

INSECURITY AT SEA: PIRACY AND OTHER RISKS TO NAVIGATION

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ARREST, DETENTION AND TRANSFER OF PIRACY SUSPECTS: A CRITICAL APPRAISAL OF THE GERMAN *COURIER* CASE DECISION

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I. Introduction; II. The Courier Case in a Nutshell; III. Legal Basis for Arresting Piracy Suspects; A. Courier Case: Article 105 Unclos Provides Sufficient Legal Basis; B. Critical Appraisal; 1. Lawfulness as a Component of the Right to Liberty; 2. Article 105 UNCLOS Lacks a Procedural Component; IV. Procedural Safeguards for Detained Piracy Suspects; A. Courier Case: Sufficient to See a Judge in the Receiving State; B. Critical Appraisal; 1. The Principle: Judicial Control by the Seizing State; a) Rigopoulos and Medvedyev: Impertinent Cases to the Issue at Hand; b) Arguments against the Proposition 'a Judge is a Judge'; 2. The Modalities: When and How to bring Piracy Suspects Before a Judge; a) Granting Judicial Control Soon after the Initial Arrest; b) Providing an Opportunity to be Heard; V. Conclusion.

I. Introduction

Patrolling naval States contributing to national or multinational counter-piracy missions are only exceptionally willing and able to prosecute piracy suspects they took captive in their own criminal courts. The preferred course of action is to transfer the suspects for prosecution to a third State located in the region prone to piracy. Current transfer practices, as well as detention pending surrender for prosecution, is not unproblematic in terms of human rights law, notably when measured against the principle of non-refoulement and the right to liberty. The *Courier* decision by the first instance administrative court of Cologne, Germany, in late 2011¹ demonstrated that this concern is not of a purely academic nature: States engaged in counter-piracy operations off the coast of Somalia and the region may well be held accountable for a failure to respect certain minimum human rights standards – even if enforcing the law as a part of a multinational operation in an extraterritorial, maritime context.

II. The *Courier* Case in a Nutshell

On 3 March 2009, the German frigate *Rheinland Pfalz* contributing to the EU-led Operation Atalanta intercepted a group of persons in a skiff suspected of hav-

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¹ *Re, 'MV Courier'* [2011] 25 K 4280/09 (Verwaltungsgericht Köln, 25. Kammer); as of 25 May 2013, the case was still pending at the appellate level: *Re 'MV Courier'*, 4 A 2948/11 (Oberverwaltungsgericht Münster).

ing carried out a pirate attack against the *Courier*, a vessel owned by a German shipping company and flying the flag of Antigua and Barbuda. The competent German prosecutorial authorities opened an investigation and issued arrest warrants against all nine intercepted persons on 6 March 2009. On the following day, however, the prosecutorial authority discontinued the investigation according to Section 153c of the German Code of Criminal Procedure. This decision was taken after the inter-ministerial decision-making body informed the prosecutorial authorities about its finding that the suspects should be transferred to Kenya pursuant to the transfer agreement concluded between the European Union and Kenya on 6 March 2009. On 10 March 2009, the suspects were handed over to the competent Kenyan authorities for criminal prosecution and detained at Shimo-La-Tewa prison located close to Mombasa, Kenya. One of the transferred suspects brought an administrative action against the German State submitting that his initial arrest, his detention from 3 to 10 March 2009 on board the German frigate and his transfer to Kenya had been unlawful.²

The complaint was successful as to the allegation that the transfer was in breach of human rights law. The Court held Germany³ accountable for transferring the complainant to Kenya in violation of the principle of non-refoulement. It stated that the conditions of detention at the Shimo-La-Tewa prison at the time of the transfer, namely the overcrowding, poor sanitary facilities, shortage of water for hygiene and pest infestation in combination with high temperatures amounted to inhuman and degrading treatment as prohibited by, *inter alia*, Article 3 ECHR, which implicitly contains a prohibition of refoulement.⁴

Meanwhile, the part of the complaint relating to arrest and detention at sea did not convince the Court: It held that the initial arrest was lawful since Article 105 UNCLOS provides a sufficient legal basis for arresting piracy suspects on the high seas.⁵ Furthermore, the Court found that the complainant's detention

² *Re 'MV Courier'*, n. 1 above, at paragraphs 2-9.

³ The German Federal Government argued before the administrative court of Cologne that acts taken by Germany while contributing to EUNAVFOR were not attributable to the German State because a transfer of authority to the European Union took place. While the Court left the issue open regarding arrest and detention, it decided the attribution question regarding the transfer part of the complaint. It opined that Germany played a decisive part in the decision to transfer the suspect and that the violations in relation thereto were attributable to Germany: *ibid.*, at paragraphs 32, 38, 52-59. On the attribution of human rights violations in the context of counter-piracy operations, see Robin Geiss and Anna Petrig, *Piracy and Armed Robbery at Sea: The Legal Framework for Counter-Piracy Operations in Somalia and the Gulf of Aden* (2011), 116-130 and Douglas Guilfoyle, "Counter-Piracy Law Enforcement and Human Rights", 59 *International & Comparative Law Quarterly* (2010), 141, 153-159.

⁴ *Re 'MV Courier'*, n. 1 above, at paragraphs 59-77; Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4 November 1950; in force 3 September 1953) (ECHR).

⁵ *Re 'MV Courier'*, n. 1 above, at paragraphs 31-36; United Nations Convention on the Law of the Sea (Montego Bay, 10 December 1982; in force 16 November 1994) (UNCLOS).

on board the German frigate was in line with the procedural safeguards flowing from the right to liberty. Most importantly, it did not find a violation of the right to liberty even though the complainant was not brought before a German judge while detained on board the German frigate for more than a week. Rather, it decided that the right to be brought before a judge was respected because the complainant was before a Kenyan judge upon his transfer.⁶

It is argued in this paper that the Court's reasoning as to the right to liberty is partly flawed. The right to liberty stipulated in Article 5(1) ECHR and Article 9(1) ICCPR⁷ requires that every arrest and detention is lawful. While Article 105 UNCLOS seems to be a sufficient legal basis in terms of substantive lawfulness, i.e. with regard to deprivation of liberty as such, it is doubtful whether the provision lives up to the requirements of *procedural* lawfulness. As regards the right to be brought promptly before a judge, it is submitted that piracy suspects seized by patrolling naval States have a right to have the legality of their arrest and detention reviewed by a judge of the *seizing* State.

