Maritime Interdiction and Human Rights

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SECTION 1 INTRODUCTION

In the course of this article, I will examine the relationship, or, more precisely, the interaction between human rights law and Maritime Interdiction Operations (hereafter MIOs). This examination will be structured in two broad steps. First, I will try to present the conditions under which a MIO is permissible under human rights law. That will include an overview of all phases of the operations, including the periods before and after the actual operation but only to the extent that there is a strong connection with the operation itself. The intention is to identify what would reasonably be expected from a human rights point of view in order for a MIO to be in full compliance with the relevant law. Then, after examining when MIOs are permissible and when they are not, I will try to elaborate on the idea that although it is undisputed that human rights obligations continue to regulate the conduct of States towards people within their jurisdiction, either in or outside their territory, a somehow different approach should be adopted in the evaluation of these obligations in the fight against criminal activity at sea. This could prove beneficial for the protection of the rights of the captured suspects as it would encourage States to uphold their human rights obligations, rather than consider them as an unbearable burden, in which case they might seek ways to escape them altogether. It is then proposed that the distance between the modus operandi of a MIO and the obligations imposed by human rights law cannot be covered only by the adap-

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tation of the *modus operandi* of the naval forces but also, at a certainly lesser extent, by the adaptation of the obligations imposed by the law.

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It is a truism that throughout the centuries, the sea has been a very prosperous area for criminal activity, mainly because of the practical obstacles it presents to law enforcement operations. Recently, criminal activity at sea has seen a rapid increase\(^2\), which persuaded States to assign more resources in policing the seas and combating maritime crime. That said, quite often crime at sea remains unreported for reasons that relate to interests of ship-owners, ship masters and even flag States\(^3\). In any case, it is important to consider how these policing, law enforcement operations affect the protection of human rights of targeted suspects.

SECTION 2 CONDITIONS OF PERMISSIBILITY

This section will be devoted to the analysis of the conditions under which a State carries out a MIO in conformity with its human rights obligations. To do that, it is necessary, first, to identify the legal framework, then, to address questions of applicability and attribution and, finally, to examine the relevant rights and the possible ways they may be protected during a MIO. While clearly distinct, those steps are closely interrelated because the identification of the law substantially defines the conditions of applicability and the scope of protection of the relevant rights. Equally, on a practical level, it is often the case that the right in need of protection might also guide us as to the applicable law; and the conditions establishing the applicability might define the relevant law. These issues will be presented in the following order: what is the law (Section 2, paragraph 1), is it applicable (Section 2, paragraph 2), and the scope of protection (Section 2, paragraph 3).

Paragraph 1 The Legal Framework

An initial observation is that the relevant legal framework consists of numerous legal regimes; of course, not all of these


regimes are applicable in every case. For example, in a given case of a MIO and only with respect to its effects on human rights, relevant law might include the 1982 Law of the Sea Convention, SOLAS, SUA, UN Security Council resolutions, soft law regulating the MIOs, the UN Charter, the UN Declaration of Human Rights, the two international human rights Covenants, regional human rights Conventions, the Refugee Convention, the Convention against Torture, customary human rights law. There is also discussion of whether international humanitarian law (‘IHL’) and, in particular, Geneva Convention III and Geneva Convention IV is relevant in some cases of counter piracy operations, with some scholars suggesting that IHL applies, while others disagree.

Due to the spatial confinements of the present chapter not all of the above will be examined. An elimination process must take place and the criteria for this elimination can be no other than considerations of practical realities. To begin with, a first restriction is the international ele-

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7. This soft law might emanate from widely recognized and applied guidelines for the conduct of MIOs; for instance the NATO guidelines or the EUNAVFOR guidelines.
ment of the MIO. Thus, there will be no discussion of the operations of a State against a ship of its own flag or its own nationals. Secondly, the chapter will focus on systematic naval operations that include MIOs and take place in specific parts of the oceans and from specific interdicting naval forces. Thirdly, the question of the applicability or the potential application of IHL to an MIO will not be addressed. Although there is no doubt that some basic human rights are protected by IHL, for the purposes of this chapter it is submitted that it is a clearly distinct area of law and it should be discussed elsewhere. This restriction also indicates that interdictions against private ships or boats will not be examined. Finally, this chapter will be based on practice. It is not meant to be only a theoretical approach; hence, incidents that have been reported or cases that have reached the courts will be canvassed.

Paragraph 2 Questions of Applicability

The first step in applying human rights law to a specific situation is to ascertain whether the persons concerned are under the jurisdiction of a State. If the latter exercises no jurisdiction, it cannot enforce its laws and, of course, it cannot be held liable for any breach of human rights law. Since, as mentioned above, this chapter deals with MIOs that have an international character, the examination of the establishment of jurisdiction will mostly concern instances occurring outside the territorial waters of a State.

A. Extraterritorial application

Although there have been arguments favouring the idea that areas beyond the boundaries of a State are in a legal vacuum, i.e. the norms of ICCPR or the ECHR do not apply\(^\text{15}\), it should be underscored that States cannot escape their human rights obligations simply by acting extraterritorially\(^\text{16}\).

\(^{15}\) The US position on Guantanamo or the UK position regarding the occupation of Iraq are examples of this approach. On these issues, the “legal vacuum” argument has been presented by H. H. Koh, “Rights to Remember”, *Economist*, 30/10/2003, at p. 24 (available online at http://www.economist.com/node/2173160); Priest and Gellman, “Stress and Duress: Tactics Used on Terrorism Suspects Held in Secret Overseas Facilities”, *Washington Post*, 26/12/2002 (available online at http://www.commondreams.org/headlines02/1226-03.htm); D. Van Natta Jr., “Questioning Terror Suspects in a Dark and Surreal World”, *New York Times*, 09/03/2003.

As far as the ICCPR is concerned\textsuperscript{17}, the HRC has held that jurisdiction is not restricted by territoriality. In its General Comment No. 31, the HRC reaffirms the extraterritorial application of the ICCPR when it concludes that “[any] 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”\textsuperscript{18}.

The ECtHR in \textit{Medvedyev v. France} reiterated the Bankovic proposition that the extraterritorial application of the ECHR is exceptional\textsuperscript{19}. According to the interpretation of the Court, two tests are to determine whether the ECHR’s protection should be extended to cover extraterritorial conduct. First, when the State exercises effective control over a foreign territory and secondly, when an individual comes under the authority and control of State agents acting outside the territory of the State.

In \textit{Medvedyev}, the Court correctly found that the boarding of the Winner constituted an exercise of jurisdiction of a kind that should engage the protection of the ECHR. However, although the result is not problematic, the reasoning of the Court is not so clear. Guilfoyle suggests it is possible that the Court did not want to address the “thorny” issue of the exact test underlying the extraterritorial application of the Convention; an unwillingness that delivers a judgment based on a “wanting and odd” reasoning\textsuperscript{20}.

A joint evaluation of \textit{Bankovic, Öcalan}\textsuperscript{21}, \textit{Issa}\textsuperscript{22}, \textit{Al-Skeini}\textsuperscript{23}, and \textit{Medvedyev}, leads to certain conclusions. Although the Court is unwilling

\textsuperscript{17} See also D. Guilfoyle, \textit{Shipping Interdiction and the Law of the Sea}, Cambridge, University Press, 2009. Guilfoyle submits that “[ICCPR] standards are prima facie applicable to the extraterritorial conduct of State organs, at least where those organs exercise ‘effective control of an area outside . . . national territory’” (p. 268).
\textsuperscript{18} Human Rights Committee, General Comment No. 31, at para. 13.
\textsuperscript{20} D. Guilfoyle, “Current Legal Developments. European Court of Human Rights: Medvedyev and Others v. France”, 25 \textit{Int. J. Marine and Coastal Law} 437 (2010), at p. 439. On the other hand, Bodini (S. P. Bodini, “Fighting Maritime Piracy under the European Convention on Human Rights”, \textit{European Journal of International Law} (2011), at p. 10) identifies the test, suggesting that the Court used the “authority and control” test. He supports this proposition by a reference to in paragraph 67 of the Judgment, where the Court said that since France “exercised full and exclusive control over the Winner and its crew . . .” then the applicants were under French jurisdiction.
\textsuperscript{23} \textit{Al-Skeini and Others v. The United Kingdom}, Grand Chamber Judgment of 7.7.2011.
to overrule Bankovic, it did not stick to its “legal space” argument. It seems that it turns to an approach that evaluates the level of “physical power and control over the person.”

After the Medvedyev judgment, coercive law enforcement jurisdiction over a foreign vessel on the high seas will probably render this vessel and its crew under the protective umbrella of the ECHR, although a simple boarding that stays clear of further actions, such as those envisaged under Article 105 UNCLOS concerning piracy, will not trigger the application of the ECHR. However, not all the questions about this issue have such a firm answer. For instance, it is not at all clear whether a warship firing from distance or a fighter jet bombing a pirate vessel would establish jurisdiction and engage the application of the ECHR. Bankovic and possibly Medvedyev would probably point to a negative answer, although Pad and Others v. Turkey might point the other way. In the latter case, fire discharged by gunship helicopters on a group of people inside Iranian territory was an act establishing extraterritorial jurisdiction. This seems more convincing as a guide in the aforementioned situations, since it is not really a matter of a “cause and effect” notion of jurisdiction as in Bankovic. Pirate vessels are not an accidental target or a collateral damage of an attack; they are the targets of the military attacks, so bombing or firing at them will bring them under the control of the military. However, Bodini suggests that there should be a further qualification in this case, namely that the military capacity of the suspected criminals is not capable of opposing the State’s capacity.

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29. The Bankovic test has not escaped criticism, which is further justified by the ECtHR’s own later jurisprudence. See for instance Scheinin who submits that “in Bankovic the ECtHR made a methodological mistake by not addressing the issue of extraterritorial effect under a ‘control-entails-responsibility’ approach” (M. Scheinin, “Extraterritorial Effect of the ICCPR”, in F. Coomans et al. (eds.), Extraterritorial Application of Human Rights, Antwerp, Intersentia, 2004, p. 73, at p. 80). See also Lawson, who emphatically maintains that “the Court got it all wrong” (R. Lawson, “Life after Bankovic: On the Extraterritorial Application of the ECHR”, in F. Coomans et al. (eds), Extraterritorial Application of Human Rights, Antwerp, Intersentia, 2004, p. 83, at p. 85) and he refers to the ILC who said, in 1975, that the conduct of organs of State A in the territory of State B without the consent of State B “is and remains an act of the State to which the organ belongs” (ILC, Yearbook, 1975, Vol. II, p. 83).
presumably because otherwise it would be hard to support that the suspected criminals are brought under the control of the State. In any event, the human rights obligations that are triggered are those which are relevant to the situation of the individuals and to the extent of the control that the State establishes over them.

B. Operations under international organizations

The establishment of jurisdiction faces another challenge when States conduct their operations under the umbrella of an international organization. That could be the case where a UN Security Council resolution imposes on States the conduct of MIOs, or where such operations are performed under the command of the European Union, NATO or other international or regional organizations. Thus, warships operating under EU NAVFOR might fall outside the reach of the ECHR, since, at the time of writing, the European Union is not yet a party to the Convention; or an interpretation of a Security Council resolution that would require the operation of a maritime interdiction would also fall outside the protection of the ECHR, since the ECtHR has judged that it cannot review the legality of a Security Council resolution. This notwithstanding, when States operate under the umbrella of an international organization, they cannot escape their human rights obligation, unless the relevant international organization effectively controls the disposition of the victims; even in this case, a State may be bound to take positive steps to ensure that the international organization’s mission will be compatible with the relevant human rights law.

There is a legitimate fear that should be expressed at this point, namely that an operation under the mandate of an international organization could provide an effective means of escaping human rights obli-

31. Al-Skeini, supra footnote 23, at para. 137. The Court, in a decision strongly contrasting its previous Bankovic judgment, seems to understand the rights under the Convention as able to be “divided and tailored”.
32. Lawson, supra footnote 29, at p. 120.
33. See how Milanovic and Papic criticize the stance of the ECtHR in its Behrami and Saramati admissibility decision with respect to the Court’s application of the international law of State responsibility and the doctrines of attribution. M. Milanovic and T. Papic, “As Bad as It Gets: The European Court of Human Rights’s Behrami and Saramati Decision and General International Law”, 58 ICLQ 267 (2009).
34. Cf. the recent conclusion of the Accession Agreement of the European Union to the ECHR; see Fifth Negotiating Meeting between the CCDH Ad Hoc Negotiation Group and the European Commission on the Accession of the European Union to the European Convention on Human Rights; Final Report (4 April 2013); available at http://www.coe.int/t/dghl/standardsetting/hrpolicy/accession/Meeting_reports/47_1%2828013%29008_final_report.EN.pdf.
gations. However, it is not certain that an umbrella of such a nature could result in such a situation. For example, the HRC has stated that its application reaches beyond the territory of a State Party to

“those within the power or effective control of the forces of [the] State Party . . . 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”\(^{36}\).

Furthermore, as the ECHR has affirmed in the *Al-Jedda* case, the UN Security Council should be presumed as not intending to impose an obligation on Member States to breach human rights\(^{37}\).

On the other hand, it is quite extreme to suggest that States are operating through international organizations in order to avoid the obligations imposed on them by various human rights regimes\(^{38}\). That could only be a possibility if human rights obligations were such or interpreted in a way that would render the conduct of an efficient and successful interdiction operation totally impossible. This, however, does not seem to be the case and more often than not the requirements of the various human rights regimes can be fulfilled without extreme burdens to the operational necessities of a maritime interdiction operation.

### C. Private security companies

Another issue that is problematic is the use of private security companies in order to combat crime at sea. So far, it has appeared as a means adopted by ship-owners in order to protect their ship, cargo and crew from pirates. However, it is possible that in the future private security companies could be used by States as patrolling forces against crime at sea, since such companies have already been used for analogous purposes on land\(^{39}\).

\(^{36}\) HRC, *supra* footnote 18, at para. 10.


\(^{38}\) Cf. also Article 61 of the ILC Draft Articles on the Responsibility of International Organizations which sets out that

“A State member of an international organization incurs international responsibility if, by taking advantage of the fact that the organization has competence in relation to the subject-matter of one of the State’s international obligations, it circumvents that obligation by causing the organization to commit an act that, if committed by the State, would have constituted a breach of the obligation.”

SECTION 3 MARITIME INTERDICATION OPERATIONS AS A THREAT TO HUMAN RIGHTS

It is reasonable to presume that human rights can be affected or threatened not only during a maritime interdiction, but also immediately before or after the actual interdiction. Therefore, at this point, it would be appropriate to split this examination in three distinct parts: the phase immediately before the interdiction, the phase of the actual interdiction and the phase immediately after. In this context, it should be noted that the meaning of “immediately” does not have a fixed meaning and refers to the acts that occur prior to or after the interdiction and are by their nature so closely connected to that operation that they can be examined as parts of it.

Paragraph 1 Prior to the Interdiction

It is certain that before an interdiction operation actually starts, which we shall, for present purposes, identify as the point of the boarding of the vessel, there is a series of prior actions on the part of the intercepting powers.

It is expected that warships operating in regions with, for example, heavy piratical activity will have a preventive function which will not be restricted only to the extent that their mere presence should discourage potential pirates from committing their planned crimes. They will probably look for information about imminent threats using all means available to them in order to retrieve such information. Therefore, it is probably safe to say that all vessels sailing inside and around the areas of operation of those warships will be subject to radar, photo, audio and video monitoring; “radio and cellular phone communications, maybe e-mails... are probably being intercepted [right now]”\footnote{Bodini, supra footnote 20, at p. 4.}

Those actions are clear interferences with the right to respect for private life, which is protected under Article 8 of the ECHR. They could be permissible under ECHR if they are in accordance with the law, pursue specific legitimate aims (found in Article 8 (2), ECHR) and are necessary in a democratic society. The qualification “necessary in a democratic society” could be met, for instance, when the monitoring of vessels takes place in maritime zones with strong piratical activity\footnote{Ibid., p. 5.}. Further, the interception of communications should also be authorized and conducted under the supervision of a judge or another authority,
independent from the executive that is responsible for or ordered the interdiction 42.

However, there is another issue that should be considered here, namely the establishment of jurisdiction. As mentioned above, there can be no obligations, hence no infringement of a right, unless the protection of the ECHR is engaged through the establishment of jurisdiction. It is difficult to assert that a warship establishes effective control over a region by its mere presence in it. That said, it is a fact that the warship quite possibly is equipped with advanced electronic means which give the ability to intercept, jam, record or filter the communications of the vessels as well as to monitor with great detail, in an audio or visual format, their “targets”. This would seem enough to regard that the vessels are for these purposes under the effective control of the warship. The test applied here would probably be the effective control over the territory. The warship, operating its advanced electronic or other technological equipment, has the capacity to interfere with communications or access audio and visual signals projected from the vessel. Within the actual range of operation of this equipment the warship is exercising effective control.

Paragraph 2  

During the Interdiction

The actual operation of a maritime interdiction could be a peaceful process where the boarding forces face no resistance from the vessel and they do not resort to violence (necessary or otherwise). However, it is unfortunately not rare for an interdiction operation to turn violent. The warship receives and returns fire and loss of life is not unlikely.

For instance, during the boarding of the Winner in the Medvedyev case, one suspect was injured and later died. Curiously enough, the family of the victim did not bring a claim for a violation of the right to life before the Court and it is not known how the Court would have evaluated the specific circumstances. However, it is safe to say that there may be instances where the interference with the right to life will be in breach of human rights obligations.

First, although the use of force in law-enforcement operations is not prohibited 43, lethal force must be subject to extreme scrutiny 44 and

44. McCann and Others v. United Kingdom, Judgment of 27.9.1995.
justified only when it is absolutely necessary. A question that arises is whether a military vessel can open fire against a suspected private vessel in order to stop it. In answering this question, it makes a big difference whether we are considering opening fire against a suspected vessel found at sea or if the vessel in question is carrying a group of armed criminals that are shooting at the warship involved. In the former case, opening fire to stop the vessel would not be allowed.

Further, whenever an interdiction operation takes place in order to resolve a hostage-taking situation, it can be presumed that the Court would address this case in an analogous fashion to Andronicou and Constantinou v. Cyprus. In such a case, the operation will not constitute violation of Article 2, ECHR, if it is carried out by specially trained forces and if the conduct of each individual participating officer does not include force used recklessly or beyond what is necessary.

Apart from the right to life, excessive violence during the interdiction might lead to a violation of the prohibition of torture or other inhuman or degrading treatment or punishment, found in Article 3 of the ECHR. This article introduces an absolute right, which guarantees that a person shall not be subject to inhuman or degrading treatment, irrespective of the victim’s conduct. It is true that the Court has shown a greater disposition to characterize State conduct as torture, instead of inhuman or degrading treatment, and based this shift on the “living instrument” interpretation tool. Therefore, violence that is severe and does not lead to death will be considered under the provisions of this article.

Paragraph 3  After the Boarding

When the boarding is completed and the naval forces have gained control over the private vessel and the people on board, there is a series of human rights that become relevant and whose prote-
tion may be violated. As already pointed out, in most cases of interdiction at sea “the legal issue at stake is not how to board the vessel but what to do with the illicit cargo, the vessel and the persons on board”\textsuperscript{49}.

To begin with, if the naval forces have boarded a vessel out of suspicion of a criminal act, then the suspected criminals have either been killed during the boarding operation or they are alive and in this case they either remain under the custody of the boarding forces or have been released and allowed to leave the vessel. The first scenario has been examined under the previous paragraph; under this paragraph we shall examine the two other scenarios.

\textit{A. Right to liberty and security of person}

In case that the suspected criminals remain in the custody of boarding forces, there is a first clear infringement of their rights in the form of a violation of their right to liberty and security of person. Questions about the legality of authority to detain arise also within this context.

Article 5 (1) (c) provides that a deprivation of personal liberty shall be justified if it is in accordance with a procedure prescribed by law and if it is a result of a lawful arrest or detention effected for the purpose of bringing that person before the competent legal authority due to reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent that person committing an offence or fleeing after having done so. Therefore, the primary consideration is whether the procedure that leads to the arrest or detention is prescribed by law.

In \textit{Medvedyev} case, the Court examined whether the French naval forces were entitled to board the \textit{Winner} and arrest and detain the crew suspected of criminal conduct. The basis on which France ordered the boarding was a diplomatic note exchanged between Cambodia and France, by which Cambodia expressed its consent that France could “intercept, inspect and take legal action” against the ship. The Court was willing to find that the boarding of the \textit{Winner} by the French forces was a procedure “prescribed by law” if \(a\) there was a clear legal authority for this action either in French law or in international law and \(b\) if that law satisfied a quality of foreseeability, in the sense that those to whom the law applies should be able to predict this application\textsuperscript{50}.


In examining the relevant law, the Court made the following observations: French law could not serve as the basis for the boarding of the Winner since its provisions could not apply to the specific circumstances of this boarding. The then French law regarding interdiction of drug trafficking provided only for consensual interdictions against ships flying a flag of a State party to the UN Narcotics Convention, 1988; however, Cambodia was not a party to that Convention, neither was it a party to the UN Convention on the Law of the Sea. Therefore, a textual interpretation of the domestic law could not allow the boarding of the Winner. In other words, this procedure was not prescribed by French law.

This raises a question as to whether appropriate and complete French law would satisfy the Court as a sufficient legal basis to apprehend and prosecute the crew of the Winner. This should be the case, since those suspects would have been apprehended and prosecuted as prescribed by law. However, although those circumstances would prima facie meet the requirements of the Convention, it is apt to question how the relevant and appropriate French legislation might enhance the element of “foreseeability” that the Court has advanced. Is it reasonable to expect the crew of a Cambodian ship to be familiar with French criminal legislation or even more with domestic legislation of every other State that might conduct interdiction operations? If this is unreasonable, as indeed it appears to be, there is no reason for the Court to examine whether there is appropriate domestic legislation, because even if there were such legislation it would by no means satisfy the “foreseeability” criterion as used by the Court. On the other hand, since the Court sought for appropriate domestic legislation in order for the interference to be “prescribed by law”, it should not use the “foreseeability” test as it has, either with respect to domestic law or, especially, when it examined the relevant international law.

The other option was to seek a legal basis for the interdiction in international law. The only available international law in this case was the diplomatic notes exchanged between Cambodia and France. The European Court accepted that the note was a treaty for purposes of international law and a satisfactory basis for the boarding of the ship, but found it difficult to consider the same about the legality of the detention of the crew, since the wording “to intercept, inspect and take legal action [against the ship]” was considered as of not sufficient clarity. It should be pointed out that under the law of the sea, the interception of the Winner was legal pursuant to the exchange of diplomatic notes.

51. Medvedyev, supra footnote 50, at para. 96.
52. Ibid., para. 99.
53. Papastavridis, supra footnote 50, at p. 874.
However, since each adjudicating body can have a different perspective, it is possible that they will understand the same rules differently.\footnote{54}{T. Treves, “Human Rights and the Law of the Sea”, 28 Berkeley Journal of International Law 1 (2010), at p. 12 (http://scholarship.law.berkeley.edu/cgi/viewcontent.cgi?article=1375&context=bjil, last access 19/4/2013).}

Nevertheless, the Court went further and said that it did not really make a difference whether the provision of the diplomatic note for legal action “against the ship” included the crew or not, since even if it expressly did so, it would still fail to pass the test of foreseeability. According to the Court, a diplomatic note exchanged between the two countries shortly before the actual interdiction would never give a practical ability to the members of the crew to predict that they were subject to the application of French law.\footnote{55}{It would have some merit to consider how the Court in its \textit{Öcalan} Judgment (\textit{supra} footnote 21, at paras. 83-99) recognized an informal agreement absent of a formal extradition treaty as a sufficient legal basis to pass the threshold of the “prescribed by law” test and enough to secure compatibility with Article 5 (1). See also how \textit{Öcalan} is invoked by Vasseur (in A. Vasseur, “Légalité de l’arrestation, du transfèrement et du jugement en France des 6 preneurs d’otages du navire ‘le Ponant’”, Sentinelle, No. 145, 20.8.2008, available at <http://sentinelle-droit-international.fr/bulletins/a2008/20080420_bull_145/sentinelle_145.htm#scuritementer1>) in order to submit that French behaviour in the incident of the “Ponant” was also lawful under the ECHR.}

That condition could only be met if the basis for the detention were a formal multilateral or bilateral treaty.\footnote{56}{Medvedyev, \textit{supra} footnote 50, at para. 100.}

Another important question is raised by this statement of the Court. If the basis of detention and prosecution is a formal multilateral treaty, the Court seems satisfied that the conditions posed by the Convention are met. However, even in this case, the effects of a multilateral treaty do not bind its signatories before ratification.\footnote{57}{Of course, there are international agreements that create binding effects without ratification, but here it is used as an example the most common way in which multilateral treaties of this nature enter into force.}

Therefore, what is suggested is that the crew of a ship involved in the conduct described as illegal in the multilateral treaty is required to know in which of the signatories the treaty has acquired binding force through ratifications, in order to “foresee” that they could be brought, according to this treaty, under the jurisdiction of that State, which can apprehend and prosecute them. Such a requirement is not reasonable.

In reading the \textit{Medvedyev} decision, very contradictory conclusions can be drawn. On the one hand, it may be supposed that a treaty such as the 1982 UN Convention on the Law of the Sea could satisfy the requirements set out by the Court.\footnote{58}{It is noteworthy to remember the \textit{Women on Waves} case, in which the Court recognized the UNCLOS as a sufficient legal basis for the actions of a State assessed under the ECHR. See \textit{Women on Waves and Others v. Portugal}, Judgment of 3.2.2009, at para. 48.}
cerned, the 1982 Convention could be considered clear and detailed enough to pass both the tests of a process that is thoroughly prescribed by law\textsuperscript{59} and the one of foreseeability\textsuperscript{60}. On the other hand, we should not ignore the partially dissenting opinion of Judges Tulkens \textit{et al.}, in which the eight judges argue that in cases of a maritime interdiction operation ECHR should be applied strictly. This partially dissenting opinion echoes the decision of the Court in First Instance, where instead of the test of foreseeability that was employed by the Grand Chamber, France was found in violation of its ECHR obligations because of a failure of the relevant law to "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".

Further, the Court in 2008 also commented on the failure of the applied law to place the detention of the crew under the supervision of a judicial authority\textsuperscript{61}. This becomes even more important if we take into account the fact that the Grand Chamber decision does not mention the foreseeability as the only test that France failed; it is just one test that France failed and there was no need for the Grand Chamber to examine whether more conditions had to be tested. Therefore, even the UNCLOS provisions for piracy might not be considered as a sufficient legal basis for the detention of captured pirates, in the absence of other procedural guarantees. Finally, it is worth mentioning that the ECtHR seems to completely ignore the customary character of the universal jurisdiction over pirates as a potential legal basis\textsuperscript{62}.

A different approach is found in the dissenting opinion of Judges Costa \textit{et al.} who assert that cases, like the one under examination, should be dealt with certain realism, since an interdiction operation

\textsuperscript{59} Interestingly enough, Passman finds a quasi right to a trial in UNCLOS in Article 105 of the Convention (where it reads "the courts of the State . . . may decide upon the penalties to be imposed"). Passman, \textit{supra} footnote 13, at p. 17. See also the Samanyolu case in the Netherlands (2010), in which the Court used Article 105 of UNCLOS as the "law" in terms of Article 5 of ECHR; LJN: BM8116, Rotterdam District Court, 10/600012-09 (17-6-2010); a summary in English is available at http://www.unicri.it/topics/piracy/database/Netherlands_2010_Crim_No_10_6000_12_09%20Judgment.pdf.

\textsuperscript{60} Bodini, \textit{supra} footnote 20, p. 3.

\textsuperscript{61} Case of Medvedyev \textit{v. France}, (Fifth Section), Judgment of 10.7.2008, at para. 61.

\textsuperscript{62} See for instance the decision on the US case \textit{United States v. Smith}, 18 US (5 Wheat.) 153 (1820) (available online at http://supreme.justia.com/cases/federal/us/18/153/case.html). In p. 161, the decision recognizes as part of common law that piracy is punished as an offence "against the law of nations . . . as an offence against the universal law of society". See also E. D. Dickinson, "Is the Crime of Piracy Obsolete?", \textit{38 Harvard Law Review} 334 (1925) who suggests that universal jurisdiction over pirates was accepted since the early seventeenth century (in pp. 335-339).
taking place on the high seas cannot be viewed under the same lens as instances of infringements that occur within the territory of a State. The seven judges maintained that their preference in favour of a “realistic” application of the ECHR in such cases does not bend or circumvent the Convention. They held that the qualification for foreseeability is there in order that a person might predict that a certain conduct would fall under the provisions of a certain law. In their view, the crew obviously knew that their conduct could result in criminal punishment. They did not operate on an assumption that their conduct was legal. Therefore, the obvious knowledge of the illegality of their conduct was sufficient for the fulfilment of the foreseeability requirement.

Secondly, the interpretation of a diplomatic note governed by international law cannot be as strict as the interpretation of a domestic statute. The practical necessities of dealing with drug smuggling, the natural consequence that the authorities will in most cases be given a very narrow window of time to react in order to prevent or suppress this illegal conduct, mean that it is not possible for the communications between the authorities of two countries to be as sophisticated in their articulation as domestic statutes that are being drafted and redrafted over a significant period of time. Therefore, in such cases, an interpretation that will not stick so much to the actual wording of the agreement and will go further into examining the intention of the parties might be more appropriate. Thirdly, the judges mentioned that it was somehow artificial to hold that the diplomatic note sufficiently authorized the detention of the ship but not the detention of the crew, since it is not possible to dissociate the crew from the ship itself.

It seems that this issue is not definitively settled. The tight balance between the Judges of the Grand Chamber (with 8 judges pushing for a strict application of the treaty law and 7 judges calling for a realistic consideration of the very exceptional circumstances) makes it difficult to extract any concrete conclusions. In a future case, with a different composition of the Court, it is just as possible that the ruling will point in the other direction.

For the time being, however, it might be the case that if the suspects were given some of the procedural guarantees, as they were in Rigopoulos, such as to promptly inform family members, to give them access to a lawyer, or to put the whole process under the supervision of a judicial authority, the Court might have been more inclined to conclude that the law prescribing the interdiction was adequate.

B. Other procedural guarantees

Another right that could be infringed in situations of detention is the right to be informed promptly, in a language that the
suspects can understand, of the reasons of their arrest and of any charges against them. Again, in this case there can be an interpretation that strictly follows the law of the Treaty and one that approaches the issue with "certain realism" considering the specific circumstances. The first would suggest that in areas where criminality at sea is a daily phenomenon and the conduct of interdiction operations intense, it is necessary that an interpreter is present, who could communicate this information in the languages or the dialects of the wider region. It is true that from this assertion can stem many practical difficulties, if not impossibilities. Certainly, the most piratical attacks in the Gulf of Aden are attributed to Somali pirates from the area of Galmudug and it could be suggested that for warships operating in that region an interpreter familiar with the dialect of Galmudug might resolve a big problem. However, this will certainly lead to other problems, involving the requirement from the boarding forces to find out, before they proceed in any enforcement actions, whether the suspects actually are Somalis or not. On the other hand, it stands to reason to submit that it is impossible that on board every ship performing interdiction operations we will have interpreters familiar with all the regional languages and dialects.

Another obligation incumbent upon States is to ensure that a suspect that is arrested will be promptly brought before a competent judicial authority. Normally, a delay of a few days would render the detention unlawful. However, in Medvedyev case, the Court, following its judgment on Rigopoulos, held that delays in bringing the suspects before a judicial authority, if materially impossible to avoid, do not violate Article 5 (3). Moreover, the Court examined and rejected the argument that alternative means of transport could reduce the period of detention after the arrest; the eight-judge partly dissenting opinion also raises this issue. However, in cases less straightforward than Rigopoulos and Medvedyev, it is not as clear whether Article 5 (3) would be violated if the delay in bringing the captured suspects before a Court was not the result of a lengthy journey to the port but of a lengthy negotiation between States unwilling to prosecute.

Such an example is the case of a Danish warship, Absalon, which captured suspected pirates and held them on board while Denmark and the Netherlands were negotiating the transfer of the captured pirates to Dutch custody. In this case, the captured pirates remained on board for over a month, which is a period long enough to result in a violation of Article 5 (3). As far as the identification of the "competent" judicial authority is concerned, the District Court of Rotterdam held that the

63. Judges Tulkens et al., partly dissenting opinion, Medvedyev case, supra footnote 50.
judicial authority must be independent from the executive, must hear itself the individual brought before it and must be able to examine the legality of the arrest and must have the jurisdiction to order the release of the suspect if it finds no reasons to justify the detention 64.

The right to an attorney while in custody is another occasion where the considerations of the “certain realism” approach advanced by the seven-judge dissenting opinion in Medvedyev should be seriously taken into account. The right to an attorney should not be considered outside the special circumstances of the reality of a military interdiction operation at sea 65. It should be agreed that the presence of a lawyer that would undertake to protect the interests of captured suspects aboard all vessels that engage in interdiction operations is impractical and probably impossible. Moreover, although easier to achieve, the option to give the captured suspects the possibility to contact lawyers of their choosing over the phone would create doubts as to the effectiveness of such practice.

Therefore, although the right to an attorney while in custody is crucial, as both the ECtHR and the US Supreme Court have held 66, it would be easier to resolve this problematic situation by accepting that access to a lawyer during custody after the arrest is difficult for every capturing State to accommodate, hence access to an attorney will be granted as soon as possible after the warship calls at a port. However, such a lack of legal counsel must be compensated and the best possible way is to hold all statements made by the captured suspects inadmissible as evidence or confession. Moreover, the personnel taking place in interdiction operations should inform the suspects of their rights to disclose no information during their presence aboard the vessel.

Relevant to the above is the issue of admissibility of evidence, which could also arise in situations of interdiction. First of all, during an interdiction operation or, better, after its successful outcome, the collection of evidence is carried out by personnel of the naval forces, who are non-experienced staff, unlike the trained criminal investigators who carry out such tasks within the territory of the State 67. Secondly, the tactical success of such operations will almost certainly come first in the minds of the interdicting forces and probably no considerations of the long-term

64. The last two are the procedural and substantive requirements posed under Article 5 (3), as identified in Schiesser v. Switzerland, Judgment of 4.12.1979, at paras. 24-38.

65. The “exceptional circumstances” in Medvedyev could easily be the test justifying a less strict application of the right to legal assistance.


effects with respect to the trial of the suspects will guide their mode of conduct. Therefore, an issue as to the quality of evidence is a problem that must be addressed. However, in any case, it should go without saying that evidence collected under the use or threat of torture will not be acceptable as rendering the proceedings as a whole unfair 68.

C. Right to property

Property rights can come into play since as a result of an interdiction operation the interdicted vessels (and whatever goods are on those vessels) could be destroyed, abandoned or formally confiscated. All these actions would be considered interferences with property rights 69. UN Security Council resolutions (e.g. 1846, 1851, and 1897) permit States to interfere with property rights by seizing and disposing of equipment that could be used in piracy activities 70. Moreover, the fight against the said criminal acts would probably be considered as a cause in accordance with the general interest which would justify such interferences. However, the requirement of proportionality is relevant and whenever the interference with property is more severe than what is necessary for the protection of the general interest, the interference will not be lawful.

D. Non-refoulement

Another very important set of questions regarding the protection of the human rights of detainees is the one addressing the issues of the obligation of non-refoulement 71. In Soering v. United Kingdom the ECtHR held that extradition is contrary to Article 3, ECHR, if it exposes an individual “to a real risk of treatment going beyond the threshold set by Article 3” 72. The obligation is very strong and cannot be derogated from even by national security interests. In fact, as the Court has already decided, the activities of the individual (the detainee), no matter how undesirable or dangerous they might have been, cannot be a material consideration when a State explores its possible courses of action or when examining the fulfilment of the non-refoulement obligation of a State 73. The principle applies to maritime

70. Res. 1851 at para. 2, res. 1846 at para. 9, res. 1897 at para. 3.
73. Chahal v. United Kingdom, supra footnote 47, at para. 80.
operations on the high seas and it is a fundamental component of the human rights implications that such operations entail. It also applies even if the deportation to an “unsafe” territory is likely to occur from the State where the individual is deported in the first place (chain refoulement). So, when Belgium transferred an Afghan asylum-seeker back to Greece, it was found in breach of its obligations of non-refoulement, because Greece was likely to deport him to Afghanistan without examining the merits of his case.

Moreover, interdiction resulting in a transfer of the captured individuals to the country of departure, which triggers the non-refoulement obligation, should be distinguished from an interdiction that constitutes a denial of entry to the territorial waters. However, even a mere denial of entry and towing ships back to the high seas may result in refoulement or “refugees in orbit”, which in itself may amount to a violation of human rights.

It should also be stressed that whether a State is safe or unsafe for someone to be deported to is a question that cannot be answered in absolute terms. Let us take as an example piracy off the coast of Somalia:

74. See the case of Hirsi Jamaa and Others v. Italy, Judgment of 23.2.2012, paras. 113-158, where the Court held that the obligation of non-refoulement was breached on a double count (since there was a risk of inhuman treatment in Libya and a risk that Libya would arbitrarily deport the individuals to Eritrea, where there was a risk of inhuman treatment, is grave). Also, see generally G. Goodwin-Gill, “The Right to Seek Asylum: Interception at Sea and the Principle of Non-Refoulement”, 23 International Journal of Refugee Law 443 (2011); E. Papastavridis, “Interception of Human Beings on the High Seas: A Contemporary Analysis under International Law”, 36 Syracuse Journal of International Law and Commerce 145 (2009).


76. Article 33 of the Refugee Convention prohibits the refoulement “in any matter whatsoever”. The obligation of non-refoulement is thus both an obligation of conduct and an obligation of result. See P. Mathew, “Legal Issues concerning Interception”, 17 Geo. Immigr. LJ 221 (2002), at p. 229. It should also be noted that the status of “refugee” exists as soon as an individual fulfils the criteria contained in the Refugee Convention. Therefore, the recognition of this status by a State is simply declaratory: see M. Pallis, “Obligations of States towards Asylum Seekers at Sea: Interactions and Conflicts between Legal Regimes”, 14 Int’l J. Refugee L. 329 (2002), at p. 363.


even though the latter has been found as an unsafe country by the ECtHR\(^\text{81}\), there should be some further deliberation on this, since it is one thing to consider Somalia as an unsafe country for the average individual to be deported to, and a totally different thing to examine whether Somalia is an unsafe country for the average captured pirate. In certain areas of Somalia, a deported pirate might well be returning to a safe and familiar environment\(^\text{82}\).

In an effort to override their non-refoulement obligation, States have tried to obtain assurances from third countries where they seek to deport or extradite individuals that these countries will not treat the individuals deported in ways contrary to international human rights standards. As a general rule, but probably not without exceptions, diplomatic assurances should not of themselves be considered able to exclude the responsibility of the deporting State.

In several cases international human rights-protection organs have opined against the adequacy of such assurances to guarantee the protection of the individual’s rights\(^\text{83}\).

However, some States seem to endorse this practice, despite the strong arguments against it. Some of them express the view that they use this practice only in limited circumstances, when the deportation is actually the only viable option. For instance, the United Kingdom has entered arrangements for assurances with Jordan, Libya, Lebanon and Algeria\(^\text{84}\). It is, of course, a matter of appreciation whether deportation would be the only viable solution as well as under which circumstances all other options are non-viable. However, it is important to notice also that States per this option view the deportation with assurances as a means to safeguard human rights rather than avoiding their obligations\(^\text{85}\). On the other hand, despite the positive reaction that such a declaration might trigger, we should try to ascertain why deportation with assurances is a means to safeguard human rights. It is true that assurances will increase the protection of the rights of the deportees. However, it is not against the “plain” deportation that we should weigh


\(^{82}\) See ECtHR, Suﬁ and Elmi v. United Kingdom, Judgment of 28.6.2011, where membership in majority clan (and protection which results therefrom) counts as an element in deciding whether non-refoulement obligations would be breached by deportation.

\(^{83}\) See for instance Agiza v. Sweden before the UN Committee against Torture. But see ECtHR case of Othman (Aby Qatada) v. The United Kingdom, Judgment of 17.1.2012, in which the Court accepts assurances re Article 3 risk (although holds that there is an Article 6 non-refoulement obligation because torture evidence might be in Jordan.


\(^{85}\) Ibid., p. 185.
the efficiency of the deportation with assurances; we should weigh it against the other options, such as keeping the suspects in the arresting State, especially if it is a party to the ECHR. Weighed against this option, a deportation, even with assurances, to a country with a bad record of human rights protection can hardly convince that it serves as a means of safeguarding human rights.

Nevertheless, it is true that many times a State tries to get adequate assurances from a third State, in order to proceed to the deportation. In any case, the reliability of assurances must be assessed on the facts of each particular case.

Sometimes assurances can reduce the risk of a breach of the prohibition of torture to a level below the threshold that would engage the non-refoulement principle.86

Lastly, it should be noted that the principle of non-refoulement should apply also in cases where the individuals have been intercepted before exiting the territorial waters of the State of departure and therefore have not acquired the status of refugees. However, the intercepting State is still under the obligation not to transfer them to a territory where they would face a risk of torture or other cruel or inhuman treatment.87

SECTION 4 SHOULD HR BE PERCEIVED AS A THREAT TO MIOs?

The wide spectrum of human rights obligations involved in a Maritime Interdiction Operation has led to the formulation of an idea that human rights law limits the ability of international forces to combat crime at sea.88 It is true that States are not always willing to prosecute criminals they apprehend at sea, because of the fear of breaching human rights law.89

This has led to a situation where “a culture of impunity reigns

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86. Mamatkulov and Askarov v. Turkey, Grand Chamber Judgment of 4.2.2005. Also SIAC, Y v. SSHD (Case No. 7) at p. 390.
89. S. De Bont, “Murky Waters: Prosecuting Pirates and Upholding Human Rights Law”, 7 Journal of International Law and International Relations 104 (2011), at p. 106. Apart from scholars, this proposition is also supported by numbers: a great majority of apprehended criminals at sea are released instead of prosecuted.
whereby nations are not holding pirates accountable for the violent crimes they commit.90

More specifically, States involved in interdictions fear that captured suspects will claim asylum the moment they find themselves within the jurisdiction of the interdicting State, either by boarding a flagged warship or by being transferred within the territory of the State.91 However, despite the potentially widespread intention of captured sea criminals to seek asylum, it is highly unlikely that such a status can be actually granted. The 1951 UN Refugee Convention in Article 1 (f) makes it clear that individuals who have committed a serious crime outside the jurisdiction of the country of refuge are not entitled to refugee status. Furthermore, it is much easier for States to prove their compliance with the non-refoulement principle even in cases where they transfer captured criminals back to their State of departure, since it is probably unlikely that those criminals could show that they would be tortured or treated inhumanely if returned.93 On the other hand, the fear of asylum claims is not the only problem relating to the future of captured criminals after they have been tried and served their sentences.

The most problematic issue is the non-refoulement obligation that precludes States from returning individuals to countries where they might face risk of torture, inhuman or degrading treatment or even a denial of other important human rights, such as the right to a fair trial,94 in cases where there is a “flagrant denial of a fair trial” in the receiving State.95 The principle of non-refoulement, found in several human rights treaties,96 poses a significant obstacle with political and economic implications for the countries that wish to get involved in interdiction operations. If a State that apprehends and captures sea criminals is by this action unable

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91. See for instance B. Waterfield, “Somali Pirates Embrace Capture as Route to Europe”, The Telegraph (UK), 19 May 2009, found online at http://www.telegraph.co.uk/news/worldnews/ piracy/5350183/Somali-pirates-embrace-capture-as-route-to-Europe.html. This article includes the example of two of a group of captured pirates who have gone on trial in the Netherlands and have declared their intention to stay as residents.
93. Dutton, supra footnote 90, at pp. 292-293.
94. Soering v. The United Kingdom, supra footnote 72, para. 113.
95. We should not forget though that the threshold for a violation of Article 6, ECtHR, is high, described as a “flagrant denial” of a fair trial. In Mamatkulov (supra footnote 86), the dissenting opinion of Judges Bratza, Bonello and Hedigan implies that “flagrant” mean a breach so fundamental as to amount to a nullification or destruction of the very essence of the right.
96. CAT Article 3 (1), ICCPR Article 7, ECHR Article 3, ACHR Article 5 (2), are the most notable examples.
to deport those criminals after their capture, or trial, or the end of their sentence, it will be unwilling to proceed to any form of criminal enforcement, which is already the case.

The problem grows because of the non-derogable nature of the principle, which has been upheld by several courts and committees that have applied various international treaties. This principle applies regardless of the circumstances under which the individual has been brought within the jurisdiction of the State. Therefore, it applies “wherever [the State] exercises its jurisdiction . . . even when operating outside its territory.”

States have tried to overcome this obstacle by returning captured criminals to safe third countries, or to countries from which they have obtained assurances that the deported criminals will not face risk of torture or other inhuman or degrading treatment. The issues that arise are first to find third countries willing to accept captured suspects, to establish that a third country is “safe” and to define the type and extent of assurances that are necessary in order to pass the threshold of the obligation of *non-refoulement*.

As to the first issue, there are means to persuade a third country to accept captured criminals, put them on trial and imprison them if a court decides so. For instance, the example of Kenya is illuminating. Interdicting States have agreed to provide the necessary funding to improve Kenya’s justice system and prisons and Kenya, in return, agreed to receive captured suspects, put them on trial and imprison them. Such agreements may prove very beneficial for both sides since the interdicting States do not have to bear the operational, financial or political burden of dealing with captured criminals, and, on the other hand, receiving third countries have the opportunity to welcome significant funding that helps improve their judicial or penitentiary systems.

When it comes to deporting with assurances, the ECHR has held that assurances or accession to treaties do not suffice in themselves and that what matters is the practical application of such assurances and whether they can provide an actual guarantee that the deported individual would be protected from any violation of his fundamental rights. Although a

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100. *Saadi v. Italy*, *supra* footnote 97, at para. 147.
bad record of human rights violations makes it hard to accept that diplomatic assurances are an adequate guarantee for the capturing State to deport the suspects, while at the same time upholding its international obligations, this bad record does not pose an absolute prohibition of such a transfer of suspects to these countries. Whether this transfer shall be prohibited depends on the merits of each individual case and especially on whether the deporting States have managed to establish adequate judicial mechanisms for reviewing the assurances agreements and have ensured that they will be able to monitor effectively the status of the deported individuals over time.\textsuperscript{101}

If a wider approach based on the “realistic evaluation” is adopted, it is suggested that the level of protection which States accord to individuals extraterritorially cannot be the same with that accorded to individuals within the States’ boundaries.

The reason is that it would be impossible for States to accord beyond their territory the rights and freedoms set out in human rights law to a level analogous to the protection those rights enjoy within the State’s boundaries. In these cases, the level of protection, the argument goes, should depend on the extent of control that the State exercises over the individual.\textsuperscript{102}

Finally, apart from operational obstacles that human rights law may pose to interdiction operations, or apart from the problems regarding the future of the captured criminals inside the capturing State, there is another consideration, namely the direct and indirect costs involved. Trials in Western European or North American States tend to be seriously expensive as compared to trials in other parts of the world.\textsuperscript{103} Moreover, the costs of maintaining convicted criminals in prisons are equally high as are the costs to find, transfer and support witnesses and evidence.

Finally, during the time that a suspect is transferred from the point of his arrest to the port of the country that will receive him, the warship that transfers him cannot participate in operations, which means that another warship should take its place, a solution that places further costs on the naval forces.

\textsuperscript{101} Committee against Torture, “Conclusions and Recommendations of the Committee against Torture: United States of America” 36th Session, UN doc. CAT/C/USA/CO/2, 2006, para. 21. See also the Qatada Judgment, supra footnote 83, where the public nature of the case meant that Jordan was more likely to abide by its assurances.

\textsuperscript{102} Lawson, supra footnote 29, at p. 105.

\textsuperscript{103} One Earth Future, in “The Economic Cost of Maritime Piracy” (working paper of December 2010, found at http://oneearthfuture.org/images/imagefiles/Cost%20of%20Piracy%20Final%20Report.pdf), has estimated that trials in North America cost six times more than trials in East Africa (at p. 19).
There is no doubt that the ECtHR’s decision in the Medvedyev case drastically affected the contemporary discourse over the fight against crimes on the high seas. Security operations, such as FRONTEX, do not have excuses for disregarding human rights. It is therefore important to set out clear guidelines towards the compatibility of interdiction operations with human rights law.

A suggestion could be to include some of the crimes at sea within the jurisdiction of the International Criminal Court (ICC). Such an initiative would eliminate doubts as to the fair trial guarantees of future apprehended suspects. However, hundreds of piracy or drug trafficking cases would probably become an unbearable burden for the ICC.

Another suggestion is for the UN Security Council to adopt resolutions that explicitly authorize interdictions and enforcement powers with respect to those criminal acts at sea that are most suitable to be regulated by a Security Council resolution, such as piracy, WMD proliferation etc. This would enable States that are willing to undertake the prosecution of the suspects and guarantee that they would operate lawfully.

Notwithstanding the means to achieve it, there needs to be a clear framework that sets out the rules regulating law enforcement over crimes at sea which must be in accordance with applicable human rights law. Harmonization and clarification of rules with regard to identifying suspect vessels, dealing with seized cargo, rules of engagement are

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105. See for instance De Blow who criticized FRONTEX whose policies rather aim to prevent immigrants from entering the European Union than protecting their human rights. See M. De Blouw, “Drowning Policies: A Proposal to Modify the Dublin Agreement and Reduce Human Rights Abuses in the Mediterranean”, 40 *California Western International Law Journal* 335 (2009-2010), at p. 343. On the other hand, FRONTEX now tries to accommodate human rights considerations in their operational framework. Very recently, on 27 September 2012, the FRONTEX Management Board designated the first FRONTEX Fundamental Rights Officer. Although the effectiveness of this new office remains to be seen in practice, it is however an example that should be followed, in principle, by all operating forces.
necessary. This is further reiterated by the European Union, which in Recommendation 840 proposes to each State to determine a framework of rules regulating the detention of suspected pirates, the means of monitoring the detention, as well as other matters. Similar recommendations were proposed by the Special Adviser to the United Nations Secretary-General, Jack Lang, who suggested the development of a legal framework compatible with human rights law and the operational constraints.

Regarding Somali piracy, he has also suggested the creation of three specialized courts and three prisons (two in Somalia, and a third that will still be Somali but outside the territory of Somalia). What seems to be clear now is that the situation where intercepting States handed suspects over to Kenya was not the ideal solution to the problem of prosecution.

However, a significant international assistance, either in the form of resources or in the form of technical assistance, to encourage prosecution, trials and enforcement of the penalties in the region where such crimes occur or the country of origin of the suspects would be preferable, at more than one level. First, it would strengthen local justice systems and, secondly, it has the advantage that nothing new needs to be created, since national courts will apply national laws under clear rules, triggering no questions of legality or compatibility with human rights norms.

Another solution is for States to include laws in their penal legislation that will criminalize piracy or any other significant crime at sea (such as drug trafficking or slave trade), giving a legal basis to prosecute in those instances that a State wishes to prosecute captured criminals in its domestic courts.

On the other hand, courts should not interpret human rights obligations when combating crime on the high seas in the same strict way that they do when evaluating a State conduct within its borders. It should be recognized that the circumstances pertaining to a high seas operation are very challenging, very different to what the State faces when operating on its territory and the resources are far less in numbers and less effective in nature. In this case, an approach close to the “certain realism” doctrine proposed by the dissenting opinion in Medvedyev would be far more beneficial, since it guarantees the best possible protection of

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111. Guilfoyle, supra footnote 27, at p. 169.
human rights while at the same time encourages States to seek prosecution of criminals. Courts applying human rights law, when assessing the legal basis of an intercepting State to board and take further enforcement action against the cargo or the crew, should not ignore the reality that even a lawful interdiction “would be pointless without the exercise of further enforcement measures regarding the illicit cargo and the alleged offenders”\(^\text{112}\).

No matter how ambiguous it may seem to States, upholding their human rights obligations while fighting crime at sea should not deter them from prosecuting captured suspects. It is clear that so far the political will of the States operating on the high seas is more focused on deterrence rather than criminal enforcement, but the importance of criminal prosecution as a major deterrent of future crime should not be overlooked\(^\text{113}\). In the end, what is important is to understand that in cases of maritime interdiction human rights law should not operate as a real threat to the human rights of the individuals concerned. If the law is unreasonably strict, it will discourage States from embracing it and lead either to impunity of criminals or to State operations entirely outside the ambit of human rights law, covert operations and questionable human rights standards. It is true that only a few and relatively easy adjustments could render prosecution in accordance with human rights law possible.

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\(^{112}\) Papastavridis, *supra* footnote 49, at p. 572.

\(^{113}\) Dutton, *supra* footnote 90, at p. 253.