Prosecuting Pirates and Upholding Human Rights Law: Taking Perspective

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Abstract

Incidents of piracy off the coast of Somalia have increased in recent years, rising by 47% between 2005 and 2009. With a growing number of states involved in the determent and disruption of attacks, there is a need to outline their human rights obligations when engaging in counter-piracy operations, so that suspected pirates are treated in accordance with international law. In addition, providing clarity to states regarding their responsibilities enables them to make informed decisions about whether, and how, to prosecute suspected pirates. Focusing on Somalia, this paper examines the piracy as situated within international law, while addressing the application of human rights treaties, and issues such as detention, right to asylum, non-refoulement, and the transfer of pirates to third parties. While ambiguity remains regarding the obligations of states dealing with suspected pirates, existing case law does provide some guidelines. However, other factors, such as political processes and expediency, have sometimes taken precedence over the protection and fulfilment of human rights.

Contents

List of Acronyms

CAT	Convention Against Torture
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
EU NAVFOR	European Union Naval Force
ICCPR	International Covenant on Civil and Political Rights
NATO	North Atlantic Treaty Organization
SUA	Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation
TFG	Transitional Federal Government
UNCLOS	United Nations Convention on the Law of the Sea
UNSCR	United Nations Security Council Resolution

Introduction

In May of 2010, Russian forces stormed a hijacked oil tanker in a rescue attempt that culminated with the arrest of ten pirates. The pirates were subsequently set adrift without navigational equipment in a small vessel in the Gulf of Aden (an area covering approximately 205,000 square miles) and are now considered dead. Some ambiguity remains regarding what happened to the pirates. Somalia's Transitional Federal Government (TFG) demanded an explanation and an apology from Russia regarding the treatment of its citizens, while the Russian officials reported that the pirates were released in a boat due to the lack of legal options for prosecution.[1]

The case above illustrates two important issues that converge, allegedly clash with, and most certainly shape counter-piracy operations. The first is the legal framework that exists to prosecute pirates. The second is the human rights obligations of states that engage in tackling piracy. This paper addresses the intersection of these two issues, with special reference to piracy off the coast of Somalia.[2]

Modern piracy has been a growing phenomenon in recent years, resulting in a flurry of international counter-piracy activities such as the adoption of United Nations Security Council Resolutions (UNSCRs) and the increase in international naval forces patrolling high-risk waters—particularly those near Somalia. Despite these attempts to address the issue, piracy attacks have multiplied rapidly, from 239 in 2006 to 406 in 2009.[3] In the first quarter of 2010,

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[1] *See, e.g.*, Abdiaziz Hassan, *Somalia Calls for Russian Explanation on Pirates*, INTERNATIONAL BUSINESS TIMES, May 14, 2010, *available at* http://www.ibtimes.com/articles/23729/20100514/somalia-calls-for-russian-explanation-on-pirates.htm; *Somalia Says Relations With Russia May Be Harmed Over Pirates' Treatment*, VOA NEWS, May 21, 2010, *available at* http://www1.voanews.com/english/news/europe/Somalia-Says-Relations-With-Russia-May-Be-Harmed-Over-Pirates-Treatment-94592344.html. It is unclear what exactly occurred regarding the pirates in question. *See, e.g.*, *Russia Says Pirates Who Held Tanker are Freed*, THE ASSOCIATED PRESS, May 8, 2010, *available at* http://insidesomalia.org/201005093038/News/Travel/Russia-says-pirates-who-held-tanker-are-freed.html (reporting that Mikhail Voitenko, editor of the Russian online Maritime Bulletin, said that the account of the pirates being released sparked suspicions that the pirates were in fact killed); *Somali Pirates Captured and Released by Russian Navy 'Have Died*,' THE TELEGRAPH (UK), May 12, 2010, *available at* http://www.telegraph.co.uk/news/worldnews/piracy/7713375/Somali-pirates-captured-and-released-by-Russian-navy-have-died.html (citing Mikhail Voitenko saying that reports the pirates were freed in a boat could be covering the possibility the pirates were killed).

[2] When commenting on "operations off Somalia," the author is referring to the area where Somali pirates are operating, which covers a vast stretch of sea incorporating the Gulf of Aden, the Red Sea, parts of the Indian Ocean, and the Arabian Sea. *See* International Chamber of Commerce, International Maritime Bureau, *Piracy and Armed Robbery Against Ships: Annual Report, 1 January – 31 December 2009*, London (Jan. 2010) at 6 [hereinafter IMB 2009 Report] (delineating the area of operations for Somali pirates). *See also* Statement of the Sixth Plenary Meeting of the Contact Group on Piracy off the Coast of Somalia, Office of the Spokesman, Washington, DC PRN: 2010/781 (June 11, 2010), *available at* http://www.state.gov/r/pa/prs/ps/2010/06/143010.htm (stating that the main area of operation for Somali pirates has expanded from the Gulf of Aden to the Indian Ocean).

[3] *See* IMB 2009 Report, *supra* note 2, at 6. There is some evidence that piracy is decreasing in 2010, since in the first three months of the year there were 67 attacks, down from 102 in the same period in 2009. *See* International Chamber of Commerce, International Maritime Bureau, *Piracy and Armed Robbery Against Ships: Report For The Period Of 1 January – 31 March 2010*, (Apr. 2010) at 5 [hereinafter IMB April 2010 Report]. Note that the IMB uses a specific definition of piracy as "an act of boarding or attempting to board any ship with the apparent intent to commit theft or any other crime, and with the apparent intent or capability to use force in the furtherance of that act"

there were 67 pirate attacks worldwide, 35 of which were allegedly committed by Somali pirates.[4] Moreover, the financial rewards of piracy are increasing. In January of 2010, a Greek tanker, the MV *Maran Centaurus*, was reportedly ransomed for a record $7 million.[5] It is estimated that in 2009, over $60 million was paid in ransom for ships hijacked by Somali pirates.[6] Simultaneously, prosecution for these attacks is unlikely. According to a U.S. tally, of the 706 pirates encountered by international navies in the waters of Somalia between August of 2008 and December of 2009, 11 were killed, 269 were transferred for prosecution, and the remaining 426 were released. Of those to be prosecuted, 46 had been convicted and 23 had been acquitted by the end of 2009.[7] The U.S. Navy reports that their counter-piracy operation Combined Task Force 151, with cooperating international naval forces, encountered more than 1,129 pirates between 2008 and June of 2010. Of those, 638 were disarmed, while 478 were transferred for prosecution.[8] Similarly, of the 275 alleged pirates captured by EU naval forces

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(*id.* at 3), which is much broader than the definition used in international conventions that will be discussed below. Note also that the problem of piracy is greater than figures suggest, as it is estimated that approximately 50% of attacks are not reported. *See, e.g.*, Elizabeth Andersen, Benjamin Brockman-Hawe and Patricia Goff, *Suppressing Maritime Piracy: Exploring the Options in International Law* 2 (2009) (ASIL, One Earth Future, ACUNS); PETER CHALK, THE MARITIME DIMENSION OF INTERNATIONAL SECURITY: TERRORISM, PIRACY, AND CHALLENGES FOR THE UNITED STATES 7 (2008).

[4] IMB April 2010 Report, *supra* note 3, at 5.

[5] *See, e.g., Somalia: Lawyers vs. Pirates*, AFP, May 2, 2010, *available at* http://insidesomalia.org/201005023022/News/Human-Rights/Somalia-Lawyers-vs.-Pirates.html (stating that $7 million was awarded in ransom). Note that there was some dispute regarding the amount paid in ransom, with pirates announcing that they received $5.5 million, despite allegations that $7 million had been dropped. *See, e.g.*, Ecoterra International, SOMALI MARINE AND COASTAL MONITOR, Jan. 18, 2010, *available at* http://coordination-maree-noire.eu/spip.php?article12050&lang=fr (reporting that pirates said they received $5.5 million, while Andrew Mwangura of the East Africa Seafarers Assistance Programme claimed that $7 million had been dropped by a helicopter); Robert I. Rotberg, *Combating Maritime Piracy: A Policy Brief with Recommendations for Action*, Jan. 26, 2010, at 1, http://www.worldpeacefoundation.org /WPF_Piracy_PolicyBrief_11.pdf (stating that between $5.5 and $7 million was given in ransom).

[6] *See* Rotberg, *supra* note 5, at 1.

[7] *See* Hassan, *supra* note 1; J. Peter Pham, National Committee on American Foreign Policy, New York, Speaking on National Public Radio: Examining Impact of Pirate Attacks (Dec. 28, 2009), *available at* http://www.npr.org/templates/story/story.php?storyId=121982547; J. Peter Pham, *Anti-Piracy, Adrift*, 18 THE J. INT'L. SEC. AFF. (Spring 2010) [hereinafter Pham, *Anti-Piracy*], *available at* http://www.securityaffairs.org/issues/2010/18/pham.php; Rotberg, *supra* note 5, at 2; *Somalia: Lawyers vs. Pirates*, *supra* note 5. The number of pirates convicted has since increased. *See, e.g.*, Henry Foy, *Somali Pirates Jailed by Dutch Court*, THE GUARDIAN, June 17, 2010, *available at* http://www.guardian.co.uk/world/2010/jun/17/somali-pirates-jailed-netherlands (noting that in June 2010, a Dutch court convicted five pirates for their attempt to hijack a Dutch-Antilles flagged ship in the Gulf of Aden in January 2009); *Somali Pirates Sentenced to Ten Years in Seychelles*, BBC NEWS, July 26, 2010, *available at* http://www.bbc.co.uk/news/world-africa-10763605 (reporting that in July of 2010 Seychelles sentenced eleven pirates to 10 years each for their roles in attempting to hijack a coastguard boat in December 2009).

[8] Navy Office of Information, *Combined Maritime Forces*, RHUMB LINES, June 28, 2010, *available at* https://www.navyreserve.navy.mil/Publications/RHUMB%20Lines/Combined%20Maritime%20Forces%2028%20Jun%2010.pdf.

between March and April of 2010, only 40 are to be prosecuted.[9] These figures indicate that around 60–85% of the pirates encountered are simply let go.

One may question why so many alleged pirates are released without being charged. Addressing piracy is challenging, not least due to the nexus of laws that are applicable to counter-piracy operations, and which incorporate customary law, United Nations Security Council Resolutions, treaty law, national law, and human rights law. Moreover, at times human rights law is perceived as limiting the ability of international forces to combat piracy.[10]

It appears that fear of violating human rights obligations plays a role in states' prosecution of suspected pirates. This raises the question of whether a trade-off exists between prosecution of pirates and protecting and promoting human rights. This paper discusses various aspects of human rights law that apply to counter-piracy operations, to contribute to the current literature that elucidates the human rights obligations of states addressing the problem of piracy, and to emphasize the rights of pirates to ensure that they are treated in accordance with the principle of due process, and that efforts are made to prevent incidents like the one cited in the opening paragraph.[11]

The paper proceeds as follows: Part I gives an overview of international law as it pertains to maritime piracy. It examines the concept of universal jurisdiction and the legal framework that regulates the fight against piracy. Part II discusses international law that protects pirates, focusing on jurisdiction. It addresses the extraterritorial application of human rights treaties, as well as their application to states acting as part of international bodies. Part III considers aspects of international human rights law as applied to combating piracy off the coast of Somalia. Specifically, it looks at issues such as detention, right to asylum, non-refoulement, and the transfer of pirates to third parties. Part IV considers the political side of the discussion, and the trade-offs between the protection of human rights and expediency.

The focus is specifically on Somalia for three main reasons: first, the increase in piracy in recent years can be attributed largely to Somali pirates.[12] Second, the Gulf of Aden, an area under attack by Somali pirates, is one of the most heavily trafficked maritime regions in the world. Situated at the crux of major shipping lanes, an estimated 16,000 to 33,000 ships pass through

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[9] *See* Mariama Diallo, *Nations Prove More Willing to Combat Piracy than Prosecuting Pirate Suspects*, VOA NEWS, June 8, 2010, *available at* http://www.voanews.com/english/news/africa/east/Nations-Prove-More-Willing-to-Combat-Piracy-than-Prosecuting-Pirate-Suspects-95861284.html.

[10] *See, e.g.*, Justin Stares, *Pirates Protected from EU Task Force by Human Rights*, THE TELEGRAPH, Nov. 1, 2008, http://www.telegraph.co.uk/news/worldnews/africaandindianocean/somalia/3363258/Pirates-protected-from-EU-task-force-by-human-rights.html (reporting that the head of the EU anti-piracy mission stated that human rights got in the way of combating piracy); Pham, *Anti-Piracy*, *supra* note 7 (stating that international human rights and humanitarian law were restricting the actions of armed forces combating piracy).

[11] Importantly, human rights obligations are just one factor perhaps limiting the prosecution of pirates. Options fully compatible with human rights law exist to combat piracy; however, financial costs, expediency, domestic laws and politics also play an important role, as discussed further in Part IV.

[12] In 2005, there were a total of 276 attacks, of which 48 were carried out by suspected Somali pirates. Conversely, of the 406 reported attacks worldwide in 2009, 217 incidents were attributed to suspected Somali pirates. *See* IMB 2009 Report, *supra* note 2, at 6, 21.

the gulf every year.[13] Third, the waters off Somalia boast one of the largest anti-piracy flotillas in the world—a conglomeration of states and multinational organizations engaged in counter-piracy operations.[14]In addition, since civil war broke out in 1992, Somalia has suffered from protracted conflict and economic collapse, and violence in the country is widespread. It is described by many as a failed state, which is incapable of offering robust protection against human rights violations to its citizens.[15] In such a situation, international human rights obligations, and their application, gain even greater significance.

Part I – Piracy in International Law

Piracy occupies a unique position in international law. Described as *hostis humani generis*, "enemies of all mankind," pirates commit the original crime under universal jurisdiction.[16] The principle of universal jurisdiction holds that certain crimes are of such a serious nature that any state is entitled, or even required, to apprehend and prosecute alleged offenders regardless of the nationality of the offenders or victims, or the location where the offense took place.[17] It differs from other forms of international jurisdiction because it is not premised on notions of sovereignty or state consent.[18]

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[13] *See, e.g.*, Roger Middleton, *Chatham House Briefing Paper: Piracy in Somalia: Threatening global trade, feeding local wars*, 3, AFP BP 08/02 (Oct. 2008) (stating that 16,000 ships a year travel through the Gulf of Aden); Navy Office of Information, *supra* note 8 (noting that approximately 33,000 ships travel through the Gulf of Aden annually); Lauren Ploch et al., *Piracy off the Horn of Africa*, Congressional Research Service, at 9 (Sept. 28, 2009) (reporting that the Assistant Secretary of the US State Department, Andrew Shapiro, estimates that 33,000 ships pass through each year).

[14] *See* Rubrick Biegon, *Somali Piracy and the International Response*, FOREIGN POLICY IN FOCUS, Jan. 29, 2009, *available at* http://www.fpif.org/articles/somali_piracy_and_the_international_response (reporting that the Gulf of Aden is being patrolled by one of the largest anti-piracy fleets in modern history). The European Union Naval Force, Combined Task Force 151, and the NATO Maritime Group are the main multinational forces, and they operate alongside warships from individual states. There are also a substantial number of attacks in areas such as Indonesia, Nigeria, India, and Bangladesh. *See, e.g.*, IMB 2009 report, *supra* note 1, at 5-6. Hence, it is important to keep in mind the global application of the legal framework related to counter-piracy operations

[15] *See* The Failed State Index 2010, FOREIGN POLICY, June 21, 2010, *available at* http://www.foreignpolicy.com/articles/2010/06/21/2010_failed_states_index_interactive_map_and_rankings (listing Somalia as the primary failed state in the world for 2010). *See also* Ken Menkhaus, *Stabilisation and humanitarian access in a collapsed state: the Somali case*, 34 DISASTERS S320 (2010) (discussing Somalia's state failure).

[16] *See, e.g.*, Michael Bahar, *Attaining Optimal Deterrence at Sea: A Legal and Strategic Theory for Naval Anti-Piracy Operations*, 40 VAND. J. TRANSNAT'L L. 1, 11 (2007) (describing piracy as the oldest offense that invokes universal jurisdiction, dating back to the 16th century); Michael P. Scharf, *Application of Treaty-Based Universal Jurisdiction To Nationals of Non-Party States*, 35 NEW ENG. L. REV. 363, 369 (2001) (claiming that piracy was the primary widely accepted crime of universal jurisdiction, existing for over 500 years). Now universal jurisdiction applies to a wider range of crimes, such as genocide, war crimes and crimes against humanity.

[17] See MITSUE INAZUMI, UNIVERSAL JURISDICTION IN MODERN INTERNATIONAL LAW: EXPANSION OF NATIONAL JURISDICTION FOR PROSECUTING SERIOUS CRIMES UNDER INTERNATIONAL LAW (2005); UNIVERSAL JURISDICTION: NATIONAL COURTS AND THE PROSECUTION OF SERIOUS CRIMES UNDER INTERNATIONAL LAW (Stephen Macedo ed. 2004), for an analysis of universal jurisdiction.

[18] *See, e.g.*, Eugene Kontorovich, *The Piracy Analogy: Modern Universal Jurisdiction's Hollow Foundation,* 45 HARV. INT'L. L. J. 183, 184 (2004). Notably, other forms of jurisdiction could also apply to piracy on the high seas, which explains why universal jurisdiction is not always invoked. The flag state principle, a form of territorial

Dating back to the sixteenth century, universal jurisdiction over piracy has been an established principle of customary international law;[19] today, customary law and international agreements govern jurisdiction over piracy.[20] Notably, customary international law is binding on all states, unlike international agreements, which only govern the actions of the states that are party to them.[21] The relevant international agreements that apply to piracy are the United Nations

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jurisdiction, could apply, as ships are registered to a nation, and are considered state territory for the purposes of jurisdiction. Similarly, the nationality principle could be applied by the state where the pirates have nationality, as it allows a state to apply its laws to its citizens even if they are located outside its territory. Alternatively, passive personality principle allows a state to apply its laws to an offense committed extraterritorially if its citizen is a victim of that offense. Note that all of these principles have limitations in application. *See, e.g.*, Jon D. Peppetti, *Building the Global Maritime Security Network: A Multinational Legal Structure to Combat Transnational Threats*, 55 NAVAL L. REV. 73, 101-104 (2008).