III. Legal Basis for Arresting Piracy Suspects

A. *Courier* Case: Article 105 UNCLOS Provides Sufficient Legal Basis

The applicant alleged that his arrest on 3 March 2009, which took place on the high seas, was unlawful. The Court rejected this part of the complaint finding that the first sentence of Article 105 UNCLOS provides a sufficiently clear and precise legal basis for arresting piracy suspects. It decided that the requirements of this provision were fulfilled in the case at hand. The arrest of the suspect by military forces on board the German frigate – a warship in the sense of Article 107 UNCLOS – took place on the high seas. Furthermore, there was reasonable suspicion that the vessel in question was a pirate ship as defined in Article 103 UNCLOS. The applicant's ship was spotted by a US helicopter in the vicinity of the *Courier* shortly after the vessel was attacked. Moreover, the skiff intercepted by the German frigate carried piracy paraphernalia on board, namely boarding tools and the type of weapons used in the attack against the *Courier*. Overall, the Court concluded that the initial arrest of the complainant was lawful.⁸

B. Critical Appraisal

According to the right to liberty stipulated under Article 5 ECHR and Article

⁶ *Re 'MV Courier'*, n. 1 above, at paragraphs 37-50.

⁷ International Covenant on Civil and Political Rights (New York, 16 December 1966; in force 23 March 1976) (ICCPR).

⁸ *Re 'MV Courier'*, n. 1 above, at paragraphs 31-36.

9 ICCPR, every deprivation of liberty must be covered by a justificatory ground, free from arbitrariness and lawful. The issue at stake in the *Courier* case was the lawfulness requirement, which is also at the centre of the following analysis.

1. Lawfulness as a Component of the Right to Liberty

Both the right to liberty under the ECHR as well as the similar guarantee of the ICCPR require that arrest and detention is lawful. The lawfulness requirement flows from two textual elements of Article 5(1) ECHR, namely from its *chapeau* stating that a person can only be deprived of his liberty ‘in accordance with a procedure prescribed by law’, and from the justificatory ground stipulated in Article 5(1) (c) ECHR where the attribute ‘lawful’ precedes the words ‘arrest and detention’. The provision thus contains a double test of legality.⁹ A fundamental command flowing from the lawfulness requirement is that any arrest or detention requires a legal basis.¹⁰ The requirement that a legal basis for deprivation of liberty must exist relates to both the deprivation of liberty as such, namely describing the grounds justifying a deprivation of liberty (‘substantive lawfulness’), and the domestic procedure by which arrest and detention are imposed (‘procedural lawfulness’). The legal basis providing for deprivation of liberty and describing the relevant procedure to deprive a person of his liberty is generally found in national law.¹¹ However, it can also stem from international law.¹² Regardless of whether the legal basis governing deprivation of liberty is a rule of international or domestic law, it must fulfil certain formal criteria. First of all, the legal basis providing for deprivation of liberty and governing the relevant procedure must be pre-existing.¹³ Further, the general principles of legal certainty and rule of law, which are particularly important regarding interferences with the right to liberty, require domestic law to be of a certain quality. According to the Court, the ‘quality of law’ standard implies that a law governing deprivation of liberty must be ‘sufficiently accessible, precise and foreseeable in its application, in order to avoid all risk of arbitrariness’.¹⁴ Sufficient precision, in turn, ‘allow[s] the citizen – if need

⁹ Stefan Trechsel and Sarah Summers (eds.), *Human Rights in Criminal Proceedings* (2006), at 419. In their case law, the Strasbourg organs do not clearly distinguish between these two textual elements. Rather, they examined them together under the heading of ‘lawfulness’: instead of many, see ECtHR, 8 February 2005, *Bordovskiy v. Russia*, App no 49491/99, at paragraph 41.

¹⁰ ECtHR, 21 April 2009, *Stephens v. Malta (No 1)*, App no 11956/07, at paragraph 61.

¹¹ On the notion of ‘law’, see Trechsel and Summers, n. 9 above, at 419.

¹² Council of Europe/European Court of Human Rights, “Guide on Article 5: Right to Liberty and Security – Article 5 of the Convention” (2012) found at: <www.echr.coe.int/NR/rdonlyres/45CE4A15-7110-494E-8899-AC824132C136/0/POINTS_CLES_Article_5_EN.pdf>, referring to ECtHR, 29 March 2010, *Medvedyev and Others v. France (Grand Chamber)*, App no 3394/03, at paragraph 79.

¹³ ECtHR, 7 June 2007, *Garabayev v. Russia*, App no 38411/02, at paragraph 87.

¹⁴ See, e.g., ECtHR, 11 October 2007, *Nasrulloev v. Russia*, App no 656/06, at paragraph 71; ECtHR, 24 April 2008, *Ismoilov and others v. Russia*, App no 2947/06, at paragraph 137; ECtHR, 23 October 2008, *Soldatenko v. Ukraine*, App no 2440/07, at paragraph 111; ECtHR,

be, with appropriate advice – to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail’.¹⁵

Article 9(1) ICCPR stipulates that no person shall be deprived of his liberty ‘except on such grounds and in accordance with such procedure as are established by law’. Thus, similar to Article 5(1) ECHR, the Covenant requires that deprivation of liberty is governed by law. On the one hand, there must be a legal basis describing grounds on which liberty may be deprived. This is referred to as the substantive component of lawfulness. On the other hand, the procedure applied in order to deprive a person of his liberty, i.e. the procedural component of lawfulness, must also be laid down in law.¹⁶ Thereby, the law governing deprivation of liberty must be of a certain quality. It must describe the grounds and procedure for depriving a person of his liberty clearly¹⁷ and with sufficient specificity.¹⁸ In other words, vague provisions or provisions couched in general terms are not in line with the principle of legality,¹⁹ which requires that rules governing arrest and detention are predictable.²⁰ Furthermore, these legal bases must be accessible to all persons subject to the relevant jurisdiction.²¹

2. Article 105 UNCLOS Lacks a Procedural Component

Domestic law does not necessarily provide a legal basis for arrest and detention of piracy suspects. This holds especially true for States, such as Germany, which contend that their codes of criminal procedure ordinarily governing arrest and detention on suspicion of criminal activity is inapplicable *ratione personae* to their navies.²² These States generally argue that Article 105 UNCLOS fills this normative gap left by domestic law regarding arrest and detention of piracy suspects on the high seas carried out by military forces. However, to date, neither the European Court of Human Rights nor the Human Rights Committee has had

8 January 2009, *Khudyakova v. Russia*, App no 13476/04, at paragraph 68.

¹⁵ *Stephens v. Malta (No 1)*, n. 10 above, at paragraph 61.

