HUMAN RIGHTS AND MARITIME LAW ENFORCEMENT

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Maritime law enforcement responses since 2010 have sparked unprecedented attention to the intersection of human rights and maritime security. This article examines four major response areas: Drug trafficking, piracy, migration, and illegal fishing. Seminal authorities and recent judicial opinions are explored along with specific questions, such as how long a suspected criminal captured at sea may be detained aboard a warship, when lethal force may be employed, and under what circumstances may a suspicious vessel be destroyed. Courts are increasingly addressing issues once considered within the sole discretion of government officials and operational commanders. The result, unfortunately, is an ad hoc collection of judicial opinions, treaties, and multilateral agreements that lack coherence and consistency. This article sets forth an essential road map for harmonizing human rights obligations with the inherent challenges of high seas maritime law enforcement.

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INTRODUCTION

After German Special Forces rescued mariners aboard a hijacked cargo ship and detained ten suspected pirates, a transfer arrangement was diplomatically brokered with Kenya.[1] In other cases over the past five years, the Dutch Navy transported five suspected Somali pirates to Rotterdam for prosecution and the French Navy interdicted drug traffickers operating off the African coast carrying 3.2 tons of cocaine.[2] In all three instances, courts found that government responses violated the suspects' human rights.[3]

Judges are now ruling on maritime law enforcement[4] issues previously under the sole ambit of government officials and operational commanders.[5] Questions

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[1] Matthias Gebauer, Horand Knaup & Marcel Rosenbach, *Caught Red-Handed: First Trial of Somali Pirates Poses Headache for Germany*, DER SPIEGEL (Apr. 20, 2010, 3:21 PM), http://www.spiegel.de/international/world/caught-red-handed-first-trial-of-somali-pirates-poses-headache-for-germany-a-689745.html.

[2] *Judgment [sic] Somali Pirates Case*, LJN: BM8116, Rotterdam Dist. Ct., 10/600012-09 (June 17, 2010) (copy on file with author); Vassis v. France, App. No. 62736/09, Eur. Ct. H.R. (2013), http://hudoc.echr.coe.int/sites/eng-press/pages/search.aspx?i=003-4415485-5305927; MARITIME ANALYSIS AND OPERATIONS CENTRE (NARCOTICS), JOCC SUMMARY (2007–2010), *available at* http://eeas.europa.eu/us/events/symposium2011/docs/jocc_summary_2007-2010_maoc_en.pdf.

[3] These rulings were issued by an administrative court in Cologne, Germany, which addressed the transfer of Somali suspects to Kenya; a Dutch district court, which addressed the delay in bringing Somali pirates before a judge; and the European Court of Human Rights in Strasbourg, France, which addressed the timeliness of actions following a French maritime drug interdiction.

[4] No internationally recognized definition of maritime law enforcement exists. For purposes of this Article, "maritime law enforcement" refers to customs, police, or other law enforcement action that seeks to detect, suppress, and/or punish violations of law in the maritime environment. Canadian counselor Blair Hankey on June 17, 1998, at an International Court of Justice (ICJ) proceeding in the case concerning *Fisheries Jurisdiction (Spain v. Canada)* stated, "Enforcement is what it is: it depends on the nature and purpose of the action taken. Whether it is lawful or unlawful is quite a different issue . . . ." Spain v. Can., Public Sitting, 1998 I.C.J. 98/14, ¶ 52 (June 17).

with a potential human rights focus include how long a suspect may be detained aboard a warship, whether a warship is compelled to operate at an accelerated speed when transporting suspects ashore, when lethal force may be employed, and under what circumstances government officials may destroy a vessel.

Courts have repeatedly addressed human rights in the context of economic and social issues, education, civil and political rights, the environment, and in armed conflict.[6] But more than a dozen judicial rulings issued primarily in Europe and Africa following maritime interdictions between 2009 and 2015[7], signal a new period in jurisprudence.[8] Moreover, even States that do not explicitly use the term "human rights" in national-level court opinions or legislation are now addressing issues related to humane and fair treatment in the context of maritime law enforcement. Because of integrated operations, such as those involving combined task forces, multinational coalitions, bilateral partnering, and ship-rider agreements,[9] recent decisions—regardless of location—have relevance across the globe.