[19] Note that there is some disagreement regarding the customary nature of universal jurisdiction over piracy, due to the lack of consistent state practice regarding prosecution. *See, e.g.*, Kontorovich, *supra* note 18, at 192 ("[U]niversal jurisdiction over pirates was more a matter of theory than of practice"); Eugene Kontorovich & Steven Art, *An Empirical Examination of Universal Jurisdiction for Piracy* (Northwestern Public Law Research Paper No. 09-26, 2010); 104 AM. J. INT'L. L. 8-9 (forthcoming 2010), *available at* http://ssrn.com/abstract=1519518 (calculating that universal jurisdiction was used in prosecuting only 0.53% of clearly universally punishable piracy cases between 1998 and 2007, with the figure increasing to 2.5% between 2008 and June 2009, and reporting that Kenya accounts for all but three cases of invoking universal jurisdiction over piracy in the past 12 years, with responsibility for 79% of cases); ALFRED P. RUBIN, THE LAW OF PIRACY 302, 348 n.50 (1988) (reporting that universal jurisdiction over piracy has been invoked "very few times.") The reasons for this rare usage are manifold but include the lack of domestic legislation to facilitate the prosecution of pirates under universal jurisdiction, as well as the fact that states are often reluctant to act as "world police," bearing the costs of prosecution without a direct nexus to the crime. *See, e.g.*, Peppetti, *supra* note 18, at 110-112 (discussing the limitations of universal jurisdiction). The first recent case of universal jurisdiction being invoked by a country with no direct connection to the piracy incident was by India, after the hijacking of the *Alondra Rainbow* in 1999. *See id.* at 108-109. Although ultimately, in 2003, the Mumbai Sessions Court sentenced the pirates to jail for up to seven years, initially India was reluctant to prosecute. As one Indian official stated: "What would happen if India convicted and imprisoned them, but after their release Indonesia refused to recognize or accept them? . . . They would become stateless people . . . Then the problem for India would be where to send them ." WILLIAM LANGEWIESCHE, THE OUTLAW SEA: CHAOS AND CRIME ON THE WORLD'S OCEANS 75 (2004). More than ten years after the *Alondra Rainbow* incident, the same problem exists, regarding the political will of states to prosecute, and their worry that they will be left responsible for the pirates, either if they fail to be convicted or after they have served their sentences. Partly due to this, so far few states—Kenya and Seychelles being notable exceptions—have been willing to prosecute pirates by invoking universal jurisdiction. Note that the ruling of the Mumbai Sessions Court was overturned by the Mumbai High Court in 2005 and all on trial were acquitted. *See* RS Nasan, *Alondra Rainbow Revisited, a Study of Related Issues in the Light of the Recent Judgment of Mumbai High Court* (South Asia Analysis Group, Paper 1379, 2005), *available at* http://www.southasiaanalysis.org/\papers14\paper1379.html; Vijay Sakhuja, *Maritime Legal Conundrum*, (Institute of Peace and Conflict Studies, India, Paper 1778, 2005), *available at* http://www.ipcs.org/article/india/maritime-legal-conundrum-1778.html.

[20] *See, e.g.*, M. Cherif Bassiouni, *Universal Jurisdiction For International Crimes: Historical Perspectives And Contemporary Practice*, 42 VA. J. INT'L L. 81, 113 (2001) (describing the evolution of the international crime of piracy over centuries through declarative prescriptions and enforcement proscriptions); Peppetti, *supra* note 18, at 105.

[21] *See, e.g.*, Peppetti, *supra* note 18, at 105.

Convention on the Law of the Sea (UNCLOS)[22] and the Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation (SUA, or the SUA Convention).[23]

The 1982 United Nations Convention on the Law of the Sea [24] defines piracy as:

> (a) any illegal acts of violence or detention, or any act of depredation, committed for private ends by the crew or the passengers of a private ship or a private aircraft, and directed:
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> (i) on the high seas, against another ship or aircraft, or against persons or property on board such ship or aircraft;
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> (ii) against a ship, aircraft, persons or property in a place outside the jurisdiction of any State;
>
> (b) any act of voluntary participation in the operation of a ship or of an aircraft with knowledge of facts making it a pirate ship or aircraft;
>
> (c) any act of inciting or of intentionally facilitating an act described in subparagraph (a) or (b). [25]

Although UNCLOS is not ratified by all states (a notable non-signatory being the United States), there is general acceptance that the definition of piracy in the Convention is a codification of international customary law.[26] Moreover, some states not party to UNCLOS, such as the US, are party to the 1958 High Seas Convention, which contains similar provisions.[27]

The relevant articles of UNCLOS (Articles 100-107 and Article 110; particularly Article 105) outline the definitions of piracy and pirate ships or aircrafts, as well as delineate some processes of seizing and boarding a ship. However, there are a number of limitations to the Convention.

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[22] United Nations Convention on the Law of the Sea, Dec. 10, 1982, 1833 U.N.T.S. 397 [hereinafter UNCLOS].
[23] Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation, Mar. 10, 1988, 1678 U.N.T.S. 221, 27 I.L.M. 668 (1998) [hereinafter SUA Convention].
[24] As of September, 2010 there were 160 State Parties and 157 signatories to the Convention. *See* United Nations Treaty Collection, *Chapter XXI Law of the Sea*, § 6, *available at* http://treaties.un.org/pages/ViewDetailsIII.aspx?&src=TREATY&mtdsg_no=XXI~6&chapter=21&Temp=mtdsg3&lang=en.
[25] UNCLOS, *supra* note 22, at Art. 101. Note that this is a more restricted definition of piracy than that used by the IMB in the compilation of its statistics, which were reported in the introductory section.
[26] *See, e.g.*, Bahar, *supra* note 16, at 10 (noting that the definition of piracy in the 1958 High Seas Convention and UNCLOS is customary international law, binding on all states); Erik Barrios, *Casting a Wider Net: Addressing the Maritime Piracy Problem in Southeast Asia*, 28 B.C. INT'L & COMP. L. REV. 149, 153 (reporting that UNCLOS is considered a codification of customary international law on piracy and that many would consider all states bound by the definition); Douglas Guilfoyle, *Piracy off Somalia: UN Security Council Resolution 1816 and IMO Regional Counter-Piracy Efforts*, 57 INT'L & COMP. L.Q 690, 693 (2008) (stating that the UNCLOS definition of piracy codifies customary international law and that universal jurisdiction over piracy has its basis in customary law). *But see* Rubin, *supra* note 19 (reporting on the difficulties of codifying piracy and pointing out that decisions regarding the definition of piracy split the International Law Commission while it was drafting the Convention).
[27] *See* Geneva Convention on the High Seas, Apr. 29, 1958, 13 U.S.T. 2312, 450 U.N.T.S. 82. *See also* Bahar, *supra* note 16, at 10; Tullio Treves, *Piracy, Law of the Sea, and Use of Force: Developments off the Coast of Somalia*, 20 EUR. J. INT'L L. 399, 401 (2009) (stating that UNCLOS Articles 100–107 and 110 are nearly identical to Articles 14–22 of the High Seas Convention and that, either as a matter of conventional or customary law, UNCLOS states the law as currently in force).

First, according to UNCLOS, piracy can only occur on the high seas, and not in territorial waters.[28] Approximately 60% of successful attacks on ships occur within territorial waters;[29] so UNCLOS does not apply to a large number of armed robberies on ships.[30]

Second, although Article 105 reiterates the concept of universal jurisdiction, stating that on the high seas, any state can seize a pirate ship, arrest the pirates, seize the possessions on board, and prosecute the suspects, there is no *obligation* on states to exercise jurisdiction, or to prosecute pirates.[31] The language used is permissive, as opposed to prescriptive. Therefore, although many states could prosecute pirates, few ultimately do so, as the prosecution of pirates rests not only on legal structures but also on the attitudes of decision makers operating within these structures.

Third, Article 105 is unclear regarding the transfer of suspected pirates from the seizing state to another state for prosecution. Munich Re, a German insurance company, claims that Article 105 only grants prosecution or punishment rights to the state that seized the vessel,[32] while Lanham reports that transferring suspects to third-party states for prosecution falls outside universal jurisdiction as delineated in UNCLOS.[33] Similarly, Kontorovich argues that this article restricts states other than the seizing state from prosecuting suspected pirates. Kontorovich draws on the Report of the International Law Commission's comments on Article 43, which he alleges indicate that the provision was intended to prevent transfers to other states.[34] However, in further

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[28] UNCLOS, *supra* note 22, at Art. 101. *See also* Eugene Kontorovich, "*A Guantanamo on the Sea": The Difficulties of Prosecuting Pirates and Terrorists*, 98 CAL. L. REV. 243, 263 (2010) (noting that as universal jurisdiction specifically applies to piracy on the high seas, at times when suspected pirates are caught, they claim to be fishermen). Territorial waters extend up to twelve nautical miles from a coastal state's baseline, while the contiguous zone stretches for a further twelve nautical miles. The exclusive economic zone exists up to 200 nautical miles from the baseline, and thereafter there are international waters.

[29] *See* International Maritime Organisation, *Reports on Acts of Piracy and Armed Robbery against Ships: Annual report 2009*, MSC.4/Circ.152, Annex 2 (Mar. 29, 2010) (reporting that 127 of the 210 successful attacks committed against ships in 2009 occurred within territorial waters or port areas. If attempted attacks are included, the number of attacks in international waters rises to 62% of the total [250 out of 406 attacks)]. The vast majority [82%] of attempted and committed attacks that occur in international waters are carried out in the East Africa region, and most of these attacks are attributed to Somali pirates).

[30] The SUA Convention, which will be discussed below, was developed partly in response to this limitation.

[31] UNCLOS, *supra* note 22, at Art. 105

> 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. The courts of the State which carried out the seizure may decide upon the penalties to be imposed, and may also determine the action to be taken with regard to the ships, aircraft or property, subject to the rights of third parties acting in good faith.

[32] Munich Re, *Knowledge Series, Piracy – Threat at Sea: A Risk Analysis* 26 (2009).

[33] Honor Lanham, Walk the Plank: Somali Pirates and International Law 33 (Oct. 2009) (unpublished L.L.B dissertation, University of Otago), *available at* http://www.otago.ac.nz/law/oylr/2010/Honor_Lanham.pdf.

[34] *See* Eugene Kontorovich, *International Legal Responses to Piracy off the Coast of Somalia*, 13 AM. SOC'Y INT'L L. n.21 (Feb. 6, 2009), *available at* http://www.asil.org/insights090206.cfm. *See also* Posting of Eugene Kontorovich to http://opiniojuris.org/2009/02/17/one-solution-to-piracy-try-pirates-in-kenya/ (Feb. 18, 2009, 8:53 p.m. EST) (noting that the International Law Commission commentary states "This article gives any State the right

discussion, Kontorovich muses that the article may have meant to preclude admiralty courts or prize courts in foreign countries, or that at least the text is unclear on the point.[35]

Conversely, Azubuike states that nothing in Article 105 makes it exclusive to the seizing state; rather, the language is permissive. Moreover, he points out that UNCLOS codified customary law of universal jurisdiction, and stipulates that if it intended to depart from universal jurisdiction, it would have been much clearer in its provisions.[36] Notably, to date no court has ruled on the stipulations present in Article 105, but doing so could potentially be problematic for states that transfer suspects to a third-party state for prosecution.

Fourth, and finally, there is some debate surrounding the "private ends" provision in the UNCLOS definition of piracy. Barrios reports that UNCLOS excludes attacks that are politically motivated. For example, he claims that maritime terrorism, such as environmental attacks with hijacked oil tankers, do not fall within the realm of UNCLOS.[37] Guilfoyle challenges this, asserting that "private ends" must be interpreted broadly to mean any action that lacks state sanction. He draws on the Belgian Court of Cassation's ruling in *Castle John v. NV Mabeco* (1986), wherein Greenpeace protestors boarded and damaged two ships on the high seas, reportedly to draw attention to the environmental damage caused by ships discharging waste into the sea. The court ruled that violence by the occupants of one private vessel against another vessel, even as a form of political protest, furthered private ends and constituted piracy. A non-private act must directly relate to the interests of, or impinge upon, the state or state system.[38] As Lanham points out, this ruling counters the earlier Harvard Draft Convention on Piracy.[39] Moreover, it rests on a highly subjective determination of what affects the interests of the state system.

What is clear is that the "private ends" provision lacks clarity. Regarding piracy off the coast of Somalia, to the author's knowledge there has been no attempt to argue against a piracy charge using the "private ends" provision, and evidence indicates that the attacks are privately motivated.[40] Guilfoyle reports that Somali pirates even declare that they are operating for private

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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 the jurisdiction of another State.").

[35] *See* Posting of Eugene Kontorovich, *supra* note 34 ("Now that I think about it, the commentary might be read as meaning that one cannot create admiralty or prize courts in foreign countries, which was occasionally a point of contention between countries . . . Of course a middle possibility is that the text is unclear."). Note that prize courts are courts that are authorized to consider whether vessels and goods have been lawfully captured and seized at sea during times of war. Prize courts are one branch of admiralty courts in the United Kingdom, while in the United States district courts have jurisdiction over prize cases.

[36] Lawrence Azubuike, *International Law Regime Against Piracy*, 15 ANN. SURV. INT'L & COMP. L., 43, 54-55 (2009).

[37] Barrios, *supra* note 26, at 156.

[38] Guilfoyle, *supra* note 26, at 693-4. *See also* Bahar, *supra* note 16, at 30 (stressing that what is critical is "not the actor's intent, but whether a state can be held liable for the actor's actions.").

[39] Lanham, *supra* note 33, at 16-20. *See* Harvard Research in Int'l Law, Draft Convention and Comment on Piracy, 26 AM. J. INT'L L. 739, 857 (Supp. 1932) [hereinafter Harvard Draft Convention] (noting that forcible acts for political ends should not fall under the common jurisdiction of all states as piracy).

[40] Note that a number of reports have alleged that the first hijackings were by fishermen acting as a self-appointed coastguard. *See, e.g.,* Andrew Mwangura, *Somalia: Pirates or Protectors*, PAMBAZUKA NEWS (May 20, 2010)

ends, which makes commercial sense, since some ransoms cannot be paid under anti-terrorism regulations.[41]

The SUA Convention addresses a number of perceived gaps in UNCLOS, although it was drafted primarily to combat maritime terrorism.[42] However, it differs from UNCLOS in that it is binding only on those states that are signatories.[43] For the purposes of this paper only selected aspects of SUA are discussed. It is worth mentioning that SUA covers attacks that are carried out in territorial waters, providing that attacked ships are on course to navigate outside that territory.[44] It permits jurisdiction by any signatory state that has a connection to the offense; for example if the act is carried out in a state's territory, is against a ship flagged to that state, is committed by a state national, or, alternatively, if a state national is a victim of the offense.[45] In addition, Article 8(1) of SUA provides for the transfer of a suspected pirate to any other State Party. Moreover, SUA Article 10 mandates prosecution or extradition of suspects by states. However, the Convention does not commit a State Party to take an offender into custody; thus this obligation can be avoided by not arresting the suspects in the first place.[46] To date, SUA has

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available at http://allafrica.com/stories/201005200856.html. However, piracy has transformed since then into a multi-million dollar industry, transcending continents. *See, e.g.*, Rotberg, *supra* note 5, at 3 (reporting that piracy is now big business, involving about 1,500 Somalis and comprising seven syndicates, which stretch from Somalia to Kenya, Dubai, Lebanon and even Russia). There has been no evidence of a link between terrorism and piracy off Somalia to date. *But see, e.g.*, Bahar, *supra* note 16 (discussing the potential connection); Sandeep Gopalan, *Put Pirates to the Sword: Targeted killings are a necessary, justified and legal response to high-seas piracy*, WALL STREET JOURNAL, Jan. 18, 2010 (stating that Somali pirates have links to al Qaeda elements).

[41] Douglas Guilfoyle, *Counter-Piracy Law Enforcement and Human Rights*, 59 INT'L & COMP. L.Q. 141, 143 (2010). Another alleged shortfall of UNCLOS is that it indicates that there must be two ships involved for an act to be regarded as piracy. This issue is not immediately relevant to the present paper but for further information see Yvonne M. Dutton, *Bringing Pirates to Justice: A Case for Including Piracy within the Jurisdiction of the International Criminal Court*, 11 CHI. J. INT'L L. 201 (2010).

[42] The SUA preamble expresses concern about the increase in terrorist acts, SUA Convention, *supra* note 23. *See also* Phani Dascalopoulou-Livada, *Piracy - The Revival of the Phenomenon and the Legal Problems it Poses*, (Min. of Foreign Affairs, Athens, Greece, Sept. 2009) (reporting that SUA is an anti-terrorist convention); Jill Harrelson, *Blackbeard Meets Blackwater: An Analysis of International Conventions that Address Piracy and the Use of Private Security Companies to Protect the Shipping Industry*, 25 AM. U. INT'L L. REV. 283, 286 (2009-2010) (stating that the Convention's main purpose is to combat terrorism).

[43] As of May, 2010 there were 156 signatories to SUA. Signatories include the majority of states with a nexus to piracy, although Somalia is a notable exception. *See* Center for Nonproliferation Studies, *Convention for the Suppression of Unlawful Acts of Violence against the Safety of Maritime Navigation (SUA), Protocol for the Suppression of Unlawful Acts of Violence against the Safety of Fixed Platform located on the Continental Shelf, SUA 2005 Protocol and the Montreal Convention*, *available at* http://www.nti.org/e_research/official_docs/inventory/pdfs/apmsuamontreal.pdf.

[44] SUA Convention, *supra* note 23, at Art. 4.

[45] *Id.* at Art. 6.