¹⁶ Manfred Nowak, *U.N. Covenant on Civil and Political Rights: CCPR Commentary* (2nd edn., 2005), at 223.

¹⁷ *Ibid.*, at 223.

¹⁸ Scott Carlson and Gregory Gisvold, *Practical Guide to the International Covenant on Civil and Political Rights* (2003), at 82.

¹⁹ Sarah Joseph, Jenny Schultz and Melissa Castan, *The International Covenant on Civil and Political Rights: Cases, Materials, and Commentary* (2nd ed., 2004), at 309; Carlson and Gisvold, n. 18 above, at 83.

²⁰ Roza Pati, *Due Process and International Terrorism* (2009), at 42.

²¹ Nowak, n. 16 above, at 223; Carlson and Gisvold, n. 18 above, at 83.

²² For the German Navy, see Claus Krefß, “Die moderne Piraterie, das Strafrecht und die Menschenrechte: Gedanken aus Anlass der deutschen Mitwirkung an der Seeoperation ATALANTA”, in Dieter Weingärtner (ed.), *Die Bundeswehr als Armee im Einsatz: Entwicklungen im nationalen und internationalen Recht* (2010), 99, 110.

a chance to examine Article 105 UNCLOS in light of the lawfulness requirement.²³ In doctrine, opinions diverge as to whether Article 105 UNCLOS is a sufficient legal basis in terms of Article 5(1) ECHR and Article 9(1) ICCPR, and the discussion is generally concentrated on the former provision. It is argued in the following analysis that the UNCLOS provision seems sufficient in terms of *substantive* lawfulness but lacks a procedural component and, as a result, arguably does not live up to the requirement of *procedural* lawfulness under the right of liberty.

With regard to piracy in the technical sense, i.e. as defined in Article 101 UNCLOS, it is argued that Article 105 UNCLOS sufficiently regulates deprivation of liberty as such. *Ratione personae*, Article 105 UNCLOS allows for the arrest of persons on board a pirate ship or a ship taken by piracy and under the control of pirates. Read together with the other piracy enforcement provisions of the UNCLOS, notably Article 101 UNCLOS defining ‘piracy’ and Article 103 UNCLOS defining a ‘pirate ship’, Article 105 UNCLOS sufficiently describes who can be deprived of his liberty. Furthermore, since piracy can only be committed on the high seas according to Article 101 UNCLOS, also the area in which a person can be deprived of his liberty is sufficiently defined.²⁴ Seen through the eyes of law enforcement officials deployed to counter-piracy operations, these legal norms indeed define the circle of persons against whom enforcement measures can be taken with sufficient clarity. The far greater challenge for forces deployed is of an operational rather than legal nature and lies in distinguishing alleged pirates from fishermen armed for the purpose of self-defence. Yet, from a legal point of view, the concepts of ‘pirate ship’ and ‘ship taken by piracy and under the control of pirates’ used in Article 105 UNCLOS and defined by virtue of Articles 101 and 103 UNCLOS – which taken together define the category of persons against whom the enforcement measures of arrest and detention can be taken – leave many definitional ambiguities. Essentially, it suffices to state that these interpretational uncertainties mainly stem from a complicated system of cross references between Articles 101, 103 and 105 UNCLOS.²⁵ However, despite these definitional ambiguities with regard to Article 105 UNCLOS, read together with Articles 101 and 103 UNCLOS, the provision seems to sufficiently describe who may be arrested in what geographical area.

The requisite level of suspicion required for an arrest is not explicitly mentioned in Article 105 UNCLOS. However, guidance in this respect can be gained from other UNCLOS counter-piracy provisions and most notably from a comparison with the right of visit stipulated in Article 110 UNCLOS. For the exercise of the (mere) right of visit, it suffices that the patrolling naval State has ‘rea-

²³ Ibid, at 112.

²⁴ Ibid, at 111; the author makes this statement regarding Article 105 UNCLOS read together with the German law pertaining to UNCLOS (*deutsches Vertragsgesetz*).

²⁵ For a detailed account on definitional ambiguities with regard to pirate ships, see Geiss and Petrig, n. 3 above, 64-65.

sonable grounds for suspecting' that the ship in question is engaged in piracy.²⁶ The logic of Article 110(2) UNCLOS is that as the initial suspicion is gradually substantiated, the range of enforcement powers is proportionally extended.²⁷ Ultimately, once the suspicion has been confirmed and the ship identified as a pirate ship according to Article 103 UNCLOS, the enforcement powers of Article 105 UNCLOS become available.²⁸

In sum, Article 105 UNCLOS, when read in its context, is arguably sufficiently clear and precise in terms of defining the requisite level of suspicion necessary for carrying out an arrest as it is with regard to the persons that can be arrested and the geographical area in which an arrest can take place. Therefore, it can be concluded that Article 105 UNCLOS may be a sufficient legal basis when measured by the standard pertaining to *substantive* lawfulness.

We now turn to the question whether Article 105 UNCLOS is sufficient in terms of *procedural* lawfulness as required by Article 5(1) ECHR and Article 9(1) ICCPR. With regard to the procedure to be followed when arresting or detaining a piracy suspect, it has been argued that Article 105 UNCLOS provides a sufficient legal basis – even though the provision is completely silent in terms of procedure. Germany, among other States, argues that in situations of private arrest, the domestic provision giving everybody the right to arrest persons caught red-handed²⁹ does not set forth procedural rules either, and yet it is a sufficient legal basis for depriving a person of his liberty.³⁰ However, this analogy seems inaccurate. The right of any person to arrest under domestic law primarily aims to avoid private persons being held liable for unlawful confinement because they took the (commendable) initiative to overpower an alleged offender caught in the act. It would, quite obviously, not make sense to oblige private persons to undertake further procedural steps. Even though the words 'any person' in the German provision regarding private arrest can be understood as also encompassing law enforcement officials, the flagrant character of situations under this provision and in counter-piracy operations are different and hardly comparable. Truly, pirates are also caught red-handed. Such arrests occur, however, within a planned and authorized law enforcement operation where States patrol the sea for the very purpose of combating the criminal phenomenon of Somali-based piracy, notably

²⁶ Article 110(1) UNCLOS.

²⁷ This follows from the third sentence of Article 110(2) UNCLOS, according to which more far-reaching enforcement powers are only available '[i]f suspicion remains'.