The benefits of protecting human rights are well documented and beyond the scope of this Article.[10] Moreover, a question that surfaced in past generations—whether human rights apply on the water—is no longer the salient issue. Rather, courts, governments, and deployed naval forces are now confronting the issue of harmonizing human rights with the inherent challenges of high seas maritime law enforcement interdictions.[11] It is an urgent issue today not just because of increased

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[5] Issues related to human rights and international armed conflicts, belligerent occupation, and military operations are outside the scope of this Article. *See generally* THE HANDBOOK OF THE INTERNATIONAL LAW OF MILITARY OPERATIONS (Terry D. Gill & Dieter Fleck eds., 2010); Saoirse De Bont, *Murky Waters: Prosecuting Pirates and Upholding Human Rights Law*, 7 J. INT'L L. & INT'L REL. 104 (2012), http://www.jilir.org/docs/issues/volume_7/7_4_DE_BONT_FINAL.pdf. Issues related to privately contracted armed security personnel are discussed, *infra* at 52–54.

[6] PHILIP ALSTON & RYAN GOODMAN, INTERNATIONAL HUMAN RIGHTS 383–488 (2012).

[7] *E.g.*, Police v. Abdeoulkader, 2014 INT 311, Cause No. 850/2013 (2014), *rev'd and remitted* Director of Public Prosecutions v. Abdeoulkader, 2015 S.C.J. 452, Rec. No. 8702, Dec. 8, 2015 (Mauritius) (copy on file with author); Samatar v. France, App. Nos. 17110/10, 17301/10 Eur. Ct. H.R. (2014), http://hudoc.echr.coe.int/eng?i=001-148290; Hassan v. France, App. Nos. 46695/10, 54588/10, Eur. Ct. H.R. (2014), http://hudoc.echr.coe.int/eng?i=001-148289; Medvedyev v. France, App. No. 3394/03, Eur. Ct. H.R. (2010), http://hudoc.echr.coe.int/eng?i=001-97979; Rigopoulos v. Spain, App. No. 37388/97, Eur. Ct. H.R. (1999), http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-5625. The European Court of Human Rights decisions have sparked considerable discussion. *See, e.g.*, *IMB Concerned Over Decision to Compensate Pirates*, INT'L CHAMBER COM. (Dec. 24, 2014), https://www.icc-ccs.org/news/1039-imb-concerned-over-decision-to-compensate-pirates (exemplifying reaction from the commercial maritime industry).

[8] *See* Office of the U. N. High Commissioner for Human Rights, *Guiding Principles on Business and Human Rights*, 3 U.N. Doc. HR/PUB/11/04 (2011), http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf. Though not a maritime law enforcement or maritime security instrument, the document is instructive for its comments that, "States' international human rights law obligations require that they respect, protect and fulfill the human rights of individuals within their territory and/or jurisdiction." *Id.* at 1.

[9] An agreement by which a law enforcement officer (the ship-rider) is embarked on a vessel (normally a warship of a governmental vessel) sailing a national flag different from the nationality of the ship-rider." *Shiprider Agreement*, UNTERM, http://unterm.un.org/dgaacs/unterm.nsf/8fa942046ff7601c85256983007ca4d8/dbd8a24747a968da85256db100504f5c?OpenDocument. Shiprider agreements include cooperation in the areas of drug enforcement, the maritime environment, fishing resources, illegal trafficking, and repression of piracy. These agreements may also contain jurisdictional clauses. *Id.*

[10] *See generally* ALSTON & GOODMAN, *supra* note 6.