[46] *Id.* at Art. 7 (permitting State parties to take suspects into custody).

rarely been invoked as a basis for prosecution,[47] although it has been presented in various UNSCRs as grounds for establishing jurisdiction to prosecute pirates.[48]

In addition to the above conventions, the UN Security Council has passed resolutions to complement the existing law on piracy, specifically with regard to Somalia.[49] Beginning with UNSCR 1816 in 2008, there have been a series of resolutions, the most recent being UNSCR 1918 in April of 2010.[50] Developed under the authorization of Chapter VII of the UN Charter, these resolutions sanction states to use "all necessary means" to repress piracy.[51] They also allow states to enter Somali territorial waters,[52] while UNSCR 1851 permits counter-piracy activities on Somali soil.[53] However, this authority to enter Somali territory is available only to cooperating states, operating with the permission of the Somali TFG, as notified to the Security Council in advance. As Guilfoyle points out, this provision makes the resolutions appear redundant, as Chapter VII authorization is not needed for consensual operations.[54] However, the resolutions do contain some novel powers; for example, UNSCRs 1846, 1851, and 1897 permit states to seize and dispose of equipment that could be used in piracy activities.[55] Notably, the European Union Naval Force (EU NAVFOR) recently began using more proactive tactics,

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[47] *See* Kontorovich, *supra* note 28, at 254 n.83 (reporting that the only case of prosecution under SUA to date was *United States v. Shi* 525 F.3d 709). *See also* Dascalopoulou-Livada, *supra* note 42 (questioning the use of SUA to combat piracy while highlighting the document's origins primarily as an anti-terrorist convention, and querying whether courts would be willing to accept this divergence from the original application of its provisions).

[48] *See* S.C. Res. 1897, U.N. Doc. S/RES/1897 (Nov. 30, 2009) at preamble, ¶ 14; S.C. Res. 1851, U.N. Doc. S/RES/1851 (Dec. 16, 2008) at preamble ("[*R*]*eiterating* that the 1988 Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation ['SUA Convention'] provides for parties to create criminal offences, establish jurisdiction, and 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.").

[49] Notably these resolutions are not customary law, neither are they applicable to any situation other than piracy off Somalia. *See, e.g.,* S.C. Res. 1816, U.N. Doc. S/RES/1816 ¶ 9 (June 2, 2008) ("*Affirms* that the authorization provided in this resolution applies only with respect to the situation in Somalia and . . . shall not be considered as establishing customary international law.").

[50] *See* S.C. Res. 1816, *supra* note 49; S.C. Res. 1838, U.N. Doc. S/RES/1838 (Oct. 7, 2008); S.C. Res. 1846, U.N. Doc. S/RES/1846 (Dec. 2, 2008); S.C. Res. 1851, *supra* note 48; S.C. Res. 1897, *supra* note 48; S.C. Res. 1918, U.N. Doc. S/RES/1918 (Apr. 27, 2010).

[51] *See, e.g.,* S.C. Res. 1816, *supra* note 49, ¶ 7(b) (permitting states to "[u]se, within the territorial waters of Somalia, in a manner consistent with action permitted on the high seas with respect to piracy under relevant international law, all necessary means to repress acts of piracy and armed robbery").

[52] *See* S.C. Res. 1816, *supra* note 49, ¶ 7(b); S.C. Res. 1846, *supra* note 49, ¶ 10.

[53] *See* S.C. Res. 1851, *supra* note 48, ¶ 6, renewed in S.C. Res. 1897, *supra* note 48, ¶ 7.

[54] Guilfoyle, *supra* note 41, at 147.

[55] *See, e.g.,* S.C. Res. 1851, *supra* note 48, ¶ 2

> *Calls* upon States, regional and international organizations that have the capacity to do so, to take part actively in the fight against piracy and armed robbery at sea off the coast of Somalia, in particular, consistent with this resolution, resolution 1846 (2008), and international law, by deploying naval vessels and military aircraft and through seizure and disposition of boats, vessels, arms and other related equipment used in the commission of piracy and armed robbery at sea off the coast of Somalia, or for which there are reasonable grounds for suspecting such use.

See also S.C. Res. 1846, *supra* note 50, ¶ 9; S.C. Res. 1897, *supra* note 48, ¶ 3.

destroying equipment and skiffs suspected of being used in piracy, a technique which, according to reports, has been highly effective.[56] The above-mentioned resolutions expressly authorize such action by international organizations.[57]

In addition, a series of agreements have been signed among regional states and some states engaging in counter-piracy operations, as well as the European Union (EU). These Memoranda of Understanding between Kenya and the US, UK, Denmark, Canada, China, and the EU, and between Seychelles and the EU, govern the transfer of pirates to Kenya and Seychelles for prosecution.[58] Notably, the North Atlantic Treaty Organization (NATO) Standing Maritime Group has no common legal framework to transfer pirates to third-party states for trial;[59] hence, states operating under its command revert to domestic laws and decisions when they take suspected pirates into custody.

Despite these international treaties, agreements, and resolutions, adequate domestic laws are required to ensure the prosecution of pirates, and many states encounter barriers to combating piracy within their domestic legislation. For example, some countries, such as Germany and France, do not confer police powers on the military.[60] Moreover, Denmark and Germany can

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[56] *See* European Union Naval Force Somalia, EUNAVFOR Proactive Tactics Proving Successful in the Gulf of Aden (June 18, 2010), http://www.eunavfor.eu/2010/06/eu-navfor-proactive-tactics-proving-successful-in-the-gulf-of-aden/; European Union Naval Force Somalia (Northwood), EU NAVFOR's Seek, Disrupt and Destroy Policy Continues It's [sic] Success (May 2, 2010), http://www.eunavfor.eu/2010/05/eu-navfors-seek-disrupt-and-destroy-policy-continues-its-success/. Note that the effectiveness of such proactive techniques has yet to be confirmed through robust research.

[57] *See, e.g.*, S.C. Res. 1851, *supra* note 48, ¶ 2.

[58] *See, e.g.*, Alphonce Shiundu, *AG Queried over Kenya's Role on Piracy Cases*, DAILY NATION, Mar. 30, 2010, *available at* http://www.nation.co.ke/News/AG%20queried%20over%20Kenya%20role%20in%20piracy%20cases/-/1056/889516/-/l96m63/-/index.html. *See also* European Union Common Security and Defence Policy, EU Naval Operation Against Piracy (EUNAVFOR – Operation ATALANTA), at 2, EUNAVFOR/17 (Apr. 25, 2010), *available at* http://www.consilium.europa.eu/uedocs/cms_data/docs/missionPress/files/100426%20Factsheet%20EU%20NAVFOR%20Somalia%20-%20version%2017_EN.pdf (noting that the EU has attempted to sign similar deals with Tanzania, Mauritius, South Africa, and Uganda, however to date none of these agreements have been formulated); IMB April 2010 Report, *supra* note 3, at 28 (reporting that Kenya cancelled its agreement with Denmark and the UK and that it stated in April of 2010 that it was unwilling to take more suspected pirates for prosecution). *But see, e.g.*, *Somalia Says Relations With Russia May Be Harmed Over Pirates' Treatment*, *supra* note 1 (claiming that in May of 2010 Kenya agreed to start accepting cases for prosecution again, however only on a case-by-case basis); EU NAVFOR Somalia, Suspected Pirates Now Transferred to Kenyan Authorities for Prosecution (Sept. 30, 2010), http://www.eunavfor.eu/2010/09/suspected-pirates-now-transferred-to-kenyan-authorities-for-prosecution/ (stating that on the 29th of September, 2010, Kenyan authorities accepted four suspected pirates for prosecution).

[59] *See High Time for Piracy Tribunal*, RADIO NETHERLANDS WORLDWIDE (May 20, 2009), http://www.rnw.nl/international-justice/article/high-time-piracy-tribunal-experts-say (noting that the decision of whether or not to prosecute pirates was up to the Netherlands, as the seizing ship was part of the NATO mission, which has no agreement in place with regard to prosecuting pirates).

[60] *See* European Security and Defence Assembly, Assembly of the Western European Union, *Report: The Role of the European Union in Combating Piracy*, ¶ 65, Doc. A/2037 (June 4, 2009) (stating that Germany does not confer police powers on the military, or permit armed forces to conduct police missions at sea).

only prosecute pirates if they have impacted national interests or citizens,[61] and some states have no definition of piracy in domestic law.[62] To address this, UNSCRs 1851 and 1897 highlight the lack of domestic legislation, and UNSCR 1897 explicitly calls on states to enact laws to criminalize piracy.[63]

Part II – Laws Protecting Pirates

Alongside (and often integrated with) the legal instruments supporting counter-piracy operations exists an international human rights system that was developed to protect the rights of all individuals. Although the doctrine of human rights is premised on philosophical and moral arguments—in that it is based on the notion that there exists a certain rational, moral order or universalism—this paper will not turn to philosophical or ethical reasoning. Rather, it is firmly situated within a legal perspective, examining the system of reputable behavior that has developed, been codified in legal instruments, and supported by states.

Prominent conventions that are particularly relevant to the issue of piracy, and that will be discussed throughout the paper, are the 1984 Convention Against Torture (CAT), the 1966 International Covenant on Civil and Political Rights (ICCPR or the Covenant), and the 1950 European Convention on Human Rights (ECHR).[64] Such conventions place positive and negative obligations on states to ensure that individuals' rights are protected. In addition, the UNSCRs relevant to piracy off the coast of Somalia make specific references to human rights law. For example, UNSCR 1918 calls on states to criminalize piracy in domestic law, and to "consider the prosecution of suspected, and imprisonment of convicted, pirates apprehended off the coast of Somalia, consistent with applicable international human rights law."[65] Additionally, UNSCR 1851, which authorizes operations in Somalia to suppress acts of piracy and armed robbery at sea (upon request of the TFG), requires states to comply with applicable international humanitarian law as well as international human rights law.[66] According to Kontorovich, the specific reference to international humanitarian law limits the scope of operations, as pirates are civilians, not

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[61] *See* Roger Middleton, *Pirates and How to Deal With Them*, 4, Chatham House Africa Programme/International Law Briefing Note: AFP/IL BN 2009/01 (Apr. 22, 2009) (noting that Denmark and Germany can prosecute pirates only if they have threatened citizens or national interests).

[62] *See Report: The Role of the European Union in combating piracy*, *supra* note 60, ¶ 65.

[63] S.C. Res. 1851, *supra* note 48, at preamble; S.C. Res. 1897, *supra* note 48, at preamble.

[64] Note that although the ECHR is a regional instrument it merits significant scrutiny in this paper, partly due to the number of member states that are engaging in counter-piracy off Somalia and partly because it presents one of the most detailed or rigorous human rights protection mechanisms. In addition, a number of its provisions have equivalents in customary international law.

[65] S.C. Res. 1918, *supra* note 50, ¶ 2. *See also* S.C. Res. 1816, *supra* note 49, ¶ 11; S.C. Res. 1846, *supra* note 50, ¶ 14; S.C. Res. 1851, *supra* note 48, ¶¶ 6-7; SC Resolution 1897, *supra* note 48, ¶¶ 11-12.

[66] S.C. Res. 1851, *supra* note 48, ¶ 6, renewed in SC Resolution 1897, *supra* note 48, ¶7. Note that resolution 1851 has been criticized as likely to cause civilian casualties. *See* Eugene Kontorovich, Piracy and International Law, Global Law Forum (Feb. 8, 2009), http://www.globallawforum.org/ViewPublication.aspx?ArticleId=96). International humanitarian law, sometimes described as the law of war or armed conflict, is a body of law that aims to protect civilians and non-combatants from the effects of armed conflict, as well as restricting some of the means and methods of warfare. Conversely, international human rights law is a body of international law, comprised mainly of treaty and customary law, which seeks to promote and protect human rights by imposing international standards of conduct.

combatants, and, in accordance with international humanitarian law, may not be specifically targeted except in self-defense.[67] Guilfoyle counters Kontorovich, claiming that pirates are neither civilians immune from targeting, nor combatants who may be subject to lethal force, but rather criminals who can be captured using reasonable force.[68] Importantly, UNSCR 1851 refers to "applicable" international humanitarian law, meaning that not all humanitarian law is considered relevant.

Legal Status of Pirates

There are dissenting opinions regarding the treatment of pirates, not least due to the confusion over their status as criminals, combatants, and/or civilians. Rivkin and Casey argue that pirates should be prosecuted in admiralty courts, as opposed to a criminal-justice model, because under international law, common criminals cannot be targeted with military force.[69] Meanwhile, Gopalan argues that lethal force should be used against piracy.[70]

Until the 20th century, pirates were similar in status to unlawful combatants, in that they could be tried as civilians or attacked and killed on the high seas.[71] However, pirates operating off Somalia today are generally not considered combatants engaged in a war.[72] Bahar links the status of combatants to the private ends requirement of piracy; piracy involves acts that are not sanctioned by states, therefore they cannot be dealt with using the laws of war and diplomacy—

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[67] Kontorovich, *supra* note 34.
[68] Guilfoyle, *supra* note 41, at 148.
[69] David B. Rivkin and Lee A. Casey, *Pirates Exploit Confusion about International Law*, WALL STREET JOURNAL, Nov. 19, 2008. Note that admiralty courts are courts that exercise jurisdiction over maritime contracts, torts, injuries, or offenses. In the US they now operate under the jurisdiction of federal district courts. In 1966, admiralty law in the US was subsumed under the Federal Rules of Civil Procedure, although procedural differences remain between admiralty courts and many other civil proceedings; for example in admiralty cases there is generally no right to a jury trial. Meanwhile, criminal law is a body of statutory and common law that addresses crime and the legal punishment of criminal offenses.
[70] Gopalan, *supra* note 40.
[71] *See* Harvard Draft Convention *supra* note 39, at 853 (stating that summary proceedings on board a ship would be "inconsistent with the spirit of modern jurisprudence," and that a formal, fair trial was required under municipal law. Note that this point was not clear-cut, as the Harvard Draft recognized that some commentators claimed that summary execution of pirates was permitted under the law of nations); Kontorovich, *supra* note 28, at 257 (describing how international law permitted summary shipboard executions, and claiming that pirates had the disabilities of both criminals and combatants, and the immunities or privileges of neither party).
[72] *See* NATO Parliamentary Assembly, *The Growing Threat of Piracy to Regional and Global Security*, 169 CDS 09 E rev 1 ¶ 39 (2009), *available at* http://www.nato-pa.int/default.asp?SHORTCUT=1770 (stating that pirate acts are not considered acts of war); Treves, *supra* note 27, at 412 (commenting that force is not used against pirates in accordance with the law of armed conflict, as there is no armed conflict). *But see* Kontorovich, *supra* note 28 (noting that pirates could claim combatant status under the Third Geneva Convention, and stating that although Article 4's conditions may not strictly be fulfilled, countries may, nonetheless, feel that some Geneva protections should be accorded to pirates); Kontorovich, *supra* note 66 (proposing that the operations against Somali pirates could possibly be described as an "armed conflict not of an international character," which would entitle pirates to protection under common Article 3 of the Geneva Conventions); Michael H. Passman, *Protections Afforded to Captured Pirates under the Law of War and International Law*, 33 TUL. MAR. L.J. 1, 4, 20-22 (2008) (claiming that the Third Geneva Convention applies to a select group of Somali pirates who are either members of armed forces but engaging in piracy for private ends, or fighting as part of an organized resistance movement).

they are criminal attacks to be addressed accordingly.[73] Article 110 of UNCLOS provides the legal basis for the use of force; however, its use is within a policing, as opposed to a military, role.[74]

In the case of Somalia, the UNSCRs permit the use of force, but they do not specifically define the nature of that force or the manner in which pirates can be seized.[75] Thus, it is necessary to revert to general international law, which establishes rules regarding the use of force in maritime policing actions. Namely, warships may use reasonable force, where necessary, in policing operations.[76]

The Extraterritorial Application of Human Rights Law

All of the human rights treaties under analysis in this paper have applicability beyond state territory, although the extent of jurisdiction is not always clear.[77] As suspected pirates are seized extraterritorially, the issue of whether suspected pirates are under the jurisdiction of seizing states for the purposes of relevant treaties is of prime importance. The relevant articles are Article 2(1) of CAT, Article 2(1) of the ICCPR, and Article 1 of the ECHR.[78]

The International Covenant on Civil and Political Rights

In the case of the ICCPR, the Human Rights Committee consistently separates the notions of territoriality and jurisdiction when deciding on obligations under the Covenant. In other words, a person does not have to be within the territory of a specific ICCPR member-state to be within the jurisdiction of the Covenant. For example, in the 1979 case of *Sergio Euben López Burgos v. Uruguay*, the Committee applied the ICCPR to the arrest and mistreatment of the plaintiff by

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[73] Bahar, *supra* note 16, at 31.
[74] *See* Middleton, *supra* note 61, at 2-3; NATO Parliamentary Assembly, *supra* note 72, ¶ 39.
[75] *See* Treves, *supra* note 27, at 412 ("It is well known that in the parlance of the Security Council 'all necessary means' means 'use of force'").
[76] *See* Douglas Guilfoyle, Piracy off Somalia: A Sketch of the Legal Framework, EJIL Analysis (Apr. 20, 2009), http://www.ejiltalk.org/piracy-off-somalia-a-sketch-of-the-legal-framework/. *See also* DOUGLAS GUILFOYLE, SHIPPING INTERDICTION AND THE LAW OF THE SEA, 277-293 (2009) (discussing, more comprehensively, the use of force during interdiction at sea).
[77] *See, e.g.*, Sophie Cacciaguidi-Fahy, *The Law of the Sea and Human Rights*, 9 PANÓPTICA 1, 17-18 (July-Aug 2007), *available at* http://www.panoptica.org/julho_agosto07/009_76A1.pdf (stating that human rights obligations cannot be avoided by extraterritorial exercises of jurisdiction).
[78] Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. Res. 39/46, Annex, at Art. 2(1), UN GAOR, 39th Sess., Supp. No. 51 at 197, U.N. Doc. A/39/51 (1984) [hereinafter Torture Convention] ("Each State Party shall take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction"); International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI), at Art. 2(1), UN GAOR, 21st Sess., Supp. No. 16 at 52, UN Doc. A/6316 (1966) [hereinafter ICCPR] ("Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status"); Convention for the Protection of Human Rights and Fundamental Freedoms, ETS 5; 213 UNTS 221 Art. 1 (1950) [hereinafter ECHR] ("The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention").