²⁸ Geiss and Petrig, n. 3 above, at 56-57.

²⁹ For an example of a provision allowing for private arrest, see Section 127(1) of the German Code of Criminal Procedure (StPO) [2011] Brian Duffet and Monika Erbing (original tr.); Kathleen Müller-Rostin (updated tr.): 'If a person is caught in the act or is being pursued, any person shall be authorized to arrest him provisionally, even without judicial order, if there is reason to suspect flight or if his identity cannot be immediately established'.

³⁰ Krefß, n. 22 above, at 112.

by means of arresting suspects and submitting them for criminal prosecution. Hence, an arrest carried out in the counter-piracy context does not have the same incidental and accidental character as situations of private arrest of alleged offenders caught *in flagranti*. For these reasons, the fact that the provision on private arrests is silent in terms of the procedure to be followed (and yet a valid legal basis for deprivation of liberty) is not a convincing argument for the proposition that Article 105 UNCLOS, which contains no explicit procedural component either, is a sufficient legal basis in light of the procedural lawfulness requirement.

One could argue that Article 105 UNCLOS contains an *implicit* procedural element. However, such an argument must be rejected in light of the drafting history of the provision. Admittedly, a treaty provision must not necessarily be interpreted historically.³¹ However, it bears mentioning that the *travaux préparatoires* of Article 105 UNCLOS (and the other counter-piracy provisions of UNCLOS) suggest that the focus of these provisions is clearly on granting enforcement powers rather than confining them. In other words, Article 105 UNCLOS does not seem to contain a procedural element aimed at curtailing the power to arrest, notably by setting forth a procedure to be followed in cases of arrest and detention or by obliging the seizing State to grant procedural safeguards to persons deprived of their liberty. The UNCLOS was adopted in 1982 – that is, at a time when the idea that human rights considerations must be given weight when enforcing the law had already gained ground. However, during the Third United Nations Conference on the Law of the Sea, held between 1973 and 1982, the interest in piracy was marginal. The counter-piracy provisions were not really discussed but rather (with some largely unexplained, minor changes) imported from the 1958 Convention on the High Seas. Therefore, Article 105 UNCLOS was not given a new meaning in 1982 when the UNCLOS was adopted, but rather reflects the idea behind the identically worded Article 19 of the 1958 Convention on the High Seas.³² The latter provision, in turn, was not thoroughly discussed during its adoption in the 1950s. This was mainly due to the fact that the drafters perceived piracy as an 18th century phenomenon and considered the application of the provision as a rather theoretical scenario.³³ Therefore, Article 43 of the draft of the International Law Commission was adopted as Article 19 of the 1958 Convention on the High Seas without any changes. The basis for the draft of the International Law Commission, in turn, was the Harvard Draft Convention on Piracy of 1932.³⁴ Thus, even though adopted in 1982, the content of Article 105 UNCLOS was largely inspired by a provision drafted in the early 1930s and thus

³¹ Mark Villiger, *Commentary on the 1969 Vienna Convention on the Law of Treaties* (2009), 444-448.

³² Geiss and Petrig, n. 3 above, 40-41, 148-49.

³³ This even led some delegates to propose the deletion of all provisions relating to piracy: *ibid.*, at 148.

³⁴ *Ibid.*, at 39-40.

at a time when the individual rights of persons subject to law enforcement measures were not a primary concern. Today, more weight is given to the interests of persons against whom law enforcement measures (at sea) are taken, and the idea of limiting enforcement powers in light of individual rights finds express mention in treaty provisions. This is, for example, evidenced by the safeguards stipulated in the boarding provision of the 2005 SUA Protocol.³⁵

Overall, Article 105 UNCLOS not only lacks an explicit but also an implicit procedural component. Therefore, it is doubtful whether the provision lives up to the requirement of *procedural* lawfulness under Article 5(1) ECHR and Article 9(1) ICCPR. Most notably, Article 105 UNCLOS hardly seems sufficiently precise, clear and foreseeable in terms of the procedure for arrest and detention of piracy suspects and the procedural safeguards to be granted to them as required by the quality of law standard developed under the lawfulness requirement of the right to liberty. In sum, the findings of the Court in the *Courier* case that Article 105 UNCLOS provided a sufficient legal basis for the arrest of the complainant suspected of piracy may be correct as regards substantive lawfulness, but arguably did not sufficiently take into account the procedural dimension of the lawfulness requirement of the right to liberty stipulated in Article 5(1) ECHR and Article 9(1) ICCPR.

IV. Procedural Safeguards for Detained Piracy Suspects

A. *Courier* Case: Sufficient to See a Judge in the Receiving State

The applicant in the *Courier* case further complained that his detention on board the German frigate without being brought before a judge within 48 hours after the arrest as required by Article 104(3) of the German Constitution was unlawful.³⁶ This part of the complaint was rejected even though the applicant was not brought before a German or any other judge while detained on board the German frigate between his arrest on 3 March 2009 and his transfer on 10 March 2009. It was only upon his transfer, on 11 March 2009, that he could avail himself of the right to see a judge.³⁷

The German Government's defence was two-fold. In the first place, it argued that the acts in question were not attributable to Germany, but rather to the European Union. In any event, the aim behind the procedural safeguards granted by the German Constitution is not to hinder the effectiveness of counter-piracy

³⁵ Article 8bis (10) 2005 Protocol to the 1988 Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation (London, 14 October 2005; in force 28 July 2010) (2005 SUA Protocol).

³⁶ *Re 'MV Courier'*, n. 1 above, at paragraphs 37, 39.

³⁷ *Ibid*, at paragraphs 5, 48-49.

operation authorized and encouraged by international law. Even if Germany did not provide for legal review of arrest and detention or any other procedural safeguards, there would be no protective gap so long as it is ensured that the suspect is transferred to a State where he ultimately benefits from the respective human rights guarantees.³⁸ Concretely, Article 5(3) ECHR guaranteeing the right to be brought promptly before a judge was not violated in the case at hand because the suspect was brought promptly before a Kenyan judge.³⁹ Thus, while the German Government does not deny the applicability of Article 5(3) ECHR as such,⁴⁰ it takes the stance that the provision does not require that the piracy suspect be brought before a judge of the seizing State, i.e. Germany. Rather, it suffices that the person is brought promptly before a judge in the receiving State, which was Kenya and thus not a State bound by the ECHR in the case at hand. In short, Germany's interpretation of Article 5(3) ECHR seems to be that 'a judge is a judge' – whether the judge is from the seizing State or a third receiving State (even if not bound by the ECHR) does not seem to matter.