[11] Non-governmental organizations (NGOs) have also recently emerged to address issues related to human rights at sea. *E.g.*, HUMAN RIGHTS AT SEA (HRAS), https://www.humanrightsatsea.org/. Founded in 2014 by David Hammond, HRAS drafted a publication summarizing its impressive first

judicial attention or because certain terms that have no uniformly, internationally accepted definition are populating bilateral and multinational documents. It is an urgent issue because no consistent approach to harmonizing human rights obligations with operational exigencies necessary in maritime law enforcement exists.[12]

Medvedyev v. France, a European Court of Human Rights case, highlights the struggle of balancing human rights obligations with maritime law enforcement operations.[13] The French government's position in the case, summarized by the Strasbourg court, emphasized that "the unpredictability of navigation and the vastness of the oceans made it impossible to provide in detail for every eventuality when ships were rerouted."[14] A joint partial dissent, however, noted that regardless of operational challenges, the court should not "endorse *unnecessary* abridgements of fundamental human rights in the fight against [drug trafficking]. Such abridgements add nothing to the efficacy of the battle against narcotics but subtract, substantially, from the battle against the diminution of human rights protection."[15]

The legal, policy, and operational challenges the Grand Chamber addressed in *Medvedyev* are emblematic of an emerging body of law. This Article examines the application of human rights on the high seas, the ocean's unique operating environment, and the patchwork of rulings following maritime interdictions. The four primary focus areas of this Article—the response to drug trafficking, piracy, maritime migration, and illegal fishing—provide an instructive prism to identify judicial trends and distill common themes. This Article also evaluates whether multilateral instruments, largely developed before expanded maritime law enforcement operations, provide sufficient guidance to address contemporary issues, such as whether a warship detaining a suspect on the high seas must be outfitted with a video link to facilitate secure communications with a public defender. This Article concludes by discussing issues likely to be addressed by policy officials, military commanders, and jurists over the next decade and provides a roadmap for a consistent approach to upholding human rights while ensuring that those who commit criminal acts on the water are held legally accountable.

I. THE UNIQUE MARITIME OPERATING ENVIRONMENT

The oceans are geographically, jurisdictionally, and operationally distinctive. The maritime space includes concepts such as "flag state," "port state," "coastal state," zones or areas such as the "territorial sea," "contiguous zone," "exclusive economic zone" (EEZ), and the "high seas." The authoritative instrument

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year. HUMAN RIGHTS AT SEA, ANNUAL REPORT, 12 MONTHS ON, "ESTABLISHING THE STANDARD" (2015), https://www.humanrightsatsea.org/wp-content/uploads/2015/05/HRAS-ANNUAL-REPORT-2015-L.pdf. HRAS seeks to "raise awareness, implementation and accountability for human rights protection throughout the maritime environment, especially where they are currently absent, ignored or being abused." *Id.* at 1.

[12] A similar lament exists regarding the intersection of human rights with other security enforcement actions, which has produced "no sense of a uniform, coherent uncontested human rights regime." ALSTON & GOODMAN, *supra* note 6, at 488.

[13] Medvedyev v. France, App. No. 3394/03, Eur. Ct. H.R. ¶ 131 (2010), http://hudoc.echr.coe.int/eng?i=001-97979.

[14] *Id.* ¶ 59.

[15] *Id.* at 46, ¶ 2 (Tulkens, Bonello, Zupancic, Fura, Spielmann, Tsotsoria, Power & Poalelungi, JJ., partly dissenting).

for maritime issues is the United Nations Convention on the Law of the Sea (LOS Convention).[16] Other relevant treaties in maritime law enforcement operations include, inter alia, the United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (Vienna Drug Convention),[17] the Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation (SUA Convention),[18] and its Protocol.[19]

A key maritime law enforcement concept is the general principle of exclusive flag state jurisdiction, which provides that vessels sail under one country's flag, and are subject to the exclusive jurisdiction of that country.[20] Generally, only the flag state may take enforcement action on the high seas against a vessel under its registry. The concept of exclusive flag state jurisdiction is widely recognized, though it is more accurately characterized as "quasi-exclusive"[21] in view of authorities that could support a maritime law enforcement boarding of a foreign-flagged vessel on the high seas or the exercise of jurisdiction.[22]

Authorities that could support boarding a foreign-flagged vessel include, among others:

a flag State's prior consent;
a flag State's favorable reply to a boarding request;
a bilateral or regional agreement or treaty;
a United Nations Security Council Resolution (U.N.S.C. Resolution);
a master's consent;
a condition of port entry; or