Uruguayan agents in Argentina.[79] On the interpretation of the phrase "within its territory," one member of the Human Rights Committee, in an individual opinion, stated that to not hold states responsible for conduct abroad would lead to "utterly absurd results."[80] Furthermore, General Comment No. 31 issued by the Human Rights Committee reaffirms the extraterritorial reach of the ICCPR, and has special relevance for any state acting as a member of multi-national operations in the Gulf of Aden. It states 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 . . . [The] enjoyment of Covenant rights is not limited to citizens of States Parties but must also be available to all individuals, regardless of nationality or statelessness, such as asylum seekers, refugees, migrant workers and other persons, who may find themselves in the territory or subject to the jurisdiction of the State Party. This principle also applies to those 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. [81]

Thus, when establishing extraterritorial jurisdiction under the ICCPR, what is important is whether a person is under the effective control of a State Party.

The Convention Against Torture[82]

It is clear that jurisdiction in the case of CAT applies to a flagged ship. For example, Article 5(1) explicitly states that a State Party should put measures in place to establish its jurisdiction over acts of, complicity in, or attempts to commit torture that are carried out on vessels registered in that state.[83] The Committee Against Torture's General Comment No. 2 indicates that jurisdiction

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[79] Sergio Euben Lopez Burgos v. Uruguay, Communication No. R.12/52, U.N. Doc. Supp. No. 40 (A/36/40) at 176 (1981). *See also* Michal Gondek, *Extraterritorial Application of the European Convention on Human Rights: Territorial Focus in the Age of Globalization?* 52 NETHERLANDS INTERNATIONAL LAW REVIEW 349, 377, 379 (2005).

[80] *See* Rick Lawson, *Life After Banković: On the Extraterritorial Application of the European Convention on Human Rights, in* EXTRATERRITORIAL APPLICATION OF HUMAN RIGHTS TREATIES 83, 94 (Fons Coomans & Menno T. Kamminga eds., 2004) (reporting the opinion of Mr. Chr. Tomuschat).

[81] Human Rights Committee, *General Comment No. 31 [80] The Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, ¶ 10, CCPR/C/21/Rev.1/Add.13 (May 26, 2004). *See also* International Court of Justice, *Advisory Opinion on Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, ¶¶107-13 (July 9, 2004), *available at* http://www.icj-cij.org/docket/files/131/1671.pdf (endorsing the Human Rights Committee jurisprudence); Gondek, *supra* note 80, at 379-80 (offering further analysis of the issue).

[82] As of 31 August, 2010, there were 147 parties to the Torture Convention. United Nations Treaty Collection, *Chapter IV Human Rights*, § 9, *available at* http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-9&chapter=4&lang=en. Notably, India has signed but not ratified the Torture Convention, and some states, including Singapore and Malaysia, are not parties.

[83] Torture Convention, *supra* note 78, at Art. 5(1)(a) ("Each State Party shall take such measures as may be necessary to establish its jurisdiction over the offences referred to in article 4 in the following cases: 1. When the offences are committed in any territory under its jurisdiction or on board a ship or aircraft registered in that State").

also applies to agents of the State in control of suspected pirates on the high seas, even if they are not on board the flagged ship, if it is considered that they have *de facto* effective control.[84]

The territorial scope of CAT, particularly Article 3, is debated. The US, for example, upholds that human rights treaties apply to persons living on US territory, and not necessarily to persons who interact with state agents in the international community.[85] As such, the U.S. State Department informed the Committee Against Torture that the US did not regard Article 8 as applicable to individuals outside US territory, although it was claimed that as a matter of policy, it did accord Article 3 protection to individuals in US custody. Importantly, the Committee Against Torture disagreed with the US on its restricted interpretation of the extraterritorial application of CAT.[86]

The European Convention on Human Rights

Extraterritorial jurisdiction under the ECHR is more ambiguous, and the case law to date does not provide clear guidance to state parties.[87] A more comprehensive analysis of existing

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See also MANFRED NOWAK AND ELIZABETH MCARTHUR, THE UNITED NATIONS CONVENTION AGAINST TORTURE: A COMMENTARY 308-10 (2008) (commenting that the member-state's duty to establish jurisdiction on ships applies regardless of the location where the offence is committed).

[84] U.N. Committee Against Torture, *Convention against torture and other cruel, inhuman or degrading treatment or punishment, General Comment No. 2, Implementation of Article 2 by States Parties*, ¶ 16, U.N. Doc. CAT/C/GC/2/CRP.1/Rev.4 (Nov. 23, 2007)

> The Committee has recognised that "any territory" includes all areas where the State exercises, directly or indirectly, in whole or in part, *de jure* or *de facto* effective control, in accordance with international law. The reference to "any territory" in article 2, like that in articles 5, 11, 12, 13, and 16, refers to prohibited acts committed not only onboard a ship or aircraft registered by a State party, but also during military occupation or peacekeeping operations and in such places as embassies, military bases, detention facilities, or other areas over which a State exercises factual or effective control. The Committee notes that this interpretation reinforces article 5, paragraph 1 (b), which requires that a State Party must take measures to exercise jurisdiction "when the alleged offender is a national of the State." The Committee considers that the scope of "territory" under article 2 must also include situations where a State Party exercises, directly or indirectly, *de facto* or *de jure* control over persons in detention.

See also id. ¶ 17 ("The Committee observes that States parties are obligated to adopt effective measures to prevent public authorities and other persons acting in an official capacity from directly committing, instigating, inciting, encouraging, acquiescing in or otherwise participating or being complicit in acts of torture as defined in the Convention."); U.N. Committee against Torture, *Consideration of Reports Submitted by States Parties under Article 19 of the Convention, Conclusions and Recommendations: USA*, U.N. Doc. CAT/C/USA/CO/2, ¶ 15 (July 25, 2006) [hereinafter Committee against Torture, *USA Report*] ("The Committee notes that a number of the Convention's provisions are expressed as applying to 'territory under [the State party's] jurisdiction' (Arts. 2, 5, 13, 16). The Committee reiterates its previously expressed view that this includes all areas under the de facto effective control of the State party, by whichever military or civil authorities such control is exercised.").

[85] *See* Michael John Garcia, *Renditions: Constraints Imposed by Laws on Torture*, Congressional Research Service, at 14 (Sept. 8, 2009).

[86] *See* Committee Against Torture, *USA Report*, *supra* note 85, ¶ 15.

[87] *See* Michael O'Boyle, *The European Convention on Human Rights and Extraterritorial Jurisdiction: A Comment on 'Life after Bankovic', in* EXTRATERRITORIAL APPLICATION OF HUMAN RIGHTS TREATIES, *supra* note 81, at 125,

jurisprudence is found in the appendix; the discussion here will be limited to examining the relevance of those judgments in the case of piracy.

It is relatively uncontested that a flagged vessel falls within ECHR jurisdiction.[88] As Lanham states, "a ship is essentially construed as a floating island for the purposes of jurisdiction."[89] ECHR case law reiterates this interpretation.[90] Hence, if a member-state takes suspected pirates on board its own vessel, it is bound by its obligations under the Convention. However, obligations are less clear regarding operations on board (or against) a pirate skiff.

To date, the European Court of Human Rights (ECtHR) has focused on two criteria to establish extraterritorial jurisdiction: "effective control" of an area, and "authority and control" over a person.[91] In the 2010 case of *Medvedyev v. France*, the ECtHR Grand Chamber Authority established that if a State Party to the ECHR exercises coercive law-enforcement jurisdiction over a foreign vessel on the high seas, then the vessel, and its occupants, come under ECHR jurisdiction.[92] However, in the case of *Medvedyev*, the crew of the foreign vessel was brought in for prosecution; it is less clear if suspected pirates who are disarmed and deterred, but not taken in for prosecution, would come under ECHR jurisdiction. To date, there is no ECHR jurisprudence specifically relating to piracy. Nonetheless, drawing on other cases, if suspected

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128 (stating that "law on jurisdiction is still in its infancy"). For a more detailed look at existing jurisprudence please see Appendix I.

[88] *See* Tarik Abdel-Monem, *The Long Arm of the European Convention on Human Rights and the Recent Development of Issa v. Turkey*, HUMAN RIGHTS BRIEF, 9, 9 (2005), http://www.wcl.american.edu/hrbrief/12/2abdel.pdf?rd=1.

[89] Lanham, *supra* note 33, at 25.

[90] *See, e.g.*, Banković v. Belgium, 2001-XII Eur. Ct. H.R. 333 ¶ 59 (GC) (admissibility decision) [hereinafter Banković]

> While international law does not exclude a State's exercise of jurisdiction extra-territorially, the suggested bases of such jurisdiction [including nationality, flag, diplomatic and consular relations, effect, protection, passive personality and universality] are, as a general rule, defined and limited by the sovereign territorial rights of the other relevant States . . . Additionally, the Court notes that other recognised instances of the extra-territorial exercise of jurisdiction by a State include cases involving the activities of its diplomatic or consular agents abroad and on board craft and vessels registered in, or flying the flag of, that State. In these specific situations, customary international law and treaty provisions have recognised the extra-territorial exercise of jurisdiction by the relevant State.

Medvedyev and Others v. France, Eur. Ct. H.R. No. 3394/03 ¶ 65 (July 10, 2008) [hereinafter Medvedyev 2008] http://cmiskp.echr.coe.int ("the Court notes that other recognised instances of the extraterritorial exercise of jurisdiction by a State include cases involving the activities of its diplomatic or consular agents abroad and on board aircraft and ships registered in, or flying the flag of, that State").

[91] *See, e.g.*, Issa v. Turkey, 41 Eur. Ct. H.R. 27 ¶¶ 72, 74 (2004). See also Öcalan v. Turkey, 2005-IV Eur. Ct. H.R. 282 ¶ 91 (GC) where the Court refers to the degree of "authority and control," as well as Loizidou v. Turkey, 310 Eur. Ct. H.R. (ser. A) (1995) (GC) (preliminary objections) wherein the Court established jurisdiction in a case where Turkey had effective control over an area outside state territory.

[92] This case is further discussed in the appendix.

pirates are under the physical control of member-state agents, they could be found to be within ECHR jurisdiction.[93]

Warships attempting to fight piracy operate under a range of national and international mandates with a decentralized legal framework. Thus, before proceeding, it is important to briefly outline ECHR jurisdiction with regard to forces operating under international mandates.[94] In general, the ECtHR appears reluctant to establish jurisdiction over the actions of multi-national forces operating under UNSCR mandates. The ECtHR's admissibility decision in the joined cases of *Behrami and Behrami v. France (2007)* and *Saramati v. France, Germany, and Norway (2007)*, which was widely criticized, held that the actions of state armed forces operating under UN Security Council authorizations are attributable to the UN, as opposed to the individual states.[95] This decision was made even though the forces were not seconded to the multi-national organization, but rather acting, to some extent, as an organ of the individual state, as is the case in current anti-piracy operations off the coast of Somalia. The International Law Commission provides clear guidance on attribution of responsibility in such a situation, declaring that effective control over the conduct in question is the sole criterion for establishing attribution.[96] Draft Article 6 states that:

> The conduct of an organ of a State or an organ or agent of an international organization that is placed at the disposal of another international organization shall be considered under international law an act of the latter organization if the organization exercises *effective control* over that conduct.[97] [italics added]

Thus, when attributing actions, the International Law Commission stresses the necessity of examining what entity—the state or international body—exercised *factual control* over the conduct in question, as it is *operational control*, as opposed to *ultimate control*, which should be the prime criterion for gauging *effective control*.[98] The Venice Commission discussed the

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[93] *See, e.g.*, Öcalan v. Turkey, *supra* note 92 (further discussed in appendix).

[94] *See* page 15 for a short analysis of ICCPR and its application by state parties acting as part of international peace-keeping or peace-enforcement operations.

[95] Behrami v. France, Eur. Ct. H.R. No. 71412/01 and 78166/01 (GC) (admissibility decision) (May 2, 2007), http://cmiskp.echr.coe.int. *Behrami* and *Saramati* were cases taken by individuals of Albanian origin living in Kosovo against states operating as part of the Kosovo Force. *See* Marko Milanović and Tatjana Papić, *As Bad as it Gets: The European Court of Human Rights's Behrami and Saramati Decision and General International Law*, 58 INT'L & COMP. L.Q, 267 (2009) (analyzing the Court's admissibility decision). Note that a similar case, *Al-Jedda v. UK*, is currently before the ECtHR. The case involves the detention of an individual in Iraq under UNSCR 1546, and the UK is arguing that it could not have exercised Article 1 jurisdiction over Al-Jedda, as the acts of UK soldiers were not attributable to the UK, but rather to the UN. The hearing was held in June 2010, and the judgment is still awaited. *See* Marko Milanović, *Grand Chamber Hearings and Preview of Al-Skeini and Al-Jedda*, EJIL: Talk! Blog of the European Journal of International Law (June 9, 2010), http://www.ejiltalk.org/grand-chamber-hearings-and-preview-of-al-skeini-and-al-jedda/.

[96] International Law Commission, *Report on the work of its sixty-first session (4 May to 5 June and 6 July to 7 August 2009)*, 62-70, U.N. GAOR, 64th Sess., Supp. No. 10, U.N. Doc. A/64/10.

[97] *Id.* at 62.

[98] *See id.* at 63, Article 6 Commentary (3) ("The criterion for attribution of conduct either to the contributing State or organization or to the receiving organization is based according to article 6 on the factual control that is exercised over the specific conduct taken by the organ or agent") and *id.* at 67, Article 6 Commentary (9) ("One may note that, when applying the criterion of effective control, 'operational' control would seem more significant than 'ultimate'

Kosovo Force, a NATO-led operation mandated by a UNSCR, stating that in international law, its acts are not attributed to the UN; the acts of Kosovo Force troops should be attributed to either NATO or their country of origin.[99] The question, according to the International Law Commission and the Venice Commission, is, as Milanović and Papić point out, "who is giving the orders – the State or the organization?"[100]

In addition to independent state forces, there are three multinational bodies conducting counter-piracy operations off the coast of Somalia: Combined Task Force 151, the NATO Maritime Group, and EU NAVFOR.[101]

The U.S.-led Combined Task Force 151 is a multinational task force established in January of 2009. Operating in the Gulf of Aden and off the coast of Somalia, it is comprised of, on average, 25 ships from 16 nations, with the aim of deterring, disrupting and suppressing piracy. It is currently under Korean command.[102] NATO's Operation Ocean Shield is being undertaken by Standing NATO Maritime Group 2, which currently consists of three ships belonging to the Netherlands, the US and Turkey.[103] It is under the overall responsibility of Joint Command Lisbon (Portugal) but day-to-day tactical control is exercised by the Allied Maritime Component Command, Headquarters Northwood, UK. When ships operating as part of Ocean Shield or Combined Task Force 151 encounter pirates, they revert to national authority in deciding how to deal with them, although sometimes national authorization may be in accordance with a request by the multinational force's Operational Commander.[104] Thus, the individual states clearly have effective control over the situation, and are responsible for upholding their obligations under international human rights law.

The European Union Naval Force Somalia runs Operation Atalanta, which is currently mandated until December of 2012. The naval force operates in a zone that includes the Gulf of Aden, the southern Red Sea, and part of the Indian Ocean. Its military personnel can arrest, detain and transfer persons who are suspected of, or who have committed, piracy or armed robbery in the

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control, since the latter hardly implies a role in the act in question."). The latter point was made specifically referring to the judgment in *Behrami*.

[99] European Commission for Democracy through Law (Venice Commission), *Opinion on Human Rights in Kosovo: Possible Establishment of Review Mechanisms*, No. 280/2004, CDL-Ad (2004)033, 18 ¶ 79 (Oct. 11, 2004), *available at* http://www.venice.coe.int/docs/2004/CDL-AD(2004)033-e.asp.

[100] Milanović and Papić, *supra* note 96, at 282.

[101] These are supported by vessels from other nations such as Russia, India, Japan, and China. There are also other international task forces such as Combined Task Forces 150 and 152, but their primary tasks do not entail engagement in counter-piracy operations.

[102] *See* Navy Office of Information, *supra* note 8. *See also* Combined Maritime Forces, Combined Task Force 151, http://www.cusnc.navy.mil/cmf/151/index.html.

[103] *See* Allied Maritime Command Headquarters Northwood, Counter Piracy Commanders Meet in the Gulf of Aden, SNMG2 2010/29 (15 July 2010), http://www.manw.nato.int/page_press_release.aspx. Previous operations were Operation Allied Provider and Operation Allied Protector, the latter of which ended in August 2009. *See* NATO-OTAN, Operation Allied Provider, http://www.aco.nato.int/page13984631.aspx; NATO-OTAN, Operation Allied Protector, http://www.aco.nato.int/page13974522.aspx.

[104] E-mail from Lieutenant Commander Jacqui Sherriff, Chief Public Affairs Officer, Allied Maritime Command Headquarters Northwood (Nov. 1, 2010, 17.35 GMT) (on file with author); E-mail from Commander Andrew Murdoch, Former Legal Advisor to CMF, Bahrain, 2008-09 (Sept. 27, 2010, 02.26 CST) (on file with author).

area where the force is operating, and the suspects can be prosecuted either in Kenya or Seychelles, or by an EU member state.[105] The EU Political and Security Committee oversees the political control and strategic direction of the operation under the overall responsibility of the Council, while the EU Military Committee controls the execution of the military mandate, which is under the command of an Operation Commander, a Deputy Commander, and a Force Commander.[106] In his discussion with the House of Lords, Rear Admiral Philip Jones, RN, Operation Atalanta, Ministry of Defense, stated that the ships of contributing member states are under EU operational command and operate under EU rules of engagement.[107] However, in the same discussion, he stated that EU ships also operate under national operational command, as in the case of France transferring suspected pirates to Puntland.[108]

The issue is where effective control of the conduct under scrutiny lies. Guilfoyle highlights that the transfer of pirates to Kenya for prosecution requires the agreement of both the national authorities of the capturing warship and of the EU NAVFOR Operation Commander.[109] Hence, he argues, any transfer decision cannot be considered only an act of the EU, and, in relation, responsibility for upholding human rights obligations also rests with the State party.[110] In the case of France transferring suspected pirates to Puntland, it appears that effective control lies with the French authorities, which means that France could be held liable for any human rights violations occurring as a result of the transfer.[111]

Therefore, any State party to the ECHR operating as part of an international force off Somalia (if in factual control over conduct, as appears to be the case when dealing with suspected pirates even under multinational agreements) must ensure that its forces act in accordance with the Convention.[112]

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[105] EU NAVFOR Somalia, European Union Naval Operation Against Piracy – Aim and Mandate, http://www.eunavfor.eu/about-us/mission/.