This argument received support by the administrative court of first instance of Cologne. It decided that Article 104(3) of the German Constitution stipulating that every criminal suspect must see a judge within 48 hours had to be modified in two ways due to the special context of the case. Firstly, it stated that the strict time frame of 48 hours stipulated in Article 104(3) of the German Constitution need not be respected. Rather, in the Court's view, it suffices if – in line with the wording of Article 5(3) ECHR and Article 9(3) ICCPR – the suspect is brought 'promptly' before a judge and, in the case at hand, seven days was considered sufficient to meet the promptness requirement.⁴¹ Secondly, it held that Article 104(3) of the German Constitution was not violated by bringing the suspect before a Kenyan judge rather than a German judge. To the contrary, it argued that since the suspect's criminal prosecution was ultimately going to take place in Kenya, only a Kenyan judge was competent to review the legality of arrest and detention.⁴²

This reasoning begs the fundamental question whether the word 'judge' of Article 5(3) ECHR and Article 9(3) ICCPR – both granting the right to be brought promptly before a judge or judicial officer – refers to a judge of the seizing State only, or whether it can be a judge of the receiving and ultimately prosecuting State or even a judge of any third State.

³⁸ Ibid, at paragraphs 20-23.

³⁹ Ibid, at paragraphs 24-26.

⁴⁰ Rather, it expressly states that this provision has been respected: *ibid*, at paragraph 24.

⁴¹ Ibid, at paragraphs 39-48.

⁴² Ibid, at paragraph 49.

B. Critical Appraisal

1. *The Principle: Judicial Control by the Seizing State*

It is submitted here that Article 5(3) ECHR and Article 9(3) ICCPR are not respected if piracy suspects are brought before a judge of the receiving and ultimately prosecuting State for judicial control of deprivation of liberty at sea by the seizing State. Rather, piracy suspects must be brought before a judge of the seizing State.

a) *Rigopoulos and Medvedyev: Impertinent Cases to the Issue at Hand*

The German Federal Government argued in the *Courier* case that Article 5(3) ECHR was complied with because the suspect was transferred to Kenya where he was brought before a judge on the day following his surrender. It argued that the delay of seven days between arrest and judicial control met the promptness requirement since, according to *Rigopoulos v. Spain* and *Medvedyev and Others v. France*⁴³ decided by the European Court of Human Rights, exceptional circumstances can justify a longer time frame and Germany transferred the suspect to the closest State willing to prosecute.⁴⁴

It is certainly true that the European Court of Human Rights bestowed the notion of ‘promptness’ with a broad meaning in *Rigopoulos* and *Medvedyev*.⁴⁵ However, it is submitted here that these two cases are impertinent to the situation at hand because the facts differ as to a crucial point. In both *Rigopoulos* and *Medvedyev*, after about two weeks, the suspects were ultimately brought before a judge of the seizing State where they could challenge the legality of their arrest and detention by the seizing and – *nota bene* – arresting and detaining State. Absent from the facts to be considered in *Rigopoulos* and *Medvedyev* were a possible surrender to a third State for prosecution and the proposition that the suspects could be brought before a judge of that receiving State. In short, the question decided by the Court was how long State A, which has seized suspects at sea far from the mainland authorities, can take to bring the suspects before its *own* judge on the mainland (i.e. a judge of State A).⁴⁶

⁴³ ECtHR, 12 January 1999, *Rigopoulos v. Spain*, App no 37388/97 and *Medvedyev*, n. 12 above.

⁴⁴ *Re ‘MV Courier’*, n. 1 above, at paragraphs 37-50, specifically at paragraph 47.

⁴⁵ The European Court of Human Rights decided in these two cases that the exceptional circumstances of these specific arrests on the high seas justified longer periods and that no violation on the promptness requirement occurred even though 16 and 13 days respectively elapsed between arrest and judicial control: *Rigopoulos*, n. 43 above, at paragraphs 8-13 of the legal considerations, and *Medvedyev*, n. 12 above, at paragraphs 127-134.

⁴⁶ The facts of these two cases, which at no point involved the idea of surrender for prosecution and bringing the suspects before a court of the receiving and ultimately prosecuting State, are as follows: In *Rigopoulos*, n. 43 above, Spain requested and received flag State authorization to board and search the suspected vessel, which was intercepted on the high seas by Spanish customs officials. The ship was thereupon escorted to the Canary Islands, which belong to Spain, and from there flown to the Spanish mainland for investigation and prosecution (The

However, in the situation under consideration in the *Courier* case and counter-piracy operations in general, piracy suspects are seized, arrested and detained by State A and brought before a judge of State B, which is supposed to grant judicial control of deprivation of liberty at sea by State A. Whether this is permissible under Article 5(3) ECHR – and, if so, how long such a process can take – was not decided in *Rigopoulos* or *Medvedyev*. Put differently, the European Court of Human Rights did not decide a case involving disposition of a criminal case involving suspects seized at sea and their ultimate transfer to a third State and the meaning of Article 5(3) ECHR in such a situation. Rather, it ruled on an arrest by State A that brought the suspects before its own courts in State A – where the suspects could ultimately challenge the legality of arrest and detention by State A before a judge of that same State. The simple fact that both the arrest of piracy suspects and the arrests in *Rigopoulos* and *Medvedyev* took place in a maritime context is not sufficient to apply the Court’s *ratio decidendi* to piracy suspects seized by one State and brought to a third State for prosecution and judicial control of deprivation of liberty at sea. Hence, the administrative court’s references to *Rigopoulos* and *Medvedyev* in the *Courier* case are not particularly pertinent to the issue at stake.

b) Arguments against the Proposition ‘a Judge is a Judge’

There are various arguments against the proposition that ‘a judge is a judge’, i.e. that it does not matter whether the suspect deprived of his liberty is brought before a judge of the seizing or receiving State. To begin, two important aspects regarding the right to be brought before a judge, which flow from the principle of *par in parem non habet iudicium/iurisdictionem*,⁴⁷ must be recalled. Firstly, the seizing State can only guarantee and ensure that a piracy suspect it took captive is brought before its own authorities, but the seizing State cannot force the receiving State to bring piracy suspects before a judge of its own courts upon transfer. Secondly, the receiving State is only competent to exercise judicial control over arrest and detention carried out under the authority of its own officials, but not over arrest and detention by the seizing State. Put differently, a judge of the

Facts, A.). In *Medvedyev*, n. 12 above, the French law enforcement authorities requested and received flag State authorization to intercept the suspected ship, which attracted the attention of the Central Office for the Repression of Drug Trafficking (OCRTIS), a ministerial body attached to the Central Police Directorate of the French Ministry of Interior (*ibid*, at paragraphs 9-10). French naval authorities instructed the commander of the French frigate to locate and intercept the suspected ship (*ibid*, at paragraph 12). On 13 June 2002, the suspected ship was spotted and intercepted (*ibid*, at paragraph 13). The same day, a French public prosecutor referred the case to the OCRTIS for examination under the *flagrante delicto* procedure (*ibid*, at paragraph 16). On 24 June 2002, a French prosecutor opened an investigation into the charges (*ibid*, at paragraph 17). On 26 June 2002, the suspected ship entered a port in France under escort (*ibid*, at paragraph 18). The suspects were ultimately prosecuted in France (*ibid*, at paragraphs 24-25).

⁴⁷ See, e.g., Yoram Dinstein, “Par in Parem Non Habet Imperium”, 1 *Israel Law Review* (1966), 407-420.

seizing State is the only judge who can effectively decide whether deprivation of liberty of piracy suspects at sea by officials of the seizing State is justified (and, if not, to order their release). Meanwhile, a judge of the receiving State is only competent to review the legality of arrest and detention upon transfer, i.e. land-based deprivation of liberty (and, if not, to order the suspect's release).⁴⁸ Hence, deprivation of liberty at sea by the seizing State and deprivation of liberty on land by the receiving State upon transfer are two separate spheres, each of which falls within the purview of a different jurisdiction.

Departing from this premise, we now turn to the purpose of Article 5(3) ECHR and Article 9(3) ICCPR, which equally exclude the idea that deprivation of liberty at sea by the seizing State can be reviewed by the receiving State upon transfer. First of all, it must be stressed that Article 5(3) ECHR and Article 9(3) ICCPR are not conceptualized as compensatory rights as are Article 5(5) ECHR and Article 9(5) ICCPR. From this follows that it is insufficient if judicial control is only provided *after* deprivation of liberty has ended in order to decide whether it was justified and, if not, to provide for monetary or another form of compensation – a remedy of a merely *compensatory* character. Rather, the purpose behind Article 5(3) ECHR and Article 9(3) ICCPR is of a *preventive* nature – concretely, to prevent arbitrary detention, abuse of power and ill-treatment by the very intervention of a judge. Hence, only if the right to be brought before a judge is granted *while* the person is deprived of his liberty can the purpose of Article 5(3) ECHR and Article 9(3) ICCPR be realized. Put another way, if judicial control is only granted in the receiving State upon surrender, i.e. when deprivation of liberty at sea has already ended, the preventive purpose of these provisions cannot be achieved.

Even if, *arguendo*, the receiving State had granted judicial control while the suspects were still detained by the seizing State at sea (for example, by means of video link), the remedy would still be ineffective because a judge of the receiving State is not competent to decide on a violation of the right to liberty by the seizing State and to order release in a case of unjustified deprivation of liberty – which is a necessary characteristic of a judge in the sense of Article 5(3) ECHR and Article 9(3) ICCPR⁴⁹ – due to the principle *par in parem non habet iudicium/iurisdictio-nem*. Furthermore, the right to be brought before a judge cannot be interpreted in

⁴⁸ See, e.g., *Re 'MS Samanyolu' (Judgment)* [2010] LJN: BM8116 (Rotterdam District Court, English translation provided by UNICRI), 5-7, where the Rotterdam court could not decide on a violation of Article 5(3) ECHR by the seizing State (Denmark) and limited its judicial control to the question whether the violation by the seizing State was attributable to the receiving State (the Netherlands).

⁴⁹ Council of Europe/European Court of Human Rights, n. 12 above, at paragraph 139 (regarding the ECHR); Stephen Bailey, "Rights in the Administration of Justice", in David Harris and Sarah Joseph (eds.), *The International Covenant on Civil and Political Rights and United Kingdom Law* (1995), at 205 (regarding the ICCPR).

a way that leads to absurd or unreasonable results that run counter to the effective protection of persons under a State's jurisdiction.⁵⁰ Yet, this is exactly what happens if the notion of 'judge' is read as offering a choice between bringing the piracy suspect before a judge of the seizing or receiving State. While the seizing State does not see itself competent to grant judicial control (for factual reasons), the receiving State is certainly not competent to do so either (for legal reasons) – this leads to the result that judicial control of arrest and detention of piracy suspects at sea disappears into a 'black hole' of jurisdictional conflict, so to speak. Such an interpretation of Article 5(3) ECHR and Article 9(3) ICCPR seems impermissible.

Moreover, we must bear in mind that a great number of suspects – up to 90 per cent in early 2011 when the catch-and-release practice peaked once more – are ultimately released for various reasons, namely for a failure to identify a State willing and able to receive piracy suspects for criminal prosecution.⁵¹ In all these cases, the initial arrest and detention pending the decision of the seizing State whether to prosecute the suspects in its own courts is based on Article 5(1)(c) ECHR, hence Article 5(3) ECHR applies. However, despite the existence of an obligation to bring the suspects before a judge, many patrolling naval States do not discharge it properly, i.e. the suspects are not granted judicial control by a judge of the seizing State at any point. Besides, given that no transfer will take place for one reason or another, no argument can be made that a judge of the receiving State can grant judicial control instead of the seizing State. Hence, in the significant number of cases where suspects are ultimately released rather than transferred, no judicial control of their arrest and detention takes place – not even, as is proposed in cases of transfer, by the receiving State.

To conclude, the basic idea behind the right to be brought before a judge – to subject the power of arrest and detention to judicial control – is also valid in the context of piracy. The power to deprive a person of his liberty and the obligation to grant judicial control of arrest and detention thus cannot be split between two States. Rather, the authorization to arrest and detain and its control must always be glued together – otherwise protection against arbitrary and unjustified deprivation of liberty is seriously weakened. Therefore, the notion of 'judge' in Article 5(3) ECHR and Article 9(3) ICCPR only refers to a judge of the seizing State, under the authority of which arrest and detention of piracy suspects at sea takes place. Applied to the fact pattern of the *Courier* case, this implies that the complainant should have been brought before a German judge in order to have his

⁵⁰ Steven Greer, *The Margin of Appreciation: Interpretation and discretion under the European Convention on Human Rights* (2000), at 15; Birgit Schlütter, "Aspects of Human Rights Interpretation by the UN Treaty Bodies", in Helen Keller and Geir Ulfstein (eds.), *UN Human Rights Treaty Bodies: Law and Legitimacy* (2012), 286-287.