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[16] United Nations Convention on the Law of the Sea, Dec. 10, 1982, 1833 U.N.T.S. 397 [hereinafter LOS Convention]. International maritime treaties existed prior to the LOS Convention, though none were as sweeping or comprehensive as the 1982 accord. See, for example, the four Conventions agreed to at Geneva on April 29, 1958: The Convention on Fishing and Conservation of the Living Resources of the High Seas, 559 U.N.T.S. 285; the Convention on the Continental Shelf, 499 U.N.T.S. 311; the Convention on the High Seas, 450 U.N.T.S. 11; and the Convention on the Territorial Sea and Contiguous Zone, 516 U.N.T.S. 205. For a discussion of maritime zones and navigational freedoms, see generally ROBIN CHURCHILL & VAUGHAN LOWE, THE LAW OF THE SEA (3d ed. 1999), and Brian Wilson & James Kraska, *American Security and Law of the Sea*, 40 OCEAN DEV. & INT'L L. 268 (2009).

[17] United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, Dec. 20, 1988, 1582 U.N.T.S. 95 [hereinafter Vienna Drug Convention].

[18] Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation, Mar. 10, 1988, 1678 U.N.T.S. 221.

[19] Int'l Maritime Org., IMO Doc. LEG/CONF.15/21, *Protocol of 2005 to the Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation*, (Nov. 1, 2005) [hereinafter 2005 SUA Protocol].

[20] LOS Convention, *supra* note 16, art. 92 ("Ships shall sail under the flag of one State only and, save in exceptional cases expressly provided for in international treaties or in this Convention, shall be subject to its exclusive jurisdiction on the high seas . . . .").

[21] *See* M/V Saiga (No. 2) (St. Vincent v. Guinea), Judgment of July 1, 1999, 120 ITLOS Rep. 143, 1 (separate opinion of Anderson, J.) ("The law of the sea has long recognised the quasi-exclusive competence of the flag State over all aspects of the grant of its nationality to ships."); *see also* Michael A. Becker, *The Shifting Public Order of the Oceans: Freedom of Navigation and the Interdiction of Ships at Sea*, 46 HARV. INT'L L. J. 131, 167 (2005) (". . . the sacrosanct notion of exclusive flag state jurisdiction may be overstated in several respects.").

[22] *See generally* James Kraska, *Broken Taillight at Sea: The Peacetime International Law of Visit, Board, Search, and Seizure*, 16 OCEAN & COASTAL L. J. 1 (2010) (examining exceptions to the general principle of exclusive flag State jurisdiction).

where reasonable grounds exist for suspecting that the ship is engaged in piracy, slave trade, unauthorized broadcasting, or is without nationality.[23]

Exceptions to the "quasi-exclusive" principle of flag state jurisdiction (separate from boarding authorities) include: crimes of universal jurisdiction, such as piracy; actions taken under the authority of a U.N. Security Council resolution; and when a flag state waives jurisdiction and permits another state to exercise jurisdiction over the ship.[24]

Freedom of the seas[25] is a fundamental element of the unique maritime environment.[26] Consistent with the quasi-general principle of exclusive state jurisdiction, vessels are largely free from interference on the high seas[27]—seaward of the twelve nautical mile territorial sea. Legitimate shipping depends upon this freedom to annually move millions of containers along with tons of cargo and goods.[28] Criminals and transnational criminal organizations (TCOs) also exploit the freedom

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[23] *See* J. ASHLEY ROACH & ROBERT W. SMITH, EXCESSIVE MARITIME CLAIMS 559, 566 (3d ed., 2012)

> (A consensual boarding is conducted at the invitation of the master (or person-in charge) of a vessel that is not otherwise subject to the jurisdiction of the boarding officer. The plenary authority of the master over all activities related to the operation of his vessel while in international waters is well established in international law and includes the authority to allow anyone to come aboard his vessel as his guest, including foreign law enforcement officials. Some States, however, do not recognize a master's authority to assent to a consensual boarding.);

see also Kraska, *supra* note 22, at 16 ("There is no codified rule of international law expressly authorizing the master of a vessel to grant consent to board his vessel, but longstanding maritime custom supports the practice.").