[106] *See* 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 O.J. (L301) 35, Art. 6(1), 7(1). *See also* EU NAVFOR Somalia, Chain of Command, http://www.eunavfor.eu/chain-of-command/ (providing further information regarding the command of EU NAVFOR).

[107] Notably, the EU is not party to the ECHR. However, Article 6 of the 2007 Treaty of Lisbon stipulates that the EU should accede to the Convention and official talks regarding the accession commenced in July 2010. *See* Council of the European Union, *Accession of the European Union to the European Convention on Human Rights*, Doc. No. 6582/10 (Feb. 17, 2010).

[108] House of Lords, European Union Committee, *Combating Somali Piracy: the EU's Naval Operation Atalanta: Report with Evidence, 12th Report of Session 2009–10,* HL Paper 103 (Apr. 14, 2010), *Appendix: Minutes of Evidence, Taken before the Select Committee on the European Union (Sub-Committee C)* (Feb. 12, 2009) 8, 11, *available at* http://www.publications.parliament.uk/pa/ld200910/ldselect/ldeucom/103/103.pdf.

[109] Guilfoyle, *supra* note 41, at 158.

[110] *Id.*

[111] House of Lords, *supra* note 109, at 11. *See also Postcard from Somali Pirate Capital*, BBC NEWS, June 16, 2009, *available at* http://news.bbc.co.uk/2/hi/africa/8103585.stm (reporting that Puntland authorities have tried and convicted approximately 90 pirates, most of whom were handed over by foreign navies, over three months in 2009. The convicted pirates are kept in stone prisons described as "sweltering cages.").

[112] Ideally, the forces should act in accordance with the Convention at all times.

Part III – International Human Rights Law and its Application to Piracy off the Coast of Somalia

It remains necessary to examine the specific obligations that arise from international human rights law. There are particular circumstances that merit detailed scrutiny—from the stages of detention, to transfer, to trial—as they are situations encountered regularly by naval forces and state authorities engaging in counter-piracy operations off Somalia.

a) Detention of Suspected Pirates

The authority or legal basis for detention can be found in the relevant UNSCRs, which authorize states to use "all necessary means" to repress piracy.[113] It appears likely that the phrase "necessary means" encompasses necessary detention, particularly as more recent resolutions call for prosecution of pirates, express concern regarding the release of pirates without their facing justice, and discuss the detention of suspected pirates due to operations conducted under the resolution.[114]

Once a suspected pirate is detained, that person has a right to be brought before a judicial authority, according to Article 5(3) of the ECHR and Article 9(4) of the ICCPR. When examining the application of these articles at sea, particularly ECHR Article 5(3), there is merit in examining case law on maritime narcotics smuggling, namely *Medvedyev v. France* (2008), and *Rigopoulos v. Spain* (1999). *Medvedyev* involved the interdiction by French authorities of a Cambodian vessel suspected of drug smuggling, while *Rigopoulos* entailed interdiction on the high seas by Spanish authorities, again for narcotics smuggling.

Article 5(3) of the ECHR states that:

> Everyone arrested or detained in accordance with the provisions of paragraph 1(c) of this article shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial.

For warships apprehending suspects on the high seas, it often takes a considerable amount of time to bring the suspects in front of a judicial authority. In the cases of *Medvedyev* and *Rigopoulos*, where transfer took 15–16 days[115] and 16 days[116] respectively, the ECtHR accorded that there was no violation of Article 5(3), or the requirement of promptitude, because it was not

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[113] *See, e.g.*, S.C. Res. 1816, *supra* note 49, ¶ 7(b) (stating that states who are cooperating with the TFG can "[u]se, within the territorial waters of Somalia, in a manner consistent with action permitted on the high seas with respect to piracy under relevant international law, all necessary means to repress acts of piracy and armed robbery.").

[114] *See, e.g.*, S.C. Res. 1918, *supra* note 50, ¶ 1 ("*Affirms* that the failure to prosecute persons responsible for acts of piracy and armed robbery at sea off the coast of Somalia undermines anti-piracy efforts of the international community"); S.C. Res. 1897, *supra* note 48, at preamble ("*Noting* with concern that the continuing limited capacity and domestic legislation to facilitate the custody and prosecution of suspected pirates after their capture has hindered more robust international action against the pirates off the coast of Somalia, and in some cases has led to pirates being released without facing justice, regardless of whether there is sufficient evidence to support prosecution.").

[115] Medvedyev and others v. France, Eur. Ct. H.R. No. 3394/03 ¶ 105 (GC) (Mar. 29, 2010) [hereinafter Medvedyev 2010], http://cmiskp.echr.coe.int.

[116] Tullio Treves, *Human Rights and the Law of the Sea*, 28 Berkeley J. Int'l L. 1, 7 (2010).

possible to physically bring the suspects before a judicial authority any sooner.[117] Nonetheless, the Court noted that only in "exceptional circumstances" would such long detention be justified.[118] Thus, existing jurisprudence appears to indicate that a member-state would not be in violation of Article 5(3) if there were a delay in bringing suspected pirates in front of a judicial authority as a result of the voyage to port.[119]

However, *Medvedyev* and *Rigopoulos* are both relatively straightforward cases regarding the interdiction of vessels that are subsequently escorted to port. Many of the cases in relation to piracy are less clear-cut. In January of 2009, the Danish warship *Absalon* picked up five suspected pirates who had been forced to jump into the water after their boat started on fire during an attempted attack. The pirates were held on board *Absalon* for over a month while the Danish and Dutch authorities deliberated the transfer of the pirates to Dutch custody.[120] It is unclear whether a member state would be in violation of Article 5(3) in a case like this, when the delay was not due to the length of voyage but rather the international community's confusion regarding where to prosecute.

Alternatively, there are multiple reports of pirates being detained by international forces only to be released without prosecution.[121] Some suspected pirates are released immediately, while

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[117] Medvedyev 2010, *supra* note 116, ¶ 105; Rigopoulos v. Spain, 1999-II Eur. Ct. H.R., 437 [hereinafter Rigopoulos]. Note that in the case of *Medvedyev* the sea voyage to Brest took 13 days, and the suspects waited another 2 to 3 days to be brought before a judicial authority.

[118] *See* Medvedyev 2010, *supra* note 116, ¶ 130.

[119] *See* Guilfoyle, *supra* note 41. *See also* Treves, *supra* note 117, 7-10 (commenting on *Medvedyev* and *Rigopoulos*); J Craig Barker & Efthymios Papastavridis, *European Court of Human Rights Medvedyev et al v. France (Grand Chamber, Application No 3394/03) Judgment of 29 March 2010*, 59 INT'L & COMP. L.Q 867 (2010) (analyzing the case of *Medvedyev*).

[120] *See Amnesty Demands Dutch and Danish Take Care of Pirates*, POLITIKEN, Feb. 4, 2009, *available at* http://www.nrc.nl/international/article2141530.ece/Amnesty_demands_Dutch_and_Danish_take_care_of_pirates; Corey Flintoff, *Prosecuting Pirates: No More Walking The Plank*, NPR, Jan. 9, 2009, *available at* http://www.npr.org/templates/story/story.php?storyId=99169738&sc=emaf. Note that this case is not isolated. *See* Mike Corder, *Nations Look to Kenya as Venue for Piracy Trials*, THE ASSOCIATED PRESS, Apr. 2009, *available at* http://www.law.com/jsp/article.jsp?id=1202429986132 (reporting that a US warship held a pirate on board for seven months); *Politics Influences the Jurisdiction for Somali Pirate Trials*, DEUTSCHE WELLE, Apr. 22, 2009, *available at* http://www.dw-world.de/dw/article/0,,4198300,00.html (stating that a German frigate allegedly held suspected pirates for 12 days while the EU and Kenya arranged for prosecution in Kenya).

[121] *See, e.g., German Navy Foils Somali Pirates*, BBC NEWS, Dec. 25, 2008, *available at* http://news.bbc.co.uk/go/em/fr/-/1/hi/world/africa/7799796.stm (stating that in December of 2008 the German navy released six pirates); *High Time for Piracy Tribunal, Experts Say*, *supra* note 59 (reporting that the Dutch navy released nine Somalis after interrogating them); John Knott, *United Kingdom: Piracy off Somalia: Prosecutions, Procrastination and Progress*, Jan. 21, 2010, *available at* http://www.mondaq.com/article.asp?articleid=92442&login=true (reporting on the pirates released by the Danish ship *Absalon*); *Pirates rule on high seas as international law lacks clarity*, RT, May 7, 2010, *available at* http://rt.com/Politics/2010-05-07/pirates-somalia-law-international.html (noting that in May of 2010 the Russians released ten pirates, stating there were no legal rules to prosecute them); Stares, *supra* note 1 (commenting that, in September of 2008, Danish forces released ten pirates after detaining them for six days); Craig Whitlock, *Navy Releases Accused Somali Pirates Held on Warship for Six Weeks*, THE WASHINGTON POST, May 28, 2010, *available at* http://www.washingtonpost.com/wp-dyn/content/article/2010/05/28/AR2010052804108.html (revealing that, in May of 2010, the US released ten Somalis having held them on board a warship for six weeks, after failing to find a location in which to prosecute the alleged pirates).

others are held for a period of time, which could again be regarded as a violation of ECHR Article 5.[122]

Apart from the legal act of detaining a pirate, there are human rights obligations regarding the process of detention. If a suspected pirate is prosecuted under the SUA Convention, due process rights are automatically entailed, including the right of the defendant to inform his state immediately and the right to be visited by a representative of his state.[123] Moreover, Bahar points out that a court could hold that basic minimum procedural standards apply to all detained individuals, in accordance with humanitarian principles of international law.[124] This is not necessarily the case in practice. For example, reports allege that Somalis being prosecuted in the US after attacking the USS *Nicholas* in April of 2010, were held naked, blindfolded, handcuffed and without access to an interpreter for days.[125]

Both the ICCPR and the ECHR contain stipulations regarding the treatment of persons in detention, such as the right to be informed of the reasons for arrest and judicial supervision of detention.[126] The ECtHR also affirms that detained suspects should be afforded certain rights, such as the notification of family members and access to legal advice.[127] Thus, it appears that if member-states do not wish to risk being found in violation of international human rights law, suspected pirates who are detained on ships should be held in appropriate conditions and accorded certain standards or procedures of detention. As Guilfoyle points out, to some extent the ECtHR needs to be realistic regarding the procedures of maritime interdiction on the high seas; however, he notes that some judges will strictly apply the relevant case law, which could be problematic for states that do not comply with the correct procedures.[128]

Hence, as articulated in Andersen *et al.*, there is a need for a clear framework for the capture and detention of pirates that is in accordance with applicable human rights law.[129] As of now, that framework remains ambiguous. The problem lies partly in the various legal frameworks that

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[122] *See, e.g.*, Middleton, *supra* note 61, at 5 (stating that holding pirates to disrupt piracy, as opposed to detaining them for prosecution, could be a violation of the ECHR).
[123] SUA Convention, *supra* note 23, at Art. 7.
[124] Bahar, *supra* note 16, at 46.
[125] *See Attorneys: Accused Pirates Blindfolded, Handcuffed*, THE ASSOCIATED PRESS, July 19, 2010, *available at* http://seattletimes.nwsource.com/html/nationworld/2012397208_apusprosecutingpirates.html.
[126] ICCPR, *supra* note 78, at Art. 9; ECHR, *supra* note 78, at Art. 5.
[127] In 2008 the Court judged that the detention of the suspects in *Medvedyev and others v. France* was arbitrary, as the invoked provisions of law 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. Nor do they place the detention under the supervision of a judicial authority." *See* Medvedyev 2008, *supra* note 91, ¶ 61. Similarly, the 2010 Grand Chamber judgment's joint partly dissenting opinion of Judge Tulkens et al. (eight judges in total) distinguished *Medvedyev* from *Rigopoulos*, highlighting the procedures that were followed in *Rigopoulos*, such as the judicial supervision, and the acts of advising the detained suspects of their rights and informing their family members of their detention. *See* Medvedyev 2010, *supra* note 116, Annex: Joint Partly Dissenting Opinion of Judges Tulkens, Bonello, Zupančić, Fura, Spielmann, Tsotsoria, Power and Poalelungi ¶ 5.
[128] Douglas Guilfoyle, *ECHR Rights at Sea: Medvedyev and others v. France*, EJIL: Talk! Blog of the European Journal of International Law (Apr. 19, 2010), http://www.ejiltalk.org/echr-rights-at-sea-medvedyev-and-others-v-france/.
[129] Andersen et al., *supra* note 3, at 14.

intersect in the fight against piracy: domestic laws, international treaties, UNSCRs, customary law, and human rights law. Thus, EU Recommendation 840 suggests that each nation-state involved in the fight against piracy needs to determine, domestically, the conditions for detaining pirates on board ships, the means of transfer to judicial authorities, and the means of monitoring the detention before transfer, including which judges should oversee the proceedings.[130]

b) Claims of Asylum, and Non-refoulement

A related worry repeatedly articulated by different states engaging in counter-piracy operations off the coast of Somalia has been that if they bring suspected pirates within their jurisdiction for prosecution, either on a flagged ship or to the state, they will be unable to remove these suspects afterward due to claims of asylum or non-refoulement obligations.[131] The UK navy was reportedly told by British authorities not to detain suspected pirates, due to fears of asylum claims and allegations of human rights violations.[132] The first piracy conviction to occur in Europe in modern times happened in the Netherlands in June of 2010, and reportedly one of those pirates has already applied for asylum there.[133]

According to then-Lord Chancellor Jack Straw, no pirate would receive asylum in the UK, as Article 1(f) of the UN's 1951 Refugee Convention places anyone who has committed a serious crime outside the country of refuge beyond the protection of the Convention.[134] The likelihood of a convicted pirate achieving refugee status is indeed slim; however, this does not mean that it would be easy to deport a suspected or convicted pirate to Somalia if he is under the UK's (or another state's) jurisdiction.

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[130] *See Report: The role of the European Union in combating piracy*, *supra* note 60, ¶ 67 (arguing that there is no comprehensive international criminal procedure to prosecute pirates, meaning that the legal framework for carrying out policing activities must be defined by individual states).

[131] *See* Corder, *supra* note 121 (highlighting the reluctance of European nations to prosecute pirates in Europe and the concern about not being able to send pirates back to Somalia); *Duel at the Suez Canal: World Scrambles to Deal with Pirate Threat*, DER SPIEGEL, Nov. 24, 2008, *available at* http://www.spiegel.de/international/world/0,1518,592433,00.html (reporting that the German government is opposed to bringing pirates to Germany for trial, as it would be impossible to extradite them to Somalia thereafter); Rivkin & Casey, *supra* note 69 (noting that the British Foreign Office told its forces not to detain pirates for fear they would claim asylum); *Somali Pirates Embrace Capture as Route to Europe*, THE TELEGRAPH (UK), May 19, 2009, *available at* http://www.telegraph.co.uk/news/worldnews/piracy/5350183/Somali-pirates-embrace-capture-as-route-to-Europe.html (stating that two pirates on trial in the Netherlands in 2009 had declared their intention to stay in the country as residents thereafter).

[132] *See* UK Parliament, HOL EU Sub-Committee C (Foreign Affairs, Defence, and Development Policy), Operation *Atalanta and Somali Piracy* (Mar. 19, 2009), *available at* http://www.parliament.uk/visiting/online-tours/virtualtours/transcripts/committee-rooms/hol-eu-sub-committeepiracy-/; Marie Woolf, *Pirates Can Claim UK Asylum*, THE SUNDAY TIMES (UK), Apr. 13, 2008, *available at* http://www.timesonline.co.uk/tol/news/uk/article3736239.ece.

[133] *See Somali pirates jailed by Dutch Court*, *supra* note 7.

[134] Mr. Jack Straw, The Secretary of State for Justice and Lord Chancellor, House of Commons Hansard Debates, Column 223 (Dec. 4, 2008), *available at* http://www.parliament.the-stationery-office.co.uk/pa/cm200809/cmhansrd/cm081204/debtext/81204-0017.htm. Article 1(f) of the Refugee Convention states that "The provisions of this Convention shall not apply to any person with respect to whom there are serious reasons for considering that: . . . (b) he has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee," Convention relating to the Status of Refugees, July 28, 1951, 189 UNTS 150.

A number of human rights treaty provisions, most notably CAT Article 3(1), ICCPR Article 7, and ECHR Article 3, protect individuals from being returned to a country where they are at risk of torture, inhuman or degrading treatment, or punishment, based on the principle of non-refoulement.[135] Crucially, the prohibition of refoulement is non-derogable, which means that regardless of what crime a suspected pirate has committed, the individual should not be returned if he or she would be at risk of torture or cruel, inhuman, or degrading treatment or punishment.[136] Moreover, the prohibition of torture, which includes the principle of non-refoulement, is a peremptory norm of international law, which means that it is binding on all states regardless of whether they are party to the relevant instruments.[137]

The applicability of non-refoulement on the high seas is subject to debate (see the discussion in Part II, p.16 above). However, if an individual is found to be under the jurisdiction of a member-state, regardless of location, then the prohibition on refoulement is absolute. As stated by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, with regard to Italy, the state "is bound by the principle of *non-refoulement* wherever it exercises its jurisdiction, which includes via its personnel and vessels engaged in border protection or rescue at sea, even when operating outside its territory. Moreover, all persons coming within Italy's jurisdiction should be afforded an appropriate opportunity and facilities to seek international protection."[138] In May of 2010, the United Nations High Commissioner for Refugees issued a briefing reiterating that no person should be involuntarily

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[135] Torture Convention, *supra* note 78, at Art. 3(1) ("No 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"); ICCPR, *supra* note 78, at Art. 7 ("No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation."); ECHR, *supra* note 78, at Art. 3 ("No one shall be subjected to torture or to inhuman or degrading treatment or punishment"). The principle of non-refoulement is stated in other regional treaties such as Article 5(2) of the American Convention on Human Rights.

[136] The non-derogable nature of non-refoulement has been laid down by various courts and committees pertaining to the different international treaties. *See* Human Rights Committee, *General Comment No. 29 on States of Emergency (Article 4)*, ¶ 11, U.N. Doc. CCPR/C/21/Rev.1/Add.11 (Aug. 31, 2001); U.N. Committee Against Torture, *Gorki Ernesto Tapia Paez v. Sweden*, ¶ 14.5, U.N. Doc. CAT/C/18/D/39/1996 (Apr. 28, 1997); Chahal v. United Kingdom, 23 Eur. H.R. Rep. 413 (1996); Saadi v. Italy, Eur. Ct. H.R. No. 37201/06 (Feb. 28, 2008), *available at:* http://cmiskp.echr.coe.int. For an analysis of the Grand Chamber's decision in *Saadi v. Italy* see Fiona de Londras, *Saadi v. Italy: European Court of Human Rights Reasserts the Absolute Prohibition on Refoulement in Terrorism Extradition Cases*, 12 ASIL INSIGHTS, May 13, 2008, http://www.asil.org/insights080513.cfm.

[137] *See* Human Rights Committee, *General Comment No. 24: Issues relating to reservations made upon ratification or accession to the Covenant or the Optional Protocols thereto, or in relation to declarations under Article 41 of the Covenant*, ¶ 8, U.N. Doc. CCPR/C/21/Rev.1/Add.6 (Nov. 4, 1994) (commenting that no state may apply reservations to peremptory norms). Note that although CAT, ECHR and ICCPR offer protection from refoulement they do not confer upon those protected individuals any status or residence in the host state. Note also that states interpret these treaties, and the obligations arising from them, differently. See upcoming paper by Yvonne M. Dutton, *Pirates and Impunity: Is the Threat of Asylum Claims a Reason to Allow Pirates to Get Away with Murder?* (forthcoming, One Earth Future Foundation, Working Paper) for further analysis of the refoulement obligations and the interpretation of states.

[138] European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, *Report to the Italian Government on the visit to Italy carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 27 to 31 July 2009*, ¶ 49, CPT/Inf (2010) 14 (Apr. 28, 2010).

returned to central and southern Somalia and calling on all states to uphold their obligations regarding non-refoulement.[139] As the insecurity in Somalia continues, and even worsens, it appears unlikely that states will be able to forcibly return individuals to it in the near future without potentially violating their own obligations under international law.[140] Notably, at present, pirates appear to be voluntarily returning to Somalia rather than remain detained. Moreover, issues of expediency play a role in states' decisions to detain and hand over pirates for prosecution. This factor is further discussed in Part IV.

c) Transfer of Suspected Pirates to a Third State

States engaging in counter-piracy operations have been eager to find a regional solution to prosecuting pirates. Hence, the EU, the UK, Denmark, and the US have signed agreements to transfer suspected pirates to Kenya for trial, and the US and the EU have agreements with Seychelles. The agreements reportedly contain assurances regarding the protection of human rights.[141] Similarly, the UK iterated elsewhere that it will not transfer suspected pirates to third states unless the UK is satisfied that they will not be subject to torture or to cruel, inhuman, or degrading treatment or punishment, to a death penalty, or to an unfair trial. The government presents assurances from Kenya that this does not occur.[142] However, existing jurisprudence indicates that diplomatic assurances are not necessarily enough.[143]

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[139] United Nations High Commissioner for Refugees (UNHCR), *UNHCR appeals on Somalia for international obligations on non-refoulement to be observed*, May 21, 2010, http://www.unhcr.org/. Note that the recommendations and guidelines of UNHCR are not binding on states.

[140] *Id.* This is not to say that refoulement of asylum-seekers to Somalia is not occurring. *See, e.g.*, Human Rights Watch, *"Welcome to Kenya": Police Abuse of Somali Refugees,* June 17, 2010, *available at* http://www.hrw.org/en/reports/2010/06/17/welcome-kenya; United Nations High Commissioner for Refugees, *Kenya: Refoulement of Somali Asylum Seekers*, Apr. 3, 2009, http://www.reliefweb.int/rw/rwb.nsf/db900SID/ASAZ-7QRDJT?OpenDocument. Note that there are also alternative options for states who have suspected pirates within their jurisdiction, such as transferring pirates to a safe third country or relying on diplomatic assurances that torture or prohibited treatment will not occur. See Section c) "Transfer of Suspected Pirates to a Third State" below. For a more in-depth analysis of non-refoulement and asylum with regard to piracy, see upcoming paper by Yvonne M. Dutton, *supra* note 138. Note also that, as highlighted in the introduction, very few suspected pirates face prosecution, and the vast majority of Somali pirates simply have their weapons confiscated and are released in their skiffs. However, the discussion on refoulement has particular relevance for those pirates who are detained and handed over to authorities of countries such as Yemen or Somalia.

[141] In the EU-Kenya and EU-Seychelles Exchanges of Letters, there are provisions in place to protect transferred suspected pirates from human rights violations. *See 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 (EU NAVFOR), and seized property in the possession of EU NAVFOR, from EU NAVFOR to Kenya and for their treatment after such transfer*, 2009 O.J. (L79) 51, Provision 3(a) ("Any transferred person will be treated humanely and will not be subjected to torture or cruel, inhuman or degrading treatment or punishment, will receive adequate accommodation and nourishment, access to medical treatment and will be able to carry out religious observance") [hereinafter EU-Kenya Exchange of Letters]; *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 O.J. (L315) 38 [hereinafter EU-Seychelles Exchange of Letters]. (Please note that the other agreements are confidential and therefore are not available to the author.)

[142] House of Lords, European Union Committee, *Appendix: Minutes of Evidence*, *supra* note 109, at 14.

[143] *See* Committee Against Torture, *USA Report*, *supra* note 85, ¶ 21; Saadi v. Italy, *supra* note 137, ¶ 147.

The ECtHR held in *Saadi v. Italy* (2008) that assurances or accession to treaties do not suffice if reliable sources report that the state conducts or tolerates activities prohibited by the Convention.[144] Moreover, the Court has an obligation to examine whether such assurances, in their practical application, provide sufficient guarantee that the individual would be protected from prohibited treatment.[145] Similarly, the Committee Against Torture proclaims that a state should only accept diplomatic assurances from other states that do not systematically engage in prohibited behavior, and even then only following a complete examination of the merits of each case. The Committee notes "the State party should establish and implement clear procedures for obtaining such assurances, with adequate judicial mechanisms for review, and effective post-return monitoring arrangements."[146]

The two main countries to which states currently transfer pirates are Seychelles and Kenya.[147] Some states also hand suspected pirates over to authorities in Somalia, Puntland and Yemen,[148] and there are reports of discussions to sign agreements—similar to those with Kenya and Seychelles—between the EU and Mauritius, Mozambique, South Africa, Tanzania and Uganda.[149]

None of those African states has an excellent human rights record. To cite Kenya as the first example, in 2009 the Committee Against Torture highlighted the "numerous and consistent allegations of widespread use of torture and ill-treatment of suspects in police custody." It also noted the challenges "in providing people under arrest with the appropriate legal safeguards, including the right to access a lawyer, an independent medical examination and the right to

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[144] Saadi v. Italy, *supra* note 137, ¶ 147.
[145] *Id.* ¶ 148.
[146] Committee Against Torture, *USA Report*, *supra* note 85, ¶ 21.
[147] *See* EU-Kenya Exchange of Letters, *supra* note 142; *Kenya, US Agree to Deal on Piracy*, VOA NEWS, Jan. 27, 2009, *available at* http://www1.voanews.com/english/news/a-13-2009-01-27-voa16-68710907.html?CFTOKEN=50615770&jsessionid=88301ba97b9ffc25c8715741371a6546f201&CFID=289525164; *Seychelles and the USA sign Piracy Agreement*, AFRICAN PRESS ORGANISATION, July 14, 2010, *available at* http://appablog.wordpress.com/2010/07/14/seychelles-and-the-usa-sign-piracy-agreement; *Seychelles to Establish Regional Court to Prosecute Pirates*, VOA NEWS, May 6, 2010, *available at* http://www1.voanews.com/english/news/Seychelles-to-Establish-Regional-Court-to-Prosecute-Pirates-92969969.html.
[148] *See* Corder, *supra* note 121 (reporting that EU nations have sent pirates back to Somalia); *Dusting Off Ancient Laws to Deal with 21st-century Piracy*, NRC HANDELSBLAD, Apr. 22, 2009, *available at* http://www.nrc.nl/international/Features/article2220357.ece/Dusting_off_ancient_laws_to_deal_with_21st-century_piracy?service=Print (highlighting that both the US and France transfer pirates to Puntland); *France Rejects Appeal by Suspected Somali Pirates*, REUTERS, Apr. 6, 2009, *available at* http://uk.reuters.com/article/idUKTRE5354Z820090406 (stating that France handed suspected pirates over to Somali authorities); *French Warship Thwarts Pirate Attack*, NPR, Jan. 6, 2009, *available at* http://www.npr.org/templates/story/story.php?storyId=99036159&sc=emaf (commenting that France had an agreement with the Somali TFG to hand over suspected pirates); Guilfoyle, *supra* note 76 (explaining that France regularly returns pirates to Somalia and Puntland); Rivkin & Casey, *supra* note 69 (stating that the French navy handed pirates over to Somali authorities); *Russian Navy Transfers Detained Somali Pirates to Yemen*, RIA NOVOSTI, Feb. 18, 2009, *available at* http://en.rian.ru/world/20090218/120209688.html (offering an account of pirates being transferred to Yemen).
[149] *See* European Union Common Security and Defence Policy, *supra* note 60, at 2 (indicating that transfer agreements with Mauritius, Mozambique, South Africa, Tanzania, and Uganda are being developed); House of Lords, European Union Committee, *supra* note 109, at 14 (reporting that there are negotiations to sign similar transfer agreements with Mauritius, Mozambique, South Africa, Tanzania and Uganda).

contact family members."[150] The Committee raised its concern regarding the terrible conditions of detention, in particular the high levels of violence, the shortage of appropriate health services, and the overcrowding, and pointed out the lack of independent monitoring of detention centers.[151] Moreover, in a shadow report by Non-government Organizations, it was revealed that 54% of complaints of torture were presented before judges or magistrates, but that action was taken only in 19% of cases.[152] A 2010 Human Rights Committee report, while acknowledging Kenya's overstretched prison system, indicates that the government is attempting to address some of the issues; for example, by revamping the service with increased focus on human rights protection, and with a development program to improve prison infrastructure.[153] Nonetheless, the US State Department reports that prison and detention center conditions were life threatening in 2009, describing torture, degrading and inhuman treatment, unsanitary conditions, and extreme overcrowding as endemic.[154]

Similarly, Freedom House reports that torture and police brutality are widespread in Yemen while abuses persist in both state and private prisons, which operate with limited outside monitoring or control.[155] Likewise, the US State Department has outlined the poor conditions and treatment, including torture, in prisons, as well as the weak and corrupt judicial system in the country.[156] Moreover, in Yemen the punishment for piracy is crucifixion, and in May of 2010 six pirates tried in Yemen were given the death sentence.[157] Notably, a large number of states are prohibited under international law from transferring persons to another state that may impose the death penalty.[158] The US Department of State reports that in Seychelles the government

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[150] U.N. Committee Against Torture, *Consideration of Reports Submitted by States Parties under Article 19 of the Convention, Concluding observations of the Committee against Torture: Kenya*, ¶ 13, CAT/C/KEN/CO/1 (Jan. 19, 2009).
[151] *Id.* ¶ 14, 15.
[152] *See* Independent Medico Legal Unit, *Torture and related Violations in Kenya: Alternative Report to the United Nations Committee Against Torture, 41st Session, 3rd to 21st November 2008*, 21 (Oct. 15, 2008).
[153] Human Rights Council, Working Group on the Universal Periodic Review, *National report submitted in accordance with paragraph 15 (a) of the annex to Human Rights Council resolution 5/1: Kenya*, ¶¶ 40, 41, 66, U.N. Doc. A/HRC/WG.6/8/KEN (Feb. 22, 2010).
[154] US DEPARTMENT OF STATE, 2009 COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES: KENYA, § 1C (2010), *available at* http://www.state.gov/g/drl/rls/hrrpt/2009/af/135959.htm
[155] FREEDOM HOUSE, COUNTRIES AT THE CROSSROADS 2010: COUNTRY REPORT – YEMEN, § 2.49 (2010), *available at* http://www.freedomhouse.org/modules/publications/ccr/modPrintVersion.cfm?edition=9&ccrpage=43&ccrcountry=207.
[156] US DEPARTMENT OF STATE, 2009 COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES: YEMEN, 1 (2010), *available at* http://www.state.gov/g/drl/rls/hrrpt/2009/nea/136083.htm.
[157] *See, e.g.*, *Dusting Off Ancient Laws to Deal with 21st-century Piracy*, *supra* note 149 (stating that Yemen imposes the penalty of crucifixion on pirates); *Second Conviction for Somalis Pirates in Week*, YEMEN NEWS AGENCY (SABA), May 19, 2010, *available at* http://www.sabanews.net/en/news214831.htm (reporting that six pirates received death sentences).
[158] *See, e.g.*, Council of Europe, *Protocol No. 13 to the Convention for the Protection of Human Rights and Fundamental Freedoms, Concerning the Abolition of the Death Penalty in all Circumstances*, ETS 187 (May 3, 2002), *available at* http://www.echr.coe.int/library/annexes/187E.pdf (abolishing the death penalty in all circumstances, and which is binding on EU member states and acceding states). *See also* Al-Saadoon and Mufdhi v. United Kingdom, Eur. Ct. H.R. No. 61498/08, ¶¶ 118, 120, 123 (Mar. 2, 2010) http://cmiskp.echr.coe.int (reiterating that a state is obligated not to refoule a person if a serious risk of the death penalty has been established).

generally respects the human rights of its citizens, but noted abuse of detainees and an inefficient and politically influenced court system as significant problems.[159]

Meanwhile, Somalia continues to be highly unstable. Fighting increased in the first three months of 2010, swelling the total number of people displaced by the civil war to 1.4 million to date.[160] Civilians in South and Central Somalia live under continuous threat from armed groups, while stoning, amputations, flogging, and other corporal punishment are common.[161] There are also numerous reports of summary executions and mutilations by terrorist group al-Shabaab.[162] Similarly, the US Department of State reports that:

> [h]uman rights abuses included unlawful and politically motivated killings; kidnappings; torture, rape, amputations, and beatings; official impunity; harsh and life-threatening prison conditions; and arbitrary arrest and detention . . . Denial of fair trial and limited privacy rights were problems . . . [resulting in] an overall deterioration in the human rights situation of the country, including in Somaliland and Puntland.[163]

However, as described by Guilfoyle, the existence of human rights violations does not prohibit outright the transfer of suspected pirates to these countries.[164] Rather, the Committee Against Torture stresses the need for an in-depth examination of the merits of each case. Simultaneously, in order for diplomatic assurances to be acceptable, states must:

- Establish and implement clear procedures for obtaining such assurances;
- Arrange adequate judicial mechanisms for review; and
- Ensure effective post-return monitoring arrangements.[165]

The procedures available for obtaining assurances from Kenya and Seychelles are evidenced in the respective Exchanges of Letters with the EU, which assure humane treatment of transferred persons.[166] Similarly, both documents outline monitoring arrangements. Specifically, they provide for EU and EU NAVFOR representatives to gain access to any transferred persons. These representatives are also assured that they will receive accounts of the prisoners, including information on their physical conditions, their places of detention, and the charges against them.

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[159] US DEPARTMENT OF STATE, 2009 COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES: SEYCHELLES (2010), *available at* http://www.state.gov/g/drl/rls/hrrpt/2009/af/135974.htm.
[160] U.N. S.C., *Report of the Secretary-General on Somalia*, ¶ 19, U.N. Doc. S/2010/234 (May 11, 2010).
[161] *Id.* ¶ 20.
[162] *Id.* ¶ 23.
[163] US DEPARTMENT OF STATE, 2009 COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES: SOMALIA, Introduction (2010), *available at* http://www.state.gov/g/drl/rls/hrrpt/2009/af/135976.htm.
[164] Guilfoyle, *supra* note 41, at 163.
[165] *See* Committee Against Torture, *USA Report*, *supra* note 85, ¶ 21.
[166] *See* EU-Kenya Exchange of Letters, *supra* note 142, at 51, § 2(c) (stating that transferred persons will be treated "humanely and in accordance with international human rights obligations, including the prohibition against torture and cruel, inhumane and degrading treatment or punishment, the prohibition of arbitrary detention and in accordance with the requirement to have a fair trial"); EU-Seychelles Exchange of Letters, *supra* note 142, at 38.

The agreement also guarantees permission for humanitarian agencies to visit persons who are transferred.[167]

However, judicial review mechanisms are not so clearly delineated, and in practice range from no review to judicial scrutiny. For example, in May of 2009, two days after a Spanish judge ordered seven suspected pirates to be brought from a Spanish navy ship to Madrid, a second Spanish judge ordered that the pirates be freed, stating that they should not be brought to Spain nor surrendered to Kenya.[168] The Spanish ship was part of the EU flotilla operating off Somalia, which means that it could have utilized the Exchange of Letters to transfer to Kenya. This lack of clarity and consistency regarding the legal procedures surrounding transfer, combined with the human rights situation in the receiving countries, could be problematic for transferring countries.

Moreover, Seychelles has asserted that, although the country will prosecute suspected pirates, it does not have the capacity to house them as they serve their prison terms, and has indicated that convicted pirates will eventually be transferred to Somalia for their imprisonment.[169] As discussed above, it remains unlikely at the current time that Somalia could protect pirates from prohibited treatment. Two prisons sponsored by the United Nations Office on Drugs and Crime, built to international standards, have been created in Somaliland and Puntland, but they are not yet ready to be occupied.[170]

It is important to note that if pirates are to be transferred to these prisons, both the arresting state and the sending state must be satisfied with the conditions and treatment afforded in the facilities, since the original arresting state could be liable if Seychelles' transfer of a pirate results in prohibited treatment.[171] A state's responsibility under the ECHR and ICCPR, when extraditing or removing individuals who may be at risk of exposure to torture or cruel and inhuman treatment, is set out in existing case law.[172] Hence, the EU-Seychelles Exchange of

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[167] *See* EU-Kenya Exchange of Letters, *supra* note 142, at 51, § 5; EU-Seychelles Exchange of Letters, *supra* note 142, at 43.

[168] *See* Daniel Woolls, *Spain: About Face on Piracy Suspects*, CHICAGO DEFENDER, May 8, 2009, *available at* http://www.chicagodefender.com/article-4353-spain-about-face-on-piracy-suspects.html.

[169] *See Seychelles convicts 11 Somali Pirates to 10 years*, CNN, July 27, 2010, *available at* http://insidesomalia.org/201007273087/News/Human-Rights/Seychells-convicts-11-Somali-pirates-to-10-years.html) (commenting that the Supreme Court issued a statement that there are 29 suspected pirates awaiting trial in Seychelles or transfer from Seychelles to Somalia); *Somali Pirates Sentenced to Ten Years in Seychelles*, *supra* note 7 (reporting on the imprisonment of eleven Somalis and noting that although Seychelles is now imprisoning pirates domestically, its capacity is very limited; hence, in July of 2010 the country passed a law to facilitate the transfer of pirates to Somalia).

[170] *See* Knott, *supra* note 122; UNITED NATIONS OFFICE ON DRUGS AND CRIME, COUNTER PIRACY PROGRAMME, 9 (Nov. 2009), *available at* http://www.unodc.org/documents/easternafrica//piracy/UNODC_Counter_Piracy_Programme.pdf.

[171] *See* Knott, *supra* note 122 (noting that both the arresting and sending state need to be sure that the treatment of prisoners will meet minimum international standards).

[172] *See* Soering v. The United Kingdom, 161 Eur. Ct. H.R. (ser. A) ¶ 88 (1989) (stating that ECHR Article 3 extends to extradition cases where the individual would be at real risk of exposure to inhuman or degrading treatment or punishment); Chitat Ng v. Canada, Communication No. 469/1991, *in* SELECTED DECISIONS OF THE HUMAN RIGHTS COMMITTEE UNDER THE OPTIONAL PROTOCOL, at 94, 104 ¶ 14.2, U.N. Doc. CCPR/C/OP/5, U.N. Sales No. 04.XIV.9 (1995) ("If a State party extradites a person within its jurisdiction in such circumstances, and if, as a result,

Letters explicitly states "the Seychelles will not transfer any transferred person to any other State without prior written consent from EU NAVFOR."[173] Whatever the outcome of transfer, it is imperative that the merits of each individual case be determined to ensure that the process meets the minimum requirements as set out by international human rights treaties.

d) Fair Trial

When transferring suspected pirates to a nation for trial, the transferring state must also take into account the likelihood that the suspects will receive a fair trial. The right to, and requirements of, a fair trial are set out in various conventions and declarations, and include Article 10 of the Universal Declaration of Human Rights and ECHR Article 6. According to Article 6, the basic requirements of a fair trial include the presumption of innocence until proven guilty according to law; the entitlement of a fair and public hearing by an independent and impartial tribunal established by law; the right to defend oneself or to have legal assistance; to have the assistance of an interpreter if needed; and to be clearly and promptly informed of the nature and cause of the charge.[174] Notably, there is a very high threshold when determining the criteria for a violation

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there is a real risk that his or her rights under the Covenant will be violated in another jurisdiction, the State party itself may be in violation of the Covenant."); Human Rights Committee, *supra* note 82, ¶ 12:

> Moreover, the article 2 obligation requiring that States Parties respect and ensure the Covenant rights for all persons in their territory and all persons under their control entails an 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.

[173] EU-Seychelles Exchange of Letters, *supra* note 142, at 38.

[174] *See* ECHR, *supra* note 78, at Art. 6:

> 1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgement shall be pronounced publicly by the press and public may be excluded from all or part of the trial in the interest of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.
> 2. Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.
> 3. Everyone charged with a criminal offence has the following minimum rights:
> (a) to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;
> (b) to have adequate time and the facilities for the preparation of his defence;
> (c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;
> (d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;
> (e) to have the free assistance of an interpreter if he cannot understand or speak the language used in court.

of ECHR Article 6, namely that there is a flagrant denial of a fair trial.[175] Rulings have provided little clarity regarding the conditions required for a flagrant denial of a fair trial; however, the partly dissenting opinion of Judges Bratza, Bonello and Hedigan (supported by Judge Rozakis) in *Mamatkulov and Askarov v. Turkey* (2005) implies that "'flagrant' 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."[176]

In the Kenyan trials to date there appears to be little indication of violations amounting to a 'flagrant denial' of a fair trial as defined in *Mamatkulov*. Trials have been run relatively promptly, with pirates receiving legal assistance and translation services, and compulsory oral testimony.[177] Moreover, the trials are run with the financial and legal support of transferring states and often are conducted in the presence of international observers.[178] The Exchange of Letters does contain provisions assuring that transferred suspects will have a fair trial, including the entitlement to a fair and impartial public hearing, the right to legal assistance, and the presumption of innocence.

Seychelles conducted its first piracy trial in March of 2010, with the first conviction in July,[179] and as more trials are conducted, the veracity of the proceedings can be further examined. However, there are also other states in that region that are trying pirates. In May of 2010, a

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[175] See, for example, Soering v. The United Kingdom, supra note 173, ¶ 113, wherein the Court stated that it "does not exclude that an issue might exceptionally be raised under Article 6 (Art. 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." See also Mamatkulov and Askarov v. Turkey, 2005-I Eur. Ct. H.R. ¶ 91(GC), in which the Court based itself on the precedent set by Soering, and stated that while "there may have been reasons for doubting at the time that they would receive a fair trial in the State of destination, there is not sufficient evidence to show that any possible irregularities in the trial were liable to constitute a flagrant denial of justice within the meaning of paragraph 113 of the aforementioned *Soering* judgment."

[176] Mamatkulov, *supra* note 176, Joint Partly Dissenting Opinion of Judges Bratza, Bonello and Hedigan, ¶ 14.

[177] Note that there have been accounts that claim that suspected pirates held in Kenya are being denied basic human rights, including the right to a fair trial and adequate medical care. *See, e.g.*, *Paris-based Group Says Accused Somali Pirates Denied Rights*, VOA NEWS, Aug. 27, 2009, *available at* http://www1.voanews.com/english/news/a-13-2009-08-27-voa36-68754822.html.

[178] However, there are allegations that the defense attorneys of suspected pirates are not getting compensated, and that there is much international pressure on Kenya to ensure convictions. *See, e.g.*, Matthias Gebauer, *Attorneys File Suit in Germany on Behalf of Alleged Pirates*, DER SPIEGEL, Apr. 15, 2009, *available at* http://www.spiegel.de/international/europe/0,1518,619103,00.html (commenting that cases were filed against the German government by the lawyers of suspected pirates on trial in Kenya, who claimed that the German government should pay for the pirate's defense. The EU-Kenya agreement stipulates that pirates have the right to an attorney, and that one should be provided free of charge if the defendant cannot arrange their own counsel. As free counsel is not guaranteed by Kenya's legal system, the lawyers claim that Germany has responsibility to ensure the provisions of a fair trial are met.); *Legal Limbo Awaits Somali Pirates*, WALL STREET JOURNAL, May 2010, *available at* http://online.wsj.com/article/NA_WSJ_PUB:SB10001424052748703961104575225810196963690.html (noting that pirates cannot afford counsel and that defense attorneys such as Francis Kadima are working pro bono to ensure that they have legal representation); Nick Wadhams, *Who Wants to Try the Captured Pirates? (No One)*, TIME, June 2, 2010, *available at* http://www.time.com/time/world/article/0,8599,1993444,00.html (reporting that pirate defense attorneys are not being paid. He cites Dickson Nyawinda, an attorney who has defended multiple pirates, stating that the trials are "political theater" and "a one-way ticket to jail").

[179] *See, e.g., Somali Pirates Sentenced to Ten Years in Seychelles*, *supra* note 7.

Yemeni court sentenced six pirates to death, despite no witnesses being present and claims that there was no evidence.[180] Russia has reportedly transferred pirates to Yemen, which, with the application of the death penalty and the allegations of unfair trial, could be held as a violation of the ECHR.[181]

As discussed above, there are multiple human rights considerations that states engaging in counter-piracy operations must take into account to ensure that they do not act in breach of their obligations under international law, with processes surrounding detention, transfer, and return being just three areas of concern.[182] Moreover, these human rights concerns do not exist in isolation from issues related to expediency and political considerations.

Part IV – The Politics of Counter-Piracy and the Trade-Off between Human Rights and Expediency

Although the international legal apparatus required to prosecute pirates is available, problems exist with domestic legislation, or the lack thereof, and in the application of the international framework.[183] Importantly, the application of law is a political as much as a legal consideration. Each state authority makes decisions regarding the treatment of suspected pirates based on the specificities of the situation, and generally holds national interests paramount. Some of these national considerations have been discussed in the course of this paper, such as the desire for states not to be left with pirates who cannot be returned to their countries of origin after trial or serving their sentence. The result is that many states place an emphasis on finding a regional solution for prosecuting pirates, and remain hesitant to initiate trial proceedings on home ground. This is not to say that trials do not occur in states within the EU or countries such as the US, but it is often the case only when national interests have been directly harmed.[184]

Another significant consideration is the cost involved. Kenya, a country that remains a key venue for prosecution, requires witnesses to attend court, which is both expensive and entails opportunity costs, as it occupies warships that would be deterring more pirate attacks. Moreover,

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[180] *See, e.g., Yemen Court Sentences Somali Pirates to Death*, VOA NEWS, May 18, 2010, *available at* http://www1.voanews.com/english/news/middle-east/Yemen-Court-Sentences-Somali-Pirates-to-Death-94137894.html; *Yemen Sentences Somali Pirates to Death*, BBC NEWS, May 18, 2010, *available at* http://news.bbc.co.uk/2/hi/middle_east/8689129.stm.

[181] *See* RIA NOVOSTI, *supra* note 149.

[182] There are further issues related to the human rights obligations of seizing states that are beyond the scope of this paper. *See, e.g.*, Guilfoyle, *supra* note 41, at 167 (examining whether some instances of transferring pirates violates the right to an effective remedy).

[183] The need for adequate domestic legislation has been discussed above (see p. 11); hence, this section will focus on the utilization of the legal framework. Note that in addition to the above-mentioned issues it can be problematic for prosecuting and seizing states to secure evidence, or to provide eyewitness testimony. *See, e.g.*, Andersen et al., *supra* note 3, at 3 (noting the difficulties related to preserving and transporting evidence); Middleton, *supra* note 61, at 7 (discussing the logistical and financial implications of ensuring witnesses are present at piracy trials); Andrew J. Shapiro, Counter-Piracy Policy: Delivering Judicial Consequences, Keynote Address to American University Law Review Symposium, Washington, DC, Mar. 31, 2010, *available at* http://www.state.gov/t/pm/rls/rm/139326.htm (including evidence collection and preservation within the list of logistical difficulties involved in prosecuting pirates).

[184] *See, e.g., German Navy Foils Somali Pirates*, *supra* note 122 (reporting that Germany would only prosecute pirates when German interests were hurt).

if a ship does detain suspected pirates, it cannot engage in military patrols until it has transferred those suspects off the ship.

Thus, expediency is an issue that cannot be disregarded in any discussion about piracy. Certain factors take precedence over others, as evidenced by the fact that the vast majority of pirates are released without any judicial proceedings as states exercise their prosecutorial discretion, focusing on immediate determent as opposed to prosecution. Similarly, turning to regional states to prosecute, despite worries about potential human rights violations, indicates a triumph of expediency over human rights concerns. It leads Kontorovich to claim that states are "auctioning prosecution to the lowest bidder,"[185] which, while perhaps understandable, is not ideal.

Conclusion

This paper outlined a number of pertinent issues surrounding human rights obligations in counter-piracy operations, including the extraterritorial application of human rights treaties, procedures for arrest and detention, and obligations surrounding transfer and prosecution.

Although the information in this paper may provide insights into the proceedings surrounding prosecution and determent of pirates, such action alone will not solve the problem of piracy. Despite the more proactive techniques adopted by EU NAVFOR, the increase in the number of pirates detained and deterred and equipment destroyed, and the prosecution of pirates both regionally and in Europe and the US,[186] piracy around Somalia (and elsewhere) continues, and even grows.[187] Furthermore, it is widely acknowledged that without a functioning government and the restoration of law and order on land in Somalia, piracy off the coast will not cease.[188]

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[185] Kontorovich, *supra* note 28, at 272.

[186] *See Attorneys: Accused Pirates Blindfolded, Handcuffed, supra* note 126 (noting that currently 11 pirates are in custody in the US on charges of piracy and that the trials are expected to commence in September and October 2010); Corder, *supra* note 121 (offering examples of European trials); *Somali Pirates Jailed by Dutch Court, supra* note 7 (describing the conviction of five Somalis in Europe's first piracy trial in modern times); *U.S. Judge Tosses Out Piracy Charge Against Somalis*, REUTERS, Aug. 17, 2010, *available at* http://www.reuters.com/article/idUSTRE67G4UO20100817 (reporting that a US judge threw out piracy charges against six Somali men accused of attacking a US navy ship in April of 2010).

[187] *See* IMB 2009 Report, *supra* note 2 (indicating that attacks in 2009 increased from 2008). *But see* IMB April 2010 Report, *supra* note 3 (reporting that attacks decreased in the first three months of 2010).

[188] Andersen et al., *supra* note 3, at 9; Peter Chalk, Piracy off the Horn of Africa: Scope, Dimensions, Causes and Responses, XVI BROWN JOURNAL OF WORLD AFFAIRS, Spring/Summer 2010, 89; Jeffrey Gettleman, *Pirates Outmaneuver Warships off Somalia*, N. Y. TIMES, Dec. 15, 2008 *available at* http://www.nytimes.com/2008/12/16/world/africa/16pirate.html?_r=1&sq=piracy&st=cse&s; James Kraska, *Coalition Strategy and the Pirates of the Gulf of Aden and the Red Sea*, 28 COMP. STRATEGY 197 (2009); House of Lords, European Union Committee, *Appendix: Minutes of Evidence, supra* note 109, at 16; Karl Sörenson, State Failure on the High Seas – Reviewing the Somali Piracy, FOI Somalia Papers: Report 3 (FOI, Swedish Defence Research Agency) (Nov. 2008) ISSN 1650-1942. *See also, e.g.*, S.C. Res. 1918, *supra* note 50, at preamble

> E*mphasizing* that peace and stability within Somalia, the strengthening of State institutions, economic and social development and respect for human rights and the rule of law are necessary to create the conditions for a durable eradication of piracy and armed robbery at sea off the coast of Somalia, and further emphasizing that Somalia's long-term security rests with the effective development by the TFG of the National Security Force and Somali Police Force, in the framework of the Djibouti Agreement and in line with a national security strategy.

Additionally, commentators have repeatedly highlighted the role that poverty plays in fueling piracy and the need to promote alternative means of income for pirates.[189] It is worth noting that piracy around Somalia allegedly originated in the 1990s with attacks on illegal fishing vessels, and some suspected pirates continue to claim that they are protecting Somali waters from illegal fishing and toxic dumping.[190]

Regardless of the relevance of such claims to piracy in Somalia at the current time,[191] the underlying causes of piracy must be addressed. The problem in the Gulf of Aden and elsewhere cannot be dealt with simply through prosecution and deterrence tactics. Nonetheless, this approach is one means of minimizing the risks to the thousands of ships that navigate the high seas. Similarly, clarifying the obligations and duties of states, and the relevant legal and human rights framework, will contribute to the attempt to contain the problem. Moreover, some of the problems encountered by prosecuting states, such as the policy of non-refoulement to Somalia, would be solved if Somalia had a legitimate, functioning judicial and prison system. Thus, it is essential that attention be paid to building capacity and restoring law and order on land.[192]

At the outset of this paper a potential trade-off between human rights and the prosecution of pirates was briefly addressed. In short, this perspective is the wrong approach to take. Human rights and international criminal law are two pillars of an international legal system and both must be upheld. A legal framework to address piracy comprises both of these pillars, and states cannot legally focus on one to the detriment of the other. Addressing piracy is a complicated affair, all the more so with the lack of clarity regarding human rights obligations. However, pirates, who may be regarded as "enemies of all mankind," are also members of mankind, and this position means that they should be accorded all the rights and protections that correspond to that membership.[193] Commenting on the problem of piracy, Hillary Clinton stated that "[w]e may

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[189] *See, e.g.*, Chalk, *supra* note 189, at 94; International Expert Group on Piracy off the Somali Coast, Final Report: Workshop commissioned by the Special Representative of the Secretary General of the UN to Somalia Ambassador Ahmedou Ould-Abdallah, Nov. 10-12, 2008, Nairobi, Kenya, at 33 [hereinafter Nairobi Report].

[190] *See, e.g.*, Julio Godoy, *Questions Abound about EU's 'Combating' of Piracy,* IPS, June 16, 2010, *available at* http://ipsnews.net/news.asp?idnews=51841; Mwangura, *supra* note 40; Nairobi report, *supra* note 190, at 14-15; Sörenson, *supra* note 189, at 28.

[191] Note that even if its origins were to protect Somali waters from illegal fishing and dumping, piracy off Somalia has developed into a huge industry, involving organized cartels spanning continents. *See, e.g.*, Chalk, *supra* note 189, at 91-92 (describing the various cartels ranging in size from 1 or 2 individuals to several hundred); Rotberg, *supra* note 5, at 3 (stating that there are seven syndicates with linkages spanning Dubai, Kenya, Lebanon and elsewhere). *See also* European Union Naval Force, Breakthroughs Along with Challenges During First Month of Swedish Command, May 17, 2010 *available at* http://www.eunavfor.eu/2010/05/breakthroughs-along-with-challenges-during-first-month-of-swedish-command/ (reporting that boats are being attacked as far as 1,200 nautical miles off the Somali coast).

[192] It should be noted that the role of the international community in capacity building and state-building in Somalia is unclear and controversial. Previous interventions, such as UNITAF and UNOSOM, had clear negative repercussions, such as an incident on October 3, 1993, which resulted in the deaths of eighteen US servicemen and ultimately led to the withdrawal of troops from the country. *See, e.g.*, RAKIYA OMAAR AND ALEX DE WAAL, SOMALIA OPERATION RESTORE HOPE: A PRELIMINARY ASSESSMENT (1993).

[193] The fundamental premise of human rights is that they are universal and belong to everyone equally. *See Universal Declaration of Human Rights*, G.A. Res. 217A, at 71, U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc. A/810, at Art. 1, 2 (1948).

be dealing with a 17th-century crime, but we need to bring 21st-century solutions to bear."[194] Those 21st-century solutions must encompass, and uphold, international human rights law.

[194] Corder, *supra* note 121.

Appendix I: Extraterritorial Application of the European Convention on Human Rights

The following is a more detailed analysis of some of the case law surrounding extraterritorial jurisdiction under the ECHR.

To date, the European Court of Human Rights' (ECtHR) jurisprudence has failed to clearly elucidate guidelines regarding the extraterritorial application of the Convention, with judgments focusing on the specifics of individual cases. This appendix will provide a brief outline to some of the Court's key rulings to support and expand on the body of the article, and to provide further insight into the relevance of the Convention for states interacting with suspected pirates.

The ECtHR Grand Chamber's ruling in *Banković v. Belgium* (2001) is one of the most important and influential decisions to date.[195] The plaintiffs were relatives of people killed when a NATO missile hit a media station in Belgrade, Yugoslavia. They claimed that certain European Convention on Human Rights (ECHR) signatories who participated in the bombing were responsible for violations of Articles 2, 10 and 13 of the Convention.[196] In its judgment, the Court stressed a restricted view of jurisdiction largely based on territory. The Grand Chamber noted that:

> . . . Article 1 of the Convention must be considered to reflect this ordinary and essentially territorial notion of jurisdiction, other bases of jurisdiction being exceptional and requiring special justification in the particular circumstances of each case.[197]

It declared the case inadmissible, commenting on the regional nature of the ECHR and stating that Yugoslavia, a country that was not previously covered by the ECHR, did not enter the "legal space" of the Convention. In addition, the Court commented that Article 1 does not encompass a "'cause-and-effect' notion of jurisdiction"[198] and disagreed with the applicants' submission, claiming that it was:

> . . . tantamount to arguing that anyone adversely affected by an act imputable to a Contracting State, wherever in the world that act may have been committed or its consequences felt, is thereby brought within the jurisdiction of that State for the purpose of Article 1 of the Convention.[199]

The *Banković* case stressed the territorial nature of the Convention and ruled that obligations arising from the Convention could not be divided and applied commensurate to the level of control exercised, because if jurisdiction were

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[195] Banković v. Belgium, 2001-XII Eur. Ct. H.R. 333 ¶ 59 (GC) (admissibility decision) [hereinafter Banković].
[196] *Id.* For a comprehensive analysis of *Banković* and the meaning of jurisdiction under Article 1, see Rick Lawson, *Life After Banković: On the Extraterritorial Application of the European Convention on Human Rights, in* EXTRATERRITORIAL APPLICATION OF HUMAN RIGHTS TREATIES 83 (Fons Coomans & Menno T. Kamminga eds., 2004). *See also* Sarah Miller, *Revisiting Extraterritorial Jurisdiction: A Territorial Justification for Extraterritorial Jurisdiction under the European Convention*, 20 EUR. J. INT'L. L., 1223, 1226 (2009).
[197] Banković, *supra* note 1, ¶ 61.
[198] *Id*. ¶ 75.
[199] *Id*. ¶ 75.

recognized in such cases, any person in the world who is affected by a member-state's actions could be brought under the Convention's jurisdiction. Critiques of the *Banković* decision have pointed out that the Court thus created "a gap in the protection afforded by the Convention," indicating that jurisdiction applies in cases of military occupation, such as *Loizidou v. Turkey* (1995)[200] but not when member-states engage in extraterritorial action short of military occupation.[201]

Subsequent decisions of the ECtHR have expanded upon some of these comments from *Banković*, and provide further insight into the important question of the degree to which the ECHR accords responsibility to member-states for human rights violations abroad. In 2005, the Grand Chamber issued its judgment on the case of *Öcalan v. Turkey*.[202] Abdullah Öcalan, a Kurd of Turkish nationality who was head of the Worker's Party of Kurdistan, was arrested by Turkish agents in the international area of Nairobi airport in Kenya. Subsequently forced to return to Turkey, he was imprisoned and interrogated, put on trial and sentenced to death. In the ECtHR, he sued Turkey for a variety of Convention violations; Turkey in turn alleged that it did not exercise its jurisdiction in Kenya. The Court ruled that Turkey was bound by its Convention obligations, stating that:

> [A]fter he had been handed over by the Kenyan officials to the Turkish officials the applicant was under effective Turkish authority and was therefore brought within the "jurisdiction" of that State for the purposes of [Article] 1 of the Convention, even though in this instance Turkey exercised its authority outside its territory.[203]

This judgment indicates that member-states making arrests abroad (for example, of suspected pirates) should accord the arrestees the protections of the ECHR.[204] In

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[200] Loizidou v. Turkey, 310 Eur. Ct. H.R. (ser. A) (1995) (GC) (preliminary objections). In this judgment the ECtHR laid emphasis on a *de facto* form of jurisdiction, as opposed to territorial, stating that "the responsibility of Contracting Parties can be involved because of acts of their authorities, whether performed within or outside national boundaries, which produce effects outside their own territory." *Id.* ¶ 62.

[201] *See* Tarik Abdel-Monem, *How far do the Lawless Areas of Europe Extend? Extraterritorial Application of the European Convention on Human Rights*, J. TRANSNAT'L L. POL'Y 159, 194 (2005). Note that the *Banković* ruling has been widely criticized. *See, e.g.*,Michal Gondek, *Extraterritorial Application of The European Convention on Human Rights: Territorial Focus in the Age of Globalization?* 52 NETHERLANDS INTERNATIONAL LAW REVIEW 349 (2005) ("This seems to be at odds with the current reality of globalization, creating a danger that the Convention will not be able to respond to challenges to human rights in that reality."); Marko Milanović and Tatjana Papić, *As Bad as it Gets: The European Court of Human Rights's Behrami and Saramati Decision and General International Law*, 58 INT'L & COMP. L.Q, 267 (2009). However, there are other authors who argue that *Banković* was consistent with previous jurisprudence, and should not be seen to undermine it. *See, e.g.,* Dominic McGoldrick, *Extraterritorial Application of the International Covenant on Civil and Political Rights, in* EXTRATERRITORIAL APPLICATION OF HUMAN RIGHTS TREATIES, *supra* note 2, at 41, 72; O'Boyle, *The European Convention on Human Rights and Extraterritorial Jurisdiction: A Comment on 'Life after Bankovic', in* EXTRATERRITORIAL APPLICATION OF HUMAN RIGHTS TREATIES, *supra* note 81, at 125.

[202] Öcalan v. Turkey, 2005-IV Eur. Ct. H.R. 282 (GC).

[203] *Id.* ¶ 91.

[204] Well-established case law further supports the point that if authorities arrest an individual then they are responsible for his or her well-being. *See e.g.*, Salman v. Turkey, 2000-VII Eur. Ct. H.R 357 ¶ 99*;* Selmouni v. France, 1999-V Eur. Ct. H.R ¶ 87.

Öcalan, as opposed to *Banković* above, the Court placed greater importance on the factual analysis of control, rather than on the territorial nature of the Convention. It indicates that exceptional situations of extraterritorial applicability include times when there is no territorial control, but a person is under the physical control of member-state agents.[205] The issue that remains unclear is what degree of control is needed in order for obligations under the Convention to extend to extraterritorial acts of member-states.

In *Issa and others v. Turkey* (2004), the ECtHR declared admissible a case brought by Iraqi women alleging that Turkish military forces abused and killed shepherds in Northern Iraq, which was not a country previously within ECHR jurisdiction.[206] Although the Court did not find the plaintiffs within the jurisdiction of Turkey, this was due to insufficient evidence that Turkish troops had operated in the area, as opposed to finding that the case did not fall within ECHR jurisdiction.[207] Although *Issa* confirmed that the ECHR applies if a member-state holds effective control of an area outside state territory, it simultaneously set a high evidentiary threshold to demonstrate such effective control.[208]

Issa and *Öcalan* clarify two important points. First, they challenge the *Banković* legal space argument, and indicate that acting in the "legal space of the Convention" is not a requisite for the extraterritorial application of the Convention's obligations. Second, in both *Issa* and *Öcalan* the Court refers to the degree of "authority and control," thus emphasizing the control of the *person* as opposed to the *territory*.[209] In *Issa*, the Court highlights that there is a need for such accountability, to prevent a State party from perpetrating violations abroad that would be forbidden in its own territory.[210]

Despite the above clarification, the influence of the *Banković* decision is paramount. The impact on national-level cases is evident in the case of *Al-Skeini v. Secretary of State for Defence* (2007), wherein the UK House of Lords, drawing on *Banković*, held that a person, Mr. Baha Mousa, who died in military prison in Iraq after allegedly being tortured, was within UK jurisdiction. However, five other cases of civilian deaths allegedly at the hands of British soldiers were dismissed on the grounds that the cases were outside the legal space of the ECHR, as they occurred in more obscure situations, such as in people's homes.[211] The case was originally heard in the English

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[205] Öcalan v. Turkey, 2003 Eur. Ct. H.R. 125 ¶ 93 ("The Court considers that the circumstances of the present case are distinguishable from those in the aforementioned *Banković vs. Belgium*, notably in that the applicant was physically forced to return to Turkey by Turkish officials and was subject to their authority and control following his arrest and return to Turkey."). *See also* Abdel-Monem, *supra* note 6; Gondek, *supra* note 6 (offering further analysis of the case).

[206] Issa v. Turkey, 41 Eur. Ct. H.R. 27 (2004).

[207] *See* Gondek, *supra* note 6, at 359 (stating that "[h]ad such [sufficient] evidence been provided, the outcome of the case could have been quite different").

[208] For further analysis see Tarik Abdel-Monem, *The Long Arm of the European Convention on Human Rights and the Recent Development of Issa v. Turkey*, HUMAN RIGHTS BRIEF, 9, 11 (2005), *available at* http://www.wcl.american.edu/hrbrief/12/2abdel.pdf?rd=1.

[209] *See* Issa, *supra* note 11, ¶ 71; Öcalan, *supra* note 7, ¶ 93.

[210] Issa, *supra* note 11, ¶ 71 ("Accountability in such situations stems from the fact that Article 1 of the Convention cannot be interpreted so as to allow a state party to perpetrate violations of the Convention on the territory of another state, which it could not perpetrate on its own territory.").

[211] R. (Al-Skeini) v. Sec'y of State for Def., [2007] UKHL 26, [2007] 3 W.L.R. 33 [hereinafter Al-Skeini HL]; R. (Al-Skeini) v. Sec'y of State for Def [2005] EWCA Civ 1609 [hereinafter Al-Skeini

High Court before proceeding to the Court of Appeal and the House of Lords. Notably, the Court of Appeal pronounced that any individual whose liberty was restricted by British forces—not only those within prison—was protected by the ECHR and the Human Rights Act.[212] The case has been brought to the Strasbourg Court and a Grand Chamber hearing on the case was held on June 9, 2010.[213] The judgement is eagerly awaited, not least because of its potential impact on the extraterritorial scope of the ECHR.

Piracy, as defined by UNCLOS, is a specific type of case because it occurs on the high seas; however, analogies can be drawn from the case law discussed above. It is more or less uncontested that a flagged vessel falls under ECHR jurisdiction.[214] As Lanham states, "a ship is essentially construed as a floating island for the purposes of jurisdiction."[215] This interpretation is reiterated in ECHR case law.[216] Hence, if a member state takes suspected pirates on board its own vessel, it is bound by its obligations under the Convention. However, obligations are less clear regarding operations on board a pirate skiff.

Nonetheless, there is relevant jurisprudence that specifically relates to the high seas. In the 2010 case of *Medvedyev v. France*, the ECtHR Grand Chamber Authority established that if a State party to the ECHR exercises coercive law-enforcement jurisdiction over a foreign vessel on the high seas, then the vessel, and its occupants, come under ECHR jurisdiction. The French authorities had intercepted a Cambodian flagged vessel, the *Winner*, on suspicion of narcotics smuggling. The Court judged that the French navy, under order of the French authorities, had full and exclusive

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CA]; R. (Al-Skeini) v. Sec'y of State for Def., [2004] EWHC 2911, [2005] 2 W.L.R. 1401 (Eng.) [hereinafter Al-Skeini HC].

[212] See Al-Skeini CA, ¶ 110 (explaining why five of the six incidents were not considered within the jurisdiction of the ECHR. It was stated that "None of them were under the control and authority of British troops at the time when they were killed . . . If troops deliberately and effectively restrict someone's liberty he is under their control.").

[213] *See* Press release Issued by the Registrar, European Court of Human Rights, Grand Chamber Hearing Al-Skeini and Others and Al Jedda v. The United Kingdom (June 6, 2010), http://cmiskp.echr.coe.int/tkp197/viewhbkm.asp?sessionId=55160796&skin=hudoc-en&action=html&table=F69A27FD8FB86142BF01C1166DEA398649&key=82942&highlight. *See also* Milanović, *supra* note 96 (offering further analysis of the Grand Chamber hearing).

[214] See e.g., Abdel-Monem, *supra* note 13, at 9.

[215] Honor Lanham, Walk the Plank: Somali Pirates and International Law 25 (Oct. 2009) (unpublished L.L.B dissertation, University of Otago), *available at* http://www.otago.ac.nz/law/oylr/2010/Honor_Lanham.pdf.

[216] *See* Banković, *supra* note 1, ¶ 59 ("While international law does not exclude a State's exercise of jurisdiction extra-territorially, the suggested bases of such jurisdiction [including nationality, flag, diplomatic and consular relations, effect, protection, passive personality and universality] are, as a general rule, defined and limited by the sovereign territorial rights of the other relevant States."). Additionally, the Court notes that other recognised instances of the extra-territorial exercise of jurisdiction by a State include cases involving the activities of its diplomatic or consular agents abroad and on board craft and vessels registered in, or flying the flag of, that State. In these specific situations, customary international law and treaty provisions have recognised the extraterritorial exercise of jurisdiction by the relevant State. *Id.* ¶ 73. *See also* Medvedyev and others v. France, Eur. Ct. H.R. No. 3394/03 ¶ 65 (GC) (Mar. 29, 2010), *available at* http://cmiskp.echr.coe.int ("[T]he Court notes that other recognised instances of the extraterritorial exercise of jurisdiction by a State include cases involving the activities of its diplomatic or consular agents abroad and on board aircraft and ships registered in, or flying the flag of, that State").

control over the Cambodian vessel in a continuous and uninterrupted manner from its interception until it reached France. Hence it was considered within France's jurisdiction for the purposes of Article 1.[217]

Guilfoyle writes that it is now firmly established that jurisdiction under Article 1 applies when coercive law-enforcement jurisdiction is exercised over a foreign vessel on the high seas.[218] However, as Guilfoyle himself notes, the *Medvedyev* judgement does not clarify by what process the Court, after stressing the ordinary rule of exclusive flag-State jurisdiction, concluded that the act of placing State party forces on a foreign vessel brings it within ECHR jurisdiction.[219] Elsewhere, Guilfoyle also argues that if a State exercises powers under UNCLOS Article 105, the disarmed suspects would be within the state's effective control, and hence within the ECHR's jurisdiction.[220] Although the *Medvedyev* judgement appears to support this argument, it is less clear whether suspected pirates, who are disarmed and deterred but not taken for prosecution, would come under ECHR jurisdiction. Notably, to date, there is no ECHR jurisprudence that specifically relates to piracy to elucidate this point. Nonetheless, drawing on other cases, particularly *Öcalan*, if suspected pirates are under the physical control of member-state agents, they could be found to be within ECHR jurisdiction. The extent of control required is not clear, however, as Abdel-Monem states, "what is known is that member-states conducting actions outside of the Council of Europe will be obligated to adhere to the European Convention on Human Rights if such control is found to exist."[221]

As can be ascertained from the above, the issue of jurisdiction remains ambiguous. As O'Boyle points out, in its judgments to date, the ECtHR has been rather cautious and has focused its interpretations of case law to the specific cases under judgment; hence, no general theory of extraterritorial jurisdiction has been developed. Thus, he purports that "law on jurisdiction is still in its infancy."[222] However, ECHR jurisprudence to date makes a number of important points. Primarily, although jurisdiction is primarily territorial, extraterritorial jurisdiction occurs in exceptional circumstances. It has been firmly established that an individual on board a flagged vessel comes under Article 1 jurisdiction. From *Öcalan* and *Issa* it appears that control of a person, as opposed to a territory, merits jurisdiction, under the 'authority and control' argument. However, the extent of control that is required remains to be clarified. Finally, the judgment in *Medvedyev* indicates that if a foreign ship comes under the control of a state through coercive law enforcement, the situation falls under the jurisdiction of the Convention.[223]

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[217] Press release issued by the Registrar, Grand Chamber judgment, Medvedyev and Others v. France (no. 3394/03), (March 29, 2010), *available at* http://cmiskp.echr.coe.int.

[218] Douglas Guilfoyle, *ECHR Rights at Sea: Medvedyev and others v. France*, EJIL: Talk! Blog of the European Journal of International Law (Apr. 19, 2010) http://www.ejiltalk.org/echr-rights-at-sea-medvedyev-and-others-v-france/.

[219] *Id.*

[220] Douglas Guilfoyle, *Counter-Piracy Law Enforcement and Human Rights*, 59 INT'L & COMP. L.Q. 141, 155 (2010).

[221] Abdel-Monem, *supra* note 6, at 197.

[222] O'Boyle, *supra* note 6, at 128.

[223] A question remains regarding the level of protection that states acting extraterritorially should accord to individuals within their jurisdiction. It would be impossible for a state to accord individuals outside its national boundaries the entire range of rights and freedoms as set out in the ECHR. *See, e.g,*

Lawson, *supra* note 2, at 105 (arguing that the level of protection is directly relative to the extent of control, and that states should accord those rights that they have the power to control).