⁵¹ Report of the Secretary-General on specialized anti-piracy courts in Somalia and other States in the region (UN Doc. S/2012/50, 20 January 2012), at paragraph 9.

arrest and detention at sea by German officials subjected to judicial control. We now turn to the question of how such judicial control can be granted in practice.

2. *The Modalities: When and How to bring Piracy Suspects Before a Judge*

We concluded that Article 5(3) ECHR and Article 9(3) ICCPR require that the suspect is brought before a judge of the seizing State rather than before a judge of the receiving or any other third State. This begs the question of the moment when judicial control must be granted – whether it is immediately after seizure and during the deliberations of the seizing State whether to prosecute the suspects in its own courts or only once the seizing State has decided to exercise its jurisdiction over the suspects. Furthermore, it must be discussed whether, under the provisions, it is necessary that piracy suspects physically appear before a judge or if the decisive aspect is the granting of the right to be personally heard.

a) Granting Judicial Control Soon after the Initial Arrest

According to Article 5(3) ECHR and Article 9(3) ICCPR, the right to be brought before a judge must be granted ‘promptly’. As a general rule, the promptness requirement does not permit a delay of more than approximately three days. However, the acceptable delay ultimately depends on the specificities of each case.⁵² Thus, the European Court of Human Rights found in *Rigopoulos* and *Medvedyev* that the wholly exceptional factual circumstances did not allow for the applicants to be brought before a judge any earlier than 16 and 13 days respectively after arrest at sea, which occurred far from the mainland authorities of the intercepting State, and thus the Court did not find a violation of the promptness requirement.⁵³ As a result, the question is whether arrest and detention of piracy suspects is comparable to the situations adjudicated in *Rigopoulos* and *Medvedyev*, and thus whether the broad interpretation of the promptness requirement is applicable to the situation under consideration here.

In the context of piracy, the initial arrest, and also detention during the deliberations of the seizing State whether the suspects will be prosecuted in domestic courts, must be based on Article 5(1)(c) ECHR. The provision equally applies in cases where the seizing State decides to exercise its criminal jurisdiction over the suspects. Hence, Article 5(3) ECHR is applicable from the initial seizure and also during the deliberations of the seizing State whether to prosecute the suspects in its courts – and remains applicable if it exceptionally decides to do so. Put differently, Article 5(3) ECHR is already applicable at a time when it is not yet clear whether the suspect will ultimately be prosecuted at all and, if such a prosecution occurs,

⁵² Pieter Van Dijk and others (eds.), *Theory and Practice of the European Convention on Human Rights* (4th edn., 2006), at 488; Robert Esser, “Die Strafprozessordnung und das Gerichtsverfassungsgesetz: EMRK, IPBPR”, in Volker Erb (ed.), *Grosskommentar Löwe-Rosenberg* (26th edn., 2012), at 276; Council of Europe/European Court of Human Rights, n. 12 above, at paragraphs 118-121.

⁵³ See n. 45 above.

whether it will take place in the seizing State or in a third State, i.e. when the case is in limbo as regards the criminal forum in which the suspects will be prosecuted. This identification and determination of the forum is the very purpose of the disposition of piracy cases.

In *Rigopoulos* and *Medvedyev*, no such disposition procedure took place. Rather, it was clear from the outset that the suspects were to be submitted for investigation and prosecution in the intercepting State, as evidenced by the fact that France and Spain sent law enforcement officials out for the very purpose of seizing these specific vessels and crews.⁵⁴ Put another way, during the 16 and 13 days, no disposition procedure took place but this time was rather necessary to physically bring the suspects to a home port and to bring them before a judge – the endeavour to transport the suspects to the mainland was immediately started after interdiction and was not delayed by a disposition procedure, i.e. the identification and determination of a criminal forum. Therefore, *Rigopoulos* and *Medvedyev* do not contain a statement on whether and for how long judicial control can be delayed when a disposition procedure is necessary. Hence, the cases do not answer the question whether judicial control must be granted after the arrest, or whether a State can wait until it has decided whether to prosecute the suspects in its own court.⁵⁵

Various arguments are in favour of granting judicial control soon after arrest. The only advantage of waiting until the disposition procedure yields a clear result on whether the suspects will be prosecuted in the courts of the seizing State is that in cases where it decides to exercise criminal jurisdiction over the suspects, they could physically be brought before a judge of the seizing State – rather than by another means. However, the cases where the seizing State ultimately decides to prosecute the suspects in its own courts are extremely rare. And even if the seizing State decides to do so, proceedings may be discontinued for one reason or another before the suspects are brought on the mainland of the seizing State. Thus, in the vast majority of cases, the seized suspects will never be brought to the mainland of the seizing State and the same operational or practical difficulties – notably how to ‘bring’ a person before a judge when he cannot physically attend a court hearing – exist regardless of whether judicial control is granted soon after arrest or only at a later point. Also, if suspects are not brought before a judge soon after

⁵⁴ See n. 46 above, for the description of the main facts of *Medvedyev* and *Rigopoulos*.

⁵⁵ There is also the view that *Rigopoulos*, n. 43 above, and *Medvedyev*, n. 12 above, are pertinent to the situation at hand. See, e.g., *Re ‘MS Samanyolu’*, n. 48 above, 5-6; the Court considered the cases pertinent for deciding whether the promptness requirement in this case was fulfilled, even though the delay between arrest and judicial control of 40 days was first and foremost due to the forum determination, i.e. disposition procedure, rather than the transport from the Danish warship to Dutch territory. However, it then decided that more than one month was not necessary in light of the factual circumstances of the case. See also Robert Esser and Sebastian Fischer, “Menschenrechtliche Implikationen der Festnahme von Piraterieverdächtigen: Die EU-Operation Atalanta im Spiegel von EMRK, IPBPR und GG” *Juristische Rundschau* (2010), 513, 521-523, who depart from the idea that the *ratio decidendi* of these two cases is, in principle, pertinent.

their arrest, and they are ultimately released because a State willing and able to prosecute them cannot be identified, it is an illusion (and not in the interest of the seized persons either) that they are kept on board the warship of the seizing State any longer than necessary for presenting their case to a judge controlling the legality of their arrest and detention because of the scarce resources available for counter-piracy operations.

In addition to these arguments of a rather practical and operational nature, there are also more principled reasons for granting judicial control immediately. We concluded earlier that the lawfulness of detention, especially as regards its procedural component, may raise issues in the context of piracy. Therefore, the intervention of a judge who decides on the merits of arrest and detention allows for deprivation of liberty in counter-piracy operations to be subjected to the rule of law. Moreover, the purpose behind Article 5(3) ECHR and Article 9(3) ICCPR, to prevent abuse of power and to keep unjustified deprivation of liberty to a minimum, can only be realized if judicial control is granted soon after the arrest given that the disposition phase may not last very long overall – even if, in some cases, more than one month had elapsed between arrest and surrender for prosecution.⁵⁶

b) Providing an Opportunity to be Heard

Since judicial control of deprivation of liberty at sea by the seizing State must be granted soon after the arrest by the seizing State, it is by and large materially impossible for the suspect to physically appear before a mainland judge. At the same time, there is generally no official with judicial powers in the sense of Article 5(3) ECHR and Article 9(3) ICCPR on board the law enforcement vessel of the seizing State.

It is submitted here that the essence of the right to be brought before a judge is to enable the suspect to exercise his right to be heard and present his case. The wording of the provision does not explicitly state that the person must be ‘physically’ brought before a judge. Yet even if the wording of the provision were to be read in this way, a teleological reduction of the provision is necessary: If requiring personal attendance at a hearing implies that *no* judicial control is granted because such attendance is materially impossible, it is still more protective if there is an opportunity to be heard by means other than physical presence (even if such means are said to be weaker). Hence, Article 5(3) ECHR and Article 9(3) ICCPR must be interpreted as requiring that the suspect can exercise his right to be heard, i.e. be provided with an opportunity to present his case – whether through personal attendance of a hearing or by another means.

There are a number of options for ensuring direct or indirect communication between the suspect detained at sea and the mainland judge. As an example, in the Danish *Elly Mærsk* case, the suspects detained at sea were given legal coun-

⁵⁶ *Re ‘MS Samanyolu’*, n. 48 above, at 5: in this case, more than a month elapsed between arrest by the Danish forces and transfer to the Netherlands.

sel who represented them at an oral hearing held in Copenhagen, Denmark.⁵⁷ Thereby, it is necessary that counsel can communicate with the suspects, for example, by means of video link – with which warships of many States contributing to the counter-piracy operations off the coast of Somalia and the region are equipped.⁵⁸ By means of video link, it is even possible to allow for direct communication between the judge and the piracy suspects. The example of Spain demonstrates that this is a practicable solution.⁵⁹ It is important that the judge receives information not only from the arresting and detaining authorities but also directly or indirectly (through the legal representative) from the suspect deprived of his liberty. Hence, even though the newly enacted French law providing for a decision by a judge on deprivation of liberty occurring at sea within 48 hours of arrest is highly commendable, it remains to be seen whether it is compatible with Article 5(3) ECHR and Article 9(3) ICCPR since it is in the discretion of the judge whether to communicate with the suspects or to base the decision on information requested from the prosecutor.⁶⁰

V. Conclusion

The *Courier* decision is arguably flawed as regards the finding that Article 105 UNCLOS provides a sufficient legal basis for arresting piracy suspects. While the provision seems sufficient in terms of substantive lawfulness in the sense of Article 5(1) ECHR and Article 9(1) ICCPR, it lacks a procedural component and arguably does not fulfil the procedural lawfulness component of the right to liberty. Furthermore, the proposition by the administrative court of first instance that ‘a judge is a judge’ – whether from the seizing or receiving State – is arguably not in line with the requirements flowing from the right to be brought promptly before a judge as

⁵⁷ Birgit Feldtmann, “Should we rule out criminal law as a means of fighting maritime piracy: An essay on the challenges and possibilities of prosecuting Somali pirates”, in Ulrika Andersson, Christoffer Wong and Helén Örnemark Hansen (eds.), *Festskrift till Per Ole Träskman* (2011), at 179; *Re ‘MV Elly Mærsk’*, U.2011.3066H, TfK2011.923/1 (Højesteret – Supreme Court of Denmark) (Dansk straffemyndighed for forsøg på at kapre dansk skib i internationalt farvand).

⁵⁸ *Re ‘MS Samanyolu’*, n. 48 above, at 6, states that according to the Dutch Ministry of Justice and Ministry of Defence, naval vessels of the Netherlands participating in the counter-piracy operations off the coast of Somalia and the region are equipped with video teleconferencing systems, precisely to protect the human rights of arrested suspects.

⁵⁹ Spain has already ‘brought’ suspects before a judge by means of video link: information on file with author.

⁶⁰ See third paragraph of Article L. 1521-15 of the Code de la défense, partie législative (2012) (Code de la défense): ‘Sauf impossibilité technique, le juge des libertés et de la détention communique, *s’il le juge utile*, avec la personne faisant objet des mesures de restriction ou de privation de liberté.’ (emphasis added).

stipulated in Article 5(3) ECHR and Article 9(3) ICCPR. Currently, the *Courier* case is pending at the appellate level. It remains to be seen how the second instance court will interpret the right to liberty and what concessions it is ready to make regarding the generally valid standard due to the specificities of counter-piracy operations, notably their extraterritorial, multinational and maritime nature.

To respect the requirements flowing from the right to liberty, which have the purpose of ensuring that no one is deprived of his liberty in an unjustified and arbitrary manner, is certainly not at the discretion of the State. In *El-Masri v. 'the former Yugoslav Republic of Macedonia'*, the Grand Chamber of the European Court of Human Rights stressed yet again that although the investigation of a specific type of criminality, *in casu* terrorist offences, 'undoubtedly presents the authorities with special problems, that does not mean that the authorities have *carte blanche* under Article 5 [ECHR] to arrest suspects and detain them in police custody, free from effective control by the domestic courts'.⁶¹ Hence, the special difficulties and challenges arising in counter-piracy operations, and specifically regarding the arrest and detention of piracy suspects, do not absolve patrolling naval States from the obligation to respect the right to liberty, notably the granting of effective judicial control in the realm of deprivation of liberty.

⁶¹ ECtHR, 13 December 2012, *El-Masri v. 'the former Yugoslav Republic of Macedonia'*, App no 39630/09, at paragraph 232.