals or against a ship flying its flag. No special procedure has been set up for cases where piracy suspects are transferred to an EU Member State that is not the seizing State. Rather, it depends on the States involved how the suspects are brought within the jurisdiction of the prosecuting State. Thereby, if the EUNAVFOR Operational Headquarters act at all, it is as a facilitator and coordinator rather than a decision-maker, as holds true for transfers to third, non-EU States.²⁸⁸ Before a transfer to an EU Member State can take place, the EU Operation Commander must be informed. Since this option hardly ever occurs and is not subject to a standardized procedure, it will not be considered any further.

Rather, the focus is on transfers to third States that are neither the seizing State nor an EU Member State. In practice, these transfers have thus far only been to two States, both located in the region prone to Somali-based piracy: Kenya and the Seychelles. Meanwhile, the legal and practical framework regulating the

284 Information from expert interview on file with author.

285 Information from expert interview on file with author.

286 Information from expert interview on file with author.

287 Information from expert interview on file with author.

288 Information from expert interview on file with author.

transfer of suspects to Mauritius will most probably be set up at the end of 2012.²⁸⁹ A transfer to a regional State is currently the most prevalent transfer for prosecution option under Article 12(1) CJA Operation Atalanta.

b) Rules Governing the Decision to Transfer to Third State

EU law does not contain a set of hard rules comprehensively describing the procedure that leads to a decision to transfer piracy suspects to a regional State for prosecution. Article 12 CJA Operation Atalanta, which mentions the possibility to transfer piracy suspects for prosecution to a third (in practice regional) State,²⁹⁰ stipulates that no persons may be transferred to such a State

unless the conditions for the transfer have been agreed with that third State in a manner consistent with relevant international law, notably international law on human rights, in order to guarantee in particular that no one shall be subjected to the death penalty, to torture or to any cruel, inhuman or degrading treatment.²⁹¹

In order to fulfil this requirement, the EU has entered into transfer agreements with Kenya, the Seychelles and Mauritius.²⁹²

However, the transfer agreements concluded between the EU and regional States do not describe the *procedure* to be followed in order to reach a transfer decision. Except for the definition of who qualifies as a transferee (which is different in all three agreements) and rules on evidence to be submitted to the regional State for the assessment of whether to accept a transfer request (contained in the agreements with the Seychelles and Mauritius), the transfer agreements do not contain rules defining how, by whom and pursuant to what criteria a transfer decision should be made.²⁹³

Rather, guidance issued by the EU, which describes in more detail the course of action to be taken if the seizing State does not exercise its jurisdiction and a transfer to a regional State is considered are standard operating procedures,²⁹⁴ most importantly the EUNAVFOR Transfer SOP. Its annexes contain specific guidance for transfers of suspects to the respective regional State.²⁹⁵ The stand-

289 Information from expert interview on file with author.

290 Article 12(1) CJA Operation Atalanta.

291 Article 12(3) CJA Operation Atalanta.

292 See above Part 1/III/B.

293 As we will see below (Part 2/II/B/5/e), the agreements contain isolated requirements regarding the implementation of the transfer decision.

294 Information from expert interview on file with author.

295 Information from expert interview on file with author.

ardized procedure followed for transfers to Kenya and to the Seychelles is quite similar.²⁹⁶

c) *Transfer Agreements and Their Personal Scope of Application*

If after the initial assessment of evidence the suspicion that the seized person committed an offence can be upheld and it is concluded that there is a reasonable prospect of conviction, the EUNAVFOR Operational Headquarters generally start evaluating the possibility of transferring the suspect to a regional State. In order to evaluate whether transfer to a regional State is a viable option, various factors must be considered by the EUNAVFOR Operational Headquarters. First of all, Article 12(3) CJA Operation Atalanta stipulates that a transfer to a regional State can only take place if the conditions for the transfer have been agreed upon with that third State in a manner consistent with international law. In order to satisfy this criterion, the EU has entered into transfer agreements with various States.

In these agreements it is, *inter alia*, defined who can be subject to a transfer.²⁹⁷ Under the terminated²⁹⁸ EU-Kenya Transfer Agreement, the person subject to transfer need not feature any link to Kenya and the personal scope of application is thus quite broad. However, at the same time, the Agreement's personal scope of application is quite narrow since it only encompasses persons suspected of piracy, but not armed robbery at sea. This is due to the definition of "transferred person", which includes "any person suspected of intending to commit, committing, or having committed, acts of piracy transferred by EUNAVFOR to Kenya" under the EU-Kenya Transfer Agreement.²⁹⁹ The notion of "piracy", in turn, refers to acts "as defined in Article 101 UNCLOS"³⁰⁰ and thus only to unlawful acts against ships and crews committed on the high seas. From this follows

296 Information from expert interview on file with author. According to the Annex regarding transfers to Kenya, which is attached to the EUNAVFOR Transfer SOP, the Annex may be used as guidance for transfers to other regional States until such time as specific guidelines are issued: information from expert interview and document on file with author.

297 Obviously, a State can also agree to receive persons not covered by the respective transfer agreement.

298 Its provisions are still followed if transfers take place between EUNAVFOR and Kenya; see above Part 1/III/B.

299 Article 1(h) Annex to Exchange of Letters between the European Union and the Government of Kenya on the conditions and modalities for the transfer of persons suspected of having committed acts of piracy and detained by the European Union-led naval force (EUNAVFOR), and seized property in the possession of EUNAVFOR, from EUNAVFOR to Kenya and for their treatment after such transfer [2009] OJ L79/49 (EU-Kenya Transfer Agreement).

300 Article 1(g) Annex to EU-Kenya Transfer Agreement.

that – at least when taken at face value – the agreement does not extend to persons suspected of having committed violent acts against ships and crew in territorial waters, which is referred to as “armed robbery at sea” in the Security Council’s counter-piracy resolutions and criminalized under Kenyan criminal law.³⁰¹ Thus, at least theoretically, the location where the offence was allegedly committed matters under the EU-Kenya Transfer Agreement. However, within that category almost all seized persons could be transferred since the Agreement covers also those “suspected of intending to commit” piracy. This part of the “transferred person” definition seems overly broad since under Kenyan criminal law the mere intention to commit the offences of piracy, armed robbery at sea, or hijacking and destroying of ships (and most other offences) is not punishable. Rather, criminal liability presupposes that the *actus reus* is at least partially fulfilled.³⁰² Even the crime of conspiracy is only punishable if both the *mens rea* and *actus reus* are present. Under Kenyan law, the generally accepted definition of conspiracy follows from the House of Lords definition in *Mulcahly v R* (1868): “A conspiracy consists not merely in the intention of two or more but in the agreement of two or more to do an unlawful act, or to do a lawful act by unlawful means. So long as such a design rests in intention only it is not indictable.” Thus, the offence of conspiracy requires an overt act – the act of the parties in agreeing to commit an offense, ie the very plot – which is different from a person just having a bad mind.³⁰³ In practice, Kenya usually only accepts so-called “hard cases”, ie where piracy has allegedly been *committed*. Transfers of persons merely intending to commit an act of piracy are thus of a rather theoretical nature.³⁰⁴

As compared to the EU-Kenya Transfer Agreement, the personal scope of application of the EU-Seychelles Transfer Agreement is broader in that it includes transfers of persons not only suspected of piracy but also of armed robbery at sea.³⁰⁵ At the same time, however, the category of persons that can be transferred to the Seychelles is more limited. According to the Agreement, the Government of the Seychelles

may authorize the EUNAVFOR to transfer suspected pirates and armed robbers captured in the course of its operations in the exclusive economic zone, territorial sea, archipelagic waters and internal waters of the Republic of Seychelles.

301 Section 369(1) Kenyan Merchant Shipping Act 2009.

302 The offences are described in Sections 369 to 371 Kenyan Merchant Shipping Act 2009.

303 On the requisites of criminal liability under Kenyan law in general and conspiracy specifically: information from expert interview on file with author.

304 Information from expert interview on file with author.

305 The EU-Seychelles Transfer Agreement does not contain definitions of terms similar to Article 1 of the EU-Kenya Transfer Agreement. The inclusion of “persons suspected of armed robbery at sea” follows, however, from the language used in the Agreement.

This authorization is extended to the protection of Seychelles-flagged vessels and Seychellois Citizens on a non-Seychelles flagged vessel beyond the limit aforementioned and in other circumstances on the high seas at the discretion of the Republic of the Seychelles.³⁰⁶

Most likely due to a realistic assessment of its limited judicial capacities, the Seychelles confined transfers to cases where the attack took place in its waters or against its interests, namely its nationals or vessels flying its flag. Even though transfers to the Seychelles absent such a link would seem to be encompassed by the wording “in other circumstances on the high seas at the discretion of the Republic of Seychelles”, in practice the island State generally seems to require the involvement of national interests.³⁰⁷

The EU-Mauritius Transfer Agreement defines the conditions and modalities for

the transfer of persons suspected of attempting to commit, committing or having committed acts of piracy within the area of operation of EUNAVFOR, on the high seas off the territorial seas of Mauritius, Madagascar, the Comoros Islands, Seychelles and Réunion Island, and detained by EUNAVFOR.³⁰⁸

This provision, which is limited to piracy according to Article 101 UNCLOS and therefore excludes armed robbery at sea, ie attacks committed in territorial waters from the Agreement’s ambit,³⁰⁹ can be interpreted in two different ways. Firstly, it can be understood as encompassing persons involved in pirate attacks carried out on the high seas in general and, if so, the Transfer Agreement would then have a broad scope of application. However, if read this way, the specification “off the territorial seas of Mauritius, Madagascar, the Comoros Island, Seychelles and Réunion Island” would be superfluous. This rather points to the second, narrower interpretation, according to which the provision aims at delimiting the area covered by the Agreement to a *specific part* of the high seas. This latter interpretation would be in line with the Government of Mauritius’ reading of the clause, taking the view that the defined area covers the exclusive economic zones

306 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 from EUNAVFOR to the Republic of Seychelles and for their Treatment after such Transfer [2009] OJ L315/37 (EU-Seychelles Transfer Agreement).

307 Information from expert interview on file with author.

308 Article 1(a) Agreement between the European Union and the Republic of Mauritius on the conditions of transfer of suspected pirates and associated seized property from the European Union-led naval force to the Republic of Mauritius and on the conditions of suspected pirates after transfer [2011] OJ L254/3 (EU-Mauritius Transfer Agreement).

309 Article 1(a) read in conjunction with Article 2(e) EU-Mauritius Transfer Agreement.

of the mentioned States.³¹⁰ Interpreted in the latter way, the agreement would not include the “principal pirate operating areas”. The Secretary-General therefore suggests that the Agreement should ideally be expanded to cover a greater area.³¹¹

d) Consultations, Negotiations and Submission of Transfer Request

If the seized suspects are covered *ratione personae* by the respective transfer agreement and if the available evidence allows for the conclusion that there are reasonable prospects of conviction, the EUNAVFOR Operational Headquarters start evaluating a possible transfer of the suspects to a third State with which it has a transfer agreement. First of all, the EU Operation Commander generally engages in a series of consultations regarding a possible transfer. In addition to the EU Force Commander,³¹² he consults with the seizing State. Even though legally speaking the seizing State cannot oppose a transfer (other than by deciding to exercise its priority to prosecute the piracy suspects in its domestic courts),³¹³ the EUNAVFOR Operational Headquarters still confers with the seizing State because, for political reasons, it would not transfer persons against the State’s will.³¹⁴

Before the EU Operation Commander submits a formal request for transfer to the respective regional State, informal consultations and an exchange of information with the potential receiving State take place. Thereby, the EUNAVFOR liaison officer stationed in Kenya as well as the Delegation of the European Union to Kenya serve as a link between the EUNAVFOR Operational Headquarters and the authorities of the receiving State.³¹⁵ Among the information provided to the regional State is the number of persons EUNAVFOR intends to transfer, as well as the particulars of the suspects held on board the respective vessel. An initial estimate of when EUNAVFOR intends to implement the transfer decision – ie physically hand over the suspects, seized property and evidence to the receiving State’s authorities – also forms part of the information provided. Most impor-

310 UNSC, ‘Report of the Secretary-General on specialized anti-piracy courts in Somalia and other States in the region’ (n 128) para 96.

311 *ibid* para 96.

312 Information from expert interview on file with author.

313 The administrative court of first instance in Cologne even concluded that by deciding not to prosecute the case in Germany despite having criminal jurisdiction, Germany made the transfer to the third State possible. Therefore, the decision to transfer is attributable to Germany rather than the EU, which would have only approved the transfer in question: *Re ‘MV Courier’* (n 238) paras 52–59.

314 Information from expert interview on file with author. At this stage, political bodies, such as the Crisis Management Planning Directorate within the European External Action Service, are not consulted on transfers: information from expert interview on file with author.

315 Information from expert interview on file with author.

tantly, the EUNAVFOR Operational Headquarters submit all available evidence to the regional authorities.³¹⁶

The transfer agreement concluded with Mauritius stipulates that

transfers shall not be carried out *before* the competent law enforcement authorities of Mauritius decide within 5 working days as of the date of receipt of evidence as forwarded by EUNAVFOR that there are reasonable prospects of securing a conviction of persons detained by EUNAVFOR.³¹⁷

The EU-Kenya Transfer Agreement did not contain such clause on EUNAVFOR's obligation to submit evidence and the receiving State's obligation to assess the evidence within a certain timeframe. The Transfer Agreement with the Seychelles contains a similar yet more ambiguous clause: the Seychellois Attorney General "shall have at least 10 days *from the date of transfer* of the suspected pirates or armed robbers to decide on the sufficiency of the available evidence in view of prosecution".³¹⁸ If the evidence is considered to be insufficient for prosecution, "EUNAVFOR shall take the full responsibility, including the financial costs, of transferring the suspected pirates and armed robbers back to their country of origin within 10 days of EUNAVFOR having been notified of such a decision". EUNAVFOR has a different understanding of what was agreed upon with the Seychelles. The EU specifies in its letter to the Seychelles that the latter has agreed to decide on the sufficiency of evidence *before* accepting a transfer. The EU argues that since EUNAVFOR provides the Seychelles with all available evidence in each case, such as logbooks, pictures and videos, the Seychellois Attorney General would be in a position to decide on the sufficiency of evidence before the transfer of suspected pirates and armed robbers is accepted.³¹⁹

As soon as it appears that the receiving State is willing and able to prosecute the suspects in question,³²⁰ the EU Operation Commander submits a formal request for transfer to the respective regional State through either the Delegation of the European Union to Kenya or the Delegation of the European Union to the Republic of Mauritius, for the Union of the Comoros and the Republic of Seychelles.³²¹ Thus, it is not the seizing State that decides to submit or actually submits a request for transfer.³²²

316 Information from expert interview on file with author.

317 Article 3(3) EU-Mauritius Transfer Agreement (emphasis added).

318 EU-Seychelles Transfer Agreement (emphasis added).

319 EU-Seychelles Transfer Agreement, B. Letter from the European Union (emphasis added); information from expert interview on file with author.

320 Information from expert interview on file with author.

321 Information from expert interview on file with author.

322 It is always the EUNAVFOR Operational Headquarters submitting the request to transfer and never the seizing State: information from expert interview on file with author.

Under the transfer agreements, the regional States are not obligated to receive suspects for investigation and prosecution. Rather, they can decide on a case-by-case basis whether to accept suspects.³²³ If no regional State with which the EU has a transfer agreement is willing and able to receive the suspects in question for prosecution, they are released, unless (theoretically) the seizing State reconsiders its decision not to exercise its jurisdiction over the suspects.

e) **Implementation of the Transfer Decision**

In cases where a regional State accepts a transfer, its implementation is proceeded with accordingly. The transfer agreements provide for supplementary implementing arrangements to be concluded pertaining to, *inter alia*, the modalities of the physical surrender of the suspects.³²⁴ In addition, the EU-Kenya Transfer Agreement and the EU-Mauritius Transfer Agreement contain isolated requirements regarding the implementation of a transfer decision, while the EU-Seychelles Transfer Agreement is silent in this respect. The two agreements stipulate that EUNAVFOR shall only transfer persons to the competent law enforcement authorities of the respective regional State.³²⁵ Furthermore, every transfer must be subject to a document signed by both parties.³²⁶ EUNAVFOR shall also provide the receiving State with detention records of every transferred person stating, *inter alia*, the time of transfer to the Kenyan authorities, the reasons for the person's detention, as well as the time and place the detention began.³²⁷ Moreover, the EUNAVFOR Transfer SOP states that the EUNAVFOR

323 Article 3(1) EU-Mauritius Transfer Agreement stipulates that Mauritius “*may* accept, upon request by EUNAVFOR, the transfer of persons detained by EUNAVFOR” (emphasis added). The EU-Kenya Transfer Agreement’s wording is interpreted as not containing an obligation to accept transfers even though it reads that “Kenya *will* accept, upon the request of EUNAVFOR, the transfer of persons detained by EUNAVFOR in connection with piracy ... and will submit such persons ... to its competent authorities for the purpose of investigation and prosecution” (emphasis added): Article 2(a) Annex to EU-Kenya Transfer Agreement; information from expert interview on file with author. The Exchange of Letters with the Seychelles states that the State “*may* authorize the EUNAVFOR to transfer suspected pirates and armed robbers” (emphasis added). That the ultimate decision whether to receive suspects is taken by the regional State also follows from information from expert interview on file with author.

324 Article 9 EU-Kenya Transfer Agreement; EU-Seychelles Transfer Agreement; Article 10 EU-Mauritius Transfer Agreement.

325 Article 2(b) Annex to EU-Kenya Transfer Agreement; Article 3(2) EU-Mauritius Transfer Agreement.

326 Article 5(a) Annex to EU-Kenya Transfer Agreement; Article 6(1) EU-Mauritius Transfer Agreement.

327 Article 5(b) Annex to EU-Kenya Transfer Agreement; Article 6(2) EU-Mauritius Transfer Agreement.

Operational Headquarters inform the ICRC of an actual transfer, which then tries to notify the transferee's relatives.³²⁸

The location and method of carrying out a transfer is arranged on a case-by-case basis.³²⁹ With regard to the location where the actual surrender takes place, different practices exist. At times, the interdicting warship transports the suspects directly to a port of the receiving State. In other instances, the suspects are brought to a port of a third State and then flown to the receiving State. For example, in one particular case, suspects were transported by the seizing vessel to a port in Djibouti and then flown to Kenya by a plane chartered by the European Union for that very purpose. While the boarding team of the seizing vessel accompanied the suspects and handed them over to the Kenyan police at a Kenyan airport, the EUNAVFOR Operational Headquarters coordinated the transport and handover.³³⁰

With regard to the implementation of future transfers to Mauritius, the special issue of transferring suspects by air arises, which is not regulated by the transfer agreement but is under consideration at this writing. Since the area most heavily affected by piracy is relatively far from Mauritius, transferring persons by ship may be rather time-consuming. This not only causes delays in the initial appearance of suspects in court, but it also diverts naval resources from the main operational area. Transporting suspects by air via a State closer to the main operational area would solve this problem. This, however, would require a formal agreement between Mauritius and the transiting State(s).³³¹

f) **Conclusion**

The process leading to the submission of a transfer request and the actual transfer following its acceptance are of a diplomatic and cooperative nature. Hence, whether a transfer can take place is not decided by an administrative or judicial body pursuant to a procedure, which is predefined in a duly published legal act and in which the transferee can exercise procedural rights. Nor is there any judicial review of the decision to transfer or the decision to submit a transfer request.³³² Moreover, the transferee is not provided with a written decision reflect-

328 Document on file with author.

329 Document on file with author.

330 Information from expert interview on file with author.

331 UNSC, 'Report of the Secretary-General on specialized anti-piracy courts in Somalia and other States in the region' (n 128) para 96.

332 The EU Operation Commander cannot ultimately decide on a transfer since it is up to the regional State to accept a requested transfer. However, in practice, a transfer request is generally only submitted if there is quasi-certainty that the regional State will accept it: information from expert interview on file with author. Thus, it can be said that the EU Operation Commander decides on a transfer, but that his decision is conditional, ie dependent on the regional State's acceptance.

ing the criteria, motives and reasoning that led EUNAVFOR to submit a transfer request to a regional State.³³³

When evaluating whether to submit a transfer request to a regional State, the EU Operation Commander ascertains whether the incident is covered by the respective transfer agreement and whether the available evidence creates a realistic prospect of conviction. Other factors taken into account are the capacity of the regional State to receive suspects for prosecution³³⁴ and the impact the transfer may have on the ongoing operations.³³⁵ The compatibility of the receiving State's criminal justice and enforcement system with human rights standards is, by definition, not a criterion to be considered when evaluating whether to request a transfer in a specific case.³³⁶ Nor do the EUNAVFOR Operational Headquarters assess with regard to a specific transferee whether there is a real risk that certain human rights will be violated upon transfer. In other words, no individual non-refoulement assessment is undertaken.³³⁷ Rather, it is argued that transfers only take place to States that it has concluded transfer agreements with, which only occurs if the respective State's human rights records in the relevant fields did not raise any concerns.³³⁸ Before concluding a transfer agreement, the EU – that is, the EU delegation to the respective regional State – assesses the human rights situation. Also, an exchange with the UNODC regarding the regional State's respect for human rights in the relevant fields takes place.³³⁹ Therefore, during the negotiation of a transfer agreement, the compatibility of transfers with human rights (and non-refoulement) standards is assessed to a sufficient degree and the standards of the judicial and enforcement systems deemed to live up to those set forth by international human rights law.³⁴⁰ It is further argued that if problems in terms of human rights should nevertheless arise, the transfer agreement could still be terminated.³⁴¹

The non-refoulement assessment is thus conducted globally, ie with regard to a regional State and independent from a specific incident or individual. It is argued that an individual assessment would not be practicable in the situation at hand; mainly because the suspects are held on board ships far from the mainland of the seizing State and the officials would encounter serious difficulties in trying to ascertain their identities.³⁴² Consequently, when no assessment with re-

333 Information from expert interview on file with author.

334 Information from expert interview on file with author.

335 Document on file with author.

336 Information from expert interview on file with author.

337 Information from expert interview on file with author.

338 Information from expert interview on file with author.

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341 Information from expert interview on file with author.

342 Information from expert interview on file with author.

gard to a specific transferee takes place, the suspect is not party to the process that may ultimately result in his transfer. Rather, the only actors involved are the EUNAVFOR Operational Headquarters and various States, first and foremost the potentially receiving State(s) and the seizing State.³⁴³ In turn, as a consequence of not being party to the proceedings, the suspect does not benefit from any procedural rights, such as a right to submit reasons against his transfer or to be represented by counsel.³⁴⁴ At most, alleged pirates are, by means of an interpreter on board speaking Somali and/or Arab,³⁴⁵ informed that attempts are being made to locate a prosecution venue and when transfer is imminent.³⁴⁶ However, he is not informed about the possibility to make a non-refoulement argument against his transfer.³⁴⁷

The provisions included in the transfer agreements – which aim to ensure that suspects transferred to a regional State are treated in a manner consistent with human rights standards – are not understood as constituting diplomatic assurances in the technical sense of the term.³⁴⁸ Further, when transferring suspects to Kenya and the Seychelles, EUNAVFOR does not request individual assurances regarding an individual suspect, such as minimum detention conditions.³⁴⁹ Prison conditions in the regional States vary considerably as only a handful are subject to UNODC reforms (among other organizations engaged in prison reform), staffed with trained guards, and specifically intended to host transferred piracy suspects. However, neither EUNAVFOR nor the seizing State request individual assurances that a specific transferee is indeed hosted in one of these prisons.³⁵⁰ With regard to Kenya, it is current practice that piracy suspects are hosted in the above average Shimo-La-Tewa prison in Mombasa during the remand period. However, for persons transferred by EUNAVFOR and later convicted by Kenyan courts, enforcement of their sentences may also take place in other Kenyan prisons.³⁵¹ What is more, we have seen that Kenya can transfer convicts to third States for enforcement of their sentences and that they do not require the consent of EUNAVFOR or the EU to do so. Rather than requesting assurances in this respect, it is merely assumed that persons are detained in the prisons subject to internationally founded and supported reforms (or any other prison in line with international standards).³⁵² It is argued that the monitoring

343 Information from expert interview on file with author.

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352 Information from expert interview on file with author.

rights of the EU and reporting obligations of the receiving State would allow for follow-up on the situation. In other words, if the earlier assumption should turn out to be incorrect, the EU could intervene at that point.³⁵³

6. Post-Transfer Phase

a) *Tracing and Monitoring Post-Transfer*

aa) Legal Framework

To ensure the observance of the rights and liberties granted under the transfer agreements³⁵⁴ and by applicable domestic and international law, monitoring provisions were included in the transfer agreements with Kenya and Mauritius. Representatives of the EU and EUNAVFOR are granted a right to access transferred persons while they are in custody and to question them.³⁵⁵ Furthermore, national and international humanitarian agencies are allowed to visit persons upon transfer.³⁵⁶ In order to render the general right to monitor – and the right to visit specifically – operational, Kenya and Mauritius each have several documentary and notification obligations. They must keep an accurate account of all transferees, documenting and recording the person's physical condition, his location of detention, the charges against him, and any significant decisions made during investigation or trial.³⁵⁷ These records must be made available to representatives of the EU and EUNAVFOR.³⁵⁸ The respective receiving State must also notify EUNAVFOR of the place of detention of transferred persons and any specific issues that may arise with regard to these persons, such as alleged improper treatment.³⁵⁹

The EU-Seychelles Transfer Agreement as such does not contain any provisions on tracing and monitoring. Rather, they are contained in a separate document called the Declaration by the European Union on the Occasion of the Signature of the Exchange of Letters between the European Union and the

353 Information from expert interview on file with author.

354 On the content of transfer agreements, see below Part 5/II/B/1/b.

355 Article 5(e) Annex to EU-Kenya Transfer Agreement; Article 6(5) EU-Mauritius Transfer Agreement.

356 Article 5(f) Annex to EU-Kenya Transfer Agreement; Article 6(6) EU-Mauritius Transfer Agreement.

357 Article 5(c) Annex to EU-Kenya Transfer Agreement; Article 6(3) EU-Mauritius Transfer Agreement.

358 Article 5(d) Annex to EU-Kenya Transfer Agreement; Article 6(4) EU-Mauritius Transfer Agreement.

359 Article 5(e) Annex to EU-Kenya Transfer Agreement; Article 6(5) EU-Mauritius Transfer Agreement.

Republic of Seychelles.³⁶⁰ In this Declaration, the EU “notes that representatives of the EU and EUNAVFOR will be granted access to any person transferred” and “be entitled to question them”.³⁶¹ The EU further “notes that an accurate account will be made available to representatives of the EU and of EUNAVFOR of all transferred persons, including ... the person’s physical condition, their place of detention, any charges against them and any significant decision taken in the course of their prosecution and trial”.³⁶² Finally, the EU states that national and international humanitarian agencies will be allowed to visit the transferees.³⁶³ This Declaration, which basically reflects the monitoring rights contained in the transfer agreements concluded between the EU and Kenya and Mauritius respectively, was issued by the EU because the Seychelles sent the letter to be exchanged to the EU after negotiations were concluded but without prior consultation of the EU. By issuing this Declaration, the EU set out in writing what was agreed upon with the Seychelles, yet was not explicitly mentioned in the Transfer Agreement. Since the Declaration has never been expressly refused or contested by the Seychelles, the EU argues that the Seychelles has tacitly accepted it.³⁶⁴

The Declaration is the only document specifying that the right to access granted to the EU and EUNAVFOR is limited to the regional State having received suspects from EUNAVFOR for prosecution.³⁶⁵ From a law of treaties perspective it seems obvious that a treaty may not impose an obligation on a State not party to it absent consent (*pacta tertiis nec nocent nec prosunt*).³⁶⁶ However, against the background that a regional prosecuting State may re-transfer convicted pirates to third States for enforcement of their sentences, the limitation that monitoring rights only apply vis-à-vis the prosecuting regional State bears mentioning.

Neither the transfer agreements nor the Declaration explicitly state for how long the monitoring rights will apply. Thus, for instance, the period of time when national and international humanitarian agencies may exercise their right

360 Declaration by the European Union on the Occasion of the Signature of the 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 from EUNAVFOR to the Republic of Seychelles and for their Treatment after Such Transfer [2009] OJ L315/43 (Declaration).

361 Article 2(1) Declaration.

362 Article 2(2) Declaration.

363 Article 2(4) Declaration.

364 Information from expert interview on file with author.

365 Article 2(1) Declaration: “[W]ill be granted access to any person transferred to the Republic of Seychelles ... as long as persons are held in custody *there*” (emphasis added).

366 Malcolm Shaw, *International Law* (6th edn, CUP 2008) 928.

to visit transferred persons is not defined.³⁶⁷ The right of EU and EUNAVFOR representatives to access transferred persons exists “as long as such persons are in custody”³⁶⁸ The term “custody” is not further explained. Yet according to EUNAVFOR, it not only encompasses pre-trial detention, but also imprisonment for the purpose of enforcing a sentence.³⁶⁹

The monitoring rights – and all other rights and obligations arising from the transfer agreement, including the rights of transferred persons – are not affected by termination of the respective transfer agreement by one of the parties.³⁷⁰ This is important in light of the termination of the EU-Kenya Transfer Agreement in 2010.

bb) Beneficiaries of Monitoring Rights

According to the wording of both the transfer agreements and the Declaration, the EU and EUNAVFOR are the beneficiaries of the right to access transferred persons and relevant records, and are also the addressees of the regional State’s notification obligations.³⁷¹ The seizing State, which (at least *de facto*) implements transfer decisions, is not explicitly identified as a beneficiary or addressee of the monitoring rights, but is arguably covered by the wording. Under the transfer agreements with Kenya and Mauritius, EUNAVFOR is defined as “EU military headquarters and national contingents contributing to the EU operation ‘Atalanta’, their ships, aircrafts and assets”.³⁷² Arguably, this definition encompasses the troop-contributing States’ *authorities* (rather than only the *assets* deployed, ie vessels and/or troops). If interpreted this way, any State contributing to EUNAVFOR (and not only the seizing State) benefit from the monitoring rights. Such a reading seems to be in line with the wording concerning the right of visit of national humanitarian agencies,³⁷³ which is not (at least explicitly) limited to agencies of the seizing State. International humanitarian agencies, namely the ICRC, are said to have visited transferred persons.³⁷⁴ On the other hand, it can be

367 Article 2(4) Declaration; Article 5(f) EU-Kenya Transfer Agreement; Article 6(6) EU-Mauritius Transfer Agreement.

368 Article 5(e) EU-Kenya Transfer Agreement; Article 6(5) EU-Mauritius Transfer Agreement.

369 Information from expert interview on file with author.

370 Article 11(4) EU-Mauritius Transfer Agreement; ‘A. Letter from the European Union’ and ‘B. Letter from the Republic of Kenya’ of EU-Kenya Transfer Agreement.

371 Article 5(e) EU-Kenya Transfer Agreement only mentions EUNAVFOR and not EU with regard to Kenya’s obligation to notify of the place of detention and other particulars. However, this may be an inadvertent omission.

372 Article 2(a) EU-Mauritius Transfer Agreement; Article 1(a) EU-Kenya Transfer Agreement. The Exchange of Letters does not define the term ‘EUNAVFOR’.

373 These can be state agencies and/or non-governmental organizations: information from expert interview on file with author.

374 Information from expert interview on file with author.

argued that the purpose of the agreements is to lay down the rights and obligations of entities involved in transfers and, therefore, the monitoring rights only apply to States contributing to EUNAVFOR that have been actively involved in the transfer, which is generally only the seizing State.

The latter reading seems to reflect current practice. While the primary entities responsible for monitoring are the Delegation of the European Union to Kenya and the Delegation of the European Union to the Republic of Mauritius, for the Union of the Comoros and the Republic of Seychelles,³⁷⁵ it does happen that the seizing State is involved in monitoring. For example, Germany is rather closely monitoring the situation of 23 persons seized by its forces contributing to EUNAVFOR and later transferred to Kenya. Staff of the German embassy in Kenya visited the Shimo-La-Tewa prison several times and personally met said transferees. Furthermore, it observed the investigation of the cases and the resulting trials by attending oral hearings, and has been in regular contact with the judicial authorities in Mombasa, Kenya.³⁷⁶

Not all of the transfer agreements entered into by the EU specify who may exercise the monitoring rights once Operation Atalanta is terminated and EUNAVFOR dissolved. Possibly due to its provisional nature, the EU-Seychelles Transfer Agreement does not regulate the issue. The most detailed answer is found in the EU-Mauritius Transfer Agreement, according to which “any person or entity designated by the EU High Representative for Foreign Affairs and Security Policy” can exercise EUNAVFOR’s rights under the Agreement after termination of the operation. Under the Agreement, this person or entity could be “the Head or staff member of the EU delegation to Mauritius or a diplomatic agent or consular official of an EU Member State accredited to Mauritius”. The notifications are to be made to the EU High Representative for Foreign Affairs and Security Policy.³⁷⁷ The EU-Kenya Transfer Agreement provides for a different solution: all rights of EUNAVFOR may be exercised by “any person or entity designated by the State exercising the Presidency of the Council of the EU”, such as “a diplomatic agent or consular official of that State accredited to Kenya”. Notifications are to be made to the State holding the Presidency of the Council of the European Union at that time.³⁷⁸

375 Information from expert interview on file with author.

376 Information from expert interview on file with author; Deutscher Bundestag, ‘Antwort der Bundesregierung auf die Kleine Anfrage der Abgeordneten Hans-Christian Ströbele, Agnes Malczak, Dr. Frithjof Schmidt, weiterer Abgeordneter und der Fraktion BÜNDNIS 90/DIE GRÜNEN’ (n 208) 5–7, question 14.

377 Article 11(5) EU-Mauritius Transfer Agreement.

378 ‘A. Letter from the European Union’ and ‘B. Letter from the Republic of Kenya’ of EU-Kenya Transfer Agreement.

b) *Re-transfers by Regional States*

The transfer agreements concluded by the EU with regional States contain different clauses on re-transfer, ie where suspects are initially transferred by EUNAVFOR to a regional State and then sent to a third State by the regional State. Such re-transfers can take place either for the purpose of investigation and prosecution or for the enforcement of a sentence, which is far more likely in practice.

The EU-Kenya Transfer Agreement stipulates that transfers for the purpose of investigation or prosecution from Kenya to any other State is subject to prior written consent from EUNAVFOR.³⁷⁹ However, a similar provision requiring the consent of EUNAVFOR in order to transfer a convicted pirate to another jurisdiction for enforcement of his sentence is missing. According to the EU, Kenya is indeed free to transfer a person convicted in its criminal courts to a third State for enforcement purposes, thus the consent of EUNAVFOR is – at least as a matter of law – not required.³⁸⁰

The re-transfer clause in the agreement between the EU and the Seychelles is formulated in a broader fashion and stipulates that the latter “will not transfer any transferred person to any other State without prior written consent from EUNAVFOR”. As a result, the consent requirement is not explicitly limited to transfers for the purpose of investigation or prosecution.³⁸¹ The provision can thus be read as subjecting transfers for enforcement of sentences to the consent of EUNAVFOR, which corresponds with the EU’s view on the matter.³⁸² This is important against the background that the Seychelles is generally unwilling to enforce the sentences of transferred persons and therefore concluded transfer for enforcement agreements with Somalia, Puntland and Somaliland.³⁸³

The Transfer Agreement with Mauritius includes a clause on transfers of suspects to a third State for enforcement of their sentences.³⁸⁴ This provision, however, does not encompass transfers to third States for investigation or prosecution. While under the other two transfer agreements “prior written consent from EUNAVFOR” is necessary in order to transfer persons to a third State,³⁸⁵ the threshold is lower in the EU-Mauritius Agreement which reads: “Mauritius may, *after consultation with the EU*, transfer such persons convicted and serving sentence in Mauritius to another State ... with a view to serving the remainder of the

379 Article 3(h) Annex to EU-Kenya Transfer Agreement.

380 Information from expert interview on file with author.

381 Article 3(h) EU-Kenya Transfer Agreement.

382 Information from expert interview on file with author.

383 See above Part 1/III/C.

384 Article 4(8) EU-Mauritius Transfer Agreement.

385 Article 3(h) EU-Kenya Transfer Agreement; EU-Seychelles Transfer Agreement.

sentence in that other State.”³⁸⁶ Should the human rights situation in the receiving State raise serious human rights concern, no transfer shall take place “before a *satisfactory solution* will have been found *through consultations* between the Parties to address the concerns expressed”.³⁸⁷ How this actually works in practice remains to be seen, but the EU assumes that if it were to oppose a transfer for enforcement to a specific State, Mauritius would (for political rather than legal reasons) not engage in doing so.³⁸⁸

C. *Arrest and Detention during Disposition*

1. *Interplay between OHQ and Seizing State in Case of Arrest*

Arrest and detention with a view to prosecute is part of the mandate of EUNAVFOR Operation Atalanta. On the one hand, this follows from EUNAVFOR’s Operation Plan, according to which States contributing to the mission can arrest and detain persons suspected of piracy or armed robbery at sea.³⁸⁹ On the other hand, it also accrues from Article 2 CJA Operation Atalanta which, in defining EUNAVFOR’s mandate, stipulates that the operation

shall, as far as available capabilities allow ... in view of prosecutions potentially brought by the relevant States ... arrest, detain and transfer persons suspected of intending, as referred to in Articles 101 and 103 of the United Nations Convention on the Law of the Sea, to commit, committing or having committed acts of piracy or armed robbery in areas where it is present.³⁹⁰

These operation-specific legal bases for arresting and detaining alleged pirates and armed robbers at sea are, in turn, warranted by international law: Article 105 UNCLOS allows for arrest and detention of persons allegedly engaging in piracy on the high seas,³⁹¹ while the respective authorization in Security Council Resolution 1846 permits arrest and detention of persons suspected of engaging in armed robbery at sea in Somalia’s territorial waters.³⁹²

Since arrest and detention of persons suspected of piracy or armed robbery at sea is a form of use of force going beyond self-defence and defence of others,

³⁸⁶ Article 4(8) EU-Mauritius Transfer Agreement (emphasis added).

³⁸⁷ Article 8(4) EU-Mauritius Transfer Agreement (emphasis added).

³⁸⁸ Information from expert interview on file with author.

³⁸⁹ Document on file with author.

³⁹⁰ Article 2(e) CJA Operation Atalanta.

³⁹¹ See above Part 1/II/A/1.

³⁹² See above Part 1/II/A/1.

EUNAVFOR's Rules of Engagement³⁹³ are another pertinent, albeit classified, legal source.³⁹⁴ Briefly defined, the Rules of Engagement are "instructions concerning the use of force"³⁹⁵ With regard to counter-piracy operations, they describe, *inter alia*, how to proceed in situations where a boat suspected of piracy or armed robbery at sea is detected, including its stopping, boarding, and the arrest and detention of the crew.³⁹⁶ By issuing *caveats*, contributing States can further restrict the use of force as permitted under the Rules of Engagement by their forces. Such national *caveats*, which do not apply to other troop-contributing States, may be necessary in order to comply with national law (including the respective State's international law obligations) and practice.³⁹⁷

Further, the EUNAVFOR Transfer SOP, which are classified and only released to NATO,³⁹⁸ contains legal considerations relating to detention of piracy suspects, in terms of both the procedures to be followed and treatment of detainees.^{399, 400} The EUNAVFOR Transfer SOP recall that pursuant to the Operation Plan, the troop-contributing States are allowed to detain persons suspected of piracy and armed robbery at sea and that detention may only be undertaken in accordance with the applicable rules of engagement, international law, and the national law of the contributing State.⁴⁰¹ Moreover, it is specified that in no situation does the EUNAVFOR Transfer SOP override national and international hard law pertaining to detention. However, if a conflict arises between the EUNAVFOR Transfer SOP and the troop-contributing State's law and policy on detention, the legal advisers of the EUNAVFOR Operational Headquarters should be in-

393 On rules of engagement in EU missions, see: Frederik Naert, 'The Application of Human Rights and International Humanitarian Law in Drafting EU Missions' Mandates and Rules of Engagement' (Working Paper No 151, October 2011) <www.law.kuleuven.be/iir/nl/onderzoek/wp/wp151e.pdf> accessed 29 January 2013, 9–10.

394 Information from expert interview on file with author; Naert (n 393) 9–10.

395 Naert (n 393) 10.

396 Information from expert interview on file with author; Naert (n 393) 9, fn 35. Regarding the issuance of Rules of Engagement for Operation Atalanta, see Article 6(1) CJA Operation Atalanta stipulating: "The Council hereby authorises the PSC [Political and Security Committee] to take the relevant decisions in accordance with Article 38 of the Treaty. This authorisation shall include the powers to amend the planning documents, including the Operation Plan, the Chain of Command and the Rules of Engagement."

397 Information from expert interview on file with author; Naert (n 393) 10.

398 Information from expert interview on file with author.

399 This issue is not dealt with in this study; see above Introduction/II/A. According to the EUNAVFOR Transfer SOP, it is the Commanding Officer who bears the ultimate responsibility for the treatment of detainees until they are released or transferred to another authority for criminal prosecution: document on file with author.

400 Information from expert interview on file with author.

401 Document on file with author.

formed.⁴⁰² It may happen that EUNAVFOR standard operating procedures are adapted by the particular troop-contributing State in order to tailor them to the assets and personnel deployed by it. Yet, these national standard operating procedures pertaining to disposition, including detention pending a decision on how to dispose of a piracy case, often greatly reflect the EUNAVFOR Transfer SOP.⁴⁰³

Considering the legal sources applicable to arrest and detention of piracy suspects by States contributing to Operation Atalanta, it can be concluded that domestic law and practice remain an important legal source regarding deprivation of liberty in counter-piracy operations. Needless to say, the rules ordinarily governing arrest and detention on suspicion of criminal activity (primarily the rules of criminal procedure) or with a view to surrender the suspects to a third State for prosecution (mainly extradition law) vary considerably among the various States contributing to Operation Atalanta. Moreover, the question of whether these rules are applicable at all in the context counter-piracy operations is answered differently by the various States contributing to EUNAVFOR.

What follows is an analysis of how the process of arrest and detention unfolds according to the relevant guidance stemming from the chain of command, first and foremost the EUNAVFOR Transfer SOP. Since these rules do not override national law and practice, and since they also designate the TCN Commanding Officer as the person responsible for various decisions relating to arrest and detention, a look into national approaches to arrest and detention of piracy suspects is necessary. These incidental references to domestic law and practice regarding arrest and detention of persons suspected of piracy or armed robbery at sea are not meant to provide an exhaustive picture of the relevant municipal legal framework. Rather, they are included in order to create a better understanding of the complex interplay between international law, EU law and domestic law as relating to deprivation of liberty in the context of counter-piracy operations. Further, the references to domestic law and practice serve to reveal how broad the spectrum of possible approaches to arrest and detention of persons suspected of piracy and armed robbery at sea truly is, and that the solutions and stances taken by a State often reflect the particularities of the respective legal system.

2. EUNAVFOR Rules Governing Arrest and Detention

After a boat suspected of piracy or armed robbery at sea is stopped, boarded and the crew apprehended, an initial collection of evidence takes place based on which it is decided whether to release the seized persons immediately or detain them for disposition. Generally, the suspects are not taken on board the law enforcement vessel during this phase.⁴⁰⁴

402 Document on file with author.

403 Information from expert interview on file with author.

404 Information from expert interview on file with author.

According to the EUNAVFOR Transfer SOP, the decision as to whether an individual suspected of piracy or armed robbery at sea may be detained for disposition lies with the TCN Commanding Officer.⁴⁰⁵ His decision to detain a suspect with a view to prosecute is reached on an individual basis. Factors taken into consideration are the evidence against the person and the likelihood of finding a prosecution venue.⁴⁰⁶ When deciding on detention, the TCN Commanding Officer should seek legal advice from both national authorities and the EUNAVFOR Operational Headquarters as necessary.⁴⁰⁷ In practice, cooperation and consultation among the command of the troop-contributing State and the EUNAVFOR Operational Headquarters seem to be important aspects of the decision-making process. Furthermore, the TCN Commanding Officer might also seek advice from or consults with the EUNAVFOR Force Headquarters.⁴⁰⁸ It is important to note that, per the understanding of the EU, arrest and initial detention of piracy suspects is carried out within the framework and under the authority of EUNAVFOR. This view is held despite the fact that the TCN Commanding Officer decides on arrest and initial detention and must thereby apply and respect national law and practice, which may trump the rules of the chain of command, such as the EUNAVFOR Transfer SOP most relevant to deprivation of liberty.⁴⁰⁹

While the initial decision to detain rests with the TCN Commanding Officer, according to the EUNAVFOR Transfer SOP it is arguably the EU Operation Commander who implicitly decides whether to detain a piracy suspect once his transfer is envisaged. Since it is the EU Operation Commander (and not the seizing State) who decides whether to evaluate, organize and request a transfer, he arguably therewith also decides on detention pending transfer. This appears to be the view taken by EUNAVFOR.⁴¹⁰ If this view is followed, the TCN Commanding Officer's decision to detain a piracy suspect therefore only pertains to the period after capture. Once, however, the EU Operation Commander initiates transfer proceedings with regard to a specific suspect, ie it can be said that the alleged pirate is "detained pending transfer", detention decisions fall within his purview.⁴¹¹

405 Document on file with author.

406 Document on file with author.

407 Information from expert interview on file with author.

408 Information from expert interview and document on file with author.

409 Information from expert interview on file with author. Therefore, in cases where the seizing State decides to prosecute the suspects in its domestic courts, a transfer is necessary by which the suspects are brought from the EUNAVFOR sphere into the national sphere; see above Part 2/II/B/2.

410 Information from expert interview on file with author.

411 This view seems to be reflected by the EUNAVFOR Transfer SOP, stating that it is the Operation Commander who makes the decision to detain (in the context of transfers to Kenya) while other rules of the EUNAVFOR Transfer SOP designate

The EUNAVFOR Transfer SOP specifies that the initial decision to detain for disposition must be made as soon as reasonably practicable and, at the latest, 48 hours after the individual has been seized by the troop-contributing State.⁴¹² If domestic law imposes stricter deadlines, they must be observed.⁴¹³ The decision to detain must be communicated to the EU Operation Commander at the EUNAVFOR Operational Headquarters no later than 48 hours after apprehension of the suspects. The TCN Commanding Officer must also notify the EU Operation Commander within the same time frame if it is likely that more time will be needed in order to determine the course of action to follow.⁴¹⁴ Given the rather short deadline of 48 hours after apprehension, the decision to detain seized suspects is generally made before it is clear whether and where the suspect will ultimately be prosecuted.⁴¹⁵

Once it is decided to detain for disposition, the seized person is considered to be a “detainee” and not simply an “apprehended person”.⁴¹⁶ The EUNAVFOR Transfer SOP sets forth a series of rights from which detainees benefit.⁴¹⁷ However, as soon as there is no longer an intention to prosecute the person taken on board, but he is still on board the seizing ship (because, for example, the decision to release has yet to be implemented), he no longer benefits from detainee status.⁴¹⁸

As soon as the decision to detain is made, the “detention process” starts. As part of this process, detainees undergo hygienic measures and medical examinations and the necessary details for contacting their relatives are gathered.⁴¹⁹ According to the EUNAVFOR Transfer SOP, EUNAVFOR Operational Headquarters contacts the ICRC which, in turn, tries to establish contact with the suspects’ families.⁴²⁰ The EUNAVFOR Transfer SOP even states that the ICRC has a right to visit piracy suspects while detained on board a law enforcement vessel.⁴²¹ While the EUNAVFOR Operational Headquarter has contacted the ICRC, in practice the exercise of the right to visit at sea remains a rather theoretical scenario.⁴²²

the TCN Commanding Officer as the responsible person for the decision to detain: document on file with author.

412 Information from expert interview on file with author.

413 Information from expert interview and document on file with author.

414 Document on file with author.

415 Information from expert interview on file with author.

416 Information from expert interview and document on file with author.

417 Document on file with author.

418 Document on file with author.

419 Information from expert interview on file with author.

420 Information from expert interview on file with author.

421 Document on file with author.

422 Information from expert interview on file with author. The ICRC’s involvement may seem unusual since counter-piracy missions are pure law enforcement opera-

3. National Approaches to Arrest and Detention of Piracy Suspects

Despite the existence of rules and guidance issued by the European Union on arrest and detention of piracy suspects, domestic law and practice remain an important source of law governing the arrest and detention of piracy suspects. National approaches to deprivation of liberty in the context of EUNAVFOR's counter-piracy operations vary considerably. Yet, two main approaches to arrest and detention of piracy suspects can be discerned.

At one end of the scale, there are States that consider arrest and detention of piracy suspects as falling within the ordinary domestic law enforcement and criminal law framework. Consequently, these domestic rules governing arrest and detention on suspicion of criminal activity are also applied to piracy suspects. They can be either general rules governing arrest and detention for the purpose of criminal investigation and prosecution, such as those laid down in domestic codes of criminal procedure, as is Spain's course of action. Other States have enacted specific legislation governing enforcement measures, including arrest and detention, taken against criminal suspects at sea, as is France's approach. Regardless of whether they apply general domestic rules governing arrest and detention on suspicion of criminal activity or specific legislation on arrest and detention of criminal suspects at sea, these States consider piracy suspects to fall within the ambit of domestic law. Persons suspected of piracy are treated the same as "ordinary" criminal suspects, who are apprehended on the seizing State's mainland or territorial seas by domestic police forces. In other words, these States pursue a "criminal law approach" to arrest and detention of piracy suspects.

At the other end of the scale, there are States that, as a general rule, consider that their domestic rules governing arrest and detention on suspicion of criminal activity do not apply to piracy suspects. Persons seized by these States on

tions that do not have a nexus to the armed conflicts going on in Somalia (see below Part 3/I) and "law enforcement detainees" are not the typical ICRC *clientèle*. To rely on the services of the ICRC may be a pragmatic approach pursued against the background that not many other organizations have the operational capability to identify and contact the suspects' families in Somalia. The ICRC's involvement is not the only particularity regarding law enforcement against piracy suspects. On a more general level, the fact that military means, and therefore military personnel, are used for a policing task – as foreseen by the law of the sea for practical reasons – necessitates special preparation. Thus, eg, warships must be adapted for use in law enforcement operations, namely for detention purposes, such as by building cells on deck (Norway) or by modifying specific areas on board the vessel for detention. This is not only necessary to ensure the proper treatment of detainees, but also to avoid collusion among suspects and to ensure the safety of the warship's crew (information from expert interview on file with author). Some States have considered acquiring so-called "maritime action vessels", which are specifically designed for law enforcement carried out in maritime regions that are not in the vicinity of a coast (information from expert interview on file with author).

suspicion of piracy are considered to be “extraordinary suspects” and only come within the ambit of these rules if specific conditions are met. More specifically, these States argue that piracy suspects only enter the door of the domestic legal framework governing deprivation of liberty of alleged criminals if the seizing State decides to exercise its criminal jurisdiction over them, ie to prosecute the specific suspects in their domestic courts. The point at which this occurs varies from State to State. However, if the seizing State decides *not* to exercise its criminal jurisdiction over specific piracy suspects, they never enter that door and remain outside the criminal law framework, including procedural safeguards afforded to arrested and detained suspects, for the entire time they are in the custody of the seizing State. This approach is followed by the German Federal Government for instance.

a) **The Criminal Law Approach**

As already alluded to above, Spain’s course of action illustrates an example of the “criminal law approach” to arrest and detention of piracy suspects. According to Spain’s view, seized piracy suspects are not deemed to be outside the Spanish criminal investigation and prosecution framework. Rather, piracy cases are in the hands of a Spanish judge applying Spanish rules governing arrest and detention on suspicion of criminal activity from the very beginning. The judge is contacted by the Ministry of Defence and informed that piracy suspects have been seized by a Spanish patrolling vessel. As we have seen earlier, no special *ad hoc* mechanism has been set up in order to decide whether domestic criminal prosecutions are warranted. Instead, piracy cases fall squarely within the purview of Spain’s prosecutorial authorities.

Under Spanish law, a judge must review the legality of an arrest within 24 hours of seizure otherwise the suspect in question must be released. This deadline is also respected in cases where piracy suspects are arrested by Spanish forces contributing to Operation Atalanta. By means of video link – with which Spanish frigates deployed to the counter-piracy operations are equipped – piracy suspects are “brought” before a judge within 24 hours of capture.⁴²³ If the judge decides not to release the suspects, he issues a pre-trial detention order. As a consequence of applying the “ordinary” Spanish legal framework governing investigation and

423 Information from expert interview on file with author. According to Douglas Guilfoyle, ‘Counter-Piracy Law Enforcement and Human Rights’ (2010) 59 *International & Comparative Law Quarterly* 141, 164 and 167, Italy also has a judicial oversight mechanism in place (as opposed to the United Kingdom): “Italy has brought captured pirates before a judge by video conference for disposition. On 25 May 2009, an Italian *Giudice d’Indagine Preliminare* (pre-trial or investigating judge) ordered the transfer of nine pirates captured by the Italian warship *Maestrale* to an Italian jail. This is significant as *Maestrale* is part of EUNAVFOR and the Exchange of Letters came into provisional application on 6 March 2009.”

prosecution of criminal cases, Spain does not consider seized piracy suspects to be “EU detainees” (the stance taken by Norway) or to be in “international law custody” (as argued by Germany). Rather, piracy suspects seized by Spanish forces are deemed to fall within the ordinary categories of criminal law, ie arrested on suspicion of criminal activity or detained on remand.⁴²⁴

France is another State taking a criminal law approach to arrest and detention of piracy suspects. In response to the *Medvedyev v France* judgment of the European Court of Human Rights,⁴²⁵ France enacted a law pertaining to counter-piracy operations and the exercise of enforcement powers at sea in January 2011.⁴²⁶ This law amended various legal acts including, *inter alia*, the Defence Code (*code de la défense*) where a new section was added on enforcement measures taken against persons on board ships (*mesures prises à l'encontre des personnes à bord des navires*) complementing the chapter on the exercise of enforcement powers at sea.⁴²⁷ The new section not only covers piracy suspects, but pertains to any person on board a ship subject to enforcement measures that cause a restriction or deprivation of liberty. This new section stipulates that any official who takes a measure qualifying as a restriction or deprivation of liberty must inform the maritime prefect (*préfet maritime*) of the measure taken who, in turn, informs the competent prosecutor (*procureur de la République territoriale-compétent*).⁴²⁸ Within 24 hours of the arrest, a health check must be carried out and a report must be issued, which namely states whether the person is fit to remain in detention.⁴²⁹ Furthermore, the liberties and detention judge (*juge des libertés et de la détention*), based on a request filed by the prosecutor, must decide within 48 hours whether the restriction or deprivation of liberty can be prolonged for a maximum period of 120 hours or whether it must be terminated. The judge's order is renewable, to which the same substantive and formal requirements as for the initial order apply.⁴³⁰ In order to reach this decision, the judge can request factual information and evidence from the prosecutor. What is more, unless technically impossible, the judge can communicate with the persons ar-

424 Information from expert interview on file with author.

425 *Medvedyev and Others v France* App no 3394/03 (Grand Chamber, ECtHR, 29 March 2010).

426 Loi français n° 2011-13 du 5 janvier 2011 relative à la lutte contre la piraterie et à l'exercice des pouvoirs de police en l'État de mer (2011) (Loi français n° 2011-13); Luc Briand, 'Lutte contre la piraterie maritime: la France renforce son arsenal législatif. À propos de la loi n° 2011-13 du 5 janvier 2011 relative à la lutte contre la piraterie et à l'exercice des pouvoirs de police en l'État en mer' [2011] *Gazette du Palais* 8, 8.

427 Code de la défense français, partie législative, partie 1, livre V (action de l'État en mer), titre II (opérations en mer), chapitre unique (exercice par l'État de ses pouvoirs de police en mer) (Code de la défense).

428 Article L. 1521-12 Code de la défense.

429 Article L. 1521-13 Code de la défense.

430 Article L. 1521-14 Code de la défense.

rested or detained.⁴³¹ The judge's decision is issued in written form, must be communicated to the suspects on board the ship in a language they understand, and is not subject to appeal.⁴³² In light of the *Medvedyev* opinion, it is important to note that, unlike the prosecutor, the liberties and detention judge is independent from the executive and thus qualifies as a judge in the sense of Article 5(3) ECHR.⁴³³

b) Piracy Suspects as "Extraordinary Suspects"

The German Federal Government's position exemplifies the "non-criminal law approach" to arrest and detention of piracy suspects.⁴³⁴ Germany argues⁴³⁵ that German troops contributing to EUNAVFOR do not act within a criminal prosecution framework (*nicht strafverfolgend tätig*) when seizing a boat suspected of piracy and arresting and detaining alleged pirates.⁴³⁶ Rather, detention of piracy suspects would have to be qualified as "international law custody" (*völkerrechtlicher Gewahrsam*) based on Article 105 UNCLOS and the similar rule under customary international law.⁴³⁷ This "international law custody" would only end if an arrest warrant issued by a German judge is executed by the German Federal Police, which requires the suspects to be physically handed over from the

431 Article L. 1521-15 Code de la défense.

432 Article L. 1521-16 Code de la défense.

433 Briand (n 426) 10.

434 Norway seems to take a similar approach, considering seized piracy suspects to be "EU detainees". They would only become domestic "law enforcement detainees" once domestic authorities decide that the suspects are to be prosecuted in their own criminal courts. Consequently, before that decision, the use of national criminal law terminology, concretely the notion of "suspect", would be avoided: information from expert interview on file with author.

435 For a summary of the German Federal Government's position on deprivation of liberty in EUNAVFOR operations, see Kreß (n 254) 104–05, referring to Deutscher Bundestag, 'Antwort der Bundesregierung auf die Kleine Anfrage der Abgeordneten Winfried Nachtwei, Kerstin Müller (Köln), Omid Nouripour, weiterer Abgeordneter und der Fraktion BÜNDNIS 90/DIE GRÜNEN: Pirateriebekämpfung am Horn von Afrika' (Drucksache 16/11150, 17 December 2008) and Deutscher Bundestag, 'Antwort der Bundesregierung auf die Kleine Anfrage der Abgeordneten Jürgen Trittin, Volker Beck (Köln), Marieluise Beck (Bremen), weiterer Abgeordneter und der Fraktion BÜNDNIS 90/DIE GRÜNEN: Überprüfung der Rechtsstaatlichkeit von Verfahren für Personen, die an Kenia überstellt werden' (Drucksache 16/12531, 17 April 2009). See also Schaller (n 259) 94–97.

436 Kreß (n 254) 104.

437 Deutscher Bundestag, 'Antwort der Bundesregierung auf die Kleine Anfrage der Abgeordneten Hans-Christian Ströbele, Agnes Malczak, Dr. Frithjof Schmidt, weiterer Abgeordneter und der Fraktion BÜNDNIS 90/DIE GRÜNEN' (n 208) 3, question 6; Kreß (n 254) 104.

German Navy to the German Federal Police (*Bundespolizei*).⁴³⁸ Such surrender will generally only take place if Germany decided to prosecute the case in its domestic criminal courts, ie to exercise its criminal jurisdiction.

Since, in the view of the German Federal Government, arrest and detention of piracy suspects by the German military does not constitute an act taken within a criminal prosecution framework (*keine Massnahme der Strafverfolgung*), it argues that the arrest of piracy suspects cannot qualify as provisional arrest pursuant to German criminal procedural law.⁴³⁹ Consequently, custody of piracy suspects is not subject to the procedural safeguards enshrined in Article 104(3) of the German Constitution (*Grundgesetz*),⁴⁴⁰ which stipulates the following: every person provisionally detained on suspicion of having committed a criminal offence shall be brought before a judge no later than the day following his arrest, the judge shall inform him of the reasons for his arrest, examine him and give him an opportunity to raise objections, and the judge shall without delay either issue a written arrest warrant or order his release.⁴⁴¹ The Government's position on the non-applicability of Article 104(3) of the German Constitution is somewhat surprising against the background that it argued the opposite in a 1994 commentary (*Denkschrift*) on the adoption of the UNCLOS. The commentary states that when German authorities exercise the enforcement powers authorized in Article 105 UNCLOS, they must observe relevant procedural rules of German law, including the safeguards stipulated in Article 104 of the German Constitution dealing with deprivation of liberty.⁴⁴² Thus, at that time, the Government admitted that arrest

438 Schaller (n 259) 96.

439 On the meaning and requirements of holding (*Festhaltung*), provisional arrest (or simply arrest: *vorläufige Festnahme*) and detention on remand (or pre-trial detention: *Untersuchungshaft*), the three main forms of deprivation of liberty for the purpose of and during criminal investigations in Germany, see: Bohlander (n 264) 71–80.

440 For an English translation of the German Constitution, see: Basic Law for the Federal Republic of Germany (Federal Ministry of Justice, Tomuschat C and Currie trs (original); Tomuschat C and Kommers D trs (revised)).

441 Kreß (n 254) 104.

442 *ibid* 113, citing *Denkschrift zum Seerechtsübereinkommen der Vereinten Nationen vom 10.12.1982 und zum Entwurf eines Übereinkommens in der Fassung vom 8.4.1994 zur Durchführung des Teils XI des Seerechtsübereinkommens der Vereinten Nationen von 1982*; BT-Drs. 12/7829, starting at 229. In this commentary, the German Federal Government stated at 247: "Soweit deutsche Stellen im Rahmen der in den Artikeln 105, 107 und 111 SRÜ eingeräumten Möglichkeiten und ihren in den deutschen Vorschriften festgelegten Befugnissen hoheitliche Maßnahmen gegen andere ergreifen, haben sie die einschlägigen deutschen Verfahrensvorschriften zu beachten. Das bedeutet auch, daß die in Artikel 104 GG enthaltenen Rechtsgarantien gewahrt werden."

and detention of piracy suspects had the characteristics of criminal prosecution, at least implicitly.⁴⁴³

Another important legal source regulating arrest and detention on suspicion of criminal activity, including procedural safeguards relating to deprivation of liberty for the purpose or in the course of criminal investigation, is the German Code of Criminal Procedure.⁴⁴⁴ The Code's territorial scope of application is generally limited to German land territory and waters under its sovereignty. Arguably, its application *ratione loci* can be extended to the high seas.⁴⁴⁵ Such an interpretation seems to be suggested by Sections 10 and 10(a) of the German Code of Criminal Procedure, which designate the German courts as competent to prosecute offences allegedly committed on the high seas. It would be strange to provide for a German forum for crimes committed on the high seas, yet at the same time deny that the competent prosecutor can take investigative measures in such a case as provided for under the German Code of Criminal Procedure.⁴⁴⁶ Furthermore, applying the German Code of Criminal Procedure on the high seas does not seem to be against international law since the high seas are not under any State's direct jurisdiction.⁴⁴⁷ What is more, Article 4(1) of the Law on Responsibilities and Competencies at Sea (*Seeaufgabengesetz*) declares that the German Code of Criminal Procedure is applicable to law enforcement measures taken on the high seas either in fulfilment of an obligation under international law or when acting pursuant to authorization under international law – which is the case in the context of piracy.⁴⁴⁸ Overall, *ratione loci* counter-piracy measures taken on the high seas fall within the ambit of the German Code of Criminal Procedure. However, according to Articles 1(1)(a) and (2)(a) of the Law on Responsibilities and Competencies at Sea, only the German Federal Police (*Bundespolizei*) are competent to take these measures, not the German Navy (*Bundeswehr*).⁴⁴⁹ Thus, even if applicable *ratione loci*, the personal scope of ap-

443 *ibid* 113.

444 For an English translation, see: German Code of Criminal Procedure (n 252).

445 Robert Esser and Sebastian Fischer, 'Festnahme von Piraterieverdächtigen auf Hoher See: Geltung des § 127 StPO im Rahmen der Operation Atalanta' (2009) 4 *Zeitschrift für Internationale Strafrechtsdogmatik* 771, 777.

446 *ibid*.

447 *ibid*.

448 Kreß (n 254) 110.

449 The competence of the Federal Police to take counter-piracy enforcement measures is also supported by Article 6 Law on the Federal Police (*Bundespolizeigesetz*): Andreas Fischer-Lescano and Lena Kreck, 'Piraterie und Menschenrechte: Rechtsfragen der Bekämpfung der Piraterie im Rahmen der europäischen Operation Atalanta' (2009) 47 *Archiv des Völkerrechts* 481, 512 and Esser and Fischer, 'Festnahme von Piraterieverdächtigen auf Hoher See' (n 445) 782. This allocation of competence is due to Article 87(a)(2) German Constitution containing the separation duty (*Trennungsgebot*). This aims to ensure a strict separation of competencies between the

plication of the German Code of Criminal Procedure does not cover the German Navy, which is actually deployed to the counter-piracy operations.⁴⁵⁰ An exception can be found in Section 127 of the German Code of Criminal Procedure, which gives everyone the right to arrest and detain and thus the German Navy as well: “If a person is caught in the act or is being pursued, any person shall be authorized to arrest him provisionally, even without judicial order, if there is reason to suspect flight or if his identity cannot be immediately established.”⁴⁵¹

In sum, German military personnel *de facto* arresting and detaining piracy suspects upon their seizure are therefore not subject to the rules of the German Code of Criminal Procedure and, according to the Federal Government’s view, not bound by Article 104(3) of the German Constitution providing procedural safeguards to persons subject to provisional arrest. It is only once Germany decides to exercise its criminal jurisdiction over the seized piracy suspects and the suspects are physically handed over to the German Federal Police that the so-called “international law custody” ends and the suspects are formally in German custody. In other words, only when piracy suspects are physically surrendered to the German Federal Police are they deemed to enter the door of German criminal law and, consequently, the “ordinary” rules on arrest and detention on suspicion of criminal activity, including procedural safeguards, apply. According to this view, the timeframes during which legal review of detention must occur – per the German Code of Criminal Procedure and Article 104 of the German Constitution – are only triggered at that moment.⁴⁵² Thus, from the minute the suspects are seized by the German Navy up until their physical handover to the German Federal Police (either in Hamburg or in Djibouti)⁴⁵³ in execution of a German arrest warrant, at no point is their arrest and detention subject to legal review.

The surrender of piracy suspects seized by German forces to Germany for criminal prosecution (and that the procedural safeguards relating to arrest and detention finally apply) is thus far only theoretical.⁴⁵⁴ The standard case is rather that piracy suspects are transferred to third States, mainly Kenya, for prosecu-

military and the police, namely to prevent the establishment of an omnipotent security service where police and military competencies are amalgamated: Fischer-Lescano and Kreck (n 449) 511.

450 Kreß (n 254) 99 and 110.

451 Esser and Fischer, ‘Festnahme von Piraterieverdächtigen auf Hoher See’ (n 445) 778–83.

452 Kreß (n 254) 104–05.

453 Andreas Uhl, ‘Hilfe für Somalia – die Operation Atalanta: Deutsche Einheiten unter EU-Führung am Horn von Afrika’ (2009) *MarineForum* 11, 13.

454 The only alleged, Somali-based pirates prosecuted in Germany were those suspected of attacking the *Taipan* and who were seized by Dutch forces and ultimately surrendered to Germany in execution of a European arrest warrant; see above Part 1/IV/A/1.

tion (or released because of a failure to identify a criminal forum willing and able to prosecute the suspects). However, in this situation, piracy suspects seized by German forces never enter the door of German criminal law. As a consequence, piracy suspects deprived of their liberty at no point benefit from the procedural safeguards relating to arrest and detention on suspicion of criminal activity as provided for by German law.

In the *Courier* case, where the inter-ministerial decision-making body ultimately decided against criminal prosecutions in Germany, one of the transferred persons filed a complaint against Germany. The transferred person argued, *inter alia*, that his detention on board the German frigate for seven days without being afforded any procedural safeguards was unlawful.⁴⁵⁵ The Government replied that the acts in question were not attributable to Germany, but rather to the European Union. In any event, the aim behind the procedural safeguards set forth in the German Constitution is not to hinder the effectiveness of counter-piracy operations authorized and encouraged by international law. Even if Germany did not provide for legal review of arrest and detention or any other procedural safeguards, there would be no protective gap so long as it is ensured that the suspect is transferred to a State where he ultimately benefits from the respective human rights guarantees.⁴⁵⁶ Concretely, Article 5(3) ECHR was not violated in the case at hand because the suspect was brought promptly before a Kenyan judge.⁴⁵⁷ Thus, while the German Government does not deny the applicability of Article 5(3) ECHR as such, it takes the stance that the provision does not require that the piracy suspect be brought before a judge of the seizing State, ie Germany. Rather, it suffices that the person is brought promptly before a judge in the receiving State, which was Kenya and thus a State not bound by the ECHR in the case at hand.⁴⁵⁸ In short, Germany's interpretation of Article 5(3) ECHR seems to be that "a judge is a judge" – whether the judge is from the seizing State or a third receiving State (even if not bound by the ECHR) does not seem to matter.

The administrative court of first instance in Cologne did not explicitly rule on the content of Article 5(3) ECHR, but was ready to accept that the procedural guarantees of Article 104(3) of the German Constitution can be applied in a modified manner due to the special context of the case. Firstly, it stated that the strict time frame of 48 hours stipulated in Article 104(3) of the German Constitution need not be respected. Rather, it would suffice if – in line with the wording of Article 5(3) ECHR and Article 9(3) ICCPR – the suspect is brought "promptly" before a judge and, in the case at hand, seven days was considered sufficient to meet the promptness requirement. Secondly, it held that Article 104(3) of the German Constitution was not violated by bringing the suspect before a Kenyan

455 *Re 'MV Courier'* (n 238) para 9.

456 *ibid* para 23.

457 *ibid* paras 24–26.

458 *ibid* para 24.

judge rather than a German judge; since the suspect's criminal prosecution was ultimately going to take place in Kenya, only a Kenyan judge was competent to review the legality of arrest and detention.⁴⁵⁹

Overall, according to the German Federal Government, piracy suspects only enter the door of German criminal law at the moment they are physically surrendered to the German Federal Police in execution of an arrest warrant issued by a German judge. Before surrender, most notably at the time of their arrest by German military forces contributing to EUNAVFOR and their detention during the deliberations of the inter-ministerial decision-making body, German criminal procedure and namely the rules governing arrest and detention on suspicion of criminal activity (including procedural safeguards) do not apply to them. In cases where Germany decides not to exercise its criminal jurisdiction over the suspects but they remain detained pending a possible transfer to a third State, the suspects do not benefit from any procedural safeguards under German law either. Rather, at that point, the piracy suspects are considered to have already entered the door of the receiving State's criminal law system and, consequently, the receiving State is also deemed to be responsible for granting procedural safeguards relating to deprivation of liberty.

III. Conclusions on Disposition of Piracy Cases: The Practice

Neither NATO nor the Combined Maritime Forces have adopted their own detain-and-transfer scheme for their respective counter-piracy operations. Rather, as has been demonstrated by the example of Denmark, States contributing to these multinational missions revert back to national control for arrest and detention of piracy suspects. At the same time, the disposition of piracy cases – ie the decision whether to prosecute piracy suspects in the seizing State, to opt for a transfer to a third State or to release them – is also carried out within a national capacity. Consequently, arrest and detention of piracy suspects and disposition of their cases is governed by domestic law and practice. This is different from EUNAVFOR, which is the sole multinational counter-piracy mission pursuing a unique transfer policy. Within this framework, arrest and detention of piracy suspects and the decision whether and where to prosecute them is not a matter falling solely within the national competence of the contributing States nor is the process entirely controlled by EUNAVFOR. Rather, deprivation of liberty of piracy suspects and disposition of their cases is characterized by a rather complex interplay between various actors, namely EUNAVFOR and the seizing State. Further, decisions relating to these matters are governed by a meshwork of different legal sources, ranging from domestic, duly published legal acts to classified guidance stemming from the EUNAVFOR chain of command. Since within the EUNAVFOR framework domestic law remains an important source of guidance

459 *ibid* para 49; for a discussion of whether this is in line with Article 5(3) ECHR, see below Part 4/II/B.

for various aspects of deprivation of liberty and the disposition procedure, approaches taken and solutions adopted in relation to these matters vary among the States contributing to Operation Atalanta.

From the case studies on the disposition frameworks of Denmark and EUNAVFOR, we can conclude that differences exist in terms of the steps taken post-seizure in deciding whether to prosecute the suspects in the seizing State or to opt for their transfer to a third State for the purpose of prosecution. Not only can differences be discerned between the national framework (Danish) and the multinational framework (EUNAVFOR), but within the latter, the process also differs depending on which contributing State carried out the seizure. Despite these differences, the disposition procedures share some commonalities.

Two approaches can be identified regarding the decision whether to prosecute piracy suspects in the seizing State. Firstly, there are those States, like Spain, where only judicial authorities are involved in the decision whether to prosecute specific piracy suspects in domestic criminal courts. In other words, piracy cases are not treated differently from other criminal cases. Secondly, there are those States, such as Denmark and Germany, where special organs have been set up in order to make a preliminary finding on whether prosecution of specific piracy suspects in their domestic courts is (legally) possible and (politically) warranted. Only if both these questions are answered affirmatively do these organs submit the case to the competent prosecutorial authorities, which make the ultimate decision on whether to prosecute domestically. Regardless of the approach followed, it is the exception rather than the rule that seizing States decide to prosecute piracy suspects seized by their forces in their domestic courts. Much more frequently, transferring the suspects to a third (regional) State for prosecution is the preferred and pursued option.

Also, the process in which a transfer of piracy suspects to a third State is evaluated, negotiated and decided upon has some common features, regardless of which disposition framework it takes place in. First of all, the case studies on the disposition procedures of Denmark and EUNAVFOR demonstrate that the decision to transfer is issued in a process, which fundamentally differs from extradition, ie the traditional and formal mechanism to surrender a person for prosecution. A transfer is the result of negotiation and cooperation between two States or between a State and EUNAVFOR, rather than a surrender for prosecution in execution of a decision issued by an administrative and/or judicial body in a formalized procedure described in a legal act. Another common feature is that the decision to transfer is not subject to judicial review. What is more, the potential transferee is not party to the process that may ultimately result in his transfer. Consequently, the piracy suspect does not benefit from any procedural safeguards, such as the right to submit reasons against his transfer or to be represented by counsel. At most, he is informed of the fact that attempts are being made to identify a prosecution venue and/or that his transfer is imminent. Yet another characteristic of the current transfer practices of Denmark and EUNAVFOR is that no individual non-refoulement assessment takes place. Rather, it is argued

that suspects are only transferred to States with which transfer agreements have been concluded. Such agreements, in turn, are only concluded if the respective State's human rights record in the relevant fields does not give rise to any concerns. Put differently, as Denmark and EUNAVFOR see it, the global non-refoulement assessment carried out when negotiating a transfer agreement makes an individual non-refoulement assessment regarding specific piracy suspects to be transferred obsolete. Finally, neither Denmark nor EUNAVFOR requests individual assurances from the receiving State, such as an assurance that a specific alleged pirate would actually be detained at a prison refurbished for the purpose of hosting alleged pirates. Rather, it is maintained that the respective transfer agreement in combination with the exercise of monitoring rights would be sufficient to ensure that transferred persons are not subject to human rights violations in the receiving State during investigation, trial and the potential enforcement of their sentence.

Lastly, with regard to arrest and detention of piracy suspects during disposition, some categorization is possible as well – despite the great variety of practices, which is mainly due to the fact that the matter is primarily or to a large extent governed by domestic law. While domestic law is the main reference point when arrest and detention is carried out by a State while on national tasking, such as a seizure by Denmark contributing to NATO's Operation Ocean Shield, we have seen that domestic law and practice are also important legal sources for deprivation of liberty occurring within the EUNAVFOR framework. Roughly speaking, among all the different national practices, two approaches to arrest and detention of piracy suspects can be discerned. On the one hand, there are the States pursuing a “criminal law approach” to deprivation of liberty in the context of counter-piracy operations. These States apply the ordinarily applicable rules governing arrest and detention on suspicion of criminal activity, including procedural safeguards, to piracy suspects they have seized. For instance, Spain applies its general rules of criminal procedure, while France has enacted specific provisions governing deprivation of liberty at sea. Piracy suspects seized by these States are afforded procedural safeguards, such as being brought before a judge within 24 or 48 hours respectively. On the other hand, there are those States, namely Denmark, which argue that piracy suspects only enter the door of domestic criminal law (and thus have the respective rules on arrest and detention on suspicion of criminal activity, including procedural safeguards, applied to them) if the seizing State decides to prosecute the suspects in its domestic courts. According to the German Federal Government's view, the jurisdictional decision alone is insufficient; rather, the application of German criminal procedural rules is only triggered once the suspects are physically surrendered to the German Federal Police by the German Navy in execution of a German arrest warrant. As long as the decision whether the seizing State is willing and able to prosecute is pending (and potential further criteria not yet fulfilled), domestic rules governing deprivation of liberty on suspicion of criminal activity do not apply to piracy suspects. If the seizing State ultimately decides not to exercise its

criminal jurisdiction over the alleged pirates, application of the rules governing arrest and detention on suspicion of criminal activity will never occur. What is more, if after such a negative jurisdictional decision the piracy suspects remain detained with an intention to transfer them, no specific domestic rules for this kind of detention generally exist and the rules on deprivation of liberty pending extradition are not applied due to the differing nature of extraditions and transfers. Overall, this generally results in piracy suspects being stripped of all procedural safeguards for the entire time they are deprived of their liberty by the seizing State. Most importantly, they are not brought before a judge controlling the (continued) legality of their arrest or detention.

Overall, considering the characteristics of the transfer decision procedure and the fact that various States do not grant arrested and detained piracy suspects any procedural rights, alleged pirates held on board warships of patrolling naval States are – when seen through the lens of procedural rights and safeguards – treated as mere objects of these decisions and procedures rather than parties with fundamental interest in the outcome. The questions of whether and to what extent such practices can be reconciled with the individual rights of piracy suspects, mainly arising from human rights law, will be the focus of the following analysis.

Part 3 Disposition of Piracy Cases: Applicable Legal Frameworks

We concluded that because of the characteristics of the transfer decision procedure and the fact that various States do not grant arrested and detained piracy suspects any procedural rights, alleged pirates held on board warships of patrolling naval States are – when seen through the lens of procedural rights and safeguards – treated as mere objects of these decisions and procedures rather than parties with a fundamental interest in the outcome. It will later be analysed whether and to what extent these practices can be reconciled with the individual rights granted to piracy suspects under international law.

As a preliminary step of this analysis, we must first identify which legal frameworks – those potentially conferring individual rights to alleged offenders subject to deprivation of liberty and possible surrender for prosecution – are *applicable* in the context of counter-piracy operations off the coast of Somalia and the region. It is submitted that counter-piracy operations are of a purely law enforcement nature and do not amount to an armed conflict. Therefore, the criteria for applying international humanitarian law are not met. Moreover, the argument that *specific* piracy suspects held by patrolling naval forces for disposition qualify as refugees cannot be entirely excluded. With regard to international human rights law, it is discussed whether arrest and detention of alleged pirates and acts and decisions taken during the disposition procedure constitute extraterritorial conduct and, if so, the conditions under which this body of law nevertheless applies.

I. International Humanitarian Law

International humanitarian law, which only applies in situations of armed conflict,¹ contains various rules that have a direct bearing on removals from one

1 Marco Sassòli, Antoine Bouvier and Anne Quintin, *How Does Law Protect in War? Cases, Documents and Teaching Materials on Contemporary Practice in International Humanitarian Law*, Vol I (3rd edn, International Committee of the Red Cross 2011) 22–32.

to another jurisdiction (namely its refoulement prohibitions) as well as deprivation of liberty.² However, it is submitted that international humanitarian law does not apply to the current operations against Somali-based pirates as they clearly have a law enforcement character and do not amount to conduct of hostilities in the context of an armed conflict. Law enforcement measures aimed at suppressing the criminal phenomenon of Somali-based piracy is the goal unequivocally stated in the Security Council resolutions on piracy.³ The Security Council has repeatedly confirmed this law enforcement paradigm by referring to the overall objective of ensuring “the long-term security of international navigation off the coast of Somalia”⁴ and the “purpose of suppressing acts of piracy and armed robbery at sea”.⁵ Further, it has encouraged States to implement treaties pertaining to mutual cooperation in criminal matters – namely the SUA Convention, the UN Convention against Transnational Organized Crime and (implicitly) the Hostage Convention – in order “to effectively investigate and prosecute piracy and armed robbery at sea offences”^{6,7}

The fact that military means, namely warships and military personnel, are used in order to suppress piracy does not alter the law enforcement character of the current operations. Rather, the choice of these means is rooted in Article 107 UNCLOS, which designates warships (as well as other ships clearly marked and identifiable as being on government service and authorized to that effect) as the only competent vessels to carry out a seizure on account of piracy. This is primarily due to the pragmatic reason that warships navigate the high seas far more frequently than police vessels.⁸ More generally, the limitation that only clearly marked and readily identifiable vessels – first and foremost warships in practice – are competent to seize alleged pirate ships enhances legal certainty and reduces the risk of unjustified interferences with liberty of navigation. In addition, in cases of unlawful seizure, it facilitates the allocation of responsibility.⁹

The categorization of counter-piracy operations off the coast of Somalia and the region as genuine law enforcement operations is not altered by the fact that they are conducted *in lieu* of a disabled government and in a State where an armed conflict is ongoing. Put differently, the mere existence of an already el-

2 See, eg, Cordula Droegge, ‘Transfers of detainees: legal framework, non-refoulement and contemporary challenges’ (2008) 90 *International Review of the Red Cross* 669, 474–76, on the transfer of detainees under international humanitarian law.

3 Robin Geiss and Anna Petrig, *Piracy and Armed Robbery at Sea: The Legal Framework for Counter-Piracy Operations in Somalia and the Gulf of Aden* (OUP 2011) 132.

4 UNSC Res 1851 (16 December 2008) UN Doc S/RES/1851, para 4.

5 UNSC Res 1851, para 6.

6 UNSC Res 1851, para 5.

7 Geiss and Petrig (n 3) 133.

8 *ibid.*

9 *ibid* 92–93 and 133.

evated level of violence in Somalia does not automatically convert each and every law enforcement operation carried out on the Somali mainland, in its territorial waters or on the high seas against Somali-based pirates into involvement in a non-international armed conflict governed by international humanitarian law and, more specifically, its rules on conduct of hostilities.¹⁰

In sum, the potential applicability of international humanitarian law, as suggested by Security Council Resolution 1851 in the abstract,¹¹ must be denied *in concreto*.¹² Therefore, for the purposes of the study at hand, the question whether international humanitarian law confers individual rights at all can be left open.¹³

II. International Refugee Law

Another body of law containing potentially relevant rules regarding transfers of piracy suspects to third States for prosecution is international refugee law. The prohibition of refoulement – a main principle to observe when removing a person from one jurisdiction to another – has its origin in international refugee law and is well-developed under this body of law. Therefore, an enquiry into whether piracy suspects may qualify as refugees under the Refugee Convention seems necessary.¹⁴ Under said Convention, the term “refugee” applies to any person who – owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion – is outside the country of his nationality. The person must be unable or, owing to such fear, unwilling to avail himself of the protection of his country of nationality.¹⁵ Only an individual status determination procedure, where the concrete background and situation of a particular piracy suspect is taken into account, can yield a defi-

10 *ibid* 135.

11 UNSC Res 1851, para 6, stipulates that enforcement measures authorized under the Resolution “shall be undertaken consistent with *applicable* international humanitarian and human rights law” (emphasis added).

12 For a refined argument against the application of international humanitarian law in the context of counter-piracy operations off the coast of Somalia and the region, see Geiss and Petrig (n 3) 131–35.

13 For a discussion whether international humanitarian law provides international individual rights, see Anne Peters, ‘Membership in the Global Constitutional Community’ in Jan Klabbers, Anne Peters and Geir Ulfstein (eds), *The Constitutionalization of International Law* (OUP 2009) 169–70, and Kate Parlett, *The Individual in the International Legal System: Continuity and Change in International Law* (CUP 2011) 176–228, Chapter 3 entitled ‘The individual in international humanitarian law’.

14 Convention relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954) 189 UNTS 137 (Refugee Convention) as amended by Protocol relating to the Status of Refugees (adopted 31 January 1967) 606 UNTS 267 (1967 Protocol).

15 Article 1(A)2 Refugee Convention as amended by Article I(2) 1967 Protocol.

nite answer to whether he qualifies as a refugee. However, considering the general characteristics of the phenomenon of Somali-based piracy and the persons participating in pirate attack groups, who are potentially subject to seizure,¹⁶ various reasons exist for excluding piracy suspects from the refugee definition. Yet, even if the vast majority of piracy suspects will not qualify as refugees for the reasons outlined next, the supposition that a specific piracy suspect may nevertheless fulfil all elements of the refugee definition cannot be entirely excluded.

An initial obstacle to qualifying a piracy suspect as a refugee may be the requirement that the person left his country of origin or habitual residence out of a well-founded fear of persecution resulting from one or more of the grounds listed in the definition: race, religion, nationality, and membership in a particular social group or political opinion. Usually, the primary motivation for Somali-based pirates to (temporarily) leave Somalia is to participate in a criminal endeavour at sea with the prospect of earning (potentially big and fast) money. The driving force behind the decision to leave the country thus seems to be the harsh economic reality and extremely dire living conditions. The Refugee Convention, however, does not protect so-called “economic migrants”, ie persons who are motivated to leave their country by exclusively economic considerations and not for persecution based on mentioned grounds.¹⁷ However, a clear-cut distinction between refugees and economic migrants is not always possible. Economic deprivation affecting a person’s livelihood may be caused by actions driven by racial, religious or political aims or intentions directed against a particular group. Such discriminatory measures may then amount to persecution.¹⁸ What is more, considering that the recruitment of persons participating in pirate attack groups often takes place in Somali refugee camps, we cannot discount the argument that a piracy suspect seized by naval forces may fulfil one of the grounds for persecution mentioned in the refugee definition. Overall, it cannot be excluded that a piracy suspect, who *prima facie* left for economic reasons, could be a victim of persecution at the same time.

Further, according to the refugee definition, a person can only be a refugee if he is outside his country of nationality or habitual residence.¹⁹ The principle of non-refoulement is thus not applicable to persons who are in their home coun-

16 See above Part 1/I.

17 UNHCR, ‘Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status: Under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees’ (Reissued, Geneva, December 2011) <www.unhcr.org/refworld/pdfid/4f33c8d92.pdf> accessed 29 January 2013, 15, para 62.

18 *ibid* 15, para 63; Kees Wouters, *International Legal Standards for the Protection from Refoulement* (Intersentia 2009) 67.

19 This question must not be confused with the issue of whether the principle of non-refoulement applies extraterritorially, which has to be answered in the affirmative: Elihu Lauterpacht and Daniel Bethlehem, ‘The scope and content of the principle of non-refoulement: Opinion’, in Erika Feller, Volker Türk and Frances Nicholson

try, ie within the territorial jurisdiction of their State.²⁰ In other words, a condition necessary to qualify as a refugee is that the person crossed an international border.²¹ Since no exception applies to this rule,²² it is thus impossible to claim protection from refoulement at foreign diplomatic missions or embassies or with foreign State agents in the country of origin.²³ Piracy suspects from Somalia seized in Somali territorial waters, which are part of Somalia's territory,²⁴ are not outside their country. Even if taken on board a foreign law enforcement vessel, the condition of being outside the home country appears unfulfilled because it is not sufficient to be under foreign jurisdiction if standing on home territory. Arguably, the requirement of being outside the home State might be fulfilled if the law enforcement vessel has left Somali territorial waters – for example, in order to transfer the suspects to a third State for prosecution. However, if the suspects are seized on the high seas, which are under no State's jurisdiction, the criterion to be outside Somalia seems to be fulfilled. When taken on board the law enforcement vessel (at the latest), flag State jurisdiction appears to supersede jurisdiction based on nationality, which arguably prevails as long as they are on their skiff in an area under no jurisdiction, and piracy suspects must be considered to be outside their home country. The third and least problematic constellation is when piracy suspects are seized in waters subject to the sovereignty of a third State. In this situation, they are outside the territory of Somalia both before and after they are taken on board the foreign law enforcement vessel. In sum, piracy suspects seized and taken on board a foreign law enforcement vessel for disposition are oftentimes outside their home State.

The provisions of the Refugee Convention do not apply to a person regarding whom there are "serious reasons for considering" that he "has committed a serious *non-political* crime outside the country of refuge prior to his admission to that country as a refugee".²⁵ This exclusion clause does not apply if we consider attacks by Somali-based pirates to be political offences. It could be argued that the piracy definition under international law requires that piracy acts are "committed for private ends"²⁶ and that this *per se* excludes their political nature. Originally, this requirement was included in the definition of piracy to acknowledge the historic exemption for civil war insurgencies that attacked solely the

(eds), *Refugee Protection in International Law: Global Consultations* (2003) <www.unhcr.org/4a1ba1aa6.html> accessed 29 January 2013, para 67.

20 Wouters (n 18) 49 and 178–79.

21 *ibid* 49.

22 UNHCR (n 17) para 88.

23 Wouters (n 18) 49 and 178–79; UNHCR (n 17) fn 11.

24 Malcolm Shaw, *International Law* (6th edn, CUP 2008) 570.

25 Article 1(F)(b) Refugee Convention (emphasis added).

26 Eg Article 101(a) UNCLOS.

vessels of the government they sought to overthrow.²⁷ This historical interpretation of the words “for private ends” has been perceived as too narrow and broader definitions have been endorsed. Some scholars maintain that it excludes all acts committed for political reasons from the definition of piracy.²⁸ This reading has been criticized for being overly broad.²⁹ Rather, and correctly, it has been argued that it is not the person’s subjective motivation that is decisive, but whether the acts in question qualify as public acts authorized by or attributable to a State. In other words, all acts of violence that lack State sanction are undertaken for private ends.³⁰ Violence against ships and crews carried out by Somali pirates are not sanctioned by Somalia – the paradigmatic failed State – and therefore are committed for private ends. Thus, the private ends requirement of the piracy definition under international law does not *per se* exclude piracy from being a politically motivated offence.

At times, it is argued that pirate attacks have a political nature because they are committed in order to protect Somali interests, namely the protection of its waters from illegal fishing and waste dumping.³¹ Absent definitions of “political offences” and “non-political offences” in the Refugee Convention or universally agreed upon definitions, it is suggested that they be interpreted in line with the notion of “relative political crimes” in extradition law.³² According to this concept, violent acts are deemed to have a political nature if they are carried out

27 It is possible that some of the attacks against ships committed in the 1980s and 1990s by the Eritrean People’s Liberation Front and the Somali National Movement (see above Part 1/I) fell under this historical exemption.

28 See, eg: Clyde Crockett, ‘Toward a Revision of the International Law of Piracy’ (1976) 26 DePaul Law Review 78, 80.

29 Douglas Guilfoyle, *Shipping Interdiction and the Law of the Sea* (CUP 2009) 36.

30 Geiss and Petrig (n 3) 61–62.

31 See above Part 1/I.

32 Walter Kälin and Jörg Künzli, ‘Article 1F(b): Freedom Fighters, Terrorist, and the Notion of Serious Non-Political Crimes’ (2000) 12 International Journal of Refugee Law 46, 65, define “relative political offences” as “offences under ordinary law which are in themselves regarded as common crimes. However, they have been committed with a clear political motivation in order to bring about a change in the balance of political power within a specific State.” Without explicitly referring to extradition law, the UNHCR (n 17) para 152, applies the same criteria to define the concept of “political offence”: “In determining whether an offence is ‘non-political’ or is, on the contrary, a ‘political’ crime, regard should be given in the first place to its nature and purpose i.e. whether it has been committed out of genuine political motives and not merely for personal reasons or gain. There should also be a close and direct causal link between the crime committed and its alleged political purpose and object. The political element of the offence should also outweigh its common-law character. This would not be the case if the acts committed are grossly out of proportion to the alleged objective. The political nature of the offence is also more difficult to accept if it involves acts of an atrocious nature.”

as part of a political movement's struggle for power, if they are politically motivated and directly linked to the political aim, and if there is proportionality between the means used and the political aim pursued.³³ As highlighted above, today,³⁴ it can hardly be said that Somali-based pirates are struggling for power over natural resources (their waters and fishing grounds) and that the attacks are motivated by the protection of Somali interests.³⁵ What is more, even if they were pursuing a political aim, the link between a violent act and the goal pursued is not sufficiently evidenced by the current *modus operandi* of Somali-based pirates and cannot be considered proportional. This holds especially true for the vast majority of cases where random (and often non-fishing) vessels are hijacked far from the Somali shoreline and ransom payments made for their freedom end up in the hands of private persons for personal enrichment.³⁶ In sum, piracy as it is conducted today hardly qualifies as a political offence.

Only those persons committing a *serious* non-political offence are excluded from the refugee definition by virtue of the exclusion clause stipulated in Article 1(F)(b) of the Refugee Convention. Thus, in addition to being a non-political offence (which it seems to be), the pirate attack in question must attain the threshold of a "serious" offence. While the UNHRC admits the difficulty of defining the notion, it states that it must be a capital crime or a very grave punishable act³⁷ and emphasizes that all relevant factors, including mitigating and aggravating circumstances, must be taken into account.³⁸ Hence, it seems to make a difference whether piracy suspects are caught red-handed while attacking a ship or whether they are seized based on a suspicion of conspiring or attempting to commit piracy because, for example, they have material on board that could be pirate paraphernalia. In other words, the seriousness threshold may not be fulfilled in each and every case – even though in the abstract offences potentially committed by alleged pirates qualify as grave.³⁹

33 Kälén and Künzli (n 32) 66–67 and 77.

34 Maybe at the very beginning, there was some connection between actors and interests; see above Part 1/I.

35 The Puntland parliament linked piracy and illegal fishing in a different and quite strange way by qualifying illegal fishing itself as piracy in its piracy definition adopted in 2010: UNSC, 'Report of the Secretary-General on the modalities for the establishment of specialized Somali anti-piracy courts' (15 June 2011) UN Doc S/2011/360, para 15.

36 See above Part 1/I.

37 UNHCR (n 17) 30, para 155.

38 *ibid* 31, para 157.

39 See, eg, Article 5 SUA Convention: "Each State Party shall make the offences set forth in article 3 [which is often fulfilled in case of pirate attacks] punishable by appropriate penalties which take into account the *grave nature* of those offences." (emphasis added).

Formal proof of previous penal prosecutions is not required, rather it suffices that the contracting State has “serious reasons for considering” that the respective individual has committed a serious non-political crime.⁴⁰ Piracy suspects are usually only taken or kept on board the law enforcement vessel of the patrolling naval State if the suspicion that they have committed an offence could be upheld after an initial assessment of the evidence.⁴¹ Arguably, this assessment meets the threshold of “serious reasons for considering” that the individual in question has committed an offence. Another question to be answered is which State’s criminal law should provide the yardstick to make this assessment. When piracy suspects are taken on board the law enforcement vessel, the forum choice, which is intimately linked with the applicable criminal law,⁴² has yet to be made. Since there is no international crime of piracy or armed robbery at sea,⁴³ applying flag State law – ie the criminal law of the patrolling naval State – seems to be a pragmatic and practicable approach, even though some States argue that their domestic criminal law does not yet apply at the time of seizure.⁴⁴ Taken as a whole, there is a high chance that piracy suspects fall under the exclusion clause of Article 1(F)(b) of the Refugee Convention and therefore do not qualify as refugees.⁴⁵

In sum, the probability that a piracy suspect seized and taken on board a law enforcement vessel qualifies as a refugee is quite low, even though such a qualification cannot be excluded *per se* and a specific piracy suspect may exceptionally fulfil all definitional elements of the refugee definition and not be subject to the previously discussed exclusion rule. However, since this is a very atypical scenario, international refugee law will only be considered at the side-lines in this study.

40 Whether this standard conflicts with the presumption of innocence – and if this right applies at all given the restrictive scope of application of Article 6 ECHR and Article 14 ICCPR (see below Part 5/III/D/4) – is an issue left open here.

41 See above Part 2/II/B/3.

42 In the realm of criminal law, prescriptive jurisdiction (power to subject persons to domestic law) and adjudicative jurisdiction (power to subject persons to domestic courts) generally coincide. This follows from the fact that domestic criminal courts – notwithstanding whether they prosecute territorial or extraterritorial conduct – only apply their municipal criminal norms as a general rule: Council of Europe – European Committee on Crime Problems, ‘Extraterritorial Criminal Jurisdiction’ (1992) 3 Criminal Law Forum 441, 458.

43 For a discussion of why the definition of piracy under Article 101 UNCLOS and Article 15 Convention on the High Seas do not constitute international crimes, see Geiss and Petrig (n 3) 139–43. As to why neither Article 3 SUA Convention nor Article 1 Hostage Convention are criminal norms on which prosecutions can be directly based, see *ibid* 153–56.

44 See, eg, the line of reasoning of Germany (Part 2/II/C/3/b) and Denmark Part 2/I/D/2/a).

45 See, eg, Douglas Guilfoyle, ‘Counter-Piracy Law Enforcement and Human Rights’ (2010) 59 International & Comparative Law Quarterly 141, 153.

III. International Human Rights Law

Undisputedly, international human rights law is the most important source of individual rights under international law. However, the applicability of relevant human rights norms in counter-piracy operations off the coast of Somalia and the region could be challenged for at least two reasons. First of all, human rights law may not apply because (at least some) acts and decisions that take place during the disposition of piracy cases occur extraterritorially. In addition, for arrest and detention carried out in Somali territorial waters, the applicability of human rights law could be questioned since these enforcement powers are exercised pursuant to the Chapter VII-based Security Council Resolution 1846. What is more, as to the attribution of potential human rights violations, it is argued that acts relating to disposition of piracy cases carried out within the EUNAVFOR framework are not attributable to the troop-contributing State but rather to the European Union.

A. *Extraterritorial Application of Human Rights Law in a Maritime Environment*

We now turn to the issue of extraterritorial application of human rights law. This issue is of particular importance since most acts taken by a seizing State vis-à-vis piracy suspects are carried out extraterritorially. As a general rule, patrolling naval States intercept, arrest and detain piracy suspects in foreign territorial waters or on the high seas and therefore extraterritorially. Also, the disposition of their cases, most notably the decision to transfer piracy suspects to a third State for prosecution, takes place (at least partially)⁴⁶ outside the territory of the seizing

46 Regarding the question whether acts and decisions during disposition of piracy cases are taken extraterritorially, a distinction must be drawn between the disposition procedure and deprivation of liberty during disposition. Acts and decisions in relation to arrest and detention of piracy suspects are, albeit not exclusively, taken by military personnel deployed abroad, ie extraterritorially (see case studies in Part 2). Meanwhile, to the extent that the disposition procedures (and specifically the process during which it is decided whether to transfer specific piracy suspects to a third State for prosecution) are in the hands of the seizing State, it is primarily governed by its mainland authorities, and the power of the commanding officer of the seizing State regarding the disposition of a piracy case is quite limited. Briefly stated, the commanding officer informs the domestic authorities about the seizure and implements their decision regarding the disposition of a piracy case, ie he physically surrenders suspects to a third State, aids in bringing them to the mainland of the seizing State or releases them. Therefore, even though the suspects potentially to be transferred to a third State are held on board a law enforcement vessel, which is located outside the seizing State's territory, the decision to transfer is usually taken on shore and thus not extraterritorially. The situation is thus comparable to a classical situation of extradition, ie where the State in whose territory the alleged offender

State. This warrants a brief overview of the conditions necessary for the application of relevant human rights treaties in an extraterritorial and (at the same time) maritime context.

The extraterritorial application of the ECHR, ICCPR, CAT and CRC – the legal yardsticks applied in the present study⁴⁷ – hinges on the concept of jurisdiction: if a State acting beyond its territory exercises either *de jure* or *de facto* jurisdiction, it is bound by its human rights obligations. The most relevant instance of *de jure* jurisdiction in the situation at hand is the exercise of jurisdiction by virtue of the flag State principle. Since the flag State principle may not cover all measures taken against piracy suspects – for instance, acts carried out when the alleged pirates are not yet on board the law enforcement vessel of the seizing State but are rather held on their skiff – *de facto* jurisdiction exercised by virtue of effective control over persons is of equal importance. Accordingly, the following is an overview of when a State may exercise *de jure* or *de facto* jurisdiction under the ECHR, ICCPR, CAT and the CRC. In addition, it will explain the conditions under which a European Union Member State engaging in counter-piracy operations is bound by obligations flowing from the CFREU, the application of which is not predicated on jurisdiction, but rather whether the respective State acts in implementation of Union law.

1. ECHR

According to Article 1 ECHR, a State Party “shall secure to everyone within their jurisdiction the rights and freedoms” of the Convention. Based on the flag State principle, a State exercises *de jure* jurisdiction over vessels flying its flag. This was decided quite early by the Commission, was confirmed by the Court⁴⁸ and

is present decides whether to remove him for prosecution. Even if the decision to remove may have human rights relevant consequences abroad, ie extraterritorially, the removal decision as such is considered to be taken within the territory of the removing State (for removal decisions in the context of the ECHR and their qualification as territorial rather than extraterritorial acts, see Anne Peters, ‘Die Anwendbarkeit der EMRK in Zeiten komplexer Hoheitsgewalt und das Prinzip der Grundrechtstoleranz’ (2010) 48 Archiv des Völkerrechts 1, 7). And yet, when compared to a classical situation of extradition, the commanding officer of the seizing ship may participate in the decision whether to transfer and the implementation of a transfer decision. Therefore, as opposed to a classical situation of extradition where decisions and implementation takes place within the territory of the extraditing State, transfers may feature an extraterritorial element. To what extent a specific disposition procedure and transfer decision process is conducted within the seizing State’s territory or extraterritorially need not be determined since, as we will see below, human rights apply to the same extent in both situations.

⁴⁷ See above Introduction/II/B.

⁴⁸ On the case law of the Commission and the Court in relation to the flag State principle (as a form of *de jure* jurisdiction) and Article 1 ECHR, see: Michael Duttwiler

recently stated in quite explicit terms by the Grand Chamber.⁴⁹ The flag State principle arguably only applies to acts taken *on board* the law enforcement vessel of the seizing State and does not extend to acts beyond its railing, such as an arrest taking place on board an alleged pirate skiff or mother ship that has been boarded by law enforcement officials.⁵⁰ However, according to the case law of the Strasbourg organs, a State also has jurisdiction in the sense of Article 1 ECHR if it exercises *de facto* jurisdiction by virtue of effective control over persons.⁵¹ At the latest, when law enforcement officials have piracy suspects in their hands, ie under physical control, the degree of control over persons necessary to trigger the extraterritorial application of the ECHR is unquestionably established.⁵² The case law of the European Court of Human Rights even lends support to the idea that human rights law already applies extraterritorially from the moment a vessel is intercepted⁵³ – ie prior to the actual boarding of the ship.⁵⁴ In *Medvedyev v France*, the Grand Chamber stated that France had “exercised full and exclusive control over the *Winner* and its crew ... from the time of its interception, in a continuous and uninterrupted manner until they were tried in France”.⁵⁵ It can thus be concluded that the seizing State is bound by the rights and freedoms as guaranteed by the ECHR from the moment of interception of an alleged pirate vessel off the coast of Somalia and the region up until the physical surrender of piracy suspects

and Anna Petrig, ‘Neue Aspekte der extraterritorialen Anwendbarkeit der EMRK: Die Strassburger Praxis zu Art. 1 EMRK anlässlich der möglichen Beteiligung der Schweiz an internationalen Polizeieinsätzen’ (2009) 10 Aktuelle Juristische Praxis 1247, 1250–53.

- 49 *Hirsi Jamaa and Others v Italy* App no 27765/09 (Grand Chamber, ECtHR, 23 February 2012) paras 75–78.
- 50 Thus, the Grand Chamber states in *Hirsi Jamaa and Others v Italy* (n 49) para 77: “The Court observes that by virtue of the relevant provisions of the law of the sea, a vessel sailing on the high seas is subject to the exclusive jurisdiction of the State of the flag it is flying. This principle of international law has led the Court to recognise, in cases concerning acts carried out *on board* vessels flying a State’s flag ... cases of extra-territorial exercise of the jurisdiction of that State.” (emphasis added).
- 51 For the case law on *de facto* jurisdiction by virtue of effective control over persons, see: Duttwiler and Petrig (n 48) 1254–57; on the application of the effective control over persons in a case where a warship intercepts a vessel on the high seas, see *Hirsi Jamaa and Others v Italy* (n 49) paras 80–81.
- 52 On effective control over persons whose custody was attained by arrest abroad, see Peters (n 46) 14–16.
- 53 The question whether jurisdiction in the sense of Article 1 ECHR is already established before interception of a pirate boat, ie in ship-to-ship operations, is not discussed here because it is not relevant to the question of disposition of piracy cases and arrest and detention during disposition.
- 54 Geiss and Petrig (n 3) 111–13.
- 55 *Medvedyev and Others v France* App no 3394/03 (Grand Chamber, ECtHR, 29 March 2010) para 67.

to a third State for prosecution because it exercises *de jure* jurisdiction (by virtue of the flag State principle) and/or *de facto* jurisdiction (in the form of effective control over persons).

2. ICCPR

According to Article 2(1) ICCPR, each State Party “undertakes to respect and to ensure to all individuals within its territory *and* subject to its jurisdiction”⁵⁶ the rights of the Covenant. Despite the rather ambiguous wording of this jurisdictional clause, the Covenant applies extraterritorially if certain criteria are met. This follows, *inter alia*, from General Comment No. 31 where the Human Rights Committee stated in the most explicit terms “that a State party must respect and ensure the rights laid down in the Covenant to anyone within the power or effective control of that State Party, even if not situated within the territory of the State Party”. It further stated that this also holds true for persons

within the power or effective control of the forces of a State Party acting outside its territory, regardless of the circumstances in which such power or effective control was obtained, such as forces constituting a national contingent of a State Party assigned to an international peace-keeping or peace-enforcement operation.⁵⁷

This liberal reading of the ICCPR’s jurisdictional rule is also supported by various views of the Human Rights Committee⁵⁸ and has been confirmed by the International Court of Justice holding that the ICCPR “is applicable in respect of acts done by a State in the exercise of its jurisdiction outside its own territory”.⁵⁹ Therefore, State Parties to the ICCPR must guarantee the rights of the Covenant to piracy suspects under their power or effective control, such as when arresting them in foreign territorial waters or on the high seas and when detaining them on board their law enforcement vessel. As per *Munaf v Romania*, it is not even necessary that the State exercises unilateral control over the individual at the time of the violation as long as the State’s (extraterritorial) conduct was a “link

56 Emphasis added.

57 HRC, ‘General Comment No. 31: The Nature of the General Legal Obligations Imposed on States Parties to the Covenant’ in ‘Note by the Secretariat, Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies: Vol I’ (2008) UN Doc HRI/GEN/1/Rev.9 (Vol. I) para 10.

58 See, eg, cases involving the kidnapping of persons by Uruguayan state agents outside the territory of Uruguay (namely *Lopez v Uruguay* and *Celiberti v Uruguay*) or cases where Uruguayan diplomatic personnel refused to issue passports to Uruguayan citizens living abroad (namely *Vidal Martins v Uruguay*): Wouters (n 18) 370–71.

59 *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (Advisory Opinion) [2004] ICJ Rep 136, 136, para 111.

in the causal chain” that ultimately led to the violation of the Covenant.⁶⁰ From this follows that a seizing State, which decides to transfer a piracy suspect under its power or effective control abroad, may be held responsible for human rights violations occurring post-removal since its transfer decision was a “link in the causal chain” leading to the respective violation.⁶¹

3. CAT

In relation to Article 3 CAT – which contains an explicit prohibition of refoulement, the only provision of this Convention relevant to the study at hand – the Committee against Torture has declared that State Parties “should apply the non-refoulement guarantee to all detainees in its custody”, including those detained extraterritorially.⁶² Specifically with regard to the maritime context, it has held that the CAT applies extraterritorially vis-à-vis persons over whom the State Party exercises *de facto* or *de jure* control while on board a vessel.⁶³ It can thus be

60 *Munaf v Romania* Comm no 1539/2006 (HRC, 21 August 2009) paras 14.1–14.6. In such a case, the relationship between the State and the individual is determined by the conduct of the State and the effect of such conduct on the Covenant rights of the individual concerned. Under this approach, the attribution criteria of State responsibility rather than presence and territory are paramount: *ibid* paras 14.1–14.6; Wouters (n 18) 375; Oona Hathaway, ‘Human Rights Abroad: When Do Human Rights Treaty Obligations Apply Extraterritorially?’ (2011) *Arizona State Law Journal* 389, 418–20.

61 See also below (Part 5/I/B/2/a/aa) on the extraterritorial application of the principle of non-refoulement.

62 CAT Committee, ‘Conclusions and Recommendations of the Committee against Torture: United States of America’ (25 July 2006) UN Doc CAT/C/USA/CO/2, para 20. On the extraterritorial application of Article 3 Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (adopted 10 December 1984, entered into force 26 June 1987) 1465 UNTS 113 (CAT) in general, see Isabelle Moulrier, ‘Extraordinary Renditions and the United Nations Convention against Torture’ in Manfred Nowak and Roland Schmidt (eds), *Extraordinary Renditions and the Protection of Human Rights* (NWV Neuer Wissenschaftlicher Verlag 2010) 150; Wouters (n 18) 434–38; with regard to the maritime context, see Guilfoyle, ‘Counter-Piracy Law Enforcement and Human Rights’ (n 45) 153–54, Andreas Fischer-Lescano, Tillmann Löhr and Timo Tohidipur, ‘Border Controls at Sea: Requirements under International Human Rights and Refugee Law’ (2009) 21 *International Journal of Refugee Law* 256, 271–72, and *Hirsi Jamaa and Others v Italy* (n 49) concurring opinion of Judge Pinto de Albuquerque.

63 See, eg, *Sonko v Spain* Comm no 368/2008 (CAT Committee, 25 November 2011). In this case, the Committee observed “that the State party’s and the complainant’s versions of the circumstances surrounding these events differ, but that both parties agree that Mr. Sonko and the other three swimmers were intercepted [extraterritorially] by a [Spanish] Civil Guard vessel and were brought on board alive. They also both assert that, upon reaching the beach [in Morocco], Mr. Sonko was not well and

concluded that piracy suspects held on board a law enforcement vessel of the seizing State and vis-à-vis whom a transfer decision is taken are under its control – a notion broadly defined by the Committee against Torture.

4. CRC

According to Article 2(1) CRC, “States Parties shall respect and ensure the rights set forth in the present Convention to each child within their jurisdiction”. There is little authoritative commentary on the scope of this provision, namely whether the CRC applies extraterritorially. The *travaux préparatoires* indicate that this provision was inspired by Article 1 ECHR and was intended to exceptionally cover extraterritorial acts, namely those involving the children of diplomats. A proposal to align the wording with the ICCPR’s jurisdictional clause and to include a reference to territory was rejected after a Polish delegate asked whether the new wording would still apply to cases involving diplomats’ children and a Finish observer proposed, in order to cover every possible situation, that the reference to territories be deleted and to keep the wording similar to the ECHR.⁶⁴ In its Advisory Opinion *Legal Consequences on the Construction of a Wall in the Occupied Palestinian Territory*, the International Court of Justice concluded that Israel is bound to respect the CRC within the Occupied Palestinian Territory, but did not elaborate on its reasoning or the standard applied.⁶⁵ In *Congo v Uganda*, the International Court of Justice, by referring to the foregoing Advisory Opinion, held that international human rights instruments are applicable in respect of acts

that, despite the efforts made to revive him, he died.” (para 10.2). On the question of the extraterritorial application of the CAT, the Committee recalled its General Comment No. 2 where it noted that jurisdiction includes any territory where the State party exercises, directly or indirectly, in whole or in part, *de jure* or *de facto* effective control, in accordance with international law (CAT Committee, ‘General Comment No. 2: Implementation of Article 2 by States Parties’ in ‘Note by the Secretariat, Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies: Vol II’ (2008) UN Doc HRI/GEN/1/Rev.9 (Vol. II) para 16). It further held that this definition of jurisdiction does not only apply to Article 2 CAT, ie the provision under scrutiny in the mentioned General Comment, but is valid with regard to all provisions of the Convention. It then found that in the case at hand Spanish Civil Guard officers “exercised control over the persons on board the vessel and were therefore responsible for their safety” (para 10.3). For another case occurring extraterritorially and in a maritime context, see *JHA v Spain* Comm no 323/2007 (CAT Committee, 21 November 2008) para 8.2.

64 Michael Dennis, ‘Application of Human Rights Treaties Extraterritorially in Times of Armed Conflict and Military Occupation’ (2005) 99 *American Journal of International Law* 119, 129, fn 74.

65 *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (n 59) para 113.

done by a State in the exercise of its jurisdiction outside its territory⁶⁶ and then concluded that the CRC is applicable extraterritorially.⁶⁷ The exact standard for the extraterritorial application of the CRC has yet to be set out authoritatively. However, from its wording – “jurisdiction” without mention of “territory” – and the fact that it was inspired by the ECHR’s jurisdictional clause and that the International Court of Justice did not subject its extraterritorial application to any restrictive conditions, the clause should be broadly construed. Thus, a State has jurisdiction in cases where control over persons, ie piracy suspects, is established. Furthermore, based on the flag State principle, a State has undeniable jurisdiction in the sense of international public law, which generally provides States with jurisdiction in terms of human rights treaties. Thus, the CRC seems to cover piracy suspects who have been arrested and whose cases are subject to disposition.

5. CFREU

The field of application of the CFREU is defined in Article 51, according to which the provisions of the CFREU are addressed to the Member States “only when they are implementing Union law”.⁶⁸ The term “Union law” encompasses, *inter alia*, norms enacted within the framework of the Common Foreign and Security Policy governed by Title V of the Treaty on European Union.⁶⁹ EUNAVFOR Operation Atalanta is based on a Council Joint Action adopted within this framework and thus Union law.⁷⁰ As long as troop-contributing States act in execution of EUNAVFOR’s mandate (which includes arrest, detention and transfer)⁷¹ and do

66 *Case Concerning Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda)* (Judgment) [2005] ICJ Rep 168, para 216, referring to paras 107–13 of *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (n 59).

67 *Case Concerning Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda)* (n 66) para 217.

68 Charter of Fundamental Rights of the European Union [2000] OJ C364/8 (CFREU). Since this study focuses on human rights obligations of States, the European Union’s obligations and responsibilities are not addressed here.

69 Hans Jarass, *Charta der Grundrechte der Europäischen Union: Unter Einbeziehung der vom EuGH entwickelten Grundrechte und der Grundrechtsregelungen der Verträge – Kommentar* (Beck 2010) 413, para 5, and 416, para 15; Luca Paladini, ‘The European Charter of Fundamental Rights After Lisbon: A “Timid” Trojan Horse in the Domain of the Common Foreign and Security Policy?’ in Giacomo Di Federico (ed), *The EU Charter of Fundamental Rights: From declaration to binding instrument* (Springer 2011) 268.

70 See above Part 2/II/A.

71 *ibid.*

not revert back to national control, they can be said to “implement”⁷² Union law, which is the other requirement for triggering the application of CFREU-based rights.⁷³ Overall, European Union Member States contributing to EUNAVFOR are thus bound by the CFREU with regard to the disposition of piracy cases, regardless of whether such acts and decisions are taken within or outside their territory. Meanwhile, third States, which are not members of the European Union, are generally not bound by the CFREU.⁷⁴ However, since the guarantees of the CFREU relevant to the disposition of piracy cases have counterparts in the ECHR and/or ICCPR, third States contributing to EUNAVFOR⁷⁵ are (materially speaking) bound by virtually the same obligations.

In sum, States party to the ECHR, ICCPR, CAT and/or CRC – ie the treaties selected to assess the compatibility of human rights law with the disposition of piracy cases – are bound by their obligations when arresting piracy suspects on the high seas or in waters subject to the sovereignty of foreign States and during disposition of their cases by virtue of the flag State principle and/or the effective control over person criterion. Moreover, European Union Member States are also bound by the CFREU whenever they implement Union law, ie act in execution of EUNAVFOR Operation Atalanta’s mandate.

B. Exercise of Chapter VII-Based Enforcement Powers

The conclusion that disposition of piracy cases is governed by human rights law is not altered by the fact that the enforcement powers exercised by States contributing to the counter-piracy operations are *partly* conferred by the Chapter VII-based Security Council resolutions. While enforcement powers on the high seas remain governed by the law of the sea, namely Article 105 UNCLOS, States and

72 Martin Borowsky, ‘Artikel 51’ in Jürgen Meyer (ed), *Charta der Grundrechte der Europäischen Union* (Nomos 2011) 654, para 25, argues that Member States implement Union law where they, briefly defined, act as the long arm of the European Union and where there is an agency situation. This is the case where their acts are induced or determined by Union law. This seems to be the case where States act in execution of the mandate of EUNAVFOR Operation Atalanta, which is defined in a legal basis qualifying as Union law. Robert Esser and Sebastian Fischer, ‘Menschenrechtliche Implikationen der Festnahme von Piraterieverdächtigen: Die EU-Operation Atalanta im Spiegel von EMRK, IPBPR und GG’ (2010) *Juristische Rundschau* 513, 516, fn 53, however, express doubts whether States contributing to Operation Atalanta implement Union law.

73 An issue distinct from the application of the CFREU in the field of the Common Foreign and Security Policy (and to Member States contributing to missions within the Common Security and Defence Policy) is whether the Court of Justice of the European Union would be competent to exercise judicial control over potential violations of the CFREU: Jarass (n 69) 26, para 66, and 413, para 5.

74 *ibid* 423, para 30.

75 See above Part 2/III/A.

regional organizations contributing to counter-piracy efforts in Somali territorial waters are authorized to do so by paragraph 10 of Security Council Resolution 1846.⁷⁶ Arguably, the Chapter VII authority to use “all necessary means to repress acts of piracy and armed robbery at sea”⁷⁷ implicitly allows for the arrest and detention of piracy suspects and disposition of their cases. By virtue of Article 103 of the UN Charter, this authorization could “displace or qualify conflicting treaty-based human rights obligations”.⁷⁸ However, Security Council Resolution 1846 explicitly calls upon all States

to cooperate in determining jurisdiction, and in the investigation and prosecution of persons responsible for acts of piracy and armed robbery off the coast of Somalia, consistent with applicable international law including international human rights law, and to render assistance by, among other actions, providing disposition and logistics assistance with respect to persons under their jurisdiction and control, such victims and witnesses and persons detained as a result of operations conducted under this resolution.

This express call to respect human rights during the disposition of cases involving piracy suspects dissipates any doubt that the Security Council intended to derogate from (derogable) human rights protection.⁷⁹

C. **Attribution of Human Rights Violations**

We have concluded that human rights law applies to the disposition of piracy cases and arrest and detention of piracy suspects at sea, despite the (partially) extraterritorial context and whether or not States exercise these powers in Somali territorial waters pursuant to the Chapter VII-based Security Council Resolution 1846. While acknowledging that human rights law applies to counter-piracy operations, various States contributing to the EU-led counter-piracy operation Atalanta take the stance that potential human rights violations are *not attributable* to them because a transfer of authority to the European Union took place. For instance, the German Federal Government argued before the administrative court of Cologne that acts taken by Germany while contributing to EUNAVFOR were not attributable to the German State. The Court, however, decided the contrary and opined that Germany played a decisive part in the decision to transfer the suspects and violations in relation thereto were attributable to Germany.⁸⁰

76 See above Part 1/II/A/1.

77 UNSC Res 1846 (2 December 2008) UN Doc S/RES/1846, para 10(b).

78 Guilfoyle, ‘Counter-Piracy Law Enforcement and Human Rights’ (n 45) 152.

79 *ibid*; Geiss and Petrig (n 3) 131.

80 *Re ‘MV Courier’* 25 K 4280/09, Urteil (Verwaltungsgericht Köln, 25. Kammer, 11 November 2011) paras 52–58.

The resulting questions – can human rights violations be attributed to both the State and the international or supranational organization or can only the actor retaining ultimate authority and control over the material part of the operation be held responsible – are answered differently by the various human rights bodies. What is certain is that the question of attribution is intrinsically linked with the specific facts of the case and cannot be decided by a general reference to the command and control structure of the respective mission. Therefore, the attribution question will be left open in the study at hand.⁸¹

81 On general considerations of the attribution question in the context of counter-piracy operations, see: Guilfoyle, 'Counter-Piracy Law Enforcement and Human Rights' (n 45) 153–59; Geiss and Petrig (n 3) 116–30.

Part 4 Arrest and Detention in Light of International Individual Rights

What follows is an analysis of arrest and detention of piracy suspects during the disposition of their cases in light of international individual rights. Thereby, a distinction is drawn between two types of deprivation of liberty that potentially occur during disposition while on board a law enforcement vessel of the seizing State: arrest and detention on suspicion of criminal activity on the one hand and with a view to transfer on the other.

The first part of the analysis focuses on the legality of arrest and detention in light of the individual rights of piracy suspects – in doing so, the obvious legal benchmark to apply is the right to liberty and security. Since only a deprivation (and not a mere restriction) of liberty triggers the application of the right to liberty, the discussion first centres on the question whether and, if so, from what moment piracy suspects intercepted by patrolling naval States and later brought on board their warship for disposition are deprived of their liberty. What then follows is an analysis of which justificatory ground deprivation of liberty can be based on during the different phases of disposition. The case essentially lies in limbo during disposition since its very purpose is to determine the fate of a specific case involving an incident of piracy – that is, whether to release the suspects or submit them for prosecution, and thus involving another decision on whether to prosecute them in the courts of the seizing State or to transfer them to a third State. This, taken together with the cooperative approach to law enforcement in the realm of piracy, makes determining the ground for detention, namely whether deprivation of liberty is on suspicion of criminal activity or with a view to transfer, highly intricate. We will then engage in a discussion of the lawfulness of arrest and detention and the requirement that it be free from arbitrariness. While some States apply their ordinary domestic criminal law framework to arrest and detention of piracy suspects, others consider them to be “extraordinary suspects” falling outside the scope of ordinarily applicable rules. This latter approach begs the question whether international rules are available, which are of a certain quality as required by the lawfulness element of the right to liberty, in order to fill the normative gap resulting from the “extraordinary suspect” approach to arrest and detention. The same question will be discussed with regard to detention

pending transfer where, as a general rule, there is an absence of specific domestic law governing this type of detention.

The second part of the analysis pertains to the issue of the procedural safeguards that must be granted to piracy suspects subject to arrest and detention on board a law enforcement vessel of the seizing State. In addition to exploring the various procedural safeguards stipulated in the different provisions enshrining the right to liberty – notably the right to information and the right to judicial review and control of deprivation of liberty – we enquire into whether piracy suspects have a right to consular assistance, which is understood to have the character of an international individual right given that they are foreign detainees vis-à-vis the seizing State.

I. Arrest and Detention of Piracy Suspects in Light of the Right to Liberty

What follows is an analysis whether arrest and detention of piracy suspects during disposition of their cases is in line with the right to liberty, which protects the classical “freedom to come and go”,¹ and the mistier concept of personal security.² The right to liberty and security is enshrined in various human rights provisions, namely Article 5 ECHR, Article 9 ICCPR, Article 6 CFREU and Article 37 CRC. None of these provisions protect an *absolute* right to liberty. Rather, they set forth the conditions under which a person can exceptionally be deprived of his liberty.³ Hence, they limit the State’s ability to interfere with the right to free movement of persons by prohibiting unlawful or arbitrary deprivation of liberty. The approaches to doing so differ among the various legal norms mentioned.

Article 5(1) ECHR contains an exhaustive list of grounds that justify a deprivation of liberty. In other words, a person cannot be deprived of his liberty except for one of the reasons listed in the provision.⁴ Further, Article 5(1) ECHR expressly stipulates that deprivation of liberty must be lawful.⁵ According to the case law of the Strasbourg organs, every deprivation of liberty must also be free from arbitrariness. Article 9(1) ICCPR, in turn, stipulates that no one shall be deprived of his liberty “except on such grounds ... as are established by law”.⁶

1 *Medvedyev and Others v France* App no 3394/03 (Grand Chamber, ECtHR, 29 March 2010) para 74.

2 The main focus is on the right to liberty while the right to security is only referred to incidentally.

3 Article 5(1) ECHR and Article 9(1) ICCPR.

4 Article 5(1)(a)-(f) ECHR.

5 See the second sentence of Article 5(1) ECHR stipulating that deprivation of liberty can only take place “in accordance with a procedure prescribed by law” and the list of justificatory grounds in Article 5(1)(a)-(f) ECHR, each of which requires that arrest, detention or the order for detention be “lawful”.

6 Third sentence of Article 9(1) ICCPR.

Hence, rather than including an exhaustive list of the justificatory grounds for exceptionally depriving a person of his liberty, the drafters of the Covenant opted for this clause, which essentially refers back to domestic law with regard to the permissible grounds for detention.⁷ In terms of lawfulness, Article 9(1) ICCPR stipulates that liberty can only be deprived in accordance with a procedure established by law. As opposed to the text of the ECHR, Article 9 ICCPR expressly states that arrest and detention must be free from arbitrariness.⁸

From the wording of Article 5(1) ECHR and Article 9(1) ICCPR – especially the terms “everyone” and “no one” – follows that every possible person benefits from the right to liberty and security.⁹ This has been confirmed by the decisions of the respective treaty bodies.¹⁰ For instance, the Human Rights Committee held in *Giry v Dominican Republic*, where a deprivation of liberty with a view to surrender for prosecution by a method other than extradition was at issue, that “although the communication concerns an individual suspected of involvement in serious crimes, and later convicted of having perpetrated the very same offences, his rights under the Covenant must be respected”.¹¹ Therefore, persons suspected of piracy and armed robbery at sea fall within the personal scope of application of the right to liberty and security enshrined in Article 5 ECHR and Article 9 ICCPR.

While Article 5 ECHR and Article 9 ICCPR describe the right to liberty in quite explicit terms (most notably they set forth the conditions under which a person can exceptionally be deprived of his liberty), Article 6 CFREU is limited to the following words: “Everyone has the right to liberty and security of person.” From the use of the word “everyone” follows that the provision applies to any person,¹² including piracy suspects. Even though the right to liberty under the CFREU appears at first sight to not contain much more than a declaratory

7 Manfred Nowak, ‘Article 6 CFREU’ in EU Network of Independent Experts on Fundamental Rights (ed), *Commentary of the Charter of Fundamental Rights of the European Union* (2006) 216–17, 223.

8 Second sentence of Article 9(1) ICCPR.

9 Robert Esser, ‘Die Strafprozessordnung und das Gerichtsverfassungsgesetz: EMRK, IPBPR’ in Volker Erb (ed), *Grosskommentar Löwe-Rosenberg* (26th edn, de Gruyter 2012) 206.

10 For the ECHR see, eg: *Khodzhayev v Russia* App no 52466/08 (ECtHR, 12 May 2010) para 132; *Khaydarov v Russia* App no 21055/09 (ECtHR, 20 May 2010) para 126; and *Gaforov v Russia* App no 25404/09 (ECtHR, 21 October 2010) para 181. For the ICCPR, see, eg, HRC, ‘General Comment No. 31: The Nature of the General Legal Obligations Imposed on States Parties to the Covenant’ in ‘Note by the Secretariat, Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies: Vol I’ (2008) UN Doc HRI/GEN/1/Rev.9 (Vol. I) para 10.

11 *Giry v Dominican Republic* Comm no 193/1985 (HRC, 20 July 1990) para 5.3.

12 Norbert Bernsdorff, ‘Artikel 6’ in Jürgen Meyer (ed), *Charta der Grundrechte der Europäischen Union* (Nomos 2011) 204.

sentence and to be more limited when compared with the ECHR and ICCPR, it is said to have the same protective scope and content as Article 5 ECHR.¹³ As a consequence thereof, Article 52(3) CFREU – which stipulates that in so far as the CFREU contains rights corresponding to the guarantees of the ECHR “the meaning and scope of those rights shall be the same as those laid down by the said Convention [ECHR]” – must be observed when interpreting Article 6 CFREU. Therefore, the analysis pertaining to Article 5 ECHR can be applied *mutatis mutandis* to Article 6 CFREU, which will not be explicitly discussed in the following.

If a child is subject to a deprivation of liberty, Article 37 CRC must be observed. Article 1 CRC defines a child as “every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier”. It is important to note that the term “majority” in this provision refers to “the legal age at which political, economic or other forms of participation begin in various countries”.¹⁴ Hence, the reference is to adulthood rather than criminal majority, ie the age at which a person can be held criminally liable and which is often considerably lower than the general age of majority. Thus, a piracy suspect benefits from the additional protections of Article 37 CRC if he is not yet 18 years old, unless the law of the seizing State sets the age of majority lower. In order to broaden the protective scope of the provision, the Committee on the Rights of the Child even recommends applying Article 37 CRC to every person below 18 years of age irrespective of the national age of majority.¹⁵ In terms of substance, the provision prescribes, *inter alia*, that no child shall be deprived of his or her liberty in an unlawful and arbitrary fashion. Furthermore, any measure depriving a child of his liberty, which shall only be used as an *ultima ratio* and for the shortest appropriate period of time, shall be in conformity with the law.¹⁶

It has been demonstrated that the drafters of Article 5 ECHR, Article 9 ICCPR, Article 6 CFREU and Article 37 CRC took different approaches to protect persons from unlawful and arbitrary arrest and detention. However, the similarities among these provisions are by far strong enough to warrant their analysis as a group along the following lines. First, the analysis will consider whether and from what moment piracy suspects can be said to be deprived of their liberty, which is necessary to trigger application of the right to liberty guaranteed by

13 *ibid* 197–98; Nowak, ‘Article 6 CFREU’ (n 7) 68.

14 UNICEF Office of Research, ‘A Glossary That Provides Non-Specialists With an Understanding of Child Rights Terminology, Particularly Related to the Convention on the Rights of the Child, Keyword: “Majority” <www.unicef-irc.org/php/Thesaurus/Glossary_Display.php?THES_LANG=1&THES_SERCH=5&THES_CHAR=M> accessed 29 January 2013.

15 Rachel Hodgkin and Peter Newell, *Implementation Handbook for the Convention on the Rights of the Child* (3rd edn, United Nations Publications 2007) 10.

16 Article 37(b) Convention on the Rights of the Child (adopted 20 November 1989, entered into force 2 September 1990) 1577 UNTS 3 (CRC).

the mentioned provisions. Second, the justificatory ground(s) available for depriving piracy suspects of their liberty will be examined. Thereby, the focus lies on Article 5(1) ECHR and whether piracy suspects are arrested and detained on suspicion of criminal activity or as persons “against whom action is being taken with a view to ... extradition” as foreseen in Article 5(1)(f) ECHR. Finally, it will describe what requirements must be met to establish that arrest and detention of piracy suspects is lawful and free from arbitrariness in light of the right to liberty.

A. “Deprivation of Liberty” Is at Stake

The right to liberty only applies to measures amounting to a *deprivation* of liberty and not to mere *restrictions* of freedom of movement.¹⁷ With regard to piracy suspects intercepted by patrolling naval States and potentially later brought on board the warship for disposition, it is disputed whether they can be said to be deprived of their liberty and, if so, from what moment the deprivation occurs. This necessitates a rebuttal of the – more or less outspoken – assertion that piracy suspects *per se* fall outside the scope of the right to liberty because they cannot be said to be arrested or detained in the sense of Article 5 ECHR and Article 9 ICCPR. It also requires an analysis of the conditions under which, and thus at what moment, the “deprivation of liberty” threshold is attained under Article 5 ECHR and Article 9 ICCPR.

1. Arrest and Detention in the Sense of the Right to Liberty

The idea that measures interfering with the personal liberty of a piracy suspect may be beyond the reach of the right to liberty (and other rights) protected by the ECHR and ICCPR is sometimes articulated in quite robust terms. For example, when explaining the various legal challenges arising in the counter-piracy context, notably that Russian law does not contain a legal basis for detaining piracy suspects at sea, former Russian President Medvedev opined that “we will have to act like our ancestors did when they met pirates. You know exactly how.”¹⁸ Generally, the proposition that alleged pirates are “extraordinary suspects” – and therefore fall outside the ordinary legal framework affording protection to persons deprived of their liberty on suspicion of criminal activity or with a view to their surrender for prosecution – is formulated in more subtle terms. Sometimes the idea even comes in disguise, hidden behind a terminological and rhetorical smokescreen. For instance, the legal basis of EUNAVFOR Operation Atalanta

17 Nuala Mole and Catherine Meredith, *Asylum and the European Convention on Human Rights* (Council of Europe 2010) 138–42; Manfred Nowak, *U.N. Covenant on Civil and Political Rights: CCPR Commentary* (2nd edn, N.P. Engel Verlag 2005) 212.

18 Ellen Barry, ‘Russia Frees Somali Pirates It Had Seized in Shootout’ *The New York Times* (7 May 2010) <www.nytimes.com/2010/05/08/world/europe/08pirate.html> accessed 29 January 2013.

avoids – as far as the respective language allows - the use of terms ordinarily employed to denote measures interfering with personal liberty. Thus, in the French version of CJA Operation Atalanta, the verbs *appréhender* and *retenir* are used¹⁹ rather than *arrêter* and *détenir* – terms commonly found in human rights provisions pertaining to personal liberty.²⁰ The use of this specific terminology has been a conscious rather than random decision.²¹ The deliberate use of alternative terms is reflected by the German version of the legal text where the initial terminology, which was in line with that of the right to liberty in the ECHR and ICCPR, was later altered. Initially, the words *festgenommen/Festnahme*, ie terms used in Article 5 ECHR and Article 9 ICCPR,²² were employed. Later, the terms *festgenommen/Festnahme* were replaced with *festgehalten/Festhalten* by means of a corrigendum.²³ This terminology is, in the view of some, not without consequences. As an example, it has been held that since piracy suspects are not

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- 19 In Article 2(e) Council Joint Action 2008/851/CFSP of 10 November 2008 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 [2008] OJ L301/33, which was amended several times and latest by Council Decision 2012/174/CFSP of 23 March 2012 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 [2012] OJL89/69 (CJA Operation Atalanta), defining the mandate of Operation Atalanta, the words *appréhender* and *retenir* are used. The title of Article 12 CJA Operation Atalanta reads: “Transfert des personnes appréhendées et retenues en vue de l’exercice de poursuites judiciaires”. Article 12(1) CJA Operation Atalanta uses the following wording: “personnes ... qui sont appréhendées et retenues, en vue de l’exercice de poursuites judiciaires”.
- 20 The second sentence of Article 9(1) ICCPR reads: “Nul ne peut faire l’objet d’une arrestation ou d’une détention arbitraire.” Article 9(4) ICCPR begins with the following words: “Quiconque se trouve privé de sa liberté par arrestation ou détention.” In Article 5(1)(c) and (f) ECHR, eg, the words *arrêter* and *détenir* and *arrestation* and *détention* are employed.
- 21 Information from expert interview on file with author. However, the French position towards deprivation of liberty at sea on suspicion of criminal activity has changed quite considerably since the adoption of CJA Operation Atalanta in 2008; today, France is in possession of specific legislation governing restrictions and deprivations of liberty at sea; see above Part2/II/C/3/a.
- 22 See, eg, the second sentence of the German version (official translation of the IC-CPR provided by Switzerland; Internationaler Pakt über bürgerliche und politische Rechte, SR 0.103.2) of Article 9(1) ICCPR where the verb *festgenommen* is used; Article 9(2) ICCPR starts with the following words: ‘Jeder Festgenommene hat bei seiner Festnahme’. See also the German version of Article 5(1) ECHR where the term *Festnahme* is used (official translation of the ECHR provided by Switzerland; which is the same in Germany, Austria and Liechtenstein; Konvention zum Schutze der Menschenrechte und Grundfreiheiten; SR 0.101).
- 23 Berichtigung der Gemeinsamen Aktion 2008/851/GASP des Rates vom 10. November 2008 über die Militäroperation der Europäischen Union als Beitrag zur Ab-

festgenommen (ie “arrested” in the sense of ECHR and ICCPR), the measures interfering with their personal liberty are not subject to any time limits.²⁴

The Strasbourg organs repeatedly stressed that the notions of “deprivation of liberty”, “arrest” and “detention” must be interpreted autonomously within the Convention framework and thus can have a meaning different from domestic law.²⁵ Further, they held that when qualifying measures or processes interfering with personal liberty as a deprivation of liberty, it is essential to concentrate on what is achieved by them and not what they are called. Any measure that has the effect of depriving a person of his liberty falls under the material scope of application of Article 5 ECHR regardless of its designation in domestic (or European) law.²⁶ Similarly, when drafting what would become Article 9 ICCPR, the Commission on Human Rights specifically chose the term “deprivation of liberty” because it encompasses all the different notions used to describe interferences with the right to come and go, such as apprehension, arrest, remand and custody. It was argued that this terminology best meets the objective entrusted to the drafters: to protect individuals from arbitrary interferences with their personal liberty in all forms.²⁷ In light of this, a functional-material rather than a formal(istic) interpretation of the notions appearing in legal texts pertaining to deprivation of liberty of piracy suspects is necessary.

As a result, the alternative terminology (sometimes) used to denote interferences with a piracy suspect’s liberty may largely be disregarded for the purposes

schreckung, Verhütung und Bekämpfung von seeräuberischen Handlungen und bewaffneten Raubüberfällen vor der Küste Somalias, 2009 Abl. (L 10) 35 (EU).

- 24 This view is, eg, taken by Wolfgang Nolting, ‘Bedeutung der Sicherheit zur See für freien Handel und politische Handlungsfähigkeit: 49. Historisch-taktische Tagung der Flotte 2009’ (2009) 3 *MarineForum* 3, 4; Robert Esser and Sebastian Fischer, ‘Menschenrechtliche Implikationen der Festnahme von Piraterieverdächtigen: Die EU-Operation Atalanta im Spiegel von EMRK, IPBPR und GG’ (2010) *Juristische Rundschau* 513, 516, argue against the hypothesis of Nolting by holding that it does not find support in current international human rights law; Andreas Fischer-Lescano and Lena Kreck, ‘Piraterie und Menschenrechte: Rechtsfragen der Bekämpfung der Piraterie im Rahmen der europäischen Operation Atalanta’ (2009) 47 *Archiv des Völkerrechts* 481, 498, also argue against the idea that by labelling the measure interfering with liberty differently, it falls outside the protective scope of the (German constitutional) right to liberty.
- 25 Stefan Trechsel and Sarah Summers (eds), *Human Rights in Criminal Proceedings* (OUP 2006) 411.
- 26 Monica Macovei, *The Right to Liberty and Security of the Person: A Guide to the Implementation of Article 5 of the European Convention on Human Rights* (Council of Europe 2002) 17.
- 27 UNHCR Working Group on Arbitrary Detention, ‘Fact Sheet No. 26: “No One Shall Be Subjected to Arbitrary Arrest, Detention or Exile” (Universal Declaration of Human Rights, Article 9)’ <www.ohchr.org/Documents/Publications/FactSheet26en.pdf> accessed 29 January 2013, IV.A.

of deciding whether these measures are governed by the right to liberty as stipulated in Article 5 ECHR and Article 9 ICCPR. In other words, the fact that some actors prefer to use a different set of terms to refer to measures interfering with the faculty of piracy suspects to come and go does not exclude piracy suspects *per se* from the protective scope of the right to liberty. Rather, the decisive question is whether the respective measures meet the threshold of a “deprivation of liberty”, which is necessary to trigger the protection of Article 5 ECHR and Article 9 ICCPR – an issue we turn to now.

2. Moment at Which Piracy Suspects Are “Deprived of Their Liberty”

For the right to liberty to apply, it is essential that the measure in question qualifies as a deprivation of liberty. Accordingly, the following analysis centres on identifying the specific moment that piracy suspects intercepted off the coast of Somalia and the region can be said to be deprived of their liberty in the sense of Article 5 ECHR and Article 9 ICCPR (and the seizing States bound by the obligations flowing from these provisions).

a) *Deprivation of Liberty under Article 5 ECHR*

Under Article 5 ECHR, the notion of personal liberty refers solely to physical liberty²⁸ and does not include the freedom to determine one’s own will.²⁹ Put another way, it only protects the liberty of movement,³⁰ ie the person’s *liberté d’aller et de venir*.³¹ Thereby, a “deprivation” of liberty must be at stake and a pure “restriction” of liberty does not meet the threshold of Article 5 ECHR. This follows from case law and a systematic reading of the Convention, which contains a specific provision dealing with restrictions of the liberty of movement.³² The distinction between restriction and deprivation of liberty is not clear-cut, “but

28 *Medvedyev and Others v France* (Grand Chamber) (n 1) para 73.

29 Domestic constitutional guarantees safeguarding personal liberty may include more than only physical liberty and extend to, eg, the determination of one’s own will: Trechsel and Summers (eds) (n 25) 407.

30 Madleine Colvin and Jonathan Cooper (eds), *Human Rights in the Investigation and Prosecution of Crime* (OUP 2009)158; Trechsel and Summers (eds) (n 25) 407–08.

31 Stig Jagerskiöld, ‘The Freedom of Movement’ in Louis Henkin (ed), *The International Bill of Rights: The Covenant on Civil and Political Rights* (Columbia University Press 1981) 169; the term *liberté d’aller et de venir* goes back to the French Revolution; the European Court of Human Rights refers to the “freedom to come and go”: *Medvedyev and Others v France* (Grand Chamber) (n 1) para 74.

32 Trechsel and Summers (eds) (n 25) 412: Article 2 of Protocol 4 to the Convention for the Protection of Human Rights and Fundamental Freedoms (entered into force 2 May 1968) ETS 46 (Protocol 4 ECHR) specifically pertains to freedom of movement.

merely one of degree or intensity, and not one of nature or substance”³³ Thus, a measure that initially qualifies as a mere restriction of liberty can turn into a deprivation of liberty if, for example, it is prolonged excessively.³⁴

In addition to the notion of “deprivation of liberty”, the terms “arrest” and “detention” appear in Article 5 ECHR. Arrest and detention are the most prevalent means by which a person is deprived of his liberty. Some take the stance that the reference to these two specific means is to provide examples of measures that have the effect of depriving a person of his liberty, but other measures can equally qualify as deprivation of liberty in the sense of Article 5 ECHR.³⁵ Meanwhile, others argue that the notions of arrest and detention are used interchangeably throughout Article 5 ECHR and should be understood as covering any measure that has the effect of depriving a person of his liberty – regardless of the terminology used in domestic law.³⁶ Considering that the provision’s protection is triggered as soon as a measure (however it may be labelled) meets the threshold of deprivation of liberty, this doctrinal dispute can be left unsettled for now.

Generally speaking, “deprivation of liberty” consists of “a measure by a public authority by which a person is kept against his or her will for a certain amount of time within a limited space and hindered by force, or a threat of force, from leaving that space”³⁷ The definition of deprivation of liberty thus contains three elements: space, time and coercion. Each element leaves room for interpretation and the different elements must be considered simultaneously as they may influence each other.³⁸ According to the European Court of Human Rights, the starting point must be the “concrete situation” of the individual concerned and the evaluation must take into account a whole range of criteria, such as the type, duration, effects and manner of implementation of the measure in question.³⁹

aa) The Space Element

With regard to the space element, confinement to a cell usually amounts to a deprivation of liberty.⁴⁰ Some States contributing to the counter-piracy operations adapted their ship(s) for this specific deployment, which is of a law enforce-

33 *Amuur v France* App no 19776/92 (ECtHR, 25 June 1996) para 42; *Medvedyev and Others v France* (Grand Chamber) (n 1) para 73.

34 *Amuur v France* (n 33) para 43.

35 Esser and Fischer, ‘Menschenrechtliche Implikationen der Festnahme von Piraterieverdächtigen’ (n 24) 516.

36 Macovei (n 26) 17.

37 Trechsel and Summers (eds) (n 25) 411.

38 *ibid* 411.

39 *Amuur v France* (n 33) para 42; *Iskandarov v Russia* App no (ECtHR, 23 September 2010) para 139; *Medvedyev and Others v France* (Grand Chamber) (n 1) para 73.

40 Trechsel and Summers (eds) (n 25) 412.

ment nature rather than of a conduct of hostile nature. Norway, for instance, constructed cells on board its frigate *Fridtjof Nansen*.⁴¹

Generally, however, warships are not equipped with cells. Absent such infrastructure, crew cabins are used for detention. Yet, no cabins may be available for detention purposes on board small ships or due to the larger number of troops embarked as compared with an “ordinary” deployment (eg because of the need for interpreters). In such cases, piracy suspects have been assigned a specific area on deck, equipped with cots and protected from the sun and other weather conditions. Also specific rooms, such as the dining room, have been used for detaining piracy suspects on board ships where no cells or empty cabins were available.⁴² Against this background, it is important to note that confinement to a cell is not necessary to fulfil the space element of the deprivation of liberty definition. Rather, the Court has found that confinement to churches, schools, stadiums, garages or hotels – even when the person can move about freely within such locations⁴³ – can amount to a deprivation of liberty.⁴⁴ What is more, the Court has decided that confinement to a means of transport⁴⁵ and specifically to a ship may constitute a deprivation of liberty.⁴⁶ In *Medvedyev v France*, the Grand Chamber held that confinement to a ship’s cabin amounted to a deprivation of liberty – this held true even once the restrictions were relaxed and the suspects could move about the ship under the official’s supervision, ie when the coercion element was strong enough. The fact that the criminal suspects were detained on board their own ship in that specific case did not alter the outcome of the assessment.⁴⁷

Overall, the space element may be fulfilled when detaining piracy suspects on board a warship or any other kind of law enforcement vessel, such as coast guard vessels. This is the case irrespective of whether piracy suspects are confined to crew cabins or cells specifically constructed on board warships deployed to counter-piracy missions, or if assigned to a specific area on deck or a room on board the warship. The space element may be fulfilled even if piracy suspects are allowed to walk about the ship under surveillance. What is more, this criterion is also met when piracy suspects are confined to their skiff or mother ship either

41 Information from expert interview on file with author.

42 Information from expert interview on file with author.

43 Trechsel and Summers (eds) (n 25) 412.

44 *ibid.*

45 *Iskandarov v Russia* (n 39) para 141; the Court decided this way by referring to *Bozano v France* App no 9990/82 (ECtHR, 18 December 1986), where the applicant was deported in a car from France to Switzerland. See also *X and Y v Sweden* App no 7376/76 (Commission Decision, 7 October 1976) summary of the findings: “A deportee travelling with police escort in an aircraft going abroad can be considered as being in detention.”

46 Trechsel and Summers (eds) (n 25) 411.

47 *Medvedyev and Others v France* (Grand Chamber) (n 1) paras 15 and 74.

after their ship has been boarded by members of a boarding team or when held at gunpoint by armed forces at very close range.

bb) The Coercion Element

The second element necessary to qualify a measure interfering with the liberty of movement of piracy suspects as a deprivation of liberty is “coercion”. The very notion of detention implies the absence of consent.⁴⁸ As long as the person stays in a certain place by his own free will, no deprivation of liberty is at stake.⁴⁹

For the element of coercion to be fulfilled, it suffices that there is a threat of force – that law enforcement officials actually resort to the use of force is not necessary.⁵⁰ It is also irrelevant whether handcuffs or similar means are used in the course of arrest and detention.⁵¹ In a case involving surrender for prosecution by a method other than extradition, the Court decided that the coercion element was fulfilled given that the applicant was accompanied by law enforcement officials during the whole period of transfer and brought to the receiving State against his will.⁵² Overall, as soon as the person is no longer free to leave, the “coercion” threshold can be said to be attained.⁵³

For piracy suspects whose skiff or mother ship has been boarded by armed forces or simply stopped by law enforcement officials, the element of coercion seems to be fulfilled. They can neither escape with the vessel nor from the vessel in the midst of the ocean – as the Court has stated, the option to leave must be realistic and not only theoretical.⁵⁴ The situation seems comparable to *Medvedyev* where the suspects were held on board their own ship, which had been boarded

48 Trechsel and Summers (eds) (n 25) 414.

49 *ibid.*

50 *ibid* 415.

51 *ibid.*

52 *Iskandarov v Russia* (n 39) para 140. It was impossible to establish all details relating to the applicant’s transfer from Russia to Tajikistan, in particular whether he was confined to a cell or locked up in any premises. Even though the information about the space element available to the Court was scarce and the interference with personal liberty only lasted for a relatively short period of time, the Court concluded that the situation went beyond a mere restriction of freedom of movement since, in addition, coercion was exercised.

53 *Macovei* (n 26) 18.

54 *Amuur v France* (n 33) concerned a completely different set of facts, and yet to some extent comparable because it was also an inescapable situation: asylum-seekers were held in the transit zone of a French airport; the French Government argued that no deprivation of liberty had been at stake because the persons seeking asylum in France could have left the transit zone, which was ‘closed on the French side’ but remained ‘open to the outside’ (para 46). The Court argued that the possibility to leave the country was only of a theoretical order since no other country offering protection comparable to that in France was inclined or prepared to receive the asylum-seekers in question (para 48).

by armed officials. In that case, the Grand Chamber gave considerable weight to the fact that the suspects were “placed under control” of officials when concluding that a deprivation of liberty had been at stake.⁵⁵ In the situation where piracy suspects are taken on board a warship in order to be held there for disposition, it cannot be said that they do so out of their own free will and the coercion element is thus undeniably fulfilled.

cc) The Time Element

The time element, ie the necessary duration of the interference with personal liberty in order to amount to a deprivation (and not mere restriction) of liberty, is the most controversial definitional component, both generally and also in the piracy context. The distinction between deprivation and restriction of liberty is especially difficult for measures of short duration and the position of the Strasbourg organs on this issue is somewhat ambiguous.⁵⁶ In doctrine, at least three different stances on whether to qualify short time measures as deprivation of liberty can be identified: firstly, those arguing that short time measures *per se* cannot amount to deprivation of liberty; secondly, those arguing that the qualification depends on the very purpose of the measure interfering with liberty; and, thirdly, those holding that the time element should not be given too much weight and arguing in favour of qualifying short-term measures as deprivation of liberty.

The main argument of those holding that short-term measures *per se* do not amount to a deprivation of liberty is that, in such cases, it is generally impossible to grant the procedural safeguards of Article 5(2) to (4) ECHR before the person is released.⁵⁷ However, it should be born in mind that Article 5 ECHR is not only about procedural safeguards. Rather, the procedural safeguards are but a means to obtain the ultimate goal of the provision – to prevent unlawful and arbitrary arrests. Thus, the basic principle that no one shall be deprived of his liberty unless it is on one of the exhaustively listed grounds and in accordance with a procedure prescribed by law, ie based on criteria and in a process that are predefined by law, has a self-standing meaning and is not dependent on (but rather reinforced by) the procedural guarantees set forth in Article 5(2) to (4) ECHR. The argument that short time measures cannot qualify as deprivation of liberty because the procedural safeguards cannot be exercised in such a short period could even be reversed: in cases where it is unlikely that the person can exercise or benefit from the procedural safeguards while the interference with liberty is ongoing – like in the piracy context – it is all the more important that law enforcement officials are bound to respect the requirements flowing from Article 5(1) ECHR, ie to guarantee that arrest and detention are lawful and free from arbitrariness. Put

55 *Medvedyev and Others v France* (Grand Chamber) (n 1) para 74.

56 Joachim Renzikowski, ‘Artikel 5 EMRK’ in Wolfram Karl (ed), *Internationaler Kommentar zur Europäischen Menschenrechtskonvention: mit einschlägigen Texten und Dokumenten* (Carl Heymanns Verlag 2004) 32.

57 Esser (n 9) 213, with references to authors adopting this position.

another way, in situations where the procedural guarantees intended to prevent arbitrary or unlawful interferences with liberty cannot become effective (or do so only after the person has been liberated again), the remainder of Article 5 ECHR intended to attain this very same objective should take full effect.

Those scholars (and the Commission on occasion) asserting that the qualification depends on the purpose of the measure base their argument on the following premise: no deprivation of liberty is at stake with regard to a short time measure, the very purpose of which is not the interference with personal liberty, but which is rather the unavoidable consequence of another measure and where it is clear from the outset (and also to the person subject to the measure) that the measure is limited to the (short) period necessary to secure the primary purpose.⁵⁸ Following this line of reasoning, measures interfering with liberty of movement while a patrolling naval State exercises its right of visit under Article 110 UNCLOS do not yet constitute a deprivation of liberty.⁵⁹ Without a doubt, the right of visit interferes with the crew's liberty of movement since it allows for the alleged pirate skiff or mother ship to be stopped, the documents to be checked and, if suspicion remains, for further examinations on board the vessel to be carried out – namely searches of the crew and ship. However, the measure can be said to have the primary purpose of verifying an initial suspicion and, if this initial suspicion remains, to take additional measures to gradually substantiate this suspicion until it is confirmed to a degree sufficient so as to trigger the enforcement powers available under Article 105 UNCLOS (seize the ship and property on board and arrest the persons) or to abandon the suspicion entirely and let the vessel continue on its journey. As soon as the ship has been identified as a pirate ship and the enforcement powers of Article 105 UNCLOS are exercised, the interference with the person's liberty qualifies as a deprivation of liberty. Firstly, because the very purpose of an arrest under Article 105 UNCLOS is to interfere with the person's liberty and the interference with liberty is no longer an incidental result of another purpose. Secondly, an arrest in the sense of Article 105 UNCLOS cannot be said to be limited in time from the outset. Rather, whether piracy suspects are released after a short while or detained for an indefinite period of time depends on the outcome of additional collection and assessment of evidence. Even if alleged pirates are ultimately released after a short period of time, this result was not – at the moment of interfering with the person's liberty and thus *ex ante* – foreseeable.

58 *ibid* 212–13, with references to authors adopting this position; Renzikowski (n 56) 33–34, cites cases where the Commission adopted this viewpoint; the author, however, takes a critical stance on the line of reasoning pursued by the Commission.

59 On an overview on the right of visit, see above Part 1/II/A/1; for a more detailed account of which ships may be visited and what types of enforcement measures are available under the right of visit, see Robin Geiss and Anna Petrig, *Piracy and Armed Robbery at Sea: The Legal Framework for Counter-Piracy Operations in Somalia and the Gulf of Aden* (OUP 2011) 55–58.

Overall, an interference with liberty resulting from the exercise of the right of visit arguably does not yet amount to a deprivation of liberty. Expressed in more operational terms,⁶⁰ the stopping of an alleged pirate skiff or mother ship based on a mere suspicion, its boarding, an initial security sweep aimed at ensuring the security of the boarding team, and verification that the boat is engaged in piracy rather than fishing instead constitutes a mere restriction of liberty. However, as soon as the suspicion hardens and the ship is identified as a pirate ship and the alleged pirates remain under the control of law enforcement officials, a deprivation of liberty must be assumed. In addition to the space and coercion elements, the time element is fulfilled since the custody of the suspects is at that moment not yet limited in time. Against this background, a later release – even if it occurs after a rather short duration of time, such as an hour or two – should not alter the qualification as a deprivation of liberty.

In practice, it happens that the measures allowed under the right of visit are not exercised by dispatching a boarding team. Rather, an initial suspicion is gradually substantiated by means that do not interfere with the suspect's liberty of movement. For example, ships suspected of piracy can be identified as such from a distance through airborne surveillance by maritime patrol aircrafts and helicopters.⁶¹ This may even be more effective than sending out a boarding team in order to verify an initial suspicion, given that piracy paraphernalia are often thrown overboard as soon as a law enforcement vessel approaches⁶² and evidence important for a later prosecution gets lost. If a ship already identified as a pirate ship from a distance is ultimately stopped, the enforcement powers taken against it stem from Article 105 UNCLOS rather than the right of visit under Article 110 UNCLOS. In other words, piracy suspects stopped in this scenario can be said to be deprived of liberty from the very moment of being stopped: in addition to the space and coercion elements, the time element is also fulfilled since – as already explained – measures based on Article 105 UNCLOS can hardly be said to have a purpose other than interfering with the person's liberty to come and go and are not limited in time from the outset.

We now turn to the third and final stance taken vis-à-vis short-term measures and whether they qualify as deprivation of liberty. An increasing number of scholars argue that, as a general rule, the time element is not a meaningful criterion to distinguish whether a case reaches the threshold of Article 5 ECHR,

60 See above Part 2/II/B/3, on how the armed forces of States contributing to EUNAVFOR generally proceed after interdiction of a boat suspected of piracy.

61 David Osler, *Operation Atalanta "Capability Shortfalls" Criticised* (Lloyd's List 2011).

62 Persons on board a boat suspected of engaging in piracy, which is being approached by a law enforcement vessel, often throw the typical paraphernalia that distinguishes them from fishermen (such as heavy weapons or ladders) over board: UNSC, 'Report of the Monitoring Group on Somalia and Eritrea pursuant to Security Council resolution 1916 (2010)' (18 July 2011) UN Doc S/2011/433, para 94.

ie whether a restriction or deprivation of liberty is at stake.⁶³ The approach of also qualifying short-term interferences with liberty of movement as deprivation of liberty⁶⁴ finds support in the Strasbourg organs' case law. In various cases, measures of short duration were qualified as a deprivation of liberty. In *Shimovolos v Russia*, for instance, the applicant was taken to the police station under a threat of force and was not free to leave the premises without the authorisation of the police officers. Even though the detention did not exceed 45 minutes, the Court considered that there was an element of coercion which was indicative of a deprivation of liberty within the meaning of Article 5(1) ECHR.⁶⁵ In *Gillan and Quinton v the United Kingdom*, the length of time during which each applicant was stopped and searched did not exceed 30 minutes. Yet, the Court found that during this period they were entirely deprived of any freedom of movement, they were obliged to remain where they were and submit to the search, and if they had refused to comply they could have been subjected to arrest and detention at a police station and criminal charges.⁶⁶ In *K.-F. v Germany*, the Court decided that the applicant's liberty was deprived because he was kept in custody 45 minutes longer than the 12 hour statutory maximum.⁶⁷ In *X v Austria*, the Commission decided that a forcible taking of blood, which only lasted a matter of minutes, constituted a deprivation of liberty.⁶⁸ In sum: "Where the facts indicate a deprivation of liberty within the meaning of Article 5 § 1, the relatively short duration of the detention does not affect this conclusion."⁶⁹ In light of this case law, even interferences with liberty while exercising the powers arising from the right of visit under Article 110 UNCLOS could – despite their rather short duration – qualify as deprivation of liberty as long as the space and coercion elements are strong enough.

All in all, the questions surrounding whether the purpose of the short-term measure should be decisive or whether the time element should be discarded altogether when determining whether a measure amounts to a deprivation of liberty can be left unanswered here. However, the position that short-term measures

63 Renzikowski (n 56) 34–35.

64 Esser (n 9) 213–14.

65 *Shimovolos v Russia* App no 30194/09 (ECtHR, 21 June 2011) paras 48–50.

66 *Gillan and Quinton v the United Kingdom* App no 4158/05 (ECtHR, 12 January 2010) para 57.

67 *K-F v Germany* App no 144/1996/765/962 (ECtHR, 27 November 1997) para 55.

68 *X v Austria* App no 8278/78 (Commission Decision, 13 December 1979) 2. of the legal considerations.

69 Council of Europe/European Court of Human Rights, 'Guide on Article 5: Right to Liberty and Security – Article 5 of the Convention' (2012) <www.echr.coe.int/NR/rdonlyres/45CE4A15-7110-494E-8899-AC824132C136/o/POINTS_CLES_Article_5_EN.pdf> accessed 29 January 2013, para 9, referring to *Rantsev v Cyprus and Russia* App no 25965/04 (ECtHR, 7 January 2010) para 317, and *Iskandarov v Russia* (n 39) para 140.

interfering with the personal liberty of piracy suspects cannot *per se* qualify as deprivation of liberty should be rejected.

dd) Conclusion

In sum, measures taken by law enforcement officials against piracy suspects that interfere with their liberty to come and go must bear all three characteristics presented above – space, coercion and time – in order to qualify as deprivation of liberty in the sense of Article 5 ECHR. The three elements are interdependent and must be considered simultaneously as they may influence each other.

There are very few cases where the Court assessed these factors regarding a situation where criminal suspects had been intercepted at sea. What is more, in some of these few cases, the conclusion that a deprivation of liberty had been at stake was made rather swiftly. As an example, in *Rigopoulos v Spain*, the Court simply stated that “the applicant was undoubtedly deprived of his liberty, since he was detained on a vessel belonging to the Spanish customs, and that detention lasted for sixteen days”.⁷⁰ The most explicit and elaborate assessment is maybe the one undertaken by the Grand Chamber in *Medvedyev v France* where the suspects were held on board their own ship for 13 days:

In the Court’s opinion, while it is true that the applicants’ movements prior to the boarding of the *Winner* were already confined to the physical boundaries of the ship, so that there was a *de facto* restriction on their freedom to come and go, it cannot be said, as the Government submitted, that the measures taken after the ship was boarded merely placed a restriction on their freedom of movement. The crew members were placed under the control of the French special forces and confined to their cabins during the voyage. True, the Government maintained that during the voyage the restrictions were relaxed. In the Court’s view that does not alter the fact that the applicants were deprived of their liberty throughout the voyage as the ship’s course was imposed by the French forces.⁷¹

Even though only a handful of cases deal with the qualification of measures interfering with liberty taken during interception of criminal suspects at sea as deprivation of liberty, the three criteria necessary for qualifying a measure as deprivation of liberty are quite well-developed. Hence, they can be applied *mutatis mutandis* to the situation of piracy suspects seized by patrolling naval States. Although the ultimate determination of whether a deprivation of liberty is at stake hinges on the specificities of the concrete case, piracy suspects can be said to be deprived of their liberty as soon as patrolling naval States exercise enforcement measures based on Article 105 UNCLOS – whether this is done on board the alleged pirate skiff or on board the warship is immaterial. The measures un-

⁷⁰ *Rigopoulos v Spain* App no 37388/97 (ECtHR, 12 January 1999) para 9 of the legal considerations.

⁷¹ *Medvedyev and Others v France* (Grand Chamber) (n 1) para 74.

der Article 105 UNCLOS become available if after the exercise of the right of visit – stopping and boarding the suspected vessel, security sweep, document check in order to verify the ship's right to fly the flag, and searching persons and property on board – the suspicion remains that the boat is engaged in piracy. Interferences with the liberty of piracy suspects occurring thereupon (notably when securing the crime scene and collecting evidence, for example, by carrying out searches and seizures and/or questioning persons on board) amount to a deprivation of liberty. Whether interferences with the liberty of movement during the exercise of the right of visit already amount to a deprivation of liberty – rather than a mere restriction – mainly depends on the approach taken vis-à-vis the short-term measures employed.

Most importantly, it must be stressed one more time that it does not matter what terminology is used in legislation or practice to denote the various measures interfering with the liberty of piracy suspects to come and go – as long as the measure qualifies as deprivation of liberty in the sense of Article 5 ECHR. It is equally immaterial whether piracy suspects are subject to *de facto* or *de jure* arrest or detention. What matters is whether the measure fulfils the space, coercion and time elements of the deprivation of liberty definition in the sense of Article 5 ECHR.

b) Deprivation of Liberty under Article 9 ICCPR

Similar to Article 5 ECHR, the notion of liberty of the person in Article 9 ICCPR must be read narrowly. Rather than relating to liberty in general, it only encompasses one of its aspects: the freedom of bodily movement.⁷²

As holds true for the ECHR, the ICCPR also draws a distinction between a deprivation of personal liberty and a restriction thereof.⁷³ The latter is a less grave restriction of freedom of bodily movement and is protected by other, more specific provisions of the Covenant rather than Article 9 ICCPR.⁷⁴ A restriction of liberty results, for example, from limitations on the free choice of domicile or residence, exile, confinement to an island or expulsion from State territory.⁷⁵

Deprivation of liberty only encompasses the freedom of bodily movement in the strictest sense. It results from the forceful detention of a person at a certain location or narrowly confined space.⁷⁶ Thus, similar to the ECHR, both a space

72 Nowak, *U.N. Covenant on Civil and Political Rights* (n 17) 212; Sarah Joseph, Jenny Schultz and Melissa Castan, *The International Covenant on Civil and Political Rights: Cases, Materials, and Commentary* (2nd edn, OUP 2004) 308.

73 Joseph, Schultz and Castan (n 72) 308.

74 Articles 12 and 13 ICCPR.

75 Nowak, *U.N. Covenant on Civil and Political Rights* (n 17) 212.

76 *ibid*; Joseph, Schultz and Castan (n 72) 308; Scott Carlson and Gregory Gisvold, *Practical Guide to the International Covenant on Civil and Political Rights* (Transnational Publishers 2003) 82.

and coercion element must be present. With regard to the space element, it is not necessary that the person is confined to a cell. Rather, the Human Rights Committee has also considered house arrest and holding a person in a military camp as amounting to deprivation of liberty.⁷⁷ Compared with Article 5 ECHR, the time criterion seems to play a lesser role in the context of Article 9 ICCPR and the short-term character of a measure does not necessarily prevent it from being qualified as a deprivation of liberty. This is illustrated by the case *Giry v Dominican Republic* where the applicant was forcibly removed by the respondent State with a view to prosecute him by means of extradition in disguise. The respondent State argued that the measure interfering with personal liberty had only lasted for a brief period and that there was never an intention to arrest and detain the applicant (for criminal prosecutions) in the Dominican Republic but merely to expel him from national territory. However, the short-term character of the measure did not prevent the Human Rights Committee from finding that Article 9 ICCPR was violated.⁷⁸ From this case also follows that the reason behind or the nature of the measure interfering with liberty is immaterial for the determination of whether it amounts to a deprivation of liberty.⁷⁹ That neither the reason for arrest or detention nor its (criminal law) nature are important in the context of Article 9 ICCPR was also confirmed by the International Court of Justice in the *Case concerning Ahmadou Sadio Diallo* where it held that the provisions of Article 9 ICCPR

apply in principle to any form of arrest or detention decided upon and carried out by a public authority, whatever its legal basis and the objective being pursued ... The scope of these provisions is not ... confined to criminal proceedings; they also apply, in principle, to measures which deprive individuals of their liberty that are taken in the context of an administrative procedure, such as those which may be necessary in order to effect the forcible removal of an alien from the national territory.⁸⁰

This finding is important against the background that some States arresting and detaining piracy suspects argue that at the time of seizure, the alleged pirates have not yet entered the door of their domestic criminal law – that is to say, the

77 Carlson and Gisvold (n 76) 82.

78 *Giry v Dominican Republic* (n 11): for the respondent State's argument, see para 4.2; the Committee did not examine whether Article 9 ICCPR had been violated because the facts at hand would "basically raise issues under article 13 of the Covenant" (para 5.3); the individual opinion submitted by four Committee members, however, contains a finding that Article 9 ICCPR had been violated in the case at hand.

79 Carlson and Gisvold (n 76) 82.

80 *Case Concerning Ahmadou Sadio Diallo (Republic of Guinea v Democratic Republic of the Congo)* (Judgment) [2010] ICJ Rep 639, para 77.

ordinary rules governing deprivation of liberty on suspicion of criminal activity do not apply to them during that phase.⁸¹

In addition to the notion of “deprivation of liberty”, the concepts of “arrest” and “detention” appear in Article 9 ICCPR. The wording and a systematic reading of Article 9 ICCPR do not provide a clear answer on how “arrest” and “detention” relate to the concept of “deprivation of liberty”. By referring to the drafting history, it is suggested that Article 9 ICCPR does not recognize any other form of deprivation of liberty beyond these two. With this in mind, it is argued that only a broad interpretation of the words “arrest” and “detention” is compatible with the object and purpose of the Covenant.⁸² Any other interpretation would contradict the comprehensive protection envisaged by the provision. Understood in this way, the notion of “arrest” denotes the act of depriving personal liberty and generally lasts until the point where the person is brought before the competent authority. The concept of “detention” refers to the state of deprivation of liberty. Thereby, it is immaterial whether this state was brought about by arrest (custody or pre-trial detention), conviction (imprisonment) or even *de facto* acts (such as kidnapping).⁸³ Whether this distinction is meaningful in the context of piracy, where many suspects are not brought before an authority at all after their arrest or while being held on board a warship, can remain unanswered since the important threshold question in relation to Article 9 ICCPR is – like in Article 5 ECHR – whether a deprivation of liberty is at stake.

The fact that piracy suspects are held against their will at a narrowly confined space – their ship or on board a law enforcement vessel – seems to suffice that the guarantees of Article 9 ICCPR apply. In light of the foregoing observations, it is immaterial for the application of Article 9 ICCPR whether a measure interfering with the liberty of movement of piracy suspects is only of a short duration. It is equally irrelevant under Article 9 ICCPR whether the seizing State deems arrest and detention of piracy suspects to be of a criminal law nature and whether it intends to prosecute the suspects in its own courts.

B. Justificatory Grounds for Depriving Piracy Suspects of Their Liberty

As soon as piracy suspects can be said to be deprived of their liberty in the sense of Article 5 ECHR and Article 9 ICCPR,⁸⁴ the guarantees of the right to liberty enshrined in these provisions apply. One such guarantee is that arrest and detention can only be carried out on specific grounds. According to Article 5 ECHR, deprivation of liberty is only permissible for those grounds that are explicitly

81 See above Part 2/I/D/1/b and Part 2/II/C/3/b.

82 It is suggested that the interpretation of the terms “arrest” and “detention” should be as broad as to include deprivation of liberty by private persons.

83 Nowak, *U.N. Covenant on Civil and Political Rights* (n 17) 221.

84 See above Part 4/I/A.

mentioned in the first paragraph of the provision. Hence, the domestic legislature can only permit deprivation of liberty within these confines. Under the ICCPR, a different paradigm governs: Article 9(1) ICCPR provides that no one shall be “deprived of his liberty except on such grounds ... as are established by law”. Thus, the domestic legislature is, in principle, free to define the grounds on which a person may be deprived of his liberty. However, the State’s sovereign right to deprive a person of liberty is limited in two ways by Article 9 ICCPR: firstly, every deprivation of liberty must meet the strictures flowing from the legality requirement and, secondly, must observe the prohibition of arbitrariness.⁸⁵ These two principles were included in express terms in Article 9(1) ICCPR as an alternative to an exhaustive listing of all permissible cases of deprivation of liberty,⁸⁶ ie the approach followed under Article 5(1) ECHR. Since Article 9(1) ICCPR contains nothing more than a reference to (domestic) law in terms of justificatory grounds for arrest and detention, the following analysis concentrates on Article 5(1) ECHR, which enumerates permissible grounds for deprivation of liberty in the provision itself and thus under international law.

As already mentioned, under the ECHR’s protection scheme, a person can only be deprived of his liberty based on one (or several) of the justificatory grounds enumerated in Article 5(1)(a) to (f) ECHR. This list of exceptions to the right to liberty is exhaustive⁸⁷ – any deprivation of liberty not covered by one of the grounds listed in the provision is *per se* in breach of the right to liberty. What is more, the exceptions must be interpreted in a strict⁸⁸ and narrow way because only such an interpretation is consistent with the aim and purpose of the provision, namely to ensure that no one is arbitrarily deprived of his liberty.⁸⁹ A narrow interpretation is also required against the background that these grounds “constitute exceptions to a most basic guarantee of individual freedom”.⁹⁰ Further, the

85 Joseph, Schultz and Castan (n 72) 308.

86 Nowak, *U.N. Covenant on Civil and Political Rights* (n 17) 223–25.

87 *Medvedyev and Others v France* (Grand Chamber) (n 1) para 117; *C v the United Kingdom* App no 10427/83 (Commission Decision, 12 May 1986) 1. of the legal considerations; *Quinn v France* App no 18580/91 (ECtHR, 22 March 1995) para 42; *Bogdanovski c Italie* App no 72177/01 (ECtHR, 14 December 2006) para 73; *Kaboulov v Ukraine* App no 41015/04 (ECtHR, 19 November 2009) para 129; *Khodzhayev v Russia* (n 10) para 132; *Khaydarov v Russia* (n 10) para 126; *Gaforov v Russia* (n 10) para 181.

88 *Medvedyev and Others v France* (Grand Chamber) (n 1) para 117; *Kolompar v Belgium* App no 11613/85 (ECtHR, 24 September 1992) para 39.

89 *Quinn v France* (n 87) para 42; *Eminbeyli v Russia* App no 42443/02 (ECtHR, 26 February 2009) para 42; *Bogdanovski c Italie* (n 87) para 73; *Kaboulov v Ukraine* (n 87) para 129.

90 *El-Masri v ‘the former Yugoslav Republic of Macedonia’* App no 39630/09 (Grand Chamber, ECtHR, 13 December 2012) para 230; *Eminbeyli v Russia* (n 89) para 42; *Shamayev and others v Georgia and Russia* App no 36378/02 (ECtHR, 12 April 2005) para 396.

obligation to interpret the justificatory grounds of Article 5(1) ECHR narrowly also flows from Article 18 ECHR, which forbids the use of the enumerated restrictions to the right to liberty for any purpose other than those for which they have been prescribed.⁹¹

In the context of piracy, three grounds listed in Article 5(1) ECHR potentially serve as justificatory grounds for deprivation of liberty: arrest and detention on suspicion of criminal activity based on subparagraph (c), arrest and detention of minors in order to bring them before a competent legal authority according to subparagraph (d), and arrest and detention of persons with respect to whom extradition proceedings are under way as permitted by subparagraph (f). Thus far, jurisprudence and doctrine have analysed deprivation of liberty of piracy suspects mainly from the angle of Article 5(1)(c) ECHR, while the other justificatory grounds have not received much attention. The justificatory ground on which deprivation of liberty is based matters a great deal. Not only are the procedures to be followed different, but the procedural guarantees to be granted to the person arrested or detained differ as well.⁹² Most notably, Article 5(3) ECHR requesting that every person deprived of his liberty “be brought promptly before a judge or other officer authorized by law to exercise judicial power” only applies to arrest and detention on suspicion of criminal activity according to Article 5(1) (c) ECHR.

The following discusses the justificatory grounds of Article 5(1)(c), (d) and (f) ECHR specifically with regard to arrest and detention of piracy suspects. Once their meanings in the context of piracy and the question whether they apply as such are clarified, the relationship between these justificatory grounds will be analysed. In other words, the study will turn to the question of which ground(s) potentially apply to each phase of disposition – ie the initial seizure and arrest, detention pending the seizing State’s decision whether to prosecute the suspects in its own courts, detention once the seizing State decides not to exercise its criminal jurisdiction and detention while a transfer is evaluated, negotiated and requested.

1. Justificatory Grounds of Article 5(1) ECHR

a) *Arrest and Detention on Suspicion of Criminal Activity*

Article 5(1)(c) ECHR permits

91 For a case where violations of Article 5(1)(f) ECHR and Article 18 ECHR are discussed see *Kolompar c la Belgique* App no 11613/85 (Rapport (31) de la Commission, 26 February 1991) para 62.

92 Regarding the requirement of lawfulness, see below Part 4/I/C; regarding the procedural safeguards to be granted see below Part 4/II.

the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so.

Whether the three alternatives mentioned in the provision have independent meanings is a controversial topic of debate in doctrine. Those taking the position that the second and third option are redundant, ie have no independent normative meaning, argue that the Court has decided that any person arrested and detained based on Article 5(1)(c) ECHR must eventually be brought to trial.⁹³ This, in turn, only makes sense if there was also a suspicion that the person concerned had actually committed an offence. If the provision is read this way, the second option (to prevent the commission of an offence) is indeed covered by the first (having committed an offence) and is therefore redundant.⁹⁴ The view that the second alternative is without independent meaning, ie that it does not allow for pure preventive detention independent of the commission of an offence, seems to be confirmed by the Court in *Jėčius v Lithuania* where it opined that a person may be arrested and detained within the meaning of Article 5(1)(c) ECHR “only in the context of criminal proceedings, for the purpose of bringing him before the competent legal authority on suspicion of having committed an offence”.⁹⁵ With reference to this judgment, it is further argued that the third alternative (to prevent flight) does not add anything to the first option and can thus only be understood to cover the scenario where the suspect is caught red-handed,⁹⁶ which is likely to happen in counter-piracy operations. The following analysis rests on the assumption that the second and third alternatives mentioned in Article 5(1)(c) ECHR have indeed no independent meaning. Therefore, as a general rule, the focal point of this study is “arrest and detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence”, which is referred to as “arrest and detention on suspicion of criminal activity”.

We now turn to the various elements of Article 5(1)(c) ECHR, the first of which is the notion of “offence”. As is common practice for terms used in

93 Trechsel and Summers (eds) (n 25) 426.

94 *ibid.* Others take the stance that the second option of Article 5(1)(c) ECHR also allows for arrest and detention of a person who has not yet committed an offence, ie for purely preventive reasons. According to this view, pure preventive detention can only be ordered for the prevention of a concrete and imminent offence and cannot be based on a general assumption that the individual in question will commit an offence in the future. On this debate, see Esser (n 9) 245–46.

95 Trechsel and Summers (eds) (n 25) 426, citing *Jėčius v Lithuania* App no 34578/97 (ECtHR, 31 July 2000) para 50, and *Wloch v Poland* App no 27785/95 (ECtHR, 19 October 2000) para 108; Esser (n 9) 246.

96 Trechsel and Summers (eds) (n 25) 427.

Convention provisions, it must be interpreted autonomously.⁹⁷ The notion of “offence” covers all conduct punishable under national law.⁹⁸ The punishment need not be a criminal sanction as such, but can be any kind of sanction having a similar effect. Furthermore, with regard to criminal offences, the category of national law to which such offences belong – for example, whether categorized as a petty offence or one of more gravity⁹⁹ – is irrelevant. However, it must be a concrete and specific offence.¹⁰⁰ The fact that the criminal law of many jurisdictions do not have (or have abolished)¹⁰¹ the specific offence of piracy or armed robbery at sea does not matter in the context at hand – the usual *modus operandi* of Somali-based pirates generally fulfils a number of other offences known to most (if not all) domestic criminal laws.¹⁰² Thus, as a general rule, the conduct of so-called Somali-based pirates amounts to an “offence” in the sense of Article 5(1)(c) ECHR.

A further element of the justificatory ground stipulated in Article 5(1)(c) ECHR is that lawful arrest and detention is conditional upon there being “reasonable suspicion” that the person deprived of liberty has committed an offence.¹⁰³ For a long time, the Commission was reluctant to scrutinize whether arresting authorities had really acted upon a reasonable suspicion.¹⁰⁴ This changed with *Fox, Campbell and Hartley v the United Kingdom* where it rejected the argument that a *bona fide* suspicion suffices. Rather, it held that “reasonable suspicion” requires the existence of facts or information such that an objective observer would

97 Colvin and Cooper (eds) (n 30) 165; Trechsel and Summers (eds) (n 25), 426–427; Esser (n 9) 240.

98 Esser (n 9) 240.

99 *ibid* (regarding German criminal law); Colvin and Cooper (eds) (n 30) 165 (re English criminal law).

100 Esser (n 9) 240.

101 In France, eg, the law of 1825 on the safety of navigation (the only legal text in France defining and criminalizing piracy) was abolished in December 2007 by ‘loi n° 2007-1787 du 20 décembre 2007 relative à la simplification du droit’ (act pertaining to the simplification of law) because the offence was considered to be superfluous in ‘modern times’: Luc Briand, ‘Lutte contre la piraterie maritime: la France renforce son arsenal législatif. À propos de la loi n° 2011-13 du 5 janvier 2011 relative à la lutte contre la piraterie et à l’exercice des pouvoirs de police en l’État en mer’ [2011] *Gazette du palais* 8, 8.

102 German criminal law, eg, does not contain a specific offence of piracy or armed robbery at sea; for the offences under German criminal law generally relevant with regard to the conduct of Somali-based pirates, see above Part 2/II/B/4/b; Danish criminal law does not contain an offence of piracy as such; for offences under Danish criminal law, which are generally fulfilled by Somali-based pirates, see above Part 2/I/B/1.

103 Colvin and Cooper (eds) (n 30) 165.

104 Trechsel and Summers (eds) (n 25) 422–23.

be satisfied that the person concerned may have committed the offence.¹⁰⁵ This reasonableness test depends on all the circumstances of the case.¹⁰⁶ As a general rule, however, the suspicion can be less than the one necessary to charge a person with an offence.¹⁰⁷ Moreover, it need not be firmly established that an offence has actually been committed nor must the precise nature of that offence be determined.¹⁰⁸ With regard to the element of “reasonable suspicion”, it must be stressed that the distinction between an alleged pirate ship on the one hand and a fishing or smuggling boat on the other often poses an operational challenge. The mere sighting of weapons on board is generally not sufficient to prove that a boat is engaged in piracy since, in the region prone to Somali-based piracy, most ships carry arms for the purpose of self-defence.¹⁰⁹ However, if the number or types of weapons on board are in excess of those needed for self-defence, this may substantiate a suspicion of piracy. A suspicion of piracy is further substantiated if the boat is located in an area where pirate attacks are known to take place and if nothing points to the fact that the fishing gear on board the vessel has been recently used (such as wet fishing nets or freshly caught fish). Moreover, pirate paraphernalia on board, such as grappling hooks and boarding ladders, are a strong indicator that the vessel is indeed a pirate boat. Finally, since it is assumed that a minimum of four persons is necessary to board a merchant ship from a skiff while one person remains on the skiff, the number of persons on board may add to the substantiation of a suspicion of piracy.¹¹⁰ In a situation where several of these indicators are present, a reasonable suspicion of criminal activity can arguably be acknowledged. Since this suspicion may later turn out to be wrong, it is important to note that deprivation of liberty does not take an unlawful or arbitrary character simply because there was an incorrect assessment of facts. This is only the case if the determination of facts suffered from extreme flaws and where the allegation of having committed an offence is completely unfounded.¹¹¹ While distinguishing pirate activity from lawful activity may be challenging in practice, nothing seems to point to the fact that patrolling naval States take the requirement of “reasonable suspicion of having committed an offence” too lightly.

105 *Fox, Campbell and Hartley v the United Kingdom* App nos 12244/86, 12245/86, 12383/86 (ECtHR, 30 August 1990) para 32.

106 Colvin and Cooper (eds) (n 30) 165; Pieter Van Dijk and others (eds), *Theory and Practice of the European Convention on Human Rights* (4th edn, Intersentia 2006) 473.

107 Trechsel and Summers (eds) (n 25) 423.

108 Van Dijk and others (eds) (n 106) 473.

109 Anna Petrig, ‘Counter-Piracy Operations in the Gulf of Aden: Expert Meeting on Multinational Law Enforcement & Sea Piracy held at the Max Planck Institute for Foreign and International Criminal Law’ (15 January 2010) <www.mpg.de/622610/pressRelease20100115> accessed 29 January 2013.

110 Document on file with author.

111 Esser (n 9) 242–43.

Finally, for the justificatory ground of Article 5(1)(c) ECHR to be fulfilled, arrest or detention must be effected for the purpose of bringing the person before the competent legal authority. First of all, it must be noted that the requirement extends to all three options mentioned under subparagraph (c), ie the suspicion of having committed an offence and to prevent the commission of an offence or the flight of an alleged offender.¹¹² The objective behind a deprivation of liberty based on subparagraph (c) – to bring the person before the competent legal authority¹¹³ – aims at ensuring two goals.¹¹⁴ Firstly, it shall secure later criminal proceedings in which a determination of innocence or guilt will take place.¹¹⁵ Secondly, it shall prevent a person from being detained over a longer period of time solely based on an administrative act.¹¹⁶ It does not suffice if the purpose of bringing the person deprived of liberty before the competent authority is only initially present, ie at the moment of arrest. Rather, it must be present during the entirety of the detention. Hence, the continued legality of detention depends on whether criminal proceedings with regard to the offence giving rise to deprivation of liberty are actually initiated and diligently pursued.¹¹⁷ In *Ciulla v Italy*, the Court stressed that Article 5(1)(c) ECHR “permits deprivations of liberty only in connection with criminal proceedings”.¹¹⁸ Since the arrest in question “was not made in the context of criminal proceedings”,¹¹⁹ it decided that it was not covered by Article 5(1)(c) ECHR. In short, arrest and detention under Article 5(1)(c) ECHR must always feature a close link to the criminal proceedings against that person for the very offence giving rise to deprivation of liberty.

While Article 5(1)(c) ECHR requires that the intention behind arrest or during detention is to investigate a criminal offence, it is not necessary that this objective can indeed ultimately be realized.¹²⁰ In the words of the Court: “The exist-

112 Jim Murdoch, *Article 5 of the European Convention on Human Rights: The Protection of Liberty and Security of Person* (Council of Europe Publishing and Documentation Service 1994) 25; Colvin and Cooper (eds) (n 30) 165.

113 The provision does not require that the order for arrest or detention itself must originate from a judicial authority: Esser (n 9) 238, and Van Dijk and others (eds) (n 106) 472.

114 Eva Unfried, *Die Freiheits- und Sicherheitsrechte nach Art. 5 EMRK: Ein Vergleich mit der Strafprozessordnung im Hinblick auf die Auswirkungen der Konventionsrechte auf die deutsche Strafrechtsprechung* (Duncker & Humblot 2006) 36.

115 *ibid*; Esser (n 9) 237–38.

116 Unfried (n 114) 36.

117 Mole and Meredith (n 17) 145–46.

118 *Ciulla v Italy* App no 11152/84 (ECtHR, 22 February 1989) para 38.

119 *ibid* para 40; rather, the applicant was deprived of his liberty for the issuance of a compulsory residence order: para 39.

120 *Labita v Italy* App no 26772/95 (ECtHR, 6 April 2000) para 155; Colvin and Cooper (eds) (n 30) 165.

ence of such a purpose is to be considered independently of its achievement.”¹²¹ Hence, the fact that a considerable number of piracy suspects are released for various reasons (namely a lack of evidence or the failure to identify a State willing and able to prosecute the suspects) after having been detained by the seizing State for hours, days or even weeks, does not matter with respect to the justificatory ground of Article 5(1)(c) ECHR – as long as the said purpose was present during the entire period of deprivation of liberty. In other words, the ultimate release of piracy suspects does not contravene Article 5(1)(c) ECHR if the arrest was carried out and detention maintained for the very purpose of bringing them before the competent legal authority.¹²²

Be that as it may, what is meant by “competent legal authority” is somewhat contested. It could either be the trial judge, ie the court ultimately deciding on the merits, or the judge or officer mentioned in Article 5(3) ECHR to which the person must be brought promptly after having been arrested.¹²³ The Court has adopted the latter approach in various cases. The main argument goes that Article 5(1)(c) ECHR and Article 5(3) ECHR must be read as a whole and that the different notions are used interchangeably.¹²⁴ The main argument in favour of the former approach, ie that it is the judge deciding on the merits, is as follows: detention on remand must always be in conformity with subparagraph (c), that is to say the purpose of bringing the person deprived of his liberty before the competent legal authority must be present during the entire period of detention. If the purpose of arrest and detention under subparagraph (c) were to bring the person before a judge or officer in the sense of Article 5(3) ECHR, detention *after* having complied with this requirement could, however, no longer be said to serve that purpose and would become unlawful because of the newly missing purpose. This would be an absurd result. Therefore, logically speaking, the purpose described in subparagraph (c) must be to bring the arrested or detained person before the judge deciding on the merits.¹²⁵

Overall, the requirement of “reasonable suspicion of having committed an offence” under Article 5(1)(c) ECHR poses no particular problems in the context of piracy. The second limb – “for the purpose of bringing him before the competent legal authority” – necessitates closer scrutiny against the background that some patrolling naval States base detention of suspects on this provision not only after the initial seizure and during the decision whether to prosecute the suspects

121 *Labita v Italy* (n 120) para 155; Colvin and Cooper (eds) (n 30) 165.

122 On later release in general and not specifically with regard to piracy, see Trechsel and Summers (eds) (n 25) 427–28, and Colvin and Cooper (eds) (n 30) 165.

123 Esser (n 9) 238.

124 Van Dijk and others (eds) (n 106) 472.

125 Trechsel and Summers (eds) (n 25) 427; in agreement with the former author: Wolfgang Peukert, ‘Artikel 5’ in Jochen Frowein and Wolfgang Peukert (eds), *Europäische Menschenrechtskonvention: EMRK-Kommentar* (3rd edn, N.P. Engel Verlag 2009) 103.

domestically, but also *after* they have decided to surrender the suspects held on board their warship to a third State for prosecution, ie not to exercise their own criminal jurisdiction over the suspects. This begs the question whether Article 5(1)(c) ECHR also justifies deprivation of liberty for the purpose of bringing the person before a *foreign* authority. This issue is intrinsically linked with the nature of the relationship between Article 5(1)(f) ECHR, which explicitly mentions arrest and detention with a view to surrender for prosecution, and Article 5(1)(c) ECHR. These interpretational challenges, which are engendered by the transnational and cooperative nature of counter-piracy operations, will be discussed after the following account of the justificatory grounds of Article 5(1)(d) and (f) ECHR.

b) Arrest and Detention of Minors

According to the UN Monitoring Group on Somalia, the age of Somali-based pirates generally varies between 17 and 32 years of age. Exceptionally, members of pirate attack groups are even younger.¹²⁶ Moreover, there is a real possibility that seized piracy suspects have not yet reached the age of majority. For instance, three of the ten seized suspects involved in the attack against the *Taipan* and later prosecuted in Hamburg, Germany were minors when they committed the offence.¹²⁷ This warrants a look into Article 5(1)(d) ECHR, which allows for “the detention of a minor by lawful order for the purpose of educational supervision or his lawful detention for the purpose of bringing him before the competent legal authority”.

Whether or not the age of majority must be defined autonomously or according to domestic law is disputed.¹²⁸ As we have seen, Article 1 CRC defines a “child” as every human being below the age of 18 years unless majority is attained earlier under the law applicable to the child. This corresponds to the recommendations of Resolution (72)29, where the Committee of Ministers stated that it is only at 18 years of age that a person has full legal capacity – however, the Resolution is not binding upon the Court.¹²⁹

Article 5(1)(d) ECHR contains two justificatory grounds for deprivation of liberty of minors. The first one refers to cases where a court or administrative body decides by a lawful order on a measure placing the minor under educational

126 UNSC (n 62) para 64 and fn 91. For more details on minors involved in pirate attacks, see above Part 1/I.

127 ‘LG Hamburg verkündet Haftstrafen für alle Piraten: Verteidiger kündigt Revision an’ (Legal Tribune Online, 19 October 2012) <www.lto.de/recht/hintergruende/h/verteidiger-kuendigen-revision-gegen-hamburger-urteil-im-piratenprozess-an/> accessed 29 January 2013.

128 Arguing for an autonomous interpretation of the age of majority: Renzikowski (n 56) 84, and Macovei (n 26) 42; arguing that the term “minor” must be defined based on domestic law: Esser (n 9) 247, and Van Dijk and others (eds) (n 106) 476.

129 Renzikowski (n 56) 84.

supervision and which entails a deprivation of liberty, such as an enforced stay in a reformatory institution or clinic.¹³⁰ The second ground allows for detention in order to bring a minor before the competent legal authority. If interpreted in its context and in line with the *travaux préparatoires*, this second justificatory ground only applies to situations where educational supervision in the sense of the first ground is being considered and only encompasses authorities competent to decide on measures having an educational purpose.¹³¹ For this ground to apply, a reasonable suspicion that the minor has committed an offence is not required. This is due to the fact that educational supervision of a minor may be justified and even necessary without the presence of criminal behaviour – for example, to secure his removal from harmful surroundings.¹³²

If Article 5(1)(d) ECHR were interpreted as allowing detention on remand of minors in general, ie not tied to an educational purpose, it would be a dangerous departure from Article 5(1)(c) ECHR for two reasons: it does not require a reasonable suspicion that the minor has committed an offence and the right to be brought promptly before the judge guaranteed by Article 5(3) ECHR does not apply. Therefore, as soon as the minor is suspected of having committed a criminal offence, arrest and detention must also be covered by the requirements stipulated under Article 5(1)(c) ECHR. Otherwise, the most important procedural safeguard enshrined in Article 5(3) ECHR could be bypassed.¹³³ If interpreting Article 5(1) ECHR along the lines of the principle of effectiveness,¹³⁴ it can be argued that making procedural safeguards available to persons deprived of their liberty aims at ensuring the overall purpose of Article 5 ECHR – which is to prevent *any* individual from being deprived of his liberty in an arbitrary or unlawful way. Like adults, minors suspected of having committed an offence have the right to be brought promptly before a judge. Hence, if minors are deprived of their liberty on suspicion of criminal activity, the requirements of Article 5(1)(c) ECHR must be respected and Article 5(3) ECHR applied.¹³⁵ That Article 5(1)(c) ECHR prevails in these situations over Article 5(1)(d) ECHR also seems evident in light of Article 37(d) CRC, which grants “the right to prompt access to legal and other assistance” to every child deprived of his liberty, ie a guarantee similar to Article 5(3) ECHR.

For these reasons, Article 5(1)(d) ECHR has no independent meaning for minors suspected of having committed acts of piracy in that the requirements of the more protective Article 5(1)(c) ECHR read together with Article 5(3) ECHR

130 Macovei (n 26) 42; Esser (n 9) 248.

131 Renzikowski (n 56) 85; Esser (n 9) 248.

132 Trechsel and Summers (eds) (n 25) 445; Macovei (n 26) 43.

133 Esser (n 9) 248.

134 Birgit Schlütter, ‘Aspects of Human Rights Interpretation by the UN Treaty Bodies’ in Helen Keller and Geir Ulfstein (eds), *UN Human Rights Treaty Bodies: Law and Legitimacy* (CUP 2012) 286–87.

135 Council of Europe/European Court of Human Rights (n 69) para 74.

must also be respected vis-à-vis minors. The justificatory ground of Article 5(1)(d) ECHR is therefore no longer considered in the following analysis.

c) Arrest and Detention with a View to Extradition or Deportation

Article 5(1)(f) ECHR contains another justificatory ground for deprivation of liberty potentially relevant in the context of counter-piracy operations off the coast of Somalia and the region. It allows for the “lawful arrest or detention ... of a person against whom action is being taken with a view to deportation or extradition”. The first step of this analysis explores what meaning the Strasbourg organs attach to the notions of deportation and extradition and whether transfers of piracy suspects for prosecution can be subsumed under one or even both of the terms, which have an autonomous meaning in the context of the ECHR.¹³⁶ The second step is an enquiry into the general meaning of “action is being taken with a view to ... extradition” in order to later apply these findings specifically to the transfer decision procedure.

aa) Transfers Are Not “Deportations” in the Sense of Article 5(1)(f) ECHR

At first sight, deportation has nothing in common with surrender for criminal prosecution, which rather seems to fall under the extradition limb of Article 5(1)(f) ECHR. However, in some cases, the Strasbourg organs found that deportation in the sense of Article 5(1)(f) ECHR encompasses extradition in disguise – understood in this context as the use of immigration proceedings, namely deportation proceedings, instead of or in circumvention of extradition proceedings in order to surrender an individual to a State anxious to criminally prosecute that person. In other cases, however, extradition in disguise was deemed to fall outside the scope of the notion of deportation. The case law of the Strasbourg organs discussing whether disguised extradition qualifies as deportation in the sense of Article 5(1)(f) ECHR or whether it is not covered by this (or any other) justificatory ground listed in Article 5(1) ECHR is scarce.¹³⁷ In quite a number of cases,

¹³⁶ The requirement that arrest and detention must be “lawful” will be discussed in Part 4/I/C together with the requirement that liberty can only be deprived “in accordance with a procedure prescribed by law” since the Court generally does not distinguish between these two elements, but rather evaluates them together under the general heading of “lawfulness”.

¹³⁷ The following cases of the Commission are not helpful for the analysis at hand – even though the use of extradition in disguise was the basis for alleged violations of Article 5 ECHR – for the following reasons: In *Akthar v the Netherlands* App no 11769/85 (Commission Decision, 2 March 1987), the applicant claimed that “his intended expulsion constitutes an extradition in disguise” and invoked Article 5(1)(f) ECHR. The Commission, however, found that “the facts of the case as submitted by the applicant do not raise any issue under this provision” and rejected this part of the complaint as manifestly ill-founded. In *Urrutikoetxea v France* App no 31113/96 (Commission Decision, 5 December 1996), the applicant, invoking Article 5(1)(c) and

the Commission or Court do not clearly answer the question whether a specific method of removal qualifies as deportation in the sense of Article 5(1)(f) ECHR, but rather start their analysis by addressing whether arrest and detention was lawful and free from arbitrariness (and then conclude the analysis there because it is found not to be).

Thus far, the Court has not subsumed extradition in disguise under the term “extradition” as used in Article 5(1)(f) ECHR.¹³⁸ When deciding whether extradition in disguise is covered by the Article 5(1)(f) ECHR notion of deportation, the Court has adopted, broadly speaking, two approaches. On the one hand, it may take a material-functional interpretative stance towards Article 5(1)(f) ECHR. Under this approach, the Court is not ready to subsume extradition in disguise under the deportation limb of Article 5(1)(f) ECHR, arguing that even though extradition in disguise formally qualifies as a measure of immigration law, its real purpose is to surrender a person for prosecution in circumvention of extradition proceedings. This interpretation has the consequence that deprivation of liberty with a view to extradition in disguise is not covered by Article 5(1)(f) ECHR, ie it lacks a valid justification. This approach is exemplified by *Bozano v France* where France decided to deport the applicant after his extradition from France to Italy proved to be impossible.¹³⁹ The formal deportation order was enforced during the night by French plainclothes officials, who took the applicant to the Swiss border where the Swiss police were waiting to take him into custody. Switzerland later

(f), (3) and (4) ECHR, considered his “forcible removal” from France to Spain to constitute a “disguised extradition” designed to secure his criminal prosecution in the receiving State. The Commission, however, stated that despite “a thorough examination of evidence”, it “found nothing to support the applicant’s argument that his removal to Spain was made for any reason other than enforcing the expulsion order against him”. This part of the application was rejected for being manifestly ill-founded. In *Iruretagoyena v France* App no 32829/96 (Commission Decision, 12 January 1998), the applicant also claimed that Article 5(1)(c) and (f), (3) and (4) ECHR had been violated through the use of disguised extradition by France. The Commission decided in the same way as in *Urrutikoetxea v France*. The case *X and Y v Sweden* (n 45), involves the deportation of a person suspected of belonging to a terrorist organization by Sweden to Japan; however, it is not mentioned whether the applicant was criminally prosecuted in the receiving State; therefore, the case will not be considered in the following analysis.

¹³⁸ The same holds true for the Commission.

¹³⁹ *Bozano v France* (n 45): Bozano had been convicted *in absentia* to life imprisonment by an Italian court (para 14) and Italian police subsequently circulated an international arrest warrant (para 15). The applicant was arrested in France and held in custody pending extradition; Italy thereupon officially applied for his extradition under a bilateral extradition treaty (paras 16–17). However, a French court ruled against his extradition because the Italian procedure for trial *in absentia* was deemed incompatible with French *ordre public* (para 18).

extradited the applicant to Italy.¹⁴⁰ On the other hand, in some cases, the Court may take a formal interpretative stance on the notion of deportation as used in Article 5(1)(f) ECHR. In these cases, it subsumes removal measures under the notion of deportation if they formally qualify as such without taking into account the actual purpose the measures intend to secure, which is surrender for prosecution.¹⁴¹ However, as a quasi-corrective effort, the Court requires that the procedural safeguards applicable to expulsion proceedings (most notably Article

140 *Bozano v France* (n 45): With regard to Article 5(1)(f) ECHR, the Court held that the disputed deprivation of liberty was not as part of “action ... with a view to extradition”, since France had refused the Italian extradition request. Rather, the Court held that it was the means chosen for giving effect to the deportation order, “the final stage of action ... with a view to deportation”. Consequently, Article 5(1)(f) ECHR only applies with respect to the words “lawful arrest or detention ... of a person against whom action is being taken with a view to deportation” (para 53). The Court held that the deportation was not lawful because it was not in line with domestic law and was not free from arbitrariness (para 58–59). The Court concluded that “[d]epriving Mr. Bozano of his liberty in this way amounted in fact to a disguised form of extradition designed to circumvent the negative ruling ... [on his extradition], and not to ‘detention’ necessary in the ordinary course of ‘action ... taken with a view to deportation’” (para 60). It held that “the deportation procedure was abused in the instant case for objects and purposes other than its normal ones” (para 61). Hence, the Court implicitly stated that the applicant’s deprivation of liberty could not be based on one of the grounds exhaustively listed in Article 5(1) ECHR.

141 At times, the Commission has also subsumed extradition in disguise under the concept of deportation; see, eg, *X v the Netherlands* App no 1983/63 (Commission Decision, 13 December 1965) where extradition of the applicant was impossible because the respective offence was not covered by the extradition treaty between the United States and the Netherlands. Upon intervention of the former State, the latter decided to deport the alleged offender, ie removal under immigration law, upon his release from Dutch prison (paras 4–6 of the legal considerations). Dutch law enforcement officials accompanied the applicant during his transport to the US by air; when the plane landed, US law enforcement officials boarded the plane and arrested the applicant (para 11 of the factual considerations). Even though the Commission found the extradition in disguise complaint to be outside the material scope of application of the provision, it addressed the forced removal and Article 5(1) ECHR when examining the admissibility of other provisions (para 10 of the legal considerations). When examining an allegation relating to the presumption of innocence, which was not directly related to the removal as such, it stated that the applicant had not been charged in the sense of Article 6(2) ECHR “but was *detained pending his deportation*” (emphasis added) (para 27 of the legal considerations). Further, on the specific and more limited complaint that his detention in the aircraft had been an interference with his right to private life under Article 8(2) ECHR, the Commission repeated that “the right not to be extradited or deported is not as such included among the rights and freedoms guaranteed by the Convention” and that “a measure of extradition or deportation generally implies that the liberty of the person to be extradited or deported is restricted during the execution of that measure”, and finding that the

1 of Protocol 7 to the ECHR) are respected when surrendering a suspect to a third State. The Court followed this approach in *Nowak v Ukraine* where the Ukrainian authorities served the applicant with an expulsion order, which stated that he was in possession of a valid residence permit but that he was wanted by the Polish law enforcement authorities on a theft charge. He was transported to the Polish border post where he was arrested by Polish officials.¹⁴² As to the characterization of the removal, the Court held that the applicant “was in fact extradited to Poland under the pretext of deportation”¹⁴³ and that the applicant’s “expulsion has appearances of extradition in disguise”.¹⁴⁴ Further, it decided that Nowak’s detention was “arbitrary and not based on law”, ie that his deprivation of liberty was unlawful and therefore in violation of Article 5(1) ECHR.¹⁴⁵ While the Court did not explicitly state whether the removal qualified as deportation, it implicitly accepted the formal qualification of the removal as deportation with the consequence that it applied the Convention standards pertaining to deportations, namely the procedural safeguards for expulsions stipulated in Article 1 of Protocol 7 ECHR. It held that “[d]espite its findings that the applicant’s expulsion has appearances of extradition in disguise ..., the Court considers that this does not preclude it from examining the question of whether the removal of the applicant from the territory of Ukraine, *which was formally presented as expulsion*, complied with the Convention requirements”,¹⁴⁶ concretely, the procedural safeguards of Article 1 of Protocol 7 ECHR.

From these cases follows that the notion of “deportation” of Article 5(1)(f) ECHR may also encompass removals for prosecution if the deportation procedure is used (or abused) for the purpose of surrendering a person for prosecution. Depending on the facts of the case, the Court seems ready to qualify a measure amounting to extradition in disguise as “deportation” in the sense of Article 5(1)(f) ECHR¹⁴⁷ – or not.

Extradition in disguise is generally used in cases where extradition seems impossible or has already been denied by the requested State. In addition, States

restriction of liberty during the flight had been a lawful detention within the meaning of Article 5(1)(f) ECHR (para 28 of the legal considerations).

142 *Nowak v Ukraine* App no 60846/10 (ECtHR, 31 March 2011): the applicant left Poland for Ukraine (paras 6–7) but, since criminal proceedings against him were ongoing, informed the Polish authorities before leaving where he could be contacted (para 7). He later went to a Ukrainian police station to report a car theft and was arrested for being an “international thief” (para 10). After four days in police custody, the applicant was served with the expulsion decision and was transported to the Polish border post (paras 10–12).

143 *ibid* para 58.

144 *ibid* para 72.

145 *ibid* para 60.

146 *ibid* para 72 (emphasis added).

147 The same held true for the Commission.

have recourse to extradition in disguise where extradition proceedings are considered to have an outcome that is too uncertain or are deemed to be too cumbersome or time-consuming.¹⁴⁸ Some of these reasons against using extradition – the classical tool for surrendering a person to the prosecuting State – may also be valid in the context of piracy. However, rather than using procedures stemming from immigration law, a new procedure – transfers – has been created in order to surrender piracy suspects to third States for prosecution. Since extradition in disguise is the only removal for prosecution method to have been subsumed under the deportation limb of Article 5(1)(f) ECHR thus far, arrest and detention pending transfer cannot be based on this part of the provision.

The case law presented on extradition in disguise is nevertheless important in the context of piracy since it illustrates how the Court is ready to interpret the notions of deportation and extradition of Article 5(1)(f) ECHR broadly, ie going beyond their meaning in the strictest sense. What is more, it demonstrates that the Court secures the right to liberty in two ways. On the one hand, it interprets methods of removal for prosecution in a functional-material way, with the consequence that a method formally qualifying as deportation but used in an abusive way or at least not for genuine immigration purposes fall outside the justificatory ground of Article 5(1)(f) ECHR. Alternatively, the Court takes a formal approach and does not look at the actual purpose intended to be secured by an immigration measure, ie surrender for prosecution, and deems extradition in disguise to be covered by the justificatory ground of Article 5(1)(f) ECHR. However, as a consequence and quasi-corrective effort, it requires that the procedural safeguards available to persons subject to expulsion under the Convention are strictly followed (which may not be the case and render surrender for prosecution unlawful).

bb) Transfers May Qualify as “Extradition” in the Sense of Article 5(1)(f) ECHR

With these findings in mind, we now turn to the question whether transfers of piracy suspects, which are not extradition proceedings *stricto sensu*, potentially qualify as extradition in the sense of Article 5(1)(f) ECHR. Absent any specific case law on transfers of piracy suspects, transfer proceedings are compared with removal for prosecution methods, which are not extradition proceedings in the strict sense of the notion but have been discussed by the Court from the angle of the extradition limb of Article 5(1)(f) ECHR. Two specific legal procedures emerge from the Court’s case law, procedures which are not extradition *stricto sensu* but – identical to transfers of piracy suspects – serve the very purpose of surrendering an individual for criminal prosecution: so-called “surrenders” of

¹⁴⁸ Cherif Bassiouni, *International Extradition: United States Law and Practice* (5th edn, OUP 2007) 203; John Murphy, *Punishing International Terrorist: The Legal Framework for Policy Initiatives* (Rowman & Allanheld Publishers 1985) 36 and 44; Geoff Gilbert, *Responding to International Crime* (Martinus Nijhoff 2006) 305–06.

fugitives to the ICTY and surrenders for prosecution based on the UK Visiting Forces Act of 1952. In addition, the Court has also opined on the conformity of *de facto* handovers for prosecution with Article 5(1) ECHR.

Today, it can be safely said that the international community has discarded the idea of establishing a Chapter VII-based *ad hoc* tribunal for prosecuting Somali-based pirates.¹⁴⁹ Yet, even absent an international piracy tribunal, surrenders of piracy suspects to third States for prosecution and surrenders of persons suspected of international core crimes to international criminal tribunals are comparable to some extent. With regard to both criminal phenomena, there is no continuity between law enforcement and criminal prosecution, and in both fields a *sui generis* procedure has been established in order to bring together these two elements of criminal justice. With respect to international core crimes, the gap between domestic law enforcement and internationalized criminal prosecution is bridged by having recourse to so-called “surrenders” of suspects to international criminal tribunals, surrenders which differ from extradition *stricto sensu*.¹⁵⁰ In the realm of piracy, where we have the inverse situation – internationalized law enforcement and domestic criminal prosecution – the issue of bringing suspects from one sphere into the other was equally solved by having recourse to a *sui generis* procedure, ie transfers.¹⁵¹ The extent to which surrenders to international criminal tribunals and transfers of piracy suspects are comparable can be left open here since, as we will see next, the case law of the European Court of Human Rights provides no clear answer on whether surrenders to an international criminal tribunal qualify as extradition in the sense of Article 5(1)(f) ECHR. It is therefore not a promising avenue for answering the question whether transfers of piracy suspects are covered by the notion of “extradition” as used in Article 5(1)(f) ECHR.

Regarding surrenders to the ICTY and their relationship to Article 5(1)(f) ECHR, two cases are of relevance: *Naletilić v Croatia*¹⁵² and *Milošević v the Netherlands*.¹⁵³ In the former case, the applicant was indicted by the ICTY in 1998. In 1999, a Croatian county court ordered the applicant to be handed over to the ICTY; the Supreme Court and Constitutional Court both confirmed the decision.¹⁵⁴ None of the complaints relate to Article 5 ECHR,¹⁵⁵ but the case is in-

149 See above Part 1/II/B/1.

150 For a detailed account on the surrender procedure under the Rome Statute, see Bert Swart, ‘Article 41 – Arrest and Surrender’ in Antonio Cassese, Paola Gaeta and John R W D Jones (eds), *The Rome Statute of the International Criminal Court: A Commentary* (OUP 2002).

151 See above Part 1/III/A and B.

152 *Naletilić v Croatia* App no 51891/99 (ECtHR, 4 May 2000).

153 *Milošević v the Netherlands* App no 77631/01 (ECtHR, 19 March 2002).

154 *Naletilić v Croatia* (n 152) The Facts.

155 In relation to his removal for prosecution, the applicant complained that if surrendered to the ICTY the domestic criminal proceedings against him would necessar-

interesting due to the Court's qualification of the handover to the ICTY. In relation to the applicant's complaint that the ICTY is not an independent and impartial tribunal in the sense of Article 6 ECHR,¹⁵⁶ it stated that

exceptionally, an issue might be raised under Article 6 of the Convention by an extradition decision in circumstances where the applicant risks suffering a flagrant denial of a fair trial. However, it is *not an act in the nature of an extradition* which is at stake here, as the applicant seems to think.¹⁵⁷ Involved here is the *surrender to an international court*, which ... offers all the necessary guarantees including those of impartiality and independence.¹⁵⁸

The Court's finding in the context of Article 6 ECHR that surrenders to an international criminal tribunal cannot be considered extraditions begs the question of what this implies for arrest and detention pending surrender to the ICTY – concretely, whether the Court would qualify a surrender to an international criminal tribunal as “extradition” when considering it from the angle of Article 5(1)(f) ECHR. In *Milosevic v the Netherlands*, the applicant complained, *inter alia*, that the manner of his transfer from the Federal Republic of Yugoslavia to the ICTY was unlawful under Article 5(1) ECHR.¹⁵⁹ However, the Court rejected the complaint in its entirety for non-exhaustion of domestic remedies and, therefore, the issue of whether surrenders to an international criminal tribunal may qualify as extradition in the sense of Article 5(1)(f) ECHR also remains unanswered by this case. Overall, the question whether the Court considers surrenders to the ICTY to be covered by the term “extradition” of Article 5(1)(f) ECHR remains uncertain and, as a result, no analogy can be drawn between surrenders to international criminal tribunals and transfers of piracy suspects to domestic jurisdictions in this respect.

A more promising way to answer whether transfers of piracy suspects can be subsumed under the term “extradition” of Article 5(1)(f) ECHR is the case law of the Commission regarding the Visiting Forces Act of 1952 (UK 1952 Act), which created a *sui generis* procedure for surrendering military deserters to the State anxious to prosecute them. The Commission decided two cases where fugitives

ily be suspended, which would violate his right to be tried within a reasonable time as protected by Article 6(1) ECHR.

156 *Naletilić v Croatia* (n 152) Complaints.

157 Note that the applicant referred to his surrender as “extradition” (*ibid*, Complaints and The Law, 1.a.), while the Court put the word “extradition” in quotation marks (*ibid*, The Law, 1.a.).

158 *ibid* The Law, 1.b. (emphasis added). The Court's finding is somewhat strange since it generally applies the principle of non-refoulement to any kind of obligatory removal for prosecution; see below Part 5/I/B/2/a/cc.

159 *Milošević v the Netherlands* (n 153) Complaints.

were surrendered by the United Kingdom to the prosecuting State based on the UK 1952 Act.¹⁶⁰

The UK 1952 Act provides for the apprehension, custody and delivery of deserters from the armed forces of a country designated in the act into the custody of the respective military authorities. Other than what the Act's title suggests, it even applies in situations where the deserter is not from a force stationed in the UK. The powers provided under the Act are exercisable upon a specific or a general request submitted by the authorities of the country to whose force the deserter belongs. The request must be certified by the requesting State and the certifying authority informs the British police. When the deserter is found, he is arrested and brought before a court of summary jurisdiction. If the court is satisfied that he is a deserter, it orders him to be handed over in the United Kingdom to the local authorities of the national armed forces he deserted. Review of the decision is possible.¹⁶¹

In *C. v the United Kingdom*, the applicant was arrested in the United Kingdom in February 1981 based on the UK 1952 Act as a suspected deserter from the Indian Army. In October 1981, he appeared before a judge who ordered that the applicant be held in prison pending his transfer to the Indian authorities. After an unsuccessful writ of *habeas corpus*, the applicant was surrendered to the Indian authorities and removed from the United Kingdom to India where he was convicted.¹⁶² In relation to Article 5(1) ECHR, the applicant complained that he had been deprived of his liberty in circumstances other than those allowed by the provision. He disputed that he was detained "with a view to deportation or extradition" according to Article 5(1)(f) ECHR since he was not extradited but rather subjected to the special procedure of the UK 1952 Act. He argued that the procedure could not be qualified as extradition since it lacked the procedural safeguards available under normal extradition proceedings. If he had been the subject of extradition proceedings in the United Kingdom, he would have benefited from safeguards that the UK 1952 Act lacks. Notably, in extradition matters, the Secretary of State has discretion not to extradite if there is a delay between the commission of the alleged offence and the implementation of the extradition order (a potentially relevant ground in the applicant's case); under the UK 1952 Act proceedings, no such power to intervene existed.¹⁶³

Despite the differences between the procedure under the UK 1952 Act and that of extradition proceedings, the Commission decided that the case "may be compared in fact with an extradition case" and thus had to be measured by

160 *NSV v the United Kingdom* App no 8971/80 (Commission Decision, 5 May 1981) and *C v the United Kingdom* (n 87).

161 *C v the United Kingdom* (n 87) Submissions of the Parties, A.2.

162 *ibid* The Facts.

163 *ibid* Complaints and Submissions of the Parties, B.3.

the standard of Article 5(1)(f) ECHR.¹⁶⁴ It found the applicant to be “a person against whom action is being taken with a view to deportation or extradition”. Even though his surrender to the Indian authorities took place in the territory of the United Kingdom, it was “a surrender out of the jurisdiction of the United Kingdom and was in fact effected directly with a view to the applicant’s removal to face trial in India”.¹⁶⁵ What is more, it held that the UK 1952 Act “may be regarded as implementing a special arrangement in the nature of an extradition arrangement”.¹⁶⁶ On the application of Article 5(1)(f) ECHR to the case at hand, the Commission decided that the requirements of the provision were complied with. The lower standard of the UK 1952 Act proceedings in terms of procedural safeguard (as compared to extradition proceedings) did not alter the Commission’s finding that the *sui generis* procedure qualifies as extradition in the sense of Article 5(1)(f) ECHR. Rather, with regard to the difference vis-à-vis procedural safeguards, the Commission made the (somewhat circular) statement that the applicant’s arrest and detention prior to surrender were “in accordance with domestic law, since it was provided for under the terms of the 1952 Act”. In other words, it emphasized the lawfulness requirement rather than examining whether the difference could have a bearing on the qualification as extradition in the sense of Article 5(1)(f) ECHR.

In an earlier (unpublished) case involving the UK 1952 Act, the Commission also concluded that the special procedure qualifies as “extradition” in the sense of Article 5(1)(f) ECHR. The applicant, who entered the United Kingdom after his desertion from the Indian Air Force, was arrested in the UK, handed over to the custody of Indian authorities and returned to India based on the UK 1952 Act.¹⁶⁷ The Commission decided that the United Kingdom was responsible for his compulsory return to India, namely for detaining the applicant and handing him over to the Indian authorities.¹⁶⁸ On whether the surrender could be covered by the notion of extradition under Article 5(1)(f) ECHR, the Commission stated that the provision “specifically envisages the possibility of extradition and other such expulsion agreements between States”.¹⁶⁹ In *C. v the United Kingdom*, the Commission summarized this finding in the following words: “the arrange-

164 *ibid* The Law, 1.

165 *ibid* The Law, 1. Earlier in the judgment, the Commission had already formulated this finding in slightly different terms: “The Commission notes that the order made by the Magistrates in the present case was one surrendering the applicant into the jurisdiction of the Indian military authorities. It was not, as such, therefore an order which, on its case, involved the removal of the applicant from the United Kingdom, but this was a foreseeable consequence of the making of the order in the particular circumstances of this case.”

166 *ibid* The Law, 1.

167 *NSV v the United Kingdom* (n 160) The Facts.

168 *ibid* The Law, introductory paras.

169 *ibid* The Law, 3.

ments of the 1952 Act resemble a special form of extradition under the terms of a specific bilateral arrangement between the United Kingdom and India”.¹⁷⁰ The Commission further emphasized that the applicant had not been deported as an illegal immigrant, but rather “extradited under a special procedure” in compliance with a request for his surrender under the UK 1952 Act.¹⁷¹

In sum, the UK 1952 Act procedure is similar to extradition in that the ultimately prosecuting State issues a request for surrender, yet different in that it can be a general rather than an individual request. Further, even though some of the protections available to persons subject to extradition do not apply to the UK 1952 Act procedure (eg in extradition proceedings, the Secretary of State has discretion not to extradite), the removal is ordered by a court of summary jurisdiction and the decision can be reviewed. Despite these differences, the Commission was ready to accept that the UK 1952 Act procedure qualifies as extradition in the sense of Article 5(1)(f) ECHR. First and foremost because the very purpose of extradition and the UK 1952 Act is the same: surrender for criminal prosecution. Neither the difference in procedure and procedural safeguards nor that the physical surrender of persons to foreign authorities took place within the requested State altered the functional-material interpretation of the term “extradition” as used in Article 5(1)(f) ECHR. Rather, the Commission emphasized that the provision “specifically envisages the possibility of extradition and other such expulsion agreements between States”¹⁷² and that the notion covers the scenario where a person is “extradited under a special procedure”,¹⁷³ which “may be regarded as implementing a special arrangement in the nature of an extradition arrangement”.¹⁷⁴

Whether the Court will pursue the functional-material approach, which the Commission adopted vis-à-vis proceedings under the UK 1952 Act, when interpreting the notion of “extradition” in the context of transfers of piracy suspects is unknown – but arguably probable. Transfers of piracy suspects feature some similarities with the UK 1952 Act. Most importantly, the goal of both procedures is to surrender a person to a third State for prosecution. Further, transfers are also a *sui generis* procedure for the surrender of a specific type of criminal suspect, ie pirates as compared to deserters under the UK 1952 Act. What is more, at least where transfer agreements exist, transfers may – similar to the UK 1952 Act surrenders – “be regarded as implementing a special arrangement in the nature of an extradition arrangement”¹⁷⁵ or be said to “resemble a special form of extradition

170 *C v the United Kingdom* (n 87) The Law, 1, referring to *NSV v the United Kingdom* (n 160).

171 *C v the United Kingdom* (n 87) The Law, 3.

172 *ibid.*

173 *ibid.*

174 *ibid* The Law, 1.

