

Chapter 8: Human Rights and Law Enforcement at Sea

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Abstract: Transnational crime ranks very high among contemporary maritime security challenges. As a consequence, maritime law enforcement is a key tool in the quest to ensure safe and unimpeded navigation. Law enforcement at sea, much like policing on dry land, is an activity inclined to infringe on human rights, not least because it may involve coercion and even the use of (deadly) force. Yet, the human rights of suspects at sea have only been uncovered of late, which is unsurprising given that the law of the sea is in large part ‘human rights blind’ and human rights law, in turn, until recently suffered from serious ‘seableness’. In fact, it was only with the first truly international maritime law enforcement operation – the counter-piracy missions off the coast of Somalia – that the discussion was propelled forward. Simultaneously, however, the very characteristics of these operations pose particular challenges in the field of human rights.

Keywords: maritime security, law enforcement, counter-piracy operations, human rights, safeguards

I. Introduction

Despite the controversy and uncertainty surrounding the concept of ‘maritime security’, the elevated position of transnational crime at sea among contemporary maritime security threats can hardly be overlooked. Quite naturally then, maritime law enforcement is key to ensuring the safe and unimpeded navigation on the seas and oceans. Yet, similar to policing on dry land, enforcement of the law in the maritime environment is an activity disposed to interfering with

the human rights of those upon whom enforcement measures are imposed, not least because it may involve coercion and sometimes even the use of (deadly) force. The linkage between maritime security, transnational crime at sea, maritime law enforcement and human rights is thus patently obvious (Section II).

However, until rather recently, safeguards and limitations constraining at-sea enforcement did not receive a great deal of scrutiny – neither in doctrine nor in practice. This is hardly surprising if we consider the idiosyncrasies of the two legal bodies that primarily govern policing in the maritime domain: the law of the sea and international human rights law (IHRL). The law of the sea, where we find the relevant authorizations to counter transnational crimes amounting to maritime security challenges, is in large part ‘human rights blind’ and only exceptionally and rather erratically limits enforcement powers exercised at sea (Section III). IHRL, in turn, which is supposed to fill the gaps left by the law of the sea, has until recently suffered from a serious ‘seablindness’ (Section IV).

As a result of this unfortunate combination, the analysis of the legal protection of persons subject to enforcement measures at sea remained unexplored until roughly a decade ago. Interestingly enough, it was the first truly international maritime law enforcement operation – the various counter-piracy missions off the coast of Somalia, the first of which was deployed in 2008 – that finally brought momentum to the discussion. They turned a spotlight on the looming, but also actual, human rights violations occurring in the course of policing operations at sea. With this, legal analyses of maritime law enforcement through a human rights lens began to flourish, and various states and international organizations started harbouring a practical interest in the issue. At the same time, however, the very characteristics of these operations pose considerable, but generally not insurmountable, challenges to the application of IHRL – many of which have not yet been sufficiently scrutinized from both a theoretical and operational point of view (Section V).

II. The Linkage Between Maritime Security and Human Rights

The term ‘maritime security’ has acquired firm footing in the vocabulary of persons and institutions dealing with the seas and oceans. Yet, despite being widely used, there is ‘little agreement’ over its exact meaning (Boşilcă et al., 2021, p. XX). Indeed, definitions of the concept are actor, context and region-specific: they are reflective of the interests of those crafting them and shaped by the purpose behind their adoption as well as the circumstances prevailing in a given area at a given time (Klein, 2011). Not only is there no agreed definition of what ‘maritime security’ is, even the definitional approaches differ considerably and notably span from positive to negative conceptualizations of the term. The former approach ‘projects a certain ideal-typical end state that has to be reached’ (Bueger, 2015, p. 159); in this vein, legal doctrine has defined maritime security, for instance, as ‘a stable order of the oceans subject to the rule of law at sea’ (Kraska & Pedrozo, 2013, p. 1). By contrast, the negative conceptualization of the term rests on an understanding of maritime security as the absence of specific threats. It is usually complemented and further specified by a list of threats deemed to amount to security challenges at sea – hence, the origin of the term ‘laundry list’ approach (Bueger, 2015, p. 159).