[24] Kraska, *supra* note 22, at 10–26; *see also* ROACH & SMITH, EXCESSIVE MARITIME CLAIMS, *supra* note 23, at 559 ("Maritime law enforcement action is premised upon the assertion of jurisdiction over the vessel or aircraft in question. Jurisdiction, in turn, depends upon the nationality, the location, the status, and the activity of the vessel or aircraft over which maritime law enforcement action is contemplated.").

[25] *See* U.S. DEPARTMENT OF DEFENSE, ASIA-PACIFIC MARITIME SECURITY STRATEGY 2 (2015), http://www.defense.gov/Portals/1/Documents/pubs/NDAA%20A-P_Maritime_SecuritY_Strategy-08142015-1300-FINALFORMAT.pdf ("While not a defined term under international law, the Department [of Defense] uses 'freedom of the seas' to mean all of the rights, freedoms, and lawful uses of the sea and airspace, including for military ships and aircraft, recognized under international law. Freedom of the seas is thus also essential to ensure access in the event of a crisis.").

[26] LOS Convention, *supra* note 16. Vessels conducting interdictions in the EEZ of another nation operate with due regard for lawful resource-related rights of the coastal state, as coastal states enjoy sovereign rights over resources, not sovereignty in this area. *See also* Charles Doyle, *Extraterritorial Application of American Criminal Law*, at 94–166, Cong. Res. Serv. 94–155 Feb. 15, 2012; Harvard Research in International Law, Supplement, *Jurisdiction with Respect to Crime*, 29 AM. J. INT'L L. 439, 445 (1935). *See generally* Brian Wilson, *An Avoidable Maritime Conflict: Disputes Regarding Military Activities in the Exclusive Economic Zone*, 41 J. MAR. L. & COM. 421 (2010) (discussing rights and duties in the EEZ).

[27] *See, e.g.*, U.S. v. Beyle, 782 F.3d 159 (4th Cir. 2015) (affirming convictions for, inter alia, piracy and murder). The *Beyle* court held, consistent with the LOS Convention, *supra* note 16, arts. 58 & 87, "The 'high seas' include areas of the seas that are outside the territorial seas of any nation. A nation's territorial seas are generally limited to an area within 12 nautical miles of the nation's coast." *Beyle*, 782 F.3d at 168.

[28] *See* U. N. Conference on Trade and Development (UNCTAD), *Review of Maritime Transport* (2015) (including information from Jan. 2014–June 2015), http://unctad.org/en/PublicationsLibrary/rmt2015_en.pdf. The "world's commercial fleet consisted of 89,464 vessels . . . . [G]lobal containerized trade . . . reached 171 million TEUs [20-foot equivalent units] . . . [and] global seaborne shipments [totaled] 9.84 billion tons."

inherent in this operating space to transit anonymously, carry illicit cargo, and conduct attacks at sea.

To combat illicit high seas activity, maritime law enforcement could employ multiple distinct, intersecting, and complementary lines of effort: Action prior to an interdiction, right of approach/boarding, detention, and the assertion of jurisdiction.

Acquiring information that supports situational awareness prior to a boarding is a key enabler of effective maritime law enforcement. Such capabilities may include "radar, photo, audio and video monitoring . . . [that supports the interception of] radio and cellular phone communications, maybe e-mails . . . ."[29]

A maritime interdiction is fundamentally different from operations on land and includes unique environmental factors—such as unpredictable weather and sea state conditions—as well as other distinctive operational considerations. "Weather is more punishing on the open water because it comes from above and below," according to a mariner, adding that severe weather on the high seas is similar to "experiencing an earthquake and a hurricane at the same time."[30] Issues for a boarding officer operating in this challenging environment could include safely inspecting containers on a moving platform, ensuring connectivity while on a vessel of interest, as well as inspecting the ship's crew, its cargo, and potentially, the vessel itself. Interdictions present yet another layer of complexity if cargo, such as cocaine, is jettisoned, or if the vessel is scuttled or intentionally set on fire. Though uncommon, maritime law enforcement officers have been killed and seriously injured during boardings.[31]

Other maritime law enforcement challenges include the frequent lack of back-up support and the ability of suspect vessels to evade detection because of their profile, low radar signature, or nighttime operations. Even after addressing operational (and potentially significant logistical, materiel, and medical) issues, legal considerations include: Resolving jurisdictional issues; ensuring an evