
Murky Waters: Prosecuting Pirates and Upholding Human Rights Law

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I. Introduction

In May 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

¹ See e.g. Abdiaziz Hassan, "Somalia Calls for Russian Explanation on Pirates", *International Business Times* (14 May 2010), online: International Business Times

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 article 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 445 in 2010.³ Moreover, the financial rewards of piracy are increasing. In November 2010, a South Korean oil tanker, *Samho Dream*, was released, reportedly after a record ransom of \$9.5 million was paid.⁴ It is estimated that in 2010, the cost of ransoms for ships hijacked by pirates was approximately \$238 million.⁵ Simultaneously, prosecution for these attacks is unlikely. The US Navy reports that the counter-piracy operation Combined Task Force 151, with cooperating international naval forces, encountered more than 1,129 pirates between 2008 and June 2010. Of those, 638 were disarmed, while 478 were

<<http://www.ibtimes.com/articles/23729/20100514/somalia-calls-for-russian-explanation-on-pirates.htm>>; Alisha Ryu, "Somalia Says Relations With Russia May Be Harmed Over Pirates' Treatment", *VOA News* (21 May 2010), online: VOA News <<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* (9 May 2008), online: InsideSomalia.org <<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).

² When commenting on operations "off the coast of 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, the Gulf of Oman and the Arabian Sea. See International Chamber of Commerce, International Maritime Bureau, *Piracy and Armed Robbery Against Ships: Annual Report, 1 January – 31 December 2010* (London: International Maritime Bureau, January 2011) at 19 [IMB 2010 Report].

³ See IMB 2010 Report, *supra* note 2 at 6. Note that the problem of piracy is greater than figures suggest, as it is estimated that approximately 50 per cent of attacks are not reported. See e.g. Elizabeth Andersen, Benjamin Brockman-Have & Patricia Geoff, *Suppressing Maritime Piracy: Exploring the Options in International Law* (2009) at 2, online: The Academic Council on the United Nations System <<http://www.acuns.org/programs/san/suppressingmaritimepiracyexploringtheoptionsininte>>; Peter Chalk, *The Maritime Dimension of International Security: Terrorism, Piracy, and Challenges for the United States* (Santa Monica: RAND Corporation, 2008) at 7.

⁴ See e.g. "Somali pirates get hefty ransom", *Al Jazeera* (07 November 2010), online: Al Jazeera <<http://english.aljazeera.net/news/africa/2010/11/2010116231624431468.html>>; "Somali pirates receive record ransom for ships' release", *BBC News* (06 November 2010), online: BBC News <<http://www.bbc.co.uk/news/world-africa-11704306>>.

⁵ One Earth Future, "The Economic Cost of Maritime Piracy", One Earth Future Working Paper (December 2010), online: One Earth Future <<http://oneearthfuture.org/images/imagefiles/The%20Economic%20Cost%20of%20Piracy%20Full%20Report.pdf>>.

transferred for prosecution.⁶ Similarly, of the 275 alleged pirates captured by EU naval forces between March and April 2010, reportedly only forty are to be prosecuted.⁷ These figures indicate that around 60–85 per cent 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.⁸

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 article 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.⁹

The article 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

⁶ Navy Office of Information, "Rhumb Lines, Combined Maritime Forces" (28 June 2010), online: Navy Office of Information <<http://www.navyreserve.navy.mil/Rhumb%20Lines/Combined%20Maritime%20Forces%2028%20Jun%2010.pdf>>.

⁷ See Mariama Diallo, "Nations Prove More Willing to Combat Piracy than Prosecuting Pirate Suspects", *VOA News* (8 June 2010), online: VOA News <<http://www.voanews.com/english/news/africa/east/Nations-Prove-More-Willing-to-Combat-Piracy-than-Prosecuting-Pirate-Suspects-95861284.html>>.

⁸ See e.g. Justin Stares, "Pirates Protected from EU Task Force by Human Rights", *The Telegraph* (UK) (1 November 2008), online: *Telegraph.co.uk* <<http://www.telegraph.co.uk/news/worldnews/africaandindianocean/somalia/3363258/Pirates-protected-from-EU-task-force-by-human-rights.html>>; J Peter Pham, "Anti-Piracy, Adrift" (2010) 18 *Journal of International Security Affairs*, online: *The Journal of International Security Affairs* <<http://www.securityaffairs.org/issues/2010/18/pham.php>> (stating that international human rights and humanitarian law were restricting the actions of armed forces combating piracy).

⁹ 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.

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.¹⁰ 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, approximately 33,000 ships pass through the gulf every year.¹¹ 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.¹² 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.¹³ In such a situation, international human rights obligations, and their application, gain even greater significance.

II. 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.¹⁴ 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.¹⁵ It differs from other forms of international

¹⁰ In 2005, there were a total of 276 attacks, of which 48 were carried out by suspected Somali pirates. Conversely, of the 445 reported attacks worldwide in 2010, 219 incidents were attributed to suspected Somali pirates. See IMB 2010 Report, *supra* note 2 at 6 and 19.

¹¹ See e.g. Navy Office of Information, *supra* note 6; US, Congressional Research Service, Lauren Ploch et al, *Piracy off the Horn of Africa* (7-5700) (Washington, DC: Congressional Research Service, 2009) at 9.

¹² Rubrick Biegon, “Somali Piracy and the International Response” *Foreign Policy in Focus* (29 January 2009), online: Foreign Policy in Focus

<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).

¹³ See e.g. “The Failed State Index 2010”, *Foreign Policy* (21 June 2010), online: Foreign Policy <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” (2010) 34 *Disasters* 320 (discussing Somalia’s state failure).

¹⁴ See e.g. Michael Bahar, “Attaining Optimal Deterrence at Sea: A Legal and Strategic Theory for Naval Anti-Piracy Operations” (2007) 40 *VJTL* 1 at 11; Michael P Scharf, “Application of Treaty-Based Universal Jurisdiction To Nationals of Non-Party States” (2001) 35 *New Eng L Rev* 363 at 369. Now universal jurisdiction applies to a wider range of crimes, such as genocide, war crimes and crimes against humanity.

¹⁵ See Mitsue Inazumi, *Universal Jurisdiction in Modern International Law: Expansion of National Jurisdiction for Prosecuting Serious Crimes under International Law* (Utrecht: Intersentia, 2005); Stephan Macedo, ed, *Universal Jurisdiction: National Courts and the Prosecution of Serious Crimes under International Law* (Philadelphia: University of Pennsylvania Press, 2004), for an analysis of universal jurisdiction.

jurisdiction because it is not premised on notions of sovereignty or state consent.¹⁶

Dating back to the sixteenth century, universal jurisdiction over piracy has been an established principle of customary international law;¹⁷ today, customary law and international agreements govern jurisdiction over piracy.¹⁸ 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.¹⁹ The relevant international agreements that apply to piracy are the United Nations Convention on the Law of the Sea (UNCLOS)²⁰ and the Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation (SUA, or the SUA Convention).²¹

The 1982 United Nations Convention on the Law of the Sea²² 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:

(i) on the high seas, against another ship or aircraft, or against persons or property on board such ship or aircraft;

¹⁶ See e.g. Eugene Kontorovich, "The Piracy Analogy: Modern Universal Jurisdiction's Hollow Foundation" (2004) 45 Harv Int'l LJ 183 at 184 [Kontorovich, "The Piracy Analogy"]. Notably, other forms of jurisdiction, such as the flag state principle, the nationality principle or the passive personality principle, could also apply to piracy on the high seas, which explains why universal jurisdiction is not always invoked. 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" (2008), 55 Naval L. Rev. 101-104.

¹⁷ 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, "The Piracy Analogy", *supra* note 16 ("[U]niversal jurisdiction over pirates was more a matter of theory than of practice" at 192); Eugene Kontorovich & Steven Art, "An Empirical Examination of Universal Jurisdiction for Piracy" 104:3 Am J Int'l L 436 at 445 (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 3.22% between 2008 and June 2009, and reporting that Kenya accounts for all but four cases of invoking universal jurisdiction over piracy in the past 12 years, with responsibility for 76% of cases). 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 16 at 110-112 (discussing the limitations of universal jurisdiction).

¹⁸ See e.g. M Cherif Bassiouni, "Universal Jurisdiction for International Crimes: Historical Perspectives and Contemporary Practice" (2001) 42 VAJIL 81 at 113 (describing the evolution of the international crime of piracy over centuries through declarative prescriptions and enforcement proscriptions); Peppetti, *supra* note 16 at 105.

¹⁹ See e.g. Peppetti, *ibid*.

²⁰ *United Nations Convention of the Law of the Sea*, 10 December 1982, 1833 UNTS 397 [UNCLOS].

²¹ *Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation*, 10 March 1988, 1678 UNTS 221, 27 ILM 668 (1998) [SUA Convention].

²² As of April 2011, there were 161 State Parties and 157 signatories to the Convention. See UNCLOS, *supra* note 20, online: United Nations Treaty Collections <http://treaties.un.org/pages/ViewDetailsIII.aspx?&src=TREATY&mtdsg_no=XXI-6&chapter=21&Temp=mtdsg3&lang=en>.

- (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).²³

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.²⁴ Moreover, some states not party to UNCLOS, such as the US, are party to the 1958 High Seas Convention, which contains similar provisions.²⁵

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.

First, according to UNCLOS, piracy can only occur on the high seas, and not in territorial waters.²⁶ Approximately 60 per cent of successful attacks on ships occur within territorial waters,²⁷ so UNCLOS does not apply to a large number of armed robberies on ships.²⁸

Second, although Article 105 reiterates the concept of universal jurisdiction—stating that on the high seas, any state can seize a pirate ship,

²³ UNCLOS, *supra* note 20 at Art 101.

²⁴ See e.g. Bahar, *supra* note 14 at 10; Erik Barrios, "Casting a Wider Net: Addressing the Maritime Piracy Problem in Southeast Asia" (2005) 28 BC Int'l & Comp L Rev 149 at 153; Douglas Guilfoyle, "Piracy off Somalia: UN Security Council Resolution 1816 and IMO Regional Counter-Piracy Efforts" (2008) 57 Int'l & Comp LQ 690 at 693 [Guilfoyle, "Piracy off Somalia"]. But see Alfred P. Rubin, *The Law of Piracy* (Newport: Naval War College Press, 1988) (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).

²⁵ See *Geneva Convention on the High Seas*, 29 April 1958, 450 UNTS 82, 13 UST 2312. See also Bahar, *supra* note 14 at 10; Tullio Treves, "Piracy, Law of the Sea, and Use of Force: Developments off the Coast of Somalia" (2009) 20 Eur J Int'l L 399 at 401 [Treves, "Piracy, Law of the Sea, and Use of Force"] (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).

²⁶ UNCLOS, *supra* note 20 at Art 101. See also Eugene Kontorovich, "A Guantanamo on the Sea: The Difficulties of Prosecuting Pirates and Terrorists" (2010) 98:1 Cal L Rev 243 at 263 [Kontorovich, "A Guantanamo on the Sea"] (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. In accordance with Article 58 of UNCLOS, the exclusive economic zone is equivalent to the high seas under the laws of piracy.

²⁷ See International Maritime Organization, *Report on Acts of Piracy and Armed Robbery Against Ships: Annual Report - 2010*, Annex 2, MSC.4/Circ.169, (2011) at 1 (reporting that 171 of the 276 successful attacks committed against ships in 2010 occurred within territorial waters or port areas. If attempted attacks are included, the number of attacks in international waters rises to 60% of the total [294 out of 489 attacks]).

²⁸ The SUA Convention, which will be discussed below, was developed partly in response to this limitation.

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.²⁹ 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, while Lanham reports that transferring suspects to third-party states for prosecution falls outside universal jurisdiction as delineated in UNCLOS.³⁰ 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.³¹ However, in further 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.³²

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.³³ Furthermore, Azubuike's argument is supported by the current practice of utilizing transfer agreements to transfer suspected pirates, thus indicating that Article 105, as interpreted by different parties, does not preclude third-party jurisdiction. Notably, to date no court has ruled on the stipulations present in Article 105.

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

²⁹ UNCLOS, *supra* note 20 at Art 105.

³⁰ Honor Lanham, *Walk the Plank: Somali Pirates and International Law* (LLB dissertation, University of Otago, 2009) at 33, online: University of Otago <http://www.otago.ac.nz/law/oylr/2009/Honor_Lanham.pdf> [unpublished]; Munich Re Group, Knowledge Series, *Piracy – Threat at Sea: A Risk Analysis* (Munich: Münchener Rückversicherungs-Gesellschaft, 2006) at 26.

³¹ See Eugene Kontorovich, "International Legal Responses to Piracy off the Coast of Somalia" (2009) 13:2 *Am Soc Int'l L*, online: American Society of International Law <<http://www.asil.org/insights090206.cfm>> [Kontorovich, "International Legal Responses to Piracy off the Coast of Somalia"]. See also Eugene Kontorovich, Blog Posting, "Why the Piracy Police Isn't Working", *Opinio Juris* (18 February 2009), online: *Opinio Juris* <<http://opiniojuris.org/2009/02/17/one-solution-to-piracy-try-pirates-in-kenya/>> [Kontorovich, "Why the Piracy Police Isn't Working"].

³² See Kontorovich, "Why the Piracy Police Isn't Working", *supra* note 31.

³³ Lawrence Azubuike, "International Law Regime Against Piracy" (2009) 15 *Ann Surv Int'l & Comp L* 43 at 54-55.

maritime terrorism, such as environmental attacks with hijacked oil tankers, do not fall within the realm of UNCLOS.³⁴ 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.³⁵ As Lanham points out, this ruling counters the earlier Harvard Draft Convention on Piracy.³⁶ 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.³⁷ Guilfoyle reports that Somali pirates even declare that they are operating for private ends, which makes commercial sense, since some ransoms cannot be paid under anti-terrorism regulations.³⁸

The SUA Convention addresses a number of perceived gaps in UNCLOS, although it was drafted primarily to combat maritime terrorism.³⁹

³⁴ Barrios, *supra* note 24 at 156.

³⁵ Guilfoyle, “Piracy off Somalia”, *supra* note 24 at 693-4. See also Bahar, *supra* note 14 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”).

³⁶ Lanham, *supra* note 30 at 16-20. See Harvard Research in Int’l Law, “Draft Convention and Comment on Piracy” (Supp 1932) 26 Am J Int’l L 739 at 857 [Harvard Draft Convention] (noting that forcible acts for political ends should not fall under the common jurisdiction of all states as piracy).

³⁷ 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* (20 May 2010), online: AllAfrica.com <<http://allafrica.com/stories/201005200856.html>>. However, piracy has transformed since then into a multi-million dollar industry, transcending continents. See e.g. Robert I Rotberg, “Combating Maritime Piracy: A Policy Brief with Recommendations for Action” (2010), online: World Peace Foundation <http://www.worldpeacefoundation.org/WPF_Piracy_PolicyBrief_11.pdf> at 3. There has been no evidence of a link between terrorism and piracy off Somalia to date. But see e.g. Bahar, *supra* note 14 (discussing the potential connection); Sandeep Gopalan, “Put Pirates to the Sword: Targeted killings are a necessary, justified and legal response to high-seas piracy”, *The Wall Street Journal* (18 January 2010), online: Wall Street Journal <<http://online.wsj.com/article/SB10001424052748703652104574651962659622546.html>> (stating that Somali pirates have links to al Qaeda elements).

³⁸ Douglas Guilfoyle, “Counter-Piracy Law Enforcement and Human Rights” (2010) 59 Int’l & Comp L Q 141 at 143 [Guilfoyle, “Counter-Piracy Law Enforcement”]. 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” (2010) 11 Chi J Int’l L 201.

³⁹ The SUA preamble expresses concern about the increase in terrorist acts (*SUA Convention*,

However, it differs from UNCLOS in that it is binding only on those states that are signatories.⁴⁰ For the purposes of this article only selected aspects of SUA are discussed. SUA covers attacks that are carried out in territorial waters, providing that attacked ships are on course to navigate outside that territory.⁴¹ 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.⁴² 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. To date, SUA has rarely been invoked as a basis for prosecution,⁴³ although it has been presented in various UNSCRs as grounds for establishing jurisdiction to prosecute pirates.⁴⁴

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.⁴⁵ Beginning with UNSCR 1816 in 2008, there have been a series of resolutions, the most recent being UNSCR 1976 in April 2011.⁴⁶ Developed under the authorization of Chapter VII of the UN Charter, these resolutions sanction states to use "all necessary means" to repress piracy.⁴⁷ They also allow states to enter Somali territorial waters,⁴⁸ while

supra note 21). See also 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" (2009-2010) 25 *Am U Int'l L Rev* 283 at 286 (stating that the Convention's main purpose is to combat terrorism).

⁴⁰ 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, Inventory of International Nonproliferation Organizations and Regimes, "Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation (SUA), Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platform [sic] Located on the Continental Shelf, SUA 2005 Protocol and the Montreal Convention" (2010), online: Nuclear Threat Initiative <http://www.nti.org/e_research/official_docs/inventory/pdfs/apmsuamontreal.pdf>.

⁴¹ *SUA Convention*, *supra* note 21 at Art 4.

⁴² *Ibid* at Art 6.

⁴³ See Kontorovich, "A Guantanamo on the Sea", *supra* note 26 at 254, n 83 (reporting that, to date, the only case of prosecution solely under SUA is *United States v Shi* 525 F 3d 709 (9th Cir 2008)).

⁴⁴ See Resolution 1851, UNSC, 2008, UN Doc S/RES/1851 at preamble [Resolution 1851]; Resolution 1897, UNSC, 2009, UN Doc S/RES/1897 at preamble, para 14 [Resolution 1897].

⁴⁵ Notably these resolutions are not customary law, neither are they applicable to any situation other than piracy off Somalia. See e.g. Resolution 1816 (2008), SC Res 1816, UNSCOR, 2008, UN Doc S/RES/1816, at para 9 [Resolution 1816].

⁴⁶ See Resolution 1816, *supra* note 45; Resolution 1838 (2008), SC Res 1838, UNSCOR, 2008, UN Doc S/RES/1838; Resolution 1846 (2008), SC Res 1846, UNSCOR, 2008, UN Doc S/RES/1846 [Resolution 1846]; Resolution 1851, *supra* note 44; Resolution 1897, *supra* note 44; Resolution 1918 (2010), SC Res 1918, UNSCOR, 2010, UN Doc S/RES/1918 [Resolution 1918]; Resolution 1950 (2010), SC Res 1950, UNSCOR, 2010, UN Doc S/RES/1950 [Resolution 1950]; Resolution 1976 (2011), SC Res 1976, UNSCOR, 2011, UN Doc S/Res/1976 [Resolution 1976].

⁴⁷ See e.g. Resolution 1816, *supra* note 45 at para 7(b).

⁴⁸ See Resolution 1816, *supra* note 45 at para 7(b); Resolution 1846, *supra* note 46 at para 10.

UNSCR 1851 permits counter-piracy activities on Somali soil.⁴⁹ 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 required for consensual operations.⁵⁰ Nonetheless, 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.⁵¹ Notably, the European Union Naval Force (EU NAVFOR) recently began using more proactive tactics, destroying equipment and skiffs suspected of being used in piracy, a technique which, according to reports, has been highly effective.⁵² The above-mentioned resolutions expressly authorize such action by international organizations.⁵³

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 (now no longer valid),⁵⁴ and between Seychelles and the EU and the US, govern the transfer

⁴⁹ Resolution 1851, *supra* note 44 at para 6; renewed in Resolution 1897, *supra* note 44 at para 7.

⁵⁰ Guilfoyle, “Counter-Piracy Law Enforcement”, *supra* note 38 at 147. Note also that the language in Resolution 1851 is not specific, and at the request of Indonesia, specific terms such as “ashore” and “including in its airspace” were removed from the final resolution, due to Indonesia’s fear that the draft resolution could be generalized and used in other jurisdictions in future. See Ecoterra International, “81st Press Release Update” (17 December 2008), online: Buzzle.com <<http://www.buzzle.com/articles/ecoterra-criticism-of-un-security-council-members-homo-cro-magnon-approach.html>>.

⁵¹ See e.g. Resolution 1851, *supra* note 44 at para 2. See also Resolution 1846, *supra* note 46 at para 9; Resolution 1897, *supra* note 44 at para 3.

³² See European Union Naval Force Somalia (Northwood), "EU NAVFOR's Seek, Disrupt and Destroy Policy Continues It's [sic] Success" (2 May 2010), online: EU NAVFOR Somalia <<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.

⁵³ See e.g. Resolution 1851, *supra* note 44 at para 2.

⁵⁴ In April 2010 Kenya announced that it was unwilling to accept more suspected pirates for prosecution. See Galgalo Bocha, “Kenya urged to change stance on piracy trials”, *Daily Nation* (17 December 2010), online: Daily Nation <<http://www.nation.co.ke/News/regional/Kenya%20urged%20to%20change%20stance%20on%20piracy%20trials%20%20/-/1070/1074450/-/9d06ai/-/index.html>> and <[http://www.nation.co.ke/News/Kenya cancels piracy trial deals/-/1056/1021740/-/u7eds2z/-/](http://www.nation.co.ke/News/Kenya%20cancels%20piracy%20trial%20deals/-/1056/1021740/-/u7eds2z/-/)>. It (stating that Kenya terminated the agreement with the EU to try captured pirates in the country, effective as of September 30, 2010); International Chamber of Commerce, International Maritime Bureau, *Piracy and Armed Robbery Against Ships: Report For The Period Of 1 January – 31 March 2010* (London: International Maritime Bureau, April 2010) at 28. Although it continued to accept some suspects thereafter, in November 2010 Kenyan Judge Mohammed Ibrahim ruled that the country does not have the jurisdiction to try pirates if the attacks occur beyond Kenyan waters. As a result, the seven cases at different levels of trial in Kenya were stopped indefinitely. See The Associated Press, “Somali Piracy Outpacing UN Efforts” *CBS News* (10 November 2010), online: CBS News <<http://www.cbsnews.com/stories/2010/11/10/world/main7039911.shtml>>; Philip Muyanga, “State accused of delaying piracy trials”, *Daily Nation* (8 March 2011), online: Daily Nation <<http://www.nation.co.ke/News/State+accused+of+delaying+piracy+trials+/-/1056/1121466/-/m7f5ivz/-/>>.

of pirates to Kenya and Seychelles for prosecution. Notably, the North Atlantic Treaty Organization (NATO) Standing Maritime Group has no common legal framework to transfer pirates to third-party states for trial;⁵⁵ 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.⁵⁶ Moreover, Denmark and Germany can only prosecute pirates if they have impacted national interests or citizens,⁵⁷ and some states have no definition of piracy in domestic law.⁵⁸ 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.⁵⁹

III. 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 article will not turn to philosophical or ethical reasoning. Rather, it is firmly situated within a legal perspective, examining the system of reputable behaviour that has developed, been codified in legal instruments, and been supported by states.

Prominent conventions that are particularly relevant to the issue of piracy, and that will be discussed throughout the article, 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).⁶⁰ Such conventions place positive

⁵⁵ See "High Time for Piracy Tribunal, experts say", *Radio Netherlands Worldwide* (20 May 2009), online: Radio Netherlands Worldwide <<http://www.rnw.nl/international-justice/article/high-time-piracy-tribunal-experts-say>>.

⁵⁶ See Assembly of the Western European Union, European Security and Defence Assembly, *The Role of the European Union in Combating Piracy*, Document A/2037 (2009) at 65, online: European Security and Defense Committee <http://www.assembly-weu.org/en/documents/sessions_ordinaires/rpt/2009/2037.php> [*Combating Piracy*].

⁵⁷ Roger Middleton, "Pirates and How to Deal With Them" (2009) Chatham House Africa Programme/International Law Briefing Note: AFP/IL BN 2009/01 at 4, online: <http://www.chathamhouse.org.uk/files/13845_220409pirates_law.pdf>.

⁵⁸ See *Combating Piracy*, *supra* note 56 at 65.

⁵⁹ Resolution 1851, *supra* note 44 at preamble; Resolution 1897, *supra* note 44 at preamble.

⁶⁰ 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 engage in counter-piracy activities 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.

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."⁶¹ 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.⁶² According to Kontorovich, the specific reference to international humanitarian law limits the scope of operations, as pirates are civilians, not combatants, and, in accordance with international humanitarian law, may not be specifically targeted except in self-defense.⁶³ 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.⁶⁴ Importantly, UNSCR 1851 refers to "applicable" international humanitarian law, meaning that not all humanitarian law is considered relevant.

1. *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.⁶⁵ Meanwhile, Gopalan argues that lethal force should be used against piracy.⁶⁶

Until the twentieth 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.⁶⁷ However, modern international law, as articulated in the Harvard Draft Convention, iterates the rights to a formal, fair trial.⁶⁸

⁶¹ Resolution 1918, *supra* note 46 at para 2. See also Resolution 1816, *supra* note 45 at para 11; Resolution 1846, *supra* note 46 at para 14; Resolution 1851, *supra* note 44 at paras 6-7; Resolution 1897, *supra* note 44 at paras 11-12.

⁶² Resolution 1851, *supra* note 44 at para 6, renewed in Resolution 1897, *supra* note 44 at para 7. Note that Resolution 1851 has been criticized as likely to cause civilian casualties. See Lolita C. Baldor and Anne Gearan, "Navy commander questions land attacks on pirates" (13 December 2008), online: Navyseals.com < <http://www.navyseals.com/navy-commander-questions-land-attacks-pirates>>.

⁶³ Kontorovich, "International Legal Responses to Piracy off the Coast of Somalia," *supra* note 31.

⁶⁴ Guilfoyle, "Counter-Piracy Law Enforcement", *supra* note 38 at 148.

⁶⁵ David B Rivkin Jr & Lee A Casey, "Pirates Exploit Confusion about International Law", *Wall Street Journal* (19 November 2008) A21.

⁶⁶ Gopalan, *supra* note 37.

⁶⁷ See Kontorovich, "A Guantanamo on the Sea", *supra* note 26 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).

⁶⁸ See Harvard Draft Convention, *supra* note 36 at 853 (stating that summary proceedings on

Moreover, pirates operating off Somalia today are generally not considered combatants engaged in a war but rather civilians.⁶⁹ 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—they are criminal attacks to be addressed accordingly.⁷⁰ As such, although Article 110 of UNCLOS provides the legal basis for the use of force against pirates, its use is within a policing, as opposed to a military, role.⁷¹

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.⁷² 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.⁷³

2. *The Extraterritorial Application of Human Rights Law*

All of the human rights treaties under analysis in this article have applicability beyond state territory, although the extent of jurisdiction is not always clear. 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

board a ship would be "inconsistent with the spirit of modern jurisprudence". 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).

⁶⁹ See Douglas Guilfoyle, "The Laws of War and the Fight against Somali Piracy: Combatants or Criminals?" (2010) 11 *Melb J Int'l L* 141 (commenting on why the laws of armed conflict do not apply to Somali piracy); NATO, Parliamentary Assembly, *The Growing Threat of Piracy to Regional and Global Security*, 169 CDS 09 E rev 1 (2009) at 39, online: *NATO Parliamentary Assembly* <<http://www.nato-pa.int/default.asp?SHORTCUT=1770>> (stating that pirate acts are not considered acts of war); Treves, "Piracy, Law of the Sea, and Use of Force", *supra* note 25 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, "A Guantanamo on the Sea", *supra* note 26 (noting that it could be difficult to deny POW protections to pirates 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); Eugene Kontorovich, "Piracy and International Law", *Global Law Forum* (2009), online: *Global Law Forum* <<http://www.globallawforum.org/ViewPublication.aspx?ArticleId=96>> (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" (2008) 33 *Tul Mar L J* 1 at 4, 20-22 (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).

⁷⁰ Bahar, *supra* note 14 at 31.

⁷¹ See Middleton, *supra* note 57 at 2-3; NATO Parliamentary Assembly, *supra* note 69 at para 39.

⁷² See Treves, "Piracy, Law of the Sea, and Use of Force", *supra* note 25 at 412 ("It is well known that in the parlance of the Security Council 'all necessary means' means 'use of force'").

⁷³ See Douglas Guilfoyle, "Piracy off Somalia: A Sketch of the Legal Framework" (20 April 2009), online *EJIL Analysis* <<http://www.ejiltalk.org/piracy-off-somalia-a-sketch-of-the-legal-framework/>> (discussing, more comprehensively, the use of force during interdiction at sea) [Guilfoyle, "Piracy off Somalia: Legal Framework"].

Article 2(1) of CAT, Article 2(1) of the ICCPR, and Article 1 of the ECHR.⁷⁴

3. *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 Uruguayan agents in Argentina.⁷⁵ 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.”⁷⁶ 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 multinational 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.⁷⁷

Thus, when establishing extraterritorial jurisdiction under the ICCPR,

⁷⁴ *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, UNGAOR, 39th Sess, Supp No 51, Annex, UN Doc A/39/51 (1984) at 197 [*Torture Convention*]; *International Covenant on Civil and Political Rights*, UNGAOR, 21st Sess, Supp No 16, Annex, UN Doc A/6316 (1966) at 52 [ICCPR]; *Convention for the Protection of Human Rights and Fundamental Freedoms*, 4 November 1950, 213 UNTS 221, ETS 5, at Art. 1 [CHRFF].

⁷⁵ *Sergio Euben Lopez Burgos v Uruguay*, Communication No R.12/52, Supp No 40, UN Doc A/36/40 (1981) 176. See also Michal Gondek, “Extraterritorial Application of the European Convention on Human Rights: Territorial Focus in the Age of Globalization?” (2005) 52 *Netherlands International Law Review* 349 at 377, 379.

⁷⁶ See Rick Lawson, “Life After Banković: On the Extraterritorial Application of the European Convention on Human Rights” in Fons Coomans & Menno T Kamminga eds, *Extraterritorial Application of Human Rights Treaties* (Oxford: Intersentia, 2004) 83 at 94 (reporting the opinion of Mr Chr Tomuschat).

⁷⁷ Human Rights Committee, *General Comment No. 31 [80]: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, 80th Sess, UNHRC, UN Doc CCPR/C/21/Rev.1/Add.13 (2004) at para 10. See also *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion [2004] ICJ Rep 136 at paras 107-13 (endorsing the Human Rights Committee jurisprudence); Gondek, *supra* note 75 at 379-80 (offering further analysis of the issue). Notably, General Comments are not binding on state authorities, but they act as an important source for interpretation of the ICCPR.

what is important is whether a person is under the effective control of a State Party.

4. *The Convention Against Torture*⁷⁸

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.⁷⁹ The Committee Against Torture's General Comment No 2 indicates that jurisdiction 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.⁸⁰

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.⁸¹ As such, the US 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.⁸²

5. *The European Convention on Human Rights*

Extraterritorial jurisdiction under the ECHR is rather more ambiguous, with judgments tending to focus on the specifics of individual cases. Hence, it is essential to take a more detailed look at existing jurisprudence, which demonstrates the various interpretations of the European Court of Human Rights (ECtHR) to date.

The ECtHR Grand Chamber's ruling in *Banković v Belgium* (2001) is one of the most important and influential decisions to date.⁸³ The plaintiffs were

⁷⁸ As of May 1, 2011, there were 147 parties to the Torture Convention. Notably, India has signed but not ratified the Torture Convention, and some states, including Singapore and Malaysia, are not parties. *Chapter IV Human Rights: Section 9*, online: United Nations Treaty Collection <http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtldsg_no=IV-9&chapter=4&lang=en>.

⁷⁹ *Torture Convention*, *supra* note 74 at Art. 5(1)(a). See also Manfred Nowak & Elizabeth McArthur, *The United Nations Convention Against Torture: A Commentary* (Oxford: Oxford University Press, 2008) at 308-10 (commenting that the member state's duty to establish jurisdiction on ships applies regardless of the location where the offence is committed).

⁸⁰ Committee against Torture, *General Comment No. 2: The Implementation of Article 2 by States Parties*, 39th Sess, UN Doc CAT/C/GC/2/CRP.1/Rev.4, (2007), at para 16. See also *ibid* at para 17; Committee against Torture, *Conclusions and recommendations of the Committee against Torture: United States of America*, 36th Sess, UN Doc CAT/C/USA/CO/2, (2006) at para 15 [Committee against Torture, USA Report].

⁸¹ See Michael John Garcia, *Renditions: Constraints Imposed by Laws on Torture*, Congressional Research Service (8 September 2009) at 14.

⁸² See Committee Against Torture, USA Report, *supra* note 80 at para 15.

⁸³ *Banković v Belgium* [GC] (dec), No 52207/99, [2001] XII ECHR 333 [*Banković*].

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.⁸⁴ 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.⁸⁵

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"⁸⁶ 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.⁸⁷

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 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),⁸⁸ but not when member states engage in extraterritorial action short of military occupation.⁸⁹

⁸⁴ *Ibid.* For a comprehensive analysis of *Banković* and the meaning of jurisdiction under Article 1, see Lawson, *supra* note 76. See also Sarah Miller, "Revisiting Extraterritorial Jurisdiction: A Territorial Justification for Extraterritorial Jurisdiction under the European Convention" (2009) 20 EJIL 1223 at 1226.

⁸⁵ *Banković*, *supra* note 83 at para 61.

⁸⁶ *Ibid* at para 75.

⁸⁷ *Ibid* at para 75.

⁸⁸ *Loizidou v Turkey* (preliminary objections) (1995), 310 ECHR (Ser A) 2216 at para 62.

⁸⁹ See Tarik Abdel-Monem, "How far do the Lawless Areas of Europe Extend? Extraterritorial Application of the European Convention on Human Rights" (2005) 14 J Transnat'l L & Pol'y 159 at 194. Note that the *Banković* ruling has been widely criticized. See e.g. Gondek, *supra* note 75 at 353 ("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 & Tatjana Papić, "As Bad as it Gets: The European Court of Human Rights's *Behrami and Saramati* Decision and General International Law" (2009) 58 ICLQ 267. 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

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*.⁹⁰ 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.⁹¹

This judgment indicates that member states making arrests abroad (for example, of suspected pirates) should accord the arrestees the protections of the ECHR.⁹² In *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.⁹³ 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.⁹⁴ 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

of the International Covenant on Civil and Political Rights" in Fons Coomans & Menno T Kamminga, eds, *Extraterritorial Application of Human Rights Treaties* (Oxford: Intersentia, 2004) 41 at 41, 72; Michael O'Boyle, "The European Convention on Human Rights and Extraterritorial Jurisdiction: A Comment on 'Life after Bankovic'" in Fons Coomans & Menno T Kamminga, eds, *Extraterritorial Application of Human Rights Treaties* (Oxford: Intersentia, 2004) 125.

⁹⁰ *Öcalan v Turkey* (GC), No 46221/99 [2005] IV ECHR 282 [*Öcalan*].

⁹¹ *Ibid* at para 91.

⁹² 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*, No 21986/93 [2000] VII ECHR 357 at para 99; *Salmouni v France*, No 25803/94 [1999] V ECHR at para 87.

⁹³ *Öcalan v Turkey*, No 46221/99 (12 March 2003) at para 93. See also Abdel-Monem, *supra* note 89; Gondek, *supra* note 75 (offering further analysis of the case).

⁹⁴ *Issa and others v Turkey*, No 31821/96, [2004] 41 ECHR 27 [*Issa*].

did not fall within ECHR jurisdiction.⁹⁵ 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.⁹⁶

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.⁹⁷ 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.⁹⁸

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, occurring in more obscure situations such as in people’s homes, were dismissed on the grounds that the cases were outside the legal space of the ECHR.⁹⁹ The case was originally heard in the English 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 was protected by the ECHR and the Human Rights Act.¹⁰⁰

The case was brought to the Strasbourg Court, and in July 2011, the Grand Chamber held that all of the applicants were within the jurisdiction of

⁹⁵ See Gondek, *supra* note 75 at 359 (stating that “[h]ad such [sufficient] evidence been provided, the outcome of the case could have been quite different”).

⁹⁶ 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*” (2005) 12 Human Rights Brief 9 at 11, online: American University Washington College of Law <<http://www.wcl.american.edu/hrbrief/12/2abdel.pdf?rd=1>>.

⁹⁷ See *Issa*, *supra* note 94 at para 71; *Öcalan*, *supra* note 90 at para 93.

⁹⁸ *Issa*, *supra* note 94 at para 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”).

⁹⁹ *R (on the application of Al-Skeini) v Secretary of State for Defence*, [2007] UKHL 26, [2007] 3 WLR 33 at para 91 [*Al-Skeini* HL]; *The Queen (on the application of Mazin Mumaa Galtah Al-Skeini and Others) v Secretary of State for Defence*, [2005] EWCA Civ 1609 [*Al-Skeini* CA]; *The Queen (on the application of Mazin Mumaa Galtah Al-Skeini and Others) v Secretary of State for Defence*, [2004] EWHC 2911, [2005] 2 WLR 1401 [*Al-Skeini* HC]. See also European Court of Human Rights, Press Release, 27021/08, “Grand Chamber Hearing *Al-Skeini and Others and Al Jedda v. the United Kingdom*” (9 June 2010), online: <<http://cmiskp.echr.coe.int>>.

¹⁰⁰ *Al-Skeini CA*, *supra* note 99 at para 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”).

the ECHR, although reiterating that extraterritorial jurisdiction remains exceptional. In fact, the Court held that the UK exercised authority and control over the individuals killed, but only in the context of the UK exercising some form of public powers:

[T]he United Kingdom (together with the United States) assumed in Iraq the exercise of some of the public powers normally to be exercised by a sovereign government. In particular, the United Kingdom assumed authority and responsibility for the maintenance of security in South East Iraq. In these exceptional circumstances, the Court considers that the United Kingdom, through its soldiers engaged in security operations in Basrah during the period in question, exercised authority and control over individuals killed in the course of such security operations, so as to establish a jurisdictional link between the deceased and the United Kingdom for the purposes of Article 1 of the Convention.¹⁰¹

In making the concept of authority and control over individuals dependent on the exercise of public powers, the Court did not overrule the *Banković* judgement, although it has somewhat altered its interpretation. Moreover, following *Issa* and *Öcalan*, it quite clearly did not uphold the “legal space” argument provided in the *Banković* judgment.

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. As Lanham states, “a ship is essentially construed as a floating island for the purposes of jurisdiction.”¹⁰² This interpretation is reiterated in ECHR case law.¹⁰³ 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 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

¹⁰¹ See *Al-Skeini and Others v. The United Kingdom* (GC), No 55721/07 (07 July 2011) at para 149 [*Al-Skeini* GC], online: European Courts of Human Rights <<http://cmiskp.echr.coe.int>>. For further analysis of the Grand Chamber judgment, see Marko Milanović, “European Court Decides *Al-Skeini* and *Al-Jedda*” (7 July 2011), online: EJIL: Talk! Blog of the European Journal of International Law <www.ejiltalk.org>.

¹⁰² Lanham, *supra* note 30 at 25.

¹⁰³ *Banković*, *supra* note 83 at paras 59 and 73. See also *Medvedyev and others v France* (GC), No 3394/03 (29 March 2010) at para 65 [*Medvedyev* 2010], online: European Courts of Human Rights <<http://cmiskp.echr.coe.int>>.

jurisdiction for the purposes of Article 1.¹⁰⁴

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.¹⁰⁵ 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.¹⁰⁶ 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.¹⁰⁷ 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. To date, there is no ECHR jurisprudence that specifically relates to piracy to elucidate this point. Nonetheless, if suspected pirates are under the physical control of member state agents, they could be found to be within ECHR jurisdiction.

The *Al-Skeini* judgment provides further analysis. Referring to the cases of *Öcalan*, *Issa* and *Medvedyev* the Court stated that it:

[D]oes not consider that jurisdiction in the above cases arose solely from the control exercised by the Contracting State over the buildings, aircraft or ship in which the individuals were held. What is decisive in such cases is the exercise of physical power and control over the person in question.¹⁰⁸

As such, it emphasises that these cases are not only about control over an area, but also about the exercise of physical power and control over a person. The extent of physical power and control required is not clear, however, drawing on the above-mentioned cases, if a suspected pirate is physically compelled by state authorities to either stay in one place or to travel to a certain location, then it appears he would be under the state's control for the purposes of ECHR jurisdiction.

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."¹⁰⁹ However, ECHR jurisprudence to date makes a number of important points. Significantly, although jurisdiction is primarily

¹⁰⁴ European Court of Human Rights, Press Release, 3394/03, "Grand Chamber Judgment *Medvedyev and Others v. France*" (29 March 2010), online: European Courts of Human Rights <<http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=Medvedyev&sessionid=70460153&skin=hudoc-pr-en>>.

¹⁰⁵ Douglas Guilfoyle, "ECHR Rights at Sea: *Medvedyev* and others v. France" (19 April 2010), online: EJIL: Talk! Blog of the European Journal of International Law <<http://www.ejiltalk.org/echr-rights-at-sea-medvedyev-and-others-v-france/>> [Guilfoyle, "ECHR Rights at Sea"].

¹⁰⁶ *Ibid.*

¹⁰⁷ Guilfoyle, "Counter-Piracy Law Enforcement", *supra* note 38 at 155.

¹⁰⁸ *Al-Skeini GC*, *supra* note 102 at para 136.

¹⁰⁹ O'Boyle, *supra* note 89 at 139.

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*, *Issa* and *Al-Skeini*, 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. The *Al-Skeini* judgment indicates that the extraterritorial control of a person can occur only in exceptional circumstances, such as when the state in question assumes the exercise of some public powers in that territory. 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.¹¹⁰

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.¹¹¹ In general, the ECtHR appears reluctant to establish jurisdiction over the actions of multinational 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 authorization are attributable to the UN, as opposed to the individual states.¹¹² This decision was made even though the forces were not seconded to the multinational 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.¹¹³ 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

¹¹⁰ 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 76 at 105 (arguing that the level of protection is directly relative to the extent of control).

¹¹¹ See Part II, *The Extraterritorial Application of Human Rights Law, for a short analysis of ICCPR and its application by state parties acting as part of international peace-keeping or peace-enforcement operations*.

¹¹² *Behrami v France* [GC] (dec), No 71412/01, [2007] 45 EHRR SE 10. *Behrami* and *Saramati* were cases taken by individuals of Albanian origin living in Kosovo against states operating as part of the Kosovo Force. See Milanović & Papić, *supra* note 89 (analyzing the Court's admissibility decision).

¹¹³ International Law Commission, *Report of the International Law Commission*, UNGAOR, 64th Sess, Supp No 10, UN Doc A/64/10 (2009).

conduct.¹¹⁴

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.¹¹⁵ The Venice Commission discussed the 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.¹¹⁶ 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?”¹¹⁷

Recently, the ECtHR’s judgment in *Al-Jedda v. UK* found that the acts of UK troops operating within the Multi-National Force in Iraq were attributable to the troop-contributing nation.¹¹⁸ The case involves the detention of an individual in Iraq under UNSCR 1546, and the UK argued 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. Referring to the guidance of the International Law Commission in Article 5 of its draft Articles on the Responsibility of International Organisations and in its commentary thereon, the ECtHR stated:

[T]he Court considers that the United Nations Security Council had neither effective control nor ultimate authority and control over the acts and omissions of troops within the Multi-National Force and that the applicant’s detention was not, therefore, attributable to the United Nations.¹¹⁹

Rather, as the internment took place within a detention facility controlled exclusively by British forces, the Court stated that “the applicant was therefore within the authority and control of the United Kingdom throughout”.¹²⁰ Notably, the Court emphasised the different roles of the UN to differentiate *Al-Jedda* from *Behrami and Saramati*, and it did not provide any

¹¹⁴ *Ibid* at 62 [emphasis added].

¹¹⁵ See *ibid* 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”); *ibid* 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’ 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*.

¹¹⁶ Council of Europe, European Commission for Democracy Through Law (Venice Commission), 60th Plenary Sess, *Opinion on Human Rights in Kosovo: Possible Establishment of Review Mechanism*, 280/2004 (2004), online: Council of Europe Venice Commission <[http://www.venice.coe.int/docs/2004/CDL-AD\(2004\)033-e.asp](http://www.venice.coe.int/docs/2004/CDL-AD(2004)033-e.asp)>.

¹¹⁷ Milanović & Papić, *supra* note 89 at 282.

¹¹⁸ See *Al-Jedda v. The United Kingdom* (GC), No 27021/08 (07 July 2011) [*Al-Jedda*], online: European Courts of Human Rights <<http://cmiskp.echr.coe.int>>.

¹¹⁹ *Ibid* at para 84.

¹²⁰ *Ibid* at para 85.

further explanation of whether factual control or ultimate control is the critical factor in such cases.¹²¹

In addition to independent state forces, there are three multinational bodies conducting counter-piracy operations off the coast of Somalia: the Combined Task Force 151, the NATO Maritime Group, and EU NAVFOR.¹²²

The Combined Task Force 151 (CTF 151), a task force of the US-commanded Combined Maritime Forces, is a multinational task force established in January 2009. Operating in the Gulf of Aden and off the coast of Somalia in an area of approximately 1.1 million square miles, it has the aim of deterring, disrupting, and suppressing piracy. At the time of writing, CTF 151 is under the command of a New Zealand Naval Officer, Captain Jim Gilmour.¹²³ NATO's Operation Ocean Shield is mandated until December 2012 and is being undertaken by Standing NATO Maritime Group 2. It currently consists of five ships belonging to the Netherlands, the US, Denmark, and Turkey, as well as one aircraft from Portugal.¹²⁴ Operation Ocean Shield 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 the Combined Task Force 151 encounter pirates, they revert to national authority in the decision on how to deal with them; at times national authorization may be in accordance with a request by the multinational force's Operational Commander.¹²⁵ 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 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

¹²¹ *Ibid* at para 83. In addition, importantly, in the *Al-Jedda* judgment, the Court clearly iterates that it should be presumed that the Security Council does not intend to impose an obligation on Member States to breach human rights, and that in the event of any ambiguity, the Court will interpret a Security Council Resolution in the manner in which it corresponds most closely to the requirements of international human rights law. See *ibid* at para 102. For further analysis see Milanović, *supra* note 102.

¹²² 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.

¹²³ See "New Zealand Captain To Lead Piracy Task Force" (5 June 2011), online: Combined Maritime Forces <<http://combinedmaritimeforces.com/2011/06/05/new-zealand-captain-to-lead-us-piracy-task-force-source-voxy-co-nz/>>.

¹²⁴ See Allied Maritime Command Headquarters Northwood, Press Release, "NATO's latest counter piracy weapon strikes early blow" (29 April 2011), online: NATO-OTAN <http://www.manw.nato.int/page_press_release_2011.aspx>. Previous operations were Operation Allied Provider and Operation Allied Protector, the latter of which ended in August 2009. See NATO-OTAN Allied Command Operations, "Operation Allied Protector" (2010), online: NATO-OTAN <<http://www.aco.nato.int/page13974522.aspx>>.

¹²⁵ E-mail from Lieutenant Commander Jacqui Sherriff, Chief Public Affairs Officer, Allied Maritime Command Headquarters Northwood (1 November 2010, 17.35 GMT) (on file with author); E-mail from Commander Andrew Murdoch, Former Legal Advisor to CMF, Bahrain, 2008-09 (27 September 2010, 02.26 CST) (on file with author).

persons who are suspected of, or who have committed, piracy or armed robbery in the area where the force is operating, and the suspects can be prosecuted either in a third state (Seychelles, or previously Kenya), or by an EU member state.¹²⁶ 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.¹²⁷ 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.¹²⁸ 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.¹²⁹

The issue is where effective control of the conduct under scrutiny lies. Guilfoyle highlights that the transfer of pirates to a third state for prosecution requires the agreement of the national authorities of the capturing warship as well as of the EU NAVFOR Operation Commander.¹³⁰ 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.¹³¹ 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.¹³²

Therefore, any State party to the ECHR operating as part of an

¹²⁶ EU NAVFOR Somalia, "Mandate", online: EU NAVFOR Somalia <<http://www.eunavfor.eu/about-us/mission>>.

¹²⁷ See EC, *Council Joint Action 2008/851/CFSP of 10 November 2008 on a European Union military operation to contribute to the deterrence, prevention, and repression of acts of piracy and armed robbery off the Somali Coast*, [2008] OJ, L 301/33 at 35. See also EU NAVFOR Somalia, Chain of Command, <http://www.eunavfor.eu/chain-of-command/> (providing further information regarding the command of EU NAVFOR).

¹²⁸ 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 EC, *Accession of the European Union to the European Convention on Human Rights* (17 February 2010) Note 6581/10.

¹²⁹ UK, 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 (2010) Appendix: Minutes of Evidence, Taken before the Select Committee on the European Union (Sub-Committee C) (12 February 2009) at 11, online: <<http://www.publications.parliament.uk/pa/ld200910/ldselect/ldseucom/103/103.pdf>> [HL, European Union Committee, "Combating Somali Piracy"].

¹³⁰ Guilfoyle, "Counter-Piracy Law Enforcement", *supra* note 38 at 158.

¹³¹ *Ibid.*

¹³² HL, European Union Committee, "Combating Somali Piracy", *supra* note 130 at 11. See also "Postcard from Somali Pirate Capital", *BBC News* (16 June 2009), online: BBC News <<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 reportedly kept in stone prisons described as "sweltering cages.").

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.¹³³

IV. 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.

1. 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.¹³⁴ 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 having to face justice, and discuss the detention of suspected pirates due to operations conducted under the resolution.¹³⁵

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 fifteen to sixteen days¹³⁶ and sixteen days¹³⁷ respectively, the ECtHR

¹³³ Ideally, the forces should act in accordance with the Convention at all times.

¹³⁴ See e.g. Resolution 1816, *supra* note 45 at para 7(b).

¹³⁵ See e.g. Resolution 1918, *supra* note 46 at para 1; Resolution 1897, *supra* note 44 at preamble.

¹³⁶ *Medvedyev* 2010, *supra* note 104 at paras 13-20.

¹³⁷ Tullio Treves, “Human Rights and the Law of the Sea” (2010) 28:1 Berkeley J Int’l L 1 at 7

accorded that there was no violation of Article 5(3), or the requirement of promptitude, because it was not possible to physically bring the suspects before a judicial authority any sooner.¹³⁸ Importantly, the Court noted that such long detention was justified by "wholly exceptional circumstances."¹³⁹ 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.¹⁴⁰

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 2009, the Danish warship *Absalon* picked up five suspected pirates who had been forced to jump into the water after their boat went 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.¹⁴¹ 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 unwillingness of various states to prosecute the suspected pirates.

Alternatively, there are multiple reports of pirates being detained by international forces only to be released without prosecution.¹⁴² Some

[Treves, "Human Rights and the Law of the Sea"].

¹³⁸ *Medvedyev* 2010, *supra* note 104 at para 105; *Rigopoulos v Spain*, No 37388/97, [1999] II ECHR 437 [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.

¹³⁹ *Medvedyev* 2010, *supra* note 104 at para 130.

¹⁴⁰ See Guilfoyle, "Counter-Piracy Law Enforcement", *supra* note 38. See also Treves, "Human Rights and the Law of the Sea", *supra* note 138 at 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" (2010) 59 Int'l & Comp L Q 867 (analyzing the case of *Medvedyev*).

¹⁴¹ See "Amnesty Demands Dutch and Danish Take Care of Pirates", *Politiken* (4 February 2009), online: NRC Handelsblad <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* (9 January 2009), online: NPR <<http://www.npr.org/templates/story/story.php?storyId=99169738&sc=emaf>>. Note that this case is not isolated. See e.g. Mike Corder, "Nations Look to Kenya as Venue for Piracy Trials" *The Associated Press* (17 April 2009), online: Law.com <<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* (22 April 2009), online: Deutsche Welle <<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).

¹⁴² See e.g. "German Navy Foils Somali Pirates", *BBC News* (25 December 2008), online: BBC News <<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); "Pirates rule on high seas as international law lacks clarity", *TV-Novosti* (7 May 2010), online: RT TV <<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); Craig Whitlock, "Navy Releases Accused Somali Pirates Held on Warship for Six Weeks", *The Washington Post* (28 May 2010), online: The Washington Post <<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

suspected pirates are released immediately, while others are held for a period of time, which could again be regarded as a violation of ECHR Article 5.¹⁴³

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.¹⁴⁴ 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.¹⁴⁵ 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 2010, were held naked, blindfolded, handcuffed, and without access to an interpreter for days.¹⁴⁶

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.¹⁴⁷ The ECtHR also affirms that detained suspects should be afforded certain rights, such as the notification of family members and access to legal advice.¹⁴⁸ 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.¹⁴⁹

held them on board a warship for six weeks, after failing to find a location in which to prosecute the alleged pirates).

¹⁴³ See e.g. Middleton, *supra* note 57 at 5.

¹⁴⁴ *SUA Convention*, *supra* note 21 at Art 7.

¹⁴⁵ Bahar, *supra* note 14 at 46.

¹⁴⁶ Steve Szkotak, "Attorneys: Accused Pirates Blindfolded, Handcuffed", *The Associated Press* (19 July 2010), online: Seattle Times <http://seattletimes.nwsources.com/html/nationworld/2012397208_apusprosecutingpirates.html>.

¹⁴⁷ *ICCPR*, *supra* note 74 at Art 9; *CHRFF*, *supra* note 74 at Art 5.

¹⁴⁸ 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." *Medvedyev and Others v. France*, No. 3394/03 (10 July 2008) at para 61 [*Medvedyev 2008*], online: European Courts of Human Rights <<http://cmiskp.echr.coe.int/tkp197/view.asp?item=3&portal=hbkm&action=html&highlight=medvedyev&sessionId=57185656&skin=hudoc-en>>. 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 104, Annex: Joint Partly Dissenting Opinion of Judges Tulkens, Bonello, Zupančić, Fura, Spielmann, Tsotsoria, Power and Poalelungi, at para 5.

¹⁴⁹ Guilfoyle, "ECHR Rights at Sea", *supra* note 106.

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.¹⁵⁰ As of now, that framework remains ambiguous. The problem lies partly in the various legal frameworks that intersect in the fight against piracy: domestic laws, international treaties, UNSCRs, customary law, and human rights law. Hence, EU Recommendation 840 suggests that each nation-state involved in the fight against piracy needs to determine, domestically, the conditions for detaining suspected 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.¹⁵¹ Similarly, Jack Lang recommends the development of a legal framework for detention at sea, which complies with international human rights law and is compatible with operational constraints.¹⁵² However, creating domestic legal norms in line with international law can be problematic. For example, as international law does not stem from a democratic process, one can question whether it is right to allow its influence to translate into norms applicable in domestic law.¹⁵³

2. *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.¹⁵⁴ 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.¹⁵⁵ The first piracy conviction to occur in Europe in modern times happened in the

¹⁵⁰ Andersen *et al.*, *supra* note 3 at 14.

¹⁵¹ See *Combating Piracy*, *supra* note 56 (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 at 67).

¹⁵² United Nations Security Council, *Report of the Special Adviser to the Secretary-General on Legal Issues Related to Piracy off the Coast of Somalia*, S/2011/30 (2011).

¹⁵³ See e.g. Ximena Fuentes Torrijos, "International Law and Domestic Law: Definitely an Odd Couple" (2008) 77 *Rev. Jur. U.P.R.* 483.

¹⁵⁴ See e.g. Corder, *supra* note 142; "Duel at the Suez Canal: World Scrambles to Deal with Pirate Threat", *Der Spiegel* (24 November 2008), online: *Der Spiegel* <<http://www.spiegel.de/international/world/0,1518,592433,00.html>>; Rivkin & Casey, *supra* note 65 (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) (19 May 2009), online: *The Telegraph* <<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).

¹⁵⁵ See UK, HOL EU Sub-Committee C (Foreign Affairs, Defence, and Development Policy), *Operation Atalanta and Somali Piracy* (19 May 2009), online: *Parliament.uk* <<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* (13 April 2008), online: *TimesOnline.co.uk* <<http://www.timesonline.co.uk/tol/news/uk/article3736239.ece>>.

Netherlands in June 2010, and reportedly one of those pirates has already applied for asylum there.¹⁵⁶

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.¹⁵⁷ 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.

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.¹⁵⁸ 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.¹⁵⁹ 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.¹⁶⁰

The applicability of non-refoulement on the high seas is subject to debate

¹⁵⁶ See Henry Foy, "Somali Pirates Jailed by Dutch Court", *The Guardian* (17 June 2010) online: <http://www.guardian.co.uk/world/2010/jun/17/somali-pirates-jailed-netherlands>.

¹⁵⁷ UK, HC, *Parliamentary Debates*, col 220 (4 Dec 2008), online: UK Parliament <<http://www.parliament.the-stationery-office.co.uk/pa/cm200809/cmhansrd/cm081204/debtext/81204-0017.htm>> (Jack Straw). See *Convention relating to the Status of Refugees*, 28 July 1951, 189 UNTS 150 at Art 1(f).

¹⁵⁸ The principle of non-refoulement is also stated in other regional treaties such as Article 5(2) of the American Convention on Human Rights.

¹⁵⁹ 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, *CCPR General Comment No. 29: Article 4: Derogations during a State of Emergency*, UNGAOR, 72nd Sess, UN Doc CCPR/C/21/Rev1/Add11, (2001) at para 11; UN Committee against Torture, *Gorki Ernesto Tapia Paez v Sweden*, Communication No 39/1996, UNGAOR, 18th Sess, UN Doc CAT/C/18/D/39/1996 (1997) at para 14.5; *Chahal v United Kingdom* (1996), [1996] ECHR 54, 23 EHRR 413; *Saadi v Italy* [GC], No 37201/06 (28 February 2008). 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", online: (2008) 12 ASIL Insights <<http://www.asil.org/insights080513.cfm>>.

¹⁶⁰ See Office of the High Commissioner for Human Rights, *CCPR 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*, UNHCR, 52nd Sess, UN Doc CCPR/C/21/Rev.1/Add.6 (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 Yvonne M Dutton "Pirates and Impunity: Is the Threat of Asylum Claims a Reason to Allow Pirates to Get Away with Murder?" (2011) 34 *Fordham Int'l LJ* 236 (for further analysis of the refoulement obligations and the interpretations of states).

(see the discussion in Part II 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.¹⁶¹

In May 2010, the United Nations High Commissioner for Refugees issued a briefing reiterating that no person should be involuntarily returned to central and southern Somalia and calling on all states to uphold their obligations regarding non-refoulement.¹⁶² As the insecurity in Somalia continues, 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.¹⁶³ Notably, at present, pirates appear to be voluntarily returning to Somalia rather than remaining 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.

3. *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 signed agreements to transfer suspected pirates to Kenya for trial (now no longer effective), and the US and the EU have agreements with Seychelles. In addition, in 2011 Seychelles signed a Prison Transfer Accord with the TFG and MOUs with Somaliland and Puntland relating to the transfer of sentenced pirates to Somalia to serve their sentences.¹⁶⁴

¹⁶¹ Council of Europe, European Committee for the Prevention of Torture, *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*, CPT/Inf (2010) 14 at para 49.

¹⁶² United Nations, Press Release, "Appeals on Somalia for international obligations on non-refoulement to be observed" (21 May 2010), online: UNHCR <<http://www.unhcr.org/>>. Note that the recommendations and guidelines of UNHCR are not binding on states.

¹⁶³ *Ibid.* This is not to say that refoulement of asylum-seekers to Somalia is not occurring. See e.g. "Welcome to Kenya": Police Abuse of Somali Refugees (New York: Human Rights Watch, 2010), online: Human Rights Watch <http://www.hrw.org>; *Kenya: Refoulement of Somali asylum seekers* (3 April 2009), online: UNHCR <<http://www.unhcr.org/>>; United Nations High Commissioner for Refugees, Briefing Notes, "Kenya: Refoulement of Somali Asylum Seekers" (3 April 2009), online: UNHCR <<http://www.unhcr.org/49d5d9c16.html>>. 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 Dutton, *supra* note 161.

¹⁶⁴ See "Seychelles signs historic accord on transfer of jailed Somali pirates", *Seychelles Nation* (12 February 2011), online: Nation.sc <<http://www.nation.sc/index.php?art=22405>>; "Seychelles finalises agreements on transfer of pirates to Puntland and Somaliland", *Seychelles Nation* (21

The various agreements reportedly contain assurances regarding the protection of human rights.¹⁶⁵ Similarly, the UK iterated 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, and it presented assurances from Kenya that this does not occur.¹⁶⁶ However, existing jurisprudence indicates that diplomatic assurances are not necessarily enough.¹⁶⁷

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.¹⁶⁸ 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.¹⁶⁹ 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, "[t]he State party should establish and implement clear procedures for obtaining such assurances, with adequate judicial mechanisms for review, and effective post-return monitoring arrangements."¹⁷⁰

States have handed over suspected pirates to countries such as Seychelles, Kenya, Somalia, and Yemen,¹⁷¹ and there are reports of

April 2011), online: Nation.sc <<http://www.nation.sc/index.php?art=23226>>.

¹⁶⁵ 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 (EUNAVFOR), and seized property in the possession of EUNAVFOR, from EUNAVFOR to Kenya and for their treatment after such transfer*, European Union and Kenya, 6 March 2009, OJ (L79) 49 at 51, Provision 3(a) [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*, European Union and Seychelles, 26 October 2009, OJ (L315) 38 [EU-Seychelles Exchange of Letters]. Moreover, as stated in the EU-Kenya Exchange of Letters, termination of the agreement does not negate the benefits or obligations arising out of the agreement before termination, which includes the benefits to suspected pirates for as long as they are held in custody or prosecuted in transferee states. (Please note that the other agreements are confidential and therefore are not available to the author.)

¹⁶⁶ HL, European Union Committee, "Combating Somali Piracy", *supra* note 130 at 14.

¹⁶⁷ See Committee Against Torture, USA Report, *supra* note 80 at para 21; *Saadi v Italy*, *supra* note 160 at para 147.

¹⁶⁸ *Saadi v Italy*, *supra* note 160 at para 147.

¹⁶⁹ *Ibid* at para 148.

¹⁷⁰ Committee Against Torture, USA Report, *supra* note 80 at para 21.

¹⁷¹ See e.g. Corder, *supra* note 142; "Dusting Off Ancient Laws to Deal With 21st-Century Piracy", *NRC Handelsblad* (22 April 2009), online: NRC Handelsblad <http://www.nrc.nl/international/Features/article2220357.ece/Dusting_off_ancient_laws_to_deal_with_21st-century_piracy?service=Print>; "French Warship Thwarts Pirate Attack", *National Public Radio* (6 January 2009), online: NPR <<http://www.npr.org/templates/story/story.php?storyId=99036159&sc=emaf>>; "Kenya, US Agree to Deal on Piracy", *VOA News* (27 January 2009), online: VOA News

discussions to sign agreements between the EU and Mauritius, Mozambique, South Africa, Tanzania, and Uganda.¹⁷²

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 contact family members."¹⁷³ 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 centres.¹⁷⁴ Moreover, in a shadow report by non-governmental organizations, it was revealed that 54 per cent of complaints of torture were presented before judges or magistrates, but that action was taken only in nineteen per cent of cases.¹⁷⁵ 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.¹⁷⁶ In addition, UNODC has conducted extensive refurbishment of Shimo La Tewa prison (and basic refurbishments in five other prisons), improving medical facilities, water supply, sanitation, and providing educational facilities, among other activities.¹⁷⁷ Nonetheless, in its 2010 report, the US State

<<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* (14 July 2010), online: African Press Organization
<<http://appablog.wordpress.com/2010/07/14/seychelles-and-the-usa-sign-piracy-agreement>>; Rivkin & Casey, *supra* note 65; "Russian Navy Transfers Detained Somali Pirates to Yemen", *RIA Novosti* (18 February 2009), online: RIA Novosti <<http://en.rian.ru/world/20090218/120209688.html>>; Sophie Hardach, "France Rejects Appeal by Suspected Somali Pirates", *Reuters* (6 April 2009), online: Reuters UK
<<http://uk.reuters.com/article/2009/04/06/uk-france-somalia-trial-sb-idUKTRE5354Z820090406>>;

¹⁷² See EC, EU Naval Operation Against Piracy (EUNAVFOR Somalia – Operation ATALANTA), [April 2010] EUNAVFOR/17 at 2 (25 April 2010); HL, European Union Committee, "Combating Somali Piracy", *supra* note 130 at 14.

¹⁷³ UN Committee Against Torture (CAT), *Concluding observations of the Committee against Torture: Kenya*, 41st Sess, UN Doc CAT/C/KEN/CO/1 (2009), at para 13.

¹⁷⁴ *Ibid* at paras 14-15.

¹⁷⁵ 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* (Kenya: The Independent Medico- Legal Unit, 2008).

¹⁷⁶ 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*, UNHRC, UN Doc A/HRC/WG.6/8/Ken/1 (2010) at paras 40, 41, 46.

¹⁷⁷ United Nations Office on Drugs and Crime, *Counter-Piracy Programme: Support to the Trial and Related Treatment of Piracy Suspects* (February 2011, Issue 5) online: UNODC <http://www.unodc.org/documents/easternafrika/piracy/20110209.UNODC_Counter_Piracy_February_Issue.pdf>.

Department reports that prison and detention centre conditions were life threatening, describing torture, degrading and inhuman treatment, unsanitary conditions, and extreme overcrowding as endemic.¹⁷⁸

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.¹⁷⁹ The US State Department has outlined the poor conditions and treatment, including torture, in prisons, as well as the widespread denial of fair public trial and the weak and corrupt judicial system in the country.¹⁸⁰ Moreover, in Yemen the punishment for piracy is crucifixion, and in May 2010 six pirates tried in Yemen were given the death sentence.¹⁸¹ Notably, a large number of states are prohibited under international law from transferring persons to another state that may impose the death penalty.¹⁸² Meanwhile, the US State Department reports poor prison conditions and an inefficient and politically influenced court system as problems in Seychelles.¹⁸³

At the same time, 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, while intense fighting in Mogadishu in June and July led to an increase in civilian casualties.¹⁸⁴ Civilians in South and Central Somalia live under continuous threat from armed groups, with reports of stoning, amputations, flogging, and other corporal punishment.¹⁸⁵ There are also numerous reports of summary executions and mutilations by group al-Shabaab.¹⁸⁶ Similarly, the US

¹⁷⁸ US, Department of State, Bureau of Democracy, Human Rights and Labor, 2010 *Human Rights Report: Kenya* (8 April 2011), online: State.gov <<http://www.state.gov/documents/organization/160127.pdf>>.

¹⁷⁹ Freedom House, *Countries at the Crossroads 2010: Country Report - Yemen* (Washington, D.C.: Freedom House, 2010), online: Freedom House <<http://www.freedomhouse.org/modules/publications/ccr/modPrintVersion.cfm?edition=9&ccrpage=43&ccrcountry=207>>.

¹⁸⁰ US, Department of State, Bureau of Democracy, Human Rights and Labor, 2010 *Human Rights Report: Yemen* (8 April 2011), online: State.gov <<http://www.state.gov/documents/organization/160081.pdf>>.

¹⁸¹ See e.g. "Dusting Off Ancient Laws to Deal with 21st-Century Piracy", *supra* note 172; "Second Conviction for Somali Pirates in Week", *Yemen News Agency* (19 May 2010), online: <<http://www.sabanews.net/en/news214831.htm>>.

¹⁸² See e.g. *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*, 3 May 2002, Eur TS 187, online: European Court of Human Rights <<http://www.echr.coe.int/library/annexes/187E.pdf>> (abolishing the death penalty in all circumstances, and which is binding on acceding states). See also *Al-Saadoon and Mufdhi v United Kingdom*, No 61498/08 (2 March 2010) at paras 118, 120 and 123, online: European Court of Human Rights <<http://cmiskp.echr.coe.int>>.

¹⁸³ US, Department of State, Bureau of Democracy, Human Rights and Labor, 2010 *Human Rights Report: Seychelles* (08 April 2011), online: State.gov <<http://www.state.gov/documents/organization/160142.pdf>>.

¹⁸⁴ *Report of the Secretary-General on Somalia*, UNSC, UN Doc S/2010/234 (May 11, 2010) para 19 [UNSC May Report]; *Report of the Secretary-General on Somalia*, UNSC, UN Doc S/2010/447 (Sept. 9, 2010) para 12 [UNSC September Report].

¹⁸⁵ UNSC May Report, *supra* note 185 at para 20; UNSC September Report, *supra* note 185 at para 29.

¹⁸⁶ UNSC May Report, *supra* note 185 at para 23.

Department of State reports that,

[h]uman rights abuses included arbitrary killings, kidnappings, torture, rape, amputations, and beatings; official impunity; harsh and life-threatening prison conditions; and arbitrary arrest, deportation, and detention ... Denial of a fair trial and limited privacy rights were problems¹⁸⁷
....

However, as described by Guilfoyle, the existence of human rights violations does not prohibit outright the transfer of suspected pirates to these countries.¹⁸⁸ 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.¹⁸⁹

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.¹⁹⁰ 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. The agreement also guarantees permission for humanitarian agencies to visit persons who are transferred.¹⁹¹

However, judicial review mechanisms are not so clearly delineated, and in practice range from no review to judicial scrutiny. For example, in May 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.¹⁹² The Spanish ship was part of the EU flotilla operating off Somalia, which means that it could have utilized the, then valid, 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

¹⁸⁷ US, Department of State, Bureau of Democracy, Human Rights and Labor, *2010 Human Rights Report: Somalia* (8 April 2011), online: State.gov <<http://www.state.gov/documents/organization/160144.pdf>>.

¹⁸⁸ Guilfoyle, "Counter-Piracy Law Enforcement", *supra* note 38 at 163.

¹⁸⁹ See Committee Against Torture, USA Report, *supra* note 80 at para 21.

¹⁹⁰ See EU-Kenya Exchange of Letters, *supra* note 166 at 51, at 2(c); EU-Seychelles Exchange of Letters, *supra* note 166 at 38.

¹⁹¹ See EU-Kenya Exchange of Letters, *supra* note 166 at 52; EU-Seychelles Exchange of Letters, *supra* note 166 at 43.

¹⁹² See Daniel Woolls, "Spain: About Face on Piracy Suspects" *Chicago Defender* (8 May 2009), online: Chicago Defender <<http://www.chicagodefender.com/article-4353-spain-about-face-on-piracy-suspects.html>>.

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.¹⁹³ In February and April 2011, agreements were signed between Seychelles and the TFG, Somaliland and Puntland to govern the transfer of sentenced pirates to these entities to serve their sentences. Hargeisa prison, refurbished by the UN, was officially opened in March 2011, and is reportedly equipped to receive prisoners transferred internationally.¹⁹⁴ In addition, UNODC is currently refurbishing Bossaso prison, and the UN plans to build two more 500-bed prisons in Somalia to house convicted pirates.¹⁹⁵

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.¹⁹⁶ 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.¹⁹⁷ Hence, the EU–Seychelles Exchange of Letters explicitly states "the Seychelles will not transfer any transferred person to any other State without prior written consent from EU NAVFOR."¹⁹⁸ 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.

4. 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 obligation on transferring states is detailed by the Human

¹⁹³ See "Seychelles convicts 11 Somali Pirates to 10 years", CNN (27 July 2010), online: INSIDESOMALIA <<http://insidesomalia.org/201007273087/News/Human-Rights/Seychelles-convicts-11-Somali-pirates-to-10-years.html>>; "Somali Pirates Sentenced to Ten Years in Seychelles", BBC News (26 July 2010) online: BBC News <<http://www.bbc.co.uk/news/world-africa-10763605>>.

¹⁹⁴ See "Somalia Opens First Prison for Pirates", *Associated Press*, (30 March 2011) online: military.com <<http://www.military.com/news/article/somalia-opens-first-prison-for-pirates.html>>.

¹⁹⁵ See "Somalia Opens First Prison for Pirates", *supra* note 195; United Nations Office on Drugs and Crime, *supra* note 178.

¹⁹⁶ John Knott, "United Kingdom: Piracy off Somalia: Prosecutions, Procrastination and Progress" *Mondaq* (21 January 2010) online: Mondaq Business Briefings <<http://www.mondaq.com/article.asp?articleid=92442&login=true>>.

¹⁹⁷ See *Soering v The United Kingdom* (1989), 11 EHRR 439; *Chitat Ng v Canada*, Communication No 469/1991, UNGAOR, 49th Sess, UN Doc CCPR/C/OP/5 (1991) at para 14.2; Human Rights Committee, *supra* note 77 at para 12.

¹⁹⁸ EU-Seychelles Exchange of Letters, *supra* note 166 at 38.

Rights Committee,¹⁹⁹ while 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.²⁰⁰ Notably, there is a very high threshold when determining the criteria for a violation of ECHR Article 6, namely that there is a flagrant denial of a fair trial.²⁰¹ 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."²⁰²

In the Kenyan and Seychellois trials that have been conducted, there appear 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, in the case of Kenya, compulsory oral testimony.²⁰³ Moreover, the trials have been run with the financial and legal support of transferring states and often have been conducted in the presence of international observers.²⁰⁴ The

¹⁹⁹ See e.g. *Chitat Ng v Canada*, *supra* note 192 at para 14.2; *Kindler v Canada*, Communication No 470/1991, UNGAOR, 48th Sess, UN Doc CCPR/C/48/D/470/1991 (1993) at para 13.1.

²⁰⁰ See *CHREFF*, *supra* note 74 at Art 6.

²⁰¹ See, for example, *Soering v The United Kingdom*, *supra* note 198 at para 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* [GC], No 46827/99 (4 February 2005) at para 91, 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."

²⁰² *Mamatkulov and Askarov v Turkey*, *supra* note 202, Joint Partly Dissenting Opinion of Judges Bratza, Bonello and Hedigan at para 14.

²⁰³ See Middleton, *supra* note 57; United Nations Office on Drugs and Crime, *supra* note 178 (reporting that it ensures the attendance of witnesses, provides translation services for suspects and provides for defence lawyers [in the case of Kenya UNODC provided defence lawyers where it was requested to do so by the courts and no other defence assistance was present]). 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* (27 August 2009), online: VOA News <<http://www1.voanews.com/english/news/a-13-2009-08-27-voa36-68754822.html>>.

²⁰⁴ See "EU pledges more support to Kenya for piracy trials", *Xinhua News*, (27 July 2010), online: Xinhua News <http://news.xinhuanet.com/english2010/world/2010-07/27/c_13417882.htm>; United Nations Office on Drugs and Crime, *supra* note 172. However, there are allegations that

Exchange of Letters 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 2010, with the first conviction in July,²⁰⁵ 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 2010, a Yemeni court sentenced six pirates to death, despite claims by the convicted that no witnesses testified and no evidence was presented.²⁰⁶ Russia has reportedly transferred suspected 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.²⁰⁷

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.²⁰⁸ Moreover, these human rights concerns do not exist in isolation from issues related to expediency and political considerations.

V. 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, more focus needs to be placed on domestic legislation, or the lack thereof, and in the application of the international framework.²⁰⁹ Importantly, the application of law is a political, as much as a legal,

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* (15 April 2009), online: *Der Spiegel* <<http://www.spiegel.de/international/europe/0,1518,619103,00.html>>; Sarah Childress, "Legal Limbo Awaits Somali Pirates", *The Wall Street Journal* (6 May 2010), online: *The Wall Street Journal* <http://online.wsj.com/article/NA_WSJ_PUB:SB10001424052748703961104575225810196963690.html>; Nick Wadhams, "Who Wants to Try the Captured Pirates? (No One)", *Time* (2 June 2010), online: *Time* <<http://www.time.com/time/world/article/0,8599,1993444,00.html>>.

²⁰⁵ See e.g. "Somali Pirates Sentenced to Ten Years in Seychelles", *supra* note 194.

²⁰⁶ See e.g. "Yemen Court Sentences Somali Pirates to Death", *VOA News* (18 May 2010), online: *VOA News* <<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* (18 May 2010), online: *BBC News* <http://news.bbc.co.uk/2/hi/middle_east/8689129.stm>.

²⁰⁷ See RIA Novosti, *supra* note 172.

²⁰⁸ 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, "Counter-Piracy Law Enforcement", *supra* note 38 at 167 (examining whether some instances of transferring pirates violates the right to an effective remedy).

²⁰⁹ The need for adequate domestic legislation has been discussed above (see Part I); 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; Middleton, *supra* note 57 at 7; Andrew J Shapiro, "Counter-Piracy Policy: Delivering Judicial Consequences" (Keynote Address delivered at the American University of Law Review Symposium, 31 March 2009), online: US Department of State <<http://www.state.gov/t/pm/rls/rm/139326.htm>>.

consideration. Each state authority engaging in counter-piracy activities operates under both resource constraints and normative or strategic constraints. It tends to make decisions regarding the treatment of suspected pirates based on the specificities of the situation, and generally holds national interests paramount.

One significant consideration is the cost involved. One Earth Future estimates that trials within the East Africa region cost on average \$52,000, while trials in North America cost approximately \$335,733.²¹⁰ Kenya, which up to recently was a key venue for prosecution, requires witnesses to attend court, which is both expensive and entails opportunity costs, as it occupies warships that could be deterring more pirate attacks. Furthermore, if a ship does detain suspected pirates, it cannot engage in military patrols until it has transferred those suspects off the ship. More than the cost of the trial, the housing of convicted pirates as they serve their sentences is an expense that many states are reluctant to bear, and, as discussed above in the article, states are reluctant to be burdened 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.²¹¹

However, cost is not the only deterrent, as nations appear willing to spend money on naval operations as opposed to prosecutions. One Earth Future estimates that \$2 billion is spent annually on the three major naval forces and the independent operations from different countries. In comparison, the cost of prosecutions in 2010 stood at \$31 million.²¹² In relation, one can question what are the motivations, or priorities, for various states that are patrolling the waters off Somalia. For example, EU NAVFOR, the first European Security and Defence Policy (ESDP) naval operation, was put forward by many of its advocates as a chance to make the EU more visible on the world stage and as an opportunity for the EU to promote its values.²¹³ It also fulfilled the objectives of various states, such as the French government's desire to strengthen the ESDP. As such, it was described by the then French Defence Minister, Hervé Morin, as a "marvellous symbol" of steps towards a Euro-military and defence policy.²¹⁴ Moreover, although the

²¹⁰ One Earth Future, *supra* note 5 at 19.

²¹¹ See e.g. "German Navy Foils Somali Pirates", *supra* note 143; Craig Whitlock, "Lack of prosecution poses challenge for foreign navies that catch Somali pirates" *The Washington Post* (24 May 2010), online: *The Washington Post* <<http://www.washingtonpost.com/wp-dyn/content/article/2010/05/23/AR2010052303893.html?referrer=emailarticle>>.

²¹² One Earth Future, *supra* note 5 at 16 and 20.

²¹³ Basil Germond & Michael E Smith, "Re-thinking European Security Interests and the ESDP: Explaining the EU's Anti-Piracy Operations" (2009) 30:3 *Contemporary Security Policy* 573 at 583.

²¹⁴ Bruno Waterfield, "UK to lead EU anti-piracy force off Somalia", *The Telegraph* (UK) (10 November 2008), online: *Telegraph.co.uk* <<http://www.telegraph.co.uk/news/worldnews/africaandindianocean/somalia/3418448/UK>>

UK was initially hesitant to promote the EU's naval operation, it eventually played a leading role, allegedly partly so that France could not claim sole credit for the EU operation.²¹⁵ Meanwhile, British Conservative MEP Geoffrey Van Orden questioned the motives behind EU NAVFOR, stating that "the EU is desperate to find military operations that it can stick its flag on in order to give credibility to its defence pretensions."²¹⁶

Moreover, when EU NAVFOR was launched in December 2008, there were questions surrounding the rules of engagement, in particular regarding what should be done with suspected pirates. The EU–Kenya Exchange of Letters was signed the following March, but this gap indicates that EU NAVFOR's first priority was to deter and disrupt, as opposed to engage in law enforcement. As mentioned in Part I, more than 60 per cent of suspected pirates that are encountered are released without charge, which provides impetus to the argument that the priority of many states operating in the waters off Somalia is not to prosecute pirates.

Decisions regarding piracy can also be used as a political tool. In 2010, Kenya declared that it would not accept more suspected pirates for prosecution, allegedly partly in response to the announcement by ICC Prosecutor Luis Moreno Ocampo that he would investigate the 2007 post-election violence.²¹⁷ Moreover, following a parliamentary committee report that criticized the signing of the agreements permitting the transfer of suspected pirates, various players, including the Vice-President Kalonzo Musyoka, Minister for Justice Mutula Kilonzo, Attorney General Amos Wako, and the Minister for Defence Yusuf Haji, tried to distance themselves from being involved with the agreements and blamed their counterparts in different departments for the MoUs.²¹⁸ In particular, despite evidence that the Attorney General's office and the Foreign Affairs ministry were in consultation throughout the drafting and signing of the MoUs, Wako reportedly denied that his office was involved in their formulation. Moreover, the trials have been portrayed as an unfair burden on Kenya which exacerbated the problems of the judicial and prison systems, and politicians have claimed that the international community has failed to provide the financial, judicial, and technical support to the extent that was promised.²¹⁹ However, with a self-reported prison population of more than 45,000, the approximately 100 pirates detained in Kenya represent only 0.2 per cent of the prison population.²²⁰ Furthermore, Kenya has received

-to-lead-EU-anti-piracy-force-off-Somalia.html >.

²¹⁵ Germond & Smith, *supra* note 214 at 585-588; Waterfield, *supra* note 215.

²¹⁶ Waterfield, *supra* note 215.

²¹⁷ See Kristen Rau & Jordan Shepherd, Blog Posting, "AMICC Representative Participates in University of Minnesota Law School Debate on US Involvement in the ICC" AMICC (28 March 2011), online: AMICC <<http://amicc.blogspot.com/>> (citing Professor Kontorovich).

²¹⁸ See Oscar Obonyo, "Blame game over 'secret MoUs' on pirates' trials", *The Standard* (7 November 2010), online: standardmedia.co.ke <<http://www.standardmedia.co.ke/entertainment/InsidePage.php?id=2000013665&cid=4&>>.

²¹⁹ See Jeff Davis, "Country cancels piracy trial deals", *Daily Nation* (30 September 2010), online: Daily Nation <<http://allafrica.com/stories/201010010009.html>>.

²²⁰ See Bocha, *supra* note 54; Kenya Prisons Service, "About Us", online:

assistance from the UNODC in the form of training and equipment for police and prosecutors, support for judicial proceedings, and renovation of courts and prison facilities, in particular the renovation of Shimo La Tewa Prison.²²¹ In fact the officer in charge of Shimo La Tewa prison reportedly described the pirates as "a blessing in disguise" because of the corresponding international support given to Kenya for upgrading the judiciary and prison system.²²²

Thus, expediency and political will are issues 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 deterrent 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 "[a]uctioning prosecution to the lowest bidder,"²²³ which, while perhaps understandable, is not ideal.

VI. Conclusion

This article outlined a number of pertinent issues pertaining to human rights law and the prosecution of pirates. After summarizing the laws regarding piracy, the article proceeded to delineate the applicability of different human rights treaties to states' counter-piracy activities. Thereafter, it discussed various aspects of detaining and prosecuting suspected pirates, including procedures for arrest and detention, and human rights obligations surrounding transfer and prosecution.

It is evident that there is ambiguity regarding the human rights obligations of states but this is not to say that it is impossible for states to prosecute pirates while acting in accordance with international human rights law. Important factors need to be taken into consideration to ensure that human rights obligations are fulfilled, but these need not act as a deterrent to prosecution. The issue that is perhaps most pertinent is the political will of states to engage in such prosecutions. It is essential for states to take steps to ensure that the necessary procedures are followed to fulfil their human rights obligations, for example by ensuring that adequate guidelines, including a legal framework for detention, are in place. In addition, further steps can be taken to facilitate prosecutions, for example by criminalizing intention to commit piracy in domestic legislation.²²⁴

<http://www.prisons.go.ke/about_us.htm>.

²²¹ United Nations Office on Drugs and Crime, *supra* note 178.

²²² Tristan McConnell, "Kenyan courts on legal front line in battle to stop Somali pirates", *The Sunday Times* (10 December 2009), online: [TimesOnline.co.uk](http://www.timesonline.co.uk) <<http://www.timesonline.co.uk/tol/news/world/africa/article6950951.ece>>.

²²³ Kontorovich, "A Guantanamo on the Sea", *supra* note 26 at 272.

²²⁴ United Nations Security Council, *supra* note 153 (recommending different steps that can be taken to facilitate prosecutions, including the development of an international model case

Ultimately, there are competing pressures on state authorities, including legal obligations, resource limitations, and strategic constraints. As such, it is necessary to take a practical approach to ensure that a viable solution is found. One such approach is to focus on developing a regional solution to prosecution and detention, that simultaneously satisfies human rights obligations and the constraints of political will. In this light, in a January 2011 report to the UN Security Council, Jack Lang recommended a plan to address piracy, of which the jurisdictional/correctional component targets Somalia, and particularly the entities Somaliland and Puntland. He proposes the establishment of three specialized courts (one in Puntland, one in Somaliland, and an extraterritorial Somali court) and three prisons.²²⁵ This approach, currently under consideration by the UN Security Council,²²⁶ would allegedly strengthen the rule of law in Somalia, while addressing the issue of where to prosecute pirates.²²⁷ In addition, it would bypass some of the problems related to relying on a regional approach, such as neighbouring states' hesitations to upset Somalis by prosecuting their people, and inadequate domestic legislation to prosecute under universal jurisdiction, which recently halted trials in Kenya.

Importantly, 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—regionally, in Europe, and the US—piracy around Somalia (and elsewhere) continues, and even grows.²²⁸ Furthermore, it is widely acknowledged that the lack of a functioning government and the lawlessness and poverty in Somalia are crucial contributing factors to the problem of piracy off its coast.²²⁹ Additionally, commentators have repeatedly highlighted the role that poverty plays in fuelling piracy and the need to promote alternative means of income for pirates.²³⁰ It is worth noting that piracy around Somalia allegedly originated

report, encouraging testimony by videoconference, and the compilation of a database of fingerprints).

²²⁵ *Ibid.*

²²⁶ Resolution 1976, *supra* note 46.

²²⁷ United Nations Security Council, *supra* note 153.

²²⁸ See IMB 2010 Report, *supra* note 2 (indicating that attacks in 2010 increased from 2009).

²²⁹ Andersen et al, *supra* note 3 at 9; Peter Chalk, "Piracy off the Horn of Africa: Scope, Dimensions, Causes and Responses" (2010) 16:2 *Brown Journal of World Affairs* 89 at 94-95; Jeffrey Gettleman, "Pirates Outmaneuver Warships off Somalia", *The New York Times* (15 December 2008), online: *The New York Times* <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" (2009) 28 *Comparative Strategy* 197; HL, European Union Committee, "Combating Somali Piracy", *supra* note 130 at 16; FOI Swedish Defence Research Agency, Karl Sörenson, "State Failure on the High Seas – Reviewing the Somali Piracy" (2008) FOI Somalia Papers: Report 3, online: FOI Swedish Defence Research Agency <<http://www.foi.se/upload/projects/Africa/FOI-R--2610.pdf>>. See also Resolution 1918, *supra* note 46 at preamble.

²³⁰ See e.g. Chalk, *supra* note 230 at 94; International Expert Group on Piracy off the Somali Coast, "Piracy off the Somali Coast" (Workshop commissioned by the Special Representative of the Secretary General of the UN to Somalia Ambassador Ahmedou Ould-Abdallah, 10-21

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.²³¹

Regardless of the relevance of such claims to piracy in Somalia at the current time,²³² 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. 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 in Somalia.²³³

To conclude, 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.²³⁴ Commenting on the problem of piracy, Hillary Clinton stated that "[w]e may be dealing with a 17th-century crime, but we need to bring 21st-century solutions to bear."²³⁵ Those twenty-first century solutions must encompass, and uphold, international human rights law.

November 2008) at 15 [Nairobi Report]; United Nations Security Council, *supra* note 153.

²³¹ See e.g. Julio Godoy, "Questions Abound about EU's 'Combating' of Piracy", *Inter Press Service* (16 June 2010), online: Inter Press Service News Agency <<http://ipsnews.net/news.asp?idnews=51841>>; Mwangura, *supra* note 37; Nairobi Report, *supra* note 231 at 14-15; Sörenson, *supra* note 230. See also Resolution 1950, *supra* note 46.

²³² 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 230 at 91-92; Rotberg, *supra* note 37 at 3. See also European Union Naval Force, News Release, "Breakthroughs Along with Challenges During First Month of Swedish Command" (17 May 2010), online: EU NAVFOR Somalia <<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).

²³³ 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* (London: African Rights, 1993).

²³⁴ The fundamental premise of human rights is that they are universal and belong to everyone equally. *Universal Declaration of Human Rights*, GA Res 217A, UNGAOR, 3d Sess, 1st plen mtg, UN Doc A/810 (1948), at Art. 1, 2.

²³⁵ Corder, *supra* note 142.