Regarding the specific threats enumerated in these ‘laundry lists’, it is noteworthy that Till’s observation that ‘the phrase “maritime security” comprehends so much’ (1996, p. 5) has not lost in currency despite being 25 years old. Maritime security continues to be ‘an inclusive term of uncertain boundaries’ (Klein et al., 2021, p. 729) even today. However, it is equally true that – despite the many variations – virtually every contemporary definition of maritime security comprises one type of threat: transnational crimes committed at sea. Indeed, the very consolidation and mounting popularity of the concept of maritime security is intrinsically linked to ‘incidences of breaking the law’ (Percy, 2018, p. 610): while the term first emerged in the

1990s, it came into the public's view following a spate of terrorist attacks against vessels occurring in the wake of 9/11, before definitely entering the common vocabulary with the rise of Somali-based piracy after 2006 (Boşilcă et al., 2021). Today, transnational crimes at sea – despite being referred to as ‘unconventional’ security challenges (Percy, 2018, p. 607) – occupy a central place in the maritime security framework. They usually complement more ‘conventional’ challenges gravitating around, *inter alia*, territorial integrity, freedom of navigation and access to resources (Percy, 2018).

From the finding that transnational crime ranks very high among contemporary challenges to a stable order of the oceans, it is only a further small step to conclude that law enforcement constitutes a ‘critical tool’ in the quest to ensure maritime security (Sonnenberg, 2012, p. 10). Indeed, given that these unconventional menaces are ‘criminal in nature or linked to criminals’, they ‘are most appropriately addressed by law enforcement’ (Sonnenberg, 2012, p. 11). While the term ‘maritime law enforcement’ is not defined in positive international law, doctrine offers various definitions. Quite instructive is the one by Wilson, according to whom maritime law enforcement ‘refers to customs, police, or other law enforcement action that seeks to detect, suppress, and/or punish violations of law in the maritime environment’ (2016, p. 244). Equally useful is the definition by Tondini, who suggests that the concept indicates ‘all police-type operations conducted by warships and other state-owned vessels against criminal, or otherwise prohibited, activities at sea’, which ‘implies the interception of merchant vessels with the purpose of subjecting them to the control of the intercepting vessel’s flag state and possibly imposing criminal or administrative sanctions’ (2017, p. 254).

The latter definition already insinuates the specific measures that may be taken in the course maritime law enforcement operations. First of all, given the vastness of the maritime commons and the resulting anonymity, the detection and localization of illegal conduct at sea often hinges on the gathering of intelligence and sharing of information between relevant actors (Klein,

2010;). If a ship suspected of engaging in criminal conduct is ultimately identified, potential measures against it may include its stopping, boarding and searching at sea or diversion to a port or other place for inspection and further investigation. Moreover, a vessel used for the commission of a crime, as well as illicit cargo and crime paraphernalia found on board, may potentially be seized and destroyed or disposed of in another way (e.g., sold). Persons on board who are suspected of engaging in illegal activity, in turn, may be searched, interrogated, arrested and detained and, if suspicion hardens, transferred for prosecution to the land territory of the seizing state or to a third state (Guilfoyle, 2009; Klein, 2011; Papastavridis, 2013). The taking of these and further enforcement measures is only lawful if it can be based on a relevant legal authorization, which are *inter alia* conferred by treaties – such as the UNCLOS or suppression conventions dealing with specific transnational crimes – and United Nations Security Council resolutions (McLaughlin, 2016).

From this broad-brush overview accrues that maritime law enforcement is – similar to other forms of policing – a ‘highly interventionist process’ (McLaughlin, 2016, p. 467). Indeed, the enforcement measures just depicted are vertically imposed by the seizing state, meaning that coercion and, as a last resort, (deadly) force may be used in cases of non-compliance. From this plainly follows that the interests and values protected by IHRL may be at stake: life, physical integrity, liberty, security, privacy and property – to name but a few. As per Batsalas (2014), human rights may be affected in all phases that a law enforcement operation at sea generally involves. Prior to interdiction, intelligence, surveillance and reconnaissance activities must be considered in light of the right to private life. When gaining access to a ship, specifically in cases of opposed boarding, the right to life and physical integrity may be at stake. Finally, upon boarding – when the ship and its cargo is searched, and persons interrogated and possibly even arrested and ultimately transferred for prosecution – yet another set of rights may attach, notably the right to liberty, various procedural safeguards and the prohibition of *refoulement*. If the

cargo and/or the vessel is destroyed or disposed of in another way, the right to property is at stake (Batsalas, 2014). It is against this backdrop that Article 2 of the UN Code of Conduct for Law Enforcement Officials stipulates that '[i]n the performance of their duty, law enforcement officials shall respect and protect human dignity and maintain and uphold the human rights of all persons'. However, as we will see next, the law of the sea, which authorizes enforcement action at sea, is certainly not a body of law imbued with the idea of IHRL. At the same time, the concept of human rights was not firmly moored in the maritime security framework until recently as a result of the 'seablindness' from which it long suffered.

III. The 'human rights blindness' of the law of the sea

In an ideal world, legal instruments authorizing enforcement measures at sea would include a detailed and comprehensive list of safeguards, which specify and thus operationalize abstract human rights norms for policing activity in the maritime domain. Moreover, these safeguards would be framed as rights belonging to persons directly or indirectly affected by at-sea enforcement measures. The reality though is a different story.

The primary reference point in terms of (enforcement) jurisdiction at sea is the UNCLOS. The UNCLOS negotiations extended from 1973 to 1982 (Rosenne & Gebhard, 2008) – and what may appear to be an impressive time span is put in perspective by the equally impressive mandate of the Conference, which was 'to adopt a convention dealing with all matters relating to the law of the sea' (UNGA 3067 (XXVIII), para. 3). In view of this broad mandate and the fact that IHRL took a giant leap forward during the period the UNCLOS was being drafted – as evidenced by the entry into force of the two UN human rights covenants in 1976 – Haines astutely surmises that there must have been 'a measure of mutual influence' (2021, p. 2). Yet,

he swiftly concludes that his was not the case. Indeed, the UNCLOS – also dubbed the ‘Constitution for the Oceans’ (Koh, p. xxxiii) – does not contain a bill of rights, as one might expect from a document with a ‘constitutional’ aspiration; nay not even a ‘general principle establishing the duty to protect people at sea’ (Papanicolopulu, 2018). Moreover, its provisions governing transnational crime at sea remain markedly silent in terms of the rights of persons upon whom enforcement measures are imposed. Symptomatic in this respect are the eight provisions dealing with piracy – seemingly the most densely regulated crime in the entire UNCLOS – none of which confer rights to piracy suspects (Petrig, 2014). It is against this backdrop that UNCLOS’ limitations become clear, namely its struggle to conceptualize persons as rights-holders (Papanicolopulu, 2012).

It would nonetheless be wrong to conclude that the UNCLOS is indifferent to people at sea and criminal suspects more specifically. Rather, as Treves succinctly put it, ‘concerns for human beings, which lie at the core of human rights concerns, are present in the texture of its provisions’ (2010, p. 3). In this vein, Oxman argued that because authorizations to enforce the law in the UNCLOS are precisely circumscribed and ‘far from unqualified’ (1998, p. 403), they are ‘detering excessive zeal’ (1998, p. 404) and thus protect liberty interests. A handful of UNCLOS provisions convey human rights concerns even more explicitly by setting specific limitations on enforcement powers. Exemplary in this respect is Article 73 UNCLOS, where the drafters counterbalanced the conferral of far-reaching enforcement powers over violations of fisheries laws with a series of safeguards: the coastal state is *inter alia* barred from imposing corporal punishment as a sanction; in case of arrest or detention of a foreign vessel, it must promptly inform the flag state of any action taken and penalties imposed; and it is obliged to promptly release an arrested vessel and its crew upon the posting of a reasonable bond.