175 *ibid.*

under the terms of a specific bilateral arrangement”¹⁷⁶ between the requesting and surrendering States. However, considerable differences exist between the two procedures. Firstly, as opposed to the UK 1952 Act procedure, the request for the surrender of a piracy suspect does not emanate from the ultimately prosecuting State but rather from the seizing State. Furthermore, while the UK 1952 Act only slightly deviates from extradition proceedings in terms of procedural guarantees, transfers are not at all subject to judicial scrutiny and the individual is not in any way involved with the proceedings in which a transfer is evaluated and decided. However, we have seen that the Commission did not attach any weight to the (slight) difference in procedural standards between extradition *stricto sensu* and the UK 1952 Act procedure when deciding whether the latter qualifies as extradition for the purposes of Article 5(1)(f) ECHR.

Before making a final supposition on whether the Court *may* qualify transfers as extradition in the sense of Article 5(1)(f) ECHR, we must consider where the Court sets the bar in terms of categorizing methods of removal for prosecution as extradition or deportation in the sense of Article 5(1)(f) ECHR. In order to incrementally determine how far the Article 5(1)(f) ECHR concepts of extradition and deportation can be stretched, case law pertaining to surrenders for prosecution not preceded by any legally predefined procedure, but having a *de facto* nature, seems helpful. Thereby, the only cases pertinent to the issue of transfers of piracy suspects are those involving a *de facto* surrender for prosecution where the Court analyses arrest or detention *with a view to* surrender for prosecution carried out by the surrendering State against which the complaint is directed – and thus from the angle of Article 5(1)(f) ECHR.¹⁷⁷ One such pertinent case is

176 *ibid*, referring to *NSV v the United Kingdom* (n 160).

177 The cases where the respondent State is the receiving State and where arrest and detention by that State *post-surrender* is analysed under Article 5(1)(c) ECHR are not helpful for the analysis at hand focusing on the deprivation of liberty with a view to surrender by the surrendering State in light of Article 5(1)(f) ECHR. Among these cases, which arise more frequently than the cases pertinent to the present analysis, are, eg: *Reinette v France* App no 14009/88 (Commission Decision, 2 October 1989), *Sánchez Ramirez v France* App no 28780/95 (Commission Decision, 24 June 1996), *Öcalan v Turkey* App no 46221/99 (ECtHR, 12 May 2005). These cases involve surrender for prosecution by *de facto* means, such as kidnapping and abduction. However, as explained, they are not helpful for the analysis of arrest and detention of piracy suspects, which is carried out by the seizing State with a view to transfer for prosecution. In these cases, a State *not* party to the ECHR carried out the seizure of the applicant and his surrender to the prosecuting State against which the complaint is directed. Arrest and detention with a view to surrender for prosecution by a non-ECHR State is obviously outside the reach of Strasbourg organs. At the same time, neither the Commission nor the Court analysed a possible participation or cooperation in the *de facto* removal by the respondent State receiving and ultimately prosecuting the person surrendered by a *de facto* means. Rather, the focus of the analysis is on the arrest by the prosecuting State *following* the handover, ie at a time when

Iskandarov v Russia where the Court decided on a *de facto* extradition not involving any formal or legal procedure.

In *Iskandarov*, an extradition request by Tajikistan had been dismissed by Russia and the applicant released from detention pending extradition. He was thereupon kidnapped by Russian State agents and removed to Tajikistan where he was ultimately prosecuted.¹⁷⁸ The Court could not clarify the details of how the applicant was brought to the prosecuting State; however, the Court found it established in fact that he was arrested by Russian State agents and remained under their control for two days until he was handed over to the Tajik law enforcement officials.¹⁷⁹ The applicant complained that his arrest by Russian law enforcement officials had been carried out in breach of Article 5(1) ECHR.¹⁸⁰ On the merits, the Court emphasized that the type of “opaque methods” employed in surrendering the applicant not only unsettle legal certainty and instil a feeling of personal insecurity, but also undermine public respect and confidence in domestic authorities.¹⁸¹ It further stressed that the applicant’s detention was not based on a decision issued pursuant to national law since it had been carried out absent any legitimate authorization. It qualified the applicant’s deprivation of liberty as an “unlawful removal designed to circumvent the Russian Prosecutor General’s Office’s dismissal of the extradition request, and not to ‘detention’ necessary in the ordinary course of ‘action ... taken with a view to deportation or extradition.’”¹⁸² Thus, the Court decided that the deprivation of liberty in question was not covered by any of the justificatory grounds exhaustively listed in Article 5(1) ECHR, namely subparagraph (f). Hence, the Court was not ready in *Iskandarov* to qualify the removal in question as deportation or extradition in the sense of

the applicant is already in the jurisdiction of the receiving State. Consequently, the benchmark to measure the legality of the arrest is Article 5(1)(c) ECHR rather than Article 5(1)(f) ECHR. In other words, arrest and detention are rather considered under the angle of the *male captus, bene detentus* maxim.

178 *Iskandarov v Russia* (n 39): Russia dismissed the extradition request submitted by Tajikistan because of the applicant’s pending asylum application (para 21) and he was released from detention. Less than two weeks later, the applicant was seized by two members of the Russian State Inspectorate for Road Safety and several men in civilian clothes. Without identifying themselves or offering an explanation, they handcuffed the applicant, hit him on the head and forced him into a car. He was then moved to another car (paras 26–27) and driven to surroundings unknown to him, detained in a sauna overnight, and beaten by the guards (para 28). The next day, the applicant was taken to a forest and handed over to a group of people (para 29). The applicant’s face was covered with a mask and he was transported by (a likely non-civilian) plane to Tajikistan where he was handed over to Tajik law enforcement officials (paras 30–32) and later convicted by a Tajik criminal court (paras 38–39).

179 *ibid* para 115.

180 *ibid* para 136.

181 *ibid* para 148.

182 *ibid* para 149.

Article 5(1)(f) ECHR. Similar to *Bozano*, this case featured elements of deceit and bad faith and was qualified as arbitrary.

As already mentioned earlier,¹⁸³ the Strasbourg organs' assessment whether a method of removal qualifies as extradition or deportation in the sense of Article 5(1)(f) ECHR – ie whether deprivation of liberty is covered by a justificatory ground – often flows into the assessment whether arrest and detention pending removal have been lawful and free from arbitrariness. In various cases, the three elements of Article 5(1) ECHR – justificatory ground, lawfulness and prohibition of arbitrariness – are not separately discussed. Rather, the assessment of the requirements that arrest and detention must be lawful and not arbitrary and whether a specific method qualifies as extradition or deportation in the sense of the justificatory ground of Article 5(1)(f) ECHR is to some extent global and the finding relates to Article 5(1) ECHR in general and not to one of its elements.

This global assessment of Article 5(1) ECHR may be due to the fact that – absent an absolute right under the Convention not to be removed *by use of a specific method* (eg extradition *stricto sensu* instead of transfers)¹⁸⁴ – the Court prefers not to directly opine on whether a specific method is within or outside the Convention's scope. Rather, it does so only indirectly and with regard to a particular measure by requiring a specific method used for surrendering a suspect to abide by a certain procedural standard,¹⁸⁵ or by controlling whether arrest and detention with a view to removal for prosecution is in line with Article 5(1)(f) ECHR, ie lawful and free from arbitrariness. By using these two tests, it *indirectly* approves or disapproves a specific method of removal. With regard to the second test, ie whether a “lawful arrest or detention of ... a person against whom action is being taken with a view to deportation or extradition” is at issue and thus a justificatory ground for deprivation of liberty is available, the Court is, paradoxically, nevertheless called upon to make a *direct* statement on the Convention's compatibility with the method as such. In other words, when deciding whether the removal at hand qualifies as extradition or deportation in the sense of the Convention, the Court is prompted to make a direct statement on a subject matter, which it prefers to leave outside its inquiry and to approach only indirectly. This may explain why the Court generally does not explicitly declare that a method of removal is not covered by Article 5(1)(f) ECHR, ie that it does not qualify as extradition or deportation in the sense of the provision. Rather, it first determines whether arrest or detention with a view to surrender for prosecution has been unlawful or arbitrary and, if so, it need not answer the question whether the method qualifies as extradition or deportation. Alternatively, it makes a global assessment of all requirements flowing from Article 5(1)(f) ECHR and thereby avoids an explicit finding whether a specific method of removal qualifies as ex-

183 See above Part 4/I/B/1/c/aa.

184 See below Part 5/I/B/1 and Part 5/IV.

185 See below Part 5/II, III and IV.

tradition or deportation, instead coming to an overall finding whether arrest and detention is in line with Article 5(1)(f) ECHR.

When making this global assessment, the threshold for finding that a specific method of removal does not qualify as extradition or deportation in the sense of Article 5(1)(f) ECHR seems rather high – it must generally involve bad faith or deceit in order to fall outside the provision’s scope. Hence, the Court only refuses to categorize a specific method of removal as deportation or extradition, as autonomously defined under the Convention, if it is quite “opaque” and likely to undermine “public respect for and confidence in domestic authorities”.¹⁸⁶ Nothing suggests that transfers of piracy suspects as occurring in the context of EUNAVFOR’s or Denmark’s counter-piracy operations involve bad faith or deceit.

In sum, it seems that the Court is ready to adopt a material-functional reading of the term extradition: to qualify a measure as extradition in the sense of Article 5(1)(f) ECHR as long as it pursues the goal of surrendering a person for prosecution. Hence, the term as employed in Article 5(1)(f) ECHR goes far beyond extradition *stricto sensu*. Consequently, it is not necessary that surrender takes place based on an extradition treaty or formal request for extradition, or in execution of an extradition order.¹⁸⁷ Rather, it also covers surrenders for prosecution, which are decided in a *sui generis* procedure (as the case law in relation to the UK 1952 Act demonstrates). Even removals for prosecution resulting from “cooperation” between the surrendering and receiving States – a term used by the Strasbourg organs to, *inter alia*, denote *de facto* handovers for prosecution – may be covered by the notion of extradition,¹⁸⁸ unless they involve an element of bad faith or deceit. Furthermore, since even *de facto* removals for prosecution were categorized by the Strasbourg organs as extradition or deportation in the sense of Article 5(1)(f) ECHR, the procedural features of a specific method of removal do not seem to be decisive in answering the question whether it can be categorized as deportation or extradition.¹⁸⁹ For all these reasons, it is *likely* that the European Court of Human Rights decides – either explicitly or most probably implicitly as part of a global assessment of the requirements of Article 5(1) ECHR – that transfers of piracy suspects by EUNAVFOR or Denmark are “extraditions” in the sense of Article 5(1)(f) ECHR. Hence, arrest and detention with a view to transfer

186 *Iskandarov v Russia* (n 39) para 148.

187 Council of Europe/European Court of Human Rights (n 69) para 94, citing *X v Switzerland* App no 9012/80 (Commission Decision, 9 December 1980).

188 Council of Europe/European Court of Human Rights (n 69) para 99, citing *Öcalan v Turkey* (n 177) para 87: “The fact that a fugitive has been handed over as a result of cooperation between States does not in itself make the arrest unlawful and does not therefore give rise to any problem under Article 5.”

189 However, arrest and detention with a view to a *de facto* handover may be unlawful (see above Part 4/I/C) or arbitrary (see above Part 4/I/D) and therefore not in compliance with other elements of Article 5(1) ECHR.

would be covered by this justificatory ground. The following analysis rests on this assumption.

cc) The Meaning of “Action is Taken with a View to Extradition”

Article 5(1)(f) ECHR only allows arrest or detention of a “person against whom *action is being taken* with a view to deportation or extradition”.¹⁹⁰ Thus, the existence of extradition (or deportation)¹⁹¹ proceedings is the sole justification for detention under Article 5(1)(f) ECHR.¹⁹² This implies that a person can only be detained under Article 5(1)(f) ECHR in order to secure an extradition.¹⁹³ At the same time, it suffices as a justification for detention that “action is being taken with a view to ... extradition”.¹⁹⁴ Hence, it is notably not required that detention with a view to extradition be “reasonably considered necessary” for any purpose other than ensuring the extradition – for example, to prevent the commission of an offence or to prevent the alleged offender’s flight.¹⁹⁵ In light of this, the following analysis describes the steps that must be taken in order to satisfy the “action is taken with a view to ... extradition” requirement. This threshold will first be determined for extradition *stricto sensu* and will later be applied *mutatis mutandis* to transfers.¹⁹⁶

The English and French wording used to describe the requirement at issue differ. According to the English version, it is necessary that arrest and detention are directed against “a person against whom *action is being taken* with a view to ... extradition”.¹⁹⁷ Meanwhile, the French provision reads : “[S]’il s’agit

190 Emphasis added.

191 From the analysis in Part 4/I/B/1/c/aa follows that it is quite unlikely that transfers are qualified as deportation in the sense of Article 5(1)(f) ECHR; therefore, the following analysis rests on the extradition option of the provision.

192 *Chinoy v the United Kingdom* App no 15199/89 (Commission Decision, 4 September 1991) 2. of the legal consideration.

193 *Whitehead v Italy* App no 13930/88 (Commission Decision, 11 March 1989) 4. and 5. of the legal considerations; *Cavallo c la France* App no 11985/86 (Décision de la Commission, 6 March 1989) 2. of the legal considerations; *Cesky c l’Italie* App no 22001/93 (Décision de la Commission, 17 January 1996) 2. of the legal considerations.

194 *MK v France* App no 30148/96 (Commission Decision, 18 and 19 September 1997) 1. of the legal considerations; *Guala c la France* App no 64117/00 (ECtHR, 18 March 2003) 3. of the legal considerations.

195 *MK v France* (n 194) 1. of the legal considerations; *Guala c la France* (n 194) 3. of the legal considerations; *Eminbeyli v Russia* (n 89) para 42; *Nasrulloev v Russia* App no 656/06 (ECtHR, 11 October 2007) para 69; *Ismoilov and others v Russia* App no 2947/06 (ECtHR, 24 April 2008) para 135; *Soldatenko v Ukraine* App no 2440/07 (ECtHR, 23 October 2008) para 109; *Gaforov v Russia* (n 10) para 182; *Shchebet v Russia* App no 16074/07 (ECtHR, 12 June 2008) para 61.

196 See further below in this section.

197 Emphasis added.

de l'arrestation ou de la détention régulières d'une personne ... contre laquelle une *procédure ... d'extradition est en cours*".¹⁹⁸ By requiring that a procedure is in progress, the French wording seems somewhat stricter. From the statement of the Court that deprivation of liberty under Article 5(1)(f) ECHR "will be justified only for so long as *extradition proceedings are in progress*",¹⁹⁹ it can be concluded that the French wording more accurately reflects the threshold required under the provision.

In several cases, the applicants maintained that an arrest or detention cannot be based on Article 5(1)(f) ECHR before the official extradition request has been issued and received by the requested State. For instance, the applicants in *Soldatenko v Ukraine* and *Svetlorusov v Ukraine* argued that only after receipt of the extradition request could their detention be qualified as being "with a view to extradition" and before it fell within the ambit of Article 5(1)(c) ECHR.²⁰⁰ In both cases, the applicants were arrested pursuant to an international search warrant and the requesting State thereupon issued a request for provisional arrest, which was followed by an extradition request.²⁰¹ In both cases, the extradition request was received more than 20 days after the arrest took place. In each case, the Court held that there were no criminal proceedings pending against the applicant in the requested State (therefore excluding Article 5(1)(c) ECHR as a basis for arrest and detention) and that the authorities of the requested State had arrested and detained the person in order to take action with a view to his extradition. Hence, the deprivation of liberty was always with a view to extradition and no provision was applicable other than Article 5(1)(f) ECHR.²⁰² In *Dubovik v Ukraine*, the Court reached the same conclusion: similar to *Soldatenko*²⁰³ and *Svetlorusov*,²⁰⁴ the Court emphasized that the requested State had not advanced any reason other than extradition for the deprivation of liberty nor did the case file suggest that a reason other than extradition had ever existed.²⁰⁵ In sum, in the cited Court cases, it was not the issuance and receipt of the extradition request that triggered the application of Article 5(1)(f) ECHR. Rather, the Court decided that the justificatory ground was already available for deprivation of liberty based on a request

198 Emphasis added.

199 *Eminbeyli v Russia* (n 89) para 42 (emphasis added); *Abdolkhani and Karimnia v Turkey* App no 30471/08 (ECtHR, 22 September 2009) para 129 (emphasis added).

200 *Soldatenko v Ukraine* (n 195) para 97; *Svetlorusov v Ukraine* App no 2929/05 (ECtHR, 12 March 2009) para 40.

201 Under the Minsk Convention, it is possible to arrest a person based on a request for provisional arrest and thus before a formal extradition request is submitted: *Soldatenko v Ukraine* (n 195) para 99; *Svetlorusov v Ukraine* (n 200) para 41.

202 *Soldatenko v Ukraine* (n 195) paras 97–99; *Svetlorusov v Ukraine* (n 200) paras 42, 47–48.

203 *Soldatenko v Ukraine* (n 195) para 99.

204 *Svetlorusov v Ukraine* (n 200) para 41.

205 *Dubovik v Ukraine* App no 33210/07 (ECtHR, 15 October 2009) para 48.

for provisional arrest.²⁰⁶ The possibility of provisional arrest is foreseen in most extradition treaties and is reserved for cases where there is a sense of urgency – the requesting State may apply for the provisional arrest of the person sought pending presentation of the extradition request.²⁰⁷ Furthermore, the Court has found that the State requesting provisional arrest and the State to which the suspect is ultimately extradited need not be one and the same.²⁰⁸

To qualify a fugitive arrested in execution of a provisional warrant as a “person against whom action is being taken with a view to ... extradition” is criticized in doctrine. It is argued that considerable time may elapse between the request of provisional arrest and the submission of an extradition request.²⁰⁹ Further, as opposed to arrest and detention on suspicion of criminal activity based on Article 5(1)(c) ECHR, no right to be brought promptly before a judge is attached.²¹⁰ Against this background, one suggestion is to follow the opinion of the British House of Lords in *Sotiriadis* where provisional arrest was deemed to be a

precautionary arrest of the fugitive criminal to prevent him from fleeing the country before the requisition for his surrender has been received ... The purpose of this provision is clear. A person arrested on a provisional warrant *is not at that stage subject to extradition at all* and may never become so.²¹¹

206 This was also decided by the Commission in *Day v Italy* App no 34573/97 (Commission Decision, 21 May 1998) The Law.

207 See, eg, Article 9 of the Model Treaty on Extradition (14 December 1990) Adopted by General Assembly resolution 45/116, subsequently amended by General Assembly resolution 52/88 (Model Treaty on Extradition); Section 20 of the Model Law on Extradition, UNODC, ‘Model Law on Extradition’ (2004) <www.unodc.org/pdf/model_law_extradition.pdf> accessed 29 January 2013 (Model Law on Extradition).

208 *Adamov c Suisse* App no 3052/06 (ECtHR, 21 June 2011) paras 60–61: the Court decided that detention pending extradition had been lawful, even if arrest and detention was initially based on a request for provisional arrest submitted by the United States but extradition took ultimately place to Russia, which had requested the suspect’s extradition more than two weeks after his arrest based on the request for provisional arrest by the United States.

209 Council of Europe, *Extradition, European Standards: Explanatory Notes on the Council of Europe Convention and Protocols and Minimum Standards Protecting Persons Subject to Transnational Criminal Proceedings* (Council of Europe 2006) 39–40: Article 16 of the European Convention on Extradition, eg, provides for two time limits: an optional limit of 18 day on the expiry of which the person deprived of liberty may be set free and a mandatory limit of 40 days after which the person shall be released if the requested State has not yet received a proper extradition request.

210 Gilbert (n 148) 64.

211 *Government of the Federal Republic of Germany v Sotiriadis* AC 1 at 25C and G-H (1975), cited in Gilbert (n 148) 65.

Consequently, to comply with Article 5(1) ECHR, a provisional arrest must be based on another justificatory ground of the provision. In this context, we recall that one of the three alternatives mentioned in Article 5(1)(c) ECHR allows arrest and detention to prevent the person from fleeing after having committed a crime.²¹² Applying this justificatory ground to persons arrested in execution of a provisional arrest warrant emanating from a State, which may later potentially submit an extradition request, would make the enhanced protection under Article 5(3) ECHR, ie the right to be brought promptly before a judge, available.²¹³

In sum, under the case law of the Strasbourg organs, it does not seem necessary that an extradition request has already been issued for the requirement “action is being taken with a view to ... extradition” to be fulfilled, which makes Article 5(1)(f) ECHR available as a basis for arrest and detention. Rather, even though criticized for not being protective enough, the issuance of a request for provisional arrest suffices. In the cases where the Court decided that a provisional arrest warrant (rather than a request for extradition) suffices to make the justificatory ground of Article 5(1)(f) ECHR available, it stressed that there were no criminal proceedings pending in the requested State. Further, it emphasized that the requested State had never advanced any reason other than extradition in connection with the applicant’s deprivation of liberty and the case file did not suggest that any reason for arrest and detention other than extradition ever existed. From this can be concluded, *e contrario*, that if the person is arrested and detained for any reason other than with a view to his extradition – for example, because of ongoing criminal proceedings in the requested State or while the requested State is considering the option of prosecuting the suspect – a provisional arrest warrant would not suffice. In such a situation, extradition proceedings can only be said to be in progress once an extradition request has been issued. Before, however, arrest and detention must be based on another justificatory ground of Article 5(1) ECHR – most likely on subparagraph (c). If the case law is understood in this way, the concerns expressed by those criticizing the idea that a provisional arrest warrant already suffices to base deprivation of liberty on Article 5(1)(f) ECHR – and that the person is thereby stripped of the more protective Article 5(1)(c) read together with Article 5(3) ECHR – can be lessened to some extent.

212 See above Part 4/I/B/1/a.

213 Gilbert (n 148) 65. See also Council of Europe, ‘Arrest in the Context of the European Convention on Extradition, Human Rights and Other Requirements’ (PC OC INF 22, Strasbourg, 31 March 2000) <www.coe.int/t/dghl/standardsetting/pc-oc/Standards_extradition_en_files/OC_INF_22E%20Arrest-Human%20rights.pdf> accessed 29 January 2013, 5 and 7, which also contains a reference to the British House of Lords decision re *Sotiriadis* and argues that since deprivation of liberty based on a request for provisional arrest is not amenable to Article 5(3) ECHR, it is crucial that the body issuing the warrant takes its decision from an impartial viewpoint based on the merits of the request.

Detention can only be based on Article 5(1)(f) ECHR *for so long* as extradition proceedings are conducted. This is a corollary of the fact that under Article 5(1)(f) ECHR, only the existence of extradition proceedings can justify detention. However, arrest and detention with a view to extradition does not become unlawful if extradition is ultimately refused.²¹⁴ Rather, it is only required that extradition proceedings are pursued with “requisite diligence” or with “due diligence”. If this is not (or no longer) the case, detention will cease to be justified.²¹⁵ Thus, even though the Convention contains no specific provisions on the conditions and circumstances under which extradition may be granted or how domestic law governing extradition proceedings must be designed,²¹⁶ certain exigencies of a procedural nature flow from Article 5(1)(f) ECHR requiring that extradition proceedings are pursued with due diligence, which relates first and foremost to the length of extradition proceedings.²¹⁷

In terms of the permissible length of extradition proceedings (and arrest and detention with a view to extradition), the due diligence standard is rather abstract. And yet, since Article 5(1)(f) ECHR is silent in this respect, the standard developed by the Strasbourg organs is the only time criterion available. In *Aribaud c Luxembourg*, the Court specified the due diligence requirement by stating that extradition proceedings must be conducted “within a reasonable time” and thus borrowed language from Article 5(3) ECHR.²¹⁸ The Court further stated that it is not necessary to conduct extradition proceedings as fast as possible for so long as

214 Trechsel and Summers (eds) (n 25) 451.

215 *X v Italy* App no 9172/80 (Commission Decision, 17 December 1981) para 5 of the legal considerations; *S c la France* App no 10965/84 (Décision de la Commission, 6 July 1988) 2. of the legal considerations; *Whitehead v Italy* (n 193) 4. of the legal considerations; *Cesky c l'Italie* (n 193) 3. of the legal considerations; *Kosonen c le Portugal* App no 31686/96 (Décision de la Commission, 21 May 1997) 1.b. of the legal considerations; *MK v France* (n 194) 1. of the legal considerations; *Quinn v France* (n 87) para 48; *Eid v Italy* App no 53490/99 (ECtHR, 22 January 2002) 1. of the legal considerations; *Leaf c l'Italie* App no 72794/01 (ECtHR, 27 November 2003) para 11 of the legal considerations; *Bogdanovski c Italie* (n 87) para 59; *Eminbeyli v Russia* (n 89) para 42.

216 *Roldan Ibañez c l'Espagne* App no 30607/96 (Décision de la Commission, 16 October 1996) 1. of the legal considerations; *Di Giovine c le Portugal* App no 39912/98 (ECtHR, 31 August 1999) para 17 of the legal considerations; *Guala c la France* (n 194) 1. of the legal considerations; *Öcalan v Turkey* (n 177) para 86; *Adamov c Suisse* (n 208) para 57.

217 In addition, the Commission stated, with a reference to the due diligence requirement, that continued detention cannot be justified by Article 5(1)(f) ECHR if it is due to an abuse of power: *X v Italy* (n 215) para 5 of the legal considerations; *S c la France* (n 215) 2. of the legal considerations; *Whitehead v Italy* (n 193) 4. of the legal considerations; *Cesky c l'Italie* (n 193) 3. of the legal considerations.

218 *Aribaud c Luxembourg* App no 41923/06 (ECtHR, 7 January 2010) para 106, stating that even though Article 5(3) ECHR does not apply *as such* to deprivation of liberty

the overall time is reasonable.²¹⁹ Whether the length of extradition proceedings affects the lawfulness of detention under Article 5(1)(f) ECHR cannot be gauged in the abstract, but rather depends on an examination of the circumstances of the particular case.²²⁰ Thereby, a variety of criteria flow into the assessment. Next to the complexity of the case, the Court has also noted that the behaviour of the extraditee could be a factor if it has contributed to the length of the proceedings.²²¹

Given that ongoing extradition proceedings are a prerequisite for lawful detention under Article 5(1)(f) ECHR, a person must be released as soon as the extradition request pertaining to him is dismissed. In *Eminbeyli v Russia*, the Court held that

some delay in implementing a decision to release is understandable and often inevitable in view of practical considerations relating to the running of the courts and the observance of particular formalities. However, the national authorities must attempt to keep it to a short minimum.²²²

Administrative formalities regarding the release cannot justify more than a few hours of delay, especially against the background that modern means of communication allow setbacks to be kept to a minimum. A delay of three days between dismissal of the extradition request and release was considered to be unlawful and arbitrary in the case at hand.²²³ In the context of piracy, however, an im-

based on Article 5(1)(f) ECHR “toujours est-il que la détention ne saurait dépasser un délai raisonnable”.

219 *In Eid v Italy* (n 215) 1. of the legal considerations; *Bogdanovski c Italie* (n 87) para 64.

220 *Osman v the United Kingdom* App no 15933/89 (Commission Decision, 14 January 1991) 1. of the legal considerations.

221 *Bogdanovski c Italie* (n 87) paras 22, 31 and 63: taking into account certain behaviour of the extraditee in order to justify the overall length of the extradition proceedings (the applicant namely refused to undergo certain examinations and made false declarations) may conflict with the right to remain silent, which is closely linked to the presumption of innocence stipulated in Article 6(2) ECHR and applicable to extradition proceedings (see below Part 5/III/D/4/a). However, when assessing the length of extradition proceedings, the emphasis should rather lie on the State’s role in accelerating or delaying them. In that vein, the Commission decided in *Kolompar c la Belgique* that even “dans l’hypothèse d’une inaction complète” of the extraditee, the State is under a particular diligence to keep detention short. Otherwise the balance between the restrictions of the right to liberty stipulated in Article 5 ECHR, which have to be interpreted narrowly, and the State’s international obligations in the realm of extradition would be disturbed (*Kolompar c la Belgique* (n 91) para 68). In the same case, the Court affirmed that “the State should have taken positive measures to expedite proceedings and thereby shorten [the extraditee’s] detention”: *Kolompar v Belgium* (n 88) para 39.

222 *Eminbeyli v Russia* (n 89) para 49.

223 *ibid* paras 49–50.

mediate release may not always be possible, namely if the seized persons must be brought on shore because their skiff has been damaged in the course of interception. Also, depending on the nautical position of the warship or due to the weather conditions, it may be unsafe to let the seized persons immediately continue on their journey in their small vessel.

In cases where extradition is granted, it is important to note that Article 5(1)(f) ECHR not only covers arrest and detention pending the decision to extradite, but also the period necessary for the enforcement of that decision, ie the transportation to the border.²²⁴ In the context of piracy, the implementation of the transfer decision is often challenging, especially since transit or overflight rights must be negotiated anew in each case absent general agreements,²²⁵ and may therefore take longer than in a land-based context. Yet, as long as the implementation of the transfer decision is pursued with requisite diligence and is only delayed because of the exceptional circumstances of the maritime context, arrest and detention during this phase seem to be covered by Article 5(1)(f) ECHR.

2. Justificatory Ground for Deprivation of Liberty per Phase of Disposition

Under Article 5(1) ECHR, a person can only be deprived of his liberty if arrest and detention is based on at least one of the justificatory grounds listed in the provision. From the analysis above follows that deprivation of liberty of piracy suspects can potentially be based on Article 5(1)(c) ECHR, which allows for arrest and detention on suspicion of criminal activity, or Article 5(1)(f) ECHR, which permits arrest and detention with a view to extradition. What follows is an analysis of the ground(s) available during each of the four phases of disposition: the initial arrest, detention of piracy suspects by the seizing State pending its decision whether to prosecute the suspects in its domestic court, detention after the seizing State has decided *not* to exercise its criminal jurisdiction and, finally, detention during the evaluation, negotiation and submission of a transfer request to a third State.

a) *Seizure and Initial Arrest of Piracy Suspects*

Whether a deprivation of liberty is already at stake when patrolling naval States interfere with the liberty of piracy suspects while acting pursuant to the right of visit stipulated in Article 110 UNCLOS or only once they exercise powers conferred by Article 105 UNCLOS, which allows for the seizure of a pirate boat and the arrest of persons on board, cannot be decided with absolute certainty.²²⁶

224 Trechsel and Summers (eds) (n 25) 451.

225 See above Part 2/II/B/5/e.

226 See above Part 4/I/A.

Either way, subparagraph (c), which allows for arrest and detention on suspicion of criminal activity, is the only justificatory ground available under Article 5(1) ECHR for the very first measure amounting to a deprivation of liberty in the course of intercepting a pirate boat. Meanwhile, as we will see below, the justificatory ground of subparagraph (f), ie arrest and detention with a view to transfer, is not yet available at this stage.

Article 5(1)(c) ECHR allows for “the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence”.²²⁷ Counter-piracy operations, which have a law enforcement character,²²⁸ are clearly undertaken with a view to arrest piracy suspects and to submit them for prosecution. For States contributing to EUNAVFOR, this goal of seizing suspects in order to put them on trial arises quite clearly from the mandate stipulating that Operation Atalanta “shall, as far as available capabilities allow ... *in view of prosecutions* potentially brought by the relevant States ... arrest, detain and transfer” piracy suspects.²²⁹ Hence, the initial arrest of piracy suspects within the EUNAVFOR framework is clearly effected for the purpose of bringing the arrested persons before a competent legal authority – be this “a judge or another officer authorised by law to exercise judicial power” in the sense of Article 5(3) ECHR as some argue, or the trial judge ultimately deciding the criminal case on the merits as other maintain.²³⁰ The same must hold true for States countering piracy in a national capacity, or States contributing to NATO, CTF or EUNAVFOR, which then revert back to national control for arrest and detention of suspects.²³¹

To base the initial arrest of piracy suspects on Article 5(1)(c) ECHR is not hampered by the fact that many seizing States are rather reluctant to receive seized suspects for prosecution. None of these States seem to exclude domestic criminal prosecution of seized suspects *per se* and they may consider domestic prosecutions, namely if important national interests are at stake.²³² Equally, the fact that some States argue that piracy suspects have not yet entered the door of

227 On the various elements of this provision in general and their meaning in the context of piracy specifically, see above Part 4/I/B/1/a.

228 See above Part 3/I.

229 Article 2(e) CJA Operation Atalanta; the fact that the option to transfer is mentioned does not change this assessment because the notion of transfer under Article 12 CJA Operation Atalanta encompasses not only surrenders of suspects to third States but also to the seizing State’s mainland authorities; see above Part 2/II/B/2.

230 See above Part 4/I/B/1/a.

231 Since the respective mandates of NATO and CTF do not cover arrest and detention of piracy suspects at all (these multinational counter-piracy operations instead pursue a deter-and-disrupt strategy and operate a catch-and-release scheme), it is necessary to revert back to national control for deprivation of liberty of piracy suspect: see above Part 2/I/A.

232 See above Part 1/II/B/1.

their domestic criminal law at the moment of their initial arrest (such as Germany or Denmark)²³³ does not alter the finding that the arrest has been “effected for the purpose of bringing him [the suspect] before the competent legal authority” in the sense of Article 5(1)(c) ECHR. This holds true particularly because the purpose element (and thus the criminal law nature of arrest and detention) of Article 5(1)(c) ECHR must be interpreted autonomously.

The justificatory ground of Article 5(1)(f) ECHR is not available for the initial arrest of piracy suspects since it only allows arrest and detention of persons “against whom action is being taken with a view to ... extradition”. In order to trigger this justificatory ground, it is necessary that an extradition request has been filed or at least that a request for provisional arrest has been issued. Meanwhile, the mere existence of an extradition treaty obviously does not fulfil this requirement given that concrete steps must have been undertaken with regard to a specific alleged offender’s surrender.²³⁴ Likewise, the existence of a transfer agreement between the seizing entity and a potential receiving State is not at all sufficient to base an initial arrest of piracy suspects on Article 5(1)(f) ECHR.²³⁵

With regard to extradition *stricto sensu*, the threshold of Article 5(1)(f) ECHR is met at earliest when the requesting State issues a request for provisional arrest of the suspect. The initial arrest of a piracy suspect, however, has few commonalities with an arrest based on a request for provisional arrest in the field of extradition. By issuing a request for provisional arrest, the requesting State expresses its strong interest to prosecute the individual in question. Put differently, in the situation where a request for provisional arrest is issued, the State ready and willing to prosecute has already been identified and the person is arrested specifically for extradition to that State. When carrying out an initial arrest of piracy suspects, the State with a strong and concrete interest in prosecuting the suspect has generally not yet been identified. Admittedly, some States have demonstrated their *general* willingness to receive piracy suspects – by entering into transfer agreements for example. However, unlike in the scenario where a suspect is arrested based on a request for provisional arrest in execution of a provisional arrest warrant, the identity of the State willing to prosecute the individual in question is unknown at the moment of the piracy suspect’s initial seizure by a patrolling naval State. Instead, each *specific* transfer is subject to individual negotiations and the submission of a request for transfer by the seizing State or EUNAVFOR. It is only during this process that the ultimately prosecuting State is gradually identified. This process, in turn, takes some time to complete and is not yet finished at the moment of the initial arrest of a piracy suspect. In other

233 See above Part 2/I/D/2/a (Denmark) and Part 2/II/C/3/a (Germany).

234 See above Part 4/I/B/1/c/cc.

235 Esser and Fischer, ‘Menschenrechtliche Implikationen der Festnahme von Piraterieverdächtigen’ (n 24) 522, fn 137.

words, the initial arrest can only be based on the justificatory ground of Article 5(1)(c) ECHR but not that of Article 5(1)(f) ECHR.

b) *Detention Pending Decision Whether to Prosecute in Seizing State*

If suspects are not released after the initial collection and assessment of evidence, the mainland authorities of the seizing State are informed of the seizure, which initiates the procedure in which it is decided whether the seizing State exercises its criminal jurisdiction over the suspects. We have seen that in some States, such as Denmark and Germany, an *ad hoc* coordination organ has been established in order to decide whether domestic prosecutions are warranted. A case is only submitted to the prosecutor if the respective organ concludes that domestic criminal jurisdiction should be exercised. In other States, like Spain, no such organ has been set up and the decision whether to prosecute suspects seized by Spanish naval forces lies solely in the hands of the prosecutorial authorities.²³⁶

As long as the seizing State's decision whether to prosecute the piracy suspects it captured is pending, deprivation of liberty can be based on Article 5(1)(c) ECHR. Since prosecution of the suspects by the seizing State is still a viable option, the purpose of Article 5(1)(c) ECHR – deprivation of liberty for the purpose of bringing the persons before the competent legal authorities on reasonable suspicion of having committed an offence – is genuinely being pursued.²³⁷ Also, if the seizing State finally decides to prosecute the case in its own courts, detention continues to be justified by Article 5(1)(c) ECHR. What is more, if the seizing State's authorities ultimately decide to discontinue criminal proceedings (for instance, if the investigation does not yield enough evidence for further prosecution),²³⁸ detention does not become retroactively devoid of justification – provided that a genuine intention to prosecute the piracy suspects existed while the decision was pending. Hence, it is the existence of a purpose to prosecute the person, rather than its achievement, which is decisive. Whether the justificatory ground of Article 5(1)(c) ECHR remains available if the seizing State decides *not* to prosecute the suspects in its own courts, but still detains them on board its warship with a view to possibly transfer the suspects to a third State, will be discussed later.²³⁹

The question remains whether detention of piracy suspects can – solely or in addition to Article 5(1)(c) ECHR – be based on Article 5(1)(f) ECHR during the phase where the seizing State deliberates if it will exercise its criminal jurisdic-

²³⁶ See above Part 2/II/B/4/b.

²³⁷ See, eg, Nolting (n 24) 4, arguing that piracy suspects are not held on board German warships for the primary purpose of verifying their identity, but rather to allow for a decision by the inter-ministerial decision-making body on whether German criminal prosecutions are warranted in the concrete case at hand.

²³⁸ See above Part 2/I/C/1.

²³⁹ See below Part 4/I/B/2/c.

tion over the suspects. Whether arrest and detention is based on subparagraph (c) or (f) of Article 5 ECHR is not without consequence: not only does the application of Article 5(3) ECHR depend on it, but deprivation of liberty with a view to extradition and arrest and detention on suspicion of criminal activity are subject to entirely different procedures with different standards²⁴⁰ (eg regarding the length of detention).²⁴¹ It is submitted here that Article 5(1)(f) ECHR is not yet available during the phase where the seizing State deliberates whether to prosecute the suspects in its own courts. We have seen that the seizing State has priority in prosecuting the suspects – either *de facto* or within the EUNAVFOR framework by virtue of Article 12 CJA Operation Atalanta.²⁴² Before the seizing State decides not to exercise its criminal jurisdiction over the suspects, it is not entirely excluded that it will prosecute the suspects in its own domestic courts, which demands that (the more protective) Article 5(1)(c) ECHR is applied. At the same time, the transfer option only arises once the seizing State has decided not to exercise its domestic criminal jurisdiction over the suspects.

In practice, however, transfer negotiations are often commenced *before* the seizing State makes a final decision on whether to prosecute the suspects. Especially in the EUNAVFOR framework, evaluation of the transfer option is often started right after the initial arrest of the suspects.²⁴³ As we will see later, Article 5(1)(f) ECHR arguably applies as soon as transfer negotiations are started. However, this should be conditioned upon the fact that the seizing State, ie the one having custody over the suspect, has already decided not to prosecute the suspects in its own courts.²⁴⁴ Since the option to prosecute the suspects in the domestic courts of the seizing State is still viable during the deliberations of the seizing State whether domestic prosecutions are warranted, Article 5(1)(f) ECHR should not be available as a justificatory ground during this period even if the transfer option is being evaluated or a transfer is negotiated in parallel. Such an interpretation of the relationship or hierarchy between subparagraphs (c) and (f) of Article 5(1) ECHR with regard to this phase of disposition seems to be alluded to when considering that the justificatory grounds of this provision must be interpreted narrowly. Hence, the words “action is being taken with a view to extradition” of Article 5(1)(f) ECHR must be construed in a strict sense and not be applied in a way that bypasses the more protective Article 5(1)(c) ECHR.²⁴⁵

240 See below Part 4/I/C/2 and 3.

241 See, eg, *X v Italy* (n 215) para 3 of the legal considerations: the length of detention must be examined separately for detention under Article 5(1)(c) ECHR and Article 5(1)(f) ECHR.

242 See above Part 2/II/B/4/a.

243 See above Part 2/II/B/5.

244 See below Part 4/I/B/2/d.

245 For a refined argument, see *ibid.*

In light of the fact that States are reluctant to receive piracy suspects for prosecution, a situation where two States both have a concrete and strong interest in exercising their criminal jurisdiction over the same suspect for the very same facts (positive jurisdictional conflict) can almost be ruled out. Against this background, it is an unlikely scenario that a seizing State has a genuine intent to first prosecute a suspect in its own courts (and detains him based on Article 5(1)(c) ECHR) and, simultaneously, to also detain him based on Article 5(1)(f) ECHR, ie with a view to surrender the suspect to a third State anxious to prosecute him for the same facts after prosecution by the seizing State. Even if this were the case, it remains somewhat unclear under current case law whether it is possible to justify detention based on Article 5(1)(c) and (f) ECHR at the same time for the same fact pattern²⁴⁶ or whether the more protective subparagraph (c) should prevail. Assuming, *arguendo*, that they can apply concurrently and with regard to the very same conduct, a State must still grant all the protections required under both provisions. Since this implies an additional burden on the seizing State, it is hardly conceivable that it advocates for a concurrent application of the two subparagraphs of Article 5(1) ECHR to a person allegedly having committed a specific pirate attack.

In sum, only Article 5(1)(c) ECHR is available for justifying detention of piracy suspects while the seizing State deliberates whether to prosecute the suspects in its domestic courts. Meanwhile, the requirements for applying the justificatory ground of Article 5(1)(f) ECHR are not yet fulfilled.

c) ***Detention Once the Seizing State Decides Not To Prosecute***

In the vast majority of cases, the seizing State decides *not* to prosecute the suspects in its domestic courts, but to pursue or give way to the transfer option. In this case, Article 5(1)(c) ECHR could only continue to serve as a justificatory ground for deprivation of liberty if the wording “bringing him before the competent authority on reasonable suspicion for having committed an offence” is understood as encompassing both the *domestic* authorities of the seizing State and *foreign* authorities. In other words, if Article 5(1)(c) ECHR is interpreted as also

²⁴⁶ In the cases of *Kolompar v Belgium* (n 88) para 36, *Raf c Espagne* App no 53652/00 (ECtHR, 17 June 2003) paras 54–61, and *Shamayev and others v Georgia and Russia* (n 90) para 400, pre-trial detention and detention pending extradition had partly overlapped. Since this was not considered to be as such in violation of Article 5 ECHR, it was concluded that an individual’s detention may be covered by various grounds of Article 5(1) ECHR at the same time (see, eg, Van Dijk and others (eds) (n 106) 483.). However, in these cases, the facts giving rise to detention on remand where *different* from the facts for which a person was detained with a view to extradition. Therefore, these cases are not pertinent for the question at stake – ie whether deprivation of liberty can be concurrently based on Articles 5(1)(c) and (f) ECHR in a situation where the conduct giving rise to arrest or detention is the same for both types of deprivation of liberty.

covering the scenario where the seizing State detains piracy suspect on suspicion of criminal activity (eg detention on remand) *on behalf* of the ultimately prosecuting State.

Practical examples of such an interpretation of Article 5(1)(c) ECHR do exist. Occasionally, governments and domestic courts assume that it is not only the initial arrest and period during which the seizing State deliberates whether to prosecute the suspects in its own courts that can be based on Article 5(1)(c) ECHR. Rather, they explicitly or implicitly assume that the justificatory ground of Article 5(1)(c) ECHR is also available beyond that point, ie *after* the seizing State has decided not to prosecute the suspects in its own courts and detains them solely with a view to their (potential) transfer to a third State. As an example, the First Instance Court of Rotterdam held in the *Samanyolu* case that from the moment the piracy suspects were seized by Danish forces on 2 January 2009 up until their physical surrender to the Netherlands and their arrest by Dutch authorities on 10 February 2009, liberty was deprived based on Article 5(1)(c) ECHR. The Court decided that Article 105 UNCLOS implicitly allows for detention on remand by the seizing State. It argued that in light of Article 100 UNCLOS, which establishes a duty of all States to cooperate in the suppression of piracy, Article 105 UNCLOS must be interpreted as also allowing for pre-trial detention to facilitate criminal proceedings in another State. Hence, Article 105 UNCLOS allows not only for detention by the seizing State on suspicion of criminal activity, but also detention by the seizing State on behalf of the receiving and ultimately prosecuting State.²⁴⁷ Thus, the Rotterdam court qualified the detention on board the Danish frigate as pre-trial detention by the seizing State (Denmark) on behalf of the ultimately prosecuting State (Netherlands), rather than as detention pending extradition (that is to say, transfer) by the seizing State (Denmark). This seems to explain why the court does not refer to Article 5(1)(f) ECHR at all.²⁴⁸ Under this “detention on behalf of” scheme, the Court took the view that the obligation to bring the suspect promptly before a judge remained with the seizing State, ie Denmark. However, it also decided that from the moment the Netherlands decided to receive the suspects (15 January 2009), the Dutch and Danish authorities worked closely together and the Dutch prosecutor should have therefore discussed the

247 On this argument of the Rotterdam court see below Part 4/I/C/2/b/bb.

248 *Re ‘MS Samanyolu’* LJN: BM8116, Urteil, Anlage I (Gericht 1. Instanz Rotterdam, 17 June 2010), Übersetzung aus der niederländischen/englischen Sprache; German translation on file with author 8; *Re ‘MS Samanyolu’* LJN: BM8116, Judgment (Rotterdam District Court, 17 June 2010), English translation provided by UNICRI 5. Consequently, it later analyzes whether Article 5(3) ECHR was respected during the entire period between seizure by Denmark and the physical surrender of the suspects to the prosecuting State (Netherlands); a course of action which would not be possible if detention pending transfer were based on Article 5(1)(f) ECHR, to which Article 5(3) ECHR does not apply: *Re ‘MS Samanyolu’* (Urteil, Anlage I) (n 248) 8; *Re ‘MS Samanyolu’* (Judgment) (n 248) 5.

necessity of a prompt presentation before a judge with his Danish counterpart. Since this did not happen, the Rotterdam court decided that the violation of Article 5(3) ECHR was also attributable to the Netherlands.²⁴⁹

The *Courier* case, presently subject to litigation in Germany, provides another example where the justificatory ground for deprivation of liberty pending transfer is seen in Article 5(1)(c) ECHR. One of the suspects – who was seized by a German frigate contributing to EUNAVFOR and transferred to Kenya after being held for seven days on board the warship – filed a complaint against Germany arguing, *inter alia*, that his detention had been unlawful because he was not brought before a German judge once during the entire time spent on board the German frigate.²⁵⁰ The German Federal Government did not explicitly state that Article 5(1)(c) ECHR applied to the detention of the suspect while on board the German frigate. However, it argued that Article 5(3) ECHR – which *nota bene* only applies when detention is based on Article 5(1)(c) ECHR – was not violated by Germany since the suspect was brought promptly before a judge in the receiving State (Kenya). The Court followed the reasoning of the government that under Article 5(3) ECHR “a judge is a judge”: it can either be a judge of the seizing, ie transferring, State or a judge of the receiving and ultimately prosecuting State.²⁵¹ The argument that the arresting State’s obligations under Article 5(3) ECHR can be discharged by the receiving State presupposes that detention of piracy suspects by the seizing State is based on Article 5(1)(c) ECHR up until their handover to a third State for prosecution.

The question whether the words “effected for the purpose of bringing him [the suspect] before the competent legal authority” of Article 5(1)(c) ECHR only encompass the purpose of bringing the suspect before domestic authorities, or if foreign authorities could also suffice, has not been explicitly decided by the Strasbourg organs. Moreover, as we will see later, neither the Commission nor the Court answered the related question whether it suffices under Article 5(3) ECHR that the suspect is brought promptly before a judge in the receiving State, or whether the piracy suspect has a right to be brought promptly before a judge in the seizing State.²⁵²

The rationale behind the requirement that arrest and detention is “effected for the purpose of bringing him [the suspect] before the competent legal authority” is twofold. On the one hand, the requirement aims at securing later criminal proceedings – ie to prevent a suspect from escaping justice. On the other hand, it aims at preventing a person from being detained over a long period solely based on an administrative act and ensures that he is brought before a competent legal

249 *Re ‘MS Samanyolu’* (Urteil, Anlage I) (n 248) 9–10; *Re ‘MS Samanyolu’* (Judgment) (n 248) 6.

250 *Re ‘MV Courier’* 25 K 4280/09 (Verwaltungsgericht Köln, 25. Kammer, 11 November 2011): for the facts, see paras 1–7.

251 *ibid* para 49.

252 See below Part 4/II/B/6/b.

authority – ie to subject deprivation of liberty to judicial scrutiny and control.²⁵³ If Article 5(1)(c) ECHR is interpreted by solely considering the rationale of securing later criminal proceedings in order to avoid impunity, it is arguably immaterial where these proceedings ultimately take place, ie whether the suspect is brought before the competent authority of the arresting and transferring State or of the ultimately prosecuting State. If read this way, the provision not only allows for arrest and detention in order to bring the suspect before the authorities of the seizing State, but also arrest and detention by the seizing State to secure a later trial in the receiving State – that is, detention on suspicion of criminal activity on behalf of the ultimately prosecuting State. Put differently, if the aim of securing criminal prosecutions and avoiding impunity is emphasized, the provision seems to allow the State, which is in the best position to realize that goal, to arrest and detain a suspect either to bring him before its own competent authorities or to bring the suspect before foreign authorities.

One argument against such a one-dimensional reading of Article 5(1)(c) ECHR is that, in addition to securing later criminal proceedings, it pursues a second goal: to prevent a person from being detained for a longer period solely based on an administrative act and to ensure that he is brought before a competent legal authority.²⁵⁴ Thus, the provision also aims at subjecting arrest and detention to judicial scrutiny and control. In other words, Article 5(1)(c) ECHR provides a justification to exceptionally deprive a person of his liberty – however, the power to arrest and detain on suspicion of criminal activity is not absolute. Rather, the proviso that a suspect can only be detained in order to be brought before a competent authority limits the power to arrest and detain and subjects it to judicial oversight. Seen from this perspective, it seems difficult to argue that the wording “competent legal authority” also encompasses a foreign authority since this would imply that the power to arrest and detain (exercised by the seizing State) is disconnected from its judicial control and scrutiny (to be guaranteed by the receiving rather than seizing State). In other words, in light of this second aim pursued by the purpose element of Article 5(1)(c) ECHR, it can hardly be maintained that the provision allows for the authority to deprive a person of his liberty to be split from the obligation to bring the person before a competent authority in order to subject the measure to judicial control. Rather, the State authorized to arrest and detain and the one bearing the obligation to bring the person before a competent authority must be the same. This flows, *inter alia*, from the principle of *par in parem non habet iudicium/iurisdictionem*,²⁵⁵ according to which the seizing State can only guarantee and ensure that the suspect is brought before its own authorities (but not before those of a third State), while the receiving State can

253 Unfried (n 114) 36; see also above Part 4/I/B/1/a.

254 *ibid.*

255 See, eg, Yoram Dinstein, ‘Par in Parem Non Habet Imperium’ (1966) 1 Israel Law Review 407.

only effectively exercise judicial control of deprivation of liberty carried out by its own officials (but not by those of the seizing third State).²⁵⁶

Another argument against interpreting the words “bringing him [the suspect] before the competent legal authority” as also encompassing arrest and detention in order to bring the suspect before a foreign authority is that when the seizing State decides not to prosecute the suspects it seized, a third State willing to prosecute them is generally not yet identified. In such a case, the words “competent legal authority” would have to be interpreted even broader than “the receiving State’s competent legal authority” to mean “a competent legal authority of any State potentially declaring its willingness in the near future to prosecute” the piracy suspect. Such an interpretation cannot be reconciled with the *Ciulla v Italy* case where the Court stressed that arrest and detention based on Article 5(1)(c) ECHR must be conducted in the context of criminal proceedings and that the provision only permits deprivation of liberty in connection with criminal proceedings – to be understood as a course of action against the applicant where concrete investigative and prosecutorial steps are taken.²⁵⁷ Since a third State ready to prosecute the suspects has generally yet to be identified at the moment the seizing State decides not to prosecute the suspects (but still holds them on board its warship), it cannot be said that the deprivation of liberty is in the context of criminal proceedings as required per *Ciulla* for the application of Article 5(1)(c) ECHR. Considering this, it seems difficult to maintain that detention by the seizing State can then still be based on Article 5(1)(c) ECHR, that it would allow for detention on remand by the seizing State on behalf of the ultimately prosecuting State.

One could argue that interpreting Article 5(1)(c) ECHR as covering the purpose of bringing the suspect before a foreign authority (and thus to apply it from seizure right through to surrender) would provide the suspect with enhanced protection since it opens the door to application of the right to be brought promptly before a judge as stipulated by Article 5(3) ECHR. This right is not amenable to detention based on Article 5(1)(f) ECHR, which is the most obvious alternative justificatory ground for depriving piracy suspects of their liberty when they are held on board a warship with a view to their (potential) transfer.²⁵⁸ However, in the piracy context, protection would not be enhanced by applying Article 5(1)(c) ECHR because various actors argue that it suffices under Article 5(3) ECHR that the suspect is brought before a judge in the receiving (rather than seizing) State. In more detail, the argument is as follows: according to one view, the authority mentioned in Article 5(1)(c) ECHR is the same as the one in Article 5(3)

256 Thus, eg, in the *Samanyolu* case, the Rotterdam court could not decide on a violation of the right to liberty by Denmark and it limited its judicial control to the question whether the violation by Denmark was also attributable to the Netherlands.

257 See above Part 4/I/B/1/a.

258 See, eg, the argument raised by Gilbert that arrest pursuant to a request for provisional arrest should be based on Article 5(1)(c) ECHR rather than Article 5(1)(f) ECHR; see above Part 4/I/B/1/c/cc.

ECHR, ie the judge reviewing the legality of arrest and detention rather than the trial judge deciding on the merits.²⁵⁹ Taken together with the proposition that the reference to the competent legal authority in Article 5(1)(c) ECHR encompasses foreign authorities, it would indeed suffice under Article 5(3) ECHR to bring the suspect before a judge in the receiving State. Various actors actually adopt such an interpretation of Article 5(3) ECHR, which, as we will see later, must be rejected for a number of reasons.²⁶⁰ In sum, the argument of applying Article 5(1)(c) ECHR to deprivation of liberty from the moment of initial arrest up until the suspects are surrendered – because it opens the door to the procedural safeguard of Article 5(3) ECHR – should be rejected. For one thing, there is no need to apply Article 5(1)(c) ECHR to the entire period between seizure and surrender in terms of enhanced protection because the seizing State is already under an obligation to bring the suspect before a judge after his initial arrest (when deprivation of liberty can only be based on Article 5(1)(c) ECHR).²⁶¹ Moreover, in practice, applying Article 5(1)(c) and (3) ECHR to the entire period between seizure and surrender often lowers protection because some actors argue that it suffices under these provisions to bring the person before a foreign judge and consider it unnecessary to bring the seized suspects before their own judge at any point.

A final argument against reading the words “bringing him [the suspect] before the competent legal authority” as including foreign authorities is that detention by the seizing State on behalf of the ultimately prosecuting State based on Article 5(1)(c) ECHR is not the only method by which to ensure the alleged offender’s presence in later criminal proceedings. Rather, it is by means of detaining a person with a view to extradition (Article 5(1)(f) ECHR) that this purpose is usually attained in criminal cases of a transnational dimension. Interpreting Article 5(1)(c) ECHR as encompassing detention on behalf of a third State in order to secure the suspect’s presence in those proceedings would considerably curtail the instances where Article 5(1)(f) ECHR is applicable. Such a broad interpretation of Article 5(1)(c) ECHR is hardly compatible in light of a systematic and contextual reading of Article 5(1) ECHR as a whole because the justificatory ground of Article 5(1)(f) ECHR is the more specific provision for arrest and detention in order to facilitate foreign criminal prosecutions.²⁶² To provide Article 5(1)(c) ECHR with such a broad scope also stands in contrast to the idea of interpreting the justificatory grounds of Article 5(1) ECHR strictly and narrowly as required by the Strasbourg organs.²⁶³ What is more, in light of the aim of Article 5 ECHR, which is to avoid arbitrary or unlawful deprivation of liberty, it can be

259 For the two views and arguments on why the preferred reading of Article 5(1)(c) ECHR is that it refers to the judge deciding on the merits, see above Part 4/I/B/1/a.

260 See below on Part 4/II/B/6/b.

261 See above Part 4/I/B/2/a.

262 Unless it is assumed that a cumulative application of subparagraph (c) and (f) of Article 5(1) ECHR is possible, which is, however, uncertain.

263 See above Part 4/I/B.

assumed that the list of exceptions was formulated in a concise way so as to avoid any redundancy or overlap and thus any ambiguity as to whether, for example, Article 5(3) ECHR applies to an instance of deprivation of liberty. In that vein, the Commission decided in *Lynas v Switzerland*²⁶⁴ and *X. v Italy*²⁶⁵ that persons deprived of their liberty based on a request for their extradition cannot invoke Article 5(3) ECHR in relation to their detention pending extradition. It found that Article 5(1)(c) ECHR did not apply to them and is only amenable to instances explicitly described in it, among which the goal to secure extradition does not figure.²⁶⁶ Article 18 ECHR also speaks against integrating a transnational element into Article 5(1)(c) ECHR, ie to allow for detention on remand by the seizing State on behalf of the ultimately prosecuting State, and in favour of subjecting these cases to the more specific provision of Article 5(1)(f) ECHR. The provision stipulates that the restrictions permitted under the Convention regarding specific rights and liberties – such as the justificatory grounds of Article 5(1) ECHR exceptionally allowing restricting the right to liberty – shall not be applied for any other purpose than those for which they have been prescribed.

For these reasons, Article 5(1)(c) ECHR should not be interpreted as including arrest and detention effected with the purpose of bringing the suspect before a *foreign* legal authority. Likewise, as we will see later in detail, it is hardly compatible with the aim pursued by the right to liberty if Article 5(3) ECHR is understood as allowing for the person to be brought before a judge in the receiving State rather than the seizing State.²⁶⁷ In sum, while initial arrest of piracy suspects and detention pending the seizing State's decision whether to prosecute the suspects in its domestic courts must be based on Article 5(1)(c) ECHR,²⁶⁸ the provision should not be applied to detention *after* the seizing State has decided not to exercise its criminal jurisdiction over the suspects it took captive. Therefore, the next step will be to analyse the moment from which Article 5(1)(f) ECHR may be available.

d) Detention during Transfer Evaluation, Negotiation and Request

We have seen that for so long as a seizing State is undecided on whether to prosecute the suspects in its own courts, detention can only be justified by Article 5(1)(c) ECHR and Article 5(1)(f) ECHR is not yet available. Further, as soon as the

264 *Lynas v Switzerland* App no 7317/75 (Commission Decision, 6 October 1976) 3.b. of the legal considerations: the applicant first underwent pre-trial detention for one offence and was then detained pending extradition for another offence.

265 *X v Italy* (n 215) para 3 of the legal considerations: the applicant was first held in detention pending extradition for one offence and later in pre-trial detention for another offence.

266 *Murdoch* (n 112) 25.

267 See below Part 4/II/B/6/b.

268 See above Part 4/I/B/2/a.

seizing State decides *not* to exercise its criminal jurisdiction over the suspects, Article 5(1)(c) ECHR is no longer available since it does not cover detention on remand on behalf of the ultimately prosecuting State. As per *Quinn v France*, the justificatory ground for detention may change during the period of detention, but deprivation of liberty must be covered by a justificatory ground at all times and without interruption.²⁶⁹ Hence, it must be determined from what moment the justificatory ground of Article 5(1)(f) ECHR applies in cases where the seizing State decides *not* to exercise its criminal jurisdiction, the transfer option is then pursued, and the suspects are therefore not released.

We have seen that in the context of extradition *stricto sensu*, the requirement “action is being taken with a view to ... extradition” of Article 5(1)(f) ECHR is not only fulfilled if the third State anxious to prosecute the alleged offender submits an extradition request. Rather, it suffices that a request for provisional arrest has been issued if there are no criminal proceedings pending in the requested State and if the requested State is not pursuing any goal other than surrender for prosecution with the deprivation of liberty.²⁷⁰ It must therefore be determined what the counterparts are of submission of a request for provisional arrest and submission of an extradition request in the context of extradition *stricto sensu* in the realm of transfers.

It has already been demonstrated that the initial arrest of piracy suspects cannot be compared to an arrest based on a request for provisional arrest (and therefore Article 5(1)(f) ECHR is not yet available). This is mainly for the reason that a third State willing to prosecute the seized person has not yet been identified at this moment and, therefore, it cannot be said that a piracy suspect has been arrested with a view to surrender for criminal prosecution.²⁷¹

Yet, without a doubt, the prosecuting State is clearly identifiable once a request for transfer has been submitted by the seizing State or, within the EUNAVFOR framework, by the EUNAVFOR Operational Headquarters. In practice, such a request is only submitted once transfer negotiations suggest that acceptance of the request is quasi-certain.²⁷² Therefore, the submission of a transfer request does not quite correspond to the issuance of an extradition request. Rather, the submission of a transfer request corresponds to the phase in extradition proceedings where, after a request for extradition has been submitted, judicial and/or administrative bodies decide that the requirements for extradition are fulfilled, ie when extradition is virtually certain and only hinges upon the execution of the extradition order. Therefore, Article 5(1)(f) ECHR should not only apply once a transfer request is submitted, but already before.

269 *Quinn v France* (n 87) paras 42–43.

270 See above Part 4/I/B/1/c/cc.

271 See above Part 4/I/B/2/a.

272 See above Part 2/II/B/5/d.

It could be argued that as soon as transfer negotiations are started with a third State and pursued with due diligence and in good faith, a stage is reached that is comparable to the one where a request for provisional arrest is submitted in the context of extradition. We have seen that in the realm of extradition a request for provisional arrest is only sufficient for applying Article 5(1)(f) ECHR if there are no criminal proceedings pending against the suspect in the requested State and if there is no indication that the requested State is detaining the person for any reason other than his surrender for prosecution. In other words, if the State exercising custody over the alleged offender vis-à-vis whom a request for provisional arrest has been issued is also considering criminal prosecution, arrest and detention must be based on Article 5(1)(c) ECHR rather than Article 5(1)(f) ECHR.²⁷³ From this can be concluded that the justificatory ground of subparagraph (f) should be available if transfer negotiations are conducted with due diligence, but only if the seizing State has already decided not to prosecute the suspects in its own courts (which equals the requirement that no criminal proceedings are pending in the requested State and that the requested State does not detain the person for any reason other than extradition). This argument – that it should suffice for applying Article 5(1)(f) ECHR that transfer negotiations were initiated and the seizing State had already decided not to exercise its criminal jurisdiction over the suspects – should *a fortiori* hold true in cases where transfer negotiations are conducted with a State with which a transfer agreement has been entered into. Such an agreement is proof of the regional State's general willingness to receive suspects for prosecution. What is more, in practice, transfer negotiations are only started if the case fulfils certain criteria necessary for transfer to a specific State, ie if there is some prospect of successful transfer negotiations. This also speaks in favour of applying Article 5(1)(f) ECHR, which requires that “action is taken with a view ... to extradition”, at the moment when transfer negotiations are started and the seizing State no longer considers prosecuting the suspect it seized.

In practice, transfer negotiations are generally started, at the latest, once the seizing State has decided not to prosecute the suspects in its domestic courts. Often, transfer negotiations are even conducted in parallel with the deliberations of the seizing State whether to prosecute the suspects in its own courts. Exceptionally, however, a delay may occur between the decision of the seizing State not to exercise its criminal jurisdiction over the suspects and the initiation of transfer negotiations. Since, in this situation, detention can no longer be based on Article 5(1)(c) ECHR but not yet on Article 5(1)(f) ECHR, the question is whether the exceptional maritime situation warrants some flexibility when interpreting the Court's line of reasoning in *Quinn*, according to which a gap of 11 hours between deprivation of liberty based on Article 5(1)(c) ECHR and Article

273 See above Part 4/I/B/1/c/cc.

5(1)(f) ECHR was too long.²⁷⁴ This seems acceptable given that, in the maritime context, the possibility to release and re-arrest is of a rather theoretical nature.

Finally, it often happens that transfer negotiations with several States take place concurrently. In the context of extradition, it is immaterial if deprivation of liberty is initially based on a request for provisional arrest by one State, but the suspect is ultimately surrendered to a different State. In other words, the Court does not require arrest and detention to be undertaken with a view to surrender to one particular State, so long as the conditions for applying Article 5(1)(f) ECHR are continuously fulfilled with regard to at least one State.²⁷⁵ Hence, it is irrelevant for the application of Article 5(1)(f) ECHR if the seizing State or EUNAVFOR conducts transfer negotiations with several States concurrently – as long as these negotiations are pursued genuinely and with due diligence with at least one State, the element “action is being taken with a view to ... extradition” is fulfilled.

3. Conclusion

Overall, it can be concluded that the initial arrest of piracy suspect must be based on Article 5(1)(c) ECHR. This justification is available up until the seizing State decides not to exercise its criminal jurisdiction over the suspects. Since the wording “effected for the purpose of bringing [the suspect] before the competent authority” should not be read as encompassing foreign authorities, Article 5(1)(c) ECHR cannot serve as a justification for detention once the seizing State has decided not to prosecute the suspects in its own courts. Finally, in cases where suspects are not released, Article 5(1)(f) ECHR is applicable from the moment transfer negotiations are initiated with a third State and the seizing State no longer considers prosecuting the suspects in its own courts. Furthermore, Article 5(1)(f) ECHR also covers the time necessary to implement a transfer decision.

C. Lawfulness of Arrest and Detention of Piracy Suspects

According to the right to liberty stipulated under Article 5 ECHR and Article 9 ICCPR, every deprivation of liberty must not only be covered by a justifica-

274 *Quinn v France* (n 87) paras 42–43: Quinn’s detention was first covered by Article 5(1)(c) ECHR; despite the fact that his release from detention on remand was ordered, he remained in custody until he was arrested anew based on an extradition request at which point his deprivation of liberty was covered by Article 5(1)(f) ECHR. The Court acknowledged that some delay in executing a decision ordering the release of a detainee may be permissible under the right to liberty. However, in the case at hand, 11 hours passed after the order to release him “forthwith”, the applicant was not notified of the decision to release and no steps were undertaken to execute the order. In light of these facts, the Court decided that there was a violation of Article 5(1) ECHR.

275 See above Part 4/I/B/1/c/cc.

tory ground, but also be free from arbitrariness and lawful. What follows is an overview of the various elements of the lawfulness requirement as flowing from Article 5(1) ECHR and Article 9(1) ICCPR, which are then applied to arrest and detention of piracy suspects on suspicion of criminal activity on the one hand and detention pending transfer on the other.

1. Elements of Substantive and Procedural Lawfulness

a) Under Article 5(1) ECHR

The lawfulness requirement flows from two textual elements of Article 5(1) ECHR, namely from its *chapeau* stating that a person can only be deprived of his liberty “in accordance with a procedure prescribed by law”, and from subparagraphs (c) and (f) where the attribute “lawful” precedes the words “arrest” and “detention”. The provision thus contains a double test of legality.²⁷⁶ In their case law, the Strasbourg organs do not clearly distinguish between these two textual elements. Rather, they examine them together under the heading of “lawfulness”. For example, in *Stephens v Malta (No. 1)*, the Court noted that “the main issue to be determined is whether the disputed detention was ‘lawful’, including whether it complied with ‘a procedure proscribed by law’”.²⁷⁷ In *Bordovskiy v Russia*, the Court even explicitly stated that there is a certain overlap between the two elements of lawfulness: “the term ‘lawful’ covers procedural as well as substantive rules. There thus exists a certain overlap between this term and the general requirement stated at the beginning of Article 5 § 1, namely the observance of ‘a procedure prescribed by law’”.²⁷⁸ For these reasons, the two lawfulness elements are considered together in the following analysis.

aa) Existence of Legal Basis and Its Characteristics

A fundamental command flowing from the lawfulness requirement is that any arrest or detention requires a legal basis, ie that a legal basis for deprivation of liberty must exist.²⁷⁹ The requirement of a legal basis relates to both the deprivation of liberty as such, namely describing the grounds justifying a deprivation of liberty (substantive lawfulness) and the domestic procedure by which arrest and detention are imposed (procedural lawfulness). For the sake of completeness, it

²⁷⁶ Trechsel and Summers (eds) (n 25) 419.

²⁷⁷ *Stephens v Malta (No 1)* App no 11956/07 (ECtHR, 21 April 2009) para 61; *Quinn v France* (n 87) para 47; *Nasrullojev v Russia* (n 195) para 70; *Ismoilov and others v Russia* (n 195) para 136; *Khodzhayev v Russia* (n 10) para 134; *Khaydarov v Russia* (n 10) para 128; *Gafarov v Russia* (n 10) para 184; *Eminbeyli v Russia* (n 89) para 43; *Shchebet v Russia* (n 195) para 62; *Guala c la France* (n 194) 3. of the legal considerations; and *Raf c Espagne* (n 246) para 53.

²⁷⁸ *Bordovskiy v Russia* App no 49491/99 (ECtHR, 8 February 2005) para 41.

²⁷⁹ *Stephens v Malta (No 1)* (n 277) para 61.

should be noted that the Commission inferred that deprivation of liberty must rest on a legal basis from both the right to liberty and also the right to security.²⁸⁰

The legal basis providing for deprivation of liberty and describing the relevant procedure to deprive a person of his liberty is generally found in national law.²⁸¹ However, it can also stem from international law.²⁸² Regardless of whether the legal basis governing deprivation of liberty is a rule of international or domestic law, it must fulfil certain formal and content-based criteria.

In terms of formal exigencies, the legal basis providing for deprivation of liberty and governing the relevant procedure must be pre-existing.²⁸³ Further, the general principles of legal certainty and rule of law, which are particularly important regarding interferences with the right to liberty, require domestic law to be of a certain quality. According to the Court, the “quality of law” standard implies that a law governing deprivation of liberty must be “sufficiently accessible, precise and foreseeable in its application, in order to avoid all risk of arbitrariness”.²⁸⁴ Sufficient precision, in turn, “allow[s] the citizen – if need be, with appropriate advice – to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail”.²⁸⁵ The Court inferred that rules governing deprivation of liberty must be sufficiently clear and accessible, ie satisfy the principle of legal certainty, not only from the lawfulness requirement pertaining to the right to liberty but also from the right to security.²⁸⁶ In some cases, the Court adds the *caveat* that quality of law is “not an end in itself and cannot be gauged in the abstract” and only becomes relevant where the poor quality of law tangibly prejudices the applicant’s substantive rights under the ECHR.²⁸⁷

One aspect of the quality of law standard is that the Court puts strict limits on the application of legal norms by analogy. For instance, it held that the absence of provisions specifically regulating detention pending extradition combined

280 See, eg, *Agee v the United Kingdom* App no 7729/76 (Commission Decision, 17 December 1976) 12. of the legal considerations; *Dyer v the United Kingdom* App no 10475/83 (Commission Decision, 9 October 1984) para 25 of the legal considerations.

281 On the notion of “law”, see Trechsel and Summers (eds) (n 25) 419.

282 Council of Europe/European Court of Human Rights (n 69), referring to *Medvedyev and Others v France* (Grand Chamber) (n 1) para 79.

283 *Garabayev v Russia* App no 38411/02 (ECtHR, 7 June 2007) para 87.

284 *Nasrulloev v Russia* (n 195) para 71; *Ismoilov and others v Russia* (n 195) para 137; *Soldatenko v Ukraine* (n 195) para 111; *Khudyakova v Russia* App no 13476/04 (ECtHR, 8 January 2009) para 68; *Svetlorusov v Ukraine* (n 200) para 47; *Eminbeyli v Russia* (n 89) para 43. In *Ryabikin v Russia* App no 8320/04 (ECtHR, 19 June 2008) para 127, the Court states that quality of law in relation to Article 5(1) ECHR implies that where a national law authorizes a deprivation of liberty, it must be sufficiently “assessable, precise and foreseeable in application” (emphasis added).

285 *Stephens v Malta (No 1)* (n 277) para 61.

286 *Nikolaishvili v Georgia* App no 37048/04 (ECtHR, 13 January 2009) para 53.

287 *Bordovskiy v Russia* (n 278) para 49; *Khudyakova v Russia* (n 284) para 69.

with a mere reference to rules on pre-trial detention and the resulting inconsistent legal positions of domestic authorities on the issue of the applicable provisions to detention pending extradition fall short of the quality of law standard.²⁸⁸ *A fortiori* the complete absence of legal provisions providing for, even by reference, a procedure for detention pending extradition falls short of the lawfulness requirement. Equally, the mere existence of a resolution of a Supreme Court (without legal force and non-binding on courts and law enforcement bodies) providing for the application of the provisions on pre-trial detention *mutatis mutandis* to detention pending extradition is not sufficient in terms of accessibility, precision and foreseeability of the legal basis for deprivation of liberty.²⁸⁹

To live up to the lawfulness requirement, the legal basis must meet certain content-based criteria, in addition to fulfilling the aforementioned formal requirements. Thus, the Court has repeatedly stressed that the substance of domestic law must be in conformity with the general principles expressed or implied in the Convention.²⁹⁰ In order to be in conformity with the Convention, domestic law stipulating the conditions for arrest and detention and regulating the procedure for depriving a person of his liberty must namely be in line with the purpose of Article 5 ECHR, which is to protect the individual from arbitrary deprivation of liberty.²⁹¹ Specifically with regard to the content of rules governing the procedure for depriving a person of his liberty, the Court held that “the notion underlying the term in question [lawfulness] is one of fair and proper procedure”.²⁹²

bb) Duty to Conform to Legal Basis and Its Correct Implementation

The mere existence of rules governing deprivation of liberty is obviously not enough to protect the individual from unlawful and arbitrary arrest and detention – it must also be ensured that they are correctly applied.²⁹³ This not only flows from the right to liberty but also the right to security.²⁹⁴ The Strasbourg organs stressed that there is a duty to conform to domestic law, both its substan-

288 *Nasrulloev v Russia* (n 195) paras 72–77; *Muminov v Russia* App no 42502/06 (ECtHR, 11 December 2008) para 121; *Ismoilov and others v Russia* (n 195) paras 138–40.

289 *Soldatenko v Ukraine* (n 195) paras 113–14.

290 *Bakhtiar c la Suisse* App no 27292/95 (Décision de la Commission, 18 January 1996) 4. of the legal considerations; Anne Peters and Tilmann Altwicker, *Europäische Menschenrechtskonvention* (2nd edn, Beck 2012) 128.

291 Council of Europe/European Court of Human Rights (n 69) para 27.

292 *Eminbeyli v Russia* (n 89) para 43. It thus confirmed an earlier finding of the Commission that the proceedings in which a person is deprived of his liberty must be fair: *Bakhtiar c la Suisse* (n 290) 4. of the legal considerations.

293 Trechsel and Summers (eds) (n 25) 419.

294 See, eg, *Agee v the United Kingdom* (n 280) 12. of the legal considerations; *Dyer v the United Kingdom* (n 280) para 25 of the legal considerations.

tive and procedural rules.²⁹⁵ This duty to comply with the law applies to all phases of deprivation of liberty, particularly the adoption, ordering and execution of measures depriving a person of his personal liberty.²⁹⁶

With regard to the implementation of these rules, ie how they are applied in a concrete instance of deprivation of liberty, the Court has held that procedural lawfulness under Article 5(1) ECHR requires a fair and proper procedure. This namely entails that “any measure depriving a person of his liberty should issue from and be executed by an appropriate authority and should not be arbitrary”.²⁹⁷ Furthermore, in order to be lawful, a period of detention must be based on a court order.²⁹⁸ Such an order must be duly reasoned, be based on concrete grounds and contain a specific time limit with regard to the measure interfering with liberty.²⁹⁹ Thus, the Court takes into account the absence or lack of reasoning in detention orders when assessing the lawfulness of detention from the angle of Article 5(1) ECHR.³⁰⁰ To wit, it found that a judicial decision authorizing detention and not providing *any* ground for depriving the person of his liberty is incompatible with the provision, notably because it violates the implicit prohibition of arbitrary deprivation of liberty.³⁰¹ Also a decision ordering deprivation of liberty that is “extremely laconic” and does not refer to any legal provision that permits deprivation of liberty does not fulfil the lawfulness and free from arbitrariness requirements enshrined in Article 5(1) ECHR.³⁰²

cc) Degree of Scrutiny Exercised by Strasbourg Organs

Since the lawfulness requirement essentially refers to domestic law, the degree to which the Court is ready to scrutinize whether such a legal basis exists and whether national authorities complied with it must be examined.³⁰³

295 *Chinoy v the United Kingdom* (n 192) 2. of the legal considerations; *Kosonen c le Portugal* (n 215) 1.a. of the legal considerations; *Guala c la France* (n 194) 3. of the legal considerations; *Raf c Espagne* (n 246) para 53; *Bordovskiy v Russia* (n 278) para 42; *Nasrulloev v Russia* (n 195) para 70; *Soldatenko v Ukraine* (n 195) para 110; *Muminov v Russia* (n 288) para 119; *Stephens v Malta (No 1)* (n 277) para 61; *Kaboulov v Ukraine* (n 87) para 130; *Khodzhayev v Russia* (n 10) para 134; *Khaydarov v Russia* (n 10) para 128; *Gaforov v Russia* (n 10) para 184, *Eminbeyli v Russia* (n 89) para 43.

296 *Medvedyev and Others v France* (Grand Chamber) (n 1) para 79; *Farmakopoulos v Belgium* App no 11683/85 (Commission Decision, 8 February 1990) 1. of the legal considerations; *Kosonen c le Portugal* (n 215) 1.b. of the legal considerations; *Bordovskiy v Russia* (n 278) para 41.

297 *Eminbeyli v Russia* (n 89) para 43.

298 Council of Europe/European Court of Human Rights (n 69) para 29.

299 *ibid* paras 31 and 33.

300 *ibid* para 31.

301 *ibid*.

302 *ibid*.

303 Trechsel and Summers (eds) (n 25) 420.

Compared with the European Court of Human Rights, the Commission acted with much more self-restraint when reviewing compliance with domestic law. According to the Commission, it is primarily the role of national authorities, namely the domestic courts, to interpret and apply domestic law. Therefore, the Commission generally did not extend its authority to the interpretation of domestic law and instead referred to the interpretation provided by domestic authorities. However, the Commission did step in and did not find itself bound by the interpretation provided by domestic authorities if it appeared arbitrary.³⁰⁴

The Court, in turn, does not limit itself to an “arbitrariness test” regarding the correct interpretation and application of domestic law on deprivation of liberty. It shares the view that it is normally the task of national authorities, notably courts, to interpret and apply domestic law. However, it takes a different stance with regard to cases involving deprivation of liberty and where a “failure to comply with domestic law entails a breach of the Convention”. In such cases, it argues, the Court “can and should ... review” whether arrest and detention complied with the legal rules governing deprivation of liberty.³⁰⁵

b) Under Article 9(1) ICCPR

Article 9(1) ICCPR stipulates that no person shall be deprived of his liberty “except on such grounds and in accordance with such procedure as are established by law”. Thus, similar to Article 5(1) ECHR, the Covenant requires that deprivation of liberty is governed by law. On the one hand, there must be a legal basis describing grounds on which liberty may be deprived. This is referred to as the substantive component of lawfulness.³⁰⁶ On the other hand, the procedure applied in order to deprive a person of his liberty, ie the procedural component of lawfulness, must also be laid down in law.³⁰⁷

From the wording of Article 9(1) ICCPR follows that it does not suffice to simply have these legal bases in place, but that a concrete measure depriving a person of his liberty must strictly abide by these rules.³⁰⁸ The rules must furthermore be in line with international law, namely with the provisions of the ICCPR.³⁰⁹ It has even been argued that if a State carries out an arrest within the

304 *S c la France* (n 215) 4. of the legal considerations.

305 *Khodzhayev v Russia* (n 10) para 135; *Khaydarov v Russia* (n 10) para 129; *Gafarov v Russia* (n 10) para 185. Almost similar wording can be found in *Bordovskiy v Russia* (n 278) para 42, and *Eminbeyli v Russia* (n 89) para 44: “[S]ince under Article 5 § 1 failure to comply with domestic law entails a breach of the Convention, it follows that the Court can and should exercise a certain power to review whether this law has been complied with.”

306 Nowak, *U.N. Covenant on Civil and Political Rights* (n 17) 223.

307 *ibid.*

308 Carlson and Gisvold (n 76) 82.

309 Nowak, *U.N. Covenant on Civil and Political Rights* (n 17) 223.

territory of another State (which is the case when patrolling naval States arrest piracy suspects in waters subject to a third State's sovereignty, namely in Somali territorial waters), the legality requirement of Article 9(1) ICCPR requires the arrest to be in line with both the law of the arresting State and the law of the territorial State.³¹⁰

Also under the right to liberty stipulated in the ICCPR, the law governing deprivation of liberty must be of a certain quality. The law must describe the grounds and procedure for depriving a person of his liberty clearly³¹¹ and with sufficient specificity.³¹² In other words, vague provisions or provisions couched in general terms are not in line with the principle of legality,³¹³ which requires that rules governing arrest and detention are predictable.³¹⁴ Furthermore, these legal bases must be accessible to all persons subject to the relevant jurisdiction.³¹⁵ Often, only a parliamentary statute or an equivalent unwritten norm of common law fulfils this accessibility requirement.³¹⁶

c) **Conclusion**

Broadly speaking, the lawfulness component of the right to liberty under the ECHR and the ICCPR requires the existence of a legal basis governing deprivation of liberty as such (substantive lawfulness) and the procedure to be followed when arresting or detaining a person (procedural lawfulness). The legal basis must not only pre-exist but also be of a certain quality: it must be generally accessible and its provisions must be precise, unequivocal and specific, which renders the legal basis and decisions based on it foreseeable and predictable. Furthermore, the substance of rules governing deprivation of liberty must be in line with the content of the ECHR and ICCPR respectively, most notably they must be free from arbitrariness and lay down a fair and proper procedure to deprive a person of his liberty. With regard to a specific instance of deprivation of liberty, arrest and detention must be carried out in conformity with the legal basis. In terms of procedure, an order for arrest or detention must emanate from the competent authority, which is generally a court, and be issued in a fair and proper procedure. An order allowing for arrest or detention must notably be duly reasoned.

310 Joseph, Schultz and Castan (n 72) 309, referring to *Domukovsky et al v Georgia* Comm nos 623/1995, 624/1995, 626/1995, 627/1995 (HRC, 6 April 1998) para 18.2.

311 Nowak, *U.N. Covenant on Civil and Political Rights* (n 17) 223.

312 Carlson and Gisvold (n 76) 82.

313 Joseph, Schultz and Castan (n 72) 309; Carlson and Gisvold (n 76) 83.

314 Roza Pati, *Due Process and International Terrorism* (Martinus Nijhoff 2009) 42.

315 Nowak, *U.N. Covenant on Civil and Political Rights* (n 17) 223; Carlson and Gisvold (n 76) 83.

316 Nowak, *U.N. Covenant on Civil and Political Rights* (n 17) 223.

For the following analysis whether deprivation of liberty of piracy suspects lives up to the lawfulness requirement stipulated in Article 5(1) ECHR and Article 9(1) ICCPR, a distinction is drawn between arrest and detention of alleged pirates on suspicion of criminal activity, ie with a view to be submitted for prosecution in the seizing State, and detention of alleged pirates in order to secure their (potential) transfer to a third State for prosecution. These two categories of deprivation of liberty are subject to different rules.

2. Lawfulness of Piracy Suspect's Arrest on Suspicion of Criminal Activity

Two approaches can be discerned regarding deprivation of liberty on suspicion of criminal activity, ie the initial arrest of piracy suspects and their detention while the seizing State deliberates whether to prosecute the suspects in its own courts. On the one hand, there are those States that pursue a criminal law approach to arrest and detention of piracy suspects. This implies that they treat piracy suspects as any other criminal suspect and subject their arrest and detention to the ordinary criminal procedural rules or to norms governing deprivation of liberty on suspicion of criminal activity specifically designed for the maritime context. The practices of Spain and France are representative of this (protective) criminal law approach to deprivation of liberty of piracy suspects. On the other hand, there are those States arguing that piracy suspects only enter the door of their domestic criminal law (including the provisions ordinarily governing arrest and detention on suspicion of criminal activity) once the State decides to actually exercise their criminal jurisdiction over the suspects it seized. Before the seizing State decides to prosecute the case in its own courts (and obviously also if it decides not to), alleged pirates arrested and detained by the State's armed forces do not benefit from the application of domestic rules usually governing arrest and detention of criminal suspects. The following discusses these two approaches in light of the lawfulness requirement flowing from the right to liberty.

Piracy suspects are not only deprived of their liberty by patrolling naval States acting in a national capacity. Rather, arrest and detention with a view to criminal prosecution constitute an important component of EUNAVFOR's mandate. Since arrest and detention within this multinational operation is subject to specific rules, namely emanating from the EUNAVFOR chain of command, this type of deprivation of liberty must be assessed separately in view of the lawfulness requirement of Article 5(1) ECHR and Article 9(1) ICCPR.

a) *By States Pursuing a Criminal Law Approach to Deprivation of Liberty*

A number of States pursue a criminal law approach to arrest and detention of piracy suspects. These States consider arrest and detention of piracy suspects to come within the ordinary law enforcement and criminal law framework. As a

consequence, they apply domestic rules governing arrest and detention on suspicion of criminal activity to piracy suspects as well. On the one hand, these can be general rules on deprivation of liberty for the purpose of criminal investigation and prosecution, such as those contained in domestic codes of criminal procedure. As an example, Spain follows this course of action.³¹⁷ On the other hand, some States have adopted specific legislation governing enforcement measures at sea, including arrest and detention on suspicion of criminal activity. This is the case under French law for instance.³¹⁸ States pursuing a criminal law approach to arrest and detention of piracy suspects apply domestic law governing deprivation of liberty on suspicion of criminal activity from the very moment they interfere with the personal liberty of alleged pirates. In short, piracy suspects are considered to be “ordinary criminal suspects” and their arrest and detention is subject to the “ordinary rules” governing deprivation of liberty on suspicion of criminal activity.

In States pursuing a criminal law approach to arrest and detention of piracy suspects, the *domestic* norms governing deprivation of liberty on suspicion of criminal activity do not pose any particular difficulties in light of the lawfulness and free from arbitrariness requirements of Article 5(1) ECHR and Article 9(1) ICCPR.³¹⁹ Concretely, there is a legal basis in existence governing deprivation of liberty as such and the procedure leading to arrest and detention. Furthermore, the characteristics of these domestic legal norms are, in principle, unproblematic in terms of substance and are in line with the quality of law standard flowing from Article 5 ECHR and Article 9 ICCPR since they are, *inter alia*, accessible, precise and, therefore, foreseeable. Most importantly, these States abide by these rules when arresting and detaining piracy suspects. They notably grant procedural safeguards to alleged pirates deprived of their liberty, such as the right to be brought before a judge within 24 (Spain) or 48 hours (France).³²⁰ When seen through the lens of domestic law governing deprivation of liberty on suspicion of criminal activity, arrest and detention of piracy suspects by these States is, *prima facie*, unproblematic in terms of lawfulness.³²¹

317 See above Part 2/II/C/3/a.

318 *ibid.*

319 Obviously, as follows from the case law pertaining to Article 5 ECHR and Article 9 ICCPR, legal norms ordinarily governing arrest and detention on suspicion of criminal activity may always fall short of the requirements flowing from the right to liberty in one respect or another. However, the ordinary domestic legal framework governing arrest and detention on suspicion of criminal activity does not raise special issues specifically with regard to piracy suspects.

320 See above Part 2/II/C/3/a.

321 If States pursuing a criminal law approach to arrest and detention of piracy suspects deprive a person of his liberty while contributing to EUNAVFOR, deprivation of liberty is not governed solely by domestic law. Rather, it is also subject to European Union law, including rules from the EUNAVFOR chain of command. For an assess-

b) By States Perceiving Alleged Pirates as “Extraordinary Suspects”

aa) Propositions How to Fill the Normative Gap

Other States contributing to counter-piracy operations off the coast of Somalia and the region do not pursue a criminal law approach to arrest and detention of piracy suspects. Rather, they consider piracy suspects to be outside the scope of domestic rules ordinarily governing arrest and detention on suspicion of criminal activity at the moment of their initial arrest and when detained pending the decision by the seizing State whether to prosecute the suspects in its domestic courts. Put differently, they consider alleged pirates to be “extraordinary suspects” during these phases of disposition. According to their view, piracy suspects only enter the door of domestic criminal law – and become “ordinary criminal suspects” – at a later point. In Denmark, for instance, the ordinary rules governing arrest and detention on suspicion of criminal activity (mainly laid down in the Danish Administration of Justice Act) are applied to piracy suspects as soon as the Danish prosecutor decides to prosecute the suspects in domestic courts.³²² In Germany, just the decision to exercise criminal jurisdiction over the suspects alone does not suffice; rather, German criminal procedural rules are only applicable once the suspects are physically surrendered from the German Navy to the German Federal Police in execution of an arrest warrant issued by a German judge.³²³

The main reason for not applying the ordinary rules on arrest and detention on suspicion of criminal activity, which are generally contained in codes of criminal procedure, is that these rules do not apply to the military. For instance, the Danish Administration of Justice Act, which exhaustively regulates when and how a person suspected of having committed an offence can be deprived of his liberty,³²⁴ does not apply *ratione personae* to the Danish military, which is entrusted with the counter-piracy law enforcement operations off the coast of Somalia and the region.³²⁵ Similarly, it is argued that German military personnel *de facto* arresting and detaining piracy suspects are not subject to the rules of the German Code of Criminal Procedure and, according to the German Federal Government’s view, not bound by Article 104(3) of the German Constitution providing procedural safeguards to persons subject to provisional arrest.³²⁶ Therefore, the ordinary rules governing arrest and detention on suspicion of criminal activity apply to piracy suspects only once the case is in the hands of the “ordinary”

ment of this type of arrest and detention in light of the lawfulness requirement, see below Part 4/I/C/2/c.

322 See above Part 2/I/D/2/a.

323 See above Part 2/II/C/3/b.

324 See above Part 2/I/D/1/b.

325 See above Part 2/I/B/2.

326 See above Part 2/II/C/3/b.

law enforcement and prosecutorial authorities of these States, ie the police and prosecutor rather than the navy.

In sum, the ordinary domestic rules governing arrest and detention on suspicion of criminal activity (mainly contained in codes of criminal procedure) do not apply to the military forces of some States deployed to the counter-piracy operations off the coast of Somalia and the region, such as the Danish and German navies. Furthermore, in neither Denmark nor Germany does there exist a specific and comprehensive set of rules regulating arrest and detention on suspicion of criminal activity carried out by military forces in a law enforcement (rather than conduct of hostilities) setting. This begs the questions of what alternative legal basis these States invoke for depriving alleged pirates of their liberty and whether the legal norms meet the lawfulness test as set out in Article 5(1) ECHR and Article 9(1) ICCPR.

A number of propositions have been made on how to fill the normative gap with respect to arrest and detention carried out by the military deployed to counter-piracy operations. In Denmark, for instance, it is argued that the *principles* of the Danish Administration of Justice Act, which governs arrest and detention on suspicion of criminal activity *in extenso*, could be applied – even though the Act as such is not applicable.³²⁷ It is doubtful whether applying principles flowing from a law, which as such is not applicable to the acting authority, is in line with the quality of law standard developed by the European Court of Human Rights – notably, the limits regarding the application of legal norms by analogy.³²⁸ Yet the question can remain unanswered since the Danish military does not seem to apply the principles of the Danish Administration of Justice Act, most notably its procedural safeguards (such as the right to be brought before a judge).³²⁹ Hence, the idea of applying the principles of the Danish Administration of Justice Act seems thus far to be of a rather theoretical order. In Germany, the situation is similar to Denmark in that the Code of Criminal Procedure as such does not apply to the navy deployed to the counter-piracy operations off the coast of Somalia and the region. However, it is argued that one single provision of the Code nevertheless applies: Section 127 of the German Code of Criminal Procedure gives everybody – and therefore also the navy – the right to arrest and detain.³³⁰

The more prevalent argument in Denmark and Germany is, however, that the normative gap in domestic law with regard to arrest and detention of piracy suspects can be filled by having recourse to international law, particularly Article 105 UNCLOS³³¹ or a similar norm under customary international law.³³²

327 See above Part 2/I/D/1/b.

328 See above Part 4/I/C/1/aa.

329 See above Part 2/I/D/1/c.

330 See above Part 2/II/C/3/b.

331 See above Part 2/I/D/1/b (Denmark) and Part 2/II/C/3/b (Germany).

332 See above Part 2/II/C/3/b (Germany).

In Denmark, parliamentary decision B59 mandating counter-piracy operations and referring to Article 105 UNCLOS is understood as another potential gap-filler.³³³ As regards armed robbery at sea, the most obvious legal basis for arrest and detention under international law is the authorization of Security Council Resolution 1846 allowing States and regional organizations to take “all necessary means to repress acts of piracy and armed robbery at sea”,³³⁴ which is understood as encompassing the enforcement powers of arrest and detention.

What follows is an analysis whether Article 105 UNCLOS (with respect to piracy in the sense of Article 101 UNCLOS) and operative paragraph 10 of Security Council Resolution 1846 (regarding armed robbery at sea, ie piracy-like attacks in Somali territorial waters) fulfil the lawfulness requirement of Article 5(1) ECHR and Article 9(1) ICCPR. For these purposes, a distinction is drawn between substantive lawfulness (ie whether the provision sufficiently regulates deprivation of liberty as such, most notably the grounds for arrest and detention) and procedural lawfulness (ie the procedure to be followed when arresting or detaining a piracy suspect).³³⁵

bb) Piracy: Applying the Lawfulness Test to Article 105 UNCLOS

Article 105 UNCLOS seems to play a crucial role in potentially filling the normative gap left by domestic law in terms of arrest and detention of piracy suspects by military forces. However, to date, neither the European Court of Human Rights nor the Human Rights Committee has had a chance to examine Article 105 UNCLOS in light of the lawfulness requirement.³³⁶ In doctrine, opinions diverge as to whether Article 105 UNCLOS is a sufficient legal basis in terms of Article 5(1) ECHR and Article 9(1) ICCPR, and the discussion is generally concentrated on the former provision.

First of all, it bears mentioning that not only a domestic law but also norms stemming from international law may provide a legal basis for deprivation of liberty. However, in either case, the norm must fulfil the substantive and formal characteristics flowing from the lawfulness requirement of the right to liberty.³³⁷ The first sentence of Article 105 UNCLOS, the only relevant part of the international norm under scrutiny, reads as follows: “On the high seas, or in any other place outside the jurisdiction of any State, every State may seize a pirate ship or aircraft, or a ship or aircraft taken by piracy and under the control of pirates, and arrest the persons and seize the property on board.”

333 See above Part 2/I/D/1/b.

334 UNSC Res 1846 (2 December 2008) UN Doc S/RES/1846, para 10.

335 See above Part 4/I/C/1.

336 Claus Kreß, ‘Die moderne Piraterie, das Strafrecht und die Menschenrechte: Gedanken aus Anlass der deutschen Mitwirkung an der Seeoperation ATALANTA’ in Dieter Weingärtner (ed), *Die Bundeswehr als Armee im Einsatz: Entwicklungen im nationalen und internationalen Recht* (Nomos 2010) 112.

337 See above Part 4/I/C/1/a/aa.

With regard to piracy in the technical sense, ie as defined in Article 101 UNCLOS, it is argued that Article 105 UNCLOS sufficiently regulates deprivation of liberty as such. *Ratione personae*, Article 105 UNCLOS allows for the arrest of persons on board a pirate ship or a ship taken by piracy and under the control of pirates. Read together with the other piracy enforcement provisions of the UNCLOS, notably Article 101 UNCLOS defining “piracy” and Article 103 UNCLOS defining a “pirate ship”, Article 105 UNCLOS sufficiently describes who can be deprived of his liberty. Furthermore, since piracy can only be committed in the high seas according to Article 101(a) and (b) UNCLOS, also the area in which a person can be deprived of his liberty is sufficiently defined.³³⁸ Seen through the eyes of law enforcement officials deployed to counter-piracy operations, these legal norms indeed define the circle of persons against whom enforcement measures can be taken with sufficient clarity. The far greater challenge for forces deployed is of an operational rather than legal nature and lies in distinguishing alleged pirates from fishermen armed for the purpose of self-defence. Yet, from a legal point of view, the concepts of “pirate ship” and “ship taken by piracy and under the control of pirates” used in Article 105 UNCLOS and defined by virtue of Articles 101 and 103 UNCLOS – which taken together define the category of persons against whom the enforcement measures of arrest and detention can be taken – leave many definitional ambiguities. Essentially, it suffices to state that these interpretational uncertainties mainly stem from a complicated system of cross references between Articles 101, 103 and 105 UNCLOS.³³⁹ However, despite these definitional ambiguities with regard to Article 105 UNCLOS, read together with Articles 101 and 103 UNCLOS, the provision seems to sufficiently describe who may be arrested in what geographical area.

The requisite level of suspicion required for an arrest is not explicitly mentioned in Article 105 UNCLOS. However, guidance in this respect can be gained from other UNCLOS counter-piracy provisions and most notably from a comparison with the right of visit stipulated in Article 110 UNCLOS. For the exercise of the (mere) right of visit, it suffices that the patrolling naval State has “reasonable grounds for suspecting” that the ship in question is engaged in piracy.³⁴⁰ The logic of Article 110(2) UNCLOS is that as the initial suspicion is gradually substantiated, the range of enforcement powers is proportionally extended.³⁴¹ Ultimately, once the suspicion has been confirmed and the ship identified as a

338 Krefß (n 336) 111; the author makes this statement regarding Article 105 UNCLOS read together with the German law pertaining to UNCLOS (*deutsches Vertragsgesetz*).

339 For a detailed account on definitional ambiguities with regard to pirate ships, see Geiss and Petrig (n 59) 64–65.

340 Article 110(1) UNCLOS.

341 This follows from the third sentence of Article 110(2) UNCLOS, according to which more far-reaching enforcement powers are only available ‘[i]f suspicion remains’.

pirate ship according to Article 103 UNCLOS, the enforcement powers of Article 105 UNCLOS become available.³⁴²

In sum, Article 105 UNCLOS, when read in its context, is arguably sufficiently clear and precise in terms of defining the requisite level of suspicion necessary for carrying out an arrest as it is with regard to the persons that can be arrested and geographical area in which an arrest can take place. Therefore, it can be concluded that Article 105 UNCLOS may be a sufficient legal basis when measured by the standard pertaining to substantive lawfulness.³⁴³

We now turn to the question whether Article 105 UNCLOS is sufficient in terms of procedural lawfulness as required by Article 5(1) ECHR and Article 9(1) ICCPR. With regard to the procedure to be followed when arresting or detaining a piracy suspect, it has been argued that Article 105 UNCLOS provides a sufficient legal basis – even though the provision is completely silent in terms of procedure. Namely, it is argued that in situations of private arrest, the domestic provision giving everybody the right to arrest persons caught red-handed³⁴⁴ does not set forth procedural rules.³⁴⁵ However, this analogy seems inaccurate. The right of any person to arrest primarily aims to avoid private persons being held liable for unlawful confinement because they took the (commendable) initiative to overpower an alleged offender caught in the act. It would, quite obviously, not make sense to oblige private persons to undertake further procedural steps. Even though the words “any person” in the German provision regarding private arrest can be understood as also encompassing law enforcement officials, the flagrant character of situations under this provision and in counter-piracy operations are different and hardly comparable. Truly, pirates are also caught red-handed. Such arrests occur, however, within a planned and authorized law enforcement operation where States patrol the sea for the very purpose of combating the criminal phenomenon of Somali-based piracy, notably by means of arresting suspects and submitting them for criminal prosecution. Hence, an arrest carried out in the counter-piracy context does not have the same incidental and accidental character as situations of private arrest of alleged offenders caught *in flagranti*. For these reasons, the fact that the provision on private arrests is silent in terms of the procedure to be followed (and yet a valid legal basis for deprivation of liberty) is not a convincing argument for the proposition that Article 105 UNCLOS, which contains no explicit procedural component either, is a sufficient legal basis in light of the procedural lawfulness requirement.

342 Geiss and Petrig (n 59) 56–57.

343 On the sufficiency of Article 105 UNCLOS in terms of procedural lawfulness, see also Part 4/I/C/3/a.

344 For an example of a provision allowing for private arrest, see Part 2/I/C/3/b on Section 127 of German Code of Criminal Procedure (StPO) (Duffet B and Erbinger M trs (original) Müller-Rostin K tr (updated) 2011).

345 Kreß (n 336) 112.

One could argue that Article 105 UNCLOS contains an *implicit* procedural element. However, such an argument must be rejected in light of the drafting history of the provision. Admittedly, a treaty provision must not necessarily be interpreted historically.³⁴⁶ However, it bears mentioning that the *travaux préparatoires* of Article 105 UNCLOS (and the other counter-piracy provisions of UNCLOS) suggest that the focus of these provisions is clearly on granting enforcement powers rather than confining them. In other words, Article 105 UNCLOS does not seem to contain a procedural element aimed at curtailing the power to arrest, notably by setting forth a procedure to be followed in cases of arrest and detention or by obliging the seizing State to grant procedural safeguards to persons deprived of their liberty. The UNCLOS was adopted in 1982 – that is, at a time when the idea that human rights considerations must be given weight when enforcing the law had already gained ground. However, during the Third United Nations Conference on the Law of the Sea, held between 1973 and 1982, the interest in piracy was marginal. The counter-piracy provisions were not really discussed but rather (with some largely unexplained, minor changes) imported from the 1958 Convention on the High Seas. Therefore, Article 105 UNCLOS was not given a new meaning in 1982 when the UNCLOS was adopted, but rather reflects the idea behind the identically worded Article 19 of the 1958 Convention on the High Seas.³⁴⁷ The latter provision, in turn, was not thoroughly discussed during its adoption in the 1950s. This was mainly due to the fact that the drafters perceived piracy as an 18th century phenomenon and considered the application of the provision as a rather theoretical scenario.³⁴⁸ Therefore, Article 43 of the draft of the International Law Commission was adopted as Article 19 of the Convention on the High Seas without any changes.³⁴⁹ The basis for the draft of the International Law Commission, in turn, was the Harvard Draft Convention on Piracy of 1932.³⁵⁰ Thus, even though adopted in 1982, the content of Article 105 UNCLOS was largely inspired by a provision drafted in the early 1930s and thus at a time when the individual rights of persons subject to law enforcement measures were not a primary concern. Today, more weight is given to the interests of persons against whom law enforcement measures (at sea) are taken, and the idea of limiting enforcement powers in light of individual rights finds express mention in treaty provisions. This is, for example, evidenced by the safeguards stipulated in the boarding provision of the 2005 SUA Protocol.³⁵¹

346 Mark Villiger, *Commentary on the 1969 Vienna Convention on the Law of Treaties* (Martinus Nijhoff 2009) 445–448.

347 Geiss and Petrig (n 59) 40–41 and 148–49.

348 This even led some delegates to propose the deletion of all provisions relating to piracy: *ibid* 148.

349 *ibid* 39–40.

350 *ibid* 39.

351 Article 8bis(10) 2005 SUA Protocol.

Overall, Article 105 UNCLOS not only lacks an explicit but also an implicit procedural component. Therefore, it is doubtful whether the provision lives up to the requirement of procedural lawfulness under Article 5(1) ECHR and Article 9(1) ICCPR. Most notably, Article 105 UNCLOS hardly seems sufficiently precise, clear and foreseeable in terms of the procedure for arrest and detention of piracy suspects and procedural safeguards to be granted to them as required by the quality of law standard developed under the lawfulness requirement of the right to liberty. In sum, the provision seems to be in line with substantive but not procedural lawfulness as required under the right to liberty stipulated in the ECHR and ICCPR.

cc) **Armed Robbery at Sea: Applying the Lawfulness Test to UNSCR 1846**
It is unlikely that the same conclusion can be reached with regard Security Council Resolution 1846, which provides enforcement powers against armed robbers at sea in Somali territorial waters. The Resolution is arguably a deficient legal basis for deprivation of liberty in terms of both procedural and substantive lawfulness.

Operative paragraph 10 of Security Council Resolution 1846 does not explicitly allow for arrest and detention. However, the broad authorization to use “all necessary means to repress acts of piracy and armed robbery at sea”³⁵² certainly includes these specific enforcement powers. That arrest and detention are among the “necessary means to repress piracy” namely follows from the fact that the Security Council has repeatedly expressed concerns that piracy suspects are “released without facing justice”.³⁵³ Also, even though *prima facie* Security Council Resolution 1846 seems to allow all necessary means to be taken to repress piracy so long as they are appropriate, this broad authorization is in fact limited by the proviso that all enforcement measures must be exercised “in a manner consistent with such action permitted on the high seas with respect to piracy under relevant international law”³⁵⁴ and the repeated emphasis by the Security Council that the UNCLOS sets out the relevant international law.³⁵⁵ While Security Council Resolution 1846 *de jure* constitutes a legal basis of its own and does not render the counter-piracy provisions of the UNCLOS directly applicable to enforcement actions in Somali territorial waters, it incorporates the relevant norms of the UNCLOS, which can be applied *mutatis mutandis* to the phenomenon of armed robbery at sea.³⁵⁶ Hence, from the implicit reference to Article 105 UNCLOS in

352 UNSC Res 1846, para 10(b).

353 Alice Priddy and Stuart Casey-Maslen, ‘Counterpiracy under International Law’ (Geneva Academy of International Humanitarian Law and Human Rights, Academy Briefing No 1, August 2012) <www.geneva-academy.ch/docs/projects/Counterpiracy.pdf> accessed 29 January 2013, 31.

354 UNSC Res 1846, para 10(b).

355 See, eg, UNSC Res 1846, preambular para 4.

356 Geiss and Petrig (n 59) 71–72.

Security Council Resolution 1846 also follows that arrest of piracy suspects is among the enforcement powers authorized by the Resolution.

As regards substantive lawfulness, and specifically the quality of law standard, it can be stated that the geographical area in which a person can be deprived of his liberty is clearly defined by Security Council Resolution 1846 in that the authorization to use all necessary means to repress piracy is explicitly limited to “the territorial waters of Somalia”.³⁵⁷ Further, the required suspicion for an arrest can be inferred from a comparison of various counter-piracy provisions of UNCLOS³⁵⁸ to which Security Council Resolution 1846 implicitly refers. However, neither from the authorization to “use all necessary means to repress acts of piracy and armed robbery at sea” nor from the reference to Article 105 UNCLOS does it follow with sufficient clarity and precision against whom these enforcement powers can be taken since the concept of “armed robbery at sea” is neither defined by the Security Council nor by the UNCLOS. Rather, the Security Council uses the term in quite an irregular fashion.³⁵⁹ Other sources of international law do not provide an unequivocal definition of the concept of armed robbery either.³⁶⁰ Despite the linguistic irregularities in the Security Council Resolutions regarding the term armed robbery at sea and the differing definitions in other sources of international law, there is broad consensus *in practice* that it denotes a concept different from piracy and refers to piracy-like acts committed in territorial waters.³⁶¹ However, notwithstanding general agreement in practice on what constitutes armed robbery at sea, it is doubtful whether Security Council Resolution 1846 is a sufficiently precise, clear and foreseeable legal basis for arrest and detention as is required by the quality of law standard, which is part of the substantive lawfulness requirement under Article 5(1) ECHR and Article 9(1) ICCPR. In sum, because the authorization of Security Resolution 1846 to arrest and detain does not adequately define the circle of persons against whom this enforcement measure can be taken (even when considering the provisions of international law to which it refers), it does not appear to be a sufficient legal basis when measured by the requirements of the substantive lawfulness test of Article 5(1) ECHR and Article 9(1) ICCPR.

357 UNSC Res 1846, para 10(b); see also above Part 1/II/A/1.

358 See above in this Section on the requisite level of suspicion for an arrest on account of piracy as inferred from a comparison of various UNCLOS counter-piracy provisions.

359 On the different ways in which the Security Council uses the term “armed robbery at sea”, see Geiss and Petrig (n 59) 72–75. The Security Council used, eg, the following wording: “piracy and armed robbery in the territorial waters and on the high seas off the coast of Somalia” in UNSC Res 1846 para 17; this wording could be read as eliminating any distinction between piracy and armed robbery at sea.

360 Geiss and Petrig (n 59) 73–75.

361 *ibid* 73–74.

With regard to procedural lawfulness, it bears mentioning that operative paragraph 10 of Security Council Resolution 1846 contains no explicit procedural element in relation to deprivation of liberty. The Resolution's implicit reference to UNCLOS³⁶² does not cure this flaw since Article 105 UNCLOS equally lacks a procedural component.³⁶³ Therefore, Security Council Resolution 1846 does not live up to the standard set forth by the requirement of procedural lawfulness under Article 5(1) ECHR and Article 9(1) ICCPR and is also a deficient legal basis in terms of substantive lawfulness.

dd) Conclusion

Overall, as regarding arrest and detention of armed robbers at sea, Security Council Resolution 1846 arguably does not constitute a sufficient legal basis for deprivation of liberty as such, ie substantive lawfulness. Furthermore, in terms of procedural lawfulness, it can be said with considerable certainty that Security Council Resolution 1846 does not live up to the quality of law standard, which is part of the lawfulness requirement under Article 5(1) ECHR and Article 9(1) ICCPR.

With regard to piracy, Article 105 UNCLOS seems to be a sufficient legal basis in light of the requirement of substantive lawfulness since it regulates all relevant aspects of deprivation of liberty as such – notably, it defines against whom, based on what suspicion and in what geographical area an arrest on account of piracy is allowed. This conclusion finds support in the jurisprudence of the Grand Chamber of the European Court of Human Rights. In *Medvedyev v France*, it stated *obiter* that compared to counter-drug operations on the high seas, the enforcement powers for counter-piracy operations are much better defined in the UNCLOS, which dedicates eight provisions to the issue.³⁶⁴ It is true that vis-à-vis the authorization of enforcement powers, and namely the power to arrest, the UNCLOS is quite comprehensive. Therefore, Article 105 UNCLOS seems, despite definitional ambiguities, to be a sufficient legal basis for arrest and detention *as such*.³⁶⁵ However, the finding is different when Article 105 UNCLOS

362 See above Part 1/II/A/1.

363 See above Part 4/I/C/2/b/bb.

364 *Medvedyev and Others v France* (Grand Chamber) (n 1) 871–79; on the analysis of Article 5(1) ECHR in *Medvedyev*, see Efthymios Papastavridis, 'II. European Court of Human Rights *Medvedyev et al v France* (Grand Chamber, Application No 3394/03) Judgment of 29 March 2010' (2010) 59 *International & Comparative Law Quarterly* 867.

365 Some scholars reach a different conclusion and argue that Article 105 UNCLOS is not a sufficient legal basis for deprivation of liberty as such: see, eg, Fischer-Lescano and Kreck (n 24) 500–05. The majority of scholars, however, are in support of the conclusion reached in this study; see, eg, Robert Esser and Sebastian Fischer, 'Festnahme von Piraterieverdächtigen auf Hoher See: Geltung des § 127 StPO im Rahmen der Operation Atalanta' (2009) 4 *Zeitschrift für Internationale Strafrechtsdog-*

is analysed in light of the requirement of procedural lawfulness. The provision contains neither an implicit nor an explicit procedural component and is therefore hardly sufficient in light of the procedural lawfulness requirement of Article 5(1) ECHR and Article 9(1) ICCPR. While the *Medvedyev* judgment is often cited in support of the idea that Article 105 UNCLOS is in line with the requirements of Article 5(1) ECHR,³⁶⁶ it should be borne in mind that the Chamber³⁶⁷ made a rather clear statement regarding procedural lawfulness in the context of norms allowing for arrest on suspicion of criminal activity at sea. It considered that the provisions invoked by the respondent State for arrest and detention of persons suspected of drug trafficking did not regulate “the conditions of deprivation of liberty on board ship, and in particular the possibility for the persons concerned to contact a lawyer or a family member” and that they did not “place the detention under the supervision of a judicial authority”,³⁶⁸ ie the provision did not sufficiently regulate procedural aspects of deprivation of liberty. When applying this threshold to Article 105 UNCLOS, it must be concluded that it does not meet the strictures of procedural lawfulness as flowing from the right to liberty of the ECHR and ICCPR.

The conclusion that Article 105 UNCLOS is arguably a sufficient legal basis for deprivation of liberty as such, ie in terms of substantive lawfulness, but does not live up to the requirements of procedural lawfulness, also holds true with regard to a customary international law norm of the same content as Article 105 UNCLOS – as it is also invoked in order to fill the normative gap for arrest and detention of piracy suspects by the military. Furthermore, this conclusion also applies to legal bases, which refer to Article 105 UNCLOS for deprivation of liberty of piracy suspects and which do not contain any further requirements or criteria regarding arrest and detention. This holds particularly true for the Danish parliamentary decision B59, which mandates counter-piracy operations and does

matik 771, 772. The conclusion also finds support in jurisprudence; see the following cases where Article 105 UNCLOS was deemed to be a sufficient basis for deprivation of liberty: *Re ‘MV Courier’* (n 250) paras 31–36; *Re ‘MS Samanyolu’* (Urteil, Anlage I) (n 248) 7–8; *Re ‘MS Samanyolu’* (Judgment) (n 248) 5.

366 Stefano Piedimonte Bodini, ‘Fighting Maritime Piracy under the European Convention on Human Rights’ (2011) 22 *European Journal of International Law* 829, 832, referring to *Medvedyev and Others v France* (Grand Chamber) (n 1).

367 Both the Chamber as well as the Grand Chamber concluded in the *Medvedyev* case that the legal basis invoked by France for depriving the alleged offenders of their liberty did not meet the strictures of the lawfulness requirement under Article 5(1) ECHR: *Medvedyev and Others v France* App no 3394/03 (Chamber, ECtHR, 10 July 2008) paras 62–63 and *Medvedyev and Others v France* (Grand Chamber) (n 1) para 103.

368 *Medvedyev and Others v France* (Chamber) (n 367) para 61.

not contain more than a passing reference to the UNCLOS (specifically Article 105) in relation to arrest and detention.³⁶⁹

In sum, if deprivation of liberty is based solely on Article 105 UNCLOS, on a customary norm of similar content, or on a domestic norm containing nothing more than a reference to Article 105 UNCLOS in terms of arrest and detention of piracy suspects, deprivation of liberty is arguably not based on a sufficient legal basis as required by Article 5(1) ECHR and Article 9(1) ICCPR. Especially since Article 105 UNCLOS is deficient in terms of the requirements flowing from procedural lawfulness. Similarly, arrest and detention of armed robbers at sea may lack a legal basis, which meets the strictures of the lawfulness test of Article 5(1) ECHR and Article 9(1) ICCPR since Security Council Resolution 1846 arguably does not describe with sufficient clarity and precision the requirements for arrest and detention as such and the procedure in relation to deprivation of liberty of piracy suspects.

c) *Within the EUNAVFOR Framework*

In instances where a State arrests and detains piracy suspects while contributing to EUNAVFOR, deprivation of liberty is not solely governed by domestic law. Even though domestic law remains an important legal source for deprivation of liberty carried out within the EUNAVFOR framework,³⁷⁰ arrest and detention of piracy suspects is subject to European Union law as well, notably rules emanating from the EUNAVFOR chain of command.

Arrest and detention as part of the mandate of Operation Atalanta is not only provided for in the (non-public) EUNAVFOR Operation Plan, but also in Article 2(e) CJA Operation Atalanta describing EUNAVFOR's mandate. Since arrest and detention is a use of force going beyond self-defence, the EUNAVFOR Rules of Engagement are a pertinent, yet classified, legal source governing deprivation of liberty of piracy suspects. Also the EUNAVFOR Transfer SOP, which are equally classified and only released to NATO, contain legal considerations regarding arrest and detention of piracy suspects. These rules from the chain of command not only pertain to deprivation of liberty as such, but also govern procedural aspects of arrest and detention.³⁷¹ Most notably, they set out the rather complex interplay between the various actors involved in deprivation of liberty carried out in the context of this multinational mission, such as the EUNAVFOR Operational and Force Headquarters, the TCN Commanding Officer and the mainland authorities of the seizing State.³⁷²

369 See above Part 2/I/B/2.

370 See above Part 2/II/C/1.

371 See above Part 2/II/C/1 and 2.

372 See above Part 2/II/C/1.

However, an understanding of who takes what decision based on what legal norms in relation to arrest and detention of piracy suspects, ie how competencies are allocated between EUNAVFOR bodies and domestic authorities, cannot easily be gained since many documents containing rules on deprivation of liberty in the context of Operation Atalanta are classified.³⁷³ Thus, for the study at hand, it was necessary to conduct expert interviews in order to discern the rules that govern deprivation of liberty in the context of EUNAVFOR and outline the interplay between actors involved in the deprivation of liberty of alleged pirates.³⁷⁴ Hence, unlike in an “ordinary” law enforcement situation, where the legal bases governing arrest and detention on suspicion of criminal activity are publicly accessible and the competencies and procedures in relation to deprivation of liberty clearly set out, important rules and guidance governing deprivation of liberty are not publicly accessible in the context of the first EU-led multinational law enforcement mission at sea.

Arguably, in terms of lawfulness under Article 5(1) ECHR and Article 9 ICCPR, there is no difference in the applicable standard if a person is deprived of his liberty by a State while acting in national capacity or while contributing to EUNAVFOR. Equally, for the individual concerned, it should not make any difference whether the ordinary law enforcement apparatus, ie police and prosecutorial services, or the military is responsible for arrest and detention on suspicion of criminal activity. Departing from these propositions, the ordinary yardstick in terms of lawfulness as enshrined in Article 5(1) ECHR and Article 9(1) ICCPR must be applied to these rules. Since most rules pertaining to deprivation of liberty in the context of Operation Atalanta are not disclosed to the public, they will not fulfil the quality of law standard – especially the requirement that norms governing arrest and detention must be publicly accessible, which is a precondition for being able to foresee the consequences of an action. Furthermore, it is argued that the main public source, CJA Operation Atalanta, is not sufficiently precise and clear regarding arrest and detention to meet the quality of law test set out by the lawfulness requirement of the right to liberty.³⁷⁵ The two provisions of CJA Operation Atalanta relevant to arrest and detention – Articles 2(e) and 12 – are analysed next in view of the required clarity and precision under the quality of law test.

Article 2(e) CJA Operation Atalanta stipulates:

373 See above Part 2/II/C.

374 See above Introduction/III.

375 Fischer-Lescano and Kreck (n 24) 505–506, reach this conclusion with regard to CJA Operation Atalanta in general; Andreas von Arnould, ‘Die moderne Piraterie und das Völkerrecht’ (2009) 47 *Archiv des Völkerrechts* 454, 474, limits its finding to Article 12 CJA Operation, which he deems not to be a sufficient legal basis for arrest and detention in light of Article 5(1) ECHR.

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: ... in view of prosecutions potentially brought by the relevant States under Article 12, arrest, detain and transfer persons suspected of intending, as referred to in Article 101 and 103 of the United Nations Convention on the Law of the Sea, to commit, committing or having committed acts of piracy or armed robbery in the areas where it is present.

With regard to piracy, the provision may be sufficiently clear in terms of deprivation of liberty as such since it allows for the arrest of persons as defined by Articles 101 and 103 UNCLOS – that is, where and against whom the enforcement power of arrest and detention may be exercised. Furthermore, the requisite level of suspicion required for an arrest follows from a comparison of various provisions of the UNCLOS, which is referred to in the *chapeau* of Article 2(e) CJA Operation *Atalanta*. Hence, the provision is comparable to Article 105 UNCLOS and the findings with regard to substantive lawfulness made in this context also apply to Article 2(e) CJA Operation *Atalanta*. However, the provision falls short of the quality of law standard in light of procedural lawfulness: neither the provision itself nor the provisions of UNCLOS,³⁷⁶ to which it refers, contain a procedural element.

As regards armed robbery at sea, it seems strange that Article 2(e) CJA Operation *Atalanta* refers to Security Council Resolution 1816 rather than Security Council Resolution 1846.³⁷⁷ Unlike the latter Resolution, which authorizes “States and regional organizations” to take all necessary means to repress piracy and armed robbery at sea,³⁷⁸ the former only authorizes States to do so.³⁷⁹ It seems that the EU-led naval operation would rather be covered by the notion of “regional organizations”. What appears to be more problematic is that the authorization in Security Council Resolution 1816, which was adopted on 2 June 2008, granted these enforcement powers for a period of six months only and was not extended at its expiry; rather, Security Council Resolution 1846, which was

376 For an analysis of Article 105 UNCLOS in light of the requirement of procedural lawfulness, see above Part 4/I/C/2/b/bb.

377 CJA Operation *Atalanta* was initially adopted on 12 November 2008, ie before Security Council issued Resolution 1846. However, the legal basis – and specifically Article 2 defining EUNAVFOR’s mandate – was revised several times after Security Council Resolution 1846 was adopted.

378 UNSC Res 1846, para 10.

379 UNSC Res 1816 (2 June 2008) UN Doc S/RES/1816, para 7. The reference to Security Council Resolution 1838 is not helpful with regard to arrest and detention since it does not authorize specific enforcement powers and contains a mere call for enhanced cooperation: Geiss and Petrig (n 59) 70. The same holds true for Security Council Resolution 1814.

adopted on 2 December 2008, provided a new authorization to exercise these enforcement powers (and the operative paragraph containing the authorization to use all necessary means was, in turn, extended several times and is still in force). A further inconsistency of Article 2(e) CJA Operation Atalanta is that it does not refer to “armed robbery at sea” but simply to “armed robbery”. Even if the words “armed robbery” are understood as “armed robbery at sea”, the meaning of the concept remains unclear – especially since Article 12(1) CJA Operation Atalanta refers to “armed robbery in Somalia’s territorial waters *or internal waters*”³⁸⁰ and, hence, deviates from the common understanding in the context of Somali-based piracy that armed robbery at sea refers to piracy-like attacks in territorial waters.³⁸¹ For all these reasons, with regard to armed robbery at sea, Article 2(e) CJA Operation Atalanta is arguably deficient not only in terms of procedural lawfulness but substantive lawfulness as well.

Article 12 CJA Operation Atalanta pertains to transfers. Since the notion of “transfer” as used in Article 12 CJA Operation Atalanta also covers the surrender of piracy suspects seized by a patrolling naval State to its mainland authorities,³⁸² the provision is not only pertinent to detention pending transfers to third States.³⁸³ Rather, it also covers detention by the seizing State with a view to prosecution of the suspects in its own courts, ie based on suspicion of criminal activity. With regard to piracy, the provision³⁸⁴ stipulates the following: “On the basis of ... Article 105 of the United Nations Convention on the Law of the Sea, persons suspected of ... piracy, who are arrested and detained, with a view to their prosecution, shall be transferred.” The explicit reference to arrest and detention is only to describe the persons who shall be transferred. Arguably, the words “shall be transferred” *implicitly* allow detaining suspects with a view to their transfer. However, even if this is assumed and the provision is deemed sufficient in terms of substantive lawfulness, it lacks any procedural element relating to deprivation of liberty and therefore does not fulfil the requirements flowing from procedural lawfulness. The same argument holds true for armed robbery at sea. Overall, Article 12 CJA Operation Atalanta is not a sufficient legal basis under the right to liberty of the ECHR and ICCPR.

In sum, most legal sources of European Union law specifically pertaining to arrest and detention carried out by a State while contributing to EUNAVFOR are not publicly accessible. The publicly accessible norms relevant to deprivation of liberty of piracy suspects – notably Articles 2(e) and 12 of CJA Operation Atalanta – are, in turn, not sufficiently clear and precise. Therefore, European Union law

380 Emphasis added.

381 See above Part 4/I/C/2/b/bb and Geiss and Petrig (n 59) 72–75, elaborating on the notion of armed robbery at sea.

382 See above Part 2/II/B/2.

383 See below Part 4/I/C/3.

384 For the full wording of the provision, see above Part 2/II/B/2.

governing arrest and detention of piracy suspects does not constitute an adequate legal basis for deprivation of liberty when seen through the lens of Article 5(1) ECHR (along with Article 6 CFREU, which is of a similar content)³⁸⁵ and Article 9(1) ICCPR.

We have already mentioned that domestic law remains an important source of guidance for various aspects of deprivation of liberty occurring within the EUNAVFOR framework.³⁸⁶ Therefore, the finding that European Union law pertaining to arrest and detention of Somali-based pirates is not in line with Article 5(1) ECHR and Article 9(1) ICCPR may be less problematic with regard to those States pursuing a criminal law approach to arrest and detention of piracy suspects. Since these States treat piracy suspects as “ordinary suspects” and apply the ordinary domestic legal framework pertaining to deprivation of liberty on suspicion of criminal activity, arrest and detention may be sufficiently governed by domestic law. However, some States contributing to EUNAVFOR do not pursue a criminal law approach to deprivation of liberty of piracy suspects. Rather, they consider piracy suspects to be “extraordinary suspects” who fall outside the scope of domestic rules governing arrest and detention on suspicion of criminal activity as long as the seizing State does not decide to prosecute them in its own courts. At the same time, international law (most notably Article 105 UNCLOS and Security Council Resolution 1846) does not adequately fill this normative gap left by domestic law – and, as we just concluded, European Union law does not remedy the situation either.

3. Lawfulness of Piracy Suspect’s Detention with a View to Transfer

Transfers do not qualify as extradition *stricto sensu*.³⁸⁷ For this reason, States generally do not apply extradition-specific legislation (nor the rules governing surrender pursuant to the execution of a European arrest warrant) to transfers for prosecution of piracy suspects.³⁸⁸ As a consequence, they do not subject deten-

385 See above Part 4/I.

386 See above Part 2/II/C/1.

387 Geiss and Petrig (n 59) 193: “Transfers of piracy suspects do not feature these main characteristics of extraditions. First of all, the request for a transfer does not come from the State to which the alleged offender shall be handed over; rather it is the State or international organization having custody over the alleged ‘pirate’ that requests a third State to take over a person for purposes of criminal prosecution. Another difference to extradition is that transfer decisions are generally not reached in a formalized procedure consisting of an admissibility proceeding (which grants the transferee a preventive effective remedy against a possible transfer) combined with a decision of the executive whether or not to extradite an alleged offender.” For a detailed account of how a transfer decision is reached, see above Part 2/I/C/3 (Denmark) and Part 2/II/B/5 (EUNAVFOR).

388 On the position of Denmark, eg, see above Part 2/I/D/3/b.

tion pending transfer to the rules that govern detention with a view to extradition *stricto sensu* or based on a European arrest warrant.³⁸⁹ What is more, States contributing to the counter-piracy operations off the coast of Somalia and the region do not seem to have adopted rules specifically governing detention pending transfers comparable in content to the rules pertaining to detention with a view to extradition.

This begs the question of what constitutes the legal basis for detention of persons suspected of piracy or armed robbery at sea, and who are held on board a vessel of the seizing State pending their transfer to a third State for prosecution. With regard to persons suspected of having committed piracy in the technical sense, the most cited legal basis for detention pending transfer is Article 105 UNCLOS. Meanwhile, operative paragraph 10 of Security Council Resolution 1846 is generally understood as providing the legal basis for detaining persons suspected of armed robbery at sea with a view to their surrender for prosecution. Exceptionally, it is argued that Article 7 SUA Convention provides a legal basis for detaining persons suspected of having committed an offence defined in Article 3 SUA Convention, which is quite likely for Somali-based pirates. With regard to suspects detained pending transfer within the context of EUNAVFOR, the following discusses whether relevant European Union law could provide a legal basis for deprivation of liberty with a view to surrender for criminal prosecution in the absence of pertinent domestic rules.

a) *Of Alleged Pirates: Article 105 UNCLOS*

Most frequently, it is argued that Article 105 UNCLOS provides the legal basis for detention pending transfer of persons suspected of piracy in the technical sense of the term. Whether Article 105 UNCLOS actually allows for detention pending transfer depends on how the provision is read.

A minority argues that Article 105 UNCLOS contains an outright prohibition of transfers for prosecution to third States. If we apply this interpretative stance to Article 105 UNCLOS, the provision obviously does not allow for *detention* pending transfer. However, as we will see later, the proposition that Article

389 With regard to arrest and detention in the context of extradition *stricto sensu*, see, eg, Article 9 of the Model Treaty on Extradition and the commentary thereof (UNODC, 'Revised Manuals on the Model Treaty on Extradition and on the Model Treaty on Mutual Assistance in Criminal Matters' (Reviewed in an Intergovernmental Expert Group Meeting, 6–8 December 2002) <www.unodc.org/pdf/model_treaty_extradition_revised_manual.pdf> accessed 29 January 2013, paras 136–157) and Sections 20–22 of the Model Law on Extradition (n 207). With regard to arrest in execution of a European arrest warrant, see Article 12 Council Framework Decision on the European arrest warrant and the surrender procedures between Member States [2002] OJ L190/1 (EU Decision on the European arrest warrant), which refers to the application of domestic law for deciding the question whether a person arrested in execution of a European arrest warrant shall remain in detention.

105 UNCLOS limits the competence to prosecute alleged pirates to the seizing State and therefore transfers for prosecution to third States must be refused. While it is true that Article 105 UNCLOS does not explicitly mention transfers specifically or surrender for prosecution in general, neither does it prohibit States from doing so.³⁹⁰

Article 105 UNCLOS does not prohibit transfers and detention pending transfer. The question remains whether it (implicitly) *allows* for detaining piracy suspects with a view to their transfer for prosecution. Such an argument seems possible when providing a teleological and contextual interpretation of Article 105 UNCLOS. There is no doubt that the counter-piracy provisions of UNCLOS aim at the repression of piracy. This notably necessitates that enforcement jurisdiction (the arrest of piracy suspects) is bridged with adjudicative jurisdiction (their criminal prosecution). In order to do so, Article 105 UNCLOS must be read as not only allowing for the *arrest* of suspects – as explicitly mentioned by the provision – but also their *detention* with a view to prosecution. In cases where the seizing State is identical to the prosecuting State, this follows from Article 105 UNCLOS itself, which refers to enforcement jurisdiction in its first sentence and adjudicative jurisdiction in its second sentence. The finding that the first sentence of Article 105 UNCLOS implicitly allows for detention of piracy suspects should also hold true if the arresting State is not identical to the ultimately prosecuting State, ie in situations where piracy suspects are detained with a view to their transfer – the prevalent means of bridging enforcement and adjudicative jurisdiction in counter-piracy operations off the coast of Somalia and the region. Such a reading of Article 105 UNCLOS is notably backed by Article 100 UNCLOS, which declares the repression of piracy *by means of cooperation* between States as the goal of the UNCLOS counter-piracy provisions. This line of reasoning was, for example, pursued by the Rotterdam court in the *Samanyolu* case. It argued that by virtue of Article 100 UNCLOS, which stipulates a duty of all States to cooperate in repressing piracy, Article 105 UNCLOS must be interpreted as allowing for detention of piracy suspects by the seizing State up until their transfer to a third State for prosecution. However, the Court did not qualify the deprivation of liberty as detention with a view to transfer, but rather as pre-trial detention by the seizing State on behalf of the ultimately prosecuting State.³⁹¹ Despite labelling the detention differently, the Court read Article 105 UNCLOS as allowing detention of piracy suspects with a view to their surrender to a third State for prosecution.

In sum, Article 105 UNCLOS arguably contains an implicit authorization for States to detain piracy suspects pending their transfer. Yet another question is whether Article 105 UNCLOS is a sufficient legal basis for detention in terms of the lawfulness requirement of Article 5(1) ECHR and Article 9(1) ICCPR. With

³⁹⁰ See below Part 5/I/A.

³⁹¹ This pertains to the phase after the seizing State (Denmark) decided not to prosecute the suspects in its own criminal courts; *Re 'MS Samanyolu'* (Urteil, Anlage I) (n 248) 8; *Re 'MS Samanyolu'* (Judgment) (n 248) 5.

regard to deprivation of liberty on suspicion of criminal activity, it has been extensively discussed whether Article 105 UNCLOS meets the lawfulness test of the right to liberty under the ECHR and ICCPR. The arguments, as well as the findings, can be applied *mutatis mutandis* to detention pending transfer.³⁹² This leads to the following result: Article 105 UNCLOS is arguably a sufficient legal basis with regard to detention pending transfer as such. However, since Article 105 UNCLOS is silent as to the procedure to be applied regarding persons detained with a view to their surrender for prosecution, it does not seem to live up to the requirements flowing from procedural lawfulness.

These conclusions on the sufficiency of Article 105 UNCLOS in terms of substantive lawfulness and its insufficiency in light of procedural lawfulness equally apply to a customary international law norm reflecting the content of Article 105 UNCLOS. The same holds true for legal bases containing nothing more than a reference to the UNCLOS generally or Article 105 UNCLOS with regard to detention pending transfer, such as the Danish parliamentary decision B59.

b) *Of Alleged Armed Robbers at Sea: UNSCR 1846*

The reference in operative paragraph 10 of Security Council Resolution 1846 to the use of “all necessary means to repress acts of piracy and armed robbery at sea” appears to cover more than only deprivation of liberty on suspicion of criminal activity.³⁹³ Rather, in principle, it also allows for detention with a view to surrender for prosecution to a third State since transfers are currently the most important tool for effectuating the criminal prosecution of Somali-based pirates and, therefore, an important component for the repression of Somali-based piracy. However, operative paragraph 10 of Security Council Resolution 1846 contains a geographical limitation by only authorizing the use of all necessary means to repress acts of piracy and armed robbery at sea “within the territorial waters of Somalia”.³⁹⁴ As long as detention pending transfer takes place within Somali territorial waters, this type of detention seems permissible under the authorization. However, as soon as the law enforcement vessel leaves these waters in order to reach the ultimately prosecuting State, the Resolution can arguably no longer serve as a warrant to detain alleged armed robbers at sea. At the same time, the provisions of the UNCLOS are limited to piracy, which per definition can only be committed in the high seas. Put differently, persons suspected of armed robbery at sea in the territorial waters of Somalia do not qualify as pirates simply because they are detained on the high seas at some point. If Article 105 UNCLOS is limited to the detention of alleged pirates in the sense of Article 101 UNCLOS, it can arguably not serve as a basis for detaining persons suspected of armed rob-

392 See above Part 4/I/C/2/b/bb.

393 See above Part 4/I/C/2/b/cc.

394 UNSC Res 1846, para 10(b).

bery at sea who were initially arrested and detained based on Security Council Resolution 1846, which limits the use of these enforcement powers to the Somali territorial waters. Also, if the vessel of the detaining State navigates waters under the sovereignty of a State other than Somalia, it is uncertain what constitutes the legal basis allowing for detention pending transfer.

For the analysis at hand, the question whether Security Council Resolution 1846 fulfils the lawfulness requirement of the right to liberty can remain unanswered. Because in any event, the Resolution does not provide a sufficient legal basis for detention pending transfer in light of the lawfulness requirement of Article 5(1) ECHR and Article 9(1) ICCPR – despite its incorporation of the content of UNCLOS. The arguments are the same as for deprivation of liberty on suspicion of criminal activity.³⁹⁵ In a nutshell, the main reason why the Resolution is not a sufficient legal basis for deprivation of liberty as such (substantive lawfulness) is that the Security Council does not define the notion of armed robbery at sea, which determines who can be detained with a view to transfer, and there is no unequivocal definition of the offence under international law.³⁹⁶ Furthermore, operative paragraph 10 of Security Council Resolution 1846 contains no explicit procedural element in relation to arrest and detention. Article 105 UNCLOS, to which the Resolution implicitly refers, equally lacks a procedural component. Therefore, operative paragraph 10 of Security Council Resolution 1846 hardly fulfils the requirements flowing from procedural lawfulness as required by Article 5(1) ECHR and Article 9(1) ICCPR. In sum, Security Council Resolution 1846 arguably does not provide a sufficient legal basis for detention of armed robbers at sea pending transfer when measured by the lawfulness standard of the right to liberty in the ECHR and ICCPR.

c) ***Of Alleged “SUA Offenders”: Article 7 SUA Convention***

Exceptionally, Article 7 SUA Convention is invoked as the legal basis allowing for detention pending transfer. This was notably done by the First Instance Court of Rotterdam in the *Samanyolu* case. In relation to Article 7 SUA Convention, the Court found that the seizing State detained the suspects “for the purpose of a transfer or extradition”, somewhat contradicting its statement in relation to Article 105 UNCLOS where it qualified deprivation of liberty as pre-trial detention by the seizing State on behalf of the ultimately prosecuting State.³⁹⁷

The first paragraph of Article 7 SUA Convention, which is of relevance here, reads as follows:

395 See above Part 4/I/C/2/b/cc.

396 *ibid.*

397 *Re ‘MS Samanyolu’* (Urteil, Anlage I) (n 248) 8; *Re ‘MS Samanyolu’* (Judgment) (n 248) 5.

Upon being satisfied that the circumstances so warrant, any State Party in the territory of which the offender or the alleged offender is present shall, in accordance with its law, take him into custody or take other measures to ensure his presence for such time as is necessary to enable any criminal or extradition proceedings to be instituted.

Article 7(1) SUA Convention is thus addressed to “any State Party in the territory of which the offender or the alleged offender is present”. This begs the question whether a piracy suspect held on board a warship can be said to be within the territory of the seizing State. This question can be left open at this stage³⁹⁸ in that Article 7 SUA Convention hardly provides a legal basis as required by Article 5(1) ECHR and Article 9(1) ICCPR for detention pending transfer for two main reasons.

Firstly, Article 7 SUA Convention obliges the seizing State to ensure the “presence” of a person suspected of having committed a SUA offence (which is likely for Somali-based pirates) for such time as is necessary to enable criminal prosecutions or extradition proceedings to be instituted. Presence can be ensured by taking the suspects into custody or by any other measure. Detention pending transfer is arguably such a means. However, according to Article 7 SUA Convention, these means must be “in accordance with its law”, ie the domestic law of the seizing State. In other words, with regard to custody and the use of other measures to ensure the alleged offender’s presence, the international provision refers back to domestic law. Therefore, Article 7 SUA Convention can hardly be used to fill a normative gap in domestic law for detention pending transfer.

Secondly, Article 7 SUA Convention does not seem to refer to the entire period of detention pending surrender for prosecution. Rather, the words “for such time as is necessary to enable ... extradition proceedings to be instituted” suggest that it only covers the interim period between arrest and the institution of extradition proceedings. Once extradition proceedings are commenced, detention must be based on extradition-specific legislation. The alternative mention to “for such time as is necessary to enable any criminal proceedings” does not appear to cover criminal proceedings in a third State and thus detention pending transfer. Rather, it is limited to criminal proceedings in the seizing State. Such an interpretation is the only logical one in light of the basic idea on which the SUA Convention rests – the principle to either extradite or prosecute. In other words, the foreign prosecution option is covered by the words “extradition proceedings” rather than the “criminal proceedings” mentioned in the alternative in Article 7 SUA Convention.

In sum, Article 7 SUA Convention does not provide a legal basis for detention pending transfer of Somali-based pirates as such – necessary to fill the

398 See below Part 4/II/D on Article 36 Vienna Convention on Consular Relations (entered into force 24 April 1964) 500 UNTS 95 (VCCR) and Part 5/III/C/2/a/cc on Article 13 ICCPR where this question will be answered in the affirmative.

normative gap in domestic law – because it essentially refers back to domestic law. For the very same reason, it cannot serve as a legal basis governing the procedure in relation to detention with a view to transfer either. As opposed to the UNCLOS, Article 7 SUA Convention is not completely silent with respect to procedural safeguards. As we will see later in greater detail,³⁹⁹ Article 7(3) SUA Convention stipulates that the alleged offender shall be entitled to communicate with the nearest appropriate representative of his State of nationality without delay and has the right to be visited by a representative of that State. However, Article 7(4) SUA Convention provides that these rights have to be “exercised in conformity with the laws and regulations” of the seizing State. Because of this reference to domestic law, Article 7(3) SUA Convention cannot be understood as filling a gap in domestic law with regard to procedural requirements for deprivation of liberty. In sum, Article 7 SUA Convention does not offer a legal basis for detention pending transfer in the absence of pertinent domestic law.

d) Of Somali-Based Pirates Detained in EUNAVFOR Framework: EU Law

Detention pending transfer occurring in the context of EUNAVFOR is mainly governed by European Union law, including rules emanating from the EUNAVFOR chain of command, in addition to the domestic law of the seizing State.⁴⁰⁰ The relevant legal sources are basically the same for detention pending transfer as for deprivation of liberty on suspicion of criminal activity. Hence, the finding that most of these legal sources are not publicly accessible – and therefore fall short of the quality of law standard developed under the lawfulness element of the right to liberty – is equally pertinent in the realm of detention pending transfer as it is for deprivation of liberty on suspicion of criminal activity.⁴⁰¹

Among the publicly accessible norms of European Union law, which potentially serve as a legal basis for detention pending transfer (in the absence of pertinent domestic and international law), are Articles 2(e) and 12 of CJA Operation Atalanta. The former provision stipulates that it is part of EUNAVFOR’s mandate to “arrest, detain and transfer” alleged Somali-based pirates under the conditions set out in international law, notably the UNCLOS. Arguably, this provision allows for detention pending transfer. Unlike Article 105 UNCLOS, which only refers to arrest in explicit terms, Article 2(e) CJA Operation Atalanta mentions detention and transfers, which read together allow for detention pending transfer. Based on the same arguments as for detention on suspicion of criminal activity, this authorization seems to be a sufficient legal basis in light of Article 5(1) ECHR and Article 9(1) ICCPR for deprivation of liberty as such for the purpose of transferring persons suspected of piracy in the technical sense, ie substantive lawfulness.

399 See below Part 4/II/D.

400 See above Part 2/II/C/1.

401 On the relevant legal sources and the fact that most of them are not publicly accessible, see above Part 4/I/C/2/c.

However, it does not meet the strictures of procedural lawfulness.⁴⁰² The reference to “applicable international law” in Article 2(e) CJA Operation Atlanta does not cure this flaw in that we have concluded that neither Article 105 UNCLOS⁴⁰³ nor Article 7 SUA lives up to procedural lawfulness as required by the right to liberty. With respect to armed robbery at sea, Article 2(e) CJA Operation Atlanta does not constitute a sufficient legal basis, neither in terms of substantive nor procedural lawfulness, for the same reasons as already laid down for detention on suspicion of criminal activity based on this provision⁴⁰⁴ – the reference to the different Security Council Resolutions has no influence on this finding due to the reasons previously elaborated.⁴⁰⁵

We concluded earlier that Article 12 CJA Operation Atlanta, which pertains to transfers, does not constitute a sufficient legal basis in light of the right to liberty. Since the notion of “transfer” as used in this provision not only covers surrender for prosecution to the mainland authorities of the seizing State but also transfers to third States,⁴⁰⁶ the conclusion on the former⁴⁰⁷ apply to the latter as well.

e) **Conclusion**

With regard to the legal basis governing detention pending transfer as such and its procedure, the conclusion is rather sobering. While legislation governing detention with a view to extradition does not apply to transfers because of their distinctly different nature, States have generally failed to adopt any rules specifically dealing with detention pending transfer. The gap left by an absence of domestic law can hardly be filled by having recourse to international or European Union law since the (analysed) provisions are not in line the lawfulness requirement of Article 5(1) ECHR and Article 9(1) ICCPR.

As regards piracy, Article 105 UNCLOS arguably fulfils the lawfulness test in terms of detention pending transfer as such, but not in terms of procedural lawfulness. Security Council Resolution 1846 does not provide a sufficient legal basis for the detention of alleged armed robbers at sea pending surrender for prosecution in light of Article 5(1) ECHR and Article 9(1) ICCPR. Even if, *arguendo*, it is considered sufficient for detention pending transfer while the seizing State navigates Somali territorial waters, it is doubtful whether it also applies once the ship has left these waters and navigates on the high seas or in waters subject to the sovereignty of a State other than Somalia. What is more, Article 7

402 For the arguments leading to this conclusion, see above Part 4/I/C/2/c.

403 See above Part 4/I/C/3/a.

404 See above Part 4/I/C/2/c.

405 *ibid.*

406 See above Part 2/II/B/2.

407 See above Part 4/I/C/2/c.

SUA Convention, which applies to any person for so long as they are suspected of having committed an offence defined in Article 3 SUA Convention, does not provide a legal basis for detention pending transfer. This is first and foremost due to the fact that it essentially refers back to domestic law, which is – *nota bene* – incomplete if not entirely missing in that respect.

The conclusion is not any less disillusioning for detention pending transfer of piracy suspects occurring in the context of EUNAVFOR. While some rules fail the lawfulness test set out by Article 5(1) ECHR and Article 9(1) ICCPR because they are not publicly accessible, even the publicly accessible rules of CJA Operation Atalanta do not fulfil the lawfulness requirement of the right to liberty in its entirety, most notably because they lack a procedural component.

D. Non-Arbitrary Arrest and Detention of Piracy Suspects

1. The Prohibition of Arbitrary Arrest and Detention

The very purpose of the right to liberty is to protect the individual from arbitrary arrest and detention. Hence, we now turn to the prohibition of arbitrariness as implicitly contained in Article 5(1) ECHR and explicitly stipulated in Article 9(1) ICCPR. After a brief account on what constitutes arbitrary arrest and detention under these two provisions, the findings are applied to deprivation of liberty in the context of piracy.

a) Article 5(1) ECHR

Article 5(1) ECHR implicitly requires that every deprivation of liberty must be free from arbitrariness.⁴⁰⁸ Thus far, the Court has not provided a single universal definition of what the concept of arbitrariness encompasses.⁴⁰⁹ However, from the case law follows that the concept extends beyond a lack of conformity with national law. Therefore, a deprivation of liberty may be lawful in terms of domestic law but still arbitrary and thus contrary to the Convention.⁴¹⁰ Hence, even though the Strasbourg organs essentially refer back to domestic law when analys-

408 Peters and Altwicker (n 290) 129. From the case law of the Commission and Court follows that the Strasbourg organs consider the prohibition of arbitrary arrest and detention as a component of lawfulness; see, for instance, *Muminov v Russia* (n 288) para 122: “the national system failed to protect the applicant from *arbitrary* detention, and his detention cannot be considered ‘*lawful*’ for the purposes of Article 5 of the Convention.” (emphasis added); see also Council of Europe/European Court of Human Rights (n 69) 7–10, where the prohibition of arbitrariness is analysed in the section pertaining to lawfulness.

409 Mole and Meredith (n 17) 79.

410 *A and others v the United Kingdom* App no 3455/05 (ECtHR, 19 February 2009) para 164; *Khodzhayev v Russia* (n 10) para 134.

ing whether arrest and detention is in line with Article 5(1) ECHR, the absolute prohibition of arbitrariness must be respected in any event.⁴¹¹

A finding of arbitrariness depends on the facts of the specific case.⁴¹² However, the Grand Chamber laid out general criteria in order to delimit, at least partly, the concept in the context of Article 5(1)(f) ECHR:

To avoid being branded as arbitrary, detention ... must be carried out in good faith; it must be closely connected to the ground of detention relied on by the Government; the place and conditions of detention should be appropriate; and the length of the detention should not exceed that reasonably required for the purpose pursued.⁴¹³

b) Article 9(1) ICCPR

Unlike the ECHR, the ICCPR explicitly states: “No one shall be subjected to *arbitrary* arrest and detention.”⁴¹⁴ The provision has two addressees: the legislature adopting laws governing deprivation of liberty on the one hand and the enforcement personnel carrying out arrest or detention on the other.⁴¹⁵ Put differently, the law itself and the enforcement of the law must be free from arbitrariness.⁴¹⁶

Neither the drafters⁴¹⁷ of the Covenant nor the Human Rights Committee has provided a straightforward definition of “arbitrary”. However, various definitional elements can be discerned from the *travaux préparatoires* and views of the Committee. First of all, it must be noted that an absence of arbitrariness extends beyond being lawful, referring to something more than merely “against

411 *Chinoy v the United Kingdom* (n 192) 2. of the legal considerations; *Quinn v France* (n 87) para 47; *Markert-Davies c la France* App no 43180/98 (ECtHR, 29 June 1999) 1. of the legal considerations; *Raf c Espagne* (n 246) para 53; *Leaf c l'Italie* (n 215) para 3 of the legal considerations; *Nasrulloev v Russia* (n 195) para 70; *Eminbeyli v Russia* (n 89) para 43; *Soldatenko v Ukraine* (n 195) para 110; *Muminov v Russia* (n 288) para 119; *Kaboulov v Ukraine* (n 87) para 129; *Khudyakova v Russia* (n 284) para 58; *Khodzhayev v Russia* (n 10) para 134; *Khaydarov v Russia* (n 10) para 128; *Ismoilov and others v Russia* (n 195) para 136; *Garabayev v Russia* (n 283) para 87; *Gaforov v Russia* (n 10) para 184; *Shchebet v Russia* (n 195) para 62.

412 A concrete example for deprivation of liberty qualified as arbitrary is found in *Shchebet v Russia* (n 195) para 63.

413 *A and others v the United Kingdom* (n 410) para 164.

414 Second sentence of Article 9(1) ICCPR (emphasis added).

415 Nowak, *U.N. Covenant on Civil and Political Rights* (n 17) 224.

416 Joseph, Schultz and Castan (n 72) 308.

417 See Parvez Hassan, ‘The International Covenant on Civil and Political Rights: Background and Perspective on Article 9(1)’ (1973) 3 *Denver Journal of International Law and Policy* 153, on the drafting history of Article 9(1) ICCPR and specifically the notion of arbitrariness.

the law”.⁴¹⁸ Further, the concept of arbitrariness must be interpreted broadly.⁴¹⁹ Finally, different views are taken with regard to the threshold that must be met to qualify deprivation of liberty as arbitrary; however, the lower threshold that incorporates an element of due process in the prohibition of arbitrariness seems to prevail. A look into the *travaux préparatoires* reveals that some delegates set a rather high threshold, defining arbitrary as “capricious, despotic, imperious, tyrannical or uncontrolled”. Others advocated in favour of a lower threshold. They understood the prohibition of arbitrariness as referring “to cases where the liberty and security of the person ... were infringed before a court had passed a sentence or without any judicial proceedings” and held that “the intention was to ensure that the executive and the police, which in all countries were endowed with discretionary powers in the public interest, did not exercise those powers without due regard for the rights of the individual”.⁴²⁰ According to this latter view, the prohibition of arbitrariness contains a due process element. Such an understanding also transpires from the 2002 Report of the UN Working Group on Arbitrary Detention where it is stated that the prolonged detention of alleged terrorists without judicial review of their detention by a competent authority confers an arbitrary character to the deprivation of liberty.⁴²¹ The Human Rights Committee also seems to endorse the idea that the prohibition of arbitrariness contains a due process component when stating in various views that “the notion of ‘arbitrariness’ is not to be equated with ‘against the law’, but must be interpreted more broadly to include elements of inappropriateness, injustice, lack of predictability and due process of law”.⁴²² In application of this standard, it namely decided that deprivation of liberty is arbitrary if a person is arrested without a warrant and subsequently kept in detention without a court order.⁴²³

2. Non-Arbitrary Arrest and Detention of Piracy Suspects

We concluded that the requirement that deprivation of liberty be free from arbitrariness extends beyond lawfulness. This implies that under the ECHR and

418 Mole and Meredith (n 17) 80.

419 *ibid.*

420 Marc Bossuyt, *Guide to the “Travaux Préparatoires” of the International Covenant on Civil and Political Rights* (Martinus Nijhoff 1987) 201.

421 UNHCR Working Group on Arbitrary Detention, ‘Report of the working group on arbitrary detention: Chairperson-Rapporteur: Louis Joinet’ (16 December 2002) UN Doc E/CN.4/2003/8, para 64; Nowak, *U.N. Covenant on Civil and Political Rights* (n 17) 226.

422 See, eg, *Marques de Morais v Angola* Comm no 1128/2002 (HRC, 18 April 2005) para 6.1; *Mukong v Cameroon* Comm no 458/1991 (HRC, 10 August 1994) para 9.8; *Gorji-Dinka v Cameroon* Comm no 1134/2002 (HRC, 17 March 2005) para 5.1.

423 Pati (n 314) 43, citing *Magana v Zaire* Comm no 90/1981 (HRC, 21 July 1983) paras 7.2 and 8.

ICCPR a deprivation of liberty may be lawful, ie abide by the requirements set forth in norms governing arrest and detention, but still arbitrary. This may be the case if deprivation of liberty is not carried out in good faith, is unpredictable, inappropriate or unjust. As compared with the ECHR, the threshold under the ICCPR appears to be lower since the prohibition of arbitrariness clearly includes an element of due process. Notably, arrest and detention carried out in the absence of an arrest warrant or court order, ie deprivation of liberty not subject to judicial review, has been qualified as arbitrary under Article 9 ICCPR.

When looking at arrest and detention carried out by Denmark or by States contributing to EUNAVFOR – either on suspicion of criminal activity or with a view to transfer – through the lens of the European Court of Human Rights case law, nothing points to arbitrary deprivation of liberty. No cases where bad faith or deception was used came to the author’s knowledge, nor does it seem that the ground(s) for deprivation of liberty and deprivation of liberty itself are disconnected. What is more, the conditions of detention on board ships of Denmark or States contributing to EUNAVFOR do not raise concerns in light of the prohibition of arbitrariness. Finally, detention may be arbitrary if its length goes beyond what is reasonably required for obtaining its purpose. Even though detention pending transfer may last for several weeks in extreme cases, the length as such does not seem to be contrary to Article 5(1)(f) ECHR considering the Court’s case law pertaining to the acceptable duration of detention pending extradition and is thus not arbitrary – at least not on account of being disproportionate to the purpose pursued. Thus, when applying the arbitrariness test of the Court, deprivation of liberty of piracy suspects by Denmark or States contributing to EUNAVFOR does not seem arbitrary.

The finding may be different under the ICCPR, since the Human Rights Committee endorses the view that the prohibition of arbitrariness encompasses a due process component. It thus sets the threshold of the prohibition lower as compared to the European Court of Human Rights. We have seen that States not taking a criminal law approach to arrest and detention of piracy suspects often do not grant piracy suspects any procedural safeguards for so long as they are detained under the authority of the military. In other words, between the initial arrest of piracy suspects up until they come under the authority of the “ordinary” law enforcement authorities, be it the police or prosecutor,⁴²⁴ they do not benefit from any procedural rights, notably the right to be brought before a judge. Furthermore, arrest and detention by these States is often not based on a court order and not subject to judicial review. Since the failure to abide by due process standards may already qualify as arbitrary, arrest and detention of piracy suspects without respecting procedural requirements flowing, *inter alia*,

424 Which occurs at earliest when the seizing State decides to prosecute the suspects in its own courts and which will never happen if the seizing State decides not to exercise its criminal jurisdiction over the seized suspects but rather opts for a transfer.

from Article 9(2) to (5) ICCPR may potentially be qualified as arbitrary under the ICCPR.

Under Article 9(1) ICCPR, arrest and detention may be arbitrary if it involves an element of unpredictability. We have concluded that for those States pursuing a non-criminal law approach to deprivation of liberty on suspicion of criminal activity, the legal basis governing deprivation of liberty as such and the procedure in relation to arrest and detention is not always precise, clear and foreseeable. In other words, the normative standards governing arrest and detention on suspicion of criminal activity are not always predictable. What is more, domestic law generally does not regulate detention pending transfer and the international norms invoked to fill this gap are often imprecise and incomplete and thus unpredictable to some extent – especially regarding the procedural aspects of deprivation of liberty. In sum, it cannot be excluded that deprivation of liberty of piracy suspects may qualify as unpredictable and thus arbitrary under Article 9(1) ICCPR.

II. Procedural Safeguards for Piracy Suspects Deprived of Their Liberty

We now turn to the various procedural safeguards that piracy suspects must be granted by virtue of human rights norms and other international individual rights. In light of the “extraordinary suspect” approach to arrest and detention, it is important to establish a minimum standard in terms of procedural safeguards and identify which State is responsible for granting them – be it the seizing State or the receiving and ultimately prosecution State. Seizing States following the “extraordinary suspect” approach do not grant piracy suspects any procedural safeguards – notably due to their argument that it is sufficient if detention is subject to judicial review and control in the receiving and ultimately prosecuting State.

Procedural safeguards to be granted to piracy suspects are contained in human rights law. The rights to liberty stipulated in Article 5 ECHR and Article 9 ICCPR contain a series of procedural safeguards available to persons deprived of their liberty, namely the right to receive sufficient information about the measure interfering with liberty and the right to have arrest and detention subjected to judicial scrutiny. In this context, it bears mentioning that Article 37(d) CRC stipulates that a minor deprived of his liberty has a right to challenge the legality of his arrest and detention before a court or other competent, independent and impartial authority, which must promptly issue a decision. Furthermore, seizing States are under an obligation to provide minors with prompt access to legal help and other appropriate forms of assistance. After the analysis of the procedural safeguards provided to piracy suspects by virtue of the human right to liberty, we turn to the right to consular assistance, which is said to have attained the status of an international individual right.

A. **Right to Information Concerning Deprivation of Liberty**

Under human rights law, every person deprived of his liberty has a right to be informed of the reasons for his arrest or detention. The right of every person to know *why* he is being deprived of his liberty is granted by Article 5(2) ECHR for example.⁴²⁵ Being in possession of relevant information is, *inter alia*, a necessary condition for the exercise of the *habeas corpus* right as guaranteed by Article 5(4) ECHR.⁴²⁶ Hence, the right to information forms an integral part of the protection scheme afforded by Article 5 ECHR⁴²⁷ and contributes to the realization of the overall purpose of the provision, which is to avoid arbitrary deprivation of liberty.⁴²⁸ The right to liberty guaranteed by Article 9 ICCPR also contains a right to information.⁴²⁹ Even though the scope and content of Article 9(2) ICCPR differs to some extent from Article 5(2) ECHR, it pursues the very same goal as the ECHR provision.⁴³⁰

Other human rights treaties do not explicitly stipulate the right of persons deprived of their liberty to receive information about their arrest or detention. For instance, Article 37 CRC, which guarantees minors the right to liberty, does not contain an explicit reference of the right to be informed of the reasons for their arrest or detention. Article 6 CFREU, which is limited to the words “[e]veryone has the right to liberty and security of person”, does not explicitly mention the procedural safeguards to be granted to arrested or detained persons. However, Article 6 CFREU is understood as having the same content as Article 5 ECHR and therefore, according to Article 52(3) CFREU, must be interpreted along the lines of the ECHR provision.⁴³¹ Consequently, Article 6 CFREU is not discussed separately in the following analysis, which mainly focuses on Article 5(2) ECHR and Article 9(2) ICCPR.

425 *K v Belgium* App no 10819/84 (Commission Decision, 5 July 1984) para 4 of the legal considerations; *Bordovskiy v Russia* (n 278) para 55; *Shamayev and others v Georgia and Russia* (n 90) para 413; *Khudyakova v Russia* (n 284) para 79; *Eminbeyli v Russia* (n 89) para 54; *Khodzhayev v Russia* (n 10) para 114.

426 *Bordovskiy v Russia* (n 278) para 55; *Shamayev and others v Georgia and Russia* (n 90) para 413; *Khudyakova v Russia* (n 284) para 79; *Eminbeyli v Russia* (n 89) para 54.

427 *Bordovskiy v Russia* (n 278) para 55; *Shamayev and others v Georgia and Russia* (n 90) para 413; *Khudyakova v Russia* (n 284) para 79; *Eminbeyli v Russia* (n 89) para 54; *Khodzhayev v Russia* (n 10) para 114; *Markert-Davies c la France* (n 411) para 6 of the legal considerations.

428 See eg *Khudyakova v Russia* (n 284) para 58; *Ismoilov and others v Russia* (n 195) para 136; or *Nasrulloev v Russia* (n 195) para 70; *Shamayev and others v Georgia and Russia* (n 90) para 413.

429 Article 9(2) ICCPR.

430 Manfred Nowak and Elisabeth McArthur, *The United Nations Convention Against Torture: A Commentary* (OUP 2008) 228.

431 See above Part 4/I.

The assessment whether sufficient information was conveyed in a prompt manner to a person deprived of his liberty cannot be assessed in the abstract. Rather, the European Court of Human Rights suggests that it is to be “assessed in each case according to its special features”.⁴³² This is no different for the ICCPR. In light of this, the following analysis aims to explain some special features of deprivation of liberty in counter-piracy operations off the coast of Somalia and the region, and to interpret the right to information by taking into account these specificities.

1. Piracy Suspects Are Beneficiaries of the Right to Information

a) Article 5(2) ECHR

Article 5(2) ECHR reads as follows: “Everyone who is arrested shall be informed promptly, in a language which he understands, of the reasons for his arrest and of any charge against him.” Despite the emphasis being on “arrest”, the right to information applies to any kind of deprivation of liberty, namely detention as well.⁴³³ What is more, despite the criminal law connotation of the wording (by referring to the charges against the arrested person), it is irrelevant which of the justificatory ground listed in Article 5(1) ECHR the measure interfering with personal liberty is based.⁴³⁴ According to the European Court of Human Rights, in using the words “any charge”, the “intention of the drafters was not to lay down a condition for its applicability, but to indicate an eventuality of which it takes account”.⁴³⁵ Per the Court, the interpretation that the right to liberty applies to all persons as soon as they are deprived of their liberty follows from the link between the right to information and the right to *habeas corpus* proceedings foreseen in Article 5(4) ECHR, which must be granted to every person deprived of his liberty. Effective use of the latter right can only be achieved if the person is promptly and adequately informed of the reasons why he is being deprived of liberty.⁴³⁶ The

432 *Bordovskiy v Russia* (n 278) para 55; *Shamayev and others v Georgia and Russia* (n 90) para 413; *Ryabikin v Russia* App no 8320/04 (ECtHR, 10 April 2007) B. of the legal considerations; *Khudyakova v Russia* (n 284) para 79; *Khodzhayev v Russia* (n 10) para 114.

433 Peters and Altwicker (n 290) 130; Régis de Goutes, ‘Article 5 § 2’ in Emmanuel De-caux, Pierre H Imbert and Louis-Edmond Pettiti (eds), *La Convention européenne des droits de l’homme: Commentaire article par article* (2nd edn, Economica 1999) 205; *Van der Leer v the Netherlands* App no 11509/85 (ECtHR, 21 February 1990) para 28.

434 de Goutes (n 433) 205.

435 *Van der Leer v the Netherlands* (n 433) para 27; Council of Europe/European Court of Human Rights (n 69) para 101.

436 *Van der Leer v the Netherlands* (n 433) para 28; *Shamayev and others v Georgia and Russia* (n 90) para 413.

information must be provided to either the person deprived of his liberty or his representative. The latter is especially important in situations where the person deprived of his liberty is incapable of receiving the information.⁴³⁷

Article 5(2) ECHR thus applies to *any* person as soon as he is deprived of his liberty.⁴³⁸ This leaves no doubt that the right to information under the ECHR applies to piracy suspects as soon as they can be said to be deprived of their liberty.⁴³⁹ Thereby, it does not matter whether their arrest and detention is carried out on suspicion of criminal activity (Article 5(1)(c) ECHR) or for the purpose of transferring them to third States for criminal prosecution (Article 5(1)(f) ECHR).⁴⁴⁰ In cases where an arrest is based on the justificatory ground of Article 5(1)(c) ECHR, ie made for the purpose of bringing a piracy suspect before a competent authority and thus to secure later criminal prosecution, he must be informed not only of the reasons leading to his arrest but also the charges against him.⁴⁴¹ When doing so, the charges must generally be identified in application of the domestic criminal law of the seizing State. This is due to the fact that the justificatory ground of Article 5(1)(c) ECHR can only serve as a basis for deprivation of liberty in order to bring the suspect before the domestic authorities of the seizing State (rather than foreign authorities).⁴⁴² This, in turn, implies that the charges are formulated pursuant to the domestic law of the seizing State, rather than the law of the (most likely not yet identified) receiving State.

b) Article 9(2) ICCPR

Article 9(2) ICCPR differs in its wording from Article 5(2) ECHR and reads: “Anyone who is arrested shall be informed, at the time of arrest, of the reasons for his arrest and shall be promptly informed of any charges against him.” The provision contains two different rights to information, each of which relates exclusively to the phase of arrest and does not extend to detention. Thereby, the notion of arrest refers to the *act* of depriving a person of his liberty as opposed to detention, which is the *state* of deprivation of liberty. As a general rule, the notion of arrest covers the period of time up until the person deprived of his liberty is brought before the competent authority.⁴⁴³

437 Council of Europe/European Court of Human Rights (n 69) para 104, with references to the Court’s case law.

438 See above Part 4/I/A.

439 As regards the moment when piracy suspects can be said to be deprived of their liberty, see above Part 4/I/A/2.

440 See below Part 4/II/A/4/b on the issue of *when* the right to be informed arises in the context of deprivation of liberty with a view to transfer.

441 See below Part 4/II/A/2/a/aa.

442 See above Part 4/I/B/2/a.

443 Nowak, *U.N. Covenant on Civil and Political Rights* (n 17) 221; see also above Part 4/I/A/2/b for the definitions of arrest and detention.

The first right – to be informed of the reasons for the arrest – arises at the very moment of arrest and applies to everyone deprived of his liberty.⁴⁴⁴ Therefore, it applies to piracy suspects as soon as they can be said to be deprived of their liberty.⁴⁴⁵ The second right – to be informed of the charges – applies exclusively to those arrests made for the purpose of criminal justice.⁴⁴⁶ Since piracy suspects are arrested on suspicion of criminal activity, this second right applies to them (in addition to the first one) and they must be informed of the charges against them. The domestic criminal law, according to which the charges are determined, must generally be that of the seizing State. This notably follows from the fact that at the moment following interception, the seizing State has generally not yet declined exercising its domestic criminal jurisdiction over the suspects and they are thus detained within the seizing State’s legal framework rather than that of any other State.

Once the suspect is formally charged with a criminal offence,⁴⁴⁷ Article 14 ICCPR applies requiring that the person is informed “promptly and in detail in a language which he understands of the nature and the cause of the charge against him”.⁴⁴⁸ In those rare cases where the seizing State decides to prosecute seized piracy suspects in its domestic courts and they are formally charged, the informational right of Article 14 ICCPR becomes applicable.

In most cases, however, the seizing State ultimately decides *not* to prosecute the suspects in its own courts. In this scenario, the suspects are generally not released but rather kept in detention in order to secure a later (potential) transfer. One could argue in this case that there is no new (physical) arrest – no *act of deprivation of liberty*. Since the right to information under Article 9(2) ICCPR only applies to arrest, ie the act of depriving a person of his liberty as opposed to the state of being in detention, no right to information would arise at the moment when piracy suspects are no longer detained with a view to prosecution in the seizing State but rather with a view to their transfer. However, the correct view

444 Stephen Bailey, ‘Rights in the Administration of Justice’ in David Harris and Sarah Joseph (eds), *The International Covenant on Civil and Political Rights and United Kingdom Law* (Clarendon Press 1995) 202; Nowak, *U.N. Covenant on Civil and Political Rights* (n 17) 228.

445 For the conditions that must be fulfilled so that a piracy suspect can be said to be deprived of his liberty in the sense of Article 9 ICCPR, see above Part 4/I/A/2/b; see below Part 4/II/A/4/a/aa on *when* the right to be informed of the reasons for arrest arise in cases where piracy suspects are arrested on suspicion of criminal activity.

446 Bailey (n 444) 202; Nowak, *U.N. Covenant on Civil and Political Rights* (n 17) 228.

447 On the difference between the notion of “charge” in the sense of Article 5(2) ECHR and “charges” in Article 9(2) ICCPR – terms used in relation to the right to information – as opposed to the term “accusation” used in the fair trial guarantees enshrined in Article 6(3)(a) ECHR and Article 14(3)(a) ICCPR, see Stefan Trechsel, ‘The Right to be Informed of the Accusation’ in Stefan Trechsel and Sarah Summers (eds), *Human Rights in Criminal Proceedings* (OUP 2006) 196.

448 Nowak, *U.N. Covenant on Civil and Political Rights* (n 17) 228.

seems to be that the ground for deprivation of liberty changes – from arrest on suspicion of criminal activity to arrest with a view to transfer⁴⁴⁹ – and that the situation must therefore be treated as a new (*de jure* rather than physical) arrest. This implies that, at this moment, piracy suspects must be informed of the (new) reasons why they are being deprived of liberty, which is to submit them for prosecution in a third State by means of transfer. Otherwise, they cannot effectively exercise their *habeas corpus* rights in relation to their detention pending transfer as granted by Article 9(4) ICCPR.⁴⁵⁰

2. Content and Extent of Information to Be Provided

a) Initial Arrest Based on Suspicion of Criminal Activity

aa) Article 5(2) ECHR

Article 5(2) ECHR requires that everyone who is arrested is informed of “the reasons of his arrest and of any charge against him”. Since the initial arrest of piracy suspects – which can solely be based on the justificatory ground of Article 5(1) (c) ECHR⁴⁵¹ – is of a criminal law nature, they must not only be informed of the reasons for their arrest, but also the charges against them.

While the exact information to be provided is determined by domestic law,⁴⁵² the Convention sets a minimum standard regarding the information to be conveyed.⁴⁵³ Two minimum benchmarks with regard to the information to be provided by virtue of Article 5(2) ECHR can be inferred from case law. One benchmark is that the information must be detailed enough for the person to understand *why* he has been arrested – he must understand the reasons leading to his arrest and those that continue to justify depriving him of liberty.⁴⁵⁴ From this follows that the extent of information to be provided cannot be determined in the abstract, but rather depends on the specificities of each instance of deprivation of liberty. For example, the extent of the information provided may be less where the person is caught red-handed and arrested for a clearly intentional and illegal

449 Similar to Article 5(1) ECHR, the view that the seizing State detains the suspects based on criminal suspicion *on behalf* of a third State must be rejected. Rather, it detains them with a view to their surrender to a third State for prosecution.

450 Esser (n 9) 270.

451 See above Part 4/I/B/2/a.

452 Esser and Fischer, ‘Menschenrechtliche Implikationen der Festnahme von Piraterieverdächtigen’ (n 24) 517.

453 In detail, see above Part 4/II/A.

454 *Kaboulov v Ukraine* (n 87) para 144; *Eminbeyli v Russia* (n 89) para 55; *K v Belgium* (n 425) para 4 of the legal considerations; *Markert-Davies c la France* (n 411) para 6 of the legal considerations.

act,⁴⁵⁵ as compared to a situation of detention where the reason changes over time without being apparent to the person deprived of his liberty (as may hold true for detention during disposition of piracy cases). Hence, if piracy suspects are caught *in flagranti* while engaging in a pirate attack, the reasons for their arrest may – at least partially – arise from the situation and thus require less explanation. Meanwhile, if persons are arrested on suspicion of conspiracy to commit piracy for example, the extent of information necessary to clarify the reasons why they are being deprived of their liberty may be greater. The other benchmark is that the content and extent of information to be provided must be enough so as to enable the person arrested and detained to challenge the lawfulness of the deprivation of liberty based on Article 5(4) ECHR⁴⁵⁶ by petitioning a court for legal review.⁴⁵⁷ This follows from the fact that the information rights guaranteed in Article 5(2) ECHR are a precondition for the effective exercise of the *habeas corpus* rights foreseen in Article 5(4) ECHR.⁴⁵⁸

According to the case law of the Strasbourg organs, every person has a right to be informed of the “essential legal and factual grounds” for his arrest or detention.⁴⁵⁹ Since the person deprived of his liberty must have knowledge of the facts leading to his arrest, a mere mention of the legal basis for the deprivation of liberty is insufficient.⁴⁶⁰ The word “essential” indicates that the information to be provided need not be exhaustive. Regarding the extent of the information to be conveyed, the Commission and Court decided that “it need not be related in its entirety by the arresting officer at the very moment of the arrest”.⁴⁶¹ Rather, it

455 Colvin and Cooper (eds) (n 30) 169; Council of Europe/European Court of Human Rights (n 69) para 109: “Arrested persons may not claim a failure to understand the reasons for their arrest in circumstances where they were arrested immediately after the commission of a criminal and intentional act ... or where they were aware of the details of alleged offences contained within previous arrest warrants and extradition requests.”

456 *Bordovskiy v Russia* (n 278) para 55; *Khudyakova v Russia* (n 284) para 79; *Eminbeyli v Russia* (n 89) para 54; *Kaboulov v Ukraine* (n 87) para 143; *Aribaud c Luxembourg* (n 218) para 115; *Khodzhayev v Russia* (n 10) para 114.

457 *Shamayev and others v Georgia and Russia* (n 90) para 413.

458 An often cited case confirming the link between Article 5(2) and (4) ECHR is *Van der Leer v the Netherlands* (n 433); since Article 5(4) ECHR applies to *any* person deprived of his liberty, it is irrelevant that the case at hand pertains to deprivation of liberty based on Article 5(1)(e) ECHR rather than Article 5(1)(c) or (f) ECHR.

459 *Bordovskiy v Russia* (n 278) para 55; *Shamayev and others v Georgia and Russia* (n 90) para 413; *Khudyakova v Russia* (n 284) para 79; *Eminbeyli v Russia* (n 89) para 54; *Kaboulov v Ukraine* (n 87) para 143; *Aribaud c Luxembourg* (n 218) para 106; *Khodzhayev v Russia* (n 10) para 114; *Markert-Davies c la France* (n 411) para 6 of the legal considerations.

460 Renzikowski (n 56) 101.

461 *Bordovskiy v Russia* (n 278) para 55; *Shamayev and others v Georgia and Russia* (n 90) para 413; *Kaboulov v Ukraine* (n 87) para 143; *Khodzhayev v Russia* (n 10) para 114;

suffices that the person is informed of the reasons in a summary way at the time of arrest and that more detailed information follows later, but still “promptly”.⁴⁶² Even though the oral or written information must be more detailed at the later stage, that it be complete is not required.⁴⁶³

While providing essential factual information may not pose any particular difficulties in the counter-piracy context, the communication of the legal grounds, ie the relevant law on which deprivation of liberty is based, may pose difficulties for the States that consider piracy suspects to be “extraordinary suspects” to whom the ordinary legal framework governing deprivation of liberty on suspicion of criminal activity does not apply. The normative gap that results from this approach cannot entirely be filled by having recourse to international or European Union law.⁴⁶⁴ This may be problematic not only in light of the lawfulness requirement of Article 5(1) ECHR, but it may also have repercussions on the proper discharge of the obligation to inform the suspects as stipulated in Article 5(2) ECHR.

Another element of the information to be provided by virtue of Article 5(2) ECHR is a statement identifying the authority competent to deprive the person of his liberty.⁴⁶⁵ This is of considerable importance in the context of counter-piracy operations where it may not always be obvious to the person being deprived of his liberty *who* is responsible for the act. As an example, it may not be apparent whether the State carried out an arrest while contributing to EUNAVFOR or whether it reverted back to national control for the very purpose of deprivation of liberty.⁴⁶⁶ The entity actually carrying out the arrest may be even less clear in the (thus far theoretical) case where shipriders are used to deprive piracy suspects of their liberty.⁴⁶⁷

Markert-Davies c la France (n 411) para 6 of the legal considerations.

462 *Kosonen c le Portugal* (n 215) 2.b. of the legal considerations: “[Q]u’il n’est pas incompatible avec l’article 5 par. 2 ... de la Convention d’informer sommairement l’intéressé des raisons de son arrestation au moment de celle-ci et plus en détail un peu plus tard”; in the case at hand, the arrested person was informed of the factual and legal grounds for his arrest at a court hearing on the day following his deprivation of liberty.

463 See, eg, *Shamayev and others v Georgia and Russia* (n 90) para 427, where the Court points out that Article 5(2) ECHR “does not require that the case file in its entirety be made available to the person concerned” but that the person deprived of his liberty “must nonetheless receive sufficient information so as to be able to apply to a court for the review of lawfulness” as provided by Article 5(4) ECHR. See also *Eminbeyli v Russia* (n 89) para 57, for a concrete application of this rather abstract criterion.

464 See above Part 4/I/C/2.

465 Unfried (n 114) 41.

466 See above Part 2/II/A.

467 On the use of shipriders see above Part 1/IV/B.

bb) Article 9(2) ICCPR

Under Article 9(2) ICCPR, the right to be informed of the *reasons* for arrest must be provided at the time of arrest and not just “promptly” as required by its counterpart in Article 5(2) ECHR. Therefore, the content of the information may be limited to a general and not legally founded description of why the person was arrested.⁴⁶⁸ However, a mere reference to the legal basis without in any way substantiating the complaint against the person is insufficient. Rather, the information must be such as to enable the person to discern “the substance of the complaint against him”.⁴⁶⁹

Information relating to the charges need not be provided at the time of the arrest – but must be imparted “promptly”. Therefore, the content of information demanded is greater. The person arrested has the right to know the specific accusations in a legal sense, which, in turn, enables him to submit a well-founded application challenging his detention.⁴⁷⁰ The threshold, however, is lower than that of Article 14(3) ICCPR, which requires that the person is informed of the nature of the charge against him (the legal provision the person is accused of violating) and its cause (the specific facts of the case against that person). Under Article 14(3) ICCPR, the rationale is to provide information sufficient to prepare a defence and not merely to challenge the legality of the arrest.⁴⁷¹

Under Article 9(2) ICCPR, the information obligations vis-à-vis piracy suspects seized on suspicion of criminal activity are basically the same as under the ECHR.⁴⁷² Since the reasons for the arrest of piracy suspects must be provided at the moment of their arrest (and not just promptly), the extent of information may be sparser and, most notably, it need not be legally founded.⁴⁷³

468 Nowak, *U.N. Covenant on Civil and Political Rights* (n 17) 229; Bailey (n 444) 202.

469 Eg, in *Drescher Caldas v Uruguay* Comm no 43/1979 (HRC, 21 July 1983) para 13, the Committee held that the information provided during Uruguay’s arrest of a person pursuant to “prompt security measures” did not adequately describe the basis for arrest since it would not enable the person to discern “the substance of the complaint against him”; see also Nowak, *U.N. Covenant on Civil and Political Rights* (n 17) 229, and Carlson and Gisvold (n 76) 84.

470 Nowak, *U.N. Covenant on Civil and Political Rights* (n 17) 230; Bailey (n 444) 202; Lawyers Committee for Human Rights, ‘What is a Fair Trial? A Basic Guide to Legal Standards and Practice’ (March 2000) <www.hrea.org/erc/Library/display_doc.php?url=http%3A%2F%2Fwww.humanrightsfirst.org%2Fwp-content%2Fuploads%2Fpdf%2Ffair_trial.pdf&external=N> accessed 29 January 2013, 5.

471 Carlson and Gisvold (n 76) 44; Lawyers Committee for Human Rights (n 470) 15.

472 See above Part 4/II/A/2/a/aa.

473 See wording of Article 9(2) ICCPR.

b) *Detention Pending Transfer*

Once the seizing State decides not to prosecute the suspects it took captive in its own courts, but keeps them in custody with a view to their (potential) transfer to a third State for prosecution, it must inform the suspects of the (new) reasons why they are being deprived of their liberty. As opposed to their interception, where the reasons for their arrest may (partially) arise from the surrounding circumstances, this cannot be said for detention pending transfer. Piracy suspects are not in any way associated with the disposition procedure.⁴⁷⁴ As a consequence, they can only become aware of the fact that they are being detained with a view to transfer if informed of such plans by the detaining authority. Therefore, under Article 5(2) ECHR and Article 9(2) ICCPR, piracy suspects must be informed that a transfer decision procedure has been started, which is the pendant of being informed of the fact that extradition proceedings have been initiated. Also, if relevant new circumstances arise – for instance, if transfer negotiations with one State (eg the flag State of the victim ship) were unsuccessful and negotiations are started with another (eg regional) State – the suspects must be informed of these developments.

The case law of the Strasbourg organs provides a somewhat ambiguous answer as to whether the content and extent of information to be supplied under Article 5(2) ECHR is the same for all arrests based on Article 5(1) ECHR, or whether the standard is lower for deprivation of liberty with a view to extradition as compared to arrest and detention on suspicion of criminal activity. While it is, for example, uncontested that a person arrested based on Article 5(1)(c) ECHR must not only be informed of the reasons of his arrest but also the charges, this is disputed with regard to arrest and detention with a view to extradition.⁴⁷⁵ In *Bordovskiy v Russia*, the Court deemed it sufficient that the person subject to extradition is informed that he is wanted by the requesting State.⁴⁷⁶ Yet, various cases of the Commission and Court suggest that this is insufficient and that the person subject to surrender for prosecution must not only understand that extradition proceedings have been initiated against him, but must also be told of specific accusations against him in the requesting State, including sufficient information about the contents of the extradition dossier in order to fully understand the charges.

The central case addressing the issue of whether an arrest on suspicion of criminal activity and an arrest with a view to extradition require the same extent of information – notably information about the charges – is *K. v Belgium*. In this case, the Commission summarized its findings as follows: “In the case of arrest with a view to extradition, the information given to the person concerned need

474 See above Part 2/III.

475 Renzikowski (n 56) 102.

476 *Bordovskiy v Russia* (n 278) paras 56–58.

not be as complete as in the case of arrest for the purpose of bringing a person to trial as provided for in Article 5, paragraph 1 (c).⁴⁷⁷ This isolated sentence seems to imply that the level of necessary information is lower when the arrest is carried out with a view to extradition as compared to arrest on suspicion of criminal activity. A differentiation is made, however, in the decision itself by the Commission's argument that Article 5(2) ECHR does not require the accused be given a complete description of all the charges at the moment of arrest on suspicion of criminal activity. It then stated that this standard is applied *mutatis mutandis* to the arrest of persons with a view to their extradition and the meaning of Article 5(2) ECHR in this context is that the person arrested with a view to extradition knows why he was arrested. The Commission further asserted that an insufficiency of information may be relevant for the fair trial rights of Article 6 ECHR – rights that do not apply to extradition proceedings. The Commission essentially argued in *K. v Belgium* that the standard of Article 5(2) ECHR regarding the extent of information to be provided is lower than the standard of Article 6 ECHR⁴⁷⁸ and that this inferior standard applies to all kinds of deprivation of liberty. However, it did not seem to state that an even lower standard should be applied to arrest and detention pending extradition. The above cited summary of the *K. v Belgium* judgment stating that the standard is lower for arrest with a view to extradition as compared to arrest on suspicion of criminal activity thus appears foreshortened.

The Court, however, seems to assume in some of its cases that the standard embodied in Article 5(2) ECHR *as such* (and not compared to Article 6 ECHR) differs depending on whether deprivation of liberty is based on Article 5(1)(c) or (f) ECHR. It recalled in these cases that when a person is arrested on suspicion of criminal activity, Article 5(2) ECHR does not require that the information given consists of a complete list of the charges against the person. By referring to *K. v Belgium*, it further stated that “[w]hen a person is arrested with a view to extradition, the information given may be even less complete”.⁴⁷⁹ In these cases, the Court made no mention of Article 6 ECHR – by comparing the extent of information to be provided under this provision with the lower standard of Article 5 ECHR – as the Commission did in *K. v Belgium*. Hence, it seems that the Court's conclusion in these cases follows from a misreading of *K. v Belgium* since it is based merely on the (foreshortened and therefore misleading) summary of the decision rather than the more differentiated motivation behind it.

477 *K v Belgium* (n 425) summary of findings.

478 The different standard in terms of the extent of information to be provided under Article 5(2) ECHR and Article 6(3)(a) ECHR seems explicable against the background that they pertain to different phases, the former to the phase following the arrest and the latter to the period preceding the criminal trial.

479 *Bordovskiy v Russia* (n 278) para 56; *Khudyakova v Russia* (n 284) para 80; *Kaboulov v Ukraine* (n 87) para 144.

The wording of Article 5(2) ECHR does not support the interpretation that deprivation of liberty with a view to extradition enjoys a lower protective standard (as compared to arrest and detention on suspicion of criminal activity), nor can it be based on a systematic reading of the provision. If Article 5(2) ECHR were not applicable or only partially applicable to deprivation of liberty with a view to extradition, this would almost certainly be evident from the wording of the provision – as it does for Article 5(3) ECHR, which is explicitly reserved for deprivation of liberty based on Article 5(1)(c) ECHR. In some of its judgments, the Court has also abandoned the idea that Article 5(2) ECHR provides a different protective standard for detention pending extradition when considered side by side with detention on suspicion of criminal activity. It did so by (adequately) reproducing the *ratio decidendi* of the Commission decision *K. v Belgium*: the extent of information to be provided under Article 5(2) ECHR can be lower than the standard enshrined in Article 6 ECHR, but it is the same for every kind of deprivation of liberty.⁴⁸⁰ In light of this, it is not far-fetched to argue that an extraditee must not only understand that extradition proceedings have been initiated against him, but must also be told of the specific accusations against him in the requesting State, including sufficient information about the contents of the extradition dossier in order to fully understand the charges.⁴⁸¹

If applied *mutatis mutandis* to transfers of piracy suspects, the seizing State must inform the suspects detained with a view to their transfer of the charges against them.⁴⁸² Admittedly, this is a difficult task for military officials who are not familiar with the domestic law of the ultimately receiving State. Yet if practice is any indication, it is not an impossible task either. Within the EUNAVOFR

480 In *Khodzhayev v Russia* (n 10) para 115, the Court stated that Article 5(2) ECHR does not require that a full list of charges is provided to someone arrested on suspicion of criminal activity and that an insufficiency of information may be relevant with regard to the fair trial rights contained in Article 6 ECHR, which, however, do not apply to extradition proceedings. In *Eminbeyli v Russia* (n 89) para 55, the Court stated that providing a complete list of charges is not necessary in the case of arrest on suspicion of criminal activity and that this reasoning applies *mutatis mutandis* to arrests with a view to extradition. Similar to *Khodzhayev v. Russia*, the Court did not state that the information provided may be even lower in case of extradition as compared to deprivation of liberty on suspicion of criminal activity. To the contrary, by literally citing the motivation (and not only the summary) of the Commission decision *K v Belgium* (n 425), it argues that insufficient information could be problematic under Article 6 ECHR, which, however, does not apply to extradition proceedings.

481 Peter Langford, 'Extradition and fundamental rights: the perspective from the European Court of Human Rights' (2009) 13 *International Journal of Human Rights* 512, 515; Esser (n 9) 236.

482 On how the promptness requirement stipulated in Article 5(2) ECHR and Article 9(2) ICCPR with respect to the information about the charges could be interpreted in the context of transfers, see below Part 4/II/A/4.

framework, for instance, deployed forces are in possession of information about the pertinent domestic law of regional States with which transfer agreements have been concluded. For example, an annex to the EUNAVFOR Transfer SOP outlines relevant provisions of Kenyan criminal law and describes scenarios likely to fulfil these provisions.⁴⁸³ Moreover, there may be the option of consulting military personnel with a legal background. This can be done either by submitting law-related issues to the legal advisor to the armed forces embarked on board the warship of the contributing State or by contacting the EUNAVFOR Operational Headquarters, which employs more legal advisors than other EU-led operations due to the multitude of legal aspects associated with Operation Atalanta.⁴⁸⁴ Furthermore, an exchange with the domestic authorities of the potential receiving State takes place before it accepts a transfer request. During this exchange, factual and evidentiary materials are submitted to the potential receiving State, which then evaluates whether there is a prospect of conviction under domestic criminal law.⁴⁸⁵ In the course of this process, the charges become clear. Overall, in the context of EUNAVFOR (and as it may hold true for Danish counter-piracy operations), it seems possible for the actors in theatre to identify the relevant charges under the domestic criminal law of the ultimately prosecuting State and to communicate them to the suspects. However, this may prove more difficult – if not impossible – in cases where transfers take place within a less formalized framework, such as surrenders for prosecution to Puntland or Somaliland.

In addition to the reasons for depriving a person of his liberty (ie that action is being taken with a view to transfer for prosecution, including information about the charges that the transferee will face upon surrender), the information provided must encompass the legal basis for deprivation of liberty. Yet, as a general rule, States detaining piracy suspects with a view to transfer do not apply extradition-specific legislation to these cases and have not adopted rules specifically governing detention pending transfer. What is more, neither international nor European Union law necessarily provides a legal basis for deprivation of liberty with a view to transfer.⁴⁸⁶ This may be problematic not only in light of the lawfulness requirement under Article 5(1) ECHR, but may also make it difficult to correctly fulfil the obligation to inform as stipulated in Article 5(2) ECHR.

483 Document on file with author.

484 Frederik Naert, 'The Application of Human Rights and International Humanitarian Law in Drafting EU Missions' Mandates and Rules of Engagement' (Working Paper No 151, October 2011) <www.law.kuleuven.be/iir/nl/onderzoek/wp/wp151e.pdf> accessed 29 January 2013, 17.

485 See above Part 2/I/C/3/a (Denmark) and Part 2/II/B/5/d (EUNAVFOR).

486 See above Part 4/I/C/3.

3. The Bearer, Form and Language of Information

Article 5(2) ECHR does not prescribe who the bearer of information must be. It is notably not required that the information be conveyed by a judge or officer with judicial power.⁴⁸⁷ Article 9(2) ICCPR does not explicitly identify who the bearer of the right to information is either. Since under the ICCPR provision the reasons for arrest must be revealed to the arrestee at the time of arrest (and not only promptly), it is arguably the arresting officer who is responsible for doing so. Meanwhile, the variety of possible actors able to provide information relating to the charges is larger and the Covenant seems to leave this determination to domestic law. Since neither Article 5(2) ECHR nor Article 9(2) ICCPR prescribes by whom the information must be conveyed and there is notably no requirement that it be a judge or officer with judicial power, the most suitable person on board the warship of the seizing State may be tasked with doing so, such as the legal advisor to the armed forces.⁴⁸⁸

As to the form in which the information must be conveyed, neither the wording of Article 5(2) ECHR nor case law relating to it contains specific requirements. Rather, it is for national law to determine the proper form.⁴⁸⁹ The information can be provided orally or in writing⁴⁹⁰ as long as the form is adequate to fulfil the requirements flowing from Article 5(2) ECHR, namely promptness and completeness. When addressing this issue, the Court does not make a distinction whether deprivation of liberty is based on Article 5(1)(c) or (f) ECHR.⁴⁹¹ Similar to the ECHR provision, Article 9(2) ICCPR does not require that the information be provided in written form.⁴⁹² In sum, the seizing State can choose the form by which it conveys the information to piracy suspects. If it opts for the written form, it is arguably necessary to duly explain the content of the document given that half of the Somali male population is illiterate – and thus piracy suspects are likely to be non-readers too.⁴⁹³

487 Esser (n 9) 266.

488 Esser and Fischer, 'Menschenrechtliche Implikationen der Festnahme von Piraterieverdächtigen' (n 24) 518.

489 Esser (n 9) 266.

490 In *Ryabikin v Russia* (n 432) B. of the legal considerations, for instance, it was deemed sufficient that at the very moment of the arrest with a view to extradition, the arresting officers provided oral information, which was followed later by the issuance of written orders by the prosecutorial authorities of the requested State.

491 In *Eminbeyli v Russia* (n 89) para 55, eg, the Court held that when a person is arrested on suspicion of criminal activity, Article 5(2) ECHR does not require that the necessary information be given in a particular form and concluded that the reasoning applies, *mutatis mutandis*, to detention pending extradition.

492 Nowak, *U.N. Covenant on Civil and Political Rights* (n 17) 229.

493 CIA, 'The World Factbook: Somalia: People and Society' (29 January 2013) <<https://www.cia.gov/library/publications/the-world-factbook/geos/so.html>> accessed 29 January 2013; literacy is defined as "age 15 and above can read and write".

Article 5(2) ECHR requires that the information be communicated in a language that the person deprived of his liberty understands. From this follows that a fair interpretation⁴⁹⁴ must be provided for orally conveyed information. Moreover, documents necessary to furnish the person with information required under Article 5(2) ECHR must be translated.⁴⁹⁵ Furthermore, the arrested person must not only understand the language in the formal sense of the word, but rather, by virtue of Article 5(2) ECHR, the essential factual and legal grounds for the arrest must be conveyed in “simple, non-technical language” that the person can understand.⁴⁹⁶ In the context of piracy, this is likely an important requirement since the suspects come from an entirely different (legal) culture.

As opposed to Article 5(2) ECHR and Article 14(3)(a) ICCPR, Article 9(2) ICCPR does not stipulate that the information must be communicated in a language that the arrested person understands.⁴⁹⁷ A proposal to explicitly include this requirement in the provision was rejected during the drafting of the Covenant, albeit there was no opposition in principle to the amendment. Rather, it was felt that the requirement was implicit in the existing text and that in any case, an inherent aspect of the draft Covenant is that its articles must be applied without discrimination.⁴⁹⁸ The drafting history – and also the fact that only information that is understood allows for effective exercise of the *habeas corpus* right in the sense of Article 9(4) ICCPR – leaves room for the argument that the information must be communicated in a language understood by the arrestee under the ICCPR as well.

All in all, information must be communicated in a language that arrested and detained piracy suspects understand – this is required explicitly by Article 5(2) ECHR and arguably implicitly by Article 9(2) ICCPR. Thus far, all piracy suspects seized by multinational forces have claimed to be from Somalia⁴⁹⁹ where the official language is Somali and, according to the Transitional Federal Charter, also Arabic.⁵⁰⁰ Yet, seized piracy suspects may not master the latter, which is mainly an erudite and trade language.⁵⁰¹ Therefore, various patrolling naval States have deployed translators speaking Somali and Arabic to the counter-piracy operations. Meanwhile, the situation where translators on board German warships

494 In *Eid v Italy* (n 215) 1. of the legal considerations.

495 In *Eminbeyli v Russia* (n 89) para 57, for instance, the person arrested with a view to extradition was furnished with a translation of the arrest warrant.

496 *Bordovskiy v Russia* (n 278) para 55; *Shamayev and others v Georgia and Russia* (n 90) para 413; *Kaboulov v Ukraine* (n 87) para 143; *Markert-Davies c la France* (n 411) para 6 of the legal considerations.

497 Nowak, *U.N. Covenant on Civil and Political Rights* (n 17) 228.

498 Bossuyt (n 420) 205; see Article 2(1) ICCPR.

499 See above Part 1/I.

500 CIA (n 493).

501 Esser and Fischer, ‘Menschenrechtliche Implikationen der Festnahme von Piraterieverdächtigen’ (n 24) 518.

only have command of Arabic has occurred, leading to scepticism whether this satisfies the requirement that information be communicated in a language that the person deprived of his liberty understands.⁵⁰² However, from the fact that an interpreter is not present at the very moment of arrest and a translation is only provided later, it cannot necessarily be concluded that the person deprived of his liberty is unaware of the reasons for his arrest since they may accrue from the circumstances surrounding the arrest.⁵⁰³ As an example, a piracy suspect arrested while attempting to board a ship may be aware of the factual reasons leading to the deprivation of liberty.

4. Promptness

a) *Arrest and Detention on Suspicion of Criminal Activity*

aa) Information about the Reasons of Arrest

Article 5(2) ECHR stipulates that the arrested person shall be informed of the reasons for arrest “promptly”. Regarding arrest and detention based on suspicion of criminal activity, a distinction must be drawn between communication of the reasons for the arrest and information relating to the charges. With regard to the former, the person must generally be informed of the reasons for his arrest as soon as possible and not later than 24 hours after the arrest.⁵⁰⁴ The specificities of a given case may justify longer deadlines, for example, two days.⁵⁰⁵ However, the Court has found a violation of the promptness requirement of Article 5(2) ECHR in cases where the information was provided after 76 hours, four days and ten days after arrest.⁵⁰⁶ This implies that piracy suspects seized by patrolling naval States must be informed of the reasons for their arrest within this period of time, which starts running from the moment a piracy suspect can be said to be deprived of his liberty.⁵⁰⁷ Unless piracy suspects are exceptionally held on board their own vessel (such as a mother ship), it suffices that the suspects are informed

502 *ibid.*

503 See, eg, *Griffin v Spain* Comm no 493/1992 (HRC, 5 April 1995) para 9.2, where a tourist who did not speak the language of the respective State was arrested after the police searched his vehicle in his presence and found 68 kilograms of hashish. The Committee found that even though no interpreter was present at his arrest (and only the day after when he was informed of the charges, ie when the second right of information under Article 9(2) ICCPR came into play), it would be wholly unreasonable to argue that the author was unaware of the reasons for his arrest. See also *Hill v Spain* Comm no 526/1993 (HRC, 2 April 1997).

504 Esser (n 9) 264, with references to the Court’s case law.

505 *Graužinis v Lithuania* App no 37975/97 (ECtHR, 10 October 2000) para 25.

506 Esser (n 9) 264–65, with references to the Court’s case law.

507 See above Part 4/I/A/2.

once brought on board the law enforcement vessel of the seizing State for disposition.⁵⁰⁸

Under Article 9(2) ICCPR, information about the reasons for arrest must be provided “at the time of arrest” (rather than “promptly”), ie as soon as piracy suspects can be said to be deprived of their liberty.⁵⁰⁹ In a nutshell, piracy suspects are deprived of their liberty in the sense of Article 9 ICCPR as soon as they are held against their will at a certain location or narrowly confined space, be it their ship or on board a law enforcement vessel. Under the ICCPR, the possible short-term character of a measure interfering with their liberty is not of great relevance and measures of short duration may amount to a deprivation of liberty. In light of this, measures interfering with the liberty of piracy suspects exercised as part of the right of visit (Article 110 UNCLOS) – and not only those based on the right to seize a pirate ship (Article 105 UNCLOS) – arguably amount to a deprivation of liberty.⁵¹⁰ Strictly interpreted, this implies that piracy suspects must be informed of the reasons for their arrest or detention while held on board their skiff or the dispatched vessel of the boarding team. However, this may not always be possible, notably due to security concerns that may override the interests involved with immediately informing the suspects of the reasons for their arrest. For instance, in cases of bad weather conditions and rough seas, or where persons have been wounded or killed due to the use of force or firearms during interception, or if dangers emanate from property on board the alleged pirate boat, Article 9(2) ICCPR must be interpreted as allowing for the relevant information to be provided only once the suspects have been brought on board the seizing State’s vessel.⁵¹¹ As a general rule, it seems possible to inform the seized persons of the reasons for their arrest at the latest when brought on board the law enforcement vessel. Since no other State authority possesses more factual background information regarding the arrest of alleged pirates than the armed forces deployed, and given that many seizing States have legal advisors to the armed forces on board their ships, it seems possible to provide the arrested person with the required information no later than when they are taken on board the warship.⁵¹²

bb) Information about the Charges

According to Article 5(2) ECHR, charges must be communicated promptly after the arrest – as holds true for the reasons of arrest. If the (*de facto* or *de jure*) arresting officer is not in possession of the relevant information to do so, he must

508 Esser and Fischer, ‘Menschenrechtliche Implikationen der Festnahme von Piraterieverdächtigen’ (n 24) 518.

509 See above Part 4/I/A/2.

510 See above Part 4/I/A/2/b.

511 See Esser and Fischer, ‘Menschenrechtliche Implikationen der Festnahme von Piraterieverdächtigen’ (n 24) 518.

512 See *ibid*, who come to this conclusion specifically with regard to the German contribution to EUNAVFOR.

undertake the necessary steps in order obtain it. Thereby, the arresting officers must ensure that the necessary information is obtained without unavoidable delay and, as soon as available, is conveyed to the arrested person.⁵¹³ However, in the context of piracy, even if the competent authorities are contacted promptly, it may take longer to obtain information about the charges from them when compared to an offence taking place domestically. This is first and foremost due to the difficulties the domestic police or prosecutor encounter when determining the relevant charges for pirate attacks taking place far away – they do not have immediate access to the crime scene and suspects, and they are entirely dependent on information from the actors in theatre.⁵¹⁴

As we have seen, the ICCPR sets forth two different time requirements: the reasons for the arrest must be provided “at the time of the arrest”, while information relating to the charges must only be communicated “promptly”, at the latest during the first interrogation.⁵¹⁵ The Human Rights Committee has specified the meaning of “promptly” in various views: while it stated in rather abstract terms that “delays should not exceed a few days”,⁵¹⁶ it was more concrete in other views and found seven and nine days after the arrest to not be prompt.⁵¹⁷ In *Komarovski v Turkmenistan*, where the person was not informed of the reasons why he was being deprived of his liberty at the time of arrest, a delay of three days to inform him of the charges was found to be in violation of the promptness requirement.⁵¹⁸ To respect these deadlines seems generally possible in the context of piracy, albeit the specificities of a given case may require more time to identify the charges.⁵¹⁹

b) *Detention Pending Transfer*

Only a few cases of the Strasbourg organs centre on the promptness requirement specifically with regard to detention pending extradition. In *Kosonen c le Portugal*, the Commission held that the arrested person must be informed (at least summarily) at the very moment of arrest and that if more complete information followed a little bit later⁵²⁰ (the day after arrest in this case), the promptness requirement is still satisfied.⁵²¹ Similar to the Commission, the Court requires

513 Esser (n 9) 265–66.

514 See above Part 2/I/D/2/a.

515 Nowak, *U.N. Covenant on Civil and Political Rights* (n 17) 230.

516 *Kennedy v Trinidad and Tobago* Comm no 845/1999 (HRC, 2 November 1999) para 7.6.

517 Nowak, *U.N. Covenant on Civil and Political Rights* (n 17) 230.

518 *Komarovski v Turkmenistan* Comm no 1450/2006 (HRC, 5 August 2008) para 73.

519 See above Part 2/I/D/2/a.

520 *Kosonen c le Portugal* (n 215) 2.b. of the legal considerations, which in French refers to “un peu plus tard”.

521 *ibid.*

that the person arrested with a view to extradition is informed in the course of the arrest. If this information is not complete, it must be completed shortly after – if this is on the day following arrest, the promptness requirement is generally met.⁵²² Meanwhile, the Court decided that an interval of four days between the beginning of the detention with a view to extradition and the first attempt to convey the information to the applicants is incompatible with the time constraints imposed by the notion of promptness.⁵²³ Equally, the Court found a violation of Article 5(2) ECHR in *Kaboulov v Ukraine* where there was no reliable indication that the applicant was informed of the reasons for his detention between the time of arrest and the examination of his case 21 days later. In this case, the Court referred to the timelines for forms of detention other than detention with a view to extradition – where information provided within seven hours of arrest was considered to be prompt, but a delay of 76 hours or ten days was not – and implicitly required that these timelines be respected for detention based on Article 5(1)(f) ECHR as well.⁵²⁴ In sum, from this case law follows that providing initial information in the course of the arrest, which is complemented by additional information the following day, satisfies the promptness requirement of Article 5(2) ECHR. However, a lapse of four days between arrest and the initial attempt to inform the person of the reasons why he was being deprived of his liberty violated the provision. It remains to be seen how the Court will decide the cases falling between these two poles, which have been inferred from current case law on arrest and detention pending extradition in light of Article 5(2) ECHR.

In the context of transfers of piracy suspects, there is a lack of clarity surrounding the meaning of “in the course of the arrest”, a criterion developed for extradition *stricto sensu* and physical arrest. Generally, piracy suspects are initially (physically) arrested on suspicion of criminal activity pursuant to Article 5(1)(c) ECHR and then detained based on this justificatory ground. Once the seiz-

522 This time frame satisfied the Court in the following cases: in *Bordovskiy v Russia* (n 278) paras 57 and 58, the Court decided that the time requirement set in Article 5(2) ECHR was satisfied given that the applicant was told in the course of his arrest that his extradition was sought. In *Ryabikin v Russia* (n 432) B. of the legal considerations, the ECtHR rejected the complaint for being manifestly ill-founded because the applicant was already aware of the criminal case pending in the requesting State prior to his arrest and was provided with information during his arrest, which was complemented by additional information the day following his arrest. In *Khudya-kova v Russia* (n 284) paras 10, 75 and 81, the information was considered to be conveyed promptly since the applicant signed a copy of the arrest warrant on the day of her arrest and, on the following day, she signed another copy and met a lawyer. In *Eminbeyli v Russia* (n 89) para 57, the applicant was told at the time of his arrest that his extradition was requested and he signed a report containing a direct reference to the arrest warrant; the applicant was served with a translation of the arrest warrant “shortly after the arrest”.

523 *Shamayev and others v Georgia and Russia* (n 90) para 416.

524 *Kaboulov v Ukraine* (n 87) para 145.

ing State decides not to prosecute the suspects it took captive, but continues to detain them in order to secure their later (potential) transfer (thus based on Article 5(1)(f) ECHR), they are not physically re-arrested. A teleological interpretation of the requirement “in the course of the arrest” suggests that it means “as soon as deprivation of liberty with a view to surrender commences”. Hence, as soon as the seizing State decides not to prosecute the suspects in its own courts (and Article 5(1)(c) ECHR can no longer serve as the justificatory ground for detention), but continues to detain them in application of Article 5(1)(f) ECHR, the suspects must be informed of the new reason for their deprivation of liberty, ie that they are detained with a view to their transfer. The requirement of Article 9(2) ICCPR – that persons must be informed of the reasons for their arrest “at the time of arrest” – must be interpreted in the same way.

In a classical situation of extradition, a request for extradition is generally accompanied by “the text of the relevant provision of the law creating the offence” and “a statement of the offence for which extradition is requested and a description of the acts or omissions constituting the alleged offence”.⁵²⁵ Hence, the arresting State is in possession of the relevant information regarding the charges the person deprived of his liberty will face upon extradition and can convey such information to the extraditee accordingly. In the context of piracy, deprivation of liberty may already be based on Article 5(1)(f) ECHR before the ultimately prosecuting State is identified.⁵²⁶ Absent a determination of the criminal forum, the applicable law and therefore the charges cannot be identified and communicated. Thus, it may be impossible to inform a piracy suspect of the charges he will face in the receiving State shortly after he is arrested, ie when his detention with a view to his potential transfer begins, or even three days after arrest. This specificity of the disposition of piracy cases may justify the interpretation that Article 5(2) ECHR is satisfied if the suspect is informed of the charges as soon as the criminal forum (and thus the applicable law) is identified, and the seizing State has had a reasonable opportunity to obtain information about the charges the transferee will face upon surrender for prosecution.

B. Right to Be Brought Promptly before a Judge

Article 5(3) ECHR and Article 9(3) ICCPR both guarantee the right of every person deprived of his liberty on suspicion of criminal activity to be brought promptly before a judge or other officer authorized by law to exercise judicial power. The meaning of this right is quite clear when a person is arrested and detained within the mainland territory of a State by its own law enforcement officials. Yet, its contours blur when applied to deprivations of liberty occurring in the context of counter-piracy operations off the coast of Somalia and the re-

525 Article 5 Model Treaty on Extradition; see also Section 16 Model Law on Extradition (n 207), which is identically worded.

526 See above Part 4/I/B/2/d.

gion – where arrest and detention generally takes place on board a vessel of the seizing State thousands of nautical miles away from the nearest home port and where the vast majority of seized suspects are ultimately prosecuted in a regional State rather than the courts of the State that took them captive. The following is a presentation and discussion of the various interpretational challenges of the right to be brought promptly before a judge that accrue from the specificities of arrest and detention of piracy suspects. This, in turn, necessitates an explanation of the general scope and content of the right to be brought promptly before a judge as guaranteed by Article 5(3) ECHR and Article 9(3) ICCPR.

1. The Purpose of the Guarantee

When deciding whether and to what extent the right to be brought before a judge applies in the counter-piracy context, it is crucial to recall its purpose. As regards Article 5(3) ECHR, the guarantee to be automatically brought before a judge, who is under an obligation to hear the person deprived of his liberty, within a short amount of time after arrest is understood as an essential and effective tool to prevent arbitrary or unjustified deprivation of liberty.⁵²⁷ First and foremost because such automatic and expedited judicial scrutiny reduces the risk of ill-treatment, which is at its greatest in the early stages of detention.⁵²⁸ It may also prevent arbitrary behaviour and abuse of the power to arrest and detain by law enforcement officials.⁵²⁹ Furthermore, it is considered to be an effective means to contain the risk of *incommunicado* detention⁵³⁰ and to keep any deprivation of liberty as short as possible.⁵³¹

The purpose pursued by Article 9(3) ICCPR is the same as that of Article 5(3) ECHR. By bringing persons deprived of their liberty for the purpose of criminal justice promptly before a judge, it allows them to challenge the legality of their detention.⁵³² This is an effective means to reduce the risk of arbitrary or unjustified deprivation of liberty.

2. The Applicability to Piracy Suspects

The personal scope of application of Article 5(3) ECHR is explicitly described in the provision stipulating that the guarantee shall apply to everyone arrested and

527 *Medvedyev and Others v France* (Grand Chamber) (n 1) para 118; Council of Europe/European Court of Human Rights (n 69) 115.

528 *Medvedyev and Others v France* (Grand Chamber) (n 1) para 118; Council of Europe/European Court of Human Rights (n 69) 117.

529 Council of Europe/European Court of Human Rights (n 69) 117.

530 *Medvedyev and Others v France* (Grand Chamber) (n 1) para 118.

531 Van Dijk and others (eds) (n 106) 487.

532 *Sharma v Nepal* Comm no 1469/2006 (HRC, 28 October 2008) para 73.

detained in accordance with Article 5(1)(c) ECHR, ie deprivation of liberty on suspicion of criminal activity.⁵³³ We have concluded that arrest and detention of piracy suspects at sea can be based on the justificatory ground of either Article 5(1)(c) ECHR or Article 5(1)(f) ECHR depending on the phase of disposition – while the latter permits arrest and detention with a view to transfer,⁵³⁴ the initial arrest of piracy suspects can only be based on the former provision.⁵³⁵ Article 5(1)(c) ECHR also applies for detention during the deliberations of the seizing State whether to prosecute the suspects it took captive in its own court and also if the seizing State decides to do so.⁵³⁶ In cases where the seizing State decides not to prosecute the suspects in its own courts but rather to pursue or give way to the transfer option, Article 5(1)(c) ECHR could only continue to serve as a justificatory ground for detention if the wording “bringing him [the suspect] before the competent authority on reasonable suspicion of having committed an offence” were understood as encompassing not only the *domestic* authorities of the seizing State but also *foreign* authorities. Put differently, if Article 5(1)(c) ECHR is interpreted as also covering the scenario where the seizing State detains piracy suspect on suspicion of criminal activity *on behalf* of the ultimately prosecuting State, it could apply after the seizing State has already decided not to exercise its criminal jurisdiction over the suspects. However, this argument has been rejected for a number of reasons, and it has been concluded that Article 5(1)(c) ECHR cannot be invoked as a justificatory ground for deprivation of liberty after the seizing State has decided not to prosecute the suspects in its own courts.⁵³⁷ Rather, as soon as transfer negotiations are initiated and the seizing State no longer considers prosecuting the suspects, deprivation of liberty must be based on Article 5(1)(f) ECHR.⁵³⁸ From this follows that the obligation of Article 5(3) ECHR to bring a piracy suspect before a judge attaches at the moment of the initial arrest, ie as soon as the seizing State takes measures in the course of intercepting a pirate boat that amount to a deprivation of liberty.⁵³⁹ And it continues to be applicable – this is notably important for periodic review if detention lasts for a longer amount of time – during the deliberations of the seizing State whether to prosecute the suspects it took captive in its own courts up until it decides not to exercise its criminal jurisdiction over them.

Article 9(3) ICCPR grants the right to be brought promptly before a judge to anyone “arrested or detained on a criminal charge”.⁵⁴⁰ This wording refers to per-

533 Article 5(3) ECHR, first part of first sentence.

534 See above Part 4/I/B/1/d.

535 See above Part 4/I/B/1/a.

536 See above Part 4/I/B/1/b.

537 See above Part 4/I/B/1/c.

538 See above Part 4/I/B/1/d.

539 When this is the case, see above Part 4/I/A/2/a.

540 Article 9(3) ICCPR.

sons who were arrested for the purpose of criminal justice. Consequently, Article 9(3) ICCPR has the same personal scope of application as Article 5(3) ECHR.⁵⁴¹ Hence, the right attaches as soon as piracy suspects can be said to be deprived of their liberty, and it is applicable up until the seizing State decides not to prosecute the suspects in its domestic courts.

3. Scope of Judicial Control

While judicial review as guaranteed by Article 9(4) ICCPR is limited to the aspect of lawfulness,⁵⁴² judicial control is broader under Article 9(3) ICCPR. The same holds true for Article 5(3) ECHR, which is not limited to the review of lawfulness in the sense of Article 5(1) ECHR as is Article 5(4) ECHR.⁵⁴³ Rather, the judge or officer must review all relevant circumstances militating for and against detention, notably whether arrest or detention can be based on one of the justificatory grounds⁵⁴⁴ and is free from arbitrariness, and decide, by reference to legal criteria, whether there are reasons to justify deprivation of liberty.⁵⁴⁵ In short, the judge or officer must consider the “merits of detention”.⁵⁴⁶

While the scope of judicial control is not limited to the issue of lawfulness, testing whether arrest and detention is in compliance with procedural and substantive lawfulness as required by Article 5(1) ECHR and Article 9(1) ICCPR is of considerable importance in the counter-piracy context. Essentially, Article 5(1) ECHR and Article 9(1) ICCPR require the existence of a legal basis governing the deprivation of liberty as such (substantive lawfulness) and procedure to be followed when arresting or detaining a person (procedural lawfulness). The legal basis must be pre-existing and of a certain quality – generally accessible, precise, unequivocal and specific – which renders it foreseeable and predictable. Further, arrest and detention must be carried out in conformity with the legal basis.⁵⁴⁷ As regards States following a criminal law approach to arrest and detention of piracy suspects and applying the “ordinary rules” governing deprivation of liberty to them, the domestic rules do not pose any particular difficulties in light of the lawfulness requirement.⁵⁴⁸ However, various States consider piracy suspects to be “extraordinary suspects” to whom the ordinary domestic legal rules on deprivation of liberty do not apply. The normative gap that results from this approach cannot easily be filled by having recourse to international law: Article 105

541 Nowak, *U.N. Covenant on Civil and Political Rights* (n 17) 230.

542 See below Part 4/II/C/3/a.

543 Council of Europe/European Court of Human Rights (n 69) para 137.

544 *ibid* paras 136 and 140.

545 *ibid* paras 135 and 137.

546 *ibid* para 135.

547 See above Part 4/I/C/1.

548 See above Part 4/I/C/2/a.

UNCLOS arguably governs arrest and detention of piracy suspects (in the technical sense) sufficiently in terms of substantive lawfulness but does not meet the strictures flowing from procedural lawfulness.⁵⁴⁹ For armed robbery at sea, the general proposal is to base arrest and detention on Security Council Resolution 1846 – however, the Resolution appears to be insufficient in terms of both substantive and procedural lawfulness.⁵⁵⁰ In cases where arrest and detention takes place within the EUNAVFOR framework, European Union law (or at least that which is publicly accessible) also falls short of adequately filling this normative gap.⁵⁵¹ All things considered, the compliance of arrest and detention with the lawfulness requirement flowing from Article 5(1) ECHR and Article 9(1) ICCPR is just one, albeit very important, component of judicial control under Article 5(3) ECHR and Article 9(3) ICCPR.

4. Procedural Features of Judicial Control

Article 5(3) ECHR gives States a fair amount of leeway in designing the domestic procedure by which judicial control of arrest and detention on suspicion of criminal activity is granted. Yet, some requirements that every domestic procedure must feature flow from the provision. First of all, the domestic procedure by which judicial control as required by virtue of Article 5(3) ECHR is granted must be set forth by law. Hence, it does not suffice if judicial control is granted by virtue of an established practice.⁵⁵² Furthermore, judicial control must be granted automatically and promptly – two characteristics deemed absolutely necessary to realize the purpose of preventing arbitrary or unjustified deprivation of liberty.⁵⁵³ Finally, an important feature of the procedure granting judicial control of arrest and detention is that the judge or officer is under an obligation to personally hear the person deprived of his liberty.

The procedural requirements flowing from Article 9(3) ICCPR are virtually the same. Most notably, judicial control must be granted automatically and promptly. Furthermore, the judge or officer must personally hear the person deprived of his liberty.

a) Automatic Judicial Control

The words “be brought promptly before a judge” of Article 5(3) ECHR and Article 9(3) ICCPR imply that judicial control must be automatic. That is, it cannot be de-

549 See above Part 4/I/C/2/b/bb.

550 See above Part 4/I/C/2/b/cc.

551 See above Part 4/I/C/2/c.

552 Esser (n 9) 274.

553 Regarding Article 5(3) ECHR: *Medvedyev and Others v France* (Grand Chamber) (n 1) para 122; Council of Europe/European Court of Human Rights (n 69) 123–24; Van Dijk and others (eds) (n 106) 487. The same must hold true for Article 9(3) ICCPR.

pendent on an application for review by the person deprived of his liberty.⁵⁵⁴ This is a distinct feature of Article 5(3) ECHR and Article 9(3) ICCPR, which differs in this respect from Article 5(4) ECHR and Article 9(4) ICCPR only providing persons deprived of their liberty with a right to *actively* seek judicial control.⁵⁵⁵

That judicial control of deprivation of liberty is granted automatically is deemed to be a characteristic absolutely necessary to realize the purpose of preventing arbitrary or unjustified deprivation of liberty⁵⁵⁶ – primarily because a person subject to ill-treatment or any other vulnerable category, such as persons ignorant of the language of the judicial officer, may not be in a position to file a request for judicial control.⁵⁵⁷ In the context of piracy, where the seized person is likely unaware of the existence of such right, it is crucial that he is automatically brought before a judge or officer.

b) The Right to Be Heard

Another important component of Article 5(3) ECHR is that the judge or officer must hear the person brought before him regarding all relevant circumstances pertaining to the deprivation of liberty in question before he takes the appropriate decision.⁵⁵⁸ The person deprived of his liberty must be able to present his arguments to the judge or officer regardless of whether there was prior judicial involvement in his arrest. Hence, even if the arrest was ordered by a court, the authorities are not freed from the obligation to bring the person before a judge or officer to be heard. Meanwhile, it is not considered necessary that a lawyer is present at the hearing, albeit an exclusion of the lawyer may have an adverse effect on the detained person's ability to present the relevant circumstances of his case.⁵⁵⁹

From the word choice of Article 9(3) ICCPR – “be brought ... before a judge” – also follows a duty to arrange a personal hearing. This, in turn, implies that the

554 *Medvedyev and Others v France* (Grand Chamber) (n 1) para 122, and Van Dijk and others (eds) (n 106) 487 (re ECHR); Carlson and Gisvold (n 76) 84 (re ICCPR); Esser (n 9) 273 (re ECHR and ICCPR).

555 Council of Europe/European Court of Human Rights (n 69) 123; Van Dijk and others (eds) (n 106) 487.

556 Regarding Article 5(3) ECHR: *Medvedyev and Others v France* (Grand Chamber) (n 1) para 122; Council of Europe/European Court of Human Rights (n 69) 123–24; Van Dijk and others (eds) (n 106) 487. The same must hold true for Article 9(3) ICCPR.

557 Regarding Article 5(3) ECHR: *Medvedyev and Others v France* (Grand Chamber) (n 1) para 122; *McKay v the United Kingdom* App no 543/03 (ECtHR, 3 October 2006) para 34. The same must hold true for Article 9(3) ICCPR.

558 *De Jong, Baljet and van den Brink v the Netherlands* App nos 8805/79, 8806/79, 9242/81 (ECtHR, 22 May 1984).

559 Council of Europe/European Court of Human Rights (n 69) para 134.

judge or officer must be competent to personally hear the person deprived of his liberty.⁵⁶⁰

In the counter-piracy context, arrest and detention generally takes place thousands of miles from the mainland authorities of the seizing State, and there is no officer with judicial power on board the law enforcement vessel of the seizing State who could grant judicial control of deprivation of liberty. This begs the question whether it is necessary under Article 5(3) ECHR and Article 9(3) ICCPR to bring the person *physically* before the judge or whether it suffices that the judge can directly communicate with piracy suspects – by video link for example. This issue will be discussed together with two other questions it is intrinsically linked to: the meaning to be given to the promptness requirement in the context of counter-piracy operations, and the more fundamental question whether judicial control can only be exercised by a judge of the seizing State or also by a judge of the receiving and ultimately prosecuting State.⁵⁶¹

c) **The Right to “Prompt” Judicial Control**

Judicial control of deprivation of liberty granted by virtue of Article 5(3) ECHR and Article 9(3) ICCPR must be provided “promptly”. This is another characteristic of the procedural safeguard that is deemed absolutely necessary to realize the purpose behind it – to prevent arbitrary or unjustified detention.⁵⁶² In the context of piracy, the meaning of “promptly” has sparked some debate. Before discussing the promptness requirement in relation to piracy,⁵⁶³ its general meaning under Article 5(3) ECHR and Article 9(3) ICCPR will be explored. Furthermore, in relation to the former provision, it is explained how the European Court of Human Rights interpreted the concept of “promptly” in *Rigopoulos v Spain*⁵⁶⁴ and *Medvedyev v France*,⁵⁶⁵ both of which involved deprivation of liberty on the high seas far from the arresting State’s mainland authorities. This will allow for a conclusion on the pertinence of these two cases for the counter-piracy context.⁵⁶⁶

aa) Article 5(3) ECHR

The Court stressed in quite unequivocal terms that judicial control of arrest and detention must “above all be prompt” not only to prevent and detect any

560 Nowak, *U.N. Covenant on Civil and Political Rights* (n 17) 232.

561 See below Part 4/II/B/6/b.

562 Van Dijk and others (eds) (n 106) 487; Council of Europe/European Court of Human Rights (n 69) paras 123–24 (re automatic).

563 See below Part 4/II/B/6/c/aa.

564 *Rigopoulos v Spain* (n 70).

565 *Medvedyev and Others v France* (Chamber) (n 367) and *Medvedyev and Others v France* (Grand Chamber) (n 1).

566 See below Part 4/II/B/6/b/aa.

ill-treatment,⁵⁶⁷ but also to keep any unjustified interference with the right to liberty to a minimum.⁵⁶⁸ It furthermore held that the “strict time constraint” introduced in Article 5(3) ECHR by the requirement that the person must be brought promptly before a judge “leaves little flexibility in interpretation, otherwise there would be a serious weakening of a procedural guarantee to the detriment of the individual and the risk of impairing the very essence of the right protected by this provision”⁵⁶⁹

The Court has thus far refrained from developing an abstract minimum standard fulfilling this strict time requirement. Rather, it has emphasized that the issue of promptness must be assessed in light of the special features of each case.⁵⁷⁰ In several cases, the Court considered a period of two days between arrest and judicial control to be prompt.⁵⁷¹ However, it deems any period in excess of four days to be *prima facie* too lengthy – and even shorter periods may violate the promptness requirement if there are no special difficulties or exceptional circumstances preventing the authorities from bringing the person before a judge earlier.⁵⁷² Yet, this presumption can be overturned and the specificities of a concrete case may justify longer timelines. Indeed, the European Court of Human Rights decided in two cases – *Rigopoulos v Spain* and *Medvedyev v France* – that the exceptional circumstances of these *specific* arrests on the high seas justified longer periods and that no violation of the promptness requirement occurred even though 16 and 13 days respectively elapsed between arrest and judicial control.

In *Rigopoulos*, Spanish customs officials, acting on the orders of a Spanish court, inspected a ship on the high seas as part of an investigation into international drug trafficking. On 23 January 1995, the ship was boarded and a search revealed large amounts of cocaine on board. After exchanging fire with several crew members who had barricaded themselves in the engine room, the crew surrendered and the vessel set sail for a Spanish port on 26 January 1995. *Rigopoulos*, the ship’s captain, was initially taken into police custody on 23 January 1995. Three days later, on 26 January 1995, a Spanish court ordered his detention on remand. Compliance with the time limit under Spanish law for holding a person in police custody was therewith obtained. The applicant was notified of the decision ordering his detention on remand on 27 January 1995 and the decision was served on him upon his arrival in a Spanish port on the Canary Islands, which happened 16 days after the ship’s interdiction (7 February 1995). The same day, *Rigopoulos* was

567 *El-Masri v ‘the former Yugoslav Republic of Macedonia’* (n 90) para 231.

568 Van Dijk and others (eds) (n 106) 488; Esser (n 9) 276.

569 *McKay v the United Kingdom* (n 557) para 33.

570 Van Dijk and others (eds) (n 106) 488; Esser (n 9) 276.

571 Esser (n 9) 276.

572 *ibid*; Council of Europe/European Court of Human Rights (n 69) para 121.

flown to Madrid, Spain where he was brought before a judge.⁵⁷³ The Court pointed out that such a long period of time between the arrest and being brought before a judge “does not at first sight appear to be compatible” with the stringent temporal limitation of Article 5(3) ECHR. However, it held that “wholly exceptional circumstances” may justify such a long period.⁵⁷⁴ In the case at hand, the Court considered the following factors: the arrest of the suspects took place on the high seas, the considerable distance to be covered to reach a competent judicial officer – the ship was more than 5500 km from Spanish territory when it was intercepted – and a 43 hour delay, which could not be attributed to the Spanish authorities as it was caused by the resistance of certain crew members.⁵⁷⁵ The Court thus concluded that in light of the “wholly exceptional circumstances of the instant case, the time which elapsed between placing the applicant in detention and bringing him before the investigating judge cannot be said in breach of the requirement of promptness” of Article 5(3) ECHR.⁵⁷⁶

In *Medvedyev*, the French naval authorities intercepted a ship on suspicion of involvement with illicit drug-trafficking, which turned out to be correct. Deprivation of liberty of the applicants began on 13 June 2003 with the interdiction of their ship on the high seas. They were not placed in police custody until they arrived in a French port on 26 June 2002. The same day, they were brought before the French investigating judge – a judicial authority in the sense of Article 5(3) ECHR.⁵⁷⁷ The Grand Chamber relied on the reasoning of the *Rigopoulos* decision and noted that the interception of the ship took place on the high seas and the distance to the French coast was comparable to that in *Rigopoulos*. It stressed that there was no indication that it took longer than necessary to escort the ship to France, especially given the intercepted ship’s poor state of repair and the weather conditions. It further opined that the option of transferring the suspects on a French law enforcement vessel to make the journey faster and the feasibility of such an operation were not for the Court to assess in the case at hand.⁵⁷⁸ The Grand Chamber further noted that after arriving in France, the applicants only spent about eight or nine hours in police custody before being brought before

573 *Rigopoulos v Spain* (n 70) paras 1–8 of the factual considerations; legal summary: ECtHR Press Unit, ‘Information Note on the Court’s case-law No. 2 - *Rigopoulos v. Spain* (dec.) - 37388/97’ (January 1999) <<http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=002-208>> accessed 29 January 2013.

574 *Rigopoulos v Spain* (n 70) paras 8 and 11 of the legal considerations.

575 *ibid* para 12 of the legal considerations.

576 *ibid* para 13 of the legal considerations.

577 *Medvedyev and Others v France* (Grand Chamber) (n 1) paras 127–28; legal summary, 4–5; ECtHR Press Unit, ‘Information Note on the Court’s case-law No. 128 – *Medvedyev and Others v. France* [GC] – 3394/03’ (March 2010) <<http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=002-1015>> accessed 29 January 2013.

578 *Medvedyev and Others v France* (Grand Chamber) (n 1) para 131; Esser (n 9) 277.

a judge, which was “perfectly compatible” with the promptness requirement.⁵⁷⁹ Overall, it concluded that Article 5(3) ECHR was not violated.⁵⁸⁰

Hence, the wholly exceptional circumstances of a *specific* case – which may be present, but not necessarily, when arresting and detaining criminal suspects on the high seas – may justify longer time frames under Article 5(3) ECHR. Whether there is judicial involvement in the deprivation of liberty as such – for example, through the issuance of an arrest warrant by the competent judge – is neither a decisive nor relevant criterion for the assessment of the promptness requirement of Article 5(3) ECHR.⁵⁸¹ This is evidenced by the *Medvedyev* judgment where the Chamber stated:

The fact remains that the detention imposed on the applicants on board the *Winner* was not under the supervision of a “competent legal authority” within the meaning of Article 5 ..., while Mr Rigopoulos had been detained “on the orders and under the strict supervision” of the Madrid Central Investigating Court; unlike him, the applicants in the instant case did not enjoy the protection against arbitrariness that such supervision affords. However, that consideration ... does not change the fact that the duration of the applicants’ detention was justified by the “wholly exceptional circumstances” described above, and in particular the time it inevitably took the *Winner* to reach France.⁵⁸²

Thus far, the European Court of Human Rights has not had a chance to interpret the promptness requirement in relation to an arrest or a situation of detention occurring in the context of the counter-piracy operations off the coast of Somalia and the region. Absent such a specific judgment, the cases of *Rigopoulos*⁵⁸³ and *Medvedyev*⁵⁸⁴ are often adduced as evidence that Article 5(3) ECHR allows for piracy suspects to be detained for more than two weeks before they are brought before a judge – who is, in practice, often a judge of the receiving and ultimately prosecuting State rather than a judge of the seizing State. It is submitted here, and discussed later,⁵⁸⁵ that interpretation of the *ratio decidendi* of these two cases must be differentiated in the context of piracy.

579 *Medvedyev and Others v France* (Grand Chamber) (n 1) paras 132–33.

580 *ibid* para 134. The Grand Chamber thus reached the same conclusion as the Court in *Medvedyev and Others v France* (Chamber) (n 367) paras 64–69.

581 Esser and Fischer, ‘Menschenrechtliche Implikationen der Festnahme von Piraterieverdächtigen’ (n 24) 522–23.

582 *Medvedyev and Others v France* (Chamber) (n 367) para 68.

583 *Rigopoulos v Spain* (n 70).

584 *Medvedyev and Others v France* (Chamber) (n 367); *Medvedyev and Others v France* (Grand Chamber) (n 1).

585 See below Part 4/II/B/6/b/aa.

bb) Article 9(3) ICCPR

Article 9(3) ICCPR requires that persons taken into custody for the purpose of criminal justice receive prompt judicial processing of their cases.⁵⁸⁶ According to General Comment No. 8 of the Human Rights Committee, delays between arrest and judicial control of deprivation of liberty “must not exceed a few days”.⁵⁸⁷ Taken together with the Committee’s case law on the requirement of “promptness”, the maximum period that can elapse between arrest and being brought before a judge or officer generally lies somewhere around three days.⁵⁸⁸ Yet, in various Concluding Observations, the Committee took a stricter interpretative stance on the promptness requirement by stating that the respective State Party should ensure that persons are brought before a judge within 48 hours.⁵⁸⁹ However, a “rigid, inexorable rule” that the arrested person must be brought before a judge within two days hardly exists and the exact determination of what is prompt “ultimately depends on the facts of each case”.⁵⁹⁰

Unlike the European Court of Human Rights, the Human Rights Committee has not yet decided a case involving an arrest on the high seas where the promptness requirement was at stake. Yet, the Committee has repeatedly stressed that the determination of what is “promptly” ultimately hinges on the specific features of each case, which suggests that it would be ready to consider the specificities of deprivation of liberty on the high seas. However, from this scarce authoritative material, it is difficult to predict how far the Committee would stretch the notion of promptness.

5. Competent Authority to Exercise Judicial Control

With regard to the authority competent to exercise judicial control, Article 5(3) ECHR stipulates that this can be either a judge or an officer authorized by law to exercise judicial power. Not only does the wording of Article 9(3) ICCPR literally correspond to that of Article 5(3) ECHR, but the Covenant provision is also interpreted the same way as its counterpart is in the European Convention of Human Rights. According to the Strasbourg organs, the “officer” mentioned in Article 5(3) ECHR is not necessarily a judge, but must nevertheless bear some

586 Carlson and Gisvold (n 76) 84.

587 HRC ‘General Comment No. 8: Article 9 (Right to Liberty and Security of Persons)’ in ‘Note by the Secretariat, Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies: Vol I’(2008) UN Doc HRI/GEN/1/Rev.9 (Vol. I) para 2.

588 Joseph, Schultz and Castan (n 72) 324–25.

589 *ibid* 325; Carlson and Gisvold (n 76) 84.

590 *Borisenko v Hungary* Comm no 852/1999 (HRC, 14 October 2002) Individual Opinion of Committee Member Bhagwati.

characteristics of one.⁵⁹¹ The officer must notably be independent of the executive and the parties.⁵⁹² In the words of the Human Rights Committee, it is “inherent in the proper exercise of judicial power that it be exercised by an authority which is independent, objective and impartial in relation to the issues dealt with”.⁵⁹³ The European Court of Human Rights further decided that the officer must be vested with the judicial power by virtue of law.⁵⁹⁴ Finally, the Court and the Committee require that both the judge and the officer must have the power to issue a binding order on the release of the arrested or detained person if deprivation of liberty is unjustified.⁵⁹⁵

In the context of piracy, however, the main issue does not turn on the mentioned characteristics that the authority must feature in order to qualify as a judge or officer in the sense of Article 5(3) ECHR. The issue is more fundamental: must it be a judge or officer of the seizing State who exercises judicial control or does it suffice if piracy suspects are brought before a judge of the receiving and ultimately prosecuting State, which is generally a State in the region prone to piracy? We turn now to this issue, which is intrinsically linked to the interpretation of the promptness requirement and the question whether piracy suspects must be physically brought before the judge.

6. Which Judge, When and How: Challenges in the Counter-Piracy Context

a) *Recalling the Practice*

For an analysis of Article 5(3) ECHR and Article 9(3) ICCPR in the context of piracy it is necessary to briefly recall current practice regarding judicial control of arrest and detention, which runs the gamut from bringing seized piracy suspects before a judge by means of video link within 24 hours of their arrest⁵⁹⁶ to detaining piracy suspects for more than a month without bringing them before

591 Council of Europe/European Court of Human Rights (n 69) para 129; Van Dijk and others (eds) (n 106) 489.

592 Council of Europe/European Court of Human Rights (n 69) para 130 (on the meaning of “independence” in this context, see paras 131–32).

593 *Kirpo v Tajikistan* Comm no 1401/2005 (HRC, 27 October 2009) para 6.5.

594 Esser (n 9) 272.

595 Council of Europe/European Court of Human Rights (n 69) para 139 (regarding the ECHR); Bailey (n 444) 205 (regarding the ICCPR).

596 See below Part 4/II/B/6/a/aa.

a judge.⁵⁹⁷ Broadly speaking, two approaches to arrest and detention of piracy suspects on suspicion of criminal activity can be discerned.⁵⁹⁸

aa) Criminal Law Approach to Arrest and Detention of Piracy Suspects

At one end of the scale, there are those States that pursue a criminal law approach to arrest and detention of piracy suspects. They consider piracy suspects to be “ordinary suspects” and, as a consequence, to be covered by the ordinary domestic rules governing arrest and detention on suspicion of criminal activity – including the domestic rules implementing the content of Article 5(3) ECHR and Article 9(3) ICCPR.⁵⁹⁹

Spain’s course of action is illustrative of this approach. Under Spanish law, a judge must review the legality of arrest within 24 hours of seizure otherwise the suspect in question must be released. This rule has equally been applied to piracy suspects, who are “brought” before a judge within 24 hours by means of video link with which Spanish ships deployed to the counter-piracy operations off the coast of Somalia and the region are equipped.⁶⁰⁰

France similarly pursues a criminal law approach to arrest and detention of piracy suspects. According to the Defence Code, to which a new section pertaining to enforcement measures taken against persons on board ships was added in 2011, stipulates that the liberties and detention judge (*juge des libertés et de la détention*) must decide within 48 hours whether deprivation of liberty can be prolonged for a maximum period of 120 hours or whether it must be terminated.⁶⁰¹

bb) Piracy Suspects as “Extraordinary Suspects”

On the other end of the scale, there are those States that consider piracy suspects seized by their forces to be “extraordinary suspects” to whom the ordinary domestic rules governing arrest and detention on suspicion of criminal activity do not apply. They are only considered to enter the door of criminal law, and therewith be able to follow the judicial avenues leading from that door, once the seizing State decides to prosecute the suspects in its own courts – which is rarely the case. For so long as this decision is pending or if the seizing State ultimately decides not to exercise its jurisdiction over the suspects, they remain outside the ordinary domestic legal framework governing arrest and detention on suspicion of criminal activity – and thus are not brought before a judge at any point.

597 The suspects allegedly involved in the attack against the *Samanyolu*, who were seized by Denmark and ultimately transferred to the Netherlands, were detained by Denmark without being granted judicial review or control of their detention by a Danish judge for 40 days; see above Part 2/I/E.

598 See above Part 2/III the finding only relates to the practice of States considered in the two case studies of the analysis at hand.

599 See above Part 2/II/C/3/a.

600 *ibid.*

601 *ibid.*

This approach is notably followed by Denmark, which only brings piracy suspects before a judge after it has decided to prosecute them in Denmark. For example, a Danish judge reviewed the legality of the arrest and detention of the suspects who allegedly attacked the Danish-flagged *Elly Mærsk* – a case where Denmark decided to exercise its criminal jurisdiction. The suspects were represented by counsel who attended the oral hearing on their behalf.⁶⁰² However, before Denmark decides to prosecute a case in its own courts, ie while the suspects are detained by the Danish military, the right to be brought before a judge is not granted.⁶⁰³ This implies that if Denmark ultimately decides not to prosecute the suspects in the own courts but rather to detain them with a view to their transfer, piracy suspects are at no point granted judicial control as required by Article 5(3) ECHR or Article 9(3) ICCPR.⁶⁰⁴ Rather, it is deemed sufficient if the suspects are brought before a judge of the receiving and ultimately prosecuting State.⁶⁰⁵

Like Denmark, the German Federal Government argues that piracy suspects are in “international law custody” after their seizure up until Germany decides to exercise its criminal jurisdiction over the suspects and the German Navy physically hands them over to the German Federal Police. However, thus far, Germany has never decided to prosecute piracy suspects seized by its forces in its domestic courts, which would trigger the application of domestic law, including the obligation to bring criminal suspects before a judge within 48 hours of apprehension. Rather, piracy suspects have been transferred to third States, mainly Kenya, for criminal prosecution. In this typical situation, piracy suspects are not brought before a German judge at any point – however long detention lasts.⁶⁰⁶

In the *Courier* case, where one of the piracy suspects seized by German forces and later transferred to Kenya filed a complaint against Germany, the transferred person argued, *inter alia*, that his detention on board the German frigate for seven days without being afforded any procedural safeguards had been unlawful. The German Federal Government replied that even though the suspects were not brought before a German judge, no protective gap existed since it was ensured that they were transferred to a State where they ultimately benefited from the respective human rights guarantee. It further argued that the right to be brought before a judge was not violated because the piracy suspect was ultimately brought before a Kenyan judge.⁶⁰⁷ The argument received support by the administrative

602 See above Part 2/I/D/2/b.

603 The main argument for not granting this right is that the legal source providing for the right, the Danish Administration of Justice Act, does not apply *ratione personae* to the military, which is not an ordinary law enforcement body, see above Part 2/I/B/2.

604 They are not granted an opportunity to seek for judicial review in the sense of Article 5(4) ECHR and Article 9(4) ICCPR either.

605 See above Part 2/I/D/3/c.

606 See above Part 2/II/C/3/b.

607 *Re ‘MV Courier’* (n 250) paras 23–26.

court of first instance in Cologne, Germany. It decided that Article 104(3) of the German Constitution stipulating that every criminal suspect must see a judge within 48 hours had to be modified in two ways due to the special context of the case. Firstly, the strict time frame of 48 hours had to be read as merely meaning “promptly” – similar to Article 5(3) ECHR and Article 9(3) ICCPR – and a period of seven days was considered to meet the promptness requirement. Secondly, it held that the constitutional guarantee was not violated by bringing the suspect before a Kenyan judge rather than a German judge. To the contrary, it argued that since the suspect’s criminal prosecution was ultimately going to take place in Kenya, only a Kenyan judge was competent to review the legality of arrest and detention.⁶⁰⁸

This reasoning begs the fundamental question whether the word “judge” of Article 5(3) ECHR and Article 9(3) ICCPR refers to a judge of the seizing State only, or whether it can be a judge of the receiving and ultimately prosecuting State or even a judge of any third State.

b) A Judge of the Seizing or Receiving State?

It is submitted here that Article 5(3) ECHR and Article 9(3) ICCPR are not respected if piracy suspects are brought before a judge of the receiving and ultimately prosecuting State for judicial control of deprivation of liberty at sea by the seizing State. Rather, piracy suspects must be brought before a judge of the seizing State.

aa) *Medvedyev and Rigopoulos*: Impertinent to the Issue at Hand

The argument that “a judge is a judge” under Article 5(3) ECHR and Article 9(3) ICCPR – whether from the seizing or receiving State – is often linked and substantiated by reference to two cases of the European Court of Human Rights: *Rigopoulos v Spain*⁶⁰⁹ and *Medvedyev and Others v France*.⁶¹⁰ For instance, the German Federal Government argued in the *Courier* case that Article 5(3) ECHR was complied with because the suspect was transferred to Kenya where he was brought before a judge on the day following his surrender. It argued that the delay of seven days between arrest and judicial control met the promptness requirement since, according to the case law of the European Court of Human Rights, exceptional circumstances can justify a longer time frame and Germany transferred the suspect to the closest State willing to prosecute.⁶¹¹

608 *Re ‘MV Courier’* (n 250) paras 37–50.

609 *Rigopoulos v Spain* (n 70).

610 *Medvedyev and Others v France* (Grand Chamber) (n 1).

611 *Re ‘MV Courier’* (n 250) paras 37–50, specifically para 47.

It is certainly true that the European Court of Human Rights bestowed the notion of “promptness” with a broad meaning in *Rigopoulos* and *Medvedyev*.⁶¹² However, it is submitted here that these two cases are impertinent to the situation at hand because the facts differ as to a crucial point. In *Rigopoulos* and *Medvedyev*, after about two weeks, the suspects were ultimately brought before a judge of the seizing State where they could challenge the legality of their arrest and detention by the seizing and – *nota bene* – arresting and detaining State. Absent from the facts under consideration in *Rigopoulos* and *Medvedyev* were a possible surrender to a third State for prosecution and the proposition that the suspects could be brought before a judge of that receiving State. In short, the question decided by the Court was how long State A, which has seized suspects at sea far from the mainland authorities, can take to bring the suspects before its own judge on the mainland (ie a judge of State A).⁶¹³ In the situation under consideration here, however, piracy suspects are seized, arrested and detained by State A and brought before a judge of State B, which is supposed to grant judicial control of deprivation of liberty at sea by State A. Whether this is permissible under Article 5(3) ECHR – and, if so, how long such a process can take – was not decided in *Rigopoulos* or *Medvedyev*. Put differently, the Court did not decide on a case involving disposition of a criminal case involving suspects seized at sea and their ultimate transfer to a third State and the meaning of Article 5(3) ECHR in such a situation. Rather, it ruled on an arrest by State A that brought the suspects before its own courts in State A – where the suspects could ultimately challenge the legality of their arrest and detention by State A before a judge of that same State. The simple fact that both the arrest of piracy suspects and the

612 See above Part 4/II/B/4/c.

613 The facts of these two cases, which at no point involved the idea of surrender for prosecution and bringing the suspects before a court of the receiving and ultimately prosecuting State, are as follows: In *Rigopoulos v Spain* (n 70), Spain requested and received flag State authorization to board and search the suspected vessel, which was intercepted on the high seas by Spanish customs officials. The ship was thereupon escorted to the Canary Islands, which belong to Spain, and from there flown to the Spanish mainland for investigation and prosecution (The Facts, A.). In *Medvedyev and Others v France* (Grand Chamber) (n 1), the French law enforcement authorities requested and received flag State authorization to intercept the suspected ship, which attracted the attention of the Central Office for the Repression of Drug Trafficking (OCRTIS), a ministerial body attached to the Central Police Directorate of the French Ministry of Interior (paras 9–10). French naval authorities instructed the commander of the French frigate to locate and intercept the suspected ship (para 12). On 13 June 2002, the suspected ship was spotted and intercepted (para 13). The same day, a French public prosecutor referred the case to the OCRTIS for examination under the *flagrante delicto* procedure (para 16). On 24 June 2002, a French prosecutor opened an investigation into the charges (para 17). On 26 June 2002, the suspected ship entered a port in France under escort (para 18). The suspects were ultimately prosecuted in France (paras 24–25).

arrests in *Rigopoulos* and *Medvedyev* took place in a maritime context is not sufficient to apply the Court's *ratio decidendi* to piracy suspects seized by one State and brought to a third State for prosecution and judicial control of deprivation of liberty at sea.

bb) Arguments against the Proposition "A Judge Is a Judge"

To begin, two important aspects regarding the right to be brought before a judge, which flow from the principle of *par in parem non habet iudicium/iurisdictionem*,⁶¹⁴ must be recalled. Firstly, the seizing State can only guarantee and ensure that a piracy suspect it took captive is brought before its own authorities, but the seizing State cannot force the receiving State to bring piracy suspects before a judge of its own courts upon transfer. Secondly, the receiving State is only competent to exercise judicial control over arrest and detention carried out under the authority of its own officials, but not over arrest and detention by the seizing State.⁶¹⁵ Put differently, a judge of the seizing State is the only judge who can effectively decide whether deprivation of liberty of piracy suspects at sea by officials of the seizing State is justified (and if not, to order their release). Meanwhile, a judge of the receiving State is only competent to review the legality of arrest and detention upon transfer, ie land-based deprivation of liberty (and to order the suspect's release if not).⁶¹⁶ Hence, deprivation of liberty at sea by the seizing State and deprivation of liberty on land by the receiving State upon transfer are two separate spheres, each of which falls within the purview of a different jurisdiction.

Departing from this premise, we now turn to the purpose of Article 5(3) ECHR and Article 9(3) ICCPR, which equally exclude the idea that deprivation of liberty at sea by the seizing State can be reviewed by the receiving State upon transfer. First of all, it must be stressed that Article 5(3) ECHR and Article 9(3) ICCPR (and Article 5(4) ECHR and Article 9(4) ICCPR as well) are not conceptualized as compensatory rights as are Article 5(5) ECHR and Article 9(5) ICCPR. From this follows that it is insufficient if judicial control is only provided *after* deprivation of liberty has ended in order to decide whether it was justified and, if not, to provide for monetary or another form of compensation – a remedy of a merely *compensatory* character.⁶¹⁷ Rather, the purpose behind Article 5(3) ECHR and Article 9(3) ICCPR is of a *preventive* nature – concretely, to prevent arbitrary detention, abuse of power and ill-treatment by the very intervention of a judge.

614 See, eg, Dinstein (n 255).

615 See also above Part 4/I/B/2/c.

616 See, eg, *Re 'MS Samanyolu'* (Urteil, Anlage I) (n 248) 8–11 and *Re 'MS Samanyolu'* (Judgment) (n 248) 5–7, where the Rotterdam court could not decide on a violation of Article 5(3) ECHR by the seizing State (Denmark) and it limited its judicial control to the question whether the violation by the seizing State was attributable to the receiving State (Netherlands). On the case, see above Part 4/I/B/2/c.

617 The same holds true for judicial review in the sense of Article 5(4) ECHR and Article 9(4) ICCPR; see below Part 4/II/C/2.

Hence, only if the right to be brought before a judge is granted *while* the person is deprived of his liberty can the purpose of Article 5(3) ECHR and Article 9(3) ICCPR be realized. Put another way, if judicial control is only granted in the receiving State upon surrender, ie when deprivation of liberty at sea has already ended, the preventive purpose of these provisions cannot be achieved.

Even if, *arguendo*, the receiving State had granted judicial control while the suspects were still detained by the seizing State at sea (for example, by means of video link), the remedy would still be ineffective because a judge of the receiving State is not competent to decide on a violation of the right to liberty by the seizing State and to order their release in a case of unjustified deprivation of liberty – which is a necessary characteristic of a judge in the sense of Article 5(3) ECHR and Article 9(3) ICCPR⁶¹⁸ – due to the principle of *par in parem non habet iudicium/iurisdictionem*.⁶¹⁹ Furthermore, the right to be brought before a judge cannot be interpreted in a way that leads to absurd or unreasonable results that run counter to the effective protection of persons under a State's jurisdiction.⁶²⁰ Yet, this is exactly what happens if the notion of “judge” is read as offering a choice between bringing the piracy suspect before a judge of the seizing or receiving State. While the seizing State does not see itself competent to grant judicial control (for factual reasons), the receiving State is indeed not competent to do so either (for legal reasons) – this leads to the result that judicial control of arrest and detention of piracy suspects at sea disappears into a “black hole” of jurisdictional conflict, so to speak. Such an interpretation of Article 5(3) ECHR and Article 9(3) ICCPR seems impermissible.

Moreover, we must bear in mind that a great number of suspects – up to 90 per cent in early 2011 when the catch-and-release practice peaked once more – are ultimately released for various reasons, namely for a failure to identify a State willing and able to receive piracy suspects for criminal prosecution.⁶²¹ In all these cases, the initial arrest and detention pending the decision of the seizing State whether to prosecute the suspects in its own courts is based on Article 5(1) (c) ECHR, hence Article 5(3) ECHR applies. However, despite the existence of an obligation to bring the suspects before a judge, it is not properly discharged in cases where the seizing State pursues the “extraordinary suspect” approach, ie the suspects are not granted judicial control by a judge of a seizing State at any point. Besides, given that no transfer will take place for one reason or another, no argument can be made that a judge of the receiving State can grant judicial control instead of the seizing State. Hence, in the significant number of cases

618 See above Part 4/II/B/5; the same holds true for the ‘court’ in the sense of Article 5(4) ECHR and Article 9(4) ICCPR, see below Part 4/II/C/5/a.

619 See above Part 4/I/B/2/c.

620 Steven Greer, *The Margin of Appreciation: Interpretation and Discretion under the European Convention on Human Rights* (Council of Europe 2000) 15; Schlütter (n 134) 286–87.

621 See above Part 1/III/A.

where piracy suspects are ultimately released rather than transferred, no judicial control of their arrest and detention takes place – not even, as is proposed in cases of transfer, by the receiving State.

To conclude, the basic idea behind the right to be brought before a judge – to subject the power of arrest and detention to judicial control – is also valid in the context of piracy. The power to deprive a person of his liberty and the obligation to grant judicial control of arrest and detention thus cannot be split between two States. Rather, the authorization to arrest and detain and its control must always be glued together – otherwise protection against arbitrary and unjustified deprivation of liberty is seriously weakened.⁶²² Therefore, the notion of “judge” in Article 5(3) ECHR and Article 9(3) ICCPR only refers to a judge of the seizing State, under the authority of which arrest and detention of piracy suspects at sea takes place.

c) *Judicial Control by the Seizing State*

We concluded that Article 5(3) ECHR and Article 9(3) ICCPR require that the suspect is brought before a judge of the seizing State rather than before a judge of the receiving or any other third State. This begs the question of the moment when judicial control must be granted – whether it is immediately after seizure and during the deliberations of the seizing State whether to prosecute the suspects in its own courts or only once the seizing State has decided to exercise its jurisdiction over the suspects. Furthermore, it must be discussed whether it is necessary that piracy suspects physically appear before a judge under the provisions, or whether the decisive aspect is the granting of the right to be personally heard.

aa) *Granting Judicial Control Soon after the Initial Arrest*

According to Article 5(3) ECHR and Article 9(3) ICCPR, the right to be brought before a judge must be granted “promptly”. As a general rule, the promptness requirement does not permit a delay of more than approximately three days. However, the acceptable delay ultimately depends on the specificities of each case. Thus, the European Court of Human Rights found in *Rigopoulos* and *Medvedyev* that the wholly exceptional factual circumstances did not allow for the applicants to be brought before a judge any earlier than 16 and 13 days respectively after arrest at sea far from the mainland authorities of the intercepting State, and thus the Court did not find a violation of the promptness requirement.⁶²³ As a result, the question is whether arrest and detention of piracy suspects is comparable to the situations adjudicated in these two cases.

622 See also above Part 4/I/B/2/c on Article 5(1)(c) ECHR where it is argued that the notion of “competent legal authority” cannot be understood as encompassing a *foreign* authority.

623 See above Part 4/II/B/4/c.

In the context of piracy, the initial arrest, and also detention during the deliberations of the seizing State whether the suspects will be prosecuted in domestic courts, must be based on Article 5(1)(c) ECHR. The provision equally applies in cases where the seizing State decides to exercise its criminal jurisdiction over the suspects, while deprivation of liberty must be based on Article 5(1)(f) ECHR if the seizing State decides not to prosecute the suspects in its courts but detains them with a view to their transfer to a third State.⁶²⁴ Hence, Article 5(3) ECHR is applicable from the initial seizure and also during the deliberations of the seizing State whether to prosecute the suspects in its courts – and remains applicable if it exceptionally decides to do so. Put differently, Article 5(3) ECHR is already applicable at a time when it is not yet clear whether the suspect will ultimately be prosecuted at all and, if such a prosecution occurs, whether it will take place in the seizing State or in a third State, ie when the case is in limbo as regards the criminal forum in which the suspects will be prosecuted.⁶²⁵ This identification and determination of the forum is the very purpose of the disposition of piracy cases.

In *Rigopoulos* and *Medvedyev*, no such disposition procedure took place. Rather, it was clear from the outset that the suspects were to be submitted for investigation and prosecution in the intercepting State, as evidenced by the fact that France and Spain sent law enforcement officials out for the very purpose of seizing these specific vessels and crews.⁶²⁶ Put another way, during the 16 and 13 days, no disposition procedure took place but this time was rather necessary to physically bring the suspects to a home port and to bring them before a judge – the endeavour to transport the suspects to the mainland was immediately started after interdiction and was not delayed by a disposition procedure, ie the identification and determination of a criminal forum. Therefore, *Rigopoulos* and *Medvedyev* do not contain a statement on whether and for how long judicial control can be delayed when a disposition procedure is necessary. Hence, the cases do not answer the question whether judicial control must be granted after the arrest, or whether a State can wait until it has decided whether to prosecute the suspects in its court.⁶²⁷

624 See above Part 4/I/B/2.

625 For this reason, the approach followed by States considering piracy suspects to be “extraordinary suspects” – to grant judicial review only if they decided to prosecute the case in their own courts – must be rejected.

626 See the description of the main facts of these two cases above Part 4/II/B/4/c/aa.

627 There is also the view that *Rigopoulos v Spain* (n 70) and *Medvedyev and Others v France* (Chamber) (n 367) are pertinent to the situation at hand. See, eg, *Re ‘MS Samanyolu’* (Urteil, Anlage I) (n 248) 8–11 and *Re ‘MS Samanyolu’* (Judgment) (n 248) 5–6; the Court considers the cases pertinent for deciding whether the promptness requirement in this case is fulfilled, even though the delay between arrest and judicial control of 40 days was first and foremost due to the forum determination, ie disposition procedure, rather than the transport from the Danish warship to Dutch

Various arguments are in favour of granting judicial control soon after arrest. The only advantage of waiting until the disposition procedure yields a clear result on whether the suspects will be prosecuted in the courts of the seizing State is that in cases where it decides to exercise criminal jurisdiction over the suspects, they could physically be brought before a judge of the seizing State – rather than by another means. However, the cases where the seizing State ultimately decides to prosecute the suspects in its own courts are extremely rare. And even if the seizing State decides to do so, proceedings may be discontinued for one reason or another before the suspects are brought on the mainland of the seizing State.⁶²⁸ Thus, in the vast majority of cases, the seized suspects will never be brought to the mainland of the seizing State and the same operational or practical difficulties – notably how to “bring” a person before a judge when he cannot physically attend a court hearing – exist regardless of whether judicial control is granted soon after arrest or only at a later point. Also, if suspects are not brought before a judge soon after their arrest, and they are ultimately released because a State willing and able to prosecute them cannot be identified, it is an illusion (and not in the interest of the seized persons either) that they are kept on board the warship of the seizing State any longer than necessary for presenting their cases to a judge controlling the legality of their detention because of the scarce resources available for counter-piracy operations.

In addition to these arguments of a rather practical and operational nature, there are also more principled reasons for granting judicial control immediately. We concluded earlier that the lawfulness of detention, especially as regards its procedural component, may raise issues in the context of piracy.⁶²⁹ Therefore, the intervention of a judge who decides on the merits of arrest and detention allows for deprivation of liberty in counter-piracy operations to be subjected to the rule of law. Moreover, the purpose behind Article 5(3) ECHR and Article 9(3) ICCPR, to prevent abuse of power and to keep unjustified deprivation of liberty to a minimum, can only be realized if judicial control is granted soon after the arrest given that the disposition phase may not last very long overall – even if, in some cases, more than one month had elapsed between arrest and surrender for prosecution.

territory. However, it then decided that more than one month was not necessary in light of the factual circumstances of the case. See also Esser and Fischer, ‘Menschenrechtliche Implikationen der Festnahme von Piraterieverdächtigen’ (n 24) 521–23, who depart from the idea that the *ratio decidendi* of these two cases is, in principle, pertinent.

628 This happened, eg, in Denmark; see above Part 2/I/C.

629 For an overview, see above Part 4/II/B/3; for a more detailed account on lawfulness of arrest and detention on suspicion of criminal activity in the context of piracy, see above Part 4/I/C/2.

bb) Providing an Opportunity to Be Heard

Since judicial control of deprivation of liberty at sea by the seizing State must be granted soon after the arrest by the seizing State, it is by and large materially impossible for the suspect to physically appear before a mainland judge. At the same time, there is generally no official with judicial powers in the sense of Article 5(3) ECHR and Article 9(3) ICCPR on board the law enforcement vessel of the seizing State.

It is submitted here that the essence of the right to be brought before a judge is to enable the suspect to exercise his right to be heard and present his case. The wording of the provision does not explicitly state that the person must be “physically” brought before a judge. Yet even if the wording of the provision were to be read in this way, a teleological reduction of the provision is necessary: if requiring physical attendance at a hearing implies that *no* judicial control is granted because such attendance is materially impossible, it is still more protective if there is an opportunity to be heard by means other than physical presence (even if such means are said to be weaker). Hence, Article 5(3) ECHR and Article 9(3) ICCPR must be interpreted as requiring that the suspect can exercise his right to be heard, ie be provided with an opportunity to present his case – whether through personal attendance at a hearing or by another means.

There are a number of options for ensuring direct or indirect communication between the suspect detained at sea and the mainland judge. As an example, in the Danish *Elly Mærsk* case, the suspects detained at sea were given a legal counsel who represented them at an oral hearing held in Copenhagen, Denmark.⁶³⁰ Thereby, it is necessary that a counsel can communicate with the suspects, for example, by means of video link – with which warships of many States contributing to the counter-piracy operations off the coast of Somalia and the region are equipped.⁶³¹ By means of video link, it is even possible to allow for direct communication between the judge and the piracy suspects. The example of Spain demonstrates that this is a practicable solution.⁶³² It is important that the judge receives information not only from the arresting and detaining authorities but also directly or indirectly (through the legal representative) from the suspect deprived of his liberty. Hence, even though the newly enacted French law providing for a decision by a judge on deprivation of liberty occurring at sea within 48

630 Part 2/I/D/2/b; *Re ‘MV Elly Mærsk’* U.2011.3066H, TfK2011.923/1 (Højesteret – Supreme Court of Denmark, 2 August 2011) (Dansk straffemyndighed for forsøg på at kapre dansk skib i internationalt farvand).

631 *Re ‘MS Samanyolu’* (Judgment) (n 248) 6, states that according to the Dutch Ministry of Justice and Ministry of Defence, naval vessels of the Netherlands participating in the counter-piracy operations off the coast of Somalia and the region are equipped with video teleconferencing systems, precisely to protect the human rights of arrested suspects.

632 Spain has already “brought” suspects before a judge by means of video link: information from expert interview on file with author.

hours of arrest is highly commendable, it remains to be seen whether it is compatible with Article 5(3) ECHR and Article 9(3) ICCPR since it is in the discretion of the judge whether to communicate with the suspects or to base the decision on information requested from the prosecutor.⁶³³

d) **Conclusion**

Article 5(3) ECHR and Article 9(3) ICCPR must be interpreted as requiring that piracy suspects are brought before a judge of the seizing State, which is – *nota bene* – the arresting and detaining State. To bring the suspects before a judge of the receiving and ultimately prosecuting State is insufficient, most notably because he is not competent to decide on deprivation of liberty at sea by a third State and because granting judicial control only after detention at sea has ended runs counter to the purpose of Article 5(3) ECHR and Article 9(3) ICCPR. Furthermore, the right to be brought before a judge must be granted soon after the initial arrest – regardless of whether the seizing State ultimately decides to prosecute the suspects in its own courts. Thereby, it is sufficient that the piracy suspect is provided with an opportunity to be heard since appearing in person is materially impossible and not an essential element of judicial control as guaranteed by Article 5(3) ECHR and Article 9(3) ICCPR.

C. **Right to Judicial Review of the Lawfulness of Detention**

Article 9(4) ICCPR entitles every person deprived of his liberty to challenge the lawfulness of his detention in a court without delay. The right is inspired by the common law concept of *habeas corpus*.⁶³⁴ Early drafts of the provision even explicitly referred to “an effective remedy in the nature of ‘habeas corpus’ by which the lawfulness of his detention shall be decided”.⁶³⁵ Yet the mention was ultimately omitted in light of the intended universal application of the Covenant and the diversity among legal and judicial systems of potential future State Parties.⁶³⁶

The ECHR also grants a right to *habeas corpus*⁶³⁷ – Article 5(4) ECHR stipulates that “[e]veryone who is deprived of his liberty by arrest or detention shall

633 On the law and the procedure in general, see above Part 2/II/C/3/a; on the issue discussed here, see third paragraph of Article L. 1521–15 Code de la défense français “Sauf impossibilité technique, le juge des libertés et de la détention communique, *s’il le juge utile*, avec la personne faisant objet des mesures de restriction ou de privation de liberté.” (emphasis added).

634 Joseph, Schultz and Castan (n 72) 330; Carlson and Gisvold (n 76) 85; Nowak, *U.N. Covenant on Civil and Political Rights* (n 17) 235.

635 Bossuyt (n 420) 213.

636 *ibid.*

637 Council of Europe/European Court of Human Rights (n 69) para 176.

be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful”.

1. Applicability of *Habeas Corpus* Right to Piracy Suspects

Article 9(4) ICCPR applies to *everyone* deprived of his liberty – not just those involved in criminal proceedings.⁶³⁸ From this follows that piracy suspects, regardless of whether detained for the purpose of criminal prosecution in the seizing State or with a view to their transfer to a third State for prosecution, have the right to apply for review of the lawfulness of their detention. Unlike the right to be brought promptly before a judge of Article 9(3) ICCPR, which must be granted *ex officio*, judicial review according to Article 9(4) ICCPR is only carried out at the instigation of either the detained person or his representative. Hence, the provision only provides a right to *actively* seek judicial review. As a consequence, the State cannot be held responsible for a person’s failure to request judicial review⁶³⁹ – provided there was a realistic opportunity to do so.⁶⁴⁰

Article 5(4) ECHR provides every person deprived of his liberty with the “right to actively seek judicial review” of his arrest or detention.⁶⁴¹ Similar to the ICCPR, it suffices that the person deprived of his liberty is granted an opportunity to petition a court for review of the lawfulness of his detention, but no automatic judicial control takes place as it does under Article 5(3) ECHR.⁶⁴² Judicial review as granted by Article 5(4) ECHR is an important component of the protection scheme afforded by the right to liberty – particularly in cases involving surrender for prosecution.⁶⁴³

From the wording of Article 5(4) ECHR follows that judicial review – a “cornerstone guarantee”⁶⁴⁴ – applies to all forms of deprivation of liberty, regardless on which justificatory ground of Article 5(1) ECHR it is based.⁶⁴⁵ Since it is an effective form of protection against arbitrary deprivation of liberty, it must be applied without exception – even if domestic authorities “assert that national security and terrorism are involved”.⁶⁴⁶ This is clear evidence that the right to *habeas corpus* applies to piracy suspects even though Somali-based piracy is considered to exacerbate the situation in Somalia, which the Security Council has qualified

638 Bailey (n 444) 208.

639 Joseph, Schultz and Castan (n 72) 331.

640 See below Part 4/II/C/4/d.

641 *Rakevich v Russia* App no 58973/00 (ECtHR, 28 October 2003) para 43.

642 Esser (n 9) 315.

643 *Kolompar v Belgium* (n 88) para 45.

644 *Rakevich v Russia* (n 641) para 43.

645 Peters and Altwicker (n 290) 133; Van Dijk and others (eds) (n 106) 499.

646 *Chahal v the United Kingdom* App no 22414/93 (ECtHR, 15 November 1996) para 131.

as a “threat to international peace and security in the region”.⁶⁴⁷ For the application of the right to judicial review under Article 5(4) ECHR it is also immaterial whether piracy suspects are detained on suspicion of criminal activity (based on Article 5(1)(c) ECHR) or with a view to their transfer (based on Article 5(1)(f) ECHR).

We have seen that piracy suspects detained based on Article 5(1)(c) ECHR – unlike those detained with a view to their transfer – also benefit from the right to be brought promptly and automatically before a judge as required by Article 5(3) ECHR. Since application of Articles 5(3) and 5(4) ECHR are not mutually exclusive,⁶⁴⁸ piracy suspects detained on suspicion of criminal activity can, in addition, apply for *habeas corpus* proceedings. This is justified given the differences between these two rights pertaining to judicial scrutiny of deprivation of liberty.⁶⁴⁹ Meanwhile, Article 13 ECHR, which stipulates a right to an effective remedy, is not available to piracy suspects exercising their right to *habeas corpus* under Article 5(4) ECHR since the latter provision is considered to be *lex specialis*.⁶⁵⁰ In sum, while Article 13 ECHR is not available to piracy suspects at all, those detained on suspicion of criminal activity⁶⁵¹ benefit from Article 5(3) and (4) ECHR, while those detained with a view to their transfer⁶⁵² only have the remedy of Article 5(4) ECHR at their disposal.

647 See above Part I/II/A/1: the Security Council did not qualify the phenomenon of piracy and armed robbery at sea *as such* as a “threat to international peace and security in the region”, but rather the situation in Somalia.

648 Esser (n 9) 302.

649 Thus, for instance, judicial review under Article 5(3) ECHR must be granted automatically and promptly, while Article 5(4) ECHR merely provides an entitlement to actively seek judicial control, which must be granted speedily. A further difference is the extent of review, which under Article 5(4) ECHR only pertains to lawfulness, while Article 5(3) ECHR is more comprehensive by obliging the judge to review the merits of detention in general. On the differences between the two rights, see also Peters and Altwicker (n 290) 134.

650 Consequently, the Strasbourg organs examined the complaints of detained persons, who argued that they did not obtain effective judicial review of the measures that deprived them of their liberty, exclusively under Article 5(4) ECHR. For cases involving detention with a view to extradition, see: *Loprete c l’Espagne et l’Italie* App no 11663/85 (Décision de la Commission, 2 March 1987) 3. of the legal considerations; *O v the United Kingdom* App no 19319/91 (Commission Decision, 2 September 1992) 3. of the legal considerations; *Bordovskiy v Russia* (n 278) para 63; *Nasrulloev v Russia* (n 195) para 79; *Ismoilov and others v Russia* (n 195) para 142; *Stephens v Malta* (No 1) (n 277) para 99.

651 Article 5(1)(c) ECHR.

652 Article 5(1)(f) ECHR.

2. Applicability to Short-Term Detention

We have concluded that per Article 5(4) ECHR and Article 9(4) ICCPR, every person deprived of his liberty has the right to petition a court for legal review of the lawfulness of his detention – regardless of the nature of his arrest and detention and the circumstances in which it occurs.⁶⁵³ Hence, States are under an obligation to grant piracy suspects a realistic opportunity to challenge the lawfulness of their arrest and detention.

The fact that arrest and detention of piracy suspects may be of a rather short duration does not discharge States of this obligation. The case law on Article 5(4) ECHR, according to which judicial review must not be granted in cases where it is clear from the outset that release will take place before a decision is issued by a court, has been overruled. Rather, judicial review must be granted for short-term detention as well.⁶⁵⁴ This was stated by the Court in quite robust terms in *Al-Nashif v Bulgaria*: “[E]veryone who is deprived of his liberty is entitled to review of the lawfulness of his detention by a court, regardless of the length of confinement.”⁶⁵⁵

In cases where a suspect is deprived of his liberty by virtue of a court order – which is certainly not the general rule in the context of piracy – this may be viewed as a (first) judicial review as required by Article 5(4) ECHR.⁶⁵⁶ Albeit not if the judicial order was issued in such a way that did not allow for effective examination of the parties’ observations – for example, by using a standard text file, prepared in advance, with but a few tiny changes made in each case.⁶⁵⁷

Judicial control granted only after deprivation of liberty has ended, for instance for a compensation claim, is not sufficient under Article 5(4) ECHR.⁶⁵⁸ In the context of piracy, the end of deprivation of liberty at sea must be interpreted as referring to the moment when piracy suspects are physically transferred to the receiving State and their arrest or detention is therefore no longer under the authority of the seizing State. The argument that it is sufficient if piracy suspects receive an opportunity to apply for judicial review in the receiving State (rather than in the seizing State) must be rejected for the very same reasons that have been laid down *in extenso* for Article 5(3) ECHR.⁶⁵⁹

As regards the precise moment at which the State must provide the opportunity to seek judicial review, the Court has stated that this must be soon after the person has been deprived of his liberty and, thereafter, at reasonable intervals if

653 See above Part 4/II/C/1.

654 Esser (n 9) 315–16.

655 *Al-Nashif v Bulgaria* App no 50963/99 (ECtHR, 20 June 2002) para 92.

656 Esser (n 9) 316.

657 *ibid*; *Svipsta v Latvia* App no 66820/01 (ECtHR, 9 March 2006) para 132.

658 Esser (n 9) 315.

659 See above Part 4/II/B/6/b and below Part 4/II/C/5.

necessary.⁶⁶⁰ That the remedy must be available from the outset⁶⁶¹ and during⁶⁶² the person's detention is a concrete aspect of the broader obligation that the right to have the lawfulness of detention reviewed must not be theoretical or even illusory, but accessible and effective. Hence, by virtue of Article 5(4) ECHR, the seizing State must grant piracy suspects an opportunity to seek judicial review of their detention on suspicion of criminal activity based on Article 5(1)(c) ECHR soon after arrest, ie soon after the seizing State has taken a measure in the course of interception that amounts to a deprivation of liberty.⁶⁶³ According to Article 5(3) ECHR, piracy suspects seized on suspicion of criminal activity must be brought promptly and automatically before a judge who decides on the merits of detention in general, not only the lawfulness of detention. Hence, the entitlement to seek judicial review under Article 5(4) ECHR may – from a practical perspective – be of lesser importance for detention on suspicion of criminal activity. However, for detention with a view to transfer, ie based on Article 5(1)(f) ECHR, *habeas corpus* proceedings are the only way to seek judicial review of detention – and are therefore of comparatively greater importance.

Article 9(4) ICCPR stipulates that the decision on the lawfulness of detention must be made “without delay”. One aspect of this temporal restriction⁶⁶⁴ concerns the time that may elapse between the person's arrest and the moment when he actually has an opportunity to access a court to seek judicial review.⁶⁶⁵ In *Hammel v Madagascar*, where the applicant was detained *incommunicado* for three days, the Human Rights Committee found a violation of Article 9(4) ICCPR because it was impossible for the author to seek judicial review.⁶⁶⁶ From

660 Council of Europe/European Court of Human Rights (n 69) para 191; this is one aspect of the “speediness” requirement, see below Part 4/II/C/4/e. Review in regular intervals is necessary where deprivation of liberty lasts for a longer period of time; if detention is based on suspicion of criminal activity, ie Article 5(1)(c) ECHR, the intervals between reviews must be short: *ibid* para 200.

661 Specifically regarding detention with a view to extradition: *Khudyakova v Russia* (n 284) paras 97 and 98.

662 Specifically with regard to detention with a view to extradition: *Nasrulloev v Russia* (n 195) para 86; *Shchebet v Russia* (n 195) para 75; *Soldatenko v Ukraine* (n 195) para 125; *Muminov v Russia* (n 288) para 113; *Khudyakova v Russia* (n 284) para 89; *Eminbeyli v Russia* (n 89) para 63; *Svetlorusov v Ukraine* (n 200) para 57; *Kaboulov v Ukraine* (n 87) para 151; *Khodzhayev v Russia* (n 10) para 121; *Khaydarov v Russia* (n 10) para 137; *Abdulazhon Isakov v Russia* App no 14049/08 (ECtHR, 8 July 2010) para 129; *Gaforov v Russia* (n 10) para 165; *Sultanov v Russia* App no 15303/09 (ECtHR, 4 November 2010) para 88.

663 See above Part 4/I/A/2.

664 For other aspects, see below Part 4/II/C/4/e.

665 Joseph, Schultz and Castan (n 72) 331.

666 *Hammel v Madagascar* Comm no 155/1983 (HRC, 2 April 1987) paras 19.4 and 20. On the other hand, the Committee decided in *Portorreal v Dominican Republic* Comm no 188/1984 (HRC, 5 November 1987) that no violation of Article 9(4) ICCPR had

this view follows that persons deprived of their liberty for a rather short duration must also be granted *habeas corpus*, and that it is not in the discretion of the State when to provide a person deprived of his liberty with the opportunity to seek judicial review.

3. The Scope of Judicial Review

The purpose of Article 5(4) ECHR is to ensure that every arrested or detained person can have the *lawfulness* of the measure interfering with his liberty of movement reviewed by a court.⁶⁶⁷ Thereby, the notion of “lawfulness” has the same meaning in the context of this provision as it does in Article 5(1) ECHR.⁶⁶⁸ Article 9(4) ICCPR is also aimed at providing the person deprived of his liberty with an opportunity to have the *lawfulness* of his arrest or detention reviewed by a court, which follows from the rather explicit wording of the provision.⁶⁶⁹

a) Testing the Lawfulness of Deprivation of Liberty

The scope of *habeas corpus* proceedings is to review whether arrest and detention is lawful in the sense of Article 5(1) ECHR. Since the term “lawfulness” in Article 5(4) ECHR refers to the concept of lawfulness in Article 5(1) ECHR, the assessment is not limited to an examination of whether arrest and detention of piracy suspects conforms to the relevant substantive and procedural rules of domestic law – which are different for detention on suspicion of criminal activity and detention with a view to transfer. Rather, the review must also encompass whether deprivation of liberty of piracy suspects is in keeping with the requirements *directly* flowing from the lawfulness component of Article 5(1) ECHR,⁶⁷⁰ which were described earlier.⁶⁷¹ Even though judicial control under Article 5(4) ECHR is limited to lawfulness in the sense of Article 5(1) ECHR, it is important to

occurred even though the author was held for 50 hours without having the opportunity to challenge his detention: Joseph, Schultz and Castan (n 72) 331.

667 *Garabayev v Russia* (n 283) para 87; *Nasrulloev v Russia* (n 195) para 86; *Ismoilov and others v Russia* (n 195) para 145; *Shchebet v Russia* (n 195) para 75; *Soldatenko v Ukraine* (n 195) para 126; *Muminov v Russia* (n 288) para 113; *Khudyakova v Russia* (n 284) para 89; *Eminbeyli v Russia* (n 89) para 63; *Svetlorusov v Ukraine* (n 200) para 57; *Kaboulov v Ukraine* (n 87) para 151; *Khodzhayev v Russia* (n 10) para 121; *Khaydarov v Russia* (n 10) para 137; *Gaforov v Russia* (n 10) para 165; *Sultanov v Russia* (n 662) para 88.

668 *Chahal v the United Kingdom* (n 646) para 127. See above Part 4/I/C/1/a for a detailed account of the concept of lawfulness as embodied in Article 5(1) ECHR.

669 Carlson and Gisvold (n 76) 85; Bailey (n 444) 208.

670 Specifically regarding detention with a view to extradition, see, eg, *Chahal v the United Kingdom* (n 646) para 129; in general, see Esser (n 9) 304.

671 See above Part 4/I/C.

note that these are two separate provisions and the observance of the latter does not necessarily entail observance of the former.⁶⁷²

The lawfulness requirement of Article 5(1) ECHR has two components. On the one side, the *chapeau* of Article 5(1) ECHR contains a lawfulness element, which pertains to every type of deprivation of liberty. On the other side, Article 5(1)(c) ECHR and Article 5(1)(f) ECHR – the two justificatory grounds relevant for arrest and detention of piracy suspects at sea – each refer to “lawful arrest and detention”.⁶⁷³ This latter component requires that lawfulness is, to some extent, assessed in light of the respective justificatory ground for deprivation of liberty.

With regard to detention pending extradition, the Court stated somewhat broadly that “whenever a foreign State’s request for extradition does not, at the outset, appear unacceptable to the authorities of the country in which the person concerned is present, the detention is the rule and release the exception”.⁶⁷⁴ Yet, by virtue of Article 5(4) ECHR, the lawfulness of arrest and detention with a view to extradition in the sense of Article 5(1)(f) ECHR – which, as previously argued, includes detention with a view to transfer⁶⁷⁵ – must be thoroughly tested in each specific case. Thereby, the review must be “sufficiently wide to encompass the various circumstances militating for or against detention”.⁶⁷⁶ The earlier statements with respect to legal review according to Article 5(4) ECHR in general also hold true for judicial control of detention with a view to extradition – the scope of judicial review must extend to both an examination of whether the arrest and ensuing detention complied with the legal basis under domestic law, and also to the procedural and substantive requirements as set forth by Article 5(1)(f) ECHR.⁶⁷⁷ This is important to stress in light of the fact that the normative framework governing arrest and detention with a view to transfer is inexistent or incomplete in many States, and international rules invoked as a substitute for missing domestic norms do not meet the strictures flowing from Article 5(1) ECHR in terms of substantive and/or procedural lawfulness.⁶⁷⁸

As regards deprivation of liberty on suspicion of criminal activity, an essential condition of Article 5(1)(c) ECHR is that arrest and detention is only justified if reasonable suspicion exists that the person has committed an offence. Therefore, *habeas corpus* proceedings as required by Article 5(4) ECHR must encompass an examination of whether the evidence was sufficient to conclude

672 *Kolompar v Belgium* (n 88) para 45; therefore, even if the Court does not find a breach of Article 5(1) ECHR in a specific case, it does not consider itself dispensed from assessing compliance with Article 5(4) ECHR.

673 See above Part 4/I/C/1/a.

674 *Sanchez-Reisse v Switzerland* App no 9862/82 (ECtHR, 21 October 1986) para 57.

675 See above Part 4/I/B/1/c/bb.

676 *Kadem v Malta* App no 55263/00 (ECtHR, 9 January 2003) para 42.

677 *Whitehead v Italy* (n 193) 5. of the legal considerations; *Kadem v Malta* (n 676) para 41; *Stephens v Malta (No 1)* (n 277) para 94.

678 See above Part 4/I/C/3.

that there was indeed reasonable suspicion that the person deprived of his liberty committed an offence.⁶⁷⁹ We concluded that nothing seems to suggest that patrolling naval States, the disposition practices of which are considered in the present study, take the requirement of “reasonable suspicion of having committed an offence” too lightly.⁶⁸⁰ Yet, per Article 5(4) ECHR, every piracy suspect deprived of his liberty based on Article 5(1)(c) ECHR has a right to have this aspect of his arrest and detention reviewed by a court. As already mentioned, Article 5(1) and (4) ECHR are separate provisions, both of which must be complied with.⁶⁸¹

For review proceedings to be in line with Article 5(4) ECHR, a mere examination of whether the arrest and ensuing detention was initially lawful is not sufficient. Rather, the assessment must also take into account the *current* factual and legal situation. Only this allows for testing whether the initial justificatory ground for deprivation of liberty is still pertinent or whether changed circumstances render it unlawful.⁶⁸² This is important for detention with a view to extradition because it could potentially last for a very long time, even several years in some cases.⁶⁸³ By comparison, detention pending transfer is relatively short in duration. Yet, since the justificatory ground for detention and the conditions for the lawfulness of arrest and detention therewith change in the course of disposition of piracy cases,⁶⁸⁴ which can span a few days or last more than a month,⁶⁸⁵ it is imperative that the court competent for judicial review considers not only the initial factual circumstances but also the current circumstances.

While *habeas corpus* proceedings guaranteed under Article 5(4) ECHR must encompass all of the above mentioned issues, the Commission stated that

679 Council of Europe/European Court of Human Rights (n 69) para 179.

680 See above Part 4/I/B/1/a, where the requirements are discussed in light of the criminal phenomena of piracy and armed robbery at sea.

681 The same holds true for Article 9(4) ICCPR, see later in this section.

682 *Kolompar c la Belgique* (n 91) para 74, and *Dubovik v Ukraine* (n 205) para 67; see also *Ismoilov and others v Russia* (n 195) para 146, and *Gaforov v Russia* (n 10) para 176, where the thrust of the complaint did not pertain to the initial placement in custody but rather to the inability to obtain judicial review of the detention after a certain amount of time had elapsed.

683 In *Khaydarov v Russia* (n 10) para 138 and *Abdulazhon Isakov v Russia* (n 662) para 124, for instance, the applicants spent more than two years in detention pending extradition. In *Kolompar v Belgium* (n 88) para 36, detention with a view to extradition lasted for over two years and eight months and in *Nasrulloev v Russia* (n 195) paras 12–38 and para 75, the review only took place almost three years after the applicant’s placement in custody.

684 Generally, the initial arrest takes place on suspicion of criminal activity (Article 5(1)(c) ECHR) and only later, ie after the seizing State has decided not to prosecute the suspects in its own courts but to detain them for their potential transfer, is it based on deprivation of liberty with a view to extradition (Article 5(1)(f) ECHR); see above Part 4/I/B/2 and Part 4/I/C/2 and 3.

685 See above Part 2/I/D/4.

nevertheless the review should not constitute a “réexamen complet de toutes les questions de fait touchant à l’exercice du pouvoir d’ordonner la détention”.⁶⁸⁶ In other words, the court reviewing the lawfulness of a specific arrest or detention carried out by a patrolling naval State should not “substitute its own discretion for that of the decision-making authority”.⁶⁸⁷

The scope of judicial review under Article 9(4) ICCPR is the same as that under Article 5(4) ECHR and is also limited to the lawfulness of deprivation of liberty. This follows from the wording of the provision.⁶⁸⁸ Even though the scope of judicial review is limited to testing the lawfulness, it is important to note that the right to seek judicial control applies regardless of whether deprivation of liberty is actually lawful.⁶⁸⁹ Put differently, the *habeas corpus* provision can be violated even if the arrest or detention under consideration was in fact lawful.⁶⁹⁰

Like Article 5(1) ECHR, the concept of lawfulness is given a substantive meaning under Article 9(4) ICCPR. This implies that formal compliance with domestic law is not sufficient.⁶⁹¹ Rather, deprivation of liberty must also be compatible with international law,⁶⁹² most notably the provisions of the Covenant and specifically Article 9 pertaining to the right to liberty.⁶⁹³

b) Importance of Judicial Review in the Context of Piracy

The element of lawfulness is perhaps among the most challenging aspects of deprivation of liberty of piracy suspects. We have seen that the lawfulness component under Article 5(1) ECHR and Article 9(1) ICCPR requires the existence of a legal basis governing deprivation of liberty as such (substantive lawfulness) and the procedure to be followed when arresting or detaining a person (procedural lawfulness). Such a legal basis must not only pre-exist but be of a certain quality as well – generally accessible, precise, unequivocal and specific – thus rendering it foreseeable and predictable. Furthermore, arrest and detention must be carried out in conformity with the legal basis.⁶⁹⁴

686 *Whitehead v Italy* (n 193) 5. of the legal considerations.

687 *Zamir v the United Kingdom* App no 9174/80 (Report of the Commission, 11 October 1983) para 99.

688 Carlson and Gisvold (n 76) 85; Bailey (n 444) 208; Nowak, *U.N. Covenant on Civil and Political Rights* (n 17) 236.

689 Joseph, Schultz and Castan (n 72) 330; Nowak, *U.N. Covenant on Civil and Political Rights* (n 17) 235.

690 Nowak, *U.N. Covenant on Civil and Political Rights* (n 17) 235.

691 Carlson and Gisvold (n 76) 85; *A v Australia* Comm no 560/1993 (HRC, 3 April 1997) para 75.

692 Nowak, *U.N. Covenant on Civil and Political Rights* (n 17) 236.

693 *A v Australia* (n 691) para 75; see also concurring individual opinion of Mr Bhagwati. On the lawfulness requirement under Article 9(1) ICCPR, see above Part 4/I/C/1/b.

694 See above Part 4/I/C/1.

Regarding piracy suspects deprived of their liberty on suspicion of criminal activity, the importance of reviewing their arrest and detention in light of the lawfulness requirement has already been stressed in the context of Article 5(3) ECHR and Article 9(3) ICCPR.⁶⁹⁵ The reasons why this is important – mainly because a normative gap exists with regard to piracy suspects arrested and detained by States that consider them to be “extraordinary suspects”⁶⁹⁶ – also hold true for judicial review under Article 5(4) ECHR and Article 9(4) ICCPR and are therefore not repeated here.

It is equally important to grant piracy suspects detained with a view to their transfer an opportunity to have the lawfulness of their detention reviewed. The legal framework governing deprivation of liberty with a view to transfer is not clearly set out. Broadly speaking, the normative situation can be described as follows: States generally do not apply extradition-specific legislation to deprivation of liberty with a view to transfer nor have they adopted rules specifically governing this new method of surrender for prosecution. Meanwhile, international law does not offer a quick fix solution to fill the normative gap in domestic law either. With regard to detention pending transfer of piracy suspects (in the technical sense), Article 105 UNCLOS is arguably sufficient in terms of substantive lawfulness but not regarding procedural lawfulness.⁶⁹⁷ As to detention of alleged armed robbers at sea pending their transfer, Security Council Resolution 1846 does not provide a legal basis that meets the lawfulness test.⁶⁹⁸ What is more, Article 7 SUA Convention, which is occasionally invoked as the legal basis for detention pending transfer, does not fill the gap of domestic law either because it essentially refers back to domestic law, which is – *nota bene* – incomplete in this respect.⁶⁹⁹ Finally, for detention of alleged pirates and armed robbers at sea with a view to their transfer in the context of EUNAVFOR, the finding is not much different – while some rules fail the lawfulness test set out by Article 5(1) ECHR and Article 9(1) ICCPR because they are not publicly available, the publicly accessible rules (Articles 2(e) and 12 of CJA Operation Atalanta) do not meet the strictures of the lawfulness test because, *inter alia*, they lack a procedural component.⁷⁰⁰

Overall, arrest and detention of piracy suspects may not necessarily comply with the lawfulness requirement of Article 5(1) ECHR and Article 9(1) ICCPR – hence, it is imperative that piracy suspects are provided with a realistic opportunity to seek judicial review of the lawfulness of their detention.

695 See above Part 4/II/B/3.

696 *ibid.*

697 See above Part 4/I/C/3/a.

698 See above Part 4/I/C/3/b.

699 See above Part 4/I/C/3/c.

700 See above Part 4/I/C/3/d.

4. Features of the Procedure and Procedural Safeguards

The normative gap regarding detention on suspicion of criminal activity that results from the “extraordinary suspect” approach of some States vis-à-vis deprivation of liberty of piracy suspects, and the legal black hole that exists with regard to detention of piracy suspects pending their transfer, is not only problematic in terms of lawfulness as required by Article 5(1) ECHR and Article 9(1) ICCPR. This normative gap, which is especially large regarding the procedural aspects of arrest and detention, also has the consequence that judicial remedies and avenues in the sense of Article 5(4) ECHR and Article 9(4) ICCPR are either inexistent (and therefore not granted to piracy suspects at all) or not established by law (and only granted by virtue of a practice). Put differently, in many instances where piracy suspects are arrested and detained on suspicion of criminal activity by a State not pursuing a criminal law approach to deprivation of liberty of piracy suspects, or when they are detained with a view to their transfer, there is no effective and accessible remedy to have the lawfulness of their detention reviewed. It is submitted here that this stands in stark contrast to Article 5(4) ECHR and Article 9(4) ICCPR, which require that piracy suspects are granted a realistic opportunity to petition a court for review of the lawfulness of their detention, and also contain some minimum requirements regarding the review procedure and procedural safeguards to be granted. This latter aspect is the subject of the following analysis.

As per *Sanchez-Reisse v Switzerland*, “the forms of the procedure required by the Convention need not ... necessarily be identical in each of the cases where the intervention of a court is required”.⁷⁰¹ A closer reading of the judgment reveals that the comparative statement has two components. Firstly, the word “court” used in various provisions of the ECHR implies that the body in question exhibits some common fundamental features, such as independence and the guarantee of a judicial procedure. Thus, the forms of procedure need not be the same for all cases where the Convention requires intervention by a court, but rather depend on the “particular nature of the circumstances in which such proceeding takes place”.⁷⁰² Secondly, even the mention of court proceedings in Article 5(4) ECHR does not denote one form of procedure, but rather it depends on the type of deprivation of liberty at stake. However, there are some minimum requirements that all *habeas corpus* proceedings based on Article 5(4) ECHR must feature. While it is not always necessary that proceedings under Article 5(4) ECHR exhibit the same guarantees as those required under Article 6(1) ECHR, the *habeas corpus*

701 *Sanchez-Reisse v Switzerland* (n 674) para 51, citing *De Wilde, Ooms and Versyp* (“*Vagrancy*”) *v Belgium* App nos 2832/66, 2835/66, 2899/66 (ECtHR, 18 June 1971) para 78.

702 *ibid.*

proceedings “must have a judicial character and provide guarantees appropriate to the kind of deprivation of liberty in question”.⁷⁰³

From this clearly follows that States have a rather wide margin to design the review procedure implementing the content of Article 5(4) ECHR. The same holds true for Article 9(4) ICCPR. Hence, nothing stands in the way of taking into account the specificities of deprivation of liberty in counter-piracy operations – provided that the procedure features some essential characteristics, to which we turn now.

a) **Receive Necessary Information**

A precondition to exercising the right to judicial review is actual knowledge of the reasons for deprivation of liberty and the relevant charges. States under the authority of which arrest and detention is carried out are thus under an obligation to provide persons deprived of their liberty with such information regardless of the context in which arrest and detention occurs, including counter-piracy operations. The extent of information to be provided by virtue of Article 5(2) ECHR must be such so as to allow for persons to effectively seek judicial review under Article 5(4) ECHR.⁷⁰⁴ Otherwise, the right to have the lawfulness of detention reviewed by a court is deprived of all its substance.⁷⁰⁵ In light of this, the Court has stated in various cases examined from the angle of the *habeas corpus* provision that “information which is essential for the assessment of the lawfulness of a detention should be made available in an appropriate manner to the suspect’s lawyer”.⁷⁰⁶

703 *Stephens v Malta (No 1)* (n 277) para 95. See also *Farmakopoulos c la Belgique* App no 11683/85 (Rapport (31) de la Commission, 4 December 1990) para 50, and *Shamayev and others v Georgia and Russia* (n 90) para 431, stressing that the guarantees must be appropriate to the kind of deprivation of liberty.

704 For a detailed account of the right to information under Article 5(2) ECHR and Article 9(2) ICCPR, see above Part 4/II/A. Van Dijk and others (eds) (n 106) 498, interprets Article 5(4) ECHR as containing a right to information independent of Article 5(2) ECHR: “The fourth paragraph of Article 5, like the second paragraph, requires that the arrested person be informed about the reasons of his arrest in order to be in a position to take proceedings with a view to having the lawfulness of his detention determined.”

705 *Shamayev and others v Georgia and Russia* (n 90) para 432.

706 In general, see, eg, *Musuc v Moldova* App no 42440/06 (ECtHR, 6 November 2007) para 54, and Colvin and Cooper (eds) (n 30) 174, citing further cases. Regarding detention based on Article 5(1)(c) ECHR, see Council of Europe/European Court of Human Rights (n 69) para 188. With regard to detention pending extradition and the obligation to inform the person that he is detained with a view to extradition and the right to access the extradition file, see *Chamaïev et autres c Géorgie et Russie* App no 36378/02 (ECtHR, 12 April 2005) para 428.

Similar to counterterrorism operations, the argument of States contributing to counter-piracy operations that material in relation to deprivation of liberty of piracy suspects is confidential is not entirely excluded. Against this background, it is important to note that the Court recognizes that the “use of confidential material may be unavoidable where national security is at stake”. However, it stressed that this does not mean that national authorities responsible for arrest and detention are free from oversight by domestic courts whenever they assert that national security is at stake. Rather, the Court argued that a survey of different State practices demonstrates that techniques are available that accommodate legitimate security concerns about the nature and sources of intelligence information, yet at the same time afford the individual a substantial measure of procedural justice.⁷⁰⁷

b) *Have an Opportunity to Be Heard*

The requirement under Article 5(4) ECHR that review proceedings must take place before a court implies that the person deprived of his liberty, or the person representing him, must be given an opportunity to defend his interests in those proceedings.⁷⁰⁸ The right to participate (in any form) in *habeas corpus* proceedings, and more specifically the right to be heard, is also a direct corollary of the requirement that review proceedings pertaining to detention based on Article 5(1)(c) or (f) ECHR must be adversarial in nature and respect the principle of “equality of arms”.⁷⁰⁹

It is generally for national law to determine how to best ensure that persons deprived of their liberty can exercise their right to be heard. Notably, whether to provide for written or oral review proceedings and, if the latter, whether to foresee the presence of the person deprived of his liberty or merely his representative.⁷¹⁰ However, if the review pertains to detention based on Article 5(1)(c) ECHR, the person deprived of his liberty must be given an opportunity to present his arguments and reply to arguments by the prosecutorial authorities.⁷¹¹ Thus, the Court requires a hearing and considers it a fundamental guarantee that the detainee is given an opportunity to be heard either in person or through representation.⁷¹² In the context of piracy, it is not a practicable solution in most cases for the suspect to physically appear before a judge of the seizing State – nor is it required by the

707 *Chahal v the United Kingdom* (n 646) para 131.

708 *Farmakopoulos c la Belgique* (n 703) para 46.

709 Regarding detention with a view to extradition, see, eg, *Sanchez-Reisse v Switzerland* (n 674) para 51; regarding detention on suspicion of criminal activity, see *Esser* (n 9) 307.

710 *Esser* (n 9) 306.

711 *ibid* 307.

712 Council of Europe/European Court of Human Rights (n 69) para 187.

case law pertaining to Article 5(4) ECHR. The right to be heard can instead be exercised through a legal representative's attendance at an oral hearing. Thereby, the suspect must be given a chance to prepare his case with the representative, which can be accomplished by means of video link and with the assistance of an interpreter for example. The Danish *Elly Mærsk* case demonstrates how this is a practicable solution despite operational constraints.⁷¹³ An alternative solution is to arrange for piracy suspects to communicate directly with the judge, by means of video link for example.

For *habeas corpus* proceedings regarding detention with a view to extradition it is less clear whether the extraditee has a right to appear in person before the court or whether written submissions are considered sufficient under Article 5(4) ECHR. The Court's findings in this respect are rather ambiguous – while it has not explicitly stated that an extraditee has a right to be heard in person at an oral hearing, it has not explicitly ruled this option out either.⁷¹⁴ For a piracy suspect detained with a view to his transfer, the right to be heard, ie to submit his arguments to the court deciding about the lawfulness of his detention, could equally be granted by providing him with a legal representative who he can communicate with in order to prepare his case.

In the context of piracy, the right to be heard can generally only be exercised effectively if the suspect is represented by counsel. This calls for a brief discussion of whether the ECHR and ICCPR grant a right of access to counsel.

713 See above Part 2/I/D/2/b: In this case, the right to be brought promptly before a judge according to Article 5(3) ECHR and Article 9(3) ICCPR was granted; however, the case is still pertinent to demonstrate the practicability of the proposed solution.

714 In *Sanchez-Reisse v Switzerland* (n 674) para 51, the Court held that the possibility to be heard either in person or, where necessary, through some form of representation, “features in certain instances among the “fundamental guarantees of procedure applied in matters of deprivation of liberty””. It continued to argue that despite the differences in wording between Article 5(3) ECHR (“right to be brought before a judge or other officer”) and Article 5(4) ECHR (“right to take proceedings”), it had “hitherto tended to acknowledge the need for a hearing before the judicial authority”. It then, however, adduces the *caveat* that these decisions concerned arrest and detention based on Article 5(1)(c) and (e) ECHR, ie not detention pending extradition, and that “the forms of procedure required by the Convention need not ... necessarily be identical in each of the cases where the intervention of a court is required”. For the concrete case at hand, it reached the decision that appearance in person would not have changed the result reached by the court. Later, in *Stephens v Malta (No 1)* (n 277) para 95, dealing with detention with a view to extradition, the Court stated that in the case of pre-trial detention based on Article 5(1)(c) ECHR, a hearing is required and that “the possibility for a detainee to be heard either in person or through some form of representation features among the fundamental guarantees of procedure applied in matters of deprivation of liberty”. However, it did not explicitly decide whether the right to appear in person before the court applied in the case at hand and, even less, whether it has to be granted in *habeas corpus* proceedings regarding detention with a view to extradition in general.

c) *Be Provided with Access to Counsel*

Article 5(4) ECHR does not explicitly articulate a right to access a lawyer. However, such a right is arguably implicitly contained in the provision since it requires review proceedings to be of an adversarial nature and to abide by the equality of arms principle.⁷¹⁵ In light of this, the Court stated that in the particular circumstances of a given case, exclusion of the detained person's lawyer may adversely affect his ability to present his case and may not be justified in the interest of justice.⁷¹⁶ The particular circumstances of piracy cases require acknowledgement of the right to access counsel since the suspect's effective presentation of his case to the judge is otherwise impossible. This is notably due to the operational and practical impossibility of arranging for the suspect to appear physically at an oral hearing, and that it is merely an illusion that a suspect advances written submissions on his own since he likely has no mastery of the court's language, is potentially illiterate and has no knowledge of the legal system of the seizing State.

The Human Rights Committee also stressed the link between access to legal representation and the full enjoyment of the right to have the lawfulness of detention reviewed as granted by Article 9(4) ICCPR.⁷¹⁷ Furthermore, in various Concluding Observations, the Human Rights Committee has made it clear that all detainees should have access to legal aid and not only persons charged with an offence and thus benefiting from Article 14(3)(d) ICCPR.⁷¹⁸ The right to legal representation, and legal aid in specific cases, is thus a feature of Article 9(4) ICCPR, but it could arguably also be based on Article 9(1) ICCPR since it is an effective means to avoid arbitrary deprivation of liberty.⁷¹⁹ Hence, under the right to liberty stipulated in Article 9 ICCPR, it appears that piracy suspects not only have a right to legal representation, but to legal aid as well.

d) *Have a Realistic Opportunity of Using the Remedy*

Under Article 5 ECHR, the right to have the lawfulness of detention reviewed must not be theoretical or even illusory. Rather, States party to this instrument must ensure that the remedy is accessible and effective.⁷²⁰

According to the Strasbourg organs, accessibility implies that "the circumstances voluntarily created by the authorities must be such as to afford applicants

715 Colvin and Cooper (eds) (n 30) 176.

716 *Lebedev v Russia* App no 4493/04 (ECtHR, 25 October 2007) para 91.

717 *Berry v Jamaica* Comm no 330/1988 (HRC, 7 April 1994) para 11.1 and *Campbell v Jamaica* Comm no 248/1987 (HRC, 30 March 1992) para 64; both cases cited by Pati (n 314) 49.

718 Joseph, Schultz and Castan (n 72) 334.

719 *ibid.*

720 See, instead of many, *Eminbeyli v Russia* (n 89) para 63, and *Kaboulov v Ukraine* (n 87) para 151.

a realistic possibility of using the remedy⁷²¹ – including piracy suspects detained on board a law enforcement vessel of the seizing State since the possibility of judicial review must be granted to all persons deprived of their liberty regardless of the nature of arrest and detention and the surrounding circumstances. Furthermore, the existence of the remedy must be sufficiently certain, in both theory and practice.⁷²² For instance, with regard to a civil law jurisdiction, the Commission decided that a remedy granted based on case law alone and not by virtue of a legal provision does not provide sufficient certainty that the remedy indeed exists.⁷²³ Hence, even if, *arguendo*, piracy suspects were actually provided with a remedy in practice despite the fact that their arrest or detention falls within the normative gap described (which notably pertains to judicial avenues), it may not be sufficient in light of this jurisprudence.

Furthermore, the Court did not consider it to be in line with Article 5(4) ECHR to have contradictory decisions of domestic courts as to the avenue of judicial review to be followed by persons detained with a view to extradition. In *Ismoilov and others v Russia*, it held that the applicants “were caught in a vicious circle of shifted responsibility where no domestic court, whether civil or criminal, was capable of reviewing the alleged unlawfulness of their detention”.⁷²⁴ Thus, domestic law must be sufficiently clear regarding the appropriate judicial avenue for a person to challenge the lawfulness of his detention. Generally speaking, no rules specifically governing deprivation of liberty with a view to transfer exist. Hence, whereas the available legal remedies are usually clearly set

721 *Garabayev v Russia* (n 283) para 94; *Nasrulloev v Russia* (n 195) para 86; *Ismoilov and others v Russia* (n 195) para 145; *Soldatenko v Ukraine* (n 195) para 125; *Khudyakova v Russia* (n 284) para 89; *Eminbeyli v Russia* (n 89) para 63; *Svetlorusov v Ukraine* (n 200) para 57; *Kaboulov v Ukraine* (n 87) para 151; *Abdulzhon Isakov v Russia* (n 662) para 129; *Sultanov v Russia* (n 662) para 88. This may notably not be the case if the time frame for applying for review is too short in light of the circumstances of the case: In *Farmakopoulos c la Belgique* (n 703) paras 51–56, the Commission decided that a State can foresee even a very short timeframe within which the application for review of the lawfulness of detention must be filed. However, a deadline of 24 hours that started running when the applicant was notified of the detention order – which was drafted in a language not understandable to the extraditee, and made no mention of the possibility of review or the 24 hours deadline – was found to violate Article 5(4) ECHR.

722 *Kolompar c la Belgique* (n 91) para 75; *Kadem v Malta* (n 676) para 41; *Nasrulloev v Russia* (n 195) para 86; *Ismoilov and others v Russia* (n 195) para 145; *Shchebet v Russia* (n 195) para 75; *Soldatenko v Ukraine* (n 195) para 125; *Muminov v Russia* (n 288) para 113; *Eminbeyli v Russia* (n 89) para 63; *Svetlorusov v Ukraine* (n 200) para 57; *Kaboulov v Ukraine* (n 87) para 151; *Khodzhayev v Russia* (n 10) para 121; *Khaydarov v Russia* (n 10) para 137; *Gafarov v Russia* (n 10) para 165; *Sultanov v Russia* (n 662) para 88.

723 *Kolompar c la Belgique* (n 91) para 75.

724 *Ismoilov and others v Russia* (n 195) para 147.

out in law in the context of extradition,⁷²⁵ this does not hold true for transfers of piracy suspects. Also, there is a real danger that piracy suspects detained on suspicion of criminal activity by States considering them to be “extraordinary suspects” are getting “caught in a vicious circle of shifted responsibility” and thus not benefitting from any remedy. For instance, the German Federal Government argues that piracy suspects arrested and detained by German forces contributing to EUNAVFOR do not enter the door of domestic criminal law unless certain criteria are met. Rather, they are in “international law custody”, which carries the consequence that the judicial avenues of German law are closed, while such avenues are absent on the level of EUNAVFOR. In short, this demonstrates that *which* justificatory ground, for example Article 5(1)(c) or (f) ECHR, deprivation of liberty of piracy suspects is based on is not without consequence.⁷²⁶ The status of piracy suspects as either being detained for prosecution in the seizing State or for transfer to a third State has repercussions on the availability of domestic remedies, which are generally not the same for both kinds of deprivation of liberty.

Moreover, as to the constraint that there must be a realistic opportunity of using the remedy, the Court also expressed its concern regarding a law that provided only criminal suspects with review of detention. Under the specific domestic law, persons detained with a view to extradition did not fall within this category and, due to a lack of standing to bring a complaint, were deprived of their right to a remedy as required by Article 5(4) ECHR.⁷²⁷ Hence, domestic law must foresee a remedy to challenge the lawfulness of detention pending extradition that is open to persons subject to extradition in the sense of Article 5(1)(f) ECHR, regardless of their legal status under national law. This finding equally applies to piracy suspects detained with a view to their transfer since this method of surrender is covered by Article 5(1)(f) ECHR. As a result, any newly created method for surrender for prosecution – one that has “transferees” rather than, for example, “extraditees” – must be free from the consequence that detained persons subject to this measure are stripped of all remedies. The same holds true for suspects deprived of their liberty on suspicion of criminal activity. By considering piracy suspects to be “extraordinary suspects” and thus not falling within the category of ordinary criminal suspects – with the repercussion that they are not able to enter the door of domestic criminal law and take the judicial avenues leading from there – seems problematic in light of Article 5(4) ECHR.

725 See, eg, Section 22 Model Law on Extradition (n 207) governing proceedings after the arrest of the person sought (notably stipulating that the competent judicial authority of the arresting State shall order the detention of the person in custody) and Section 23(2). See also Article 14 EU Decision on the European arrest warrant.

726 See above Part 4/I/B/2.

727 *Nasrulloev v Russia* (n 195) paras 88–90; *Sultanov v Russia* (n 662) para 91; *Soldatenko v Ukraine* (n 195) para 126; *Svetlorusov v Ukraine* (n 200) para 58, referring to *Soldatenko v Ukraine* (n 195).

Also under Article 9(4) ICCPR, the person deprived of his liberty must be provided with a realistic opportunity of using the remedy.⁷²⁸ The Human Rights Committee opined that this requires proceedings testing the lawfulness of detention to be simple, expeditious and free of charge if the person deprived of his liberty does not have the necessary means to pay for them.⁷²⁹ Furthermore, the Committee has stressed in various views that the remedy of having the lawfulness of detention reviewed must be effectively available. This is notably not the case where persons are barred from challenging their arrest and detention because they are held *incommunicado*.⁷³⁰ Moreover, situations where the writ of *habeas corpus* as granted under domestic law is inapplicable to specific persons – in the cases at hand, the writ did not apply to persons detained under “prompt security measures” – are considered to be a denial of an effective remedy.⁷³¹ Hence, also in light of Article 9(4) ICCPR, it may be problematic to consider piracy suspects to be “extraordinary suspects” if the consequence is a denial of access to domestic *habeas corpus* proceedings.

e) **Obtain a Decision Speedily or without Delay**

Article 5(4) ECHR entitles everyone deprived of his liberty to have the lawfulness of his detention “decided speedily by a court”. The speediness requirement encompasses two obligations: to promptly provide detained persons with an opportunity to seek judicial review, as we have already discussed,⁷³² and to conduct review proceedings with due diligence,⁷³³ to which we turn now.

Besides being another safeguard against arbitrary detention, which is the very purpose of Article 5 ECHR, the Court also justified the necessity for a swift decision on the lawfulness of detention by reference to the presumption of innocence. In *Khudyakova v Russia*, the Court argued that when trial is pending, a defendant can only fully benefit from the presumption of innocence if the decision on the lawfulness of detention on suspicion of criminal activity is taken with the necessary speed. It continued to state that the “same logic may be applicable to detention pending extradition when the investigation is pending”.⁷³⁴

728 See below Part 4/II/C/4/d.

729 Pati (n 314) 48.

730 *ibid.*

731 *ibid.*; *Santullo Valcada v Uruguay* Comm no 9/1977 (HRC, 26 October 1979) paras 2 and 12, and *Torres Ramirez v Uruguay* Comm no 4/1977 (HRC, 23 July 1980) paras 2 and 18.

732 See above Part 4/II/C/2.

733 *Khudyakova v Russia* (n 284) paras 97–98.

734 *ibid.* para 92. This argument is in line with the decisions of the Court that the presumption of innocence as guaranteed by Article 6(2) ECHR not only applies to criminal proceedings *stricto sensu* but also to extradition proceedings; see below Part 5/III/D/4/a.

The speediness requirement applies to all forms of detention,⁷³⁵ yet the actual amount of time satisfying the speediness requirement varies between different forms of detention and also depends on the specificities of a given case.⁷³⁶ Hence, the concept that a decision must be taken “speedily” cannot be defined in the abstract. Rather, and thus similar to the “reasonable time” requirement in Articles 5(3) and 6(1) ECHR, it must be determined in light of the circumstances of each case by taking various factors into account.⁷³⁷ Despite referring to a case-by-case determination, the case law of the Strasbourg organs provides some general guidance for assessing whether the right to a speedy judicial decision has been respected. The period to be taken into account starts when either the request for review is lodged or when the application for release is made.⁷³⁸ If administrative proceedings are a prerequisite to judicial oversight of the lawfulness of detention pending extradition, the submission of the request to the relevant administration triggers the time limit.⁷³⁹ The final determination of the legality of the applicant’s detention, including any appeals, signals the end of the period to be taken into account for assessing the speediness requirement.⁷⁴⁰ Hence, if there are two levels of jurisdiction in a given case, an overall assessment must be made with regard to the speediness requirement.⁷⁴¹

The factors to be considered when assessing the speediness requirement are similar to those of the reasonable time requirement under Article 5(3) ECHR and Article 6(1) ECHR, including the complexity of a case and the diligence shown by the authorities.⁷⁴² In *Sanchez-Reisse*, the respondent State invoked various factors explaining or excusing the length of time that had elapsed between the lodging of the application and the taking of the decision on lawfulness regarding detention with a view to extradition. Regardless of these factors, the Court stressed that

735 Regarding detention with a view to extradition, the right to a speedy judicial decision was confirmed by the Court in various cases: *Bordovskiy v Russia* (n 278) para 64; *Garabayev v Russia* (n 283) para 94; *Nasrulloev v Russia* (n 195) para 86; *Ismoilov and others v Russia* (n 195) para 145; *Soldatenko v Ukraine* (n 195) para 125; *Muminov v Russia* (n 288) para 113; *Khudyakova v Russia* (n 284) para 92; *Khodzhayev v Russia* (n 10) para 121; *Khaydarov v Russia* (n 10) para 137; *Abdulazhon Isakov v Russia* (n 662) para 129; *Gaforov v Russia* (n 10) para 165.

736 Council of Europe/European Court of Human Rights (n 69) para 190; Esser (n 9) 318.

737 Council of Europe/European Court of Human Rights (n 69) para 190; for review of detention based on Article 5(1)(f) ECHR, see, eg, *Sanchez-Reisse v Switzerland* (n 674) para 55; *Kadem v Malta* (n 676) para 43.

738 Council of Europe/European Court of Human Rights (n 69) para 193; for review of detention based on Article 5(1)(f) ECHR specifically, see: *Sanchez-Reisse v Switzerland* (n 674) para 61.

739 *Sanchez-Reisse v Switzerland* (n 674) para 55.

740 Council of Europe/European Court of Human Rights (n 69) para 193.

741 *ibid* para 195.

742 *Mooren v Germany* App no 11364/03 (ECtHR, 9 July 2009).

the “fact nevertheless remains that the applicant was entitled to a speedy decision – whether affirmative or negative – on the lawfulness of his custody”.⁷⁴³ This statement reflects the broader understanding of the Court that Article 5(4) ECHR encompasses a positive obligation upon Contracting States, namely the duty to organize their judicial system in such a way that their courts can meet the obligation to examine detention “speedily”.⁷⁴⁴ Finally, whether (and, if so, how) the applicant’s conduct is factored in has not been precisely answered by the Strasbourg organs thus far regarding detention pending extradition.⁷⁴⁵ For review proceedings concerning detention on suspicion of criminal activity, the Court does not exclude the behaviour of the applicant from being taken into account when assessing the “speediness” requirement.⁷⁴⁶

In application of these criteria, the Commission considered ten days⁷⁴⁷ and the Court 17 days⁷⁴⁸ as being excessively long when deciding on the lawfulness of detention with a view to extradition proceedings. On appeal, periods of 36 days⁷⁴⁹ and 46 days⁷⁵⁰ respectively were considered to be in violation of Article 5(4)

743 *Sanchez-Reisse v Switzerland* (n 674) paras 56–57. Among the reasons invoked by the State Party for justifying the delay were the mixed administrative and judicial nature of the review proceedings, the fact that the decision on innocence or guilt is taken by a foreign court, the gravity of the alleged offence, the risk of the suspect absconding and the complexity of extradition questions.

744 *Eminbeyli v Russia* (n 89) para 67. Thus, for instance, neither an excessive workload nor a vacation period can justify a period of inactivity of domestic judicial authorities: Council of Europe/European Court of Human Rights (n 69), para 202.

745 See above Part 4/I/B/1/c/cc.

746 See, eg, *Mooren v Germany* (n 742); and *Rokhlina v Russia* App no 54071/00 (ECtHR, 7 April 2005) para 79: The Court found that the total duration of the proceedings (41 days for two levels of jurisdiction) was in line with Article 5(4) ECHR. The Court noted that the applicant had requested leave to appear in person at the appeal court and for this reason the court had to adjourn the proceedings for one week.

747 The case law of the Commission on the requirement of speediness for *habeas corpus* proceedings in the context of extradition is scarce. In *Farmakopoulos c la Belgique* (n 703) para 54, the Commission stated that a law, which foresees a minimum period of ten days for a decision on the lawfulness to be rendered, is not in line with Article 5(4) ECHR. In *Kolompar c la Belgique* (n 91) para 74, the decision on the lawfulness was taken six months after submission of the application and the appeal was not yet decided after a period of 15 months has elapsed; these periods were obviously not in line with Article 5(4) ECHR.

748 The Court decided in extradition-specific cases that the following time limits for a first instance decision did not meet the speediness requirement of Article 5(4) ECHR: 17 days (*Kadem v Malta* (n 676) paras 44 and 45), 18 days (*Khudyakova v Russia* (n 284) paras 99 and 100), 31 days (*Sanchez-Reisse v Switzerland* (n 674) paras 4 and 59) and 11 weeks (*Eminbeyli v Russia* (n 89) para 67).

749 *Khudyakova v Russia* (n 284) paras 99–100.

750 *Sanchez-Reisse v Switzerland* (n 674) paras 54 and 60.

ECHR. Regarding detention on remand, the presumption of innocence requires that the authorities carry out a particularly speedy review.⁷⁵¹ From these time limits follows that the word “promptly” as used in Article 5(3) ECHR indicates greater urgency than “speedily” as used in Article 5(4) ECHR.⁷⁵² Furthermore, the time limits reflect the Court’s finding that the “speediness” standard is to be interpreted less strictly in appellate review proceedings. It argued that the primary goal of Article 5(4) ECHR is to avoid arbitrary deprivation of liberty. Thus, the detention must be considered to be lawful and not arbitrary if it has already been confirmed by a court of first instance, even if the decision is subject to appeal. The second level of jurisdiction is less concerned with arbitrariness, but rather aims at providing additional guarantees in order to evaluate the appropriateness of continued detention.⁷⁵³

While Article 5(3) ECHR requires that review proceedings “shall be decided speedily by a court”, Article 9(4) ICCPR stipulates that the decision relating to the lawfulness of detention must be made “without delay”. As to the permissible delay of a court rendering its decision regarding the lawfulness of detention, the Human Rights Committee stressed that “as a matter of principle, the adjudication of a case by any court of law should take place as expeditiously as possible”. However, this does not mean that “precise deadlines for the handing down of judgments” can be set, which, if not observed, automatically implies that a decision was delayed in violation of Article 9(4) ICCPR. Rather, a case-by-case assessment is necessary.⁷⁵⁴ When doing so, the nature of deprivation of liberty must be taken into account.⁷⁵⁵

Overall, both the Strasbourg organs and the Human Rights Committee stress on the one hand that a decision on the lawfulness of detention must be issued without delay. Yet, on the other hand, the permissible time that may elapse between the application for judicial review and its decision is heavily dependent on the specificities of each case. With regard to Article 5(3) ECHR, the European Court of Human Rights interpreted the notion of “promptness” quite broadly in the context of deprivation of liberty taking place on the high seas far from the intercepting State as compared to arrest and detention occurring in a territorial, land-based context.⁷⁵⁶ Whether it will do the same with regard to the speediness requirement of Article 5(4) ECHR is yet to be seen. The Human Rights Committee has not yet had a chance to evaluate the time restrictions of Article 9(3) and (4) ICCPR with regard to deprivation of liberty in an extraterritorial, maritime con-

751 Council of Europe/European Court of Human Rights (n 69) para 199.

752 *ibid* para 192.

753 *Khudyakova v Russia* (n 284) para 93.

754 *Torres v Finland* Comm no 291/1988 (HRC, 2 April 1990) para 73.

755 *Carlson and Gisvold* (n 76) 86.

756 See above Part 4/II/B/4/c/aa.

text. Hence, its stance on the acceptable delay in rendering a decision in *habeas corpus* proceedings in the counter-piracy context is not clear either.

5. A Court Must Take the Decision – Of Which State?

a) The Notion of “Court”

According to Article 5(4) ECHR, the lawfulness of detention shall be decided by a “court”. This body must not necessarily be “a court of law of the classic kind integrated within the standard judicial machinery of the country”.⁷⁵⁷ Yet, it must be a body possessing judicial character, independent of the executive and parties to the case, impartial, based on a law and offering certain procedural guarantees.⁷⁵⁸ If the applicant lodges more than one application for release, it is in line with Article 5(4) ECHR that the same magistrate presides over all the *habeas corpus* proceedings.⁷⁵⁹ Furthermore, the provision does not compel State Parties to set up a second level of jurisdiction to review the lawfulness of detention. However, if an appeal system is installed, it must “in principle accord to the detainees the same guarantees on appeal as at first instance”.⁷⁶⁰ Finally, a court in the sense of Article 5(4) ECHR must have the power to order termination of the deprivation of liberty if it proves to be unlawful.⁷⁶¹ Since the judicial review must be capable of leading to the person’s release if appropriate,⁷⁶² a court that only has the power to take provisional decisions without “*l’autorité de la chose jugée*” would not be in line with Article 5(4) ECHR.⁷⁶³

As for detention with a view to extradition, the Court has had to decide whether it is compatible with Article 5(4) ECHR to require that an applicant first apply to an administrative body on the matter in question, which then renders

757 *Weeks v the United Kingdom* App no 9787/82 (ECtHR, 2 March 1987) para 61.

758 Council of Europe/European Court of Human Rights (n 69) para 181; Peukert (n 125) 130; Esser (n 9) 303.

759 Specifically regarding detention with a view to extradition, see *Stephens v Malta (No 1)* (n 277) para 96.

760 Specifically regarding detention with a view to extradition, see, *Khudyakova v Russia* (n 284) para 93; *Stephens v Malta (No 1)* (n 277) para 95; in general, see Council of Europe/European Court of Human Rights (n 69) para 183.

761 Specifically with regard to detention pending extradition, see, *Kadem v Malta* (n 676) para 41; *Khudyakova v Russia* (n 284) para 92.

762 *Garabayev v Russia* (n 283) para 94; *Nasrulloev v Russia* (n 195) para 86; *Ismoilov and others v Russia* (n 195) para 145; *Shchebet v Russia* (n 195) para 75; *Soldatenko v Ukraine* (n 195) para 125; *Muminov v Russia* (n 288) para 113; *Eminbeyli v Russia* (n 89) para 63; *Kaboulov v Ukraine* (n 87) para 151; *Khodzhayev v Russia* (n 10) para 121; *Khaydarov v Russia* (n 10) para 137; *Abdulazhon Isakov v Russia* (n 662) para 129; *Gaforov v Russia* (n 10) para 165; *Sultanov v Russia* (n 662) para 88.

763 *Kolompar c la Belgique* (n 91) para 74.

an opinion, prior to petitioning a court. In *Sanchez-Reisse*, the Court considered that the intervention by the executive did not impede the applicant's access to a court nor did it limit the court's power. Furthermore, it stated that "as extradition, by its very nature, involves a State's international relations, it is understandable that the executive should have an opportunity to express its views on a measure likely to have an influence in such a sensitive area".⁷⁶⁴ However, as we will see later, the right to be heard requires that the applicant is provided with an opportunity to reply to the executive's opinion. Otherwise the procedure is unbalanced and does not guarantee the "minimum adversarial element" called for by Article 5(4) ECHR.⁷⁶⁵ Moreover, the duration of the administrative proceedings are taken into account when evaluating whether review of the lawfulness was carried out "speedily".⁷⁶⁶ These are considerations to be taken into account regarding the body competent to decide on the lawfulness of detention with a view to transfer – since this new method of surrender has some commonalities with extradition despite the fundamental differences.

According to Article 9(3) ICCPR, review proceedings must take place before a "court". This implies that review must be conducted by a body with the requisite judicial character.⁷⁶⁷ Specifically concerning a person deprived of his liberty with a view to extradition, the Human Rights Committee opined that review by a ministry, while affording some measure of protection and review of legality, does not satisfy the requirement flowing from Article 9(4) ICCPR. Rather, the provision envisages a court deciding on lawfulness in order to "ensure a higher degree of objectivity and independence in such control".⁷⁶⁸ A court in the sense of Article 9(4) ICCPR must possess not just formal power but also real power to review the lawfulness of detention.⁷⁶⁹ It must be able to assess all relevant circumstances of detention, most notably its proportionality.⁷⁷⁰ Furthermore, the body competent for judicial review must have the power to order release if deprivation of liberty turns out to be unlawful.⁷⁷¹ Unlike Article 5(4) ECHR, Article 9(4) ICCPR requires that the lawfulness of detention must be directly reviewed by a court – and not only after review by a body not qualifying as such (eg higher administrative authorities). This stricture put on States does not flow from the requirement that legal review must take place before a court, but is an aspect of the obligation to carry out review "without delay".⁷⁷²

764 *Sanchez-Reisse v Switzerland* (n 674) para 46.

765 *ibid* paras 50–51.

766 *ibid* para 54.

767 *Carlson and Gisvold* (n 76) 86.

768 *Torres v Finland* (n 754) para 7.2.

769 *A v Australia* (n 691) para 7.5.

770 *Nowak, U.N. Covenant on Civil and Political Rights* (n 17) 236.

771 *A v Australia* (n 691) para 7.5.

772 *Nowak, U.N. Covenant on Civil and Political Rights* (n 17) 237.

b) The Courts of the Seizing State

The characteristics that a court must feature in the sense of Article 5(4) ECHR and Article 9(4) ICCPR are not the crucial issue in the context of piracy – like those of a judge or officer in the sense of Article 5(3) ECHR and Article 9(3) ICCPR. The more fundamental question is whether it suffices that the person deprived of his liberty can apply for judicial review in the receiving State rather than the seizing State.⁷⁷³

It is submitted here that under Article 5(4) ECHR and Article 9(4) ICCPR, there is only one body competent to decide on the lawfulness of arrest and detention carried out by the seizing State: a court of the seizing State. This is based on essentially the same arguments as were advanced in the context of the right to be brought promptly before a judge as required by Article 5(3) ECHR and Article 9(3) ICCPR – that the judge of the receiving State is not competent to decide on arrest and detention at sea carried out under the authority of the seizing State. Furthermore, the purpose of the right to be brought before a judge – and also of the right to seek judicial review of detention under Article 5(4) ECHR and Article 9(4) ICCPR – is of a preventive nature and thus cannot be achieved if judicial scrutiny is only granted after transfer, ie when detention at sea has already ended.⁷⁷⁴

D. Right to Consular Assistance

Article 36(1) VCCR provides non-national detainees with the right to communicate with and have access to consular officers and to be informed about these rights. According to case law and doctrine, this provision contains international individual rights stemming from a source other than human rights law.⁷⁷⁵ For in-

773 See above Part 4/I/B/2. Most of the time, the issue is only discussed in relation to the right to be brought before a judge. This mainly stems from the fact that, for some actors, detention of piracy suspects is construed to be based on suspicion of criminal activity (Article 5(1)(c) ECHR) from seizure up until surrender – first by the seizing State on its own behalf and, once it has decided not to prosecute the suspects in its own courts, on behalf of the receiving and ultimately prosecuting State. If detention is qualified in this way – a view that should be rejected – the right to be brought before a judge is available from seizure to surrender. The consequence thereof is that it leaves little room for Article 5(4) ECHR, both in practice and academic discussion.

774 See above Part 4/II/B/6/c/aa.

775 Anne Peters, 'Membership in the Global Constitutional Community' in Jan Kläbers, Anne Peters and Geir Ulfstein (eds), *The Constitutionalization of International Law* (OUP 2009) 168–69; Sital Kalantry, 'The Intent-to-Benefit: Individually Enforceable Rights under International Treaties' (2008) 44 *Stanford Journal of International Law* 63, 94–99; Brittany Whitesell, 'Diamond in the Rough: Mining Article 36(1)(B) of the Vienna Convention on Consular Relations for an Individual Right to Due Process' (2004) 54 *Duke Law Journal* 587, 618–19.

stance, the International Court of Justice adopted this approach in the *LaGrand Case* stating that Article 36(1) VCCR “creates individual rights”.⁷⁷⁶ National courts have embraced this idea as well.⁷⁷⁷

Article 7(1) SUA Convention provides a legal basis for detaining persons suspected of having committed an offence defined in Article 3 SUA Convention for such time as is necessary to enable criminal prosecution or extradition proceedings to be instituted. It is quite likely that persons arrested off the coast of Somalia and the region on suspicion of attacking ships have committed an offence as defined in Article 3 SUA Convention. Furthermore, during the disposition of their cases, it is highly probable that they are either detained with a view to criminal prosecution in the seizing State or for extradition purposes if their transfer is considered.⁷⁷⁸ According to Article 7(3) SUA Convention, persons subject to this type of custody “shall be entitled to ... communicate without delay with the nearest appropriate representative of the State of which he is a national” and to “be visited by a representative of that State”. Article 6 Hostage Convention, which is equally relevant in the context of Somali-based piracy, has virtually the same content as Article 7 SUA Convention.

Like Article 36(1) VCCR, Article 7 SUA Convention and Article 6 Hostage Convention can arguably be understood as providing international individual rights. Yet, the application of these rights to piracy suspects detained during the disposition of their cases is met by two obstacles – one legal and the other practical. The legal obstacle seems surmountable: all three provisions are, *prima facie*, conditioned upon arrest and detention on State territory. Thus, Article 36(1) VCCR refers to deprivation of liberty occurring “within its consular district”, and Article 6 Hostage Convention refers to “any State Party in the territory of which the alleged offender is present” as does Article 7 SUA Convention in very similar terms. Arguably, these implicit and explicit references must be understood as referring to deprivation of liberty taking place in “areas under the State’s jurisdiction”. Only such an interpretation allows for application of the provisions to piracy suspects detained on board a law enforcement vessel of the seizing State, ie where the seizing State undeniably has jurisdiction by virtue of the flag State principle. Various arguments, which will be presented when discussing the reference to “territory” in Article 13 ICCPR,⁷⁷⁹ advocate for such a teleological interpretation. However, alleged Somali-based pirates may nevertheless fail to benefit

776 *LaGrand Case (Germany v United States of America)* (Judgment) [2001] ICJ Rep 2001, 494, para 77.

777 This notably holds true for the German Constitutional Court; for a discussion of the respective decision, see Klaus Gärditz, ‘Article 36, Vienna Convention on Consular Relations – Treaty Interpretation and Enforcement – International Court of Justice – Fair Trial – Suppression of Evidence’ (2007) 101 *American Journal of International Law* 627.

778 See above Part 4/I/C/3/c.

779 See below Part 5/III/C/2/a/cc.

from the content of these rights due to a practical obstacle: the lack of a solid and effective network of Somali consular representatives in the States potentially seizing and detaining piracy suspects on board their law enforcement vessels for the purpose of disposition.

III. Conclusions on Arrest and Detention

The foregoing analysis has shown that the “extraordinary suspect” approach to arrest and detention of piracy suspects conflicts with several prescripts flowing from the right to liberty – both on the level of legality of arrest and detention and regarding the procedural safeguards to be granted to persons deprived of their liberty.

Whether to respect the requirements flowing from the right to liberty, which have the purpose of ensuring that no one is deprived of his liberty in an unjustified and arbitrary manner, is not at the discretion of the State. In *El-Masri*, the Grand Chamber of the European Court of Human Rights stressed yet again that although the investigation of a specific type of criminality, *in casu* terrorist offences, “undoubtedly presents the authorities with special problems, that does not mean that the authorities have *carte blanche* under Article 5 [ECHR] to arrest suspects and detain them in police custody, free from effective control by the domestic courts”.⁷⁸⁰ Patrolling naval States indeed encounter special difficulties in counter-piracy operations and specifically regarding the arrest and detention of piracy suspects. Some ensue from the fact that the case is in limbo during disposition – the very objective of which is to determine whether the suspects will be prosecuted and, if so, in which criminal forum. Taken together with the fact that a unique method for surrender is employed – transfers rather than the classical method of extradition – renders the determination of the applicable justificatory ground for deprivation of liberty rather difficult. Further, in a number of jurisdictions, the ordinary domestic legal framework governing deprivation of liberty, including procedural safeguards, is not applicable to the military, which is, *nota bene*, responsible for enforcing the law against Somali-based pirates. What is more, arrest and detention takes place far from the mainland authorities of the seizing State competent for review of the legality of arrest and detention. And, finally, some interpretational challenges in relation to the right to liberty – notably whether the seizing State is responsible for discharging the obligations flowing from the right or whether this can be done by the receiving and ultimately prosecuting State – arise from the fact that States closely cooperate in the suppression of piracy and armed robbery at sea. Yet, as the European Court of Human Rights quite firmly stated, these difficulties and challenges do not provide patrolling naval States with a *carte blanche* in terms of arrest and detention. Rather, notwithstanding the operational and contextual challenges involved in the investigation

780 *El-Masri v ‘the former Yugoslav Republic of Macedonia’* (n 90) para 232.

and prosecution of piracy cases, the right to liberty must be respected in every situation.

While respect for the right to liberty as such is beyond question, the fact that the arrests occurs at sea and that piracy suspects are detained on board a law enforcement vessel of the seizing State *may* necessitate some concession as regards the substance of the various procedural safeguards to be granted by virtue of Article 5 ECHR and Article 9 ICCPR. However, in doing so, it is crucial to distinguish which requirements of the right to liberty cannot be respected because of the “wholly exceptional circumstances” in which arrest and detention of specific piracy suspects takes place, and to identify where the failure to comply with the right to liberty is due to a lack of planning and preparation or due to the inexistence of a pertinent legal framework. At least in the context of domestic and land-based law enforcement, the Court has repeatedly stressed that “[i]t is for the Contracting States to organise their legal system in a way that their law-enforcement authorities can meet the obligation to avoid unjustified deprivation of liberty”.⁷⁸¹ That this should not hold true for counter-piracy operations, which were launched in late 2008 and have been ongoing ever since, can hardly be contended.

The example of France demonstrates that there is no clear-cut dividing line between what is deemed to be impossible to grant (or in light of current human rights law even unnecessary) in terms of procedural protection against arbitrary and unjustified arrest and detention at sea and what is not granted because of a lack of planning or the inexistence of relevant law. In its preliminary observations in the *Medvedyev* case before the European Court of Human Rights, France stressed that arrest and detention “had taken place on the high sea, so that it was necessary to take into account the specificities of the maritime environment and of navigation at sea”.⁷⁸² It further argued that “for want of any provisions in the Convention ... concerning maritime matters” the ECHR is inapplicable *ratione materiae*.⁷⁸³ In the alternative, it suggested “that freedom to come and go on board a ship has more restrictive limits, which were the confines of the ship itself” and, therefore, holding persons on board a ship does not amount to deprivation of liberty.⁷⁸⁴ Not even one year after the final decision of this case by the Grand Chamber, France added a new section to its Defence Code pertaining to enforcement measures taken against persons on board ships. One provision of this rather exemplary law regarding deprivation of liberty at sea stipulates that a judge must decide within 48 hours after an arrest at sea whether it can be prolonged or whether it must be terminated.

781 *Eminbeyli v Russia* (n 89) para 49.

782 *Medvedyev and Others v France* (Grand Chamber) (n 1) para 49.

783 *ibid.*

784 *ibid* para 50.

The example of France not only demonstrates that judicial intervention is, technically and operationally speaking, possible for deprivation of liberty at sea. But it also demonstrates the necessity that arrest and detention at sea by any domestic authority is governed by appropriate legal rules. It is against this background that the Security Council's invitation to States "to examine their domestic legal frameworks for detention at sea of suspected pirates to ensure that their laws provide reasonable procedures, consistent with applicable international human rights law"⁷⁸⁵ must be understood.

In conclusion, to consider piracy suspects to be "extraordinary suspects" for whom the door of criminal law is closed (except for the rarity that the seizing State decides to prosecute the cases in its own courts) and, therefore, also every avenue leading to protection against unjustified and arbitrary arrest and detention, is incompatible with the right to liberty and security of persons. What is more, it denies piracy suspects the crucial status of *subjects* and, in turn, "the right to have rights".⁷⁸⁶

785 UNSC Res 1976 (11 April 2011) UN Doc S/RES/1976, para 16.

786 This expression stems from Hannah Arendt, who is quoted by Judge Pinto de Albuquerque in his concurring opinion in *Hirsi Jamaa and Others v Italy* App no 27765/09 (Grand Chamber, ECtHR, 23 February 2012), which is a decision of great relevance in the context of removal of persons intercepted at sea; on the expression coined by Arendt, see also Peters, 'Membership in the Global Constitutional Community' (n 775) 158–59.

Part 5 Transfer Decision Procedure in Light of International Individual Rights

Patrolling naval States are only exceptionally willing and able to prosecute the suspects they take captive in their domestic courts. The vast majority of suspects are instead prosecuted by third States, mainly from the region prone to piracy – and transfers serve as the prevalent means by which to put alleged pirates in the hands of the ultimately prosecuting State.

The current transfer practice features two main characteristics, which need closer scrutiny in terms of the international individual rights of piracy suspects. Firstly, piracy suspects are not in any way associated to the proceedings in which their potential transfer is decided. As a consequence, they cannot exercise any procedural rights during these proceedings. Another feature of the current transfer practice is that no individual non-refoulement assessment takes place. Rather, actors involved in transfers of piracy suspect consider the non-refoulement principle to be respected by the very fact that they have concluded a transfer agreement with the receiving State. Whether current transfer practice is in line with the international individual rights of piracy suspects is analysed in the following.

Thereby, it is first discussed whether international law provides piracy suspects with either an absolute or a conditional right not to be surrendered for prosecution to a third State. The conclusion is that no absolute prohibition of transfer of piracy suspects exists, but that the principle of non-refoulement may prohibit a specific transfer for prosecution if there is a real risk that certain human rights of the specific piracy suspect will be violated upon transfer. In light of this conditional right not to be transferred flowing from the non-refoulement principle, we will then probe the argument that a non-refoulement assessment on an individual basis, ie with regard to a specific piracy suspect, is unnecessary since a global non-refoulement assessment has already taken place, as a precondition to concluding a transfer agreement with the regional State. Lastly, it is discussed whether it is compatible with current human rights law that piracy suspects are not associated to proceedings potentially leading to their transfer and, as a consequence, that they are not granted any procedural safeguards – except for being informed that their transfer is considered or imminent.

I. A Conditional Right Not to Be Transferred: Non-Refoulement

This following analysis focuses on whether international law provides piracy suspects with either an absolute right or a conditional right not to be surrendered to a third State for prosecution. As a first step, the argument put forward by some scholars that the piracy provisions of the law of the sea – concretely Article 105 UNCLOS and Article 19 of the Convention on the High Seas – prohibit transfers to third States as such is confuted. Secondly, it discusses how human rights law – similar to the law of the sea – does not contain an absolute right not to be surrendered for prosecution either. However, it will be shown that the prohibition of refoulement explicitly or implicitly contained in human rights law may bar a specific transfer if there is a real risk that certain rights of the piracy suspect will be violated upon transfer. It will further demonstrate that this conditional right not to be surrendered to a third State for prosecution flowing from the principle of non-refoulement applies to piracy suspects, and describe the harms potentially inflicted upon transfer that may bar a specific transfer.

A. No Transfer Prohibition Flowing from the Law of the Sea

Some scholars argue that according to Article 105 UNCLOS (and the identically worded Article 19 of the Convention on the High Seas), only the seizing State is competent to criminally prosecute piracy suspects. In other words, these provisions only provide the seizing State – that is, the *forum deprehensionis* – with adjudicative jurisdiction at the exclusion of any other State. Consequently, these provisions prohibit transfers of piracy suspects to third States for criminal prosecution *as such*, regardless of the means employed or the State alleged pirates are transferred to.¹

Article 105 UNCLOS and Article 19 of the Convention on the High Seas are the only provisions of the law of the sea dealing with the criminal prosecution of piracy suspects upon seizure. The second sentence of both provisions reads: “The courts of the State which carried out the seizure may decide upon penalties to be imposed, and may also determine the action to be taken with regard to the ships, aircraft or property, subject to rights of third parties acting in good faith.” It is submitted here that Article 105 UNCLOS and Article 19 of the Convention on the High Seas cannot be read as precluding the surrender of suspects to third States

1 Eg, this position is maintained by Eugene Kontorovich, ‘International Legal Responses to Piracy off the Coast of Somalia’ (6 February 2009) <www.asil.org/insights090206.cfm> accessed 29 January 2013; Eugene Kontorovich, ‘A Guantánamo on the Sea’: The Difficulty of Prosecuting Pirates and Terrorists’ (2010) 98 California Law Review 243, 270; and Andreas Fischer-Lescano and Lena Kreck, ‘Piraterie und Menschenrechte: Rechtsfragen der Bekämpfung der Piraterie im Rahmen der europäischen Operation Atalanta’ (2009) 47 Archiv des Völkerrechts 481, 514–15 and 521.

for prosecution, ie that it contains a limited universality principle providing only the seizing State with the competence to prosecute.

Proponents of the theory of the limited universality principle support their view with the very short commentary of the International Law Commission on the almost identically worded draft provision of Article 19 of the Convention on the High Seas. This commentary reads as follows:

This article gives any State the right to seize pirate ships (and ships seized by pirates) and to have them adjudicated upon by its courts. This right cannot be exercised at a place under jurisdiction of another State. The Commission did not think it necessary to go into details concerning the penalties to be imposed and the other measures to be taken by courts.²

However, as to the second sentence of the commentary (“This right...”), it is unclear whether the International Law Commission is referring to the right to seize a pirate ship or the right to prosecute suspects. This leaves it open to debate whether enforcement jurisdiction (seizure) or adjudicative jurisdiction (criminal prosecution) “cannot be exercised at a place under the jurisdiction of another State”. A teleological interpretation suggests that the right to seize cannot be exercised in a foreign jurisdiction, but that a person suspected of having engaged in piracy can be prosecuted by any State. This argument is supported by the fact that the International Law Commission basically endorsed the Harvard Draft Convention on Piracy,³ which contains the idea that any State having lawful custody of a piracy suspect may prosecute and punish that person.⁴ Further, even if the International Law Commission is referring to the right to prosecute, it would

2 ILC, ‘Articles concerning the Law of the Sea with commentaries’ in ‘Report of the International Law Commission covering the work of its eighth session’ (23 April–4 July 1956) UN Doc A/3159, 283 (commentary relating to Article 43).

3 *ibid*: “In its work on the articles concerning piracy, the Commission was greatly assisted by the research carried out at the Harvard Law School, which culminated in a draft convention of nineteen articles with commentary, prepared in 1932 under the direction of Professor Joseph Bingham. In general, the Commission was able to endorse the findings of that research.”

4 Article 14(1) Harvard Draft Convention on Piracy, Codification of International Law, Part IV – Piracy, (1932) 26 *American Journal of International Law Supplement* 739: “A state which has lawful custody of a person suspected of piracy may prosecute and punish that person.” The provision does not curtail the right to the State, which carried out the seizure, but rather allows for surrenders for prosecution to third States. The Commentary relating to this provision of the Harvard Draft Convention on Piracy cites the following sentence of Halleck, *International Law* (Vol I, 3rd ed) 54, which is very explicit in that regard: “Certain offences against this law – as piracy, for example – wheresoever and by whomsoever committed, are within the cognizance of the judicial power of every State; for, being regarded as the common enemies of all mankind, any one may lawfully capture pirates upon the high

only suggest that the seizing State cannot exercise its own judicial power in a foreign jurisdiction. This, however, does not preclude a third State from exercising its own independent criminal jurisdiction.⁵

Under customary international law every State is competent to prosecute piracy suspects.⁶ Against this background, it is difficult to see why the drafters of Article 19 of the Convention on the High Seas and Article 105 UNCLOS would have limited the competence to prosecute to the seizing State and thus implicitly prohibiting surrenders to third States for prosecution. If the long-standing universality principle had been narrowed down so significantly, a word of explanation in the drafting materials would certainly have been required – all the more since piracy is the paradigmatic⁷ universal jurisdiction crime. However, the *travaux préparatoires* pertaining to Article 105 UNCLOS and Article 19 of the Convention on the High Seas are silent in this respect, which suggests that no such limitation was intended and introduced in these provisions.

What is more, if these provisions are read as prohibiting removals for prosecution as such, they would stand in direct opposition to the Hostage and SUA Conventions, which establish a duty to extradite if the seized person is not prosecuted by the seizing State.⁸ The SUA Convention even goes a step further by allowing “private removals”: the master of a private ship may deliver persons suspected of having engaged in a SUA offence to a third State.⁹ Both treaties are highly relevant in the suppression of Somali-based piracy¹⁰ and the Security Council has repeatedly urged States to implement the obligations flowing from them.¹¹ Moreover, the Security Council has called upon States at numerous times to cooperate in determining jurisdiction with a view to prosecute piracy sus-

seas, and the tribunals of any State, *within whose territorial jurisdiction they may be brought*, can try and punish them for their crimes.” (emphasis added): *ibid* 852.

5 Douglas Guilfoyle, ‘Counter-Piracy Law Enforcement and Human Rights’ (2010) 59 *International & Comparative Law Quarterly* 141, 144–45.

6 Robin Geiss and Anna Petrig, *Piracy and Armed Robbery at Sea: The Legal Framework for Counter-Piracy Operations in Somalia and the Gulf of Aden* (OUP 2011) 143–47.

7 Princeton Project on Universal Jurisdiction, ‘The Princeton Principles on Universal Jurisdiction’ (2001) <http://lapa.princeton.edu/hosteddocs/unive_jur.pdf> accessed 29 January 2013, 45.

8 Geiss and Petrig (n 6) 163–64; for reasons why the extradite-or-prosecute clause is not only applicable if the alleged offender is found on the *territory* of a State party but also if he is held on board a law enforcement vessel of the seizing State, see *ibid*.

9 See above on deliveries Part 1/IV/A/2.

10 Most attacks against ships and persons on board carried out by Somali-based pirates fulfil one or more of the offences described in Article 1 Hostage Convention and Article 3 SUA Convention.

11 See above Part 1/II/B/2.

pects.¹² This suggests that the seizing State has the power to surrender a piracy suspect to a third State with a view to prosecute.

For all these reasons, Article 105 UNCLOS and Article 19 of the Convention on the High Seas cannot be read as limiting the competence to prosecute piracy suspects to the seizing State and prohibiting transfers for prosecution as such. The First Instance Court of Rotterdam came to this conclusion in the *Samanyolu* case,¹³ and it also finds support in doctrine.¹⁴ Therefore, the question can be left unanswered whether Article 105 UNCLOS and Article 19 of the Convention on the High Seas only contain interstate obligations or whether the provisions confer individual rights to piracy suspects subject to transfer for prosecution.

B. A Conditional Right Not to be Transferred under Human Rights Law

The law of the sea does not prohibit the surrender of piracy suspects to third States for prosecution and therefore does not bar transfers as such. As we will see next, human rights law does not contain an absolute right not to be removed for prosecution either.¹⁵ However, the principle of non-refoulement explicitly or

¹² See above Part 1/II/B/1.

¹³ *Re 'MS Samanyolu'* LJN: BM8116, Urteil, Anlage I (Gericht 1. Instanz Rotterdam, 17 June 2010), Übersetzung aus der niederländischen/englischen Sprache; German translation on file with author, 3; *Re 'MS Samanyolu'* LJN: BM8116, Judgment (Rotterdam District Court, 17 June 2010), English translation provided by UNICRI, 2; see the quite extensive analysis of Article 105 UNCLOS made by the prosecutor: *Re 'MS Samanyolu'* LJN: BM8116, Urteil [Antrag der Staatsanwaltschaft] (Gericht 1. Instanz Rotterdam, 17 June 2010), Übersetzung aus der niederländischen/englischen Sprache; German translation on file with author, 81–90.

¹⁴ This conclusion is namely supported by: Claus Kreß, 'Die moderne Piraterie, das Strafrecht und die Menschenrechte: Gedanken aus Anlass der deutschen Mitwirkung an der Seeoperation ATALANTA' in Dieter Weingärtner (ed), *Die Bundeswehr als Armee im Einsatz: Entwicklungen im nationalen und internationalen Recht* (Nomos 2010) 117; Douglas Guilfoyle, 'Treaty Jurisdiction over Pirates: A Compilation of Legal Texts with Introductory Notes' (Prepared for the 3rd Meeting of Working Group 2 on Legal Issues, Contact Group on Piracy off the Coast of Somalia, Copenhagen, 26–27 August 2009) <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1537272> accessed 29 January 2013, 6, para 21; Tullio Treves, 'Piracy, Law of the Sea, and Use of Force: Developments off the Coast of Somalia' (2009) 20 *European Journal of International Law* 399, 402. On how the provision can be understood if not interpreted as containing a limited universality principle, see Geiss and Petrig (n 6) 148–51.

¹⁵ Most statements do not refer to the umbrella term "surrender for prosecution" or "removal for prosecution". Rather, they state that there is no right not to be deported or not to be extradited under human rights law. Even though there is no unequivocal definition of the term "deportation", it generally refers to the enforcement of a decision or order requiring the departure of an alien, which is issued under immigration law: ILC, 'Expulsion of Aliens: Memorandum of the Secretariat' (58th Ses-

implicitly contained in various human rights treaties may prohibit a State from transferring a specific piracy suspect to a specific destination. In other words, it contains a conditional right not to be transferred if there is a real risk that certain human rights violations will occur upon surrender for prosecution.¹⁶

1. No Absolute Right Not to Be Transferred under Human Rights Law

Human rights law – specifically the ECHR, ICCPR and CAT – does not confer piracy suspects with an absolute right not to be transferred and, consequently, transfers are not *per se* in breach of it.¹⁷

Both the European Commission of Human Rights and the European Court of Human Rights have repeatedly opined that the right not to be extradited (understood very broadly in the present context as encompassing transfers)¹⁸ is not included as such among the rights and freedoms of the ECHR.¹⁹ Rather, the Strasbourg organs have recognized the “beneficial purpose of extradition in preventing fugitive offenders from evading justice”²⁰ and have held that it is in the

sion, Geneva, 1 May–9 June and 3 July–11 August 2006) UN Doc A/CN.4/565, para 91. Since transfers of piracy suspects do not display the characteristics of deportations (most notably they do not qualify as extradition in disguise of deportation) (Geiss and Petrig (n 6) 193), the following analysis will not examine whether there is a right not to be deported. Rather, the analysis is limited to what is referred to as extradition. As we will see in greater detail below (Part 5/I/B/2/a/cc), in the present context, the notion of extradition refers to any means and methods of removal for prosecution (including transfers) and not only to extradition *stricto sensu*.

16 In addition, as we have seen above in Part 4, arrest and detention with a view to transfer may be contrary to the right to liberty and security and thus have repercussions on the legality of transfers.

17 Geoff Gilbert, *Responding to International Crime* (Martinus Nijhoff 2006) 139–40; Venice Commission, ‘CDL-AD(2006)009: Opinion on the International legal obligations of Council of Europe member States in respect of secret detention facilities and inter-state transport of prisoners adopted by the Venice Commission at its 66th Plenary Session (17–18 March 2006)’ para 68 (statement relates to the ECHR only).

18 That the reference of the Strasbourg organs to “extradition” in the present context not only encompasses extradition *stricto sensu* but also removal for prosecution by a variety of means and methods, including transfers, see below Part 5/I/B/2/a/cc.

19 For the Commission see, eg, *X v the Netherlands* App no 1983/63 (Commission Decision, 13 December 1965) para 10 of the legal considerations, *Lynas v Switzerland* App no 7317/75 (Commission Decision, 6 October 1976) 1. of the legal considerations; for the Court see, eg, *Soering v the United Kingdom* App no 14038/88 (ECtHR, 7 July 1989) para 85; *Gonzalez v Spain* App no 43544/98 (ECtHR, 29 June 1999) 4. of the legal considerations; *Shamayev and others v Georgia and Russia* App no 36378/02 (ECtHR, 12 April 2005) para 427; *Parlanti v Germany* App no 45097/04 (ECtHR, 26 May 2005) 7. of the legal considerations.

20 *Soering v the United Kingdom* (n 19) para 86.

interest of all nations that fugitives are brought to justice.²¹ However, in the same breath, they also stated that extradition does not fall outside the material scope of application of the Convention,²² which follows, for instance, from Article 5(1) (f) ECHR allowing for “the lawful ... detention of a person against whom action is being taken with a view to ... extradition”.²³ Even though there is no absolute right not to be surrendered to a third State for prosecution under the ECHR, a State may be prohibited from removing an individual in a *concrete case* because it would violate one or several rights and freedoms guaranteed by the ECHR. To put it in the words of the Court, “in so far as a measure of extradition has consequences adversely affecting the enjoyment of a Convention right, it may, assuming that the consequences are not too remote, attract the obligations of a Contracting State under the relevant Convention guarantee”.²⁴ Therefore, it can be concluded that the ECHR does not provide piracy suspects with an absolute right not to be transferred for prosecution. However, under certain circumstances, the Convention indirectly prohibits a specific transfer in a concrete case since its effects would potentially violate one or several rights guaranteed by the Convention.

Meanwhile, the ICCPR does not contain an absolute right against extradition either (including transfers).²⁵ In the words of the Human Rights Committee: “There is no provision of the Covenant making it unlawful for a State party to seek extradition of a person from another country.”²⁶ On the contrary, extradition is considered to be “an important instrument of cooperation in the administration of justice”, which aims at preventing so-called safe havens “for those who seek to evade fair trial for criminal offences”.²⁷ Similar to the ECHR, the Covenant does not prohibit surrender for prosecution *per se*. However, different provisions of the ICCPR may operate to the effect that a transfer is prohibited in a specific case. In its earlier views, the Human Rights Committee emphasized that “extradition as such is outside the scope of the application of the Covenant”,²⁸ but at the same time admitted “that a State party’s obligation in relation to a matter itself outside the scope of the Covenant may still be engaged by reference to other provisions

21 *ibid* para 89.

22 Madleine Colvin and Jonathan Cooper (eds), *Human Rights in the Investigation and Prosecution of Crime* (OUP 2009) 378.

23 See, eg, *Soering v the United Kingdom* (n 19) para 85.

24 See, eg, *ibid*; and *Gonzalez v Spain* (n 19) 4. of the legal considerations.

25 The Committee uses the term “extradition” very broadly in the present context, ie encompassing any means by which a removal for prosecution can be obtained: see below Part 5/I/B/2/a/cc.

26 *MA v Italy* Comm no 117/1981 (HRC, 10 April 1984) para 13.4.

27 *Cox v Canada* Comm no 539/1993 (HRC, 31 October 1994) para 13.4.

28 During the drafting of the ICCPR, a discussion took place whether to include a provision on extradition in the treaty. The majority did not consider this appropriate. See below Part 5/III/C/2 on Article 13 ICCPR.

of the Covenant”.²⁹ Later, it no longer emphasized that extradition is outside the scope of application of the ICCPR³⁰ – quite to the contrary, it stated that “extradition as such does not fall outside the protection of the Covenant”.³¹ The result, however, has been the same whether the Human Rights Committee deemed extradition to be inside or outside the scope of the ICCPR, finding communications to be admissible *ratione materiae* where the author did “not claim that extradition *as such* violates the Covenant, but rather that the particular circumstances related to the *effects* of his extradition would raise issues under specific provisions of the Covenant”.³² On the merits, the Human Rights Committee has decided in various cases that extradition is prohibited where substantial grounds exist for believing that the individual to be surrendered faces a real risk of irreparable harm in the receiving State, such as those risks prohibited by the right to life³³ and the right not to be subjected to torture and other forms of ill-treatment.³⁴ Thus, while the ICCPR does not outlaw surrenders for prosecution as such, a specific transfer may be prohibited if it would violate specific rights under the Covenant.

Finally, an absolute right not to be surrendered for prosecution is also absent from the CAT. However, similar to the ECHR and IPCCR, a concrete measure of removal for the purpose of criminal prosecution in the receiving State may be prohibited because it violates Article 3(1) CAT³⁵ stipulating that “[n]o State Party shall expel, return (‘refouler’) or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture”.

While human rights law does not provide piracy suspects with an absolute right against surrender for prosecution, various human rights treaties implicitly or explicitly prohibit the seizing entity from transferring a specific piracy suspect to a specific destination if there is a real risk that certain rights and freedoms of

29 *Kindler v Canada* Comm no 470/1991 (HRC, 30 July 1993) para 6.1; *Ng v Canada* Comm no 469/1991 (HRC, 5 November 1993) para 6.1; *Cox v Canada* (n 27) para 10.3.

30 *Judge v Canada* Comm no 829/1998 (HRC, 5 August 2002).

31 *Everett v Spain* Comm no 961/2000 (HRC, 9 July 2004) para 6.4. In this case, the author did not raise a non-refoulement claim. However, since the HRC emphasizes in its findings that Articles 6 and 7 ICCPR in particular apply in relation to extradition (both provisions embody a refoulement prohibition), the case is nevertheless relevant for the question whether an indirect prohibition against removal for prosecution exists.

32 *Kindler v Canada* (n 29) para 6.1; *Ng v Canada* (n 29) para 6.1; *Cox v Canada* (n 27) para 10.3 (emphasis added).

33 Article 6 ICCPR.

34 Article 7 ICCPR.

35 Isabelle Moulrier, ‘Extraordinary Renditions and the United Nations Convention against Torture’ in Manfred Nowak and Roland Schmidt (eds), *Extraordinary Renditions and the Protection of Human Rights* (NWV Neuer Wissenschaftlicher Verlag 2010) 151.

the person to be surrendered will be violated in the receiving State. This conditional right not to be surrendered for prosecution is embodied in what is referred to as the prohibition of refoulement to which we turn now.

2. A Conditional Right Not to Be Transferred: Non-Refoulement

Briefly defined, the principle of non-refoulement prohibits the forced direct or indirect removal of a person to a State or territory where he risks being subjected to certain human rights violations.³⁶ Which potential human rights violations may bar a specific surrender for prosecution varies among human rights treaties.³⁷

The object and purpose of the principle of non-refoulement is the prevention of human rights violations in the receiving State (rather than righting past wrongs).³⁸ Therefore, the principle obliges States not to bring a person within a jurisdiction where he is at risk of certain human rights violations, ie not to expose a person to a certain risk.³⁹ Whether the risk materializes upon removal is irrelevant.⁴⁰ The prohibition in no way entails the co-responsibility of the removing State for human rights violations by the receiving entity.⁴¹ Nor does it provide a basis for establishing the responsibility of the receiving State for potential human rights violations.⁴²

The principle of non-refoulement can be found in various areas of international law, that is, refugee law, human rights law and international humanitarian law. Since the latter body of law does not apply to counter-piracy operations⁴³ and since the chances are quite low that a piracy suspect qualifies as a refugee,⁴⁴ the fo-

36 Kees Wouters, *International Legal Standards for the Protection from Refoulement* (Intersentia 2009) 25.

37 See below Part 5/I/B/2/b.

38 Wouters (n 36) 25.

39 *ibid*; for the ECHR, see *El-Masri v 'the former Yugoslav Republic of Macedonia'* App no 39630/09 (ECtHR, 13 December 2012) para 212. In addition to this negative obligation, the prohibition of refoulement imposes positive obligations on States, the realization of which are necessary to ensure the effective protection of individuals concerned from the mentioned risks. Among them are the obligations to establish a procedure in which the non-refoulement claim is assessed and reviewed and where the individual concerned benefits from certain procedural safeguards and, in cases where an individual is surrendered to a third State, to monitor the situation post-removal; see below Part 5/II and III.

40 Wouters (n 36) 25.

41 *ibid*.

42 *Soering v the United Kingdom* (n 19) para 91; *El-Masri v 'the former Yugoslav Republic of Macedonia'* (n 39) para 212.

43 On the non-applicability of international humanitarian law, see above Part 3/I.

44 Therefore, only incidental references to the prohibition of refoulement under international refugee law are made in the following.

cus of the following analysis is on the principle of non-refoulement under human rights law. First of all, we will consider Article 3 CAT, which prohibits removing a person where there are substantial grounds for believing that he would be in danger of being subjected to torture in the receiving State. Next to Article 19(2) CFREU, which will only be considered at the side-lines, Article 3 CAT is the only explicit non-refoulement provision of the human rights treaties applied as legal yardsticks in the present study.⁴⁵ The ICCPR and ECHR do not explicitly articulate a prohibition of refoulement. However, according to General Comment No. 31 of the Human Rights Committee, State Parties must refrain from removing a person to a place “where there are substantial grounds for believing that there is a real risk of irreparable harm, such as that contemplated by articles 6 and 7 of the Covenant”.⁴⁶ Thus, the material scope of the refoulement prohibitions under the ICCPR are largely determined by the content of the right to life and the prohibition of torture and other forms of ill-treatment. The European Commission of Human Rights and the European Court of Human Rights have also interpreted various articles of the ECHR as containing a refoulement prohibition, namely the right to life,⁴⁷ the right not to be subjected to torture and inhuman treatment,⁴⁸ and the right to a fair trial.⁴⁹ ⁵⁰ According to the Court, a flagrant violation of the right to liberty and security⁵¹ may also bar a specific removal; to date,⁵² however,

45 See above Introduction/II/B.

46 HRC, ‘General Comment No. 31: The Nature of the General Legal Obligations Imposed on States Parties to the Covenant’ in ‘Note by the Secretariat, Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies: Vol I’ (2008) UN Doc HRI/GEN/1/Rev.9 (Vol. I) para 12.

47 Article 2 ECHR.

48 Article 3 ECHR.

49 Article 6 ECHR.

50 Most non-refoulement cases are considered under Article 3 ECHR and many under Articles 2 and 6 ECHR. However, a real risk of being subjected to harm prohibited by other provisions may also prohibit removal in a specific case. This is namely the situation for Article 8 ECHR protecting the respect for family and private life (for cases where a violation has been found, see eg, ECtHR Press Unit, ‘Factsheet – Expulsions and Extraditions’ (April 2012) <www.echr.coe.int/NR/rdonlyres/211A6F9C-A4EC-4CF7-AB2E-42E9D49FB2EF/0/FICHES_Expulsions_et_extraditions_EN.pdf> accessed 29 January 2013, 10, and Nuala Mole and Catherine Meredith, *Asylum and the European Convention on Human Rights* (Council of Europe 2010) 100–102 and 186) and Article 4 of Protocol 4 ECHR prohibiting collective expulsion of aliens (for case law where a violation of this provision has been found, see eg, ECtHR Press Unit (n 50) 2 and 9). However, these provisions are not analyzed in the study at hand since they are not particularly relevant with regard to the transfer of piracy suspects.

51 Article 5 ECHR.

52 As of 12 December 2012.

the Court has yet to find a violation of the non-refoulement aspect of the latter provision.⁵³

The conditions under which a State must refrain from removal – ie the substantive side of the principle of non-refoulement – are well-researched and defined in current doctrine.⁵⁴ The present study is therefore limited to describing the gist of the principle of non-refoulement under the ICCPR, ECHR (including the CFREU) and CAT, and to highlight issues of particular importance or ambiguity regarding transfers of piracy suspects. As already mentioned earlier,⁵⁵ the main focus is on transfers to Somalia, specifically to its regional entities Somaliland and Puntland, which together are currently prosecuting the largest number of piracy suspects.⁵⁶ Transfers to Kenya and the Seychelles, which are the main transfer destinations of Denmark and EUNAVFOR,⁵⁷ are principally considered in the context of re-transfers – ie where alleged pirates are transferred to these regional States by Denmark or EUNAVFOR and, following conviction, sent to Somalia for enforcement of their sentences.⁵⁸ Finding a violation of the principle of non-refoulement hinges upon the concrete facts of a case; therefore, the following analysis does not aim to make a statement on whether the principle of non-refoulement has in fact been violated by States transferring piracy suspects. Rather, it seeks to lay down the legal parameters for such an assessment and, incidentally, to identify situations that may be prone to violations of the prohibition of refoulement.

The principle of non-refoulement is not an unequivocal, uniform concept – not even if only viewed from the angle of the above-mentioned human rights treaties.⁵⁹ Rather, the scope and content of the prohibition of refoulement vary

53 Mole and Meredith (n 50) 95–96.

54 To name but a few studies on the substantive side of the principle of non-refoulement: Wouters (n 36) (analyzing the principle of non-refoulement under the ECHR, ICCPR, CAT and 1951 Refugee Convention); Oliver Thurin, *Der Schutz des Fremden vor rechtswidriger Abschiebung: Das Prinzip des Non-Refoulement nach Artikel 3 EMRK* (Springer 2009) (on Article 3 ECHR only); Manfred Nowak and Elisabeth McArthur, *The United Nations Convention Against Torture: A Commentary* (OUP 2008) (on Article 3 CAT); Elihu Lauterpacht and Daniel Bethlehem, ‘The scope and content of the principle of *non-refoulement*: Opinion’, in Erika Feller, Volker Türk and Frances Nicholson (eds), *Refugee Protection in International Law: Global Consultations* (2003) <www.unhcr.org/4a1ba1aa6.html> accessed 29 January 2013 (principle of non-refoulement under refugee law).

55 See above Introduction/II/A.

56 See above Part 1/III/B.

57 See above Introduction/II/A.

58 On re-transfers in relation to transfers undertaken by Denmark, see above Part 2/I/C/4/b, and on re-transfers following transfers within the EUNAVFOR framework, see above Part 2/II/B/6/b.

59 Wouters (n 36) 577.

considerably. For example, we will see that the harm sought to be prevented, ie the nature of the risk that a person must face upon transfer in order to trigger the application of the principle, differs under the various prohibitions of refoulement. However, at the same time, similarities do exist among the different prohibitions of refoulement. For instance, all provisions are applicable extraterritorially and in a maritime context, ie on board law enforcement vessels. Furthermore, *ratione personae*, all provisions under consideration apply to piracy suspects held on board law enforcement vessels of the seizing State. What is more, under all the provisions scrutinized, the means and methods of removal extend to transfers for prosecution to *any* entity, ie including Puntland and Somaliland. The following describes the differences and similarities between the various non-refoulement provisions.

a) **Similarities: Applicability of Non-Refoulement Principle**

aa) Extraterritorially on Board Law Enforcement Vessels

We have already seen that the human rights treaties analysed in the study at hand apply extraterritorially and in a maritime context based on the exercise of *de jure* jurisdiction by the seizing State through the flag State principle and/or the exercise of *de facto* jurisdiction by virtue of effective control wield over piracy suspects.⁶⁰ The same holds true for the principle of non-refoulement contained in these treaties. Since the decision to transfer, ie the phase of disposition where the principle of non-refoulement is of utmost importance, is generally taken vis-à-vis piracy suspects held on board the law enforcement vessel of the seizing State, the prohibition of refoulement applies extraterritorially *qua* the flag State principle. Furthermore, when a State is in a position to transfer a person to a third State for prosecution, it can be said to exercise the requisite level of effective control over such a person for its human rights obligations to apply extraterritorially based on the exercise of *de facto* jurisdiction.⁶¹

That the principle of non-refoulement contained in Article 3 CAT applies extraterritorially vis-à-vis persons over whom the State in question exercises *de facto* or *de jure* control on board a vessel has been confirmed by the CAT Committee.⁶² Also, the principle of non-refoulement under the ICCPR is applicable in relation to persons held in custody by a State abroad.⁶³ The Human Rights Committee refuted the argument of a territorial restriction on the prohibition of

60 See above Part 3/III/A.

61 Anja Klug and Tim Howe, 'The Concept of State Jurisdiction and the Applicability of the *Non-Refoulement* Principle to Extraterritorial Interception Measures' in Bernard Ryan and Valsamis Mitsilegas (eds), *Extraterritorial Immigration Control: Legal Challenges* (Martinus Nijhoff 2010) 91–96.

62 See above Part 3/III/A/3.

63 Wouters (n 36) 375–76.

refoulement in quite explicit terms in 2006 when it declared that State parties to the ICCPR

should take all necessary measures to ensure that individuals, including those it detains outside its own territory, are not returned to another country by way of *inter alia*, their transfer, rendition, extradition, expulsion or refoulement if there are substantial reasons for believing that they would be in danger of being subjected to torture or cruel, inhuman or degrading treatment or punishment.⁶⁴

The principle of non-refoulement under the ECHR also applies extraterritorially and on board law enforcement vessels.⁶⁵ In the 2012 Grand Chamber judgment *Hirsi Jamaa and others v Italy*, the European Court of Human Rights applied Article 3 ECHR to persons held on board a warship on the high seas.⁶⁶ While the Grand Chamber discussed the extraterritorial application of the rights and freedoms of the Convention on board vessels in general,⁶⁷ Judge Pinto de Albuquerque explicitly stated in his concurring opinion that “[t]he prohibition of refoulement is not limited to the territory of a State, but also applies to extraterritorial State action, including action occurring on the high seas”.⁶⁸ Finally, we have seen that the scope of the CFREU, which contains an explicit refoulement prohibition, is predicated on the acting authority and the source of law it applies rather than the notion of territory. Therefore, when implementing Union law – for example, when acting within the mandate of EUNAVFOR – European Union Member States must also comply with the principle of non-refoulement formulated in Article 19(2) CFREU.⁶⁹ It is interesting to note that the Grand Chamber

64 HRC, ‘Concluding Observations of the Human Rights Committee: United States of America’ (18 December 2006) UN Doc CCPR/C/USA/CO/3/Rev.1, para 16, cited in Wouters (n 36) 376. See also Andreas Fischer-Lescano, Tillmann Löhr and Timo Tohidipur, ‘Border Controls at Sea: Requirements under International Human Rights and Refugee Law’ (2009) 21 *International Journal of Refugee Law* 256, 272 (regarding Article 7 ICCPR) and *Hirsi Jamaa and Others v Italy* App no 27765/09 (Grand Chamber, ECtHR, 23 February 2012) concurring opinion Judge Pinto de Albuquerque, 68–69.

65 On the extraterritorial application of the non-refoulement provisions of the ECHR, see Wouters (n 36) 217–21, specifically with regard to persons held on board ships, see 219.

66 *Hirsi Jamaa and Others v Italy* (n 64) paras 110–38.

67 *ibid* paras 70–82.

68 *ibid* concurring opinion, 68–69 (regarding the CAT and ICCPR) and 78 (regarding the principle of non-refoulement under the ECHR).

69 See above Part 3/III/A/5. See also Martin Scheinin, ‘Rescue at Sea - Human Rights Obligations of States and Private Actors, with a Focus on the EU’s External Borders’ (RSCAS Policy Paper 2012/05, 2012) <http://cadmus.eui.eu/bitstream/handle/1814/22389/RSCAS_PP_2012_05.pdf?sequence=1> accessed 29 January 2013, 4–5.

of the European Court of Human Rights referred to this provision when deciding on a violation of the non-refoulement principle contained in Article 3 ECHR in *Hirsi Jamaa* and explained that it

attaches particular weight to the content of a letter written ... by Mr Jacques Barrot, Vice-President of the European Commission, in which he stressed the importance of compliance with the principle of *non-refoulement* in the context of operations carried out on the high seas by Member States of the European Union.⁷⁰

The statement was made in the context of the surveillance of the European Union's external borders. However, it is not irrelevant for the question of transfers of piracy suspects for that it pertains to the interception of persons on the high seas and their removal to a third State, without these persons ever entering the territory of the State deciding and implementing the removal.⁷¹

Overall, we can conclude that not only do the human rights treaties under scrutiny in general apply extraterritorially on board law enforcement vessels, but their implicit or explicit refoulement prohibitions do as well; a conclusion achieved by virtue of the flag State principle and/or because the seizing State exercises effective control over piracy suspects subject to transfer.

bb) To Piracy Suspects

In following with the discussion of how the principle of non-refoulement applies to persons held extraterritorially on board law enforcement vessels, we now turn to the question of whether the prohibition applies *ratione personae* to piracy suspects, ie alleged criminals.

According to Article 3 CAT, no State Party shall surrender “a person” to a State where there are substantial grounds for believing that he would be in danger of being subjected to torture. From these words follows that the personal scope of application extends to any person, regardless of, *inter alia*, his nationality or legal status. It thus applies *ratione personae* without limitation.⁷² The CAT Committee explicitly stated that common criminals cannot be excluded from the personal scope of application⁷³ – as they can under the exclusion clause of Article 1(F) (b) of the Refugee Convention with the consequence that they cannot benefit from the protection of the non-refoulement principle articulated in Article 33 of the Refugee Convention. Further, Article 3 CAT does not contain an analogous provision to Article 33(2) of the Refugee Convention, which denies protection from refoulement to a person “who, having been convicted by a final judgment

⁷⁰ *Hirsi Jamaa and Others v Italy* (n 64) para 135.

⁷¹ See, eg, the statement made by France in *Medvedyev and Others v France* App no 3394/03 (Grand Chamber, ECtHR, 29 March 2010) para 49.

⁷² *Wouters* (n 36) 434–35; *Nowak and McArthur* (n 54) 197.

⁷³ *Nowak and McArthur* (n 54) 148. On the exclusion clause under the Refugee Convention, see above Part 3/II.

of a particularly serious crime, constitutes a danger to the community of that country”.⁷⁴ Put simply, even the most dangerous convicted criminal cannot be excluded from the personal scope of application of Article 3 CAT.⁷⁵ *A fortiori*, the provision applies *ratione personae* to a person suspected of an offence, such as an alleged pirate subject to transfer.

The same result is yielded by an analysis of the ICCPR. The Covenant’s general scope of application provision, Article 2(1) ICCPR, refers to “all individuals”. According to the *travaux préparatoires*, the term “person” was initially envisaged but was replaced by “individual” in order to also protect those human beings who are denied legal personality by the respective State. The specific ICCPR provisions from which the principle of non-refoulement is derived apply equally to all individuals and therefore do not alter the general personal scope of application of the Covenant: the right to life enshrined in Article 6(1) ICCPR protects “every human being”, while Article 7 ICCPR stipulates that “no one” may be subjected to torture and the forms of ill-treatment prohibited under the provision.⁷⁶ The personal scope of application of the principle of non-refoulement under the ICCPR is thus the broadest possible⁷⁷ and includes piracy suspects.

The implicit prohibitions of refoulement under the ECHR are also applicable to everyone without any limitation as to, for example, the person’s legal status or previous behaviour.⁷⁸ With respect to Article 3 ECHR, the Grand Chamber stated in quite explicit terms that due to the absolute nature of the prohibition of torture, Article 3 ECHR applies irrespective of the victim’s conduct. Therefore, the nature of the offence allegedly committed by the applicant is irrelevant for the purpose of assessing a violation of Article 3 ECHR.⁷⁹

cc) To the Removal Method of Transfers

Transfers as they occur in the context of counter-piracy operations are a means and method for surrendering a suspect to a third State for prosecution, which is new to the realm of international cooperation in criminal matters. However, as we will see next, the principle of non-refoulement under consideration includes all forms of removing a person. In other words, the prohibitions apply to any kind of “obligatory departure” to another State or territory, irrespective of the legal context in which it takes place, the formal nature of the removal or the specific wording used in explicit refoulement prohibitions to refer to the means and

74 *ibid* 148 and 197.

75 *ibid* 195 and 197.

76 Manfred Nowak, *U.N. Covenant on Civil and Political Rights: CCPR Commentary* (2nd edn, N.P. Engel Verlag 2005) 41.

77 Wouters (n 36) 369.

78 On Article 3 ECHR: *ibid* 202–03.

79 *Saadi v Italy* App no 37201/06 (ECtHR, 28 February 2008) para 127.

method of removal.⁸⁰ Therefore, the non-refoulement provisions considered in this study also apply to transfers of piracy suspects.

In terms of means and methods of removal covered by Article 3 CAT, the following are explicitly mentioned in the provision: expulsion, return (“refoulement”)⁸¹ and extradition. However, according to the *travaux préparatoires* and the practice of the CAT Committee, together these explicitly mentioned methods cover all forms of “forced removal” or “obligatory departure” in whatever legal setting they take place.⁸² Hence, not only do formal processes by which persons are surrendered from one State to another for the purpose of criminal prosecution, such as extradition, fall within the ambit of Article 3 CAT, but also informal and *de facto* means (even if illegal). An example of the latter category are so-called “ordinary renditions”, ie the forcible abduction and removal of a suspect by military forces or intelligence agents from a third State for the purpose of bringing him to justice.⁸³ Hence, transfers of piracy suspects, whatever form they take and whether of a *de facto* nature, ie transfers by simple executive action or following a decision issued in a (partially) legally predefined procedure, must abide by Article 3 CAT.

The refoulement prohibitions under the ICCPR apply equally to any form of forced removal. Furthermore, similar to the CAT, they apply regardless of the legal setting in which the obligatory departure takes place. Therefore, the prohibitions not only apply to the formal means of extradition and deportation, but also to less formal or informal means of removing a person, such as renditions to justice as practiced in the counter-terrorism context.⁸⁴ Without a doubt, transfers

80 Nowak and McArthur (n 54) 195–96; Wouters (n 36) 29; Cordula Droege, ‘Transfers of detainees: legal framework, non-refoulement and contemporary challenges’ (2008) 90 *International Review of the Red Cross* 669, 671.

81 These two terms resemble and are inspired by Article 33(1) Refugee Convention: Wouters (n 36) 435.

82 *ibid* 505; Nowak and McArthur (n 54) 195.

83 *ibid* 195–96. The authors distinguish between “ordinary rendition” and “extraordinary rendition”, which they define as the forced removals of alleged terrorist to countries with harsher interrogation methods.

84 HRC, ‘General Comment No. 31: The Nature of the General Legal Obligations Imposed on States Parties to the Covenant’ (n 46) para 12: “obligation not to extradite, deport, expel or otherwise remove a person from their territory” (emphasis added); HRC, ‘General Comment No. 20: Article 7 (Prohibition of Torture, or Other Cruel, Inhuman or Degrading Treatment or Punishment)’ in ‘Note by the Secretariat, Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies: Vol I’ (2008) UN Doc HRI/GEN/1/Rev.9 (Vol. I) para 9; regarding the US practice of “rendition to justice” as a counter-terrorism measure, see: HRC, ‘Concluding Observations of the Human Rights Committee: United States of America’ (n 64) para 16: “The State party should take all necessary measures to ensure that individuals, including those it detains outside its own territory, are not returned to another country by way of *inter alia*, their transfer, rendition,

of piracy suspects are among the removal methods covered by the prohibitions of refoulement under the ICCPR.

The finding is the same with regard to the prohibitions of refoulement under the ECHR, which also apply equally to all forms of removal, regardless of the legal setting they take place in.⁸⁵ Moreover, the principles elaborated by the Court regarding one form of removal apply *mutatis mutandis* to all others.⁸⁶ In sum, the different forms of transfers of piracy suspects are means and methods of removal that must abide by the principle of non-refoulement under the ECHR,⁸⁷ and also Article 3 CAT and those of the ICCPR provided that the remaining applicability criteria are met.

dd) To All Destinations to Which Piracy Suspects Are Sent

The main focus of the analysis of the substantive side of the non-refoulement principle lies on transfers to Somalia, namely its regional entities of Puntland and Somaliland, either as a destination for direct transfers for the purpose of prosecution or for re-transfers for the purpose of enforcement of sentences. Therefore, we must first consider whether these entities, which are not internationally recognized States, qualify as receiving entities under the non-refoulement provisions analysed in this study.

Article 3 CAT requires that the person is surrendered “to another State”, which need not be a State Party to the CAT as the notion refers to any State in the world.⁸⁸ The use of the word “State” (as opposed to “territory”⁸⁹) implies that the legal status of the receiving entity is of relevance⁹⁰ as it excludes territories that do not belong to a State according to international law.⁹¹ However, under interna-

extradition, expulsion or refoulement if there are substantial reasons for believing that they would be in danger of being subjected to torture or cruel, inhuman or degrading treatment or punishment.” (emphasis added).

85 Jacques Hartmann, ‘The European Convention on Human Rights and Extradition’ in Kaiyan H Kaikobad and Michael Bohlander (eds), *International Law and Power: Perspectives on Legal Order and Justice: Essays in Honour of Colin Warbrick* (Martinus Nijhoff 2009) 25–26; Wouters (n 36) 317–18 (statement relates only to Article 3 ECHR).

86 Hartmann (n 85) 26–27.

87 Robert Esser, ‘Die Strafprozessordnung und das Gerichtsverfassungsgesetz: EMRK, IPBPR’ in Volker Erb (ed), *Grosskommentar Löwe-Rosenberg* (26th edn, de Gruyter 2012) 146.

88 Nowak and McArthur (n 54) 198.

89 Article 33(1) Refugee Convention, eg, refers to “territories” rather than “States”.

90 Lauterpacht and Bethlehem (n 54) 122.

91 Walter Kälin, Martina Caroni and Lukas Heim, ‘Article 33 para. 1’ in Andreas Zimmermann (ed), *The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol: A Commentary* (OUP 2011) para 142. Wouters (n 36) 506, states that “only those territories or areas which are under the *sovereign control* of a State come with-

tional law, territories not under the control of central State authorities – the failed State situation – remain part of the State.⁹² Thus, Somaliland, which declared independence in 1991 and is *de facto* self-governing but not internationally recognized as a State,⁹³ remains part of the Somali territory. The same holds true for Puntland, which considers itself an autonomous State within Somalia and whose constitution provides that it will contribute to the establishment and protection of a Somali Government if based on a federal structure.⁹⁴ Transfers of piracy suspects to these entities belonging to the territory of Somalia are therefore covered by the notion “to another State”.

The Human Rights Committee employs different terms to refer to the area to which forced removal is prohibited under the ICCPR. Among the terms used are: “another country”, “another jurisdiction”, “a place”, “any country” and “locations”. From this follows that the legal status or any other qualification of the area a person is sent to does not matter.⁹⁵ Therefore, any destination to which piracy suspects are currently transferred is covered by the ICCPR’s prohibitions of refoulement.

The Strasbourg organs have only rarely discussed the legal status of the receiving entity explicitly. However, specifically with regard to Somalia, it has found that Article 3 ECHR is applicable even though State authority had ceased to exist in Somalia at the material time.⁹⁶ Rather, it is “sufficient that those who hold substantial power within the State, even though they are not the Government, threaten the life and security of the applicant”.⁹⁷ Therefore, regardless of whether the Somali Transitional Federal Government’s sovereignty penetrates the respective regions to which piracy suspects are sent, the non-refoulement provision of Article 3 ECHR applies. Thus, *de facto* rather than *de jure* governmental power is decisive. There seems to be no indication that this should be any different for the prohibitions of refoulement arising from Articles 2, 5 and 6 ECHR.

in the scope of Article 3” (emphasis added). Thus, it seems that he implies that it is not enough that a territory belongs to a State under international law. However, Wouters then argues that a person removed to a territory not governed by a sovereign State arguably comes within the scope of Article 3 CAT if interpreted according to its object and purpose.

92 *ibid* 16.

93 UNSC, ‘Report of the Secretary-General on the modalities for the establishment of specialized Somali anti-piracy courts’ (15 June 2011) UN Doc S/2011/360, Annex II, paras 2 and 5.

94 *ibid*.

95 Wouters (n 36) 405.

96 *Ahmed v Austria* App no 25964/94 (ECtHR, 17 December 1996) para 46. See also *Ahmed v Austria* App no 25964/94 (Commission Report, 5 July 1995) para 68; both cases cited in Pieter Van Dijk and others (eds), *Theory and Practice of the European Convention on Human Rights* (4th edn, Intersentia 2006) 439.

97 *ibid*.

ee) To Harm Potentially Inflicted upon Transfer and Re-Transfer

The principle of non-refoulement not only aims at preventing harm emanating from the State to which the piracy suspect is transferred in the first place, but also harm potentially inflicted by any State to which he may be subsequently removed. In other words, the refoulement prohibition extends to indirect removals. This has been confirmed by the CAT Committee with regard to Article 3 CAT⁹⁸ and by the Human Rights Committee in quite robust terms with regard to Articles 6 and 7 ICCPR.⁹⁹ In addition, the case law of the European Court of Human Rights leaves no doubts that the principle of non-refoulement contained in various ECHR provisions apply to “chain removals”.¹⁰⁰ Finally, the implicit refoulement prohibition of the CRC also aims at preventing “irreparable harm to the child ... either in the country to which the removal is to be effected or in any country to which the child may subsequently be removed”.¹⁰¹

This finding is important in the counter-piracy context since a majority of States receiving piracy suspects for prosecution are not ready to enforce the often long sentences imposed on pirates. Therefore, convicted pirates are likely to be (and were already)¹⁰² removed by the prosecuting State to yet another State for enforcement purposes. Thus far, the only State willing to receive convicted pirates for enforcement of their sentences is Somalia and its regional entities. The Seychelles is the first prosecuting State to enter into transfer for enforcement agreements with Somalia, Puntland and Somaliland. Other States will most probably follow.¹⁰³ Therefore, the assessment of whether there is a real risk that certain human rights will be violated upon transfer must not be limited to the

98 CAT Committee, ‘General Comment No. 1: Implementation of Article 3 of the Convention in the Context of Article 22 (Refoulement and Communications)’ in ‘Note by the Secretariat, Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies: Vol II’ (2008) UN Doc HRI/GEN/1/Rev.9 (Vol. II) para 2.

99 HRC, ‘General Comment No. 31: The Nature of the General Legal Obligations Imposed on States Parties to the Covenant’ (n 46) para 12: The “obligation not to extradite, deport, expel or otherwise remove a person from their territory, where there are substantial grounds for believing that there is a real risk of irreparable harm, such as that contemplated by articles 6 and 7 of the Covenant, either in the country to which removal is to be effected *or in any country to which the person may subsequently be removed.*” (emphasis added).

100 With regard to Article 3 ECHR: Mole and Meredith (n 50) 74–76; Thurin (n 54) 210–17; Wouters (n 36) 320–23.

101 Committee on the Rights of the Child, ‘General Comment No. 6: Treatment of unaccompanied and separated children outside their country of origin’ in ‘Note by the Secretariat, Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies: Vol II’ (2008) UN Doc HRI/GEN/1/Rev.9 (Vol. II) para 27.

102 See above Part 1/III/C.

103 *ibid.*

receiving State, but must also include the situation in any third State to which a suspected or convicted pirate may be re-transferred.

b) Differences: Harm to Be Prevented by Refoulement Prohibitions

The non-refoulement provisions of the CAT, ICCPR and ECHR feature similarities in that they all apply to piracy suspects held on board law enforcement vessels navigating the high seas or in foreign waters and subject to a transfer for prosecution to any destination. What is more, they all aim at preventing harm not only potentially inflicted in the State receiving piracy suspects in the first place (for the purpose of prosecution), but also human rights violations conceivably occurring upon re-transfer (mainly for the purpose of enforcement of sentences). However, as we will see next, the various prohibitions of refoulement differ in terms of the nature of the harm sought to be prevented upon surrender for prosecution.

We have seen that the object and purpose of the principle of non-refoulement is the prevention of human rights violations.¹⁰⁴ However, not every human rights violation potentially occurring post-surrender may bar a transfer. Rather, only certain human rights include a non-refoulement component. The following presents the harms sought to be prevented by the principle of non-refoulement, not exhaustively but with a special focus on the risks and harms that could conceivably arise in entities receiving piracy suspects for prosecution or enforcement of their sentences.

aa) Prohibition of Torture and Other Forms of Ill-Treatment

Among the human rights violations the principle of non-refoulement is designed to prevent is potential ill-treatment of the individual subject to removal in the receiving State. While Article 3 CAT merely pertains to acts of torture, Article 7 ICCPR, Article 3 ECHR and Article 19(2) CFREU, which closely follows the ECHR provision,¹⁰⁵ also prohibit surrender in cases where there is a real risk that the transferee will be subjected to cruel, inhuman and degrading treatment in the receiving State. According to the Committee on the Right of the Child, States Parties to the CRC “shall not return a child to a country where there are substantial grounds for believing that there is a real risk of irreparable harm to the child, such as ... those contemplated under ... articles 6 and 37 of the Convention”.¹⁰⁶ The latter provision contains a prohibition of torture or other cruel, inhuman or degrading treatment or punishment¹⁰⁷ and, therefore, the principle of non-refoulement under the CRC applies equally to torture and other forms of ill-treatment.

104 Wouters (n 36) 25; see above Part 5/I/B/2.

105 Hans Jarass, *Charta der Grundrechte der Europäischen Union: Unter Einbeziehung der vom EuGH entwickelten Grundrechte und der Grundrechtsregelungen der Verträge – Kommentar* (Beck 2010) 204, para 1.

106 Committee on the Rights of the Child (n 101) para 27.

107 Article 37(a) CRC.

Furthermore, the prohibition applies regardless of whether such treatment originates from a State or non-State actor.¹⁰⁸

Article 3 CAT

Article 3 CAT protects a person from being subjected to “torture” as defined in Article 1 CAT, but not from acts of cruel, inhuman or degrading treatment or punishment envisaged in Article 16 CAT. This conclusion not only follows from a combined reading of the two provisions but also from the drafting history.¹⁰⁹ What is more, the CAT Committee stated quite plainly that Article 3 “does not encompass situations of ill-treatment envisaged by Article 16”.¹¹⁰

The torture definition of Article 1 CAT is only fulfilled if the intentional acts causing severe pain or suffering are “inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in official capacity”.¹¹¹ In other words, the definition of torture requires some form of official involvement by the State. As a consequence, acts materially amounting to torture but committed by non-State actors without the consent or acquiescence of the government are not covered by Article 1 CAT or Article 3 CAT respectively.¹¹² An important exception exists, however, with regard to situations where State structures have completely broken down or if a State has lost effective control over part of its territory to private or non-governmental entities.

108 Committee on the Rights of the Child (n 101) para 27.

109 Wouters (n 36) 518. Nowak and McArthur (n 54) 199–200: The original Swedish draft aimed at the protection of persons against both risks, which would have been in line with the protection from refoulement under Article 7 ICCPR. However, a later draft restricted the protection from refoulement under Article 3 CAT to torture, which has been supported by a majority of States, all above the United States.

110 *BS v Canada* Comm no 166/2000 (CAT Committee, 14 November 2001) para 7.4, and *TM v Sweden* Comm no 228/2003 (CAT Committee, 18 November 2003) para 6.2, cited in Nowak and McArthur (n 54) 200. See also CAT Committee, ‘General Comment No. 1: Implementation of Article 3 of the Convention in the Context of Article 22 (Refoulement and Communications)’ (n 98) para 1: “Article 3 is confined in its application to cases where there are substantial grounds for believing that the author would be in danger of being subjected to torture as defined in article 1 of the Convention.” See Wouters (n 36) 519–20, on the confusion that has arisen among scholars on whether the CAT Committee has changed its view regarding the harm protected against by Article 3 CAT with CAT Committee, ‘General Comment No. 2: Implementation of Article 2 by States Parties’ in ‘Note by the Secretariat, Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies: Vol II’ (2008) UN Doc HRI/GEN/1/Rev.9 (Vol. II) and why this is not the case.

111 On the notion of torture as used in Article 1 CAT, see Nowak and McArthur (n 54) 27–86.

112 Wouters (n 36) 445–49; Nowak and McArthur (n 54) 200–201.

Initially, the CAT Committee distinguished between whether a central government exists or not in order to decide whether a situation can be qualified as one where State structures have broken down, which would exceptionally allow for acts of private or non-governmental entities to be brought within the reach of the torture definition of Article 1 CAT. If a central government existed, Article 3 CAT was considered inapplicable when acts of torture emanated from non-State actors (unless, obviously, the central government was involved). If no central government existed, Article 3 applied under the condition that the non-State actor could be regarded as *de facto* government or persons acting in an official capacity.¹¹³ The CAT Committee has applied this distinction with regard to Somalia.¹¹⁴ In 1999, it decided in *Elmi v Australia* that

for a number of years Somalia has been without a central government, that the international community negotiates with the warring factions and that some of the factions operating in Mogadishu have set up quasi-governmental institutions and are negotiating the establishment of a common administration. It follows then that, *de facto*, those factions exercise certain prerogatives that are comparable to those normally exercised by legitimate governments. Accordingly, the members of those factions can fall, for the purposes of the application of the Convention, within the phrase “public officials or other persons acting in an official capacity” contained in article 1.¹¹⁵

In *H.M.H.I. v Australia*, decided three years later, the Committee reached the opposite conclusion as to whether a central government existed in Somalia and held that

Somalia currently possesses a State authority in the form of the Transitional National Government, which has relations with the international community in its capacity as central Government, though some doubts may exist as to the reach of its territorial authority and its permanence. Accordingly, the Committee does not consider this case to fall within the exceptional situation in *Elmi*, and takes the view that acts of such entities as are now in Somalia commonly fall outside the scope of article 3 of the Convention.¹¹⁶

However, in *S.S. v the Netherlands*, decided in 2003, the CAT Committee did not make the distinction whether a central government existed or not. Instead, the test for the application of Article 3 CAT to cases where the risk of torture emanates from a non-State actor was whether the non-governmental entity occupied

113 Wouters (n 36) 449–50.

114 Other cases involved the situation in Sri Lanka; see *ibid* 450–51.

115 *Elmi v Australia* Comm no 120/1998 (CAT Committee, 14 May 1999) para 6.5.

116 *HMHI v Australia* Comm no 177/2001 (CAT Committee, 1 May 2002) para 6.4.

and exercised quasi-governmental authority over the territory to which the complainant would be returned.¹¹⁷ Given that there have been no other decisions on this issue since this case, it is not clear whether the Committee has abandoned the criterion of whether a central government exists or not. Arguably, the purpose of the CAT – ie to prevent torture – is best met when *not* making the distinction whether non-State actors qualify as “other persons acting in an official capacity” in the context of Article 1 CAT dependent from (the rather formal criterion) of whether a central government exists or not, but instead whether non-State actors exercise quasi-governmental authority over a specific territory.¹¹⁸ Furthermore, such a liberal and dynamic interpretation of the words “other persons acting in an official capacity” would be in line with the approach taken in Article 9 of the Articles on Responsibility of States for Internationally Wrongful Acts, according to which conduct carried out by persons or a group of persons in the absence or default of the official authorities qualifies, under certain conditions, as an act of State.¹¹⁹ This provision “presuppose the existence of a Government in office and of State machinery whose place is taken by irregulars or whose action is supplemented in certain cases”,¹²⁰ ie it envisages situations where a government exists but is not fully effective throughout its territory, as currently seems to be the case for the Somali Transitional Federal Government.

We have seen that Puntland perceives itself as an autonomous State within a federal Somalia.¹²¹ Being a federal entity of a State, its police officers, members of the judiciary and prison staff qualify as “public officials” in the sense of Article 1 CAT without any further ado. The situation in Somaliland and south-central Somalia, however, is somewhat different: Somaliland claims to be an independent State under the effective control and authority of its own administration rather than the Somali Transitional Federal Government. In south-central Somalia, despite recent territorial gains by the Somali Transitional Federal Government, many regions are controlled by Al-Shabaab, which opposes the federal government. Persons dealing with piracy suspects or convicts in Somaliland and areas controlled by Al-Shabaab should qualify as persons acting in an official capacity

117 *SS v the Netherlands* Comm no 191/2001 (CAT Committee, 5 May 2003) para 6.4.

118 Wouters (n 36) 451.

119 *ibid* 451–52; ILC, ‘Responsibility of States for Internationally Wrongful Acts’ in ‘Report of the Commission to the General Assembly on the work of its fifty-third session’ (23 April–1 June and 2 July 2001) UN Doc A/56/10, Article 9: ‘The conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is in fact exercising elements of the governmental authority in the absence or default of the official authorities and in circumstances such as to call for the exercise of those elements of authority.’

120 ILC, ‘Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries’ in ‘Report of the Commission to the General Assembly on the work of its fifty-third session’ (23 April–1 June and 2 July 2001) UN Doc A/56/10, 49.

121 See above Part 1/I.

in the sense of Article 1 CAT. In other words, the test formulated by the CAT Committee in *S.S. v the Netherlands* should apply: despite the existence of the Somali Transitional Federal Government, these non-State actors should qualify as persons acting in an official capacity since they exercise *de facto* governmental authority over Somaliland and areas in south-central Somalia respectively.

In cases where the specific ill-treatment of piracy suspects, which is possibly inflicted upon transfer, does not amount to torture in the sense of Article 1 CAT or is attributable to actors not qualifying as persons acting in an official capacity, the prohibition of refoulement under Article 3 CAT will not provide any protection against surrender for prosecution. However, in these cases, a piracy suspect's transfer may be barred by the non-refoulement principle implicitly contained in Article 7 ICCPR and Article 3 ECHR (as well as the similar Article 19(2) CFREU), the thresholds of which are lower not only with regard to the harm the principle aims at preventing, but also with regard to the circle of persons that may inflict such ill-treatment.

Article 7 ICCPR

According to the Human Rights Committee, States party to the ICCPR "must not expose individuals to the danger of torture or cruel, inhuman or degrading treatment or punishment upon return to another country".¹²² As opposed to Article 3 CAT, the refoulement prohibition flowing from Article 7 ICCPR also covers cruel, inhuman or degrading treatment or punishment. What is more, the principle of non-refoulement as enshrined in the ICCPR prohibits both public and private actors from committing the proscribed acts. Therefore, prohibited ill-treatment emanating from non-State actors falls within the ambit of the refoulement prohibition of Article 7 ICCPR,¹²³ which may be of potential relevance regarding transfers of piracy suspects to Somaliland and south-central Somalia.¹²⁴

With regard to the treatment Article 7 ICCPR aims at preventing, two issues of particular importance in the context of piracy are worth highlighting: firstly, corporal punishment potentially inflicted on convicted pirates in the receiving State and, secondly, harsh prison conditions in which transferred persons may be held upon surrender. With regard to the first issue, the Human Rights Committee has repeatedly held that corporal punishment is incompatible with Article 7 ICCPR, irrespective of the nature and brutality of the crime that it seeks to punish or its lawfulness under domestic law.¹²⁵ Thus, the Human Rights Committee is

122 HRC, 'General Comment No. 20: Article 7 (Prohibition of Torture, or Other Cruel, Inhuman or Degrading Treatment or Punishment)' (n 84) para 9.

123 Nowak (n 76) 161–62; Wouters (n 36) 391.

124 See above Part 5/1/B/2/b/aa.

125 HRC, 'General Comment No. 20: Article 7 (Prohibition of Torture, or Other Cruel, Inhuman or Degrading Treatment or Punishment)' (n 84) para 5; see, eg, *Matthews v Trinidad and Tobago* Comm no 569/1993 (HRC, 31 March 1998) para 7.2 (obiter); *Osbourne v Jamaica* Comm no 759/1997 (HRC, 15 March 2000) para 9.1 (whipping)

not ready to exceptionally allow for corporal punishment where it is permitted by national criminal law. Hence, it takes a universal rather than a relativist interpretative stance on Article 7 ICCPR. Corporal punishment is still embodied in the legislation of various countries prosecuting piracy suspects. In 2009, for example, the Human Rights Committee “reiterated its deep concern that corporal punishment such as flogging, and in a few cases even amputation of limbs, are still prescribed by law and practiced in Yemen in violation of article 7 of ICCPR”.¹²⁶ In Somalia, Somaliland and Puntland, Islamic Sharia law, which potentially provides for corporal punishment,¹²⁷ is enshrined in the respective constitutions.¹²⁸ The Puntland Constitution, for instance, prohibits torture “unless sentenced by Islamic Sharia courts in accordance with Islamic law”.¹²⁹ According to UNODC, three legal systems – formal law, Sharia law and customary law – theoretically operate in parallel in Somalia and its regional entities but are not always clearly distinguishable in their application. Even where a formal justice system exists, it is not administered in a systematic way.¹³⁰ Therefore, even though piracy cases are generally prosecuted by courts belonging to the formal court structure applying formal law,¹³¹ the possibility that Sharia law is applied cannot be excluded. Against the background that, as of early January 2011, only 5 per cent of the judges in Somaliland and less than 5 per cent of the judges in Puntland had received legal training, they are “[o]ften ignorant of applicable statutory law” and “apply customary law, including sharia”.¹³² Surrenders for prosecution to jurisdictions that are potentially inflicting corporal punishment on convicted criminals may

with tamarind switch); *Sooklal v Trinidad and Tobago* Comm no 928/2000 (HRC, 25 October 2001) para 4.6 (whipping with the birch); *Pryce v Jamaica* Comm no 793/1998 (HRC, 15 March 2004) para 6.2 (whipping with tamarind switch).

- 126 HRC, ‘Concluding Observations of the Human Rights Committee: Yemen’ (9 August 2005) UN Doc CCPR/CO/84/YEM, para 16; the same is stated in: HR Council – UPR Working Group, ‘Compilation prepared by the Office of the High Commissioner for Human Rights, in accordance with Paragraph 15(b) of the Annex to the Human Rights Council resolution 5/1’ (9 March 2009) UN Doc A/HRC/WG.6/5/YEM/2, para 21.
- 127 Nowak (n 76) 167.
- 128 UNSC, ‘Report of the Secretary-General on the modalities for the establishment of specialized Somali anti-piracy courts’ (n 93) Annex II, para 9.
- 129 US Department of State, ‘2010 Human Rights Report: Somalia’ (2010 Country Reports on Human Rights Practices 8 April 2011) <www.state.gov/j/drl/rls/hrrprt/2010/af/154369.htm> accessed 29 January 2013, 7.
- 130 UNSC, ‘Report of the Secretary-General on the modalities for the establishment of specialized Somali anti-piracy courts’ (n 93) Annex II, para 7.
- 131 *ibid* Annex II, para 11.
- 132 UNSC, ‘Report of the Special Adviser to the Secretary-General on Legal Issues Related to Piracy off the Coast of Somalia’ (25 January 2011) UN Doc S/2011/30, para 116.

therefore be problematic in terms of the non-refoulement principle as protected by Article 7 ICCPR.

Not only corporal punishment but also detention in harsh conditions may amount to cruel, inhuman or degrading treatment as prohibited under Article 7 ICCPR. Prison conditions vary greatly among the States to which piracy suspects are transferred. Even with regard to a specific transfer destination, it is impossible to make a general finding as to the compatibility of the prison conditions with Article 7 ICCPR because piracy suspects (especially those transferred under “international scrutiny”) may be detained in specially refurbished or newly constructed prisons, the standards of which are certainly above average if compared with “ordinary” prisons. For example, piracy suspects transferred by Denmark and EUNAVFOR to Kenya are generally detained in the Shimo-La-Tewa prison during the investigation and trial phases.¹³³ This prison was subject to major reforms within the framework of the UNODC Counter Piracy Programme and today seems to live up to international standards. However, as we will see later in greater detail, before being refurbished, persons transferred to this prison were found to be held in conditions amounting to inhuman and degrading treatment.¹³⁴ According to the UN Secretary-General, as of January 2011, international support has been provided or is currently being provided to six penitentiaries in Kenya (out of the 93 establishments in total), which have been designated to accommodate alleged and convicted pirates, including the aforementioned Shimo-La-Tewa prison.¹³⁵ While detention in these prisons may not be problematic in terms of Article 7 ICCPR, transferring States currently do not require individual assurances from Kenya that a transferred piracy suspect will indeed be imprisoned in one of these “above average” detention centres upon his transfer. Rather, it is *assumed* that persons are detained in specially refurbished institutions.¹³⁶

In light of the refoulement prohibition under Article 7 ICCPR, the prison conditions in Somalia, Somaliland and Puntland are especially worrisome. In 2008, the Office of the United Nations High Commissioner for Human Rights stated that “[p]rison conditions [in Somaliland and Puntland] remain poor and life threatening and detention centres lack basic health care and water supplies. Prison officials are not sufficiently trained and abuses by guards are commonly reported.”¹³⁷ In 2010, the Secretary-General stressed that the increasing number

133 See above Part 2/I/C/3/b (Denmark) and Part 2/II/B/5/f (EUNAVFOR).

134 See below Part 5/I/B/2/b/aa on the decision of the administrative court of first instance in Cologne, Germany.

135 UNSC, ‘Report of the Secretary-General on specialized anti-piracy courts in Somalia and other States in the region’ (20 January 2012) UN Doc S/2012/50, para 70.

136 See above Part 2/I/C/3/b (Denmark) and Part 2/II/B/5/f (EUNAVFOR).

137 OHCHR, ‘Preliminary Human Rights Assessment on Somalia: Mission Report, 19 July to 2 August 2008’ <www.ohchr.org/Documents/Countries/somalia_assessment_mission_report.pdf> accessed 29 January 2013, para 30.

of piracy suspects imprisoned in Puntland had a deteriorating effect on its prison conditions:

[P]rison facilities in “Puntland” are increasingly strained, owing to the rising number of pirates in detention, adding pressure to an already weak penal system. The “Puntland” prison population has grown by approximately 10 per cent per month, the majority of prisoners being detained without due process.¹³⁸

In 2011, the overall situation had not yet fundamentally changed, even though the UNODC and UNDP took various measures in order to bring specific prisons in line with international standards. Thus, the Secretary-General stated that

UNODC recently opened a new prison in Hargeysa, “Somaliland”, and UNDP is working to open a new prison in Qardho, “Puntland”. Both of these facilities are required to house existing prisoners currently held in poorly maintained and overcrowded prisons. Among the prison population at the prison in Bosasso, Puntland is a small number of persons transferred by foreign naval forces. They are held there, both before and after trial, in *extremely poor conditions*.¹³⁹

Transferring States may therefore be precluded from transferring piracy suspects to Somaliland and Puntland (absent individual assurances that such persons will be detained in a refurbished or newly constructed prison facility, one which is in line with an international standard)¹⁴⁰ or be held liable for doing so.¹⁴¹ What is more, we have seen that the principle of non-refoulement under the ICCPR also aims at protecting from harm inflicted upon re-transfer.¹⁴² Therefore, the risk assessment must take into account a possible re-transfer of a convicted pirate to Somalia or its regional entities for enforcement of his sentence by the prosecuting State, to which the suspect was initially transferred by the seizing State.¹⁴³

Article 3 ECHR

Article 3 ECHR stipulates that no one shall be subjected to torture or inhuman or degrading treatment or punishment. As early as 1961, the European Commission of Human Rights held that in certain exceptional circumstances a removal may be in violation of Article 3 ECHR. However, it was not until more than three

138 UNSC, ‘Report of the Secretary-General on Somalia’ (1 May 2012) UN Doc S/2012/283, para 66.

139 UNSC, ‘Report of the Secretary-General on the modalities for the establishment of specialized Somali anti-piracy courts’ (n 93) para 31 (emphasis added).

140 See below Part 5/II/B/2 and 3 on diplomatic assurances.

141 For the number of persons transferred to Somaliland and Puntland by third States, see above Part 1/III/B.

142 See above Part 5/I/B/2/a/ee.

143 See below Part 5/II.

decades later that it finally found a specific expulsion violated Article 3 ECHR.¹⁴⁴ What is more, only a handful of cases submitted to the Commission were considered admissible and decided on the merits.¹⁴⁵ Still, by interpreting Article 3 ECHR as having a non-refoulement component, the Commission considerably broadened the provision's protective ambit. It also paved the way for the interpretation of Article 3 ECHR by the European Court of Human Rights, which decided *Soering v the United Kingdom* in 1989, its first case involving the prohibition of non-refoulement under Article 3 ECHR.¹⁴⁶ The Court held that

[i]t would hardly be compatible with the underlying values of the Convention ... were a Contracting State knowingly to surrender a fugitive to another State where there were substantial grounds for believing that he would be in danger of being subjected to torture, however heinous the crime allegedly committed. Extradition in such circumstances, while not explicitly referred to in the brief and general wording of Article 3 ... would plainly be contrary to the spirit and intent of the Article, and in the Court's view this inherent obligation not to extradite also extends to cases in which the fugitive would be faced in the receiving State by a real risk of exposure to inhuman or degrading treatment or punishment proscribed by that Article.¹⁴⁷

Since then, the principle of non-refoulement under Article 3 ECHR has been a source of constant jurisprudence.¹⁴⁸

The text of the Convention does not define the notions of "torture" or "inhuman or degrading treatment or punishment", which are prohibited by Article 3 ECHR in equal terms. As opposed to the definition of torture in Article 1 CAT, for conduct to amount to torture in the sense of Article 3 ECHR it is not required that such conduct be carried out by, be instigated by or have the consent or acquiescence of a public official or other person acting in an official capacity.¹⁴⁹ The same holds true for inhuman or degrading treatment or punishment, which may be inflicted by private individuals in the country to which the person is (intended to be) removed.¹⁵⁰ Thus, the actual perpetrator of the harm potentially inflicted

144 *MN c la France* App no 19465/92 (Rapport de la Commission, 10 March 1994) paras 50–62.

145 Thurin (n 54) 20–21; for an overview on the Commission's case law on Article 3 ECHR, see: *ibid* 14–21; for a recent case of the Grand Chamber, see *El-Masri v 'the former Yugoslav Republic of Macedonia'* (n 39) paras 212–23.

146 *Soering v the United Kingdom* (n 19).

147 *ibid* para 88.

148 For a comprehensive overview on and summaries of the Court's case law on Article 3 ECHR and non-refoulement following its decision in *Soering* up until *NA v the United Kingdom* App no 25904/07 (ECtHR, 17 June 2008), see Thurin (n 54) 22–102.

149 *Wouters* (n 36) 225.

150 *ibid* 237–38.

in the receiving State is irrelevant as long as the harm in question reaches the minimum level of severity as required by Article 3 ECHR.¹⁵¹

The case law of the Strasbourg organs does not permit a sharp distinction between torture and other forms of ill-treatment proscribed by Article 3 ECHR. However, it can be said that they differ regarding the intensity of the suffering inflicted and the required mental state of the perpetrator.¹⁵² Causing very serious and cruel pain and suffering of a physical or mental nature, torture is the most intense or severe form of ill-treatment. The conduct must be inflicted intentionally,¹⁵³ which is often evidenced by the fact that a person is tortured for a specific purpose – for example, to obtain a confession or information in interrogation situations or to punish an individual.¹⁵⁴ Given the case-specific approach of the Court, it is difficult to provide a general definition the level of severity specific conduct must attain in order to amount to torture. However, the severity criterion can be fulfilled by the intensity of the act itself, the repetition of an act, the continuity of an act or an accumulation of conduct.¹⁵⁵ Inhuman treatment and punishment covers conduct that “deliberately causes severe suffering, mental or physical, which, in the particular situation, is unjustifiable”.¹⁵⁶ Intent may be a relevant, yet not a necessary factor for determining whether treatment is inhuman. Also, the treatment may be inflicted for a specific purpose, such as to humiliate, debase or disgrace the individual, but again it is not a necessary element of the definition.¹⁵⁷ It is important to note that the level of severity is not absolute, but rather depends on the facts and circumstances of the case, namely personal factors such as age and the victim’s state of health.¹⁵⁸ The difference between inhuman and degrading treatment and punishment is, again, one of intensity.¹⁵⁹ Treatment and punishment can be qualified as degrading, the least severe form of prohibited conduct under Article 3 ECHR, if it grossly humiliates the person before others, drives the person to act against his will or conscience,¹⁶⁰ or if it is intended to arouse feelings of fear, anguish and inferiority capable of humiliat-

151 *ibid* 238; Richard Clayton and Hugh Tomlinson, *The Law of Human Rights* (2nd edn, OUP 2009) 514.

152 Van Dijk and others (eds) (n 96) 406; Wouters (n 36) 221–22.

153 The Court, however, does not consider the element of intent explicitly in all cases: *ibid* 222.

154 Van Dijk and others (eds) (n 96) 406; Wouters (n 36) 222.

155 Wouters (n 36) 223.

156 The Greek case, cited in Van Dijk and others (eds) (n 96) 406.

157 Clayton and Tomlinson (n 151) 499; Wouters (n 36) 226.

158 Wouters (n 36) 227.

159 Van Dijk and others (eds) (n 96) 406; Wouters (n 36) 228: the Court often does not distinguish clearly between these two forms of ill-treatment.

160 Clayton and Tomlinson (n 151) 502; Van Dijk and others (eds) (n 96).

ing the victim.¹⁶¹ With regard to all forms of ill-treatment proscribed by Article 3 ECHR, it makes no difference whether it is a situation of removal or one outside the context of non-refoulement – the standards applied in determining whether specific treatment is in violation of the provision are the same.¹⁶² This was explicitly stated by the Grand Chamber of the Court in *Saadi v Italy*.¹⁶³

Without restating the case law regarding ill-treatment as proscribed by Article 3 ECHR within¹⁶⁴ or outside the context of non-refoulement¹⁶⁵ in its entirety, the following situations will now be discussed in light of the provision as they are of particular relevance to transfers of piracy suspects: prison conditions, the treatment of prisoners, as well as punishment and sentences. With regard to prison conditions and the treatment of prisoners, the Strasbourg organs have repeatedly confirmed that poor prison conditions – namely overcrowding, a lack of proper medical and sanitary facilities, inadequate sleeping arrangements, recreation and contact with the outside world (and any combination of these factors) – can be in contravention of Article 3 ECHR.¹⁶⁶ By the same token, specific treatment of the prisoner may amount to ill-treatment prohibited by the provision.¹⁶⁷ Although the assessment is always case-specific (namely depending of the victim's situation) and thus hardly generalizable,¹⁶⁸ the threshold of what constitutes degrading treatment of prisoners has been set rather low in some cases – especially when considering that no distinction is made between conduct prohibited under Article 3 ECHR as a bar to refoulement and conduct that a State is prohibited from directly inflicting.¹⁶⁹ For instance, the Court decided in *Yankov v Bulgaria* that the forced shaving of a detainee's head, which had the purpose of debasing and/or subduing the applicant, amounted to degrading treatment in the sense of Article 3 ECHR.¹⁷⁰ In another case, *Moisejevs v Latvia*, the ap-

161 Clayton and Tomlinson (n 151) 502; Wouters (n 36) 228.

162 Wouters (n 36) 242–43.

163 *Saadi v Italy* (n 79) para 138, cited in Wouters (n 36) 243.

164 For specific conduct amounting to torture in the sense of Article 3 ECHR in general, see: Wouters (n 36) 222–25. For acts categorized as inhuman or degrading treatment or punishment in general, see *ibid* 225–37.

165 For case law on proscribed ill-treatment prohibited by the non-refoulement component of Article 3 ECHR specifically, see: *ibid* 238–46.

166 Clayton and Tomlinson (n 151) 508–09; Hartmann (n 85) 42–43; Wouters (n 36) 232–33.

167 Clayton and Tomlinson (n 151) 505–08, citing case law pertaining to assaults, interrogations and other forms of ill-treatment while in custody or detention.

168 Hartmann (n 85) 41.

169 See above on the standard applied equally to both categories.

170 *Yankov v Bulgaria* App no 39084/97 (ECtHR, 11 December 2003) paras 99–121: The Court argued that the shaving resulted in a forced change in the person's appearance, leaving a physical mark on the victim and a feeling of inferiority. Moreover, the shaving had neither a legal basis nor could a valid justification be adduced. The

plicant complained that due to insufficient meals he went hungry on the days he was due to appear in court, which the Court found to be in violation of Article 3 ECHR.¹⁷¹ In both cases, the conduct was without a doubt reprehensible. However, a consistent application of Article 3 ECHR – which prohibits the same conduct whether it is inflicted directly or is intended to be prevented upon removal and thus does not allow for a double standard – would imply that piracy suspects cannot be transferred if there is a real risk of being shaved bald or receiving a light meal in certain circumstances in the receiving State.¹⁷² In other words, a real risk of (comparatively and relatively speaking) minor ill-treatment in the receiving State could already bar a specific transfer. It is somewhat difficult to imagine that the Court would apply Article 3 ECHR with such consistency. At the same time, however, the Grand Chamber insisted in *Saadi v Italy* that the notion of risk must be assessed independently and rejected the idea of balancing the risk of harm potentially inflicted upon removal against the dangerousness the person presents to the community if not removed.¹⁷³ Hence, the Court may not allow the threshold of risk that a piracy suspect must face upon removal in order to bar its surrender to be set higher simply because the suspect might be released if not transferred, thus benefitting from impunity. Overall, the case law relating to Article 3 ECHR demonstrates the Court's seriousness with regard to the physical integrity of detained persons.¹⁷⁴ Therefore, even if – *arguendo* and going against the finding in

age of the applicant (55 years) and the fact that he had to appear in court nine days after the forced shaving were also taken into account by the Court: case mentioned in *Wouters* (n 36) 226 and 235.

171 *Moisejevs c Lettonie* App no 64846/01 (ECtHR, 15 June 2006) paras 75–81: on the days of the court hearings, the applicant was not given a normal lunch and was limited to a slice of bread, an onion and a piece of grilled fish or a meatball. The Court held that such a meal was clearly insufficient to meet the body's functional needs, especially when considering the applicant's participation in the hearings causing increased psychological tension. In addition, on a number of occasions after returning to the prison in the evening, the applicant did not receive a full dinner, only a bread roll; case mentioned in *Wouters* (n 36) 235.

172 *ibid* 243.

173 *Saadi v Italy* (n 79) para 139: “The Court considers that the argument based on the balancing of the risk of harm if the person is sent back against the dangerousness he or she represents to the community if not sent back is misconceived. The concepts of ‘risk’ and ‘dangerousness’ in this context do not lend themselves to a balancing test because they are notions that can only be assessed independently of each other. Either the evidence adduced before the Court reveals that there is a substantial risk if the person is sent back or it does not. The prospect that he may pose a serious threat to the community if not returned does not reduce in any way the degree of risk of ill treatment that the person may be subject to on return.”

174 *Hartmann* (n 85) 39; Hélène Lambert, ‘The European Convention on Human Rights and the Protection of Refugees: Limits and Opportunities’ (2005) 24 *Refugee Survey Quarterly* 39, 49.

Saadi v Italy – the Court could set the benchmark in terms of Article 3 ECHR higher when assessing prison conditions or detainee treatment in the context of non-refoulement as compared to directly inflicted harm and taking into account potential impunity of a piracy suspect if not transferred, transfers of piracy suspects to specific destinations and prisons may be prone to a violation of the said provision because of the rather harsh prison conditions in some of the receiving States – most notably in Puntland and Somaliland.¹⁷⁵ Even transfers to Kenya may be problematic depending on where the transferred person will be detained. For example, the administrative court of first instance in Cologne, Germany decided that the transfer of a piracy suspect to the Shimo-La-Tewa prison on 10 March 2009, and thus before the prison had been refurbished with international aid, was in breach of the principle of non-refoulement. It held that the overcrowding, poor sanitary facilities, shortage of water for hygiene and pest infestation in combination with high temperatures amounted to inhuman and degrading treatment.¹⁷⁶

A violation of Article 3 ECHR may not only arise from harsh prison conditions and improper detainee treatment, but also from certain forms of punishment or the way sentences are executed. For instance, a disproportionate or unjustified sentence imposed by the court in a criminal proceeding may constitute inhuman punishment. Even though the imposition of a sentence of life imprisonment on an adult is not as such a violation of Article 3 ECHR, an irreducible life sentence may violate the provision. Thus, the Court has considered it possible that the surrender of an individual to a State where he is at real risk of life imprisonment without a possibility of early release may violate Article 3 ECHR.¹⁷⁷ However, where the life sentence could possibly be reviewed with respect to its commutation, remission or termination, or the person could be conditionally released, no issue will arise under Article 3 ECHR.¹⁷⁸ Respective assurances that this form of sentence will not be imposed or executed may avert the danger of a violation of Article 3 ECHR.¹⁷⁹ The non-refoulement provision of the CRC equally

175 See above Part 5/I/B/2/b/aa on Article 7 ICCPR and the prison conditions in Puntland and Somaliland.

176 *Re 'MV Courier'* 25 K 4280/09 (Verwaltungsgericht Köln, 25. Kammer, 11 November 2011) paras 64–77.

177 Clayton and Tomlinson (n 151) 501, with references to case law; Hartmann (n 85) 36–38, see fn 59 containing references to case law on this issue. In *Harkins and Edwards v the United Kingdom* App nos 9146/07 and 32650/07 (ECtHR, 17 January 2012), a complaint of an Article 3 ECHR violation was denied because, even if the US courts decided to impose life sentences upon the applicants without the possibility of parole, it was not deemed to be grossly disproportionate.

178 Clayton and Tomlinson (n 151) 502.

179 See, eg, *Nivette v France* App no 44190/98 (ECtHR, 3 July 2001) cited in ECtHR Press Unit (n 50) 6: “the assurances obtained from the State of California were such as to avert the danger of the applicant’s being sentenced to life imprisonment without any possibility of early release”.

precludes the transfer of a minor if there is a real risk that Article 6 CRC will be violated, which explicitly prohibits “life imprisonment without possibility of release”.¹⁸⁰ The prospect of piracy suspects being charged with a crime carrying a mandatory life sentence without the possibility of early release in the receiving State cannot *per se* be excluded and must be assessed in the individual case by taking domestic criminal law and practice into account. Transfer agreements – where they exist – do not rule out this form of punishment¹⁸¹ and the issuance of individual assurances does not appear to be current practice in the counter-piracy context.

Punishment may qualify as degrading in the sense of Article 3 ECHR if it carries an element of humiliation going beyond the humiliation that inevitably arises from the actual conviction or punishment imposed by State authorities. Punishment may be degrading even though it does not outrage the public or inflict lasting injuries. Moreover, a punishment may be degrading even if it is viewed as an effective deterrent, imposed for grave violent crimes or administered in private (rather than in public). The assessment is relative and depends on the particular circumstances of any given case.¹⁸² For instance, the Court has ruled in a variety of cases that corporal punishment may qualify as degrading,¹⁸³ and, as discussed earlier, various (regional) States to which piracy suspects are transferred include corporal punishment among the sentences potentially imposed on convicted criminals.¹⁸⁴

Regarding capital punishment, the Court has found that the imposition of the death sentence following an unfair trial – which must not necessarily meet the threshold of a flagrant denial of justice¹⁸⁵ – amounts to inhuman treatment.¹⁸⁶ What is more, certain methods of carrying out a death sentence have been found to violate Article 3 ECHR.¹⁸⁷ In *Al-Saadoon and Mufdhi v the United Kingdom*, decided in 2010, the Court’s reasoning went one step further: the death penalty *as such* may constitute inhuman and degrading treatment contrary to Article 3

180 Article 37(a) CRC; Committee on the Rights of the Child (n 101) para 27.

181 On the content of transfer agreements aimed at ensuring the substantive side of the principle of non-refoulement, see below Part 5/II/B/1/b.

182 Clayton and Tomlinson (n 151) 503.

183 *ibid* 503–04.

184 See above Part 5/I/B/2/b/aa.

185 See below Part 5/I/B/2/b/cc on the flagrant denial of justice standard.

186 *Öcalan v Turkey* App no 46221/99 (ECtHR, 12 May 2005) paras 167–75.

187 ECtHR Press Unit, ‘Factsheet – Death Penalty Abolition’ (December 2012) <www.echr.coe.int/NR/rdonlyres/C20F17A5-5F49-47C9-9CBD-A2A26985E099/0/FICH-ES_Abolition_peine_de_mort_EN.pdf> accessed 29 January 2013, 1–2: The risk of being stoned to death in the receiving State may bar refoulement: *Jabari v Turkey* App no 40035/98 (ECtHR, 11 July 2000); a real risk of spending a very long period of time on death row with ever-mounting anguish of waiting to be executed may also prevent refoulement: *Soering v the United Kingdom* (n 19).

ECHR since it causes physical pain and intense psychological suffering as a result of the foreknowledge of death.¹⁸⁸ From this case law follows that the transfer of piracy suspects who are potentially charged with an offence carrying the death penalty to retentionist States¹⁸⁹ may be problematic in light of the principle of non-refoulement implicitly contained in Article 3 ECHR – unless individual assurances not to impose and carry out a death sentence can be secured before transfer.

bb) Right to Life

Another fundamental value protected by the principle of non-refoulement under human rights law is the right to life as enshrined in Article 6 ICCPR, Article 2 ECHR, Article 2 CFREU and Article 6 CRC.¹⁹⁰ This component of the prohibition of refoulement is important against the background that seizing States transfer piracy suspects to third States for prosecution, which still retain the death penalty, such as Somalia and Yemen.¹⁹¹ Furthermore, even though Kenya, one of the main transfer destinations, can be said to be abolitionist in practice, its criminal

188 *Al-Saadoon and Mufdhi v the United Kingdom* App no 61498/08 (ECtHR, 2 March 2010); in the case at hand, the Court found a violation of Article 3 ECHR, see para 137: “Moreover, it considers that the applicants’ well-founded fear of being executed by the Iraqi authorities during the period May 2006 to July 2009 must have given rise to a significant degree of mental suffering and that to subject them to such suffering constituted inhuman treatment within the meaning of Article 3 of the Convention.” See also para 144: “The outcome of the applicants’ case before the IHT is currently uncertain. While the applicants remain at real risk of execution since their case has been remitted for reinvestigation, it cannot at the present time be predicted whether or not they will be retried on charges carrying the death penalty, convicted, sentenced to death and executed. Whatever the eventual result, however, it is the case that through the actions and inaction of the United Kingdom authorities the applicants have been subjected, since at least May 2006, to the fear of execution by the Iraqi authorities. The Court has held above that causing the applicants psychological suffering of this nature and degree constituted inhuman treatment. It follows that there has been a violation of Article 3 of the Convention.”

189 On the regional States receiving piracy suspects for prosecution still retaining the death penalty in their domestic law, see below Part 5/I/B/2/b/bb.

190 According to the Committee on the Rights of the Child (n 101) para 27, a State “shall not return a child to a country where there are substantial grounds for believing that there is a real risk of irreparable harm to the child, such as ... those contemplated under articles 6 and 37 of the Convention”.

191 Amnesty International, ‘Abolitionist & Retentionist Countries’ <www.amnesty.org/en/death-penalty/abolitionist-and-retentionist-countries> accessed 29 January 2013; The imposition of the death penalty in Yemen for participation in pirate attacks is a real likelihood; a Yemeni court sentenced six Somali-based pirates to death in May 2010, who were transferred to Yemen by Russian forces BBC News, ‘Yemen sentences Somali pirates to death’ (18 May 2010) <<http://news.bbc.co.uk/2/hi/8689129.stm>> accessed 29 January 2013, and Sarah Miley, ‘Yemen Court Sentences 6 Somali

law still retains capital punishment for specific offences.¹⁹² The same holds true for Tanzania.¹⁹³

The content of the non-refoulement principle flowing from the right to life varies under the different human rights treaties. In addition, one and the same treaty (or even a single provision) may entail differing obligations for retentionist and abolitionist States. This is important since both categories of States, those having abolished the death penalty themselves¹⁹⁴ and those still retaining it,¹⁹⁵ transfer piracy suspects to States that have not yet banned the death penalty from their law and thus could potentially impose and implement capital punishment

Pirates to Death' (18 May 2010) <<http://jurist.org/paperchase/2010/05/yemen-court-sentences-12-pirates-6-to-death.php>> accessed 29 January 2013.

- 192 Amnesty International (n 191) defines the term "abolitionist in practice" as follows: "Countries which retain the death penalty for ordinary crimes such as murder but can be considered abolitionist in practice in that they have not executed anyone during the past 10 years and are believed to have a policy or established practice of not carrying out executions."
- 193 UNSC, 'Report of the Secretary-General on specialized anti-piracy courts in Somalia and other States in the region' (n 135) para 99: "Section 66 of the Penal Code specifically contemplates the possibility of prosecuting suspected pirates arrested by foreign navies, specifying that a special arrangement between the arresting State or agency and the United Republic of Tanzania is necessary where the pirate ship is not registered in the United Republic of Tanzania. Any such agreement would need to take into consideration whether the accused persons are suspected of murder, in addition to piracy, as murder carries the death penalty in the United Republic of Tanzania."
- 194 Denmark and EUNAVFOR, eg, transfer piracy suspects to Kenya, which still retains the death penalty in its domestic law (on assurances pertaining to the death penalty contained in the transfer agreements concluded between Kenya and Denmark and the European Union respectively, see below Part 5/II/B/1/b). According to Nicolas Gros-Verheyde, 'Bilan des opérations anti-piraterie (EUNAVFOR Atalanta, CTF, Otan, Russie, Inde)' <www.bruxelles2.eu/bilan-des-operations-anti-piraterie-eunavfor-atalanta-ctf-otan-russie-exclusif> accessed 29 January 2013, as of April 2011, France has transferred more than 80 piracy suspects seized under national authority and control to Puntland for prosecution; for a specific instance of transfer where France surrendered 24 piracy suspects to Puntland for prosecution, see AFP, 'Puntland court jails 37 Somali pirates' (2009) <www.google.com/hostednews/afp/article/ALeqM5gJCTKa_pRT-W3hzyfp9rfLGSuIvg> accessed 29 January 2013; Nicolas Gros-Verheyde, 'Livrer les pirates ou les libérer? Puntland ou pas Puntland?' (2010) <<http://bruxelles2.over-blog.com/article-livrer-les-pirates-ou-les-liberer-puntland-ou-pas-puntland-46668585.html>> accessed 29 January 2013.
- 195 For instance, India (retentionist State) and Russia (retains the death penalty although it is abolitionist in practice) transferred piracy suspects to Yemen: Mohammed Al Qadhi, 'Death sentences for Somali pirates who killed Yemeni sailor on oil tanker' (The National, 2010) <www.thenational.ae/news/world/middle-east/death-sentences-for-somali-pirates-who-killed-yemeni-sailor-on-oil-tanker> accessed 29 January 2013.

on transferred persons. Accordingly, the following will present an overview of the principle of non-refoulement flowing from the right to life under the ICCPR and ECHR.

Article 6 ICCPR

Under the principle of non-refoulement implicitly contained in the right of life stipulated in Article 6 ICCPR, the ensuing obligations differ between retentionist and abolitionist transferring States.

Retentionist State Parties to the ICCPR are under an obligation to carefully assess the probability whether capital punishment will be imposed or carried out against the transferee in the receiving State. If there is a real risk that this is the case, the transferring State must assess whether the limitations regarding the imposition and implementation of the death penalty contained in, *inter alia*, Article 6(2) and (5) ICCPR will be respected by the receiving State.¹⁹⁶ If not, transferring a piracy suspect to that State is prohibited under the principle of non-refoulement flowing from Article 6 ICCPR.¹⁹⁷ Among these limitations is Article 6(2) ICCPR stipulating that the death sentence can only be carried out pursuant to a final judgment rendered by a competent court and that it may only be imposed for the most serious crimes according to the law in force at the time the crime was committed. Whether, under Article 6(2) ICCPR, a State is allowed to attach the death penalty to the type of offences potentially committed by a pirate attack is difficult to say with certainty given the fluid nature of the “most serious crimes” concept and the fact that a pirate attack generally fulfils a number of offence descriptions – namely the offence of piracy or armed robbery at sea where criminalized by domestic criminal law or general offences, such as hostage taking, false imprisonment or the offences defined in Article 3 SUA Convention.¹⁹⁸ The Human Rights Committee has decided in several cases that legislation calling for a *mandatory* death sentence (even for such serious crimes as murder), which do not allow for the specificities of the case to be taken into account, is not allowed under Article 6(2) ICCPR. Furthermore, the provision is interpreted as only permitting the death penalty for intentional killings and intentional infliction of grievous bodily harm.¹⁹⁹ Therefore, it is doubtful whether a criminal provision foreseeing the death penalty for the specific offences of piracy or armed robbery at sea, which do not necessarily involve a killing or the infliction of bodily harm, is in line with Article 6(2) ICCPR. In addition, Article 6(2) ICCPR prohibits States from imposing the death penalty based on a retroactively applied law. Hence, a transfer to a State where there is a real risk that the death penalty could be imposed pursu-

196 Article 6 ICCPR contains further limitations, which are, however, not discussed here; eg, Article 6(3) ICCPR stipulates that “[a]nyone sentenced to death shall have the right to seek pardon or commutation of the sentence”.

197 Nowak (n 76) 151.

198 See above Part 2/I/B/1 on Danish law and Part 2/II/B/4/b on German law.

199 Nowak (n 76) 141–42.

ant to the retroactive application of a law is prohibited. In light of the fact that the criminal law pertaining to piracy is in a state of flux in many jurisdictions – several are about to introduce or revise provisions criminalizing piracy and armed robbery at sea – transferring States must carefully assess whether there is a real risk that such newly enacted provisions criminalizing the phenomena of piracy and armed robbery at sea and carrying the death penalty could be applied retroactively. Article 6(2) ICCPR further requires that a sentence of death is not imposed contrary to the provisions of the Covenant. It is thus prohibited to transfer a piracy suspect to a State where a real risk exists that the death penalty will be imposed in criminal proceedings not fulfilling the minimum fair trial guarantees of the Covenant as set forth in Article 14 ICCPR or contrary to Article 15 ICCPR, *inter alia*, stipulating the *lex mitior* principle.²⁰⁰ Whether there is a real risk that the death sentence will be imposed on a piracy suspects in the receiving State as a result of criminal proceedings not living up to the fair trial standards stipulated in the ICCPR must be assessed on a case-by-case basis. Finally, Article 6(5) ICCPR stipulates that the “[s]entence of death shall not be imposed for crimes committed by persons below eighteen years of age”. Against the background that the Security Council expressed “concern about the reported involvement of children in piracy off the coast of Somalia”,²⁰¹ namely their recruitment into pirate attack groups,²⁰² this aspect of the principle of non-refoulement flowing from the right to life is of practical importance.

As far as abolitionist States are concerned, the obligations flowing from the non-refoulement principle under Article 6 ICCPR go even further. In the landmark case *Judge v Canada*, the Human Rights Committee determined that Article 6(1) ICCPR prevents abolitionist States from extraditing or deporting a person to a retentionist State where that person faces a real risk of being subjected to the death penalty. This holds true in all cases – ie regardless of whether the requirements of Article 6(2) to (5) ICCPR as described above are respected by the receiving State.²⁰³ In particular, the Human Rights Committee held:

For countries that have abolished the death penalty, there is an obligation not to expose a person to a real risk of its application. Thus, they [abolitionist countries] may not remove, either by deportation or extradition, individuals from their jurisdiction

200 *ibid* 140–41.

201 UNSC Res 1950 (23 November 2010) UN Doc S/RES/1950, preambular para 3; UNSC Res 2020 (22 November 2011) UN Doc S/RES/2020, preambular para 3.

202 UNSC, ‘Report of the Secretary-General pursuant to Security Council resolution 1950 (2010)’ (25 October 2011) UN Doc S/2011/662, para 71; see above Part 1/I.

203 With *Judge v Canada* (n 30), the Committee overruled its previous holdings, which are summarized in: Joanna Harrington, ‘The Absent Dialogue: Extradition and the International Covenant on Civil and Political Rights’ (2006) 32 *Queen’s Law Journal* 82, 98–108.

if it may be reasonably anticipated that they will be sentenced to death, without ensuring that the death sentence would not be carried out.²⁰⁴

Since the Human Rights Committee does not make a distinction between extradition, deportation and other forms of removal with regard to the non-refoulement principle flowing from Articles 6 and 7 ICCPR,²⁰⁵ transfers of piracy suspects in all their forms are covered. From this follows that States that have abolished the death penalty²⁰⁶ must refrain from transferring piracy suspects to a State where there is a real risk that the death penalty will be imposed or carried out against that individual, unless diplomatic assurances have effectively excluded such a sentence with regard to the specific suspect transferred.²⁰⁷

Article 2 ECHR

The right to life enshrined in Article 2 ECHR is interpreted as implicitly providing protection against refoulement if it will put the individual's life at risk. Namely, the right to life as stipulated in Article 2 ECHR will be violated if the death penalty is a result of an unfair trial.²⁰⁸ In *Öcalan v Turkey*, the Grand Chamber held that Article 2 ECHR prohibits “an arbitrary deprivation of life pursuant to capital punishment”. This follows from Article 2(1) ECHR, which explicitly states that “[e]veryone's right to life shall be protected from law” and that “[n]o one shall be deprived of his life save in the execution of a sentence of a court”. This, in turn, implies that the court imposing the death sentence is an independent and impartial tribunal within the meaning of the case law of the European Court of Human Rights. Further, the Court stressed that criminal proceedings in which the death sentence may be imposed must abide by “the most rigorous standard of fairness” be it in the first instance or during the appeal process.²⁰⁹ If the fair trial concept under the ECHR is understood as a sliding scale – with the “flagrant denial of justice” standard at the lowest level and only encompassing the most fundamental violations of the right to a fair trial guaranteed by Article 6 ECHR²¹⁰ – the most rigorous standard of fairness flowing from Article 2 ECHR seems to be at the top end of this scale and require that the determination of criminal charges scrupulously follows the prescripts of Article 6 ECHR. It seems open to debate whether trials in regional States potentially imposing the death sentence for the crimes referred to as piracy and armed robbery at sea always live up to this most

204 *Judge v Canada* (n 30) para 10(4).

205 HRC, ‘General Comment No. 31: The Nature of the General Legal Obligations Imposed on States Parties to the Covenant’ (n 46) para 12.

206 Eg, State parties to the 2nd Optional Protocol ICCPR.

207 On diplomatic assurances, see below Part 5/II/B/2 and 3.

208 *Öcalan v Turkey* (n 186) para 166.

209 *ibid.*

210 On the concept of “flagrant denial of justice”, see below Part 5/I/B/2/b/cc.

rigorous standard of fairness (as measured by Article 6 ECHR). For instance, the Secretary-General stated in June 2011 that “[t]he full programmes of assistance in ‘Somaliland’ and ‘Puntland’ will run for three years, after which time UNDP and UNODC estimate that piracy trials in these regions will achieve international standards”.²¹¹ Thus, criminal proceedings as currently conducted in these two regional entities of Somalia may not necessarily be in line with the “most rigorous standard of fairness” as measured by Article 6 ECHR.

Article 19(2) CFREU explicitly stipulates that “[n]o one may be removed, expelled or extradited to a State where there is a serious risk that he or she would be subjected to the death penalty”. Hence, it contains a plain prohibition of transfer in cases where there are serious reasons to believe that the transferee will be subject to a death sentence in the receiving State. The European Court of Human Rights decided along these lines in *Al-Saadoon and Mufdhi v the United Kingdom* and held that

Article 2 of the Convention and Article 1 of Protocol No. 13 prohibit the extradition or deportation of an individual to another State where substantial grounds have been shown for believing that he or she would face a real risk of being subjected to the death penalty there.²¹²

However, the Court ultimately decided the case based on Article 3 ECHR – by reaching the conclusion that the death penalty as such amounts to inhuman and degrading treatment²¹³ – and did not find it necessary to decide whether there had also been a violation of the applicant’s right to life as embodied in Article 2 ECHR and reinforced by Protocol 13.²¹⁴

211 UNSC, ‘Report of the Secretary-General on the modalities for the establishment of specialized Somali anti-piracy courts’ (n 93) para 38.

212 *Al-Saadoon and Mufdhi v the United Kingdom* (n 188) para 123.

213 See above Part 5/I/B/2/b/aa.

214 *Al-Saadoon and Mufdhi v the United Kingdom* (n 188) para 145. For most non-refoulement cases where violations of Article 2 ECHR and Article 3 ECHR were raised, they have, on the merits, first been decided based on the latter provision and, if a violation was found, the Court did not deem it necessary to further examine the complaint under Article 2 ECHR (Wouters (n 36) 346, see fn 780 for a list of cases where the Court proceeded in this way; Hartmann (n 85) 33). The Court generally proceeds the same way if a specific removal arguably exposes the individual at a risk of ill-treatment prohibited by Article 3 ECHR on the one hand and to the death penalty as prohibited under Article 1 of Protocol 6 ECHR and Article 1 of Protocol 13 ECHR on the other (Wouters (n 36) 346, see fns 781 and 782 for a list of cases where the Court took this approach). Exceptionally, however, the Court has found a violation of the right to life and the prohibition of death penalty (in addition to a violation of Article 3 ECHR) (ibid, see, eg, *Bader and Kanbor v Sweden* App no 13284/04 (ECtHR, 8 November 2005) paras 45–48, where violations of Articles 2 and 3 ECHR were found).

cc) Right to a Fair Trial

Since transfers of piracy suspects are undertaken for the purpose of their criminal prosecution in the receiving State, the next step is to enquire into whether the right to a fair trial also contains a non-refoulement component, ie whether the risk of being subjected to an unfair trial in the receiving State may bar a specific transfer. As we will see, this question is not entirely settled under the case law pertaining to the ICCPR and ECHR.

With regard to the ICCPR, the Human Rights Committee does not necessarily exclude the possibility that provisions of the Covenant other than the right to life in Article 6 ICCPR and the prohibition of torture and other forms of ill-treatment of Article 7 ICCPR could contain a refoulement prohibition.²¹⁵ Furthermore, specifically with regard to the right of a fair trial stipulated in Article 14 ICCPR, it follows from *A.R.J. v Australia* that the Committee seems to accept that this provision may entail a prohibition of refoulement. However, neither in this case nor in any other case did it decide that removing a person to another jurisdiction constituted a violation of the right to a fair trial.²¹⁶ What is more, to date, the Committee has not yet specified whether any kind of due process violation may bar a transfer or whether only qualified violations of the fair trial guarantee result in a violation of this provision – as is the case under the non-refoulement provision of Article 6 ECHR as we will see next.

The European Court of Human Rights has already noted in the *Soering* case that it “does not exclude that an issue might exceptionally be raised under Article 6 by an extradition decision in circumstances where the fugitive has suffered or risks suffering a flagrant denial of a fair trial in the requesting country”.²¹⁷ In the abstract, this principle has subsequently been confirmed by the Court in various cases.²¹⁸ However, in the 22 years since *Soering*, the Court has never found a removal to actually be in violation of the refoulement prohibition under Article 6

215 See, eg, HRC, ‘General Comment No. 31: The Nature of the General Legal Obligations Imposed on States Parties to the Covenant’ (n 46) para 12: “an obligation not to ... remove a person from their territory, where there are substantial grounds for believing that there is a real risk of irreparable harm, *such as* that contemplated by articles 6 and 7 of the Covenant, either in the country to which removal is to be effected or in any country to which the person may subsequently be removed to” (emphasis added). From the words “such as” it can be concluded that the reference to Articles 6 and 7 ICCPR is not exhaustive.

216 *ARJ v Australia* Comm no 692/1996 (HRC, 11 August 1997) para 6.15; on this case, see Wouters (n 36) 420–21.

217 *Soering v the United Kingdom* (n 19) para 113.

218 See, eg, the rather recent cases of *Mamatkulov and Askaraov v Turkey* App nos 46827/99 and 46951/99 (ECtHR, 4 February 2005) paras 90–91, and *Al-Saadoon and Mufdhi v the United Kingdom* (n 188) para 149.

ECHR.²¹⁹ It was only with the January 2012 judgment of *Othman (Abu Qatada) v the United Kingdom* that for the first time the Court decided that a removal would be in breach of Article 6 ECHR.²²⁰ Only a “flagrant denial of justice” in the receiving State may bar a transfer. However, this concept on which the principle of non-refoulement under Article 6 ECHR turns has little elaboration in jurisprudence. In the only case where the Court found a violation of the prohibition of refoulement under Article 6 ECHR, it decided that “flagrant denial of justice” stands for “a trial which is manifestly contrary to the provisions of Article 6 or principles embodied therein”.²²¹ A more precise yet abstract definition is still missing from the Court’s case law, but the Court has referred to different forms of unfairness potentially amounting to a flagrant denial of justice: conviction *in absentia* without the possibility of having the charges reheard in a new trial; a trial of summary nature, which is in total disregard of defence rights; detention without any access to an independent and impartial tribunal to have the detention’s legality reviewed; deliberate and systematic refusal of access to a lawyer, especially for a foreign detainee.²²² Furthermore, with regard to the case under scrutiny, the Court found the admission of evidence obtained through torture in a criminal trial to constitute a flagrant denial of justice,²²³ and did not rule out that the admission of evidence obtained by other forms of ill-treatment not amounting to torture may also reach the threshold of a flagrant denial of justice.²²⁴ Whether the “flagrant denial of justice” test requires that the trial in question to have serious consequences for the applicant was left open by the Court.²²⁵

Overall, from the case law of the Court follows that it applies a “stringent test of unfairness” when assessing whether there is a real risk that criminal proceedings in the receiving State are conducted in a way amounting to a flagrant denial of justice.²²⁶ As opposed to Article 3 ECHR – where the Court does not distinguish between situations of direct violation of the provision and the prevention of a violation upon removal in relation to the threshold of harm that constitutes a violation of Article 3 ECHR²²⁷ – the Court has introduced a double standard with regard to fair trial rights guaranteed by Article 6 ECHR. In the words of the Court, a flagrant denial of justice

219 *Othman (Abu Qatada) v the United Kingdom* App no 8139/09 (ECtHR, 17 January 2012) para 260.

220 *ibid* para 287.

221 *ibid* para 259.

222 *ibid* with references to the respective cases.

223 *ibid* paras 263 and 267.

224 *ibid* para 267.

225 *ibid* para 262.

226 *ibid* para 260.

227 See above Part 5/I/B/2/b/aa.

goes beyond mere irregularities or lack of safeguards in the trial procedures such as might result in a breach of Article 6 if occurring within the Contracting State itself. What is required is a breach of the principles of fair trial guaranteed by Article 6 which is so fundamental as to amount to a nullification, or destruction of the very essence, of the right guaranteed by that Article.²²⁸

In sum, only a qualified violation of Article 6 ECHR constitutes a bar to surrender for prosecution, whereas any violation of the fair trial guarantee that falls below this rather demanding standard does not. Therefore, prosecutions of piracy suspects in the receiving State may fall quite short of the fair trial standard enshrined in Article 6 ECHR and yet a transfer to such a State would not violate the non-refoulement component of this provision – even though it may violate, for instance, the non-refoulement component of the right to life because the death penalty is imposed in an unfair trial, ie contrary to Article 6 ECHR.^{229, 230}

dd) Right to Liberty and Security

There may be a risk that piracy suspects transferred to third States are arbitrarily detained. For instance, the UN Secretary-General has stated that a majority of prisoners in Puntland are detained without due process.²³¹ This example begs the question whether a transfer of a piracy suspect is prohibited if there are serious reasons to believe that the transferred person will be deprived of his liberty in the receiving State in violation of the right to liberty and security as stipulated in, for example, Article 9 ICCPR and Article 5 ECHR.

We have seen that the Human Rights Committee does not exclude the assertion that rights other than Articles 6 and 7 ICCPR may contain a non-refoulement component.²³² However, thus far, the Committee has not found a specific removal to be in violation of the right to liberty guaranteed by Article 9 ICCPR.

The same holds true for the European Court of Human Rights: while in theory it perfectly accepts that the right to liberty and security stipulated in Article 5 ECHR contains a non-refoulement component,²³³ it has never found an actual vi-

228 *Othman (Abu Qatada) v the United Kingdom* (n 219) para 260; the flagrant denial of fair trial standard was defined in very similar terms by Judges Bratza, Noello and Hedigan in their Joint Partly Dissenting Opinion: *ibid* para 14.

229 See above Part 5/1/B/2/b/bb.

230 Guilfoyle, 'Counter-Piracy Law Enforcement and Human Rights' (n 5) 166.

231 UNSC, 'Report of the Secretary-General on Somalia' (n 138) para 66: "It is important to note that prison facilities in 'Puntland' are increasingly strained, owing to the rising number of pirates in detention, adding pressure to an already weak penal system. The 'Puntland' prison population has grown by approximately 10 per cent per month, the majority of prisoners being detained without due process."

232 See above Part 5/1/B/2/b/cc.

233 In *Othman (Abu Qatada) v the United Kingdom* (n 219) the Court dissipated any doubts in this regard, which were the result of its findings in *Tomic v the United*

olation of this provision in the context of removal.²³⁴ Interestingly enough, however, in *El-Masri* decided in 2012, the Grand Chamber found the removing State (Macedonia) responsible for detention by CIA agents in Afghanistan following surrender of the applicant – rather than holding the removing State (Macedonia) liable for exposing the applicant to a risk of violation of the right to liberty and security, ie based on the doctrine of non-refoulement.²³⁵

The argument for applying Article 5 ECHR to removal cases is closely connected with the non-refoulement component of Article 6 ECHR. According to the Court

it would be illogical if an applicant who faced imprisonment in a receiving State after a flagrantly unfair trial could rely on Article 6 to prevent his expulsion to that State but an applicant who faced imprisonment without any trial whatsoever could not rely on Article 5 to prevent his expulsion.²³⁶

Further, the threshold for prohibiting a removal based on Article 5 ECHR is as high as it is for Article 6 ECHR in that the Court requires that the person be at real risk of a flagrant breach of the right to liberty and security if removed. This is namely the case if there is a real risk the person will be arbitrarily detained for many years in the receiving State without any intention on the part of the State to

Kingdom App no 17837/03 (ECtHR, 14 October 2003) (see Mole and Meredith (n 50) 95–96).

234 See, eg, *Othman (Abu Qatada) v the United Kingdom* (n 219) paras 234–235; and *F v the United Kingdom* App no 17341/03 (ECtHR, 22 June 2004) complaints and 2. of the legal considerations, where the applicant complained that upon his expulsion to Iran he would face arbitrary detention. The Court did not deny that Article 5 ECHR has a non-refoulement component, but decided *in concreto* that the applicant's submissions did not contain a concrete indication that he would be arrested upon removal. Cases involving arbitrary arrest and detention *upon* removal must be distinguished from the situation of arrest and detention *with a view to* remove; regarding the latter situation a violation of Article 5(1) and (4) ECHR was, eg, found in *Popov v France* App nos 39472/07 and 39474/07 (ECtHR, 19 January 2012), but was denied in *Adamov c Suisse* App no 3052/06 (ECtHR, 21 June 2011).

235 *El-Masri v 'the former Yugoslav Republic of Macedonia'* (n 39) paras 238–241; for a discussion of this issue, see André Nollkaemper, 'The ECtHR Finds Macedonia Responsible in Connection with Torture by the CIA, but on What Basis?' (24 December 2012) <www.ejiltalk.org/author/andrenollkaemper/> accessed 29 January 2013.

236 *Othman (Abu Qatada) v the United Kingdom* (n 219) para 232. Further, the Court argued that there might be a situation where the applicant has already been convicted in the receiving State following a flagrantly unfair trial and is to be extradited to that State for the enforcement of the sentence. If there was no existing possibility that the criminal trial would be reopened after his return, he could not rely on Article 6 ECHR because he would not be at risk of a further flagrant denial of justice. In this situation, the Court found it unreasonable if he could not invoke Article 5 ECHR.

bring him or her to trial. The statement of the Secretary-General that a majority of prisoners in Puntland are detained without due process is far too imprecise (especially in terms of the duration of arbitrary detention) to allow for a conclusion on whether the principle of non-refoulement under Article 5 ECHR could be violated when transferring piracy suspects to this entity.²³⁷ In addition, the “flagrant breach” test is also met if the transferee is at risk of being imprisoned for a substantial period of time in the receiving State after being convicted in a flagrantly unfair trial.²³⁸ The sentences imposed for having engaged in pirate attacks are potentially of a long duration.²³⁹ However, whether a specific transferee is at risk of such a sentence being imposed by the court following a flagrantly unfair trial cannot be decided in the abstract, but must be assessed in the individual case.

C. Conclusions on the Conditional Right Not to Be Transferred

The question whether international law provides piracy suspects with an absolute right not to be transferred must be answered in the negative. As for the law of the sea, Article 105 UNCLOS and Article 19 of the Convention on the High Seas cannot be read as limiting the competence to prosecute piracy suspects to the seizing State and, as a consequence, prohibiting transfers for prosecution altogether. Human rights law does not contain an absolute right not to be surrendered for prosecution either. However, the principle of non-refoulement, which is explicitly or implicitly contained in various human rights treaties, may prohibit a seizing State from transferring a specific piracy suspect to a specific destination. Hence, by virtue of the principle of non-refoulement, a specific piracy suspect has a conditional right not to be transferred if there is a real risk that certain of his human rights will be violated upon surrender.

The principle of non-refoulement, as contained in the CAT, ICCPR and ECHR, without a doubt applies to piracy suspects detained on board a law enforcement vessel of the seizing State and subject to transfer. First of all, the principle of non-refoulement undeniably applies extraterritorially on board a warship of the seizing State, either by virtue of the flag State principle and/or because the seizing State exercises effective control over a transferee. Secondly, the prohibitions of refoulement analysed above have the broadest possible personal scope of application – they apply to everyone subject to removal and thus also to alleged criminals. Furthermore, the principle of non-refoulement covers any method by

237 UNSC, ‘Report of the Secretary-General on Somalia’ (n 138) para 66.

238 *Othman (Abu Qatada) v the United Kingdom* (n 219) para 233.

239 For an overview on penalties imposed on Somali-based pirates in criminal trials conducted in various States, see Eugene Kontorovich, ‘The Penalties for Piracy: Discussion Paper prepared for Oceans Beyond Piracy – a Project of One Earth Future Foundation’ (2012) <http://oceansbeyondpiracy.org/sites/default/files/obp_penalties_for_piracy_final.pdf> accessed 29 January 2013.

which an “obligatory departure” to another State or territory is obtained, regardless of the legal context in which it takes place, the formal nature of removal or the specific wording used in explicit refoulement prohibitions referring to methods of removal. Hence, transfers that occur in the context of counter-piracy operations are clearly covered by the principle of non-refoulement. Lastly, it is irrelevant which destination piracy suspects are transferred to for application of the refoulement prohibitions of Article 3 CAT, the ICCPR and ECHR. Hence, transfers to Somaliland and Puntland, which have a somewhat ambiguous status, are also covered by these prohibitions. As regards the protective ambit of the principle of non-refoulement, it is important to recall that it not only aims at preventing harm emanating from the State to which a piracy suspect is transferred in the first place, but also harm potentially inflicted by any State to which he may be subsequently removed. This is significant against the background that a majority of States receiving piracy suspects for prosecution are not ready to enforce the often long sentences imposed on pirates. Therefore, convicted pirates are likely (and have already been) re-transferred by the prosecuting State to Somalia or its regional entities for enforcement purposes.

Among the human rights violations sought to be prevented by the principle of non-refoulement is the ill-treatment of piracy suspects, notably the infliction of corporal punishment, the imposition of a death sentence following an unfair trial and detention in harsh prison conditions. Another fundamental value protected by the principle is the right to life. This is important since a number of regional States prosecuting piracy suspects still retain the death penalty in their domestic law. Finally, the risk of a flagrant denial of the right to a fair trial in the receiving State may potentially bar a specific transfer. Meanwhile, the non-refoulement component of the right to liberty and security prohibiting a transfer if there is a risk that piracy suspects are detained in flagrant breach of the right is still of a rather theoretical order.

The finding of a violation of the non-refoulement principle hinges upon the concrete facts of a case – hence, it is impossible to make a definite finding on whether the principle has actually been violated (or will be violated) by a specific transfer of a piracy suspect. Yet, in light of the foregoing analysis, it does not seem far-fetched to state that the human rights violations sought to be prevented by the principle of non-refoulement *may* occur upon transfer. Therefore, we now turn to an analysis of how seizing States currently make the decision to transfer piracy suspects and whether this practice is such as to effectively implement the substantive side of the principle of non-refoulement as described in the foregoing analysis.

II. Right to an Individual Non-Refoulement Assessment

Within the current transfer frameworks of Denmark and EUNAVFOR, no individual non-refoulement assessment takes place, ie no determination whether there is a real risk that certain human rights of a *specific* transferee will be violat-

ed upon transfer. Rather, it is argued that an individual non-refoulement assessment is unnecessary given that a global non-refoulement assessment took place before, and as a condition of the conclusion of transfer agreements with regional States receiving piracy suspects for prosecution.

A. The Practice: Global Rather than Individual Assessment

As mentioned, current transfer practice is such that an individual non-refoulement assessment does not take place. The justification provided for not carrying out such an individual non-refoulement determination does not differ between Denmark and EUNAVFOR.

Denmark takes the stance that by concluding transfer agreements with Kenya and the Seychelles respectively, which prohibit ill-treatment and the imposition of the death penalty on transferred piracy suspects and which grant various fair trial rights to them, is sufficient in terms of ensuring the principle of non-refoulement. Such agreements are only concluded if Denmark deems the prison conditions and the manner in which criminal cases are investigated and prosecuted by the receiving State to be in line with international human rights law generally and the guarantees protected by the prohibitions of refoulement specifically. This general assessment of the human rights standards of the receiving State makes a non-refoulement assessment with regard to a specific transferee obsolete.²⁴⁰

The line of reasoning is very similar to that regarding transfers taking place within the EUNAVFOR framework. When evaluating whether to submit a transfer request to a regional State, the EU Operation Commander ascertains whether the incident is covered by the respective transfer agreement, assesses whether there is a realistic prospect of conviction, and evaluates a potential transfer in light of the capacity of the regional State to receive suspects for prosecution and the operational impact of such a transfer. Meanwhile, the compatibility of the receiving State's criminal justice and enforcement system with human rights standards is not a factor taken into consideration when evaluating whether to request a transfer in a specific case, ie no determination takes place whether there is a real risk that certain human rights of the *specific* piracy suspect to be transferred will be violated upon transfer. Rather, it is argued that transfers only take place to States with which transfer agreements exist. Such agreements, in turn, are only concluded if the respective State's human rights records in the relevant fields do not raise any concerns. Before concluding a transfer agreement, the European Union assesses the human rights situation in the respective State. Therefore, during the negotiation of a transfer agreement, the compatibility of transfers with human rights (and non-refoulement) standards flowing from international hu-

²⁴⁰ See above Part 2/I/C/3/b.

man rights law have already been assessed to a sufficient degree and deemed to be met.²⁴¹

To conclude, both Denmark and EUNAVFOR do not consider it necessary to determine whether the principle of non-refoulement is observed when transferring a *specific* person to a particular destination (an individual non-refoulement assessment). Rather, they take the stance that an assessment with regard to a whole country and all persons potentially transferred to it in the future is sufficient, which is undertaken before concluding a transfer agreement with that State (a global non-refoulement assessment). This proposition is tested in the following analysis in light of the procedural side of the principle of non-refoulement.

B. The Law: Individual Rather than Global Assessment

Delving into the argument that an individual non-refoulement assessment can be dispensed with because of the existence of a transfer agreement first necessitates an understanding of the said agreements, most notably of their content.

1. Transfer Agreements

a) Not All Transfer Agreements Are Public

Not all transfer agreements are public – rather, a distinction exists in terms of accessibility and transparency between transfer agreements entered into by the European Union and regional States on the one hand and those concluded bilaterally between two States on the other. While those belonging to the former category are published in the Official Journal of the European Union, the interstate agreements are not public, with the exception of the agreement between Denmark and Kenya, which was released upon its termination.²⁴² Also, the transfer agreement template provided by Working Group 2 is only accessible to members of the Contact Group on Piracy off the Coast of Somalia.²⁴³ Among the reasons cited for non-disclosure of the agreements is that it has been agreed to with the receiving State,²⁴⁴ and also because Somali pirates could adapt their strategies and tactics based on publicly available documents pertaining to the suppression of piracy.²⁴⁵

Even if not disclosed to the public, it can be inferred from different statements that most of the transfer agreements concluded thus far (at least those that Kenya is a party to), as well as the template of Working Group 2, are quite similar in content. Thus, it has been stated that the content of the template was

241 See above Part 2/II/B/5/f.

242 Information from expert interview on file with author.

243 Information from expert interview on file with author.

244 Information from expert interview on file with author.

245 Information from expert interview on file with author.

largely inspired by agreements already in place when the template was written,²⁴⁶ namely the (public) EU-Kenya Transfer Agreement and the UK-Kenya Transfer Agreement.²⁴⁷ The UK-Kenya Agreement, in turn, is modelled after the EU-Kenya Transfer Agreement.²⁴⁸ Further, it has been confirmed that great similarities exist between the Working Group's template and the (now public) Denmark-Kenya Transfer Agreement, which is, in turn, very similar to the (public) transfer agreements concluded by the European Union.²⁴⁹ Hence, by and large, the content of the mentioned agreements seems to be quite similar.

b) Main Content of Transfer Agreements

As a general rule, transfer agreements concluded in the context of counter-piracy operations contain a clause in which the regional State declares its willingness to accept piracy suspects for prosecution, subject to its consent in each individual case.²⁵⁰ Furthermore, they determine the obligations of the seizing State, most notably that it provides assistance to the regional State in the investigation and prosecution of transferred piracy suspects, and contains technical rules on the implementation of a transfer decision.²⁵¹ Of greater interest in the context of the

246 Information from expert interview on file with author.

247 Information from expert interview on file with author.

248 This conclusion is drawn from the following answer, as provided by the UK's Foreign & Commonwealth Office in response to a Freedom of Information Act Request filed by the author, in which disclosure of the Memorandum of Understanding between the UK and Kenya was requested: "Whilst we realise that there is a public interest in knowing the details of how we are combating piracy off the coast of Somalia, in this case, should we act contrary to the stated wishes of the Kenyan government it would adversely affect our ability to combat piracy in the Gulf of Aden and in the seas off the east coast of Africa and damage the wider UK-Kenya relationship. However, you may find it useful to look at the Exchange of Letters between the European Union and Kenya on the transfer of persons suspected of having committed acts of piracy [internet link omitted]. It is similar in content to the agreement between the UK and Kenya and is available to the public." Foreign & Commonwealth Office (UK), 'Re: FOI Request 0185-09', letter attached to e-mail sent 21 April 2009 to Anna Petrig, on file with author.

249 Information from expert interview on file with author.

250 See, eg, Article 1 Agreement between the European Union and the Republic of Mauritius on the conditions of transfer of suspected pirates and associated seized property from the European Union-led naval force to the Republic of Mauritius and on the conditions of suspected pirates after transfer [2011] OJ L254/3 (EU-Mauritius Transfer Agreement).

251 See, eg, Articles 3 and 7 EU-Mauritius Transfer Agreement. These rights by and large reflect the content of Article 5(3) ECHR and Article 9(3) ICCPR, ie the right to be brought promptly before a judge, and the fair trial rights of Article 6 ECHR and Article 14 ICCPR.

non-refoulement principle is that transfer agreements generally contain a clause stipulating that transferred persons must be treated humanely and not subjected to torture or other forms of ill-treatment, notably while detained, and granting them specific rights regarding the investigation and prosecution of their cases.²⁵² Furthermore, various transfer agreements, particularly those with retentionist States, contain a clause prohibiting the imposition of the death penalty.²⁵³ Finally, the agreements contain rules on tracing and monitoring²⁵⁴ and re-transfers,²⁵⁵ the content of which was described earlier in detail.²⁵⁶

2. Transfer Agreements Cannot Replace Individual Assessment

Actors involved in the transfer of piracy suspects generally do not label transfer agreements as diplomatic assurances.²⁵⁷ Only rarely are transfer agreements explicitly referred to as diplomatic assurances.²⁵⁸ However, these agreements are concluded specifically to prevent transfers from taking place in violation of the principle of non-refoulement. This is evidenced by Article 12(3) CJA Operation Atalanta, which is invoked as the legal basis for the transfer agreements entered into by the European Union,²⁵⁹ stipulating that

[n]o persons ... may be transferred to a third State unless the conditions for the transfer have been agreed with that third State in a manner consistent with relevant international law, notably international law on human rights, in order to guarantee in particular that no one shall be subjected to the death penalty, to torture or to any cruel, inhuman or degrading treatment.²⁶⁰

252 See, eg, Article 4 EU-Mauritius Transfer Agreement.

253 Even though Mauritius is an abolitionist State, Article 5 EU-Mauritius Transfer Agreement prohibits the imposition of the death penalty against transferred persons.

254 See, eg, Article 6 EU-Mauritius Transfer Agreement.

255 For re-transfers, see above Part 2/I/C/4/b (Denmark) and Part 2/II/B/6/b (EUNAVFOR).

256 For tracing and monitoring, see above Part 2/I/C/4/a (Denmark) and Part 2/II/B/6/a (EUNAVFOR).

257 See above Part 2/I/C/3/b (Denmark) and Part 2/II/B/5/f (EUNAVFOR).

258 See, eg, *Re 'MV Courier'* (n 176) para 23.

259 See third preambular consideration of Council Decision 2011/640/CFSP of 12 July 2011 on the signing and conclusion of the Agreement between the European Union and the Republic of Mauritius on the conditions of transfer of suspected pirates and associated seized property from the European Union-led naval force to the Republic of Mauritius and on the conditions of suspected pirates after transfer [2011] OJ L254/1 (Council Decision 2011/640/CFSP).

260 Article 12(3) Council Joint Action 2008/851/CFSP of 10 November 2008 on a European Union military operation to contribute to the deterrence, prevention and re-

Hence, the purpose sought to be achieved by these transfer agreements, and specifically their clauses obliging the receiving States to refrain from ill-treatment and imposition of the death penalty, is to exclude or minimize the risk that transferred piracy suspects are subject to human rights violations upon surrender that amount to a violation of the principle of non-refoulement. Hence, they are concluded in order to enable transfers to these States (as Article 12(3) CJA Operation Atalanta alludes to). Since transfer agreements appear to have the same function and purpose as diplomatic assurances, their reliability and effectiveness in terms of preventing a violation of the non-refoulement principle must be assessed by applying the standards developed for diplomatic assurances. The same holds true for the question whether a transfer agreement can replace an individual non-refoulement assessment, as actors currently involved in transfer proceedings suggest.

According to the jurisprudence of the European Court of Human Rights and the views of the Committee against Torture, the mere receipt of diplomatic assurances does not allow a removing State to claim compliance with the principle of non-refoulement. This holds true even if the receiving State is party to international human rights treaties.²⁶¹ Not only in *Saadi v Italy*, but also in more than a dozen subsequent cases, the Court refused to allow the removing State to discharge its obligations flowing from the principle of non-refoulement by simple reference to the diplomatic assurances it obtained.²⁶² Rather, diplomatic assurances are but one piece of evidence to be taken into account when assessing whether there is a real risk that certain human rights of the person subject to removal will be violated upon surrender.²⁶³ In sum, the question whether there is a real risk that a transferee's human rights protected by the principle of non-refoulement will be violated upon surrender and the question whether diplomatic

pression of acts of piracy and armed robbery off the Somali coast [2008] OJ L301/33; amended several times and latest by Council Decision 2012/174/CFSP of 23 March 2012 amending Joint Action 2008/851/CFSP on a Europe on Union military operation to contribute to the deterrence, prevention and repression of acts of piracy and armed robbery off the Somali coast [2012] OJ L89/69.

261 Regarding the prohibition of refoulement in Article 3 CAT, see Nowak and McArthur (n 54) 150; regarding the principle of non-refoulement in the ECHR, see: *Saadi v Italy* (n 79) para 149; Alice Izumo, 'Diplomatic Assurances against Torture and Ill Treatment: European Court of Human Rights Jurisprudence' (2010–2011) 42 Columbia Human Rights Law Review 233, 258; and Alexander Lorz and Heiko Sauer, 'Wann genau steht Art. 3 EMRK einer Auslieferung oder Ausweisung entgegen? Eine Systematisierung der Rechtsprechung des EGMR zu den Beweisanforderungen für die Konventionswidrigkeit aufenthaltsbeendender Massnahmen' (2010) 37 Europäische Grundrechte-Zeitschrift 389, 404; Emanuela-Chiara Gillard, 'There's no place like home: States' obligations in relation to transfers of persons' (2008) 90 International Review of the Red Cross 703, 743.

262 Izumo (n 261) 259.

263 *Saadi v Italy* (n 79) paras 143–148; Izumo (n 261) 258.

assurances received can remove the risk must both be assessed with regard to a specific person subject to removal.²⁶⁴

In light of this, the proposition of actors involved in transfers of piracy suspects that no individual non-refoulement assessment is necessary in light of the global non-refoulement assessment carried out prior to concluding a transfer agreement must be rejected. Rather, the seizing State is under an obligation to determine with regard to a specific piracy suspect to be transferred whether there is a risk that certain of his human rights will be violated upon transfer and whether the respective transfer agreement can remove such a risk.²⁶⁵

3. Assessment of Reliability and Effectiveness of Diplomatic Assurances

As regards the assessment of the reliability and effectiveness of diplomatic assurances in their practical application in a concrete case, various criteria have been developed in the jurisprudence of supervisory bodies – some of which are internal and others external to the assurances.²⁶⁶

An external factor of the utmost importance for the assessment of the reliability and effectiveness of diplomatic assurances is the human rights situation in the receiving State.²⁶⁷ Since in the context of transfers of piracy suspects their re-transfer to Somalia, Somaliland and Puntland for the enforcement of their sentences is likely,²⁶⁸ the human rights record of these entities must be equally taken into account when evaluating diplomatic assurances.

Among the factors internal to diplomatic assurances is their consistency and content, which have to be considered when assessing the reliability and effectiveness of such assurances. The content must be sufficiently specific, explicit and clear.²⁶⁹ Yet, transfer agreements are not without ambiguities. For example, some interpretational challenges arise regarding the personal scope of application of the transfer agreements concluded between the European Union and Kenya

264 Lorz and Sauer (n 261) 404.

265 In *Re 'MV Courier'* (n 176) para 23, Germany, the respondent State, refers to the EU-Kenya Transfer Agreement and states that diplomatic assurances are, in principle, an appropriate and effective means to exclude a certain type of treatment that could potentially violate certain human rights upon transfer; however, it then states that this would not relieve the State of the obligation to assess whether the assurances provide sufficient protection *in the individual case*.

266 Izumo (n 261) 260. The question whether diplomatic assurances can be effective and reliable at all in preventing a violation of the principle of non-refoulement or only in preventing certain acts by the receiving State (eg, to avoid imposition of the death penalty but not to prevent ill-treatment), is not discussed here.

267 *ibid* 264–273; Lorz and Sauer (n 261) 406.

268 See above Part 1/III/C.

269 Izumo (n 261) 264; Lorz and Sauer (n 261) 405.

and Mauritius respectively.²⁷⁰ Furthermore, the rather important issue whether the consent of the seizing State (or the European Union) is necessary in cases of re-transfer of convicted pirates for the enforcement of their sentences does not clearly emerge from all publicly available transfer agreements.²⁷¹

Another central factor is whether the provider of the assurances is in a capacity to actually ensure the respect of them.²⁷² In light of this, when an assurance that the death penalty will not be imposed or carried out against transferred piracy suspects is issued by the executive branch, which is generally the internal actor responsible for entering into transfer agreements with other States or the European Union, it is questionable whether it is binding upon the judiciary ultimately sentencing convicted pirates.

A further key factor to consider regarding the reliability and effectiveness of diplomatic assurances pertains to the possibility of monitoring compliance with such assurances after surrender.²⁷³ In this context, it must be stressed that the EU-Seychelles Transfer Agreement does not contain any provisions on tracing and monitoring – rather, they only find mention in the Declaration issued by the European Union, which was neither explicitly refused nor openly accepted by the Seychelles. Hence, it is unclear whether the Seychelles considers itself bound by the Declaration.²⁷⁴ Even though obvious, it is nevertheless important to recall that the monitoring rights, such as a right to visit detainees, guaranteed in transfer agreements only extend to the exercise of these rights within the territory of the State with which the treaty was concluded.²⁷⁵ Thus, in cases of re-transfer of convicted pirates to Somalia, Somaliland and Puntland for enforcement purposes, the transferring State or EUNAVFOR does not have any monitoring rights and the enforcing State is not bound by any tracing or recording obligations by virtue of the transfer agreement.²⁷⁶ As for transfers by Denmark and EUNAVFOR to Kenya, this may be even more problematic given that re-transfers do not seem to require the consent of the original transferring State (or the European Union).²⁷⁷ An added ambiguity regarding monitoring ensues from the fact that the transfer agreements entered into by the European Union do not explicitly mention the transferring State as a beneficiary of the monitoring rights in addition to the European Union and EUNAVFOR. Furthermore, not all of these transfer agree-

270 See above Part 2/II/B/5/c.

271 See above Part 2/I/C/4/b (Denmark) and Part 2/II/B/6/b (EUNAVFOR).

272 *Izumo* (n 261) 261; *Lorz and Sauer* (n 261) 405.

273 *Izumo* (n 261) 262–63; *Lorz and Sauer* (n 261) 405–06.

274 See above Part 2/II/B/6/a/aa.

275 *ibid.*

276 *ibid.*

277 See above Part 2/I/C/4/b (Denmark) and Part 2/II/B/6/b (EUNAVFOR).

ments specify who may exercise the monitoring rights once Operation Atalanta is terminated and EUNAVFOR dissolved.²⁷⁸

The doubts expressed here about the reliability and effectiveness of the assurances contained in transfer agreements concluded in the counter-piracy context pertains to *publicly available* agreements. However, as already mentioned, a number of agreements are not disclosed to the public. This contradicts the requirement formulated by various supervisory bodies that the issuance of diplomatic assurances must not involve any secrecy and that they must be open to judicial control.²⁷⁹

To conclude, the proposition that transfer agreements replace an individual non-refoulement assessment must be rejected. Rather, transfer agreements are but one element to be taken into account when determining whether there is a risk of a violation of the non-refoulement principle with regard to a specific piracy suspect.

4. Necessity of Individual Non-Refoulement Assessments at Sea

States removing persons from their jurisdiction are under an obligation to assess the risk of a violation of the prohibition of refoulement on an individual basis.²⁸⁰ This obligation exists regardless of the circumstances of the situation – that is, whether the person subject to removal is within the land territory of the State or on the high seas.²⁸¹ Thus, the Grand Chamber of the European Court of Human Rights stated quite explicitly in *Hirsi Jamaa and others v Italy*, which concerned the interception of approximately 200 persons on the high seas and their push-back,²⁸² that “having regard to the absolute character of the rights secured by Article 3 [ECHR]”, the “burden and pressure” migration at sea puts on States “cannot absolve a State of its obligations under that provision”.²⁸³ Given that the persons were expelled without any form of individual non-refoulement assessment, the Grand Chamber concluded that it amounted to a collective expulsion prohibited under Article 4 of Protocol 4 ECHR.²⁸⁴ From this it can be concluded that the obligation to carry out an individual non-refoulement assessment applies to seizing States, even though piracy suspects are intercepted at sea and later held on board law enforcement vessels of the intercepting State.

278 See above Part 2/II/B/6/a/bb.

279 Nowak and McArthur (n 54) 150.

280 Droege (n 80) 679; *Hirsi Jamaa and Others v Italy* (n 64) concurring opinion of Judge Pinto de Albuquerque.

281 Guy Goodwin-Gill, ‘The Right to Seek Asylum: Interception at Sea and the Principle of Non-Refoulement’ (Inaugural Lecture given at the Palais des Académies, Bruxelles, 16 February 2011) 2.

282 *Hirsi Jamaa and Others v Italy* (n 64) paras 9–14.

283 *ibid* para 122.

284 *ibid* para 186.

C. *Conclusions on the Right to an Individual Non-Refoulement Assessment*

A number of patrolling naval States, as well as the European Union, have concluded transfer agreements with various regional States willing to receive piracy suspects for prosecution. While the agreements entered into by the European Union are public, this does not hold true for those concluded bilaterally between two States with the exception of the agreement between Denmark and Kenya, which became public following its termination. The content of these agreements is by and large the same regardless of the contracting parties – they contain clauses stipulating that transferred persons must be treated humanely, not subjected to torture or other form of ill-treatment, and that the death penalty must not be imposed on them.

Actors currently involved in transfers of piracy suspects take the stance that no individual non-refoulement assessment is necessary in light of the existence of these transfer agreements. This stance is supported by the theory that such agreements are only concluded if an assessment of the human rights situation in the respective regional State – notably regarding the investigation and prosecution of criminal cases and detention – yields that it is in line with the standard flowing from international human rights law. Yet, we previously concluded that such agreements, which have the same character and purpose as diplomatic assurances, cannot replace an individual non-refoulement assessment. Rather, these agreements are but one piece of evidence to be taken into account when assessing whether there is a real risk that certain human rights of a specific piracy suspect will be violated upon transfer. Furthermore, we determined that the reliability and effectiveness of the assurances contained in transfer agreements must not be overestimated given that their content is ambiguous to some extent, particularly with regard to monitoring rights.

To conclude, there is an obligation to conduct an individual assessment – even at sea – whether a specific surrender for prosecution violates the prohibition of refoulement. Thus, when considering whether to transfer piracy suspects to third States for prosecution, seizing States are under an obligation to provide for a procedure that allows such an individual non-refoulement assessment to be conducted.

III. *Right to Be a Party to Transfer Proceedings*

What follows is an analysis of the procedural requirements flowing from human rights law – notably to ensure respect for the non-refoulement principle – that must be respected in removal for prosecution proceedings and, therefore, also in transfer proceedings. Furthermore, this analysis will enquire into the procedural safeguards that must be granted to piracy suspects subject to transfer proceedings.

We begin with an analysis of what requirements flow from the principle of non-refoulement itself – that is, exploring the procedural dimension of the principle. Next is a discussion of whether the procedural safeguards relating to expulsion are potentially applicable to piracy suspects. And finally, we will end by examining whether piracy suspects subject to transfer benefit from the myriad of procedural safeguards referred to as fair trial rights. Before doing so, we briefly recall how current transfer proceedings are conducted and what role is reserved for piracy suspect subject to transfer in these proceedings.

A. Current Practice

The case studies on the disposition frameworks of Denmark and EUNAVFOR reveal that the transfer decision procedures of these two actors have some common features. First of all, a decision to transfer is the result of negotiation and cooperation between two States or between a State and EUNAVFOR, rather than a decision issued by an administrative and/or judicial body in a formalized procedure described in a legal act. Furthermore, no individual non-refoulement assessment is carried out because the existence of transfer agreements is deemed sufficient in order to ensure respect for the principle of non-refoulement – a proposition that has already been rejected.²⁸⁵ Finally, within the disposition framework of neither Denmark nor EUNAVFOR is the transferee provided with a written decision reflecting the reasons for his removal – and the decision to transfer is not subject to judicial review.²⁸⁶

A common feature of transfers is that the potential transferee is not a party to the proceedings that may ultimately result in his transfer. Consequently, the piracy suspect does not benefit from any procedural safeguards, such as the right to be represented by counsel or the right to submit reasons against his transfer – most notably the right to formulate and substantiate a non-refoulement claim. At most, he is informed of the fact that attempts are being made to identify a prosecution venue and/or that his transfer is imminent.²⁸⁷

In short, when seen through the lens of procedural rights and safeguards, piracy suspects are mere objects of the transfer decision procedure rather than parties with fundamental interests in the outcome of such procedures and beneficiaries of different procedural safeguards. Hence, the following analysis centres on whether this practice is in line with the procedural dimension of the principle of non-refoulement and the provisions governing the procedural aspects of expulsion and the right to a fair trial.

285 See above Part 5/II.

286 In more details, see above Part 2/I/C/3 (Denmark) and Part 2/II/B/5 (EUNAVFOR).

287 In more details, see above Part 2/I/C/3/b (Denmark) and Part 2/II/B/5/f (EUNAVFOR).

B. Procedural Dimension of the Principle of Non-Refoulement

We previously concluded that the seizing State must refrain from transferring a specific piracy suspect if there is a real risk that certain of his human rights will be violated upon transfer.²⁸⁸ This obligation reflecting the substantive side of the principle of non-refoulement is complemented by a procedural dimension,²⁸⁹ which is essential to the actual implementation of the protection afforded by the prohibition of refoulement.²⁹⁰ Yet, unlike the Refugee Convention,²⁹¹ none of the human rights treaties chosen as the benchmarks for present study explicitly mention the aspects pertaining to the procedural side of the principle of non-refoulement. Rather, these aspects are of a *création purement prétorienne*,²⁹² which started, if compared with the jurisprudential development of the substantive aspects of the principle of non-refoulement, relatively late and restrainedly but have gained momentum during the last decade.²⁹³

In providing an overview of these procedural aspects of the prohibition of refoulement, two phases are distinguished. Firstly, the focus is on the initial assessment of the risk that a specific piracy suspect will be the victim of certain human rights violations upon transfer. Secondly, we consider the right to have a removal decision reviewed, ie the finding that there is no valid non-refoulement claim.

1. The Right to a Non-Refoulement Assessment

The national authorities of the State having effective control over the person subject to removal are under an obligation to determine whether the substantive side of the principle of non-refoulement will be violated by removing that person.²⁹⁴ That the obligation to carry out such a non-refoulement assessment also exists with regard to piracy suspects detained on board a warship of the seizing State and subject to transfer was discussed earlier.²⁹⁵

288 See above Part 5/I/B/2.

289 Droege (n 80) 679.

290 Gillard (n 261) 731.

291 *ibid.*

292 The notion is used by Frédéric Sudre, 'Article 3' in Emmanuel Decaux, Pierre H Imbert and Louis-Edmond Pettiti (eds), *La Convention européenne des droits de l'homme: Commentaire article par article* (2nd edn, Economica 1999) 161, in the context of Article 3 ECHR, namely with regard to the principle of non-refoulement.

293 Gillard (n 261) 730.

294 *ibid.* 731.

295 See above Part 5/II.

a) **Assessment Ex Proprio Motu**

It is argued in doctrine that States planning to transfer a person must make such a non-refoulement assessment *ex proprio motu* – that is, regardless of whether a person expresses his fears concerning a potential transfer or formulates a non-refoulement claim.²⁹⁶ In *Hirsi Jamaa*, a case concerning a push-back operation at sea involving more than 200 persons, the Grand Chamber of European Court of Human Rights rejected the proposition of the respondent State that the persons removed did not expressly request asylum and held that “it was for the national authorities, faced with a situation in which human rights were being systematically violated ... to find out about the treatment to which the applicants would be exposed after their return”. It then concluded that the absence of an express claim for protection does not exempt the removing State from its obligations flowing from the principle of non-refoulement.²⁹⁷ Hence, a non-refoulement assessment arguably must be carried out despite the fact that piracy suspects have not expressed their fears regarding a possible transfer.

As an absolute minimum, the seizing State is under an obligation to inform piracy suspects in a timely manner about the existence of the non-refoulement principle and how to claim protection.²⁹⁸ This is important against the background that piracy suspects are generally ignorant about the existence of such right and its exercise.

In sum, the view expressed by some States contributing to counter-piracy operations off the coast of Somalia that they would only carry out a non-refoulement assessment at the express request of a piracy suspect (a theoretical scenario thus far)²⁹⁹ seems incompatible with the procedural dimension of the principle of non-refoulement. This holds all the more true since these States do not inform piracy suspects subject to transfer about the existence of such an option.

b) **Obligation to Establish an Assessment Procedure**

An individual non-refoulement assessment can only take place if an appropriate procedural framework has been put in place. If a person is surrendered for

296 Gillard (n 261) 731; Droege (n 80) 679.

297 *Hirsi Jamaa and Others v Italy* (n 64) paras 132–33.

298 For a summary of the obligation to provide information about the existence of rights (notably the principle of non-refoulement) and procedural aspects in the context of asylum procedures, see, eg, UNHCR, ‘Statement on the Right to an Effective Remedy in Relation to Accelerated Asylum Procedures: Issued in the context of the preliminary ruling reference to the Court of Justice of the European Union from the Luxembourg Administrative Tribunal regarding the interpretation of Article 39, Asylum Procedures Directive (APD), and Articles 6 and 13 ECHR’ (21 May 2010) <www.unhcr.org/4deccc639.pdf> accessed 29 January 2013, paras 14–15.

299 See, eg, above Part 2/1/C/3/b.

prosecution by means of extradition, the proceedings provide an appropriate framework for conducting a non-refoulement assessment: an argument against removal based on non-refoulement considerations can be made by either invoking human rights provisions containing a non-refoulement component³⁰⁰ or by relying on a ground for refusal of extradition, which incorporates the idea of non-refoulement, during these proceedings.³⁰¹ Appropriate procedures for carrying out an initial non-refoulement assessment are generally also in place in the realm of immigration law: most States provide for a refugee status determination procedure, which is clear in terms of the competent authorities and judicial avenues to take.³⁰² Yet, in the context of piracy where surrender for prosecution is obtained by transfer rather than extradition³⁰³ and where transferees usually do not qualify as refugees,³⁰⁴ it may not be readily obvious within which framework, by whom and how the initial non-refoulement assessment must be carried out.

However, by virtue of the procedural dimension of the principle of non-refoulement (and the broader obligation to respect and ensure human rights),³⁰⁵ seizing States are under an obligation to provide for an appropriate framework where an initial non-refoulement assessment can be carried out, ie to establish appropriate procedures and to designate a competent authority to do so.³⁰⁶ Again, the fact that persons are held on board a warship of the intercepting State – rather than on its land territory – does not alter this finding. This follows quite clearly from *Hirsi Jamaa* where the Grand Chamber of the European Court of Human Rights found that the push-back operation following interception at sea was carried out “without any form of examination of each applicant’s individual situation”, and concluded that this was in violation of both the non-refoulement provision and the prohibition of collective expulsion.³⁰⁷

Beyond requiring that an individual non-refoulement assessment takes place – which thus implies that a procedure to do so must be established by the removing State – the Grand Chamber criticized the respondent State in *Hirsi Jamaa* because “the personnel on board the military ship were not trained to conduct individual interviews and were not assisted by interpreters or legal advisers”.³⁰⁸

300 Sibylle Kapferer, *The Interface Between Extradition and Asylum* (PPLA/2003/05, UNHCR, Department of International Protection 2003) 41–43.

301 See, eg, Sections 5 and 6 Model Law on Extradition, UNODC, ‘Model Law on Extradition’ (2004) <www.unodc.org/pdf/model_law_extradition.pdf> accessed 29 January 2013 (Model Law on Extradition).

302 Gillard (n 261) 731.

303 See above Part 1/IV/A/1.

304 See above Part 3/II.

305 See, eg, Article 2(1) ICCPR.

306 Wouters (n 36) 411; Gillard (n 261) 731.

307 *Hirsi Jamaa and Others v Italy* (n 64) para 185.

308 *ibid.*

The Committee against Torture equally emphasized the fact that State officials carrying out the initial assessment must be adequately trained.³⁰⁹ This is an important consideration for transfer proceedings carried out in the context of counter-piracy operations where the military forces deployed are not necessarily properly trained to conduct interviews. On a more general and fundamental level, the Human Rights Committee observed in *Ahani v Canada*, which involved a non-refoulement claim, that “where one of the highest values protected by the Covenant, namely the right to be free from torture, is at stake, the closest scrutiny should be applied to the *fairness* of the procedure applied to determine whether an individual is at substantial risk of torture”.³¹⁰

In conclusion, States considering the transfer of piracy suspects have a wide margin of appreciation and a fair bit of discretion when it comes to the design and organisation of the initial non-refoulement assessment procedure.³¹¹ Hence, it is possible to accommodate the constraints flowing from the uniqueness of the context, notably that piracy suspects subject to transfer are held on board a warship rather than the mainland of the seizing State. However, at the same time, the procedure must be in line with the limits and prescripts set out by human rights supervisory bodies regarding the initial non-refoulement assessment procedure, including the procedural safeguards to be granted.

2. The Right to Review a Removal Decision

If the initial non-refoulement assessment results in the decision that the claim for protection is unfounded, ie that there is no real risk that certain human rights of the person subject to removal will be violated upon surrender, the individual has a right to challenge that decision.³¹² Accordingly, we now turn to the different legal bases providing for a right to review of the removal decision and the procedural requirements of such a right to appeal.

a) *Right to an Effective Remedy against a Removal Decision*

All three human rights treaties under consideration here – the ECHR, ICCPR and CAT – provide a right to have a removal decision reviewed, that is, the finding that a non-refoulement claim is unfounded.

aa) ECHR

As regards the ECHR, it must first be noted that Article 1 of Protocol 7 ECHR, which explicitly states the right to have an expulsion decision reviewed and the

309 Wouters (n 36) 515.

310 *Ahani v Canada* Comm no 1051/2002 (HRC, 29 March 2004) para 10.6 (emphasis added).

311 Wouters (n 36) 330.

312 *ibid* 412; Gillard (n 261) 731.

right to be represented for this purpose, is not applicable to extradition and, therefore, not to transfers either.³¹³ However, a right to have a removal decision reviewed flows from a combined reading of the respective ECHR provisions containing a non-refoulement component³¹⁴ and the right to an effective remedy as guaranteed by Article 13 ECHR.³¹⁵

Article 13 ECHR guarantees to everyone “an effective remedy before a national authority” if their rights and freedoms as set forth in the Convention are violated. Despite the formulation that everyone “whose rights and freedoms ... are violated”, application of the provision is not conditional upon a prior holding that a substantive right was actually violated – here the principle of non-refoulement. Rather, it suffices that an arguable claim regarding a violation of a substantive right is made.³¹⁶

All in all, it is worth repeating that the principle of non-refoulement applies to piracy suspects,³¹⁷ as does the right to an effective remedy of Article 13 ECHR granted to “everyone”. From this follows quite plainly that – by virtue of a combined reading of these two rights flowing from the ECHR – piracy suspects have a right to review of their initial transfer decision.

bb) ICCPR

Within the ICCPR framework, there are potentially two different legal bases from which a right to have a transfer decision reviewed can be inferred. First of all, there is Article 13 ICCPR, which explicitly stipulates that persons subject to expulsion have a right to have their removal decision reviewed – and, as will be demonstrated later, Article 13 ICCPR arguably applies to piracy suspects.³¹⁸ Even if this conclusion, which rests on doctrine rather than jurisprudence, could be called into question, the ICCPR offers another path for obtaining review of a decision that denied the existence of a valid non-refoulement claim. This alternative right to appeal flows from a combined reading of the respective prohibitions of refoulement, concretely Article 6 and 7 ICCPR, and the right to an effective remedy according to Article 2(3) ICCPR.³¹⁹

313 See below Part 5/III/C/1.

314 See above Part 5/I/B/2/b.

315 Wouters (n 36) 331–42.

316 As regards the meaning of the notion “arguable claim” in the context of Article 13 ECHR, see, eg, Andrew Drzemczewski and Christos Giakoumopoulos, ‘Article 13’ in Emmanuel Decaux, Pierre H Imbert and Louis-Edmond Pettiti (eds), *La Convention européenne des droits de l’homme: Commentaire article par article* (2nd edn, Economica 1999) 463–65. For a discussion of the notion in the context of the principle of non-refoulement, see, eg, Wouters (n 36) 333–36.

317 See above Part 5/I/B/2/a.

318 See below Part 5/III/C/2.

319 Wouters (n 36) 412.

This was stated in quite unequivocal terms in *Alzery v Sweden* where the Committee noted that “article 2 of the Covenant, read in conjunction with article 7, requires an effective remedy for violations of the latter provision”.³²⁰ Even though only Article 7 ICCPR is mentioned in *Alzery*, the same holds true for Article 6 ICCPR, which equally contains a non-refoulement component,³²¹ because the right to an effective remedy is granted for a violation of any of the rights or freedoms enshrined in the Covenant and not only a select few.³²² Furthermore, despite its wording, application of Article 2(3) ICCPR is not conditional upon a prior holding that the principle of non-refoulement was actually violated. Rather, similar to Article 13 ECHR, it suffices that an arguable claim regarding a violation of a substantive right is made.³²³

Piracy suspects are clearly covered *ratione personae* by the right to have a decision containing a negative non-refoulement assessment reviewed because both the prohibitions of refoulement as implicitly contained in Articles 6 and 7 ICCPR³²⁴ and the right to an effective remedy granted to “any person” apply to them.

cc) CAT

The CAT does not contain an explicit and self-standing right to an effective remedy as opposed to Article 13 ECHR and Article 2(3) ICCPR, which provide for a right to review of a removal decision when taken together with the respective prohibitions of refoulement. Rather, the Committee against Torture bases the right to an effective remedy directly on the prohibition of refoulement of Article 3 CAT. In *Agiza v Sweden*, the Committee against Torture stated in rather emphatic terms that such a right is implicit in Article 3 CAT since “the right to an effective remedy for a breach of the Convention underpins the entire Convention, for otherwise the protections afforded by the Convention would be rendered largely illusory”. While certain provisions dictate explicit remedies, the Committee against Torture has found it necessary to interpret other provisions as containing such remedies implicitly – as it did with regard to Article 3 CAT:

[I]n order to reinforce the protection of the norm in question and understanding the Convention consistently, the prohibition on refoulement contained in article 3 should be interpreted ... to encompass a remedy for its breach, even though it may not contain on its face such a right to remedy for a breach thereof.³²⁵

320 *Alzery v Sweden* Comm no 1416/2005 (HRC, 25 October 2006) para 11.8.

321 See above Part 5/I/B/2/b/bb.

322 See wording of Article 2(3) ICCPR.

323 Nowak (n 76) 67.

324 See above Part 5/I/B/2/a and b.

325 *Agiza v Sweden* Comm no 233/2003 (CAT Committee, 20 May 2005) para 13.6.

In light of this, the Committee against Torture generally requires that an investigation takes place *after* an alleged violation of Article 3 CAT has occurred. However, given the nature of the principle of non-refoulement, which is to prevent exposure to potential human rights violations, the right to an effective remedy requires an “opportunity for effective, independent and impartial review of the decision to expel or remove, once that decision is made”³²⁶ The right to review must be granted whether the person subject to removal is detained on the mainland territory of the removing State or extraterritorially,³²⁷ and thus also to piracy suspects detained on board a law enforcement vessel of the seizing State navigating foreign waters or the high seas. A failure to grant such an opportunity before an independent authority may amount to a violation of Article 3 CAT.³²⁸

Finally, it bears mentioning that in *Arkauz v France* – a case that is strikingly similar to the transfer of piracy suspects – the Committee expressed its concerns vis-à-vis a practice by which individuals were handed over by the police of one State to its counterpart in another State by virtue of a mere administrative procedure and absent any “intervention of a judicial authority and without the possibility for the author to contact his family or his lawyers”. The Committee against Torture stressed that the rights of Arkauz, a person convicted of terrorism-related charges, had not been respected “in a situation where he was particularly vulnerable to possible abuse”. Although it recognized the “need for close cooperation between States in the fight against crime and for effective measures to be agreed upon for that purpose”, the Committee firmly concluded that removal measures “must fully respect the rights and fundamental freedoms of the individual concerned”.³²⁹ Since in the context of counter-piracy operations, piracy suspects are currently also handed over to the law enforcement officials of the receiving State by the seizing State’s law enforcement officials without legal review granted by an administrative or judicial body, the findings of *Arkauz* are of particular importance. Hence, piracy suspects must be provided with an opportunity to have their transfer decisions reviewed.³³⁰

326 *ibid* para 13.6.

327 CAT Committee, ‘Conclusions and Recommendations of the Committee against Torture: United States of America’ (25 July 2006) UN Doc CAT/C/USA/CO/2, para 20.

328 *Agiza v Sweden* Comm no 233/2003 (CAT Committee, 20 May 2005) para 13.7.

329 *Akauz v France* Comm no 63/1997 (CAT Committee, 9 November 1999) para 11.5.

330 See also UN Commission on Human Rights, ‘Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment’ (1 September 2004) UN Doc A/59/324, para 29, emphasizing that where the risk of torture and ill-treatment is elevated (which is arguably the case for transfers to Somalia and its regional entities), it is “particularly important that proceedings leading to expulsion respect appropriate legal safeguards, at the very least a hearing before a judicial instance and the right to appeal”.

b) *Procedural Requirements*

As to the characteristics of the review procedure, it must first of all be “effective”.³³¹ Since no such remedy is presently offered to piracy suspects at all and given that the effectiveness criterion can only be assessed on a case-by-case basis taking into account all relevant circumstances and the pertinent features of the respective national system,³³² the discussion here is limited to two aspects of effectiveness – that the remedy must be granted prior to removal and have suspensive effect and that it must be accessible.

As regards the first component of effectiveness, the European Court of Human Rights stressed that where the principle of non-refoulement is at stake, it only considers a remedy to be effective if it has automatic suspensive effect.³³³ Hence, domestic authorities must provide a remedy capable of preventing the execution of a removal measure, either by setting forth that the ordinary appeal proceedings have automatic suspensive effect or by enabling the person subject to removal to apply for a provisional measure, ie an urgent procedure that brings the execution of a removal order to a halt.³³⁴ The Human Rights Committee also emphasized that the opportunity to appeal the removal decision, ie the decision containing a negative non-refoulement assessment, must be granted *prior* to surrender. The remedy would otherwise be ineffective because it could not “avoid irreparable harm to the individual” – rather, it would be “otiose and devoid of meaning”.³³⁵

In the context of piracy, two interests potentially clash with respect to granting a right to lodge an appeal with suspensive effect prior to surrender. On the one hand, patrolling naval States are interested in keeping detention on board their ships short in duration, not only because warships generally lack facilities specifically designed for detention or only have adequate detention facilities for a modest amount of suspects,³³⁶ but also because detention absorbs the already

331 On the required effectiveness of the remedy, see, eg, *Agiza v Sweden* (n 325) para 13.8.

332 Nowak (n 76) 65.

333 *Wouters* (n 36) 341, citing *Gebremedhin [Gaberamadhien] v France* App no 25389/05 (ECtHR, 26 April 2007) para 66.

334 *Wouters* (n 36) 341–42. In this context, it bears mentioning that an individual, whose complaint is pending before the European Court of Human Rights, can lodge a request for the suspension of his removal according to Rule 39 of the Court’s Rules of Procedure; see Pamela McCormick, “A Risk of Irreparable Damage”: Interim Measures in Proceedings before the European Court of Human Rights’ (2009–2010) 12 *Cambridge Yearbook of European Legal Studies* 313.

335 *Alzery v Sweden* (n 320) para 11.8. On the requirements for applying for an interim measure before the Committee in order to halt a removal, see Gino Naldi, ‘Interim Measures in the UN Human Rights Committee’ (2004) 53 *International & Comparative Law Quarterly* 445, especially 446–50.

336 See above Part 4/I/A/2/aa.

scarce resources, notably in terms of personnel. On the other hand, transferring piracy suspects before their non-refoulement claims are thoroughly assessed may expose them to a risk of irreparable harm, which cannot (or only partially) be compensated with a remedy only available in the receiving State, the exercise of which is more illusory than real in the context of Somali-based piracy.

With regard to the accessibility of the remedy, the Human Rights Committee held that a remedy must be available in both law and practice.³³⁷ Special efforts may be necessary in the context of piracy in order to make the remedy accessible – such as providing piracy suspects subject to transfer not only with sufficient information about the existence of such remedy,³³⁸ but with translation services and access to free legal representation as well.³³⁹

Finally, it must be noted that the Committee against Torture opined that national security concerns may justify minor modification of the particular review mechanism, but it must continue to satisfy the requirements of Article 3 CAT to provide for an “effective, independent and impartial review”.³⁴⁰ Hence, the phenomenon of piracy – even if qualified as a national security concern, which is contested here³⁴¹ – cannot alter the finding that by virtue of Article 3 CAT, piracy suspects subject to transfer have a right to have their removal decisions reviewed.

3. Conclusion

The procedural dimension of the principle of non-refoulement requires transferring States to carry out an initial determination whether there is a real risk that certain human rights of the specific piracy suspect will be violated upon transfer. Arguably, the State must do so *ex proprio motu* and not only when the piracy suspect subject to transfer expresses fears in relation to his removal. At the very least, the seizing State must inform the person subject to transfer about the existence of the principle of non-refoulement and how to claim protection accordingly.

A corollary of this obligation is that the seizing State must establish an appropriate procedural framework by which to carry out an initial non-refoulement assessment. Hence, the seizing State must set up a procedure, designate the competent authority or person, and train officials for the specific task of conducting a non-refoulement assessment.

Furthermore, piracy suspects have a right to have their transfer decision reviewed. Under the ECHR and ICCPR, this follows from a combined reading of

337 HRC, ‘General Comment No. 31: The Nature of the General Legal Obligations Imposed on States Parties to the Covenant’ (n 46) para 15.

338 See above Part 5/III/B/1/a.

339 Wouters (n 36) 413: in concluding observations, the Committee has stated that asylum-seekers must have full access to early and free legal representation so that their rights under the Covenant receive full protection.

340 *Agiza v Sweden* (n 325) para 13.8.

341 See below Part 5/III/C/2/d/dd.

the respective prohibitions of refoulement and the right to an effective remedy. Even though, unlike the ECHR and ICCPR, the CAT does not contain a free-standing right to an effective remedy, the Committee against Torture interprets Article 3 CAT as implicitly containing a right to an effective remedy.

Above all, the right to review must be effective. In the context of the principle of non-refoulement, this notably implies that the remedy must be granted prior to removal and have suspensive effect. Furthermore, the remedy must be accessible, not only in theory but also in practice. Since piracy suspects are detained on board a law enforcement vessel of the seizing State, special measures may be necessary to make the right to review accessible in practice, such as providing timely information about the possibility to appeal the transfer decision, translation services and even legal counsel.

In conclusion, the current transfer practice – where piracy suspects subject to removal are not associated to the transfer proceedings at all and, as a consequence, are not granted any procedural rights – stands in contradiction and defiance of the requirements flowing from the procedural component of the non-refoulement principle, which is essential to the actual implementation of the protection afforded by the prohibition of refoulement.

C. Procedural Safeguards Relating to Expulsion: Applicable to Piracy Suspects?

Prima facie, the minimum procedural safeguards relating to expulsion of aliens do not appear to be applicable to piracy suspects subject to transfer – since transfers are a method for obtaining surrender for prosecution rather than a measure of immigration law, such as expulsion *stricto sensu* is. This first impression will be confirmed with regard to Article 1 of Protocol 7 ECHR, which is indeed only applicable to expulsion, referred to as deportation in Article 5(1)(f) ECHR, which transfers are not.³⁴² Meanwhile, it is argued in the following that Article 13 ICCPR applies to piracy suspects subject to transfer. This notably follows from the fact that the Human Rights Committee not only applies the provision to removal measures of immigration law, but also to cases involving extradition *stricto sensu* and *de facto* surrenders for prosecution.

1. Article 1 of Protocol 7 ECHR

Article 1 of Protocol 7 ECHR does not curtail a State's right to exclude aliens from its jurisdiction. Rather, it subjects expulsion to specific minimum due process requirements. Firstly, the provision stipulates that expulsion can only take place in pursuance of a "decision reached in accordance with law", which is a manifestation of the principle of legality.³⁴³ This seems to prohibit expulsions not based

342 See above Part 4/I/B/1/c/aa.

343 ILC, 'Expulsion of Aliens' (n 15) paras 287 and 289.

on a decision reached in a procedure described by domestic law. While the notion of “law” refers to domestic law, the European Court of Human Rights requires the law to be of a certain quality. It must be accessible, foreseeable, and provide “a measure of protection against arbitrary interferences by public authorities with the rights secured in the Convention”.³⁴⁴ Secondly, Article 1 of Protocol 7 ECHR enumerates three procedural protections to be accorded to persons subject to expulsion proceedings: the rights to submit reasons against expulsion, to have the case reviewed and to be represented for these purposes before the deciding body or person(s).³⁴⁵ A person can be expelled *before* the exercise of these three rights if such expulsion is “necessary in the interests of public order” or “grounded on reasons of national security”.³⁴⁶ However, the individual is entitled to have recourse to these safeguards after being deported.³⁴⁷

These due process guarantees only apply to procedures relating to “expulsion” – which does not encompass extradition, and neither does it cover transfers of piracy suspects that have the same purpose as extradition. This results from the following interpretation: in the French text of the ECHR, the term *expulsion* not only appears in Article 1 of Protocol 7 ECHR,³⁴⁸ but also in Article 5(1)(f) ECHR where this concept is mentioned alongside extradition.³⁴⁹ The use of two different notions – *expulsion* and *extradition* – in one provision implies that they denote different concepts.³⁵⁰ This view is confirmed by the Explanatory Report

344 *Lupsa v Romania* App no 10337/04 (ECtHR, 8 June 2006) para 55. If Article 1 of Protocol 7 to the European Convention for the Protection of Human Rights and Fundamental Freedoms (entered into force 1 November 1988) ETS 117 (Protocol 7 ECHR) were applicable to transfers of piracy suspects, the requirement of a decision based on a law fulfilling a certain qualitative standard could be problematic with regard to transfer decisions, which are not issued in a formalized procedure described in a law, but are rather the result of negotiation and cooperation between two States or between a State and EUNAVFOR (see above Part 2/III); for a discussion of this issue in the context of Article 13 ICCPR, see below Part 5/III/C/2/b.

345 Article 1(a), (b) and (c) of Protocol 7 ECHR.

346 Article 1(2) of Protocol 7 ECHR.

347 Hélène Lambert, *The position of aliens in relation to the European Convention on Human Rights* (3rd edn, Council of Europe 2007) 37; *Lupsa v Romania* (n 344) para 53.

348 The English text of Article 5(1)(f) ECHR uses the term “deportation”, which, however, seems to be synonymous to “expulsion”.

349 In the English text of Article 5(1)(f) ECHR the term “deportation” is used, which, however, must be understood in the present context as a synonym for “expulsion”. The term “extradition” does not appear elsewhere in the ECHR or its Protocols; the term *expulsion* or *deportation*, is used in Article 5(1)(f) ECHR, Articles 3 and 4 of Protocol 4 ECHR and Article 1 of Protocol 7 ECHR.

350 This interpretative stance is, eg, taken by Stefan Trechsel, ‘The Role of International Organs Controlling Human Rights in the Field of International Co-operation’ in Albin Eser and Otto Lagodny (eds), *Principles and Procedures for a New Transna-*

on Article 1 of Protocol 7 ECHR, to which the Strasbourg organs give (too)³⁵¹ much weight, stipulating that the “concept of expulsion is used in a generic sense as meaning any measure compelling the departure of an alien from the territory but does not include extradition”.³⁵² This finding must be combined with our previous conclusion that transfers of piracy suspects are arguably covered by the notion of extradition,³⁵³ but not by the concept of deportation,³⁵⁴ mentioned in Article 5(1)(f) ECHR. Hence, since transfers of piracy suspects are not deportations, ie expulsions, they are not covered by Article 1 of Protocol 7 ECHR.

2. Article 13 ICCPR

Article 13 ICCPR stipulates that an alien lawfully in the territory of a State party to the ICCPR may only be expelled therefrom in pursuance of a decision reached in accordance with law. Furthermore, the person subject to expulsion benefits from various procedural guarantees, unless compelling reasons of national security do not allow so: the right to submit reasons against expulsion, the right to have the case reviewed before a competent authority or a person designated by such an authority, and the right to be represented in review proceedings. The overall purpose of Article 13 ICCPR is thus to prevent an arbitrary decision to remove a person from the jurisdiction, which constitutes a serious matter for the individual concerned.³⁵⁵

tional Criminal Law: Documentation of an International Workshop in Freiburg, May 1991 (Max-Planck-Institut für ausländisches und internationales Strafrecht 1992) 647.

- 351 Ian Bryan and Peter Langford, ‘Impediments to the Expulsion of Non-Nationals: Substance and Coherence in Procedural Protection under the European Convention on Human Rights’ (2010) 79 *Nordic Journal of International Law* 457, 474–77.
- 352 Council of Europe, ‘Protocol No. 7 to the Convention for the Protection of Human Rights and Fundamental Freedoms: Explanatory Report’ (ETS No 117) <<http://conventions.coe.int/Treaty/EN/Reports/Html/117.htm>> accessed 29 January 2013, para 10. The exclusion of extradition from the ambit of Article 1 of Protocol 7 ECHR is confirmed by Cees Flinterman, ‘Chapter 25: Expulsion of Aliens (Article 1 of Protocol No. 7)’ in Pieter Van Dijk and others (eds), *Theory and Practice of the European Convention on Human Rights* (4th edn, Intersentia 2006) 966.
- 353 See above Part 4/I/B/1/c/bb.
- 354 The only method of surrender for prosecution covered by the notion of deportation or expulsion is extradition in disguise (and the Court is ready to apply Article 1 of Protocol 7 ECHR to extradition in disguise; see, eg, *Nowak v Ukraine* App no 60846/10 (ECtHR, 31 March 2011) paras 58 and 62). Transfers of piracy suspects, however, cannot be qualified as extradition in disguise; see above Part 4/I/B/1/c/aa.
- 355 Marc Bossuyt, *Guide to the “Travaux Préparatoires” of the International Covenant on Civil and Political Rights* (Martinus Nijhoff 1987) 268–69; HRC, ‘General Comment No. 15: The Position of Aliens Under the Covenant’ in ‘Note by the Secretariat, Compilation of General Comments and General Recommendations Adopted by

a) *Applicability to Piracy Suspects*

According to the wording of Article 13 ICCPR, it only applies to aliens lawfully in the territory of a State party to the Covenant, which has the intention of expelling them. This begs the question whether piracy suspects subject to transfer can be said to be subject to expulsion in the sense of the provision. Furthermore, while Somali nationals are generally aliens vis-à-vis the seizing State, it seems less clear whether piracy suspects held on board a warship of the seizing State are aliens lawfully in the territory of a State Party. If these questions, to which we turn now, are answered in the affirmative, piracy suspects have access to a myriad of procedural safeguards and the transfer decision procedure is subject to a test of lawfulness.

aa) *Applicability of Article 13 ICCPR to Extradition*

The analysis of whether transfers are covered by Article 13 ICCPR involves two steps. The point of departure is whether extradition, ie surrender for prosecution not qualifying as a measure of immigration law, is covered by the notion of expulsion as used in Article 13 ICCPR. Since this is the case, as a second step,³⁵⁶ we will explore the meaning of extradition in the present context – whether it only encompasses extradition *stricto sensu* or also other methods of removal for prosecution and arguably transfers of piracy suspects as a result.

While the inclusion of extradition was discussed during the drafting of what became Article 13 ICCPR,³⁵⁷ the various proposals explicitly mentioning extradition in the provision were ultimately rejected.³⁵⁸ Hence, according to the drafters' intent, extradition *stricto sensu* was not meant to be covered by Article 13 ICCPR.

Human Rights Treaty Bodies: Vol I' (2008) UN Doc HRI/GEN/1/Rev.9 (Vol. I) para 10.

356 See below Part 5/III/C/2/a/bb.

357 Bossuyt (n 355) 268.

358 From the proceedings of the Commission on Human Rights we learn that provisions covering extradition were discussed in connection with what became Article 13 ICCPR (Bossuyt (n 355) 268). Thereby, the opinions differed on the advisability of including the topic of extradition in Article 13 ICCPR. While some argued for including certain general principles on extradition, others argued that extradition was not appropriate for inclusion in the Covenant in which only fundamental human rights and not rights being corollaries thereof should be enclosed (ibid 273). Another argument for the non-inclusion of a provision on extradition in the ICCPR was that the drafters feared that it "would cause difficulties regarding the relationship of the covenant to existing treaties and bilateral agreements". Instead, a separate convention on extradition was suggested (ibid 274). Opinions on whether to include extradition in Article 13 ICCPR were also split in the Third Committee of the General Assembly. According to the *travaux préparatoires*, some members stated that the article as drafted by the Commission on Human Rights had a "serious shortcoming" in that it did not contain a reference to extradition (ibid 273).

Yet, the *travaux préparatoires* are but one means for treaty interpretation³⁵⁹ and – as will be discussed shortly – the Human Rights Committee very much accepts the idea that extradition is covered by the notion of expulsion of Article 13 ICCPR.

One view held in doctrine is that the Human Rights Committee initially adhered to the idea that Article 13 ICCPR does not cover extradition and only later changed its opinion. This view is corroborated by reference to *M.A. v Italy* where the Committee stated that “no provision of the Covenant making it unlawful for a State party to seek extradition of a person from another country”,³⁶⁰ and with a reference to the 1986 General Comment No. 15 where the Committee wrote that extradition is controlled by other international norms rather than by the ICCPR.³⁶¹ It is argued that, without openly admitting it, the Committee essentially overruled this case law in 1990 with *Giry v Dominican Republic*³⁶² where it found that extradition falls within the scope of Article 13 ICCPR.³⁶³

However, it is submitted here that the Human Right Committee never excluded extradition from the scope of Article 13 ICCPR in the first place. In General Comment No. 15, the Committee stated that Article 13 ICCPR is

applicable to all procedures aimed at the obligatory departure of an alien, whether described in national law as expulsion or otherwise. If such procedures entail arrest, the safeguards of the Covenant relating to deprivation of liberty (arts. 9 and 10) may also be applicable. If the *arrest* is for the particular purpose of extradition, other provisions of national and international law may apply.³⁶⁴

The last sentence only seems to relate to provisions on the *arrest* with a view to extradition (and proceedings relating to such an arrest), but not to the procedural safeguards to be granted in extradition proceedings as such – especially when this sentence is considered together with the previous one, which relates to arrests only.³⁶⁵ Furthermore, the statement that “other provisions of national and

359 Mark Villiger, *Commentary on the 1969 Vienna Convention on the Law of Treaties* (Martinus Nijhoff 2009) 445.

360 *MA v Italy* (n 26) para 13.4.

361 HRC, ‘General Comment No. 15: The Position of Aliens Under the Covenant’ (n 355) para 9.

362 *Giry v Dominican Republic* Comm no 193/1985 (HRC, 20 July 1990) para 5.5.

363 This view is namely held by Nowak (n 76) 293–94.

364 HRC, ‘General Comment No. 15: The Position of Aliens Under the Covenant’ (n 355) para 9 (emphasis added).

365 Ulrike Brandl, ‘Artikel 1 Protokoll 7 EMRK’ in Wolfram Karl (ed), *Internationaler Kommentar zur Europäischen Menschenrechtskonvention mit einschlägigen Texten und Dokumenten* (Carl Heymanns Verlag 2007) 19, states that the Committee applies Article 13 ICCPR not only to expulsions as a measure of immigration law but also to extradition proceedings; this would flow from HRC, ‘General Comment No.

international law may apply” to extradition does not exclude the applicability of Article 13 ICCPR and other Covenant provisions as such. Rather, it points to the fact that the obligations of the ICCPR do not automatically take precedence over obligations resulting from extradition agreements and, as a consequence thereof, a conflict of international obligations may arise. Thus, General Comment No. 15 does not exclude the application of Article 13 ICCPR to extradition. Rather, it foreshadows the Committee’s functional approach to Article 13 ICCPR³⁶⁶ – ie giving the term “expulsion” a broad interpretation, notably including methods of removal for prosecution – which the Committee later explicitly confirmed in *Giry v Dominican Republic* and several other cases.

Moreover, in the case of *M.A. v. Italy*, the author did not invoke Article 13 ICCPR as such and only stated that the extradition order violated his rights because he had been convicted of a political offence.³⁶⁷ Indeed, Article 13 ICCPR does not contain a right not to be extradited based on substantive grounds for refusal of an extradition request, such as the political offence exception. It merely stipulates the procedural guarantees that must be conferred upon an extraditee in extradition proceedings. Since the political offence exception relates to substantive grounds for refusal of extradition, it is thus not covered *ratione materiae* by Article 13 ICCPR. However, this does not mean that the provision is *per se* inapplicable to extradition proceedings. The finding by the Human Rights Committee that there is “no provision of the Covenant making it unlawful for a State party to seek extradition of a person from another country” and that the complaint was therefore incompatible with the provision *ratione materiae* fits perfectly within the scope of Article 13 ICCPR, which only pertains to the procedure but not to the substance.

The *Giry v Dominican Republic* decision must therefore be seen as a continuation of the Committee’s view that extradition does not fall outside the scope of the Covenant – rather than overruling its previous decisions. In *Giry*, it held that “regardless of whether the action against the author is termed extradition or expulsion”,³⁶⁸ the word “expulsion” as used in Article 13 ICCPR “must be understood broadly” and observed that “extradition comes within the scope of the ar-

15: The Position of Aliens Under the Covenant’ (n 355) para 9. Brandt thus invokes the same paragraph of General Comment No. 15 to demonstrate that Article 13 ICCPR applies to extradition proceedings as Nowak does to demonstrate the contrary, ie that Article 13 ICCPR does *not* apply to extradition proceedings.

366 ILC, ‘Expulsion of Aliens’ (n 15) para 89 and fn 170.

367 *MA v Italy* (n 26) para 2.3. An indicia that the author did not complain about a violation of Article 13 ICCPR, ie procedural deficiencies in his extradition proceedings, follows from the fact that he did not direct the complaint against France, which was the extraditing State and therefore conducted the extradition proceedings, but against Italy, ie the State that requested his extradition and later conducted the criminal trial against him.

368 In *Giry v Dominican Republic* (n 362) para 5.5.

ticle". Furthermore, it stressed that this finding confirms its stance on the scope of application of Article 13 ICCPR taken in General Comments involving this issue.³⁶⁹

That extradition is not excluded from Article 13 ICCPR and the Covenant itself was also confirmed in the later decision of *Kindler v Canada* where the Committee stated that regardless of whether an alien is required to leave the territory through expulsion or extradition, "the general guarantees of article 13 in principle apply, as do the requirements of the Covenant as a whole". In *Everett v Spain*, the Committee yet again emphasized that extradition as such does not fall outside the scope of the ICCPR and stated in very explicit and robust terms:

On the contrary, several provisions, including articles 6, 7, 9 and 13, are necessarily applicable in relation to extradition. Particularly, in cases where, as in the current one, the judiciary is involved in deciding about extradition, it must respect the principles of impartiality, fairness and equality, as enshrined in article 14, paragraph 1, and also reflected in article 13 of the Covenant.³⁷⁰

In sum, the procedural safeguards explicitly listed in Article 13 ICCPR, as well as the principles of impartiality, fairness and equality implicitly contained in the provision,³⁷¹ apply to extradition proceedings.³⁷²

bb) Transfers Meet the Committee's Definition of Extradition

The preliminary finding is that the Human Rights Committee has confirmed the application of Article 13 ICCPR to extradition proceedings in various instances. The ensuing analysis therefore centres on how the Committee understands the notion of "extradition" in the context of Article 13 ICCPR: either as limited to extradition *stricto sensu* or as encompassing other methods of removal for prosecution and, therefore, transfers of piracy suspects as well.

In the cases of *M.A. v Italy*, *Kindler v Canada* and *Everett v Spain*, the authors were removed from the territory of the respective respondent State in order

369 *ibid.*

370 *Everett v Spain* (n 31) para 6.4.

371 See below Part 5/III/C/2/c.

372 The application of Article 13 ICCPR to extradition does not in any way limit the State's entitlement to enter into extradition agreements. Hence, the Committee applies Article 13 ICCPR while at the same time referring to the *travaux préparatoires*, according to which the provision was not intended to "detract from normal extradition arrangements" (*Kindler v Canada* (n 29) para 6.6.). Put differently, no provision of the Covenant makes it unlawful for a State to seek extradition of a person from another country in a concrete case (*MA v Italy* (n 26) para 13.4). The only, but important, consequence flowing from the application of Article 13 ICCPR is that extradition practices under such treaties must comply with the procedural guarantees and safeguards set forth in Article 13 ICCPR (*Giry v Dominican Republic* (n 362) para 5.5).

to face justice in a third State by means of extradition *stricto sensu*. In all these cases, the State with an interest in prosecuting the author in question submitted a request for extradition to the State in the territory of which the fugitive was present, whose extradition was ultimately granted in (allegedly deficient) extradition proceedings.³⁷³ In these decisions, the Committee used the term “extradition” in order to refer to extradition *stricto sensu*,³⁷⁴ ie a procedure by and large corresponding to the one described in the UN Model Treaty and Model Law on Extradition.³⁷⁵

In *Giry v Dominican Republic* and *Cañón García v Ecuador*, the authors were surrendered to a third State for the purpose of criminal prosecution by means other than extradition *stricto sensu* – that is, following a formal extradition request and pursuant to an order obtained in extradition proceedings. According to the facts as submitted by *Giry*, the author went to an airport in the Dominican Republic to buy a ticket for a flight to the Antilles. Two Dominican agents apprehended him and took him to a police station located in the airport. Two hours later, he was taken out a back door leading directly to the runway and made to board an airplane bound for Puerto Rico. Upon his arrival in Puerto Rico, he was arrested and charged with several offences. The author was later tried before the United States District Court of San Juan in Puerto Rico.³⁷⁶ Despite the existence of an extradition treaty between the United States and the Dominican Republic,³⁷⁷ the author did not benefit from the proceedings foreseen therein. The State Party referred to the removal in a variety of ways. To wit, it stated that the author was “*deported* from the Dominican Republic to the United States of America *on the basis of the extradition treaty* existing between the two nations”³⁷⁸ and declared in a later submission that the State’s intention was merely to “*expel*” the author from its territory.³⁷⁹ In response to this confusing terminology, the Human Rights Committee stated that “[r]egardless of whether the action against the author is termed extradition or expulsion, the Committee confirms ... that ‘expulsion’ in the context of article 13 must be understood broadly and observes

373 For the facts of these cases, see *MA v Italy* (n 26) paras 2.3, 8, 10 and 13.4; *Kindler v Canada* (n 29) paras 1, 2.1–2.4; *Everett v Spain* (n 31) paras 2.1–2.3.

374 In *Everett v Spain* (n 31) no other term than “extradition” appears in the analysis pertaining to Article 13 ICCPR. In *Kindler v Canada* (n 29) para 6.6, the Committee uses the term “expulsion” to denote a concept different from extradition *stricto sensu*: “whether an alien is required to leave the territory through *expulsion* or *extradition*, the general guarantees of article 13 in principle apply” (emphasis added).

375 Model Treaty on Extradition (14 December 1990) Adopted by General Assembly resolution 45/116, subsequently amended by General Assembly resolution 52/88 (Model Treaty on Extradition) and Model Law on Extradition (n 301).

376 *Giry v Dominican Republic* (n 362) paras 3.1 and 3.2.

377 *ibid* para 4.1.

378 *ibid* (emphasis added).

379 *ibid* para 4.2.

that extradition comes within the scope of the article”³⁸⁰ It further stated that “it is evident that the author was not afforded an opportunity, *in the circumstances of the extradition*, to submit reasons against his *expulsion* or to have his case reviewed by the competent authority”.³⁸¹ From this statement, two conclusions can be drawn: firstly, the notion of “expulsion” in Article 13 ICCPR is an umbrella term, which includes extradition, and, secondly, extradition not only includes extradition *stricto sensu* but also other methods for surrendering a person to a third State for criminal prosecution.

Also in *Cañón García*, formal extradition proceedings were not followed despite the existence of an extradition agreement between Ecuador and the United States.³⁸² Rather, the author, a citizen and resident of Columbia travelling in Ecuador at the material time, was brought to the prosecuting State in the following way: on their way back to the hotel, he and his wife were surrounded by ten armed men, reportedly Ecuadorian police officers acting on behalf of Interpol and the United States Drug Enforcement Agency. They were forced into a vehicle and were told that the police were executing an “order” coming from the United States Embassy. Upon arrival at a private residence, the author was separated from his wife. After spending the night handcuffed to a table and chair, he was taken to the airport the next morning where two individuals who identified themselves as agents of the United States Drug Enforcement Agency and informed him that he would be flown to the United States on the basis of an arrest warrant issued against him. After being read his “Miranda rights”, he was informed that he was detained by order of the United States Government. The author’s request to consult a lawyer or to speak with the Colombian Consul was turned down. Instead, he was immediately made to board a plane bound for the United States.³⁸³ The State Party referred to the removal as an “expulsion”.³⁸⁴ The Committee used neither the word “extradition” nor “expulsion” to explain the facts at hand, but simply held that the State Party conceded that the “author’s removal from Ecuadorian jurisdiction” suffered from irregularities³⁸⁵ and that the “facts before it reveal violations of articles 7, 9 and 13 of the Covenant”.³⁸⁶ From this case follows that the Committee interprets the term “expulsion” of Article 13 ICCPR in a functional-teleological way rather than in a formal-literal way.³⁸⁷ Hence, the decisive issue is not the designation of the method but rather the *function* of the method used, namely removing a person from one jurisdiction and

380 *ibid* para 5.5.

381 *ibid* (emphasis added).

382 *Cañón García v Ecuador* Comm no 319/1988 (HRC, 5 November 1991) para 2.3.

383 *ibid* paras 1–2.4.

384 *ibid* para 4.1.

385 *ibid* para 5.2. (emphasis added).

386 *ibid* para 6.1.

387 ILC, ‘Expulsion of Aliens’ (n 15) para 89 and fn 170.

bringing him into another. Thereby, the underlying purpose of the removal can (but not necessarily) be to obtain a jurisdictional change for the purpose of criminal prosecution.

In sum, the term “expulsion” as used in Article 13 ICCPR is an umbrella term encompassing extradition. Extradition, in turn, includes extradition *stricto sensu* but also other methods for bringing a person into the jurisdiction of a third State for the purpose of criminal prosecution. In light of this functional-teleological interpretation of the terms “expulsion” and “extradition” by the Human Rights Committee, the designation of a measure or practice by a State Party seems irrelevant so long as it leads to a forced removal of the person from the State Party’s territory. To qualify as extradition as interpreted by the Committee in the context of Article 13 ICCPR, the removal must also be for the purpose of criminal prosecution of the person in the receiving State. Since transfers involve forced removal for the purpose of criminal prosecution, they appear to be covered by the notions of “expulsion” and “extradition” as interpreted by the Human Rights Committee in the context of Article 13 ICCPR. Hence, the provision is applicable to piracy suspects subject to transfer – provided they can be considered as “alien[s] lawfully in the territory of a State Party”, another condition of Article 13 ICCPR to which we turn now.

cc) Piracy Suspects as “Aliens Lawfully in the Territory of a State Party”

The personal scope of application of Article 13 ICCPR is limited to aliens lawfully in the territory of a State Party. The term “alien” must be understood comprehensively as encompassing all non-nationals – that is, not only foreigners, but also stateless persons and refugees.³⁸⁸ We have seen that the piracy suspects intercepted thus far by patrolling naval States all claim to be from Somalia.³⁸⁹ Unless piracy suspects are intercepted by Somali officials, notably the coastguards of Somaliland and Puntland, they undeniably qualify as aliens vis-à-vis the seizing State.

The requirement that the alien is “lawfully in the territory of a State Party” is identical to the one stipulated in Article 12(1) ICCPR³⁹⁰ and is governed by domestic law, which may subject the alien’s entry and stay in the State’s territory to restrictions as long such laws are in accordance with the State’s international obligations.³⁹¹ An alien is considered to be lawfully in the territory of a State Party if

388 Nowak (n 76) 292.

389 See above Part 1/I.

390 Nowak (n 76) 292.

391 HRC, ‘General Comment No. 27: Article 12 (Freedom of Movement)’ in ‘Note by the Secretariat, Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies: Vol I’ (2008) UN Doc HRI/GEN/1/Rev.9 (Vol. I) para 4; HRC, ‘General Comment No. 15: The Position of Aliens Under the Covenant’ (n 355) para 9. The international obligation of non-refoulement, for instance, may curtail the State’s liberty to restrict entry or stay in its territory: *ibid*

his entry was in accordance with domestic law and his subsequent stay conforms to domestic law.³⁹² As a general rule, “lawful presence” requires that the person is in possession of proper documentation,³⁹³ complied with the conditions for entry, ie observed the frontier control formalities, and has not overstayed the period for which he was admitted.³⁹⁴ Article 13 ICCPR does not require that a person is lawfully “established” in that country. Rather, a legal title under domestic or international law suffices – even if very short-term.³⁹⁵ In sum, illegal entrants and aliens do not fall within the scope of Article 13 ICCPR.³⁹⁶

Obviously, piracy suspects intercepted in maritime law enforcement operations are unlikely to be in possession of proper documentation or be in compliance with the conditions for entry of the seizing State. However, this also holds true for extraditees who often enter the State clandestinely (and possibly without proper documentation) given that an identity check at the border would probably lead to their arrest. We have seen that the Human Rights Committee is quite resolved in applying Article 13 ICCPR to extradition. Also, it has proven itself ready to skip over the “lawful presence” requirement in these cases. In *Kindler*, the “alien” requirement was obviously fulfilled given that the author was a citizen of the United States,³⁹⁷ extradited back to his home country by Canada.³⁹⁸ After his conviction by a court in the United States and prior to the sentencing, he escaped from custody and fled to Canada where he was arrested.³⁹⁹ However, *Kindler* entered Canada illegally and his stay at no point became legal while he was in the country. Despite being *unlawfully* in the territory of Canada, the Human Rights Committee decided that the guarantees of Article 13 ICCPR applied to the author.

para 5; Nowak (n 76) 263–64; Sarah Joseph, Jenny Schultz and Melissa Castan, *The International Covenant on Civil and Political Rights: Cases, Materials, and Commentary* (2nd edn, OUP 2004) 379.

392 HRC, ‘General Comment No. 15: The Position of Aliens Under the Covenant’ (n 355) para 9.

393 Such as a valid passport or travel documents, if necessary with a visa.

394 The person can, *inter alia*, be admitted to stay *ex lege*, by virtue of landing conditions or a residence permit. ILC, ‘Expulsion of Aliens’ (n 15) para 44 and fn 78; Nowak (n 76) 292 and 264.

395 A proposal to insert the word “established” after the word “lawfully” was clearly rejected by the majority, which was not willing to narrow down the protective scope of Article 13 ICCPR: Bossuyt (n 355) 269–70.

396 HRC, ‘General Comment No. 15: The Position of Aliens Under the Covenant’ (n 355) para 9. If the legality of a person’s entry or stay is in dispute, the Committee requires that any decision to remove the person from the territory shall to be taken in accordance with the guarantees stipulated in Article 13 ICCPR.

397 *Kindler v Canada* (n 29) para 1.

398 *ibid* paras 2.1–2.4.

399 *ibid* para 2.1 and 6.6; a violation of Article 13 ICCPR, however, was not found because the author benefited from the procedural guarantees required under the provision.

It stated that “whether an alien is required to leave the territory through expulsion or extradition, the general guarantees of article 13 in principle apply”.⁴⁰⁰

Hence, in extradition cases, the Committee seems to acknowledge that the extraditee is – as a general rule and due to the very fact that he is a fugitive – *not* lawfully in the territory of the State Party. It skips over the requirement of “lawfully in the territory” in order to apply the guarantees of Article 13 ICCPR to extradition cases. It has therefore taken a different path than the one suggested by Committee member Aguilar Urbina who, in his dissenting opinion in *Kindler*, argued against the application of Article 13 ICCPR to extradition cases because

the individuals against whom the proceedings are initiated are not necessarily lawfully within the jurisdiction of a country; on the contrary – and especially if it is borne in mind that article 13 leaves the question of the lawfulness of the alien’s presence to national law – in a great many instances persons who are subject to extradition proceedings have entered the territory of the requested State illegally, as in the case of the author of the communication.⁴⁰¹

All in all, the Human Rights Committee is prepared to bypass the lawfulness requirement in the realm of extradition *stricto sensu* – otherwise the application of Article 13 ICCPR would not be possible in most cases of surrender for prosecution. This suggests that the same should be done with regard to piracy suspects subject to transfer since they are in a situation comparable to that of extraditees.

Not only should the Committee’s jurisprudence lead to this conclusion, but so should the rationale behind the requirement of “lawfully in the territory of a State Party”. Arguably, the rationale behind this requirement is that if a person enters the territory of a State in violation of its rules of entry, and thus against the will of that State, the State’s efforts to remove the person from its jurisdiction should not be complicated by imposing a decision reached in accordance with a law and by obliging the State to provide the person subject to removal with various procedural guarantees. However, in a situation where State agents bring a person within their jurisdiction by their very *own* act and at their *own* initiative – as is the case for seizure and arrest of piracy suspects at sea – it cannot be said that the person entered the State’s territory against its will and that therefore the removal should not be complicated by applying Article 13 ICCPR. Hence, unlike extraditees, who generally enter the territory of the removing State against the State’s will (and where Article 13 ICCPR nevertheless applies), piracy suspects come into the seizing State’s jurisdiction due to the initiative and acts of the seizing State rather than their own. *A fortiori*, the requirement that the person must be “lawfully” in the territory of the removing State must be discarded in cases involving transfers of piracy suspects.

⁴⁰⁰ *ibid* para 6.6.

⁴⁰¹ *ibid* para 7 of dissenting opinion by Mr. Francisco Jose Aguilar Urbina.

We will now discuss the requirement that the alien must be “in the territory” of the removing State and whether it can be fulfilled with regard to persons held on board a warship of the seizing State. The element of “territory” would undeniably be fulfilled if ships were understood as floating territories. This approach was prevalent when the Permanent Court of International Justice decided the *Lotus* case in 1927.⁴⁰² Today, however, equating ships and territory for the application of law is generally regarded as outdated and, in light of the flag State principle, perceived as an obsolete concept.⁴⁰³ As Brownlie correctly states, “[a]bstract discussion as to whether ships ... are ‘territory’ lacks reality, since in a legal context the word denotes a particular sphere of legal competence and not a geographical concept”.⁴⁰⁴ Hence, today, it is through the flag State principle that the “sphere of legal competences” – specifically the right and duty to exercise prescriptive, enforcement and adjudicative jurisdiction – applies on board a ship to the same extent as it does within a State’s territory. Taking this into account, the concept of quasi-territoriality indeed seems obsolete.

In accordance with the idea that in a legal context the notion of territory denotes “a particular sphere of legal competence” – rather than a portion of land – Article 13 ICCPR must then be understood as referring to all areas where a State exercises jurisdiction in the sense of public international law. Put another way, the notion of “territory” in Article 13 ICCPR must be read as “areas under the State’s jurisdiction”. Since, by virtue of the flag State principle,⁴⁰⁵ the State undeniably exercises jurisdiction on board warships – and especially warships

402 *The Case of the S.S. “Lotus” (France v Turkey)* (Judgment) [1927] PCIJ Rep Series A No 10, 25: “A corollary of the principle of the freedom of the seas is that a ship on the high seas is assimilated to the territory of the State the flag of which it flies, for, just as in its own territory, that State exercises its authority upon it, and no other State may do so. All that can be said is that by virtue of the principle of the freedom of the sea, a ship is placed in the same position as national territory ... It follows that what occurs on board a vessel on the high seas must be regarded as if it occurred on the territory of the State whose flag the ship flies.”

403 See, eg, *Lauritzen v Larsen* 345 US 571 (1953), 585 and fn 18.

404 Ian Brownlie, *Principles of Public International Law* (7th edn, OUP 2008) 113.

405 According to the second sentence of Article 91(1) UNCLOS and Article 5(1) Convention on the High Seas, ships have the nationality of the State whose flag they are entitled to fly. Among other functions, the nationality of a ship indicates which State is permitted under international law to exercise its jurisdiction. Thus, the nationality of a ship denotes a legal relationship between the vessel and its flag State in that the vessel is attached to the flag State that has the right and duty to effectively exercise its jurisdiction to prescribe, enforce and adjudicate over the vessel. On Article 91 UNCLOS, see Myron Nordquist and others (eds), *United Nations Convention on the Law of the Sea 1982: A Commentary – Volume III: Articles 86 to 132 and Documentary Annexes* (Martinus Nijhoff 1995) 103–09. The seizing State has not only jurisdiction in the sense of public international law, but also in the sense of the jurisdictional clauses of human rights treaties, notably Article 2(1) ICCPR; see above Part 3/III/A.

enjoying complete immunity from the jurisdiction of other States⁴⁰⁶ – it should be bound by Article 13 ICCPR.

If the notion of territory is understood in its strictest sense as only referring to land territory and the territorial sea, a State could too easily bypass not only Article 13 ICCPR but also other human rights obligations that refer to “territory”. In *Hirsi Jamaa*, decided by the Grand Chamber of the European Court of Human Rights in early 2012, the respondent State argued that the principle of non-refoulement is limited to the State’s territory – namely because of the words “country in which he is” of Article 33(2) of the Refugee Convention – and therefore does not extend to acts occurring on board its warship located on the high seas. Judge Pinto de Albuquerque replied to this proposition in his concurring opinion as follows:

According to Article 31 § 1 of the Vienna Convention on the Law of Treaties, a treaty provision should be interpreted in good faith ... A State ... lacks good faith when it engages in conduct outside its territory which would be unacceptable inside in view of its treaty obligations (the double standard test). A double standard policy based on the place where it is executed infringes the treaty obligation, which is binding on the State in question.⁴⁰⁷

He then concluded (as did the Grand Chamber)⁴⁰⁸ that not only must the principle of non-refoulement apply “to any State action conducted beyond State borders”, but also that the procedural guarantees relating to the evaluation of asylum claims “are not limited to the land and maritime territory of a State but also apply on the high seas”.⁴⁰⁹ In the context of transfers of piracy suspects, Article 13 ICCPR is indeed an important procedural device to effectively implement the non-refoulement principle since it allows for reasons to be submitted against removal. Hence, in light of the *ratio decidendi* of *Hirsi Jamaa*, Article 13 ICCPR must apply not only in the State’s territory, but also on board its warships navigating the high seas or in waters under the sovereignty of third States.

A comparison of the wording of Article 13 ICCPR with that of the SUA Convention and Hostage Convention also leads to the result that the notion of “territory” should be read as encompassing ships. These treaties – when interpreted literally – are clearly based on the idea that a fugitive is present in a State Party’s territory. Thus, for instance, the core obligation to extradite or prosecute commences with the words “[t]he State Party in the territory of which the of-

⁴⁰⁶ Article 95 UNCLOS.

⁴⁰⁷ *Hirsi Jamaa and Others v Italy* (n 64) concurring opinion of Judge Pinto de Albuquerque.

⁴⁰⁸ *ibid.*

⁴⁰⁹ *ibid.*

fender or the alleged offender is found”⁴¹⁰ and “[t]he State Party in the territory of which the alleged offender is found”⁴¹¹ respectively. Despite this wording, the Security Council has repeatedly stressed the importance of implementing the obligations of the SUA Convention and, implicitly, those of the Hostage Convention in order to suppress Somali-based piracy.⁴¹² This suggests that in the context of piracy provisions referring to “territory” must be read as referring to “jurisdiction”. This seems to be what the Rotterdam Court implicitly reasoned when deciding the *Samanyolu* case: it argued that detention with a view to transfer taking place on board warships could be based on Article 7 SUA Convention,⁴¹³ the wording of which also requires the presence of the alleged offender within the “territory” of the detaining State.

These arguments suggest that Article 13 ICCPR should be read as applying as soon as a State has jurisdiction over a person in the sense of public international law – which a seizing State undeniable has over piracy suspects detained on board its warship, who are subject to transfer. Hence, in light of the fact that piracy suspects are generally aliens to the seizing State, and that the Human Rights Committee has discarded the requirement that the person must be “lawfully” in the territory of the removing State in cases involving surrender for prosecution, all elements necessary to trigger the application of Article 13 ICCPR are arguably fulfilled.

Thus, even though *prima facie* the application of Article 13 ICCPR seems rather far-fetched, the Human Rights Committee interprets the notion of “expulsion” broadly enough so as to subsume transfers of piracy suspects. Further, it does not require lawful presence in cases involving surrender for the purpose of prosecution. Moreover, the argument that the notion of “territory” must be interpreted as “jurisdiction” finds support in doctrine and has been admitted implicitly or explicitly by courts and the Security Council with regard to provisions referring to “territory” other than Article 13 ICCPR – even with regard to piracy specifically. For these reasons, we can accept that Article 13 ICCPR is applicable to piracy suspects and turn now to its content.

b) Removal Pursuant to a Decision Reached in Accordance with Law

Article 13 ICCPR stipulates that a person may only be expelled⁴¹⁴ “in pursuance of a decision reached in accordance with law”. From this lawfulness requirement

⁴¹⁰ Article 10(1) SUA Convention.

⁴¹¹ Article 8 Hostage Convention.

⁴¹² See above Part 1/II/B/2; for a discussion whether a piracy suspect held on board a warship is within the flag State’s “territory” for the purposes of the SUA Convention, see Guilfoyle (n 14) 17.

⁴¹³ See above Part 4/I/C/3/c.

⁴¹⁴ In the following, the more neutral terms “removal” and “to remove” are used, since the notion of expulsion has a very strong connotation to immigration law; however,

first of all follows that a transfer decision must be authorized by and have its basis in law.⁴¹⁵

According to the Human Rights Committee and the International Court of Justice, the reference to “law” in Article 13 ICCPR must be understood as essentially referring to the domestic law of the State Party concerned, which is applicable in that respect⁴¹⁶ and as it stood at the time of the decision.⁴¹⁷ Thus, a removal order is only reached “in accordance with law” when it complies with both the substantive and procedural requirements of domestic law.⁴¹⁸ Yet, the formal identification of a valid legal source and compliance with it when issuing a removal decision is insufficient. Rather, the notion of “law” also involves a qualitative aspect.⁴¹⁹ In terms of substance, it must notably be compatible with the provisions of the ICCPR.⁴²⁰ As regards its form, the notion of law requires that the legal basis on which the removal decision rests is of a certain quality: clear, specific and not couched in general terms, in order to make the consequences of its application foreseeable and predictable. Furthermore, it must be accessible to all persons subject to the relevant jurisdiction. These substantive and formal requirements of the legal basis follow, *inter alia*, from an interpretation of the notion of “law” as used in Article 13 ICCPR in light of other Covenant provisions referring to this concept, most notably the lawfulness requirement under Article 9(1) ICCPR stipulating that liberty can only be deprived “in accordance with such procedure as are established by law”.⁴²¹

We noted earlier that the legal basis governing transfers of piracy suspects is not readily identifiable – that is, the basis describing by whom, in what procedure and based on what criteria persons suspected of piracy can be surrendered for prosecution. Taking the example of Denmark, no specific national legisla-

as we have seen above in Part 5/III/C/2/a/bb, Article 13 ICCPR not only covers expulsion *stricto sensu*, ie measures of immigration law, but also extradition, which is understood in the broadest sense possible, ie going beyond extradition *stricto sensu* and arguably encompassing transfers of piracy suspects.

415 Ben Saul, ‘The Kafka-esque Case of Sheikh Mansour Leghaei: The Denial of the International Human Right to a Fair Hearing in National Security Assessments and Migration Proceedings in Australia’ (Legal Studies Research Paper No 10/111, November 2010) <<http://ssrn.com/abstract=1701374>> accessed 29 January 2013, 9.

416 *Case Concerning Ahmadou Sadio Diallo (Republic of Guinea v Democratic Republic of the Congo)* (Judgment) [2010] ICJ Rep 639, para 65; *Maroufidou v Sweden* Comm no 13/85 (HRC, 9 April 1981) para 9.3; and *Alzery v Sweden* (n 320) para 11.10.

417 *Case Concerning Ahmadou Sadio Diallo (Republic of Guinea v Democratic Republic of the Congo)* (n 416) para 65; *Alzery v Sweden* (n 320) para 11.10.

418 *Maroufidou v Sweden* (n 416) para 9.3.

419 Saul (n 415) 9.

420 *Case Concerning Ahmadou Sadio Diallo (Republic of Guinea v Democratic Republic of the Congo)* (n 416) para 65; *Maroufidou v Sweden* (n 416) para 9.3.

421 See above Part 4/I/C/1/b.

tion governing transfer proceedings has been enacted. At the same time, NATO's mandate does not extend to transfers with a view to prosecution, and the issue is therefore not covered by rules emanating from the chain of command. Moreover, the transfer agreements concluded by Denmark with Kenya and the Seychelles respectively do not describe the transfer decision procedure either. While parliamentary decision B59 is interpreted as implicitly allowing for transfers, it does not govern the procedure leading to surrender for prosecution of piracy suspects either.⁴²² The situation is equally sobering regarding transfers taking place within the EUNAVFOR framework since there is no set of hard rules that comprehensively describes the transfer decision procedure. While Article 12 CJA Operation Atalanta mentions the option of transfer for prosecution, it does not regulate how a decision to transfer is actually taken. The various transfer agreements concluded between the European Union and various regional States respectively are also silent in this respect. Rather, to the extent that potential transfers and the course of action to be taken post-seizure are governed by rules, they are described in classified military documents – most importantly in the EUNAVFOR Transfer SOP.⁴²³ As far as national authorities of the seizing State are involved in transfers proceedings,⁴²⁴ this participation is generally not regulated by specific, publicly accessible legal rules, but rather – if at all – subject to internal, undisclosed instructions to the administration.⁴²⁵

In sum, the procedure leading to transfer for prosecution of piracy suspects is generally not described in specific domestic law, which is publicly accessible. For transfers taking place within the EUNAVFOR framework, publicly available rules describing the transfer procedure are equally missing. As far as the course of action regarding transfers is governed by rules, they are contained in classified or non-public documents – be it rules from the chain of command, such as the EUNAVFOR Transfer SOP, or guidelines internal to the administration. In light of this, the transfer decisions can hardly be said to be “reached in accordance with law” as is required by Article 13 ICCPR. Rather, they are the result of cooperation and negotiation on a diplomatic-political level.

Even though the wording of Article 13 ICCPR stipulates that a removal can only take place in pursuance of a *decision* reached in accordance with law, this does not mean it is inapplicable to *de facto* removals not involving any administrative or judicial decision. This follows quite plainly from *Giry v Dominican Republic* where the minority of the Human Rights Committee argued that the

422 See above Part 2/I/B/4.

423 See above Part 2/II/B/1.

424 The minimum involvement would be that domestic authorities of the seizing State decide not to prosecute the suspects in their own courts and thereby give way to a potential transfer of the suspects seized by its forces.

425 See, eg. above Part 2/II/B/4/b on the guidelines adopted for the functioning of the German inter-ministerial decision-making body.

forcible transfer of the author to a third State for criminal prosecution⁴²⁶ was an act of violence – “a decision not capable of being related to an act falling within the competence of the administration” – because the removing State was not able to produce or refer to any administrative act ordering the expulsion or extradition. They took the stance that the removal would only be covered by Article 13 ICCPR if there had been an (even irregular) administrative act – but not in the absence of such an act.⁴²⁷ Yet, the majority of the Committee members did not follow this line of reasoning and found that Article 13 ICCPR had been violated *for the very reason* that the removing State was not able to furnish a text containing the removal decision or show that the decision was reached “in accordance with law”.⁴²⁸ The majority view is certainly the preferred one, otherwise *de facto* transfers of criminal suspects not involving any administrative or judicial decision – and thus the most arbitrary forms of removal – would fall outside the ambit of Article 13 ICCPR.

The transfer decision procedures of Denmark and EUNAVFOR are to a large extent formalized, standardized and “in pursuance of a decision”, even if its issuance may fall short of the lawfulness requirement of Article 13 ICCPR. However, this should not belie the fact that, in many cases, patrolling naval States surrender piracy suspects for prosecution to third States in an *ad hoc* manner and not pursuant to a decision as required by Article 13 ICCPR – this holds notably true for transfers to Somaliland and Puntland, which are among the more problematic destinations in terms of the prohibition of refoulement.⁴²⁹ However, in light of *Giry*, such *de facto* handovers for prosecution are equally covered by the scope of application of Article 13 ICCPR – and will hardly ever meet its prescripts.

c) *Implicit Due Process Guarantee*

Article 13 ICCPR is interpreted as containing an implicit due process guarantee, in addition to and independent of the explicit procedural requirements and safeguards of the provision.⁴³⁰ Article 32(2) of the Refugee Convention, which largely inspired the content of Article 13 ICCPR,⁴³¹ explicitly refers to due pro-

426 On the facts of this case involving a *de facto* removal for prosecution, see above Part 5/III/C/2/a/bb.

427 *Giry v Dominican Republic* (n 362), individual opinion submitted by Ms. Christine Chanet and Msrs. Francisco Aguilar Urbina, Nisuke Ando and Bertil Wennergren.

428 *ibid* para 5.5.

429 See above Introduction/II/A and Part 5/B/2/b.

430 This also holds true for the explicit due process requirement under Article 32(2) Refugee Convention: Ulrike Davy, ‘Article 32’ in Andreas Zimmermann (ed), *The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol: A Commentary* (OUP 2011) 1315–16.

431 UNGA, ‘Annotations on the Text of the Draft International Covenants on Human Rights’ (1955) UN Doc A/2929, 40; Bossuyt (n 355) 269; Davy (n 430) 1297; Nowak (n

cess.⁴³² However, this is not the only evidence for the existence of an implicit due process requirement under Article 13 ICCPR. This also follows quite plainly from General Comment No. 32, according to which “[t]he procedural guarantees of article 13 of the Covenant incorporate notions of due process also reflected in article 14 and thus should be interpreted in the light of this latter provision”.⁴³³ This finding is underpinned by a reference to *Everett* where the Committee held that in extradition cases the “principles of impartiality, fairness and equality, as enshrined in Article 14, paragraph 1, and also reflected in Article 13 of the Covenant” must be respected.⁴³⁴ Furthermore, General Comment No. 32 refers in this context to *Ahani v Canada* where the Human Rights Committee stated that Article 13 ICCPR “incorporates notions of due process also reflected in article 14 of the Covenant”.⁴³⁵

In sum, Article 13 ICCPR contains a due process component, which embraces the principles of impartiality, fairness and equality of arms. These principles, to which we turn now, have a similar meaning as under Article 14(1) ICCPR. However, under Article 13 ICCPR, these principles not only apply to judicial bodies (as they do with respect to the first sentence of Article 14(1) ICCPR) and to courts and tribunals determining criminal charges (as they do under the second sentence of Article 14(1) ICCPR) – which would make them inapplicable to transfer proceedings.⁴³⁶ Rather, they apply no matter what body or authority decides on removal⁴³⁷ and, hence, also to transfer proceedings as they are currently conducted.

76) 291.

432 Article 32(2) Refugee Convention reads: “The expulsion of such a refugee shall be only in pursuance of a decision reached in accordance with *due process of law*.” (emphasis added).

433 HRC, ‘General Comment No. 32: Right to Equality Before Courts and Tribunals and to a Fair Trial’ in ‘Note by the Secretariat, Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies: Vol I’ (2008) UN Doc HRI/GEN/1/Rev.9 (Vol. I) para 62.

434 *Everett v Spain* (n 31) para 6.4.

435 *Ahani v Canada* (n 310) para 10.9.

436 See below Part 5/III/D/1 and 2.

437 See, eg, HRC, ‘General Comment No. 32: Right to Equality Before Courts and Tribunals and to a Fair Trial’ (n 433) para 62: “The procedural guarantees of article 13 of the Covenant incorporate notions of due process also reflected in article 14 and thus should be interpreted in the light of this latter provision”; a reference to, *inter alia*, *Ahani v Canada* (n 310) is made to underline this statement. In this case, the Committee applied the due process principles to a procedure where expulsion was decided by a minister, ie the executive branch. The Committee stated that “article 13 is in principle applicable to the Minister’s decision on risk of harm, being a decision leading to expulsion” (para 10.8) and then turned to the relationship between Articles 13 and 14 ICCPR with regard to expulsion noting “that as article 13 speaks directly to the situation in the present case and incorporates notions of due process

aa) Impartiality

Impartiality under Article 14(1) ICCPR, which is an absolute right not subject to any exceptions,⁴³⁸ encompasses two components. Firstly, the principle requires that decisions must not be influenced by a judge's "personal bias or prejudice". Moreover, judges must not "harbour preconceptions about the particular case before them, nor act in ways that improperly promote the interests of one of the parties to the detriment of the other". Secondly, there is the aspect of objective impartiality, which requires that the "tribunal must also appear to a reasonable observer to be impartial". Hence, apart from the judge's personal mind-set, no ascertainable objective facts may exist that would raise doubts regarding the judge's impartiality. Put differently, it is not sufficient that a member of the bench is impartial – he must also be perceived as impartial.⁴³⁹ The impartiality of the deciding body may notably be at stake if one or several of its members have been previously involved with the subject matter to be adjudicated.⁴⁴⁰

As regards the body or authority tasked with deciding on removal, it is important to note that the lawfulness requirement under Article 13 ICCPR does not entail that the decision must be taken by a *judicial* body or authority. Rather, it can be issued by an executive-administrative body, which does not feature the characteristics flowing from the qualifier "judicial",⁴⁴¹ most notably independence from the executive, objectiveness and impartiality in relation to the subject matter to be decided.⁴⁴² This is important against the background that actors involved in transfer decision proceedings generally do not display the attributes of a *judicial* body – be it, for example, the inter-ministerial coordination organ together with the Ministry of Foreign Affairs regarding piracy suspects seized by Denmark, or the inter-ministerial decision-making body and the Ministry of Foreign Affairs together with the EUNAVFOR Operational Headquarters

also reflected in article 14 of the Covenant, it would be inappropriate in terms of the scheme of the Covenant to apply the broader and general provision of article 14 directly" (para 10.9).

438 HRC, 'General Comment No. 32: Right to Equality Before Courts and Tribunals and to a Fair Trial' (n 433) para 19.

439 *ibid* para 21, with various references to its views.

440 In *Piscioneri v Spain* Comm no 956/2000 (HRC, 7 August 2003), the complaint was raised that the judges who considered the extradition at first instance formed part of the court, which ruled on the application for reconsideration, and that they could have exerted a certain influence on their colleagues (para 3.3). However, because of non-exhaustion of domestic remedies, the Committee did not decide the issue of prior judicial involvement on the merits (para 6.5).

441 Nowak (n 76) 294–95.

442 On the notion of judicial body or authority, see below Part 5/III/D/1.

with regard to piracy suspects intercepted by German forces contributing to Operation Atalanta.⁴⁴³

Yet, no matter the actor tasked with deciding on surrender for prosecution, it is bound to respect the guarantees of Article 13 ICCPR⁴⁴⁴ – among which impartiality figures prominently. At the very least, it is doubtful whether all actors currently tasked with deciding on transfers of piracy suspects meet the strictures of subjective and objective impartiality, given that some of them (for example, the *ad hoc* bodies deciding whether domestic prosecution or transfer is warranted in a specific case) are involved in the process for the very purpose of protecting State interests.⁴⁴⁵

bb) Fairness

The notion of “fair trial” is on the one hand used as a generic term referring to the totality of procedural guarantees contained in Article 14 ICCPR that ensure the proper administration of justice.⁴⁴⁶ On the other, the expression “fair ... hearing” of the second sentence of Article 14(1) ICCPR specifically refers to the hearing as such, ie the actual conduct of legal proceedings.⁴⁴⁷ The principle of fairness of Article 13 ICCPR must be understood in the latter sense.

The right to a fair hearing of the first sentence of Article 14(1) ICCPR is broader than the sum of the guarantees stipulated in Article 14(3) ICCPR, which exclusively apply to the determination of criminal charges⁴⁴⁸ – and, therefore,

443 On the actors involved in transfer decision proceedings, see above Part 2/III. On the issue whether actors involved in transfer decision procedures in the context of counter-piracy operations qualify as judicial bodies or authorities, see below Part 5/III/D/1.

444 Scott Carlson and Gregory Gisvold, *Practical Guide to the International Covenant on Civil and Political Rights* (Transnational Publishers 2003) 100–01.

445 See below Part 5/III/D/1.

446 See, eg, the title of the HRC’s General Comment No. 32 (n 433), which reads: “Right to equality before courts and tribunals and to a *fair trial*” (emphasis added); see also its paras 2 and 3.

447 While the notion of “fairness” refers to the hearing, the principle of impartiality applies to the court: David Weissbrodt, *The Right to a Fair Trial under the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights* (Martinus Nijhoff 2001) 55.

448 This can be deduced from the wording of Article 14(3) ICCPR, which entitles persons charged with a criminal offense to specific “minimum guarantees”. HRC, ‘General Comment No. 13: Article 14 (Administration of Justice)’ (no longer in force) in ‘Note by the Secretariat, Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies: Vol I’ (2008) UN Doc HRI/GEN/1/Rev.9 (Vol. I) para 5; see also Nihal Jayawickrama, ‘The right to fair trial under the International Covenant on Civil and Political Rights’ in Andrew Byrnes (ed), *The Right to Fair Trial in International & Comparative Perspective* (Centre for Comparative and Public Law, University of Hong Kong 1997) 39; Gerald Heckman,

not to transfers of piracy suspects.⁴⁴⁹ Thus, specific proceedings may violate the principle of fairness of the second sentence of Article 14(1) ICCPR, even though the guarantees of Article 14(3) ICCPR were observed.⁴⁵⁰ This implies that a rather strict standard of fairness must be observed in transfer proceedings in the context of counter-piracy operations.

Article 14 ICCPR is not concerned with the substance of a specific decision, for example, whether a specific transfer is in line with the substantive side of the prohibition of *refoulement*.⁴⁵¹ The principle of fairness, which is independent from the outcome, does not ensure equality of results either. Hence, it could not be the basis for the claim that some piracy suspects are released despite suspicion of criminal activity while others are transferred to a third State for prosecution.⁴⁵² Rather, the principle of fairness solely aims at the observance of certain procedural guarantees.⁴⁵³ Among these procedural requirements is that a judgment must be reasoned and that reasonably efficient administrative channels exist through which the person subject to removal or his counsel can request and obtain relevant court documents.⁴⁵⁴ What is more, in order to secure the fairness of proceedings, they must be conducted in an expeditious manner.⁴⁵⁵

The fairness of a hearing as guaranteed by Article 14(1) ICCPR cannot be construed as entirely excluding proceedings held *in absentia*. Rather, under certain circumstances, they are permissible in the interest of justice. However, certain requirements must be respected in order to prevent a violation of the fair

‘Securing Procedural Safeguards for Asylum Seekers in Canadian Law: An Expanding Role for International Human Rights Law?’ (2003) 15 *International Journal of Refugee Law*, 226.

449 See below Part 5/III/D/3/b.

450 Nowak (n 76) 321, and Lawyers Committee for Human Rights, ‘What is a Fair Trial? A Basic Guide to Legal Standards and Practice’ (March 2000) <www.hrea.org/erc/Library/display_doc.php?url=http%3A%2F%2Fwww.humanrightsfirst.org%2Fwp-content%2Fuploads%2Fpdf%2Ffair_trial.pdf&external=N> accessed 29 January 2013, 12.

451 On the substantive side of the principle of non-*refoulement*, see above Part 5/I/B/2/b.

452 In the *Samanyolu* case, the suspects seized by Danish forces and transferred to the Netherlands argued that the principle of equality and the prohibition of arbitrariness were violated by releasing some piracy suspects despite the existence of criminal suspicion while prosecuting others; see above Part 1/III/A.

453 HRC, ‘General Comment No. 32: Right to Equality Before Courts and Tribunals and to a Fair Trial’ (n 433) para 26; Joseph, Schultz and Castan (n 391) 408.

454 Jayawickrama (n 448) 41, citing *MF v Jamaica* Comm no 335/1988 (HRC, 17 July 1992).

455 HRC, ‘General Comment No. 32: Right to Equality Before Courts and Tribunals and to a Fair Trial’ (n 433) para 27; Joseph, Schultz and Castan (n 391) 410–11; Jayawickrama (n 448) 39. Delays that are neither justified by the complexity of the case nor by the behaviour of the parties violate the fair hearing standard enshrined in Article 14(1) ICCPR.

trial guarantee under Article 14(1) ICCPR when adjudicating a person in his absence, including summoning the accused in a timely manner and informing him about the proceedings.⁴⁵⁶ As noted earlier for the right to be brought promptly before a judge and the right to seek judicial review of the lawfulness of detention,⁴⁵⁷ in the context of piracy, it is usually not a practicable solution for the suspect to physically appear before mainland authorities of the seizing State. Hence, to the extent that transfer proceedings are not conducted on board the seizing State's law enforcement vessel, it seems permissible for such proceedings to occur in the absence of the piracy suspect subject to transfer. Yet, the principle of fairness (and even more so, the principle of equality of arms)⁴⁵⁸ seems to require that the transferee is represented by counsel during both the proceedings pertaining to the initial transfer decision and those reviewing the decision.⁴⁵⁹

It is not uncommon that persons subject to removal apply for provisional measures in order to halt their actual surrender, which is a means to prevent irreparable harm. In *Weiss v Austria*, the Committee decided that the right to an effective remedy⁴⁶⁰ and the principle of equality before courts and tribunals were violated because the author was removed from the territory in breach of an order to stay his extradition, which was issued by an administrative court and duly communicated to the competent officials. The Committee did not specify which component of the right to equality before courts and tribunals – fairness or equality of arms – was violated by removing the author from the territory despite a stay of execution.⁴⁶¹ Yet, since both principles are covered by the due process component of Article 13 ICCPR, seizing States are bound to respect a decision ordering the stay of a specific transfer. To provide piracy suspects (*de lege ferenda*) with an opportunity to apply for provisional measures, which seriously delay a possible surrender if granted, potentially conflicts with the constraints and goals of an operational order – yet it may be the only way to prevent irreparable harm.⁴⁶²

cc) Equality of Arms

Another component of the due process guarantee of Article 13 ICCPR is the principle of equality of arms, which is also referred to as procedural equality between

456 *Maleki v Italy* Comm no 699/1996 (HRC, 15 July 1999) para 9.2; *Benhadj v Algeria* Comm no 1173/2003 (HRC, 20 July 2007) para 8.9.

457 See above Part 4/II/B/4/b and Part 4/II/C/4/b.

458 See below Part 5/III/C/2/c/cc.

459 The right to be represented explicitly stated in Article 13 ICCPR only pertains to review proceedings; see Part 5/III/C/2/d/cc.

460 Article 2(3) ICCPR.

461 *Weiss v Austria* Comm no 1086/2002 (HRC, 3 April 2003) paras 9.6 and 10.1.

462 On this conflict of interests, see above Part 5/III/B/2/b.

parties.⁴⁶³ The principle requires that all parties to a procedure must be provided with the same procedural rights “unless distinctions are based on law and can be justified on objective and reasonable grounds, not entailing actual disadvantage or other unfairness to the defendant”.⁴⁶⁴ Thus, all parties must be treated in such a way that ensures their procedurally equal position during the course of proceedings⁴⁶⁵ – a prescript that is far from being realized in the context of transfer proceedings where piracy suspects are not associated to the transfer procedure at all and, as consequence, they cannot exercise any procedural rights.

According to the Human Rights Committee, the balance between parties is disturbed if the person subject to the proceedings is not able to understand or express himself adequately in the official court language and the assistance of an interpreter – in exceptional cases for free⁴⁶⁶ – is not provided.⁴⁶⁷ This finding is pertinent given that piracy suspects generally have no mastery of the language in which transfer proceedings are conducted, and it underlines the need for translators to be on board a ship, as is the practice of various patrolling naval States.⁴⁶⁸ Furthermore, unequal opportunities in terms of participation in the proceedings and the unequal availability of legal remedies – a reality in the context of transfer proceedings – run counter to the idea of equality of arms. Thus, a disturbance of procedural equality of the parties has been found where an extradition law allowed the prosecutor to appeal the extradition decision but not the defendant,⁴⁶⁹ where one party was not provided full opportunity to challenge the arguments and evidence adduced by the other party,⁴⁷⁰ and where the State refused to allow a party to attend relevant proceedings.⁴⁷¹ It also arises if the accused and/or his counsel are excluded from an appellate hearing.⁴⁷²

d) Explicit Procedural Guarantees

Article 13 ICCPR contains three explicit procedural guarantees: the right to submit reasons against removal, the right to have the decision reviewed and the right

463 Jayawickrama (n 448) 40.

464 HRC, ‘General Comment No. 32: Right to Equality Before Courts and Tribunals and to a Fair Trial’ (n 433) para 13.

465 Lawyers Committee for Human Rights (n 450) 12; Carlson and Gisvold (n 444) 42.

466 HRC, ‘General Comment No. 32: Right to Equality Before Courts and Tribunals and to a Fair Trial’ (n 433) para 13.

467 Jayawickrama (n 448) 40, with references to various views of the Committee.

468 See above Part 4/II/A/3.

469 *Weiss v Austria* (n 461) paras 9.6 and 10.1.

470 HRC, ‘General Comment No. 32: Right to Equality Before Courts and Tribunals and to a Fair Trial’ (n 433) para 13; Joseph, Schultz and Castan (n 391) 412 and 415.

471 *ibid* 412.

472 Lawyers Committee for Human Rights (n 450) 12.

to be represented in review proceedings. These procedural safeguards must be granted “except where compelling reasons of national security otherwise require”.

aa) The Right to Submit Reasons against Removal

Article 13 ICCPR grants a right to submit reasons against the removal in question. Hence, persons subject to surrender proceedings must be provided with ample opportunity to present arguments against their removal⁴⁷³ and to comment on the material serving as the basis for the authority’s decision on removal.⁴⁷⁴

Domestic and international law pertaining to extradition *stricto sensu* mention various grounds for refusal of an extradition request, which go far beyond the reasons flowing from the prohibition of refoulement.⁴⁷⁵ In the context of transfers of piracy suspects, however, the grounds for refusal of an extradition request do not apply as such. At the same time, the law of the sea does not provide piracy suspects with a right not to be surrendered for prosecution.⁴⁷⁶ However, as we concluded earlier, the principle of non-refoulement may bar the transfer of a specific piracy suspect because, in the case in question, there is a real risk that he will face certain human rights violations upon surrender.⁴⁷⁷ The right to submit reasons against removal provides a piracy suspect subject to transfer proceedings with a possibility to initiate and substantiate a non-refoulement claim – arguably the only reason based on which his transfer can be prohibited.

Thereby, the breadth of admissible evidence to underline a non-refoulement claim must not be narrowly construed since Article 13 ICCPR aims at providing the individual with an effective remedy and the person must be given full facilities to pursue his remedy against removal.⁴⁷⁸ From the prescript that the person must have an effective remedy against his removal also follows that the opportunity to submit reasons against removal must be provided early, ie when the initial

473 Wouters (n 36) 416 (on Article 32(2) of the 1951 Refugee Convention). For cases, see, for instance, *Kindler v Canada* (n 29) para 6.6, where there was not a violation of Article 13 ICCPR because, *inter alia*, the author “had ample opportunity to present his arguments against extradition” before Canadian courts. In *Hammel v Madagascar* Comm no 155/1983 (HRC, 2 April 1987), the author was only notified of his removal from the territory of the State under consideration six hours before the actual deportation; hence, he was not able to exercise his right to submit reasons against expulsion, which was in violation of Article 13 ICCPR, see paras 9.1, 18.2, 19.2 and 20.

474 *Ahani v Canada* (n 310) paras 10.7 and 10.8.

475 See, eg, Sections 4–15 Model Law on Extradition (n 301) listing grounds for refusal of an extradition request.

476 See above Part 5/I/A.

477 See above Part 5/I/B/2/b.

478 HRC, ‘General Comment No. 15: The Position of Aliens Under the Covenant’ (n 355) para 10.

decision to remove is enacted, not only in review proceedings.⁴⁷⁹ The reservation of the right to submit reasons against removal until just before the order was implemented was found to be a violation of Article 13 ICCPR.⁴⁸⁰

The right to submit reasons against removal may be exercised through several means, namely by a hearing. However, Article 13 ICCPR does not grant a right to a hearing *expressis verbis*, and the Committee does not require a hearing in all removal proceedings either, even though a procedure not granting such a right “may, in certain circumstances, raise questions” under Article 13 ICCPR.⁴⁸¹ In light of this, the doctrine tends to argue that Article 13 ICCPR does not contain a right to a hearing.⁴⁸² In the context of judicial control and review of deprivation of liberty, we concluded that there are a number of options for ensuring direct or indirect communication between the piracy suspects detained at sea and the mainland judge, ie to exercise the right to be heard.⁴⁸³ These findings also hold true for transfer proceedings and the right to submit reasons against removal.

A pre-condition for exercising the right to submit reasons against removal is that the person knows of and has information about his potential surrender, including the relevant underlying facts and evidence. In order to be meaningful, such

479 To grant the right to submit reasons during the initial decision procedure seems indicated in light of the Committee’s stance that persons subject to removal must be provided with an effective remedy (*ibid* para 10). Also, the sequence of the clauses of Article 13 ICCPR and a teleological interpretation of the provision support such a reading. According to Davy (n 430) 1317, the right to submit reasons aims at ensuring that the decision to remove a person from a certain jurisdiction is based on facts and legal reasoning that are a source of contention by the individuals concerned. If the right to submit reasons were only accorded after the initial decision, the procedural safeguard would become much less meaningful; notably because not all appeal proceedings allow for full review of the law and facts of the initial decision, and because arguments put forward only at the stage where an initial decision to remove is already on the table may reverberate less in the minds of those deciding at a second instance.

480 *Case Concerning Ahmadou Sadio Diallo (Republic of Guinea v Democratic Republic of the Congo)* (n 416) para 74.

481 ILC, ‘Sixth Report on Expulsion of Aliens: Submitted by Maurica Kamto, Special Rapporteur: Addendum’ (62nd Session, Geneva, 3 May–4 June and 5 July–6 August 2010, 28 May 2010) UN Doc A/CN.4/625/Add.1, para 86.

482 Nowak (n 76) 297. See also Wouters (n 36) 417. However, Wouters’ reference to *VRMB v Canada* Comm no 236/1987 (HRC, 18 July 1988) is not very convincing, since the Committee simply stated that Article 13 ICCPR was complied with since the author had “ample opportunity, in formal proceedings *including oral hearings* ... to present his case” (paras 4.5 and 6.3, emphasis added); from this case it does not necessarily follow whether an oral hearing is necessary.

483 See above Part 4/II/B/4/b and Part 4/II/C/4/b.

information must be provided in due time⁴⁸⁴ and be translated.⁴⁸⁵ Since piracy suspects are currently not associated to transfer proceedings at all, they may not even be aware that their surrender for prosecution is being considered. Hence, it is of the utmost important that they are informed in due time (and not only after a transfer decision has been made) and in a language they understand – otherwise they cannot effectively exercise the right to submit reasons against removal,⁴⁸⁶ which is a precondition to having an effective remedy against refoulement.

Finally, the right to submit reasons against removal is futile unless the authorities involved in the removal decision are obliged to assess facts and evidence produced by the person subject to a potential surrender, and to assess whether the measure is in conformity with domestic and international law. The Human Rights Committee and the International Court of Justice implicitly confirm this stance in their case law.⁴⁸⁷

bb) Right to Have His Case Reviewed

Article 13 ICCPR further guarantees that every person subject to removal has the right “to have his case reviewed by ... the competent authority or a person or persons especially designated by the competent authority”. This right limiting the State’s discretion to remove persons from its territory is another important safeguard for protecting an individual from arbitrariness.⁴⁸⁸ Yet, the content of this right is not very well-developed in the case law of the Human Rights Committee – the few cases discussing the issue often lie at the extreme edges of the obviously

484 In *Hammel v Madagascar* (n 473) paras 9.1, 18.2, 19.2 and 20, the Committee found a violation of Article 13 ICCPR because the author was informed about his removal only six hours before he was taken *manu militari* to the plane leaving for another country.

485 Davy (n 430) 131 (in relation to Article 32(2) Refugee Convention).

486 Gerald Heckman, ‘UN Human Rights Committee Views on Rights of Suspected Terrorists in Detention and Deportation Proceedings: *Ahani v. Canada*’ (2005) 99 *American Journal of International Law* 669, 673; for a similar argument in the context of Article 32(2) Refugee Convention, see Davy (n 430) 1317, and Wouters (n 36) 416.

487 *Case Concerning Ahmadou Sadio Diallo (Republic of Guinea v Democratic Republic of the Congo)* (n 416), para 74: the person subject to expulsion must be “allowed to submit his defence to a competent authority *in order to have his arguments taken into consideration*” (emphasis added). See also *Kindler v Canada* (n 29) para 6.6, where the extradition proceedings were found to be in line with the procedural requirements set forth in Article 13 ICCPR since, *inter alia*, the author had ample opportunity to present his arguments against extradition before domestic courts, which “*considered the facts and the evidence before it*” (emphasis added).

488 UNGA (n 431), 40; Bossuyt (n 355) 268–70.

permissible⁴⁸⁹ or impermissible⁴⁹⁰ under Article 13 ICCPR, thus making it difficult to determine the minimum standard.⁴⁹¹

The right to review requires that the person subject to removal is provided with an opportunity to have his decision reviewed after the initial decision to expel is handed down, ie Article 13 ICCPR grants a remedy against the initial decision.⁴⁹² Whether the authority reviewing the initial decision must be a higher authority or whether the same authority can conduct review proceedings does not clearly follow from the Committee's jurisprudence.⁴⁹³ In doctrine, it is argued that Article 13 ICCPR provides for an appeal to a higher authority.⁴⁹⁴

489 See, eg, *VRMB v Canada* (n 482) paras 2.4 and 6.3, and *Truong v Canada* Comm no 743/1997 (HRC, 28 March 2003) paras 2.2 and 7.6.

490 See, eg, *Giry v Dominican Republic* (n 362) para 5.5, and *Cañón Garcia v Ecuador* (n 382) para 5.2.

491 Among the cases providing a modest amount of information about the minimum content of the right "to have his case reviewed", are *Maroufidou v Sweden* (n 416), *Pinkney v Canada* Comm no 27/1978 (HRC, 29 October 1981) and *Hammel v Madagascar* (n 473). Given the scarce case law, an important source for interpretation is, again, Article 32(2) Refugee Convention.

492 The view of Joseph, Schultz and Castan (n 391) 382, that possibly "the alien's right of review simply means a review of the initial expulsion decision, which may have been made without the furnishing of an opportunity for the alien to present counterarguments", ie that the right to review is basically identical with the right to submit reasons against removal, must be rejected. The only argument the authors provide for such a view is a reference to *Truong v Canada* (n 489) para 7.6; the decision, however, seems impertinent because it does not answer the question whether a subsequent review of the initial decision is required under Article 13 ICCPR, but rather pertains to the question whether there is a right to a second appeal. That the right to review is an "appeal" rather than the right to have the reasons submitted taken into account at some point seems confirmed by the drafting history, see, eg, UNGA (n 431) 40. See also HRC, 'General Comment No. 15: The Position of Aliens Under the Covenant' (n 355) para 10, where the word "appeal" is used. Also Nehemiah Robinson, *Convention Relating to the Status of Refugees: Its History and Interpretation: A Commentary* (Institute of Jewish Affairs 1953) 158–59, refers to a "right to appeal".

493 From the following cases, even though involving the right to legal review, no conclusion can be drawn whether a higher authority must conduct the review: *Truong v Canada* (n 489) paras 2.2, 3.4 and 7.6; *Karker v France* Comm no 833/1998 (HRC, 26 October 2000) paras 2.1 and 9.3; *VRMB v Canada* (n 482) paras 2.4 and 6.3; *Cañón Garcia v Ecuador* (n 382) para 5.2; *Giry v Dominican Republic* (n 362) para 5.5; *Everett v Spain* (n 31) paras 2.3 and para 6.4; *Kindler v Canada* (n 29) paras 2.3–2.4, 6.6.

494 Nowak (n 76) 297. In relation to Article 32(2) Refugee Convention, see Paul Weis, *The Refugee Convention, 1951: The Travaux Préparatoires Analysed, With a Commentary* (CUP 1995) 322–23 (higher authority required unless impossible, eg, because the initial decision was issued by the highest authority); Robinson (n 492) 159 (higher authority; if the highest authority decided on the initial decision, a new hearing must be granted instead of an appeal); James Hathaway, *The Rights of Refugees under*

The “competent authority” responsible for the decision in review proceedings need not be judicial and can be administrative in nature. For extradition *stricto sensu*, this follows from *Everett v Spain* where the Committee held that “the Covenant does not require that extradition procedures be judicial in nature” while at the same time affirming that Article 13 ICCPR applies to these proceedings.⁴⁹⁵ Even though not explicitly stated, this finding seems to apply to proceedings regarding the initial extradition order and review proceedings. That administrative authorities can conduct review proceedings also follows from the fact that according to the provision, review can be provided by “a person or persons especially designated by the competent authority”. The possibility of delegating decision-making power was specifically foreseen for cases where domestic law entrusts an administrative body with removal rather than a judicial body.⁴⁹⁶ While the possibility to delegate power was contested during the drafting of the provision,⁴⁹⁷ it was ultimately retained in order to respect the diversity of national systems – many of which lay the power to decide and review expulsion cases in the hands of administrative rather than judicial bodies.⁴⁹⁸ No matter what authority decides on proceedings at the appeal level, it must display certain characteristics that are necessary for a remedy to be effective as required by the Human Rights Committee.⁴⁹⁹

International Law (CUP 2005) 671–72 (authority of some seniority); and Davy (n 430) 1318 (authority of some seniority featuring some specific characteristics).

495 *Everett v Spain* (n 31) para 6.4.

496 Under Article 32(2) Refugee Convention, delegation is also possible; for instance, where the body competent to decide is a member of the executive branch, such as a minister, who appoints certain officials or a board to hear the refugee: Weis (n 494) 323.

497 Bossuyt (n 355) 270.

498 While not questioning that administrative authorities are competent to review expulsion decisions according to Article 13 ICCPR, Pieter Boeles, *Fair Immigration Proceedings in Europe* (Martinus Nijhoff 1997) 124, and Wouters (n 36) 416, argue that an interpretation of the provision in light of Article 2(3) ICCPR advocates for granting review by a judicial body.

499 See, eg, HRC, ‘General Comment No. 15: The Position of Aliens Under the Covenant’ (n 355) para 10; *Hammel v Madagascar* (n 473) para 19.2. It must notably be able to take into account all relevant facts and be able to review not only questions of fact but also of law. A purely formal examination of a removal decision falls short of these requirements. Similarly, a review body not having real authority over the expulsion process is not in line with Article 13 ICCPR (Hathaway (n 494) 67, and Davy (n 430) 1318). Applying these criteria, the Committee held that lodging a protest at the consular or diplomatic mission of the expelling State is not sufficient to comply with the right to review (ILC, ‘Expulsion of Aliens’ (n 15) para 661).

Persons subject to removal must be informed not only about the available legal remedies but also about the modalities of their exercise.⁵⁰⁰ This is a crucial aspect in the context of piracy, where the persons subject to transfer are generally ignorant about the existence of procedural rights and safeguards.

Review proceedings are only effective – which is required by the Committee⁵⁰¹ – if the opportunity to apply for review is granted prior to the implementation of the removal order.⁵⁰² Arguably, the appeal provided by virtue of Article 13 ICCPR must also have “suspensive effect”, which implies that a decision to transfer can only be implemented and enforced once the review decision becomes final. Such a reading of the right to review seems possible in light of the effectiveness of the remedy emphasized by the Committee.⁵⁰³ At the very least, the Committee recommended giving suspensive effect to emergency remedies filed by asylum-seekers against expulsion orders.⁵⁰⁴

cc) The Right to Be Represented

Finally, Article 13 ICCPR contains a right to be represented. From the wording “and to have his case reviewed by, and be represented for the purpose before, the competent authority” follows that the right to representation only extends to the review proceedings, ie not to proceedings in which the initial decision to remove is issued.⁵⁰⁵

According to the doctrine on Article 32(2) of the Refugee Convention – which is referenced in light of the scarce case law on the right to be represented under Article 13 ICCPR – the person subject to removal must be enabled to seek legal advice and to make use of the expertise of legal experts. Thus, it obliges authorities to provide the person to be expelled with the opportunity to make

500 Nowak (n 76) 299; in relation to Article 32(2) Refugee Convention, see Davy (n 430) 1318.

501 HRC, ‘General Comment No. 15: The Position of Aliens Under the Covenant’ (n 355) para 10.

502 This follows from *Case Concerning Ahmadou Sadio Diallo (Republic of Guinea v Democratic Republic of the Congo)* (n 416) para 74, and *Hammel v Madagascar* (n 473) para 19.2, where the author was not afforded a possibility to lodge an appeal prior to his expulsion, but was only able to apply for review after he was deported. With this decision, the Committee seems to have overruled *Maroufidou v Sweden* (n 416) paras 8 and 9.1–11, where it found that Article 13 ICCPR was not violated even though the decision to expel was immediately executed and the author was only able to apply for review after the implementation of the expulsion order.

503 HRC, ‘General Comment No. 15: The Position of Aliens Under the Covenant’ (n 355) para 10.

504 HRC, ‘Concluding Observations of the Human Rights Committee: Belgium’ (12 August 2004) UN Doc CCPR/CO/81/BEL, para 23.

505 Nowak (n 76) 299; ILC, ‘Sixth Report on Expulsion of Aliens: Submitted by Maurica Kamto, Special Rapporteur’ (n 481) para 104. The same holds true for Article 32(2) Refugee Convention: Davy (n 430) 1318.

contact with legal experts and, if necessary, to provide the names and addresses of attorneys.⁵⁰⁶ Even though Article 13 ICCPR does not explicitly refer to *legal* assistance, unlike Article 14(3)(d) ICCPR, it is part of the right to be represented.⁵⁰⁷

Hence, piracy suspects subject to transfer have a right to legal assistance in transfer proceedings, even though Article 14(3)(d) ICCPR does not apply to them.⁵⁰⁸ However, as opposed to the fair trial provision, which provides for free legal assistance in certain circumstances, representation as guaranteed under Article 13 ICCPR seems to be at the expense of the person subject to removal.⁵⁰⁹

dd) No “Compelling Reasons of National Security” in the Piracy Context
According to Article 13 ICCPR, the three explicit procedural safeguards can be restricted for “compelling reasons of national security” – but *not* the requirement that the decision be reached in accordance with law, including its due process guarantee embracing the principles of impartiality, fairness and equality.⁵¹⁰ As compared with the other limitation clauses of the ICCPR, that of Article 13 ICCPR has a higher threshold since the reasons must be of a “compelling” nature.⁵¹¹

The word “national” in the restriction clause points to a phenomenon of great concern in terms of the security of a country as a whole. Put differently, the granting of procedural safeguards can only be restricted if the interests of a whole nation are at stake.⁵¹² First of all, it is doubtful whether a seizing State is allowed to refer to the phenomenon of Somali-based piracy as such in order to restrict procedural safeguards, or whether the threat must instead emanate from the specific piracy suspect to be transferred whose procedural rights the seizing State aims at curtailing. Even if piracy as such is the reference point, it can hardly be argued that piracy off the coast of Somalia and the region constitutes a compelling national security threat for the European States contributing to the counter-piracy operations, the disposition and transfer practices of which are analysed in this study.⁵¹³ It must be recalled that – on an international level – the Security Council

506 *ibid* 1308.

507 Joseph, Schultz and Castan (n 391) 383.

508 See below Part 5/III/D/3/b.

509 Nowak (n 76) 300; according to Davy (n 430) 1318, State authorities are prohibited from interfering with or intimidating persons subject to expulsion from making contact with NGOs offering free legal assistance.

510 Nowak (n 76) 300; Hathaway (n 494) 675.

511 The following provisions of the ICCPR allow limitation of rights based on reasons of national security, without requiring that they be “compelling”: Articles 12(3), 14(1), 19(3)(b), 21 and 22(2) ICCPR. The restriction clause of Article 13 ICCPR is identical to the one of Article 32(2) Refugee Convention.

512 Alexandre Kiss, ‘Permissible Limitations on Rights’ in Louis Henkin (ed), *The International Bill of Rights: The Covenant on Civil and Political Rights* (Columbia University Press 1981) 297.

513 See above Introduction/II and III.

has not qualified piracy as such as a “threat to international peace and security in the region”, but rather the overall situation in Somalia, which is exacerbated by the phenomenon of piracy.⁵¹⁴

A further argument against qualifying the criminal phenomenon of piracy as a compelling national security threat ensues from a comparison of the terms “security” and “safety”, which are both used in the Covenant. Under various provisions of the ICCPR, rights can be restricted for reasons of public safety.⁵¹⁵ The term “public safety” notably includes the prevention of crime and disorder. Thus, based on the “public safety” limitation, certain rights may be restricted in order to preserve law and order – for example, if the exercise of such rights would involve a danger to the safety of persons, their lives or bodily integrity.⁵¹⁶ Since national safety is not mentioned as a ground for restricting the procedural safeguards of Article 13 ICCPR, it cannot be argued that the procedural safeguards of piracy suspects must be restricted to preserve law and order, ie to prevent the commission of further pirate attacks. Put another way, the notion of “compelling reasons of national security” cannot be equated with “public safety”, which includes the prevention of crime. Rather, the interest justifying a restriction of the right of Article 13 ICCPR must be of a greater magnitude.

Among the situations amounting to a national security threat are an endangerment of the territorial integrity and political independence of a State, and a political or military threat to the entire nation.⁵¹⁷ These reasons must be compelling, ie imperative, to allow for restriction of the rights of Article 13 ICCPR.⁵¹⁸ This emphasizes the narrowness of the exception,⁵¹⁹ advocates for a very strict interpretation of the concept of national security,⁵²⁰ and that recourse to restrictions should be used sparingly and in very unusual cases.⁵²¹

For all these reasons, it is hardly conceivable that a seizing State, which has the onus of proof that “compelling reasons of national security” exist,⁵²² can convincingly demonstrate that granting one or more of the procedural safeguards of

514 See above Part 1/II/A/1.

515 Articles 18(3), 21 and 22(2) ICCPR.

516 Kiss (n 512) 298.

517 *ibid* 297; Nowak (n 76) 300.

518 Heckman (n 486) 675.

519 Stig Jagerskiöld, ‘The Freedom of Movement’ in Louis Henkin (ed), *The International Bill of Rights: The Covenant on Civil and Political Rights* (Columbia University Press 1981) 184.

520 Davy (n 430) 1320.

521 Robinson (n 492) 159.

522 Hathaway (n 494) 676; Davy (n 430) 1320. In *Giry v Dominican Republic* (n 362), where a *de facto* removal for prosecution was at issue, the respondent State failed to demonstrate that compelling reasons of national security justified the failure to grant any of the three procedural safeguards (para 5.5).

Article 13 ICCPR to piracy suspects subject to transfer cannot be reconciled with the preservation of the security of the nation as a whole.

e) **Conclusion**

Taken at face value, Article 13 ICCPR does not apply to piracy suspects subject to transfer since according to its wording application is reserved for aliens lawfully in the territory of a State party to the Covenant and who are subject to expulsion. Yet, a look into the interpretation by the Human Rights Committee of the various elements, which together constitute the provision's threshold of application, reveals that it may apply to piracy suspects detained on board a law enforcement vessel of the seizing State and subject to transfer proceedings.

First of all, the Committee takes a very broad interpretative stance on the notion of "expulsion" of Article 13 ICCPR, according to which it not only covers measures of immigration law, ie expulsion *stricto sensu*, but rather serves as an umbrella term encompassing extradition. The notion of extradition, in turn, includes extradition *stricto sensu* and also other methods for bringing a person into the jurisdiction of a third State for the purpose of criminal prosecution, even those of a purely *de facto* nature. Hence, transfers of piracy suspects meet the Committee's definition of expulsion in the context of Article 13 ICCPR. Furthermore, in cases involving surrender for the purpose of prosecution, the Committee does not require lawful presence in the territory but rather skips over this element. Finally, the argument that the notion of "territory" must be interpreted as "jurisdiction", which a seizing State undeniably exercises on board its law enforcement vessel by virtue of the flag State principle, finds support in both doctrine and case law. For these reasons, it is concluded that Article 13 ICCPR is applicable to piracy suspects subject to transfer.

The applicability of Article 13 ICCPR to transfers subjects them to a lawfulness test. Yet, the requirement that a removal can only take place "in pursuance of a decision reached in accordance with law" is hardly fulfilled at present given that rules governing the transfer *procedure*, which are publicly accessible and thus meet the quality of law standard of the lawfulness requirement, are virtually non-existent.

Further characteristics that must be exhibited in the procedure in which a decision to transfer a piracy suspect is taken flow from the implicit due process component of Article 13 ICCPR, which embraces the principles of impartiality, fairness and equality of arms. The fact that piracy suspects subject to transfer proceedings are not associated to the proceedings potentially leading to their transfer and, as a consequence, are not granted any procedural safeguards during that process stands in stark contrast with the concepts of fairness and procedural equality of the parties.

Through the application of Article 13 ICCPR, piracy suspects benefit from a myriad of procedural rights. Arguably, similar rights and safeguards must be

granted by virtue of the principle of non-refoulement.⁵²³ However, under Article 13 ICCPR, these safeguards are not only explicitly mentioned in the provision, but their content is also better defined in the jurisprudence of, *inter alia*, the Human Rights Committee and the International Court of Justice when compared with the procedural dimension of the principle of non-refoulement. Essentially, a piracy suspect has the right to submit reasons against his transfer during the procedure leading to the *initial* decision to transfer him. This allows the suspect to formulate and substantiate a non-refoulement claim. If his transfer is decided upon, Article 13 ICCPR provides the piracy suspect with a right to have this decision reviewed and to be represented by counsel for this purpose.

D. Fair Trial Rights: Applicable to Piracy Suspects?

Various human rights treaties guarantee the right to a fair trial, notably Article 6 ECHR and Article 14 ICCPR. Thus far, however, neither the European Court of Human Rights nor the Human Rights Committee has had a chance to decide on the applicability of the various aspects of the right to a fair trial as such in the context of transfer proceedings, the prevalent method for surrendering piracy suspects for prosecution in the context of counter-piracy operations off the coast of Somalia and the region. Absent specific case law, the following analysis centres on the question whether the various guarantees of Article 6 ECHR and Article 14 ICCPR are applicable to extradition proceedings and, if so, whether an analogy can be drawn between extradition and transfers, which are a functional equivalent of extradition in the realm of counter-piracy operations.

Article 6 ECHR and Article 14 ICCPR contain an assemblage of various guarantees – not all of which are relevant to transfer proceedings. For instance, the right to appeal, the right to compensation if there has been a miscarriage of justice and the prohibition of double jeopardy⁵²⁴ enshrined in Article 14(5), (6) and (7) ICCPR only apply to persons convicted of an offence.⁵²⁵ Piracy suspects detained on board a warship of the seizing State for the purpose of disposition, however, have not been convicted, and at the beginning of the disposition phase it is not even clear if they will ultimately face criminal prosecution at all. Meanwhile, the content of the right to equality before courts and tribunals – a guarantee found in Article 14 ICCPR⁵²⁶ but not Article 6 ECHR – is pertinent to transfer proceedings since it essentially contains the principles of impartiality, fairness and equality of arms. The same holds true for the right to a fair hearing by a competent, independent and impartial tribunal established by law as guar-

523 See above Part 5/III/B.

524 Article 14(7) ICCPR. These guarantees are not part of Article 6 ECHR, but rather stipulated in other provisions of the Convention.

525 This follows from the very explicit wording of these provisions.

526 First sentence of Article 14(1) ICCPR.

anteed by the ECHR and ICCPR.⁵²⁷ Furthermore, access to the defence rights stipulated in Article 6(3) ECHR and Article 14(3) ICCPR, notably the right to legal assistance and the free assistance of an interpreter, is a precondition for the effective assertion of a non-refoulement claim by piracy suspects subject to transfer proceedings. It is also important that actors involved in counter-piracy operations respect the presumption of innocence as guaranteed by Article 6(2) ECHR and Article 14(2) ICCPR. In sum, the content of the various guarantees of the right to fair trial of Article 6 ECHR and Article 14 ICCPR are pertinent to transfer proceedings.⁵²⁸

Yet, even though pertinent in their content, it remains to be seen if these various guarantees of Article 6 ECHR and Article 14 ICCPR are applicable to extradition proceedings and, therefore, also to transfer proceedings. This question cannot be answered for the whole of Article 6 ECHR and Article 14 ICCPR respectively. Rather, their various guarantees are combined with different scopes of applications. Given the rather complex nature of the right to a fair trial under the ECHR and ICCPR, a separate analysis is necessary for each guarantee with respect to its applicability to extradition (and transfer) proceedings⁵²⁹ – an analysis to which we turn now.

1. Equality before Courts and Tribunals

The first sentence of Article 14(1) ICCPR stipulates that all persons shall be equal before courts and tribunals. Article 6 ECHR, the counterpart of the fair trial pro-

527 Article 6(1) ECHR and second sentence of Article 14(1) ICCPR.

528 The analysis at hand is on the applicability of the guarantees of Article 6 ECHR and Article 14 ICCPR to transfer proceedings, ie *not* to the disposition phase in its entirety. This distinction is important since some of the guarantees of the right to a fair trial (eg the principles of fairness, impartiality and equality of arms, the presumption of innocence and the right to free assistance of an interpreter) may also be relevant for other phases of disposition, notably during the deliberations of the seizing State whether to prosecute the suspects in its own courts. For this phase of disposition, however, the threshold of application of these guarantees must not be determined by drawing an analogy to their application to extradition proceedings. Rather, it must be determined whether the steps taken by the authorities of the seizing State with regard to a potential exercise of adjudicative jurisdiction over the suspects meet the threshold of application of the various guarantees of Article 6 ECHR and Article 14 ICCPR, notably whether these steps amount to a determination of a criminal charge or whether the piracy suspects qualify as persons charged with a criminal offence. Hence, the threshold of application of Article 6 ECHR and Article 14 ICCPR as defined and developed for criminal cases in an “ordinary” domestic context must be applied for the time after the initial seizure and during the deliberations of the seizing State whether to prosecute the suspects in its own courts.

529 Regarding Article 14 ICCPR, see HRC, ‘General Comment No. 32: Right to Equality Before Courts and Tribunals and to a Fair Trial’ (n 433) para 3.

vision of the ICCPR, does not contain a similar guarantee. The right to equality before courts and tribunals essentially embraces the principles of impartiality, fairness and equality of arms.⁵³⁰

The right to equality before courts and tribunals has the lowest threshold of application of all the Article 14 ICCPR rights. Unlike the second sentence of Article 14(2) ICCPR, the application of the right to equality before courts and tribunals is not limited to proceedings involving a determination of criminal charges – a condition that extradition proceedings do not fulfil.⁵³¹ Rather, according to General Comment No. 32 of the Human Rights Committee, the right to equality before courts and tribunals applies “whenever domestic law entrusts a judicial body with a judicial task”⁵³² Furthermore, the guarantee applies “regardless of the nature of the proceedings before such bodies”.⁵³³ This interpretation is in line with the inclusive wording of the first sentence of Article 14(1) ICCPR, which designates “all persons” as beneficiaries of the right to equality before courts and tribunals. Hence, the terms “courts” and “tribunals” in the opening sentence of Article 14(1) ICCPR are independent from and have a broader meaning than the same terms as used in the remainder of the provision.⁵³⁴

In light of this, the Committee is prepared to apply the right to equality before courts and tribunals to extradition proceedings, albeit only if a “judicial body” is deciding on surrender for prosecution. This is confirmed by General Comment No. 32 where the Human Rights Committee states that the right to equality before courts and tribunals must be respected whenever domestic law entrusts a judicial body with a judicial task. It underpins this finding, *inter alia*, by reference to *Everett v Spain*, a case pertaining to extradition *stricto sensu*.⁵³⁵ In the same General Comment, it writes that “[i]nsofar as domestic law entrusts a judicial body with the task of deciding about expulsions or deportations, the guarantee of equality of all persons before the courts and tribunals as enshrined in article 14, paragraph 1 ... are applicable”. Even though the Comment does not explicitly mention extradition proceedings, the only case cited in the footnote belonging to this statement is again *Everett*, a pure extradition case.⁵³⁶ It might be that the Committee did not explicitly mention extradition (and limited itself to a reference to expulsion and deportation) because it has a very broad understand-

530 *ibid* para 8.

531 See below Part 5/III/D/2/b.

532 HRC, ‘General Comment No. 32: Right to Equality Before Courts and Tribunals and to a Fair Trial’ (n 433) para 7.

533 *ibid* para 3.

534 *ibid* para 7; Boeles (n 498) 126.

535 HRC, ‘General Comment No. 32: Right to Equality Before Courts and Tribunals and to a Fair Trial’ (n 433) para 7, referring to *Everett v Spain* (n 31).

536 HRC, ‘General Comment No. 32: Right to Equality Before Courts and Tribunals and to a Fair Trial’ (n 433) para 62 and fn 124.

ing of the term “expulsion”, encompassing extradition *stricto sensu* and arguably even transfers of piracy suspects.⁵³⁷

The criterion that a “judicial body” decides on extradition in order to make the right to equality before courts and tribunals amenable to these proceedings is certainly fulfilled if the judiciary is tasked with deciding on surrender for prosecution.⁵³⁸ However, in various jurisdictions, executive-administrative authorities decide on extradition rather than those of the judiciary. Yet other jurisdictions have established a mixed procedure, where both the judiciary and authorities belonging to the executive are involved in deciding on extradition.⁵³⁹ As regards transfer proceedings in the counter-piracy context, the judiciary is generally not involved in the decision whether to surrender piracy suspects to third States for prosecution. Rather, the conduct of transfer proceedings is generally reserved for executive-administrative bodies – be it, for example, the inter-ministerial coordination organ together with the Ministry of Foreign Affairs regarding piracy suspects seized by Denmark, or the inter-ministerial decision-making body and the Ministry of Foreign Affairs together with the EUNAVFOR Operational Headquarters with regard to piracy suspects intercepted by German forces contributing to Operation Atalanta.⁵⁴⁰ This begs the question whether and, if so, under which conditions executive-administrative authorities deciding on extradition (or transfers) qualify as judicial bodies.

The Human Rights Committee does not provide a definition of the notion “judicial body” in the context of the right to equality before courts and tribunals. The *Everett* case lends support to the idea that in the realm of extradition, the term “judicial body” extends beyond the judiciary and may also encompass executive-administrative bodies. In *Everett*, the Committee held that

although the Covenant does not require that extradition proceedings be judicial in nature, extradition as such does not fall outside the protection of the Covenant. On the contrary, several provisions ... are necessarily applicable in relation to extradition. *Particularly*, in cases where, as in the current one, the judiciary is involved in deciding about extradition, it must respect the principles of impartiality, fairness and equality, as enshrined in article 14, paragraph 1.⁵⁴¹

From the word “particularly” follows that the application of the right to equality before courts and tribunals is not limited to proceedings where the judiciary is involved. This conclusion is further supported by the Committee’s definition

537 See above Part 5/III/C/2/a/bb.

538 This was the case in *Everett v Spain* (n 31) para 6.4, where both a criminal and a constitutional court decided on extradition.

539 See, eg, Sections 19 and 23–26 Model Law on Extradition (n 301).

540 See above Part 2/III.

541 *Everett v Spain* (n 31) para 6.4 (emphasis added).

of “tribunal” in the sense of the second sentence of Article 14(1) ICCPR as “a body, regardless of its denomination, that is established by law, is independent of the executive and legislative branches of government or enjoys in specific cases judicial independence in deciding legal matters in proceedings that are judicial in nature”.⁵⁴² This definition implies that administrative authorities, which are entrusted with a judicial task and are independent from the executive and legislative power for the exercise of that specific duty, are covered by the notion of “tribunal” as used in the second sentence of Article 14(1) ICCPR. Since the notion of “courts and tribunals” in the first sentence of Article 14(1) ICCPR is even broader than the one in the second sentence to which the mentioned definition pertains, executive-administrative bodies deciding on a legal matter in judicial proceedings appear to be covered by the right to equality before courts and tribunals.

Yet, the conditions under which such bodies qualify as judicial bodies emerge from neither *Everett* nor the few Committee views discussing the application of the right to equality before courts and tribunals to proceedings before executive-administrative bodies.⁵⁴³ Hence, it is difficult (or nearly impossible) to generally identify the characteristics a body must feature in order to qualify as a judicial body and, therefore, as a court or tribunal in the sense of the opening sentence of Article 14 ICCPR. The difficulty in interpreting the notions of court and tribunal is compounded by the inconsistent use of these two terms in the equally authoritative texts of Article 14(1) ICCPR in several different languages.⁵⁴⁴ Furthermore, when discussing the scope of Article 14(1) ICCPR, the Committee

542 HRC, ‘General Comment No. 32: Right to Equality Before Courts and Tribunals and to a Fair Trial’ (n 433) para 18.

543 For cases involving a discussion of the notion “judicial body” in the context of administrative proceedings, see, eg, *Perterer v Austria* Comm no 1015/2001 (HRC, 20 July 2004) para 9.2; *Gonzalez v Guyana* Comm no 1246/2004 (HRC, 21 May 2010) para 13.4; and *Lederbauer v Austria* Comm no 1454/2006 (HRC, 11 September 2007) para 7.2.

544 Benedict Kingsbury, ‘The Concept of “Law” in Global Administrative Law’ (2009) 20 *European Journal of International Law* 23, 44. A comparison of the various texts of Article 14(1) ICCPR demonstrates that the notions “court” and “tribunal” are inconsistently used in this provision. In the English version of Article 14(1) ICCPR the following terms are used: “courts and tribunals” in the first sentence, “tribunal” in the second sentence and “court” in the third sentence. Similar to the English version, the words “tribunaux et cours de justice”/“tribunales y cortes de justicia” are used in the first sentence of the French and Spanish version; however, in both texts, only the word “tribunal” is used in the second and third sentences. In the Russian version, the terms are used in yet a different way: while the terms “суд” and “трибунал” appear in the first sentence, the notion “суд” is used in the second and third sentences.

often refers to the whole paragraph without specifying whether the statement pertains to the first and/or second sentence.⁵⁴⁵

Absent a clear definition of the qualifier “judicial” in the context of the right to equality before courts and tribunals, we turn to its interpretation in the context of Article 9(3) ICCPR – the right to be brought before a “judge or other officer authorized by law to exercise *judicial* power”.⁵⁴⁶ In this provision – which reflects the dichotomy between judiciary and judicial body quite well – the word “judicial” implies that the officer must be independent of the executive and the parties, objective and impartial in relation to the issues dealt with.⁵⁴⁷

In the realm of extradition, the executive is involved because extradition is deemed to be intrinsically linked with foreign relations and, in turn, a matter involving political considerations – hence, an area where judicial inquiry is limited and a certain role is reserved for the executive.⁵⁴⁸ The perception that the decision on surrender for prosecution must not be left to prosecutorial and judicial authorities alone, but that the decision-making process must also involve the views of the executive, is reflected in the realm of piracy suspects where some States have created *ad hoc* organs on the ministerial level to issue a preliminary decision on whether domestic prosecution is warranted in a specific case or whether to pursue or give way to a transfer.⁵⁴⁹ Against this background, it can hardly be argued that when the executive is (partially) deciding on surrender for prosecution, it displays the characteristics of a judicial body, ie is independent and disinterested in the issue to be decided. On the contrary, the executive’s very intervention is foreseen in order to protect the State’s interests. Also the EUNAVFOR Operational Headquarters, which plays an important role in transfer proceedings occurring in the framework of Operation Atalanta, is certainly not a judicial body as defined above. Overall, we can thus conclude that the bodies and authorities currently involved in transfer decision proceedings hardly qualify as judicial bodies, which is, however, a requirement for applying the right to equality before courts and tribunals to surrender for prosecution proceedings.

The principles of impartiality, fairness and equality of arms – the main content of the right to equality before courts and tribunals – therefore does not apply to piracy suspects by virtue of Article 14 ICCPR. However, we concluded earlier that Article 13 ICCPR, which implicitly contains these three principles of Article

545 See, eg, *Perterer v Austria* (n 543) para 9.2, 10.1 and 10.4; *Lederbauer v Austria* (n 543) para 7.2.

546 Emphasis added.

547 See above Part 4/II/B/5.

548 See, eg, Gilbert (n 17) 67–72, section entitled ‘The Roles of the Judiciary and the Executive’, which compares the respective roles the judiciary and the executive have in extradition proceedings in various jurisdictions.

549 See above Part 2/II/B/4/b.

14 ICCPR,⁵⁵⁰ arguably applies to piracy suspects subject to transfer proceedings.⁵⁵¹ Hence, these fundamental guarantees nevertheless display their effects in transfer proceedings.

2. Fair Hearing by a Tribunal with Certain Features

a) Article 6(1) ECHR

Article 6(1) ECHR contains, *inter alia*, an entitlement to a fair hearing within a reasonable amount of time by an independent and impartial tribunal established by law. However, only a person whose proceedings involve a “determination of his civil rights and obligations or of any criminal charge against him” benefit from the provision. The European Court of Human Rights, like the European Commission of Human Rights, has consistently decided that extradition proceedings do not involve a determination of civil rights or criminal charges and are therefore excluded from the protective ambit of Article 6(1) ECHR. This finding, which applies *mutatis mutandis* to proceedings on transfer for prosecution of piracy suspects, is substantiated by two main arguments.⁵⁵²

aa) No Full Determination of Innocence or Guilt

The main argument provided by the Commission for not applying Article 6(1) ECHR to extradition proceedings was that they do not involve a full examination of a person’s guilt or innocence and therefore do not constitute a determination of a criminal charge. As an example, in *H. v Spain*, the Commission stated that the word “determination” involves “the full process of the examination of an individual’s guilt or innocence of an offence, and not the mere process of determining whether a person can be extradited to another country”.⁵⁵³ The Court

550 See above Part 5/III/B/2/c.

551 See above Part 5/III/2/a.

552 In *Messina c la Suisse* App no 27322/95 (Décision de la Commission, 9 April 1997) 3. of the legal considerations, a singular argumentation for not applying Article 6(1) ECHR to extradition proceedings can be found. The Commission argued that extradition proceedings concern discretionary acts of an administrative nature, which do not involve any determination of civil rights or criminal charges. Yet, the characterization of extradition proceedings as discretionary acts of an administrative nature was not explained any further and only substantiated by reference to two cases, which, however, do not pertain to extradition at all, but rather involve expulsion and a tenancy dispute respectively. Thus, the Commission’s argument is built on a rather unstable ground.

553 *H v Spain* App no 10227/82 (Commission Decision, 12 December 1983) 2. of the legal considerations. The Commission used this argument for not applying the basic fair trial guarantees of Article 6(1) ECHR to extradition proceedings in a subsequent series of cases; see, eg, *S c la France* App no 10965/84 (Décision de la Commission, 6 July 1988) 3. of the legal considerations; *Whitehead v Italy* App no 13930/88 (Com-

also invokes this argument for not applying Article 6(1) ECHR to extradition proceedings – yet not as the main argument as it was for the Commission.⁵⁵⁴

In *H. v Spain*, the Commission admitted that extradition proceedings may encompass the establishment of a *prima facie* case against the alleged offender.⁵⁵⁵ However, it reached the conclusion that extradition proceedings do not “in themselves form part of the determination of the applicant’s guilt or innocence”, which is reserved for criminal proceedings ultimately held in the State requesting extradition.⁵⁵⁶ Hence, the fact that a piracy suspect’s case is evaluated in terms of the prospect of conviction during transfer proceedings,⁵⁵⁷ ie a *prima facie* case is established, does not alter the fact that according to the view of the Strasbourg organs, no determination of innocence or guilt takes place and therefore deter-

mission Decision, 11 March 1989) 2. of the legal considerations; *Farmakopoulos v Belgium* App no 11683/85 (Commission Decision, 8 February 1990) 3.a. of the legal considerations; *Quinn c la France* App no 19764/92 (Décision de la Commission, 8 September 1992) 1. of the legal considerations; *Debuine c la Belgique* App no 18059/91 (Décision de la Commission, 8 January 1993), 1. of the legal considerations; *Aylor-Davis v France* App no 22742/93 (Commission Decision, 20 January 1994) 3. of the legal considerations; *EGM v Luxembourg* App no 24015/94 (Commission Decision, 20 May 1994) 2. of the legal considerations; *HPL c l’Autriche* App no 24132/94 (Décision de la Commission, 5 July 1994) 1. of the legal considerations; and *BB c la France* App no 23071/93 (Décision de la Commission, 2 December 1994) 2. of the legal considerations.

554 *Sardinas Albo v Italy* App no 56271/00 (ECtHR, 8 January 2004) 3.b. of the legal considerations. In some of its cases, the Court simply stated that extradition proceedings “do not concern a dispute ... over an applicant’s civil rights and obligations or the determination of a criminal charge against him or her within the meaning of Article 6 of the Convention” and referred to cases of the Commission stating that extradition proceedings do not involve a full determination of the individual’s innocence or guilt; see, eg, *Raf v Spain* App no 53652/00 (ECtHR, 21 November 2000) 1. of the legal considerations; and *Peñafiel Salgado c l’Espagne* App no 65964/01 (ECtHR, 16 April 2002) 1. of the legal considerations.

555 See, eg, *Kirkwood v the United Kingdom* App no 10479/83 (Commission Decision, 12 March 1984) 9. of the legal considerations, where the Commission stated that extradition proceedings may involve an “assessment of whether or not there was, on the basis of the evidence, the outline of a case to answer against the applicant” and that this “necessarily involved a certain, limited, examination of the issues which would be decisive in the applicant’s ultimate trial”. In this case, the applicant complained of a violation of Article 6(3) ECHR; however, the Commission based its reasoning for not applying this provision on the fact that no determination of a criminal charge was at issue (on applying the threshold of application of Article 6(1) ECHR to Article 6(3) ECHR, see below Part 5/III/D/3/a). Therefore, the *ratio decidendi* is also pertinent to a discussion of Article 6(1) ECHR, the application of which is explicitly conditioned on the determination of a criminal charge.

556 *Kirkwood v the United Kingdom* (n 555) 9. of the legal considerations.

557 See above Part 2/II/B/5/d.

mination of a criminal charge, which is, however, a precondition for applying Article 6(1) ECHR.

bb) **Analogy between Deportation and Extradition Proceedings**

The most frequent argument provided by the Court against the application of Article 6(1) ECHR to extradition proceedings rests on an analogy between deportation proceedings, which are not amenable to Article 6(1) ECHR, and extradition proceedings.⁵⁵⁸ This equation of extradition proceedings with deportation proceedings started with *Sardinias Albo v Italy* where the Court stressed that it consistently found that

decisions regarding the entry, right to remain and deportation of aliens do not concern the determination of an applicant's civil rights or obligations or of a criminal charge against him within the meaning of Article 6 § 1 of the Convention [referring to the *Maaouia v. France* Grand Chamber judgment]. This provision is therefore not applicable to the ... proceedings concerning the extradition of the applicant.⁵⁵⁹

The Court did not elaborate on this argument any further and limited itself to the reference to the *Maaouia* judgment.⁵⁶⁰ The Court pursued the same line of reasoning in a subsequent series of cases,⁵⁶¹ and this analogy argument (including the reference to *Maaouia*) was even endorsed by the Grand Chamber.⁵⁶²

The analogy argument therefore basically rests on a reference to the *Maaouia* Grand Chamber judgment. In this case, the applicant filed a complaint against France because the length of the proceedings concerning the rescission of an exclusion order against him (an immigration measure qualifying as expulsion in the sense of the Convention) was unreasonable in light of Article 6(1) ECHR.⁵⁶³ The Grand Chamber rejected the application of Article 6(1) ECHR to these proceedings for various reasons. It first held that the concepts of “civil rights and obligations” and “criminal charge” must be interpreted autonomously, ie not

558 While this is the main argument of the Court against applying Article 6(1) ECHR to extradition proceedings, the Commission generally did not use it; see, however, *Gezici v Switzerland* App no 17518/90 (Commission Decision, 7 March 1991) where it invoked this analogy-based argument.

559 *Sardinias Albo v Italy* (n 554) 3.b. of the legal considerations.

560 *Maaouia v France* App no 39652/98 (ECtHR, 5 October 2000).

561 *McDonald and others v Slovakia* App no 72812/01 (ECtHR, 16 November 2004) 2. of the legal considerations; *Cenaj c la Grèce et l'Albanie* App no 12049/06 (ECtHR, 4 October 2007) 2. of the legal considerations; *Parlanti v Germany* (n 19) 4. of the legal considerations; and *Mamatkulov and Abdurasulovic (Aksarov) v Turkey* App nos 46827/99 and 46951/99 (ECtHR, 6 February 2003) paras 80 and 81.

562 *Mamatkulov and Askaraov v Turkey* (n 218) paras 82–83.

563 *Maaouia v France* (n 560) paras 9–17.

solely by reference to domestic law.⁵⁶⁴ Secondly, it referred to the case law of the Commission, according to which procedures concerning the expulsion of aliens do not fall within the scope of application of Article 6(1) ECHR.⁵⁶⁵ The Grand Chamber then pointed out that the provisions of the ECHR must be construed in light of the entire Convention system, including the Protocols. In that vein, the Court referred to Article 1 of Protocol 7 ECHR, which contains procedural guarantees applicable to the expulsion of aliens, and to the Preamble of the instrument, emphasizing the need to take “further steps to ensure the collective enforcement of certain rights and freedoms by means of the Convention” – a goal realized by the very adoption of this Protocol. According to the Grand Chamber, the establishment of specific procedural safeguards for expulsion and the Preamble of Protocol 7 demonstrate that States were aware that Article 6(1) ECHR does not apply to expulsion proceedings. This also transpires from the Explanatory Report on Protocol No. 7, which states that Article 1 was adopted in order to afford minimum guarantees to persons subject to expulsion, “cases which are not covered by other international instruments” and which were only brought within the purview of the Convention by the adoption of Article 1 of Protocol 7 ECHR. The Grand Chamber went on to state that “by adopting Article 1 of Protocol No. 7 containing guarantees specifically concerning proceedings for the expulsion of aliens the States clearly intimated their intention not to include such proceedings within the scope of Article 6 § 1 of the Convention”.⁵⁶⁶ It further argued that proceedings concerning the rescission of an exclusion order do not concern the determination of a civil right, even if an exclusion order incidentally has major repercussions on civil rights, such as the applicant’s private and family life or employment.⁵⁶⁷ In the view of the Grand Chamber, these proceedings do not constitute a criminal charge either given that exclusion orders, which in most States may also be adopted by administrative authorities, constitute a special preventive measure for the purpose of immigration control. The fact that they are imposed in the context of criminal proceedings does not alter their preventive nature.⁵⁶⁸ In light of these arguments, the Court reached the conclusion that “decisions regarding the entry, stay and deportation of aliens do not concern the determination of an applicant’s civil rights or obligations or of a criminal charge against him, within the meaning of Article 6 § 1 of the Convention”.⁵⁶⁹

As mentioned, the Court, including the Grand Chamber, draws an analogy between deportation and extradition in order to rule out the application of Article 6(1) ECHR to extradition proceedings: since the provision does not apply

564 *ibid* para 34.

565 *ibid* para 35.

566 *ibid* paras 36–37.

567 *ibid* para 38.

568 *ibid* para 39.

569 *ibid* para 40.

to deportation, it is not applicable to extradition either. The Court, including the Grand Chamber, does not substantiate or elaborate on this analogy argument – they simply refer to the *Maaouia* Grand Chamber judgement. However, it is submitted here that the arguments and findings of *Maaouia*, which were made in the context of deportation, cannot be summarily carried over to extradition for the following reasons.

Firstly, in *Maaouia*, the Grand Chamber refers to the case law of the Commission, according to which proceedings concerning the stay of an alien do not fall within the scope of application of Article 6(1) ECHR⁵⁷⁰ because decisions concerning entry, stay and deportation are discretionary acts by a public authority and of an administrative order.⁵⁷¹ This case law, however, is not necessarily pertinent to extradition proceedings. First of all, because the Commission issued this statement in relation to the question whether decisions on entry, stay or expulsion qualify as a determination of “civil rights”⁵⁷² – which extradition proceedings are clearly not.⁵⁷³ Furthermore, in many jurisdictions, extradition is no longer a purely administrative act of a discretionary nature not allowing for any judicial scrutiny.⁵⁷⁴ For these reasons, the “administrative, discretionary nature” argument made by the Commission in connection with expulsion decisions – and the *Maaouia* Grand Chamber reference to this case law – is not necessarily pertinent to extradition proceedings. Meanwhile, transfer proceedings in the context of counter-piracy operations may be of an “administrative, discretionary nature”. However, they do not involve a determination of civil rights; hence, the argument of the Commission, to which the Grand Chamber refers in *Maaouia*, is not pertinent to transfer proceedings either.⁵⁷⁵

570 *ibid* para 35.

571 See, eg, *Singh and Uppal v the United Kingdom* App no 8244/78 (Commission Decision, 2 May 1979) 2. of the legal considerations; and *Omkananda and the Divine Light Zentrum v Switzerland* App no 8118/77 (Commission Decision, 19 March 1991) 8. of the legal considerations.

572 See, eg, *Singh and Uppal v the United Kingdom* (n 571) 2. of the legal considerations; *Omkananda and the Divine Light Zentrum v Switzerland* (n 571) 8. of the legal considerations.

573 If extradition proceedings were to fall within the ambit of Article 6(1) ECHR at all, then it is because they qualify as a determination of a “criminal charge”; this is also the view of the Commission; see, eg, *H v Spain* (n 553) 2. of the legal considerations; *Kirkwood v the United Kingdom* (n 555) 9. of the legal considerations; *Debuine c la Belgique* (n 553), 1. of the legal considerations; *Aylor-Davis v France* (n 553) 3. of the legal considerations; *EGM v Luxembourg* (n 553) 2. of the legal considerations; and *HPL c l’Autriche* (n 553) 1. of the legal considerations.

574 Rather, in many jurisdictions, both the executive and the judiciary are involved in extradition proceedings; see, eg, *Gilbert* (n 17) 67–72; this also transpires from Sections 19 and 23–26 Model Law on Extradition (n 301); on mixed procedures, involving the executive and the judiciary, see also above Part 5/III/D/1.

575 See above Part 5/III/D/1.

Another argument provided by the Grand Chamber in *Maaouia* against the application of Article 6(1) ECHR to deportation proceedings pertains to the question whether they constitute a determination of civil rights. It is argued that these decisions do not in themselves violate civil rights, even though they may ultimately lead to such a violation or have other consequences on civil rights.⁵⁷⁶ However, neither extradition proceedings nor transfer proceedings involve a determination of “civil rights”. Hence, this argument of *Maaouia*, on which the extradition-deportation analogy partially rests, is not pertinent regarding surrenderers for prosecution.

The main argument in the *Maaouia* Grand Chamber judgment as to why Article 6(1) ECHR does not apply to decisions regarding the entry, stay or deportation of aliens is that Article 1 of Protocol 7 ECHR – granting procedural safeguards in expulsion proceedings – was adopted specifically because of the non-applicability of Article 6(1) ECHR to expulsion proceedings. Put differently, Article 1 of Protocol 7 ECHR constitutes *lex specialis* and therefore applies at the exclusion of Article 6(1) ECHR.⁵⁷⁷ However, the procedural safeguards of Article 1 of Protocol 7 ECHR are not applicable to extradition *stricto sensu* nor are they applicable to transfer proceedings.⁵⁷⁸ Therefore, this main argument of the *Maaouia* judgment for not applying Article 6(1) ECHR to expulsion proceedings cannot be carried over to extradition or transfer proceedings. To the contrary, the conclusion should rather be that since the more specific rule of Article 1 of Protocol 7 ECHR does not apply to extradition and transfer proceedings, the more general guarantee enshrined in Article 6(1) ECHR should be applicable instead.

In sum, the *ratio decidendi* of the *Maaouia* Grand Chamber judgment has its pertinence to decisions concerning the entry, stay or expulsion of aliens. However, as has been demonstrated, its arguments are impertinent to extradition and transfer proceedings. As a consequence, the Court’s main argument against applying Article 6(1) ECHR to surrender for prosecution proceedings – consisting of an analogy between expulsion and extradition proceedings, which is substantiated by a mere reference to the *Maaouia* case – is not very convincing.⁵⁷⁹ Thus far, the Court has not provided any extradition-specific argumentation for the non-application of Article 6(1) ECHR. Hence, while the stance of the European Court of Human Rights on the non-application of Article 6(1) ECHR

576 For cases stating this, see, eg, *Maaouia v France* (n 560) para 38; and *Agee v the United Kingdom* App no 7729/76 (Commission Decision, 17 December 1976) 28. of the legal considerations.

577 *Maaouia v France* (n 560) paras 36–37.

578 See above Part 5/III/C/1.

579 For a discussion of the *Maaouia* case in relation to the question whether the scope of application of Article 6 ECHR should be extended, see Stephan Breitenmoser, ‘Die Bedeutung der EMRK im Ausländerrecht’ in Joachim Renzikowski (ed), *Die EMRK im Privat-, Straf- und Öffentlichen Recht: Grundlagen einer europäischen Rechtskultur* (Schulthess 2004) 227–29.

to extradition proceedings (and, therefore, probably to transfer proceedings too) is quite firm, it does not rest on particularly solid and specific arguments.

b) Article 14(1) ICCPR

Similar to Article 6(1) ECHR, the second sentence of Article 14(1) ICCPR also provides for a fair hearing by a competent, independent and impartial tribunal established by law. This provision incorporates a higher threshold of application compared with the right to equality before courts and tribunals⁵⁸⁰ in that its application is reserved for proceedings involving a “determination of any criminal charge”.⁵⁸¹

However, the Human Rights Committee takes the firm stance that extradition proceedings do not involve a determination of a criminal charge. In *Everett*, for example, it stated quite plainly that “even when decided by a court the consideration of an extradition request does not amount to the determination of a criminal charge in the meaning of Article 14”.⁵⁸² This does not leave much room to argue that transfer proceedings amount to a determination of a criminal charge.

The second sentence of Article 14(1) ICCPR is thus not applicable to transfer proceedings. Yet two of its main precepts – the principles of impartiality and fairness – may nevertheless find their way into transfer proceedings since Article 13 ICCPR, which implicitly contains these fundamental guarantees, arguably applies to piracy suspects subject to transfer proceedings.⁵⁸³

3. Defence Rights

Article 6(3) ECHR and Article 14(3) ICCPR contain a number of defence rights, which further develop and complement the basic fair trial guarantees of Article 6(1) ECHR and Article 14(1) ICCPR. Some of them, notably the rights to legal assistance and the free assistance of an interpreter, are important in order to effectively raise a non-refoulement claim in the context of transfer proceedings. Yet, as discussed next, these defence rights are not amenable to extradition proceedings and, therefore, do not apply to transfer proceedings either.

⁵⁸⁰ See above Part 5/III/D/1.

⁵⁸¹ Since extradition proceedings do not qualify as a determination of rights and obligations in a suit of law, this alternative option, under which the second sentence of Article 14(1) ICCPR applies, is not mentioned in this analysis.

⁵⁸² *Everett v Spain* (n 31) para 6.4.

⁵⁸³ See above Part 5/III/C/2. This is different from the ECHR where neither Article 6(1) ECHR nor the procedural safeguards relating to expulsion apply to extradition *stricto sensu* and transfers of piracy suspects.

a) Article 6(3) ECHR

The defence rights of Article 6(3) ECHR are reserved for persons “charged with a criminal offence”. Hence, the provision does not stipulate that the defence rights only apply to proceedings involving a determination of a criminal charge as Article 6(1) ECHR does. Nevertheless, both the Commission and the Court made the argument that Article 6(3) ECHR does not apply to extradition proceedings because it does not involve a determination of a criminal charge or of civil rights and obligations.

aa) No Full Determination of Innocence or Guilt

The main argument provided by the Commission for not applying Article 6(3) ECHR to extradition proceedings is the same as the one it used to reject the application of Article 6(1) ECHR. It argued that the words “determination of any criminal charge” concern the full process of examining a person’s guilt or innocence in respect to a criminal charge. Extradition proceedings, however, do not involve such a determination of innocence and guilt. Such a determination, it argued, is rather the subject of criminal proceedings in the requesting State.⁵⁸⁴

This seems a strange argument *prima facie* since the application of Article 6(3) ECHR – unlike Article 6(1) ECHR and Article 14(1) and (3) ICCPR – is not explicitly predicated on a determination of a criminal charge. Such wording is absent from the provision, where the catalogue of rights is merely preceded by the words: “Everyone charged with a criminal offence has the following rights.”⁵⁸⁵

584 The argument comes along in various forms. In *Kirkwood v the United Kingdom* (n 555) 9. of the legal considerations, for instance, the Commission applies the threshold of Article 6(1) ECHR, ie the determination of a criminal charge, to the whole of Article 6 ECHR. In later cases, the Commission no longer applied the threshold Article 6(1) ECHR to the whole of Article 6 ECHR but still to Article 6(3) ECHR; see, eg, *Debuine c la Belgique* (n 553) 1. of the legal considerations. This seems consequential given that in the meantime, the Commission decided to apply the presumption of innocence provided for in Article 6(2) ECHR to persons subject to extradition proceedings; see below Part 5/III/D/4. In various cases, the Commission merely states that Article 6 ECHR as a whole is not applicable to extradition proceedings without providing an explicit explanation as to why. The only substantiation for this quite thin reasoning is a reference to its earlier case law on Article 6(1) ECHR, which rests on the argument that the provision does not apply to extradition proceedings because they do not involve the full process of determining a person’s innocence or guilt: *Saward c la France* App no 28693/95 (Décision de la Commission, 4 September 1996) 4. of the legal considerations; *Meier c la France et la Suisse* App no 33023/96 (Décision de la Commission, 1 July 1998) 2. of the legal consideration; *Kosonen c le Portugal* App no 31686/96 (Décision de la Commission, 21 May 1997) 2.a. of the legal considerations.

585 In a singular case, *X v Austria* App no 1918/63 (Commission Decision, 18 December 1963) para 2 of the legal considerations, the Commission focused on the explicit wording of Article 6(3) ECHR, ie whether an extraditee is a person “charged with

Hence, it seems that the Commission introduced a new, implicit requirement into Article 6(3) ECHR – even though it never explicitly stated that it imported the threshold of Article 6(1) ECHR into Article 6(3) ECHR, and never explained why it made the application of Article 6(3) ECHR contingent upon a determination of a criminal charge.

bb) Analogy between Deportation and Extradition Proceedings

The Court uses the same main argument for the non-application of Article 6(3) ECHR to extradition proceedings as it does for Article 6(1) ECHR, equating extradition and deportation proceedings. It reiterates that decisions regarding deportation of aliens do not concern the determination of civil rights or obligations or of a criminal charge within the meaning of Article 6(1) ECHR, and thus summarily concludes that Article 6(3) ECHR is not applicable to extradition proceedings either. Similar to this argument made in the context of Article 6(1) ECHR, the Court underpins its finding with a reference to the *Maaouia* Grand Chamber judgment.⁵⁸⁶

As discussed earlier, the analogy between deportation and extradition proceedings is built on a rather weak fundament and should be rejected for a number of reasons.⁵⁸⁷ The criticism of this line of reasoning in connection with Article 6(1) ECHR is equally valid in the context of Article 6(3) ECHR. In addition, the argument in the *Maaouia* case centres on the notion of “determination of a criminal charge”. Yet, Article 6(3) ECHR does *not* contain any explicit reference to the determination of a criminal charge. Rather, according to its wording, it applies to every person “charged with a criminal offence”. Hence, the analogy argument – which focuses on the question whether a determination of a criminal charge is at issue in deportation proceedings (and extradition proceedings respectively) – is even less pertinent in the context of Article 6(3) ECHR than it is in the context of Article 6(1) ECHR.

Even though the arguments for not applying Article 6(3) ECHR to extradition proceedings are not particularly strong, the findings of the Commission and Court are rather unambiguous: Article 6(3) ECHR does not apply to extradition proceedings and therefore not to proceedings on the transfer for prosecution of piracy suspects either.

a criminal offence”; the Commission denied this because the extraditing State only decides whether to surrender the person for prosecution and, if so, to which jurisdiction.

586 *McDonald and others v Slovakia* (n 561) 2. of the legal considerations; and *Parlanti v Germany* (n 19) 4. of the legal considerations.

587 See above Part 5/III/D/2/a.

b) **Article 14(3) ICCPR**

Unlike Article 6(3) ECHR, the application of Article 14(3) ICCPR is explicitly limited to proceedings involving a determination of criminal charges. The Human Rights Committee does not deem this provision to be amenable to extradition proceedings. This is notably evidenced by its view *Esposito v Spain* where the Committee decided that the author complaining of a violation of Article 14(3) ICCPR “was not charged or found guilty of a criminal offence” in the State conducting the extradition proceedings, and that the “decision to extradite him did not constitute a punishment resulting from a criminal procedure”. As a consequence, the extradition proceedings against the author did not amount to a determination of a criminal charge within the meaning of Article 14 ICCPR.⁵⁸⁸

This finding can be applied *mutatis mutandis* to piracy suspects subject to transfer proceedings, ie the defence rights of Article 14(3) ICCPR do not apply to them. This holds true even though the rights to legal assistance and free assistance of an interpreter seem essential for piracy suspects who generally have no mastery of the language of the seizing State and are ignorant of the legal system of the State intending to transfer them.

4. **Presumption of Innocence**

Article 6(2) ECHR and Article 14(2) ICCPR contain the presumption of innocence, which namely imposes the burden of proving a charge on the prosecution and encompasses the *in dubio pro reo* principle, meaning that the defendant must be found not guilty if any doubt exists.⁵⁸⁹ While these aspects of the principle pertain to the conduct of the criminal trial itself, the principle also has a *portée* outside the courtroom: it imposes a “duty for all public authorities to refrain from prejudging the outcome of a trial”, for example, by avoiding any public statement affirming the guilt of the accused person.⁵⁹⁰ This latter aspect is of considerable importance in the counter-piracy context where alleged pirates are often caught red-handed. In light of the “visible wrong” that such an attack against a ship and its crew involves, the difference between “suspected of” and “guilty of” risk being blurred – one may forget that piracy suspects caught in the act may ultimately

⁵⁸⁸ *Esposito v Spain* Comm no 1359/2005 (HRC, 20 March 2007) para 7.6.

⁵⁸⁹ HRC, ‘General Comment No. 32: Right to Equality Before Courts and Tribunals and to a Fair Trial’ (n 433) para 30; Nowak (n 76) 330.

⁵⁹⁰ For the ICCPR, see HRC, ‘General Comment No. 32: Right to Equality Before Courts and Tribunals and to a Fair Trial’ (n 433) para 30; for various aspects of the presumption of innocence under the ECHR, see Pieter Van Dijk and Marc Viering, ‘Chapter 10: Right to a Fair and Public Hearing (Article 6)’ in Pieter Van Dijk and others (eds), *Theory and Practice of the European Convention on Human Rights* (4th edn, Intersentia 2006) 624–31.

be found not guilty in terms of criminal law, due to a lack of jurisdiction of the prosecuting State for instance.⁵⁹¹

a) **Article 6(2) ECHR**

Article 6(2) ECHR stipulates that “[e]veryone charged with a criminal offence shall be presumed innocent until proved guilty according to the law”. Unlike Article 6(1) ECHR, the provision’s application is not limited to proceedings involving a determination of a criminal charge. Rather, like Article 6(3) ECHR, the provision requires only that a person is *charged* with an offence. Despite the apparently identical threshold of application, the Strasbourg organs rather categorically rejected the application of Article 6(3) ECHR to extraditees⁵⁹² – while both decided to apply the presumption of innocence stipulated in Article 6(2) ECHR to persons subject to extradition proceedings.

aa) **Guarantee Not Limited to Criminal Proceedings**

The Commission’s case law on whether persons subject to extradition proceedings benefit from the presumption of innocence is rather erratic. In some cases, it rejected the application of Article 6(2) ECHR. It did so notably for the argument that extraditees are not “charged with a criminal offence” given that the only question to decide in extradition proceedings is whether to extradite the person and, if so, to which State.⁵⁹³ Another argument of the Commission is that extradition proceedings do not involve a full determination of a person’s guilt or innocence.⁵⁹⁴

However, the Commission also took the opposite stance arguing that the presumption of innocence is applicable to extraditees. It held that although extradition proceedings do not fall within the scope of Article 6(1) and (3) ECHR, extraditees can qualify as “persons charged with a criminal offence” within the meaning of Article 6(2) ECHR. It found that the presumption of innocence “is not only a procedural guarantee in criminal proceedings, but requires all State organs to refrain from statements on the guilt of the accused before that guilt has been established by the competent court”. It then added the *caveat* that this would not prevent State organs from making statements on the existence of a criminal suspicion.⁵⁹⁵

591 For instance, Kenya acquitted several transferred piracy suspects because it lacked jurisdiction over the alleged facts.

592 This seems to be due to the fact that the Strasbourg organs, without explicitly stating so, imported the threshold requirement from Article 6(1) ECHR – the determination of a criminal charge – into Article 6(3) ECHR; see above Part 5/III/D/3/a.

593 *X v Austria* (n 585) para 2 of the legal considerations.

594 *BB c la France* (n 553) 2. and 3. of the legal considerations.

595 *P, RH, LL v Austria* App no 15776/89 (Commission Decision, 5 December 1989) 1. of the legal considerations.

Hence, the focus of the Commission was less on the nature of extradition proceedings but rather on the effect that statements of the actors bound by the obligation of Article 6(2) ECHR may have on the outcome of criminal prosecutions. Thus, all State officials are prohibited from making statements that could have a prejudicial effect on the ultimate determination of innocence or guilt in criminal proceedings – even if such proceedings ultimately take place abroad, as is the case in the realm of extradition and transfers. Consequently, statements made in connection with extradition and transfer proceedings are encompassed by the guarantee.

bb) Close Link between Impugned Statement and Criminal Proceedings Abroad

In *Ismoilov and others v Russia*, the Court argued that fulfilment of the requirement “charged with a criminal offence”, which triggers the application of the presumption of innocence, does not require that criminal proceedings are pending in the requested State. Rather, it suffices that there is

any close link, in legislation, practice or fact, between the impugned statements made in the context of the extradition proceedings and the criminal proceedings against the applicants in [the requesting State] which might be regarded as sufficient to render the applicants “charged with a criminal offence” within the meaning of Article 6 § 2 of the Convention.⁵⁹⁶

In the case at hand, the Court affirmed such a close link given that “the applicant’s extradition was ordered for the purpose of their criminal prosecution” and “[t]he extradition proceedings were therefore a direct consequence, and the concomitant, of the criminal investigations pending against them in [the requesting State] justifying the extension of the scope of application to the latter”.⁵⁹⁷

The line of reasoning initiated with *Ismoilov* was pursued in later cases involving the same issue. In various cases, the Court simply referred to this judgment and limited itself to the statement that Article 6(2) ECHR is applicable where extradition proceedings are a direct consequence, and the concomitant, of the criminal investigations pending against an individual in the receiving State.⁵⁹⁸ In other cases, the Court went directly into an examination of whether there was a violation of Article 6(2) ECHR and thus acknowledged its application to extradition proceedings implicitly.⁵⁹⁹

⁵⁹⁶ *Ismoilov and others v Russia* App no 2947/06 (ECtHR, 24 April 2008) para 163.

⁵⁹⁷ *ibid* para 164 (emphasis added).

⁵⁹⁸ See, eg, *Gaforov v Russia* App no 25404/09 (ECtHR, 21 October 2010) para 208; and *Khaydarov v Russia* App no 21055/09 (ECtHR, 20 May 2010) para 148.

⁵⁹⁹ See, eg, *Kolesnik v Russia* App no 26876/08 (ECtHR, 17 June 2010) paras 90–93; *Sultanov v Russia* App no 15303/09 (ECtHR, 4 November 2010) paras 93–96.

From this case law follows that the term “charged with a criminal offence” has a broader meaning with regard to the presumption of innocence stipulated in Article 6(2) ECHR than in Article 6(3) ECHR.⁶⁰⁰ Most notably, the Court does not require that the person is charged with a criminal offence in the requested State to trigger the guarantee of Article 6(2) ECHR.⁶⁰¹ Rather, it suffices that the extradition proceedings or the impugned statement feature a link with criminal investigations or prosecutions taking place abroad.

As opposed to extradition proceedings, where a State anxious to prosecute the suspects requests their surrender, a State willing and able to prosecute piracy suspects is not yet identified with certainty when transfer proceedings are initiated. Hence, unlike in extradition proceedings where criminal investigations or prosecutions have generally already been launched against the person when his extradition is requested, this is rarely the case in the very first phase of transfer proceedings. Yet, the rationale behind the application of Article 6(2) ECHR to extradition proceedings seems to be to prevent State organs or officials from making statements that could have a prejudicial effect on later criminal proceedings against the person subject to surrender for prosecution. Whether criminal prosecutions have been formally launched when the impugned statement is made should not be decisive, rather a link between the content of the statement and potential future criminal prosecutions suffices. Hence, the presumption of innocence must also be respected at the beginning of transfer proceedings since they may have an impact on the criminal prosecution of the seized suspects, which are only later formally initiated.⁶⁰²

600 *Ismoilov and others v Russia* (n 596) paras 163–64: This notably follows from the statement of the Court that a close link between the impugned statement in the extradition proceedings and the criminal proceedings “might be regarded as sufficient to render the applicants ‘charged with a criminal offence’ within the meaning of Article 6 § 2 of the Convention”. Further, the Court held that extradition proceedings were ordered for the purpose of criminal prosecution and thus justified “the extension of the scope of the application of Article 6 § 2” ECHR because such proceedings were a direct consequence and concomitant of the pending criminal investigations in the requesting State.

601 Thus, the Court stated in *Ismoilov and others v Russia* (n 596) para 164, that the wording of the extradition decision showed that the applicants were charged with a criminal offence in the requesting State “which is *in itself sufficient* to bring into play the applicability of Article 6 § 2 of the Convention” (emphasis added). In addition, the Court referred to *P, RH, LL v Austria* (n 595) where the applicants awaiting their extradition were considered to be charged with a criminal offence in the meaning of Article 6(2) ECHR.

602 Furthermore, the presumption of innocence may even be relevant *before* the transfer option comes into play, ie after the initial arrest and during the deliberations of the seizing State whether to prosecute the suspects in its own courts. Whether Article 6(2) ECHR applies must then be determined according to the interpretation given to the words “charged with a criminal offence” in a domestic context, ie with

b) Article 14(2) ICCPR

Similar to Article 6(2) ECHR, Article 14(2) ICCPR containing the presumption of innocence applies to “[e]veryone charged with a criminal offence”. However, unlike the Strasbourg organs, the Human Rights Committee is not ready to apply this right in the context of extradition proceedings because it does not deem extraditees to be charged with a criminal offence in the sense of the provision.⁶⁰³ Hence, Article 14(2) ICCPR is inapplicable in the context of transfer proceedings.

5. Juvenile Offenders

Article 14(4) ICCPR stipulates that “[i]n the case of juvenile persons, the procedure shall be such as will take account of their age and the desirability of promoting their rehabilitation”. When solely considering the wording of this provision, an argument can be made that it applies to all forms of procedures as long as the person involved is a juvenile. However, the French wording of Article 14(4) ICCPR is narrower and reads: “La procédure applicable aux jeunes gens qui ne sont pas encore majeurs *au regard de la loi pénale* tiendra compte de leur âge et de l’intérêt que présente leur rééducation.”⁶⁰⁴

According to one view, the references to the “*loi pénale*” in the French text and “*efectos penales*” in the Spanish text, as well as a reading of the provision in its context, suggest that it only relates to criminal trials.⁶⁰⁵ Admittedly, the reference to the “*loi pénale*” implies that there must be a nexus with criminal law. Yet, in actuality, it is merely a reference to the legal basis according to which the determination whether a person is juvenile must be made. In addition, the wording does not seem to require that the minor be subject to criminal prosecution, but rather it only refers to proceedings where the age of criminal majority is relevant. It is not uncommon for domestic extradition law to refer to criminal law in order to define the notion of a minor or juvenile.⁶⁰⁶ Moreover, the reference to “rehabilitation” in Article 14(4) ICCPR does not preclude its application to extradition proceedings – to the contrary, rehabilitation of the alleged offender is a consideration

respect to potential or actual criminal investigations and prosecutions in the seizing State. The definition of the threshold requirement for the context of extradition proceedings is then impertinent.

603 *Cabal and Bertran v Australia* Comm no 1020/2001 (HRC, 7 August 2003) para 7.6; Gjermund Mathisen, ‘On the fairness of proceedings for extradition or surrender’ (2010) *European Human Rights Law Review* 486, 489.

604 Emphasis added.

605 Nowak (n 76) 346, fn 254.

606 See, eg, Article 33(1) of the Swiss Federal Act of 20 March 1981 on International Mutual Assistance in Criminal Matters (Swiss Mutual Assistance Act, IMAC): “Children and juveniles as defined in the Swiss Penal Code whose extradition is requested shall, if possible, be repatriated by the juvenile authorities.”

taken into account in extradition matters.⁶⁰⁷ General Comment No. 32 further declares that in relation to the provision at hand “States should take measures to establish an appropriate juvenile criminal justice system, in order to ensure that juveniles are treated in a manner commensurate with their age”.⁶⁰⁸ The reference to “criminal justice system”, which is broader than the notion of “criminal trial”, allows for the conclusion that the provision extends to extradition proceedings (or repatriation proceedings) involving minors. Furthermore, in the context of Article 14(4) ICCPR, the Committee refers to both criminal proceedings and detention before and during trial, which also points to a broad understanding of the notion of “procedure” in Article 14(4) ICCPR.

In sum, Article 14(4) ICCPR arguably encompasses all procedures in the realm of criminal law so long as they involve a person who has yet to attain the age of criminal majority. Therefore, at the very least, it is not entirely excluded that piracy suspects who are minors⁶⁰⁹ benefit from this provision. Essentially, the provision requires transfer proceedings to take into account the minor age of the person involved and to promote the social rehabilitation of the juvenile – a consideration that is especially significant when deciding whether to transfer a juvenile piracy suspect to a third State potentially thousands of miles away from his home country.

6. Conclusion

Despite the importance of the guarantees contained in Article 6 ECHR and Article 14 ICCPR for piracy suspects subject to transfer proceedings, they do not apply to them – with the exception of the presumption of innocence of Article 6(2) ECHR and the fair trial guarantee for juveniles stipulated in Article 14(4) ICCPR.

As demonstrated above, the arguments for not applying these guarantees to extradition (and transfer) proceedings are by and large not particularly elaborate, not extradition-specific and, thus, impertinent to a certain extent. Against this background and given the rather far-reaching consequences a surrender for prosecution decision has for the individual, and thus the importance that these proceedings are fair and the persons subject to such proceedings benefit from procedural safeguards, the non-application of fair trial rights to extradition proceedings was and still is subject to criticism. While some advocate for

607 For instance, “social rehabilitation” of the alleged offender is a consideration, which is taken into account in the Swiss Mutual Assistance Act; with regard to juveniles, see Article 33; with regard to adults see, eg, Articles 36 IMAC, 40(2) IMAC and 85(2) IMAC.

608 HRC, ‘General Comment No. 32: Right to Equality Before Courts and Tribunals and to a Fair Trial’ (n 433) para 43.

609 See above Part 1/I.

the application of the fair trial right as such to extradition proceedings,⁶¹⁰ others argue that there is a need for adoption of a general principle of fairness to govern all aspects of transnational criminal cases and which is not subject to restrictive conditions of applicability as are the fair trial rights of Article 6 ECHR and Article 14 ICCPR.⁶¹¹ And yet, the idea of making the fair trial guarantees in some way amenable to extradition proceedings has yet to gain firm ground in jurisprudence and doctrine.⁶¹²

In the realm of transfers of piracy suspects – where the potential transferee is currently not even a party to the process that may ultimately lead to his transfer and, as a consequence, does not benefit from any procedural safeguards – the debate has not yet arrived at a point where the discussion includes whether piracy suspects should benefit from the fair trial rights of Article 6 ECHR and Article 14 ICCPR.

E. Conclusions on the Right to Be a Party to Transfer Proceedings

The current transfer practice is such that piracy suspects are not in any way associated to the proceedings that could result in their surrender for prosecution and, as a consequence, they are not granted any procedural safeguards. The foregoing analysis has demonstrated that this approach runs counter to several procedural human rights norms that clearly provide piracy suspects with a right to be a party to their transfer proceedings and to exercise procedural rights – a *sine qua non* for effectively claiming protection from a specific removal that would violate the prohibition of refolement.

First of all, these requirements flow from the procedural dimension of the principle of non-refoulement. Even though this aspect of the principle is of a

610 For instance, the International Law Association already recommended in the late 1990s that “[d]omestic extradition procedures should themselves comply with international human rights norms, in particular, extradition proceedings, whether labelled as judicial or administrative, should guarantee certain minimum safeguards contained in Article 14 of the International Covenant on Civil and Political Rights”: International Law Association, *Report of the Sixty-Seventh Conference held at Helsinki, Finland, 12 to 17 August 1996* (International Law Association 1996) 236; see also, International Law Association, *Report of the Sixty-Eight Conference held at Taipei, Taiwan, Republic of China, 24 to 30 May 1998* (International Law Association 1998) 14, 146 and 153. *Ng v Canada* (n 29) Individual opinion by Mr. Francisco José Aguilar Urbina (dissenting) on 14 ICCPR.

611 See, eg, Sabine Gless, ‘Transnational Cooperation in Criminal Matters and the Guarantee of a Fair Trial – Approaches to a General Principle’ (2013) 9 *Utrecht Law Review* 90.

612 See, eg, Mathisen (n 603) 491, arguing that the refusal of the European Court of Human Rights and the Human Rights Committee to apply Article 6(1) ECHR and Article 14(1) ICCPR respectively to extradition proceedings “is not only understandable but also well founded”.

rather recent *création purement prétorienne*, it contains some very important and concrete requirements for transfer proceedings. First of all, it obliges States to carry out an initial non-refoulement assessment on an individual basis – arguably *ex proprio motu* and certainly if a piracy suspect, who has been duly informed about the existence of the non-refoulement principle and how to claim its protection, expresses fears in relation to his potential surrender for prosecution. Furthermore, piracy suspects have a right to have their transfer decision reviewed. A corollary of these obligations is that patrolling naval States must establish an appropriate procedural framework by which to carry out the initial non-refoulement assessment and the review of transfer decisions.

The clear advantage of taking the principle of non-refoulement as the legal basis for these procedural rights is that it undeniably applies to piracy suspects. This, in turn, cannot be said with absolute certainty about Article 13 ICCPR – the application of which may be preferred. First of all because it clearly states that a removal can only take place in pursuance of a “decision in accordance with law”. Also because it explicitly provides for three important procedural safeguards and, in addition, contains an implicit due process component embracing the fundamental principles of impartiality, fairness and equality of arms. Hence, in comparison with the procedural dimension of the non-refoulement principle, Article 13 ICCPR is much more explicit and the content has been relatively well-described in and developed by jurisprudence. However, its application is reserved for aliens lawfully in the territory of the expelling State. Even though there are solid arguments that these conditions are met by piracy suspects subject to removal and held on board a law enforcement vessel of the transferring State, this has yet to be confirmed by the courts. Within the framework of the ECHR, the procedural dimension of the principle of non-refoulement is the only viable option to even infer a right to participate in transfer proceedings and to be granted procedural safeguards since Article 1 of Protocol 7 ECHR does not apply to extradition and, therefore, not to transfers either.

Of all the guarantees referred to as fair trial rights, only very few are amenable to transfers: the presumption of innocence of Article 6(2) ECHR – but not its counterpart in Article 14(2) ICCPR – and Article 14(4) ICCPR providing special protections for minors involved in transfer proceedings. However, the basic and specific fair trial guarantees of Article 6(1) and (3) ECHR and Article 14(1) and (3) ICCPR are not applicable to extradition and, therefore, not to transfers either. Although within the framework of the ICCPR, the fundamental principles of impartiality, fairness and equality of arms arguably nevertheless apply to transfer proceedings by virtue of Article 13 ICCPR rather than based on Article 14 ICCPR directly, there is no similar means available under the ECHR to make the content of Article 6 ECHR amenable to transfer proceedings. The arguments for the non-application of most of the fair trial rights to extradition (and thus transfer) proceedings do not rest on particularly principled or solid arguments. For instance, persons subject to surrender for prosecution benefit from the presumption of innocence stipulated in the ECHR, but its application by virtue of

Article 14(2) ICCPR is excluded because of the nature of extradition proceedings. Furthermore, we have seen that the main reasons invoked for not applying the basic and specific fair trial guarantees of Article 6(1) and (3) ECHR and Article 14(1) and (3) ICCPR to surrender for prosecution proceedings are not very extradition-specific.

To conclude, the application of fair trial rights to piracy suspects is extremely limited and they are clearly not beneficiaries of the procedural safeguards in relation to expulsion as stipulated in Article 1 of Protocol 7 ECHR. However, by virtue of the procedural dimension of the principle of non-refoulement and the guarantees flowing from Article 13 ICCPR, piracy suspects subject to transfer proceedings clearly have a right to participate in these proceedings. Furthermore, they must be granted various procedural safeguards in order to effectively formulate and substantiate a non-refoulement claim.

IV. Conclusions on Transfer Decision Procedure

International law as it stands now does not offer piracy suspects an absolute right not to be surrendered for prosecution. However, by virtue of the non-refoulement principle, a specific piracy suspect has a conditional right not to be transferred to a specific destination if there is a real risk that certain of his human rights will be violated upon transfer. In order for actual and meaningful implementation of the protection afforded by the non-refoulement principle to occur, it is absolutely necessary that the transferring State observes its obligation to carry out a non-refoulement assessment on an individual basis and that the transferee can participate in these proceedings in a way that he can effectively formulate and substantiate his non-refoulement claim.

In light of this, we concluded that the proposition formulated by actors involved in transfers of piracy suspects – that the existence of transfer agreements renders a non-refoulement assessment on an individual basis obsolete – is unacceptable. What is more, the principle of non-refoulement can only display its protective effect if the individual is associated to the proceedings potentially resulting in his removal and is granted procedural safeguards. To do so is not at the discretion of the State. Rather, by virtue of various procedural human rights norms, piracy suspects have a right to be a party to the proceedings concerning their transfer and to exercise and benefit from a number of procedural rights.

That the person subject to transfer was intercepted at sea and is detained on board a law enforcement vessel of the transferring State – rather than its land territory – does not change this conclusion. Admittedly, allowing for the exercise of procedural rights in a maritime context poses special, albeit not insurmountable, difficulties. By comparison, the argument by States contributing to the International Security Assistance Force that they hand detainees over to the Afghan Government based on transfer agreements because they lack the ability to keep them in custody in a country where they do not run their own detention facilities has been rebutted. Practical considerations do not “provide a legal argu-

ment against the validity of the non-refoulement principle under international law” and, furthermore, “if States are present in situations of armed conflict, it is foreseeable that they will have to take people under their effective control, in which case they will be responsible for those persons’ well-being”.⁶¹³ In counter-piracy operations, where arrest, detention and transfer for prosecution of piracy suspects are clearly part of the mandate – if not the very purpose of the mission – the foreseeability argument must *a fortiori* hold true. Hence, a distinction seems necessary between the rights materially impossible to grant in a situation where persons subject to removal are detained on board a warship of the seizing State and, on the other hand, the rights that cannot be granted because of a lack of planning and anticipation.

Certainly, under international law as it stands now it is in the State’s discretion to choose the method of surrender for prosecution – notably to have recourse to procedures less formalized than extradition. And yet, whatever method the surrendering State finds appropriate for a given situation, it must abide by the procedural requirements flowing from human rights law. This is indispensable for the implementation of the substantive side of the principle of non-refoulement, which applies to *all* methods of surrender for prosecution. In this context, it is important to stress that granting procedural safeguards to transferees must not be equated with prohibiting transfers *per se* and that being a serious impediment to bringing piracy suspects to justice. Rather, there are often ways to reconcile the competing interests of safeguarding human rights and avoiding potential impunity – notably by having recourse to *reliable* and *effective* diplomatic assurances.⁶¹⁴

To conclude, the hypothesis that piracy suspects have a “right to have rights” during the disposition of their cases and most notably when their transfer is at stake has been confirmed by the foregoing analysis. The combined sum of procedural human rights norms discussed and deemed to be applicable to piracy suspects subject to transfer clearly grants them a right to be a party to their transfer proceedings, and thus a subject rather than an object. Put differently, to treat piracy suspects as mere objects of transfer proceedings and not to grant them a non-refoulement assessment on an individual basis not only amounts to as “a refusal to recognize [them] ... as persons before the law”,⁶¹⁵ and thus a breach of Article 16 ICCPR, but it is also in defiance of different procedural human rights – most notably the procedural dimension of the non-refoulement principle and Article 13 ICCPR.

613 Droege (n 80) 693.

614 *ibid* 694, mentions transfers of detainees with the assurance that they are held at specific detention facilities where there is no risk that the person is subjected to human rights violations aimed at being prevented by the principle of non-refoulement.

615 *Kimouche v Algeria* Comm no 1328/2004 (HRC, 10 July 2007) para 7.8; *Grioua v Algeria* Comm no 1327/2004 (HRC, 10 July 2007) para 7.8; *Aouabdia v Algeria* Comm no 1780/2008 (HRC, 19 May 2011) para 7.9.

Concluding Remarks

It has been submitted in this study that the “extraordinary suspect” approach to arrest and detention of piracy suspects, and the practice of treating them as mere objects of proceedings potentially resulting in their transfer, stands in contradiction and defiance of the idea that piracy suspects too are holders of international individual rights, most notably stemming from international human rights law.

This hypothesis has been confirmed in the foregoing analysis. The failure to perceive piracy suspects as *subjects* of the disposition procedure amounts to a violation of a number of individual rights with a procedural component: the “extraordinary suspect” approach to arrest and detention most notably conflicts with various prescripts flowing from the right to liberty. Moreover, piracy suspects are not in any way associated with the proceedings concerning their potential transfer and are not granted a non-refoulement assessment on an individual basis, which is incompatible with the procedural dimension of the principle of non-refoulement and procedural minimum safeguards relating to expulsion. On a more general level, to perceive piracy suspects as mere objects rather than subjects of decisions and proceedings during the disposition of their cases implies that they “are in practice deprived of their capacity to exercise entitlements under law” – and the Human Rights Committee has found this to be in breach of Article 16 ICCPR.¹

The findings of the study at hand are surprising for one reason in particular: in a purely domestic and land-based setting, the States whose disposition practices were analysed here, have, as a general rule, completely accepted and implemented the basic idea that criminal suspects deprived of their liberty and persons subject to surrender for prosecution have “a right to have rights”.² This

1 *Kimouche v Algeria* Comm no 1328/2004 (HRC, 10 July 2007) para 7.8; *Grioua v Algeria* Comm no 1327/2004 (HRC, 10 July 2007) para 7.8.

2 This expression stems from Hannah Arendt, who is quoted by Judge Pinto de Albuquerque in his concurring opinion in *Hirsi Jamaa and Others v Italy* App no 27765/09 (Grand Chamber, ECtHR, 23 February 2012), which is a decision of great relevance in the context of removal of persons intercepted at sea; on the expression

begs the question why arrest, detention and transfers by these very same States in the context of counter-piracy operations off the coast of Somalia and the region are *not* based on this premise. A conclusive and definite answer to this question is not readily available, yet the foregoing analysis reveals various factors that, taken together, may contribute to the current approach to the arrest, detention and transfer of piracy suspects.

To ascribe the fact that piracy suspects are not granted the procedural protection required by international law during the disposition of their cases to a lack of will on the part of patrolling naval States to do so is far too simplistic. It may have its truth that singular actors deploying ships and assets to the area prone to Somali-based piracy are pursuing goals other than the suppression of piracy suspects – and that they are therefore not entirely resolved or prepared to discharge their obligations notably stemming from human rights law, which ensue when intercepting and detaining piracy suspects. Yet, it would be incorrect and unjust to state that the majority of actors pursue a hidden agenda when contributing to the counter-piracy operations off the coast of Somalia and the region. Rather, they deploy personnel and assets with the genuine intention of protecting vulnerable ships and their crews in areas prone to Somali-based piracy and to further the (certainly ambitious) goal that the Security Council set: the full and durable eradication of piracy.

One partial explanation of the current approach to arrest, detention and transfers may be that military forces are responsible for enforcing the law off the coast of Somalia and the region rather than the “ordinary” domestic law enforcement authorities, that is, police and prosecutorial authorities. The law of the sea, notably Article 107 UNCLOS, perfectly accepts the idea that the military is the main actor in counter-piracy operations for that it reserves the entitlement to seize on account of piracy to “warships or military aircraft, or other ships or aircraft clearly marked and identifiable as being on government service and authorized to that effect”. And yet, domestic law pertaining to deprivation of liberty on suspicion of criminal activity in some States is such that it does not cover the military *ratione personae*. This lack of coordination between the authorization to use military means and personnel for counter-piracy operations on the level of international law and the scope of application of the domestic legal frameworks pertaining to law enforcement results in a normative gap. Hence, not only does the procedure leading to arrest and detention lack a clear legal basis in States not pursuing a criminal law approach to arrest and detention, but so does the granting of procedural safeguards to persons subject to deprivation of liberty – with the consequence that arrested and detained piracy suspects are stripped of protection in procedural terms.

coined by Arendt, see also Anne Peters, ‘Membership in the Global Constitutional Community’ in Jan Klabbers, Anne Peters and Geir Ulfstein (eds), *The Constitution-ization of International Law* (OUP 2009) 158–59.

That it is the military enforcing the law against alleged Somali-based pirates not only has repercussions on the level of competencies and the applicability of domestic law. It also has repercussions on the quality of the law on which deprivation of liberty during disposition and the transfer procedure rests. Deprivation of liberty on suspicion of criminal activity carried out by the “ordinary” law enforcement authorities is, as a general rule, governed by legal bases that are democratically legitimized, duly published and, thus, publicly accessible. By and large, the same holds true for surrender for prosecution by means of extradition carried out by administrative and/or judicial authorities. However, in the context of counter-piracy operations, arrest, detention and transfer are to a large extent regulated and governed by classified documents, such as rules on engagement and standard operating procedures. This challenges the basic assumption that legal bases authorizing enforcement powers must be of a certain quality – notably be sufficiently accessible and thus foreseeable – in order to satisfy the fundamental principles of legal certainty and rule of law.

Another reason for not giving international individual rights of piracy suspects due respect during the disposition of their cases arguably stems from the rather unique nature of counter-piracy operations. They are arguably the first truly internationalized law enforcement operation, aimed at preventing and suppressing an entire criminal phenomenon occurring in foreign waters or on the high seas. Thus, counter-piracy operations cannot be compared to transnational police operations, which are (generally) directed at specific individual(s) who allegedly participated in a past criminal venture or intend to prevent a concrete, imminent criminal act. Rather, counter-piracy operations aim to secure the sea by patrolling and engaging in surveillance activities.

Hence, one of the characteristics of counter-piracy operations is that they take place extraterritorially and in a maritime context. The idea that human rights law may apply to a State acting beyond its borders has gained firm ground over the last several decades. And yet, most writings and the bulk of the case law pertains to the extraterritorial application of human rights law in land-based operations. Hence, the meaning of the criteria of “effective control” over persons or territory – instances where a State exercises jurisdiction in the sense of the jurisdictional clauses of human rights treaties – is not well-developed for the maritime context. This may involve some uncertainty regarding the application of human rights law to acts leading to the arrest of piracy suspects at sea. While human rights law undeniably applies by virtue of the flag State principle to acts and decisions taken on board a law enforcement vessel of the seizing State, this is less clear for acts taking place beyond the railing.

The extraterritorial, maritime context in which counter-piracy operations take place, and specifically the fact that proceedings involving deprivation of liberty and transfers largely occur on board a warship of the seizing State, has a dimension beyond the applicability of human rights as such – many of the human rights provisions relevant to arrest, detention and transfers contain a “territorial element”. To briefly recall, this namely holds true for Article 13 ICCPR, the ap-

plication of which is predicated on the lawful presence of the person subject to removal “in the territory” of the surrendering State. As regards arrest and detention, the granting of consular rights presupposes that the person is present in the consular district of the national State (VCCR) or is in the territory of the custodial State (SUA Convention and Hostage Convention). Whether these implicit or explicit references to territory can be interpreted teleologically to mean “jurisdiction” – what the seizing State undoubtedly has on board its warship by virtue of the flag State principle – remains to be seen. This uncertainty as to the meaning of a specific notion in an entirely new context evidences the fact that the law governing law enforcement and its authoritative interpretation by courts often lags seriously behind operational realities.

The cooperative nature of counter-piracy operations off the coast of Somalia and the region adds another layer of intricacy to the interpretation of different human rights provisions, which, when applied in a purely domestic and land-based law enforcement operation, have fairly clear content and meaning. This holds particularly true for the right to liberty enshrined in Article 5 ECHR. Some States takes the stance that the obligations arising from this provision – the fulfilment of which would be incumbent on them in an “ordinary” law enforcement setting – can be discharged by third States. Without repeating the findings made in this respect, we must recall that this approach calls into question the whole assumption on which provisions establishing the right to liberty rests: that the power to deprive a person of his liberty and the obligation to subject arrest and detention to judicial control must always be glued together – otherwise protection against arbitrary and unjustified deprivation of liberty is seriously weakened.

A final reason as to why piracy suspects are not perceived as subjects but mere objects of decisions and procedures during the disposition of their cases, may go back to a basic characteristic of the body of law, from which counter-piracy enforcement powers stem – the law of the sea. A shortcoming identified with regard to the UNCLOS pertains to the “difficulty to configure persons as the beneficiaries of right and the recipient of duties” within this treaty and “the ensuing uncertain subjectivity of persons under the law of the sea”.³ It is argued that persons are considered solely “as the object of protection ... or repression” – and with regard to “repression” reference is made to Article 105 UNCLOS,⁴ which serves as the legal cornerstone for arrest, detention and transfer of piracy suspects. Yet, even though explicit mention of persons is made in Article 105 UNCLOS, we demonstrated earlier that its content is largely inspired by a provision drafted in the early 1930s and thus at a time when the individual rights of persons subject to law enforcement measures were not a primary concern. Hence, counter-piracy operations rest to a large extent on a set of provisions which are based on neither the assumption of subjectivity of the person nor the idea that

3 Irini Papanicolopulu, ‘The Law of the Sea Convention: No Place for Persons?’ (2012) 27 *International Journal of Marine and Coastal Law* 867, 867.

4 *ibid* 873.

international individual rights of persons against whom enforcement measures are directed constrain these powers. Essentially, the current approach to arrest, detention and transfer is, to a certain extent, reflective of the law of the sea, which equally relegates persons to a lesser status.

To conclude, the precise origins of and justification behind the current approach to arrest, detention and transfer of piracy suspects cannot be determined with certainty. Yet, what can be affirmed with certainty is that international law as it stands today grants international individual rights to every criminal suspect deprived of his liberty and to every person subject to surrender for prosecution. Hence, piracy suspects have “a right to have rights”, and it is out of the question to perceive and treat them as “scorners of the law of nations” that “can find no protection in law”⁵ – as Gentili suggested many centuries ago.

5 Alberico Gentili, *De iure belli libri tres: The translation of the edition of 1612* (John Rolfe tr, Clarendon Press 1933) 423, para 697.

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