While the practical importance of provisions of this kind cannot be underestimated – indeed, the majority of cases adjudicated by the International Tribunal for the Law of the Sea turned on

prompt release of vessels as provided for in Article 73 UNCLOS (Petrig & Bo, 2019) – two caveats are in order. First, provisions of the UNCLOS that usher concerns for human beings are framed as obligations of states and do not attribute any rights directly to individuals, which has repercussions on ‘standing and options for redress’ (Papanicolopulu, 2018, p. 55). Second, the UNCLOS provisions setting limitations on the exercise of enforcement powers are few and far between, which means that considerable protective gaps remain. Particularly striking is the absence of a rule governing the use of force – and this was not an oversight. Shearer, who attended the UNCLOS negotiations as a delegate, somewhat ironically comments on this lacuna by stating that provisions authorizing enforcement action ‘appear to assume that the delinquent vessel will meekly submit’ to the respective measures (1998, p. 440). He goes on to explain that the protective gap was due to ‘a disinclination’ during the negotiations ‘to discuss such distasteful matters’ (ibid, p. 440) and the prevailing perception among delegates that ‘customary international law already governed the exercise of force’ sufficiently (Shearer, 1986, p. 341). The latter proposition is reflective of the idea expressed in the preamble of the UNCLOS, according to which ‘matters not regulated by this Convention continue to be governed by the rules and principles of general international law’. As Anderson perceptively concluded, ‘[p]olicing at sea is one of those matters’ (2013, p. 234). This, together with the earlier observations about the protection of suspects by the UNCLOS, implies that IHRL continues to occupy a central role in limiting enforcement powers.

The same conclusion can be drawn as regards legal instruments governing transnational crimes at sea – the so-called ‘suppression conventions’ – even though they contain, to different extents, safeguards limiting enforcement action. Considering these treaties on a timeline, one can observe an expansion over time of provisions dedicated to the protection of persons affected by enforcement measures at sea. While the 1988 UN Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances obliges states engaged in at-sea enforcement action

to ‘take due account of the need not to endanger the safety of life at sea, the security of the vessel and the cargo’ (Article 17) – a clause replicated in the 2000 Migrant Smuggling Protocol (Article 9) and 1995 Fish Stock Agreement (Article 21) – the latter regulates, in addition, the use of force (Article 22). The 2005 SUA Protocol, which was adopted in the aftermath of the 9/11 attacks to counter terrorism and non-proliferation of weapons of mass destruction at sea, is even more comprehensive. Next to listing the safeguards known from earlier suppression conventions, it builds a bridge to IHRL by requiring that persons against whom enforcement measures are taken ‘are treated ... in compliance with the applicable provisions of international law, including international human rights law’ (Article 8*bis*(10)(a)(ii)). The importance of IHRL is further emphasized through a non-prejudice clause stipulating that the 2005 SUA Protocol shall in no way affect rights and obligations arising under IHRL. This heightened awareness of the role of IHRL in countering transnational crime is due to the zeitgeist prevailing when the treaty was negotiated; indeed, its preamble refers to a UN General Assembly resolution reaffirming the obligation of states to ‘ensure that any measure taken to combat terrorism complies with their obligations under international law, in particular international human rights law’.

Although the other mentioned suppression conventions do not feature the link between norms authorizing enforcement measures and human rights as prominently as the 2005 SUA Protocol does, IHRL plays an important – complementary but also self-standing – role in the quest to limit the exercise of enforcement powers at sea. It is complementary because important protective gaps remain: while the conventions emphasize the safety and treatment of persons, they lack procedural safeguards, such as the right to be informed about the reason of the arrest, the right to be brought promptly before a judge, and the right to formulate a non-refoulement claim and have it assessed on an individual basis (Petrig, 2014). IHRL has, in addition, a self-standing role: since the safeguards in suppression conventions are framed as obligations of states, it ‘not

always clear who owns the equivalent rights’ (Papanicolopulu, 2018, p. 55) – a question that, by contrast, can be clearly answered in IHRL where human beings are the holders of rights.

Finally, IHRL is also key for the protection of criminal suspects subject to enforcement measures authorized by the UN Security Council – as it did, for instance, regarding armed robbery at sea off the coast of Somalia or the smuggling of migrants from Libya. While earlier resolutions remained mute in terms of strictures attaching to the exercise of authorized enforcement powers, newer ones tend to include germane phraseology, according to which the exercise of authorized powers must be ‘in full compliance with ... international human rights law, as applicable’ (UNSCR 2292 (2016), para. 4). Hence, rather than setting out the specific safeguards that must be observed by states or regional and international organizations acting upon granted authorizations, the Security Council refers to the ‘applicable’ IHRL. Besides the fact that this ‘referential approach’ is problematic because of the uncertainties regarding whether, when and to what extent human rights apply in the at-sea enforcement context (to which we turn in the last section of this chapter), the Security Council follows this path more erratically than consistently (Petrig, 2018).

To conclude, while the law of the sea does not directly attribute any (human) rights to suspects, it at least obliges states to observe specific limits when exercising enforcement powers at sea. Yet, these safeguards are far from complete and important protective gaps remain. IHRL thus, as a matter of circumstance, plays a key role in protecting persons subject to enforcement measures at sea from unwarranted and arbitrary state action. What is more, the law of the sea recognizes this complementary or self-standing role of IHRL by relying on various legal techniques – notably by stating in the preamble of the UNCLOS that matters not regulated by the convention are left to international law, through the non-prejudice clauses or express linkages with IHRL included in suppression conventions, or by pursuing a referential approach as does the UN Security Council. True, IHRL would also apply without the law of the sea building

these bridges. Yet the linkage has a practical and symbolic importance as it renders the liaisons between these two bodies of law – which led a separate existence for a (too) long time– more visible.

IV. The ‘seablindness’ of human rights law

It sounds like a truism that ‘the right to have rights’ (*Hirsi Jamaa v Italy*, Concurring Opinion Judge Pinto de Albuquerque, 2012, p. 59) under IHRL belongs to both people on land and people at sea and cannot ‘depend on the place where a person happens to be’ (Papanicolopulu, 2018, p. 4). Yet, the idea that criminal suspects at sea are – just like perpetrators on land – entitled to rights and freedoms espoused in IHRL has only started taking hold in the past decade. In practice, considerable differences between land and sea persist; even in states which, in a land-based context, are the ‘model pupils’ in terms of human rights implementation, such as Denmark (Petrig, 2014). While the ‘move beyond seablindness’ (Bueger & Edmunds, 2017, p. 1294) took place quite late in international security studies (Boşilcă et al., 2021), it occurred even later in the field of human rights law, the reasons for which are manifold and interrelated.

That the maritime dimension of human rights (and the human rights dimension of the law of the sea) has long been overlooked has much to do with the people who draft, interpret and apply the law. Oxman got to the heart of the matter when writing that ‘[v]iewed from afar, all lawyers constitute a single guild’ and lawyers themselves tend to perceive international lawyers as belonging to ‘a single guild’ (1998, p. 399). Yet, when zooming in, it becomes apparent that two different epistemic communities engage with the law of the sea and IHRL respectively and that ‘the gulf’ between them ‘is real’ (ibid, p. 400). Treves similarly observes the emergence of specialized fields of international law ‘with clusters of scholars, organizations and sometimes courts and tribunals’ (2010, p. 1) among which interaction is limited. Against this backdrop it

is hardly surprising that the law of the sea and IHRL largely developed ‘in isolation from each other’ (Oxman, 1998, p. 400) and the sizable community of IHRL lawyers tended to ‘forget about the existence of the sea’ (Papanicolopulu, 2018, p. 8) – both of which resulted in a body of IHRL scholarship with a palpable land bias.

The neglect of the maritime dimension of IHRL can further be observed at the institutional level. Organs set up to monitor human rights compliance, such as the UN Human Rights Council and treaty body system, primarily focus their attention on states’ human rights performance on dry land. Conduct of states in the maritime environment, by contrast, is far from comprehensively and systematically scrutinized; nor is the seascape at the centre of the otherwise commendable efforts of NGOs and civil society organizations relating to the implementation and actual realization of human rights. Only rarely is there a dedicated workstreams for human rights abuses occurring at sea; and the first NGO that uniquely but comprehensively deals with rights of persons in the maritime environment – the UK-based charity ‘Human Rights at Sea’ – was only established in 2014 (Haines, 2021).

A further explanation for the modest awareness about the human rights of people at sea is to be found in the law itself. Norms comprised in IHRL instruments are formulated with a high degree of abstraction and generality. They neither mention specific geographical contexts nor categories of persons since, as a general rule, human rights are supposed to apply to everybody everywhere as long as the person is under the jurisdiction of a state party to the respective treaty (Article 1 ECHR, Article 2(1) ICCPR). An important means for refining and translating general IHRL norms for or to specific contexts and/or categories of persons is the development of soft law instruments (Lagoutte et al., 2016). Yet, for the maritime space, and the rights of criminal suspects at sea specifically, this process has started only of late.

The fact that the maritime dimension of IHRL remained largely underexplored opened up space for the claim that human rights do not apply to policing activities at sea. Indeed, in a case before the European Court of Human Rights involving a violation of the right to liberty of suspects arrested by a French navy vessel in the course of counter-drug operations at sea, France argued that the ECHR would be inapplicable *ratione materiae* ‘for want of any provisions in the Convention ... concerning maritime matters’ (*Medvedyev v France*, para. 49). This objection – which is emblematic of the difficulty to conceive IHRL as a body of law restricting police activity at sea – was one that the Court was not prepared to accept, and France was found to have violated the rights of the suspects arrested at sea. The ruling probably would not have attracted so much interest had it not come at a very sensitive moment – when the first truly internationalized law enforcement operation, which was deployed to counter piracy off the coast of Somalia, was in full swing, resulting in numerous foiled attacks and dozens of arrests of suspects. These operations marked the turning point as regards the rights of persons subject to policing measures at sea and contributed to the emergence of the concept of human rights at sea more generally (Haines, 2021; Papanicolopulu, 2018).

This high-profile constabulary response to Somali-based piracy, to which an unprecedented number of states and, initially, three multinational missions contributed (Geiss & Petrig, 2011), attracted a great deal of media attention. With this, police operations at sea, including the risk for human rights violations they entail, swung into public view (Haines, 2021). For the contributing states, as well as regional and international organizations, the issue of human rights at sea was no longer merely theoretical but suddenly a tangible and imminent political and operational concern (Treves, 2009; Treves, 2010).

It goes without saying that these operations, including the human rights issues they involve, also attracted the attention of the legal community. According to Papanicolopulu, ‘an unprece-

dent ed flourishing of legal literature’ (2018, p. 1) on counter-piracy law enforcement and human rights could be witnessed. Indeed, a series of articles (e.g., Treves, 2009; Guilfoyle, 2010), chapters (e.g., Geiss & Petrig, 2011; Batselas, 2014) and even entire books (e.g., Petrig, 2014) began chartering these relatively unknown waters.

What is more, the ongoing operations led to renewed interest from academics and practitioners alike in the (handful) of international court rulings comprising pronouncement on human rights and law enforcement at sea. They also gave rise to new cases before domestic and international courts that, mainly or tangentially, involved human rights issues. According to Wilson, this judicial involvement implied that ‘[j]udges are now ruling on maritime law enforcement issues previously under the sole ambit of government officials and operational commanders’ (2016, p. 245). The more than a dozen judgments involving maritime interdiction and human rights issued between 2009 and 2015 were even said to ‘signal a new period in jurisprudence’ (ibid), which was previously primarily concerned with human rights abuses on dry land.

The counter-piracy operations off the coast of Somalia were thus a watershed moment for the idea that police activity at sea must abide by human rights standards. Moreover, the developments in this specific field served as a catalyst for the establishment of the concept of human rights at sea more generally and, with this, a clear rejection of the idea of the seas and oceans as a ‘zone de non-droit’ where IHRL could be overlooked altogether (Grobson, 2017).

V. Conclusion

Roughly a decade ago, Treves wrote that the law of the sea and IHRL are ‘not separate planets rotating in different orbits’, but rather two that ‘meet in many situations’ (2010, p. 13). Indeed, as this chapter demonstrated, the law of the sea builds various bridges to IHRL, and it is increasingly accepted that IHRL applies not only at land but also in the maritime environment.

Yet, the legal issues arising at the interface of these two bodies of law have only recently been uncovered and many have not yet been fully explored from a theoretical and operational point of view, let alone decided by courts or human rights bodies. As regards law enforcement operations to counter maritime security threats specifically, relying on answers developed in the context of policing the land may provide a useful starting point, but will often be insufficient as every single feature of these operations – the maritime environment, actors involved, cooperative approach and informality – poses intricate challenges as regards the protection of suspects through IHRL.

In terms of the operational environment, it seems no longer contested that human rights apply in the maritime domain; instead, the question has become more subtle, namely whether the ‘wholly exceptional circumstances’ (*Medvedyev v France*, para. 105) reigning at sea may justify a modified standard. So far, these circumstances have been invoked to justify lower standards than those applicable on land – for instance, a more generous interpretation of the concept of bringing a suspect ‘promptly’ before a judge (Batsalas, 2014). It is posited that the ‘wholly exceptional circumstances’ may, in specific situations, require adherence to a stricter standard than on land. As Papanicolopulu rightly stressed in a more general context, people at sea ‘find themselves in a hostile environment, not intended to accommodate humans, and in areas that are often far off from land and the possibility to apply for protection’ (2018, p. 2). Overall, the ‘maritime situation’ (Treves, 2010, p. 8) in which suspects – and enforcers alike – are present, must be taken into account when interpreting IHRL norms; and this may ultimately result in a more lenient or stricter standard compared to that developed for policing the land. A ‘context-free’ application of human rights (Wilson, 2016, p. 319), by contrast, entails the risk of the law being ‘incompletely or inefficiently or even incorrectly’ applied (Papanicolopulu, 2018, p. 8).

In terms of actors, the law of the sea plainly foresees a role for the navy in policing the sea, notably by stipulating that only warships (next to other specific state crafts) are authorized to

enforce the law at sea. In various states though, domestic law does not (yet) fully account for this role of the navy and the fact that warships are used as ‘lawships’ (Bateman, 2014); and domestic law plays a pivotal role in (multinational) law enforcement operations at sea, including for the protection of suspects as it translates the abstract human rights norms into concrete operational rules to be followed (Petrig, 2020). That domestic law does not sufficiently take into account the policing role of the navy may manifest itself in the fact that the personal scope of application of key domestic legal acts only extends to the police (and maybe coast guard) but not the navy. Further, the territorial scope of application of relevant legal acts, such as codes of criminal procedure or police laws, may be such that it only covers waters under the sovereignty of the coastal state but not the high seas. Finally, counter-piracy operations evidenced that certain states follow an ‘extraordinary suspect approach’, taking the stance that suspects deprived of their liberty at sea are not ‘ordinary’ criminal suspects (such as those arrested by these states on land) to which domestic criminal law and the respective procedural safeguards apply. They only exceptionally apply domestic law and its protections to suspects seized at sea, namely in the (very rare) case they decide to prosecute them in their own domestic courts. In the standard case, however, where suspects are transferred to third states for prosecution, they are not granted the procedural rights that seizing states usually grant to persons arrested on dry land (Petrig, 2014).

The cooperative approach to law enforcement at sea is yet another source for intricate legal human rights issues. Of major complexity is, for instance, the question of attribution of violations in a setting where states interact with their counterparts and, oftentimes, with international organizations (Geiss & Petrig, 2011). Moreover, views differ as to which state is responsible for granting a specific right in the first place. On land, as a general rule, one and the same state arrests, detains and prosecutes a suspect; and this state is responsible for safeguarding the human rights of the person subject to the respective measures. In multinational operations, such

as the counter-piracy missions, the measures of arrest, detention, transfer and prosecution are often taken by different states. This may lead to confusion as to which state must ensure specific rights, which can be illustrated at the example of the right to be brought promptly before a judge: is it the seizing state and/or the (regional) state to which the person is ultimately transferred for prosecution which must bring them before a judge? Some argue that a ‘judge is a judge’, regardless of the state to which they belong and that it suffices if the suspect is brought before a judge upon their transfer to a third state for prosecution, what at times take place weeks after the arrest. Yet, good legal reasons – extensively discussed by the present author previously (Petrig, 2013) – exist for maintaining that the *seizing* state’s courts must oversee the legality of the arrest and detention taking place at sea.

Lastly, concerns regarding human rights also result from the ‘turn to informality’ (Guilfoyle, 2021, p. 293) witnessed in the response to Somali-based piracy and likely to become a feature of maritime security operations more generally (Bueger & Edmunds, 2017). Reliance on informal processes instead of well-established legal procedures specifically, may entail great practical benefits but come with the risk ‘to sequester maritime security measures away from ordinary oversight or interaction with human rights norms’ (Guilfoyle, 2021, p. 309). The phenomenon of ‘transfers’ to bring suspects within the jurisdiction of the prosecuting state in counter-piracy operations in the Indian Ocean is quite illustrative in this respect. As seizing states were reluctant to bring arrested suspects before their domestic courts, at times resulting in their release, it proved impossible to implement the basic tenet of every law enforcement operation – to bring alleged offenders to justice. To solve the problem, the EU and several states concluded transfer agreements with states of the region in which the latter declared their general willingness to accept piracy suspects for prosecution. Hence, rather than relying on extradition, which is the most obvious legal mechanism to move suspects from the jurisdiction of the arresting state to that of the prosecuting state, seizing states opted for ‘transfers’. The two processes differ

considerably, notably in terms of human rights protection. Extradition is a surrender taking place in execution of a decision issued by an administrative and/or judicial body in a formalized procedure prescribed by law in which the suspect is a party. By contrast, transfers are the result of negotiation and cooperation between relevant stakeholders in informal fora without participation of the suspect. Hence, in extradition proceedings, suspects can exercise procedural rights, most notably formulating a non-refoulement claim and requesting the judicial review of the decision – possibilities that are inexistent when transfers are used (Petrig, 2014).

This cursory overview suffices to demonstrate that the features of (multinational) law enforcement operations to counter maritime security threats pose particular challenges in granting suspects seized at sea the same rights as are granted to their peers on land. Many of these challenges have not yet received sufficient attention in doctrine and practice. Thus, further scrutiny of the phenomenon of maritime law enforcement through the analytical lens of ‘human rights at sea’ is necessary in order to fully realize the idea that human rights do not end at the shore but extend fully to the sea and oceans. If successful, international maritime security law – which ‘has emerged as a “hybrid” sub-speciality of international law in the borderland between various areas of legal studies’ (Boşilcă et al., 2021, p. XX) – will live up to its claim to include international human rights law – not only on paper, but in the operational reality too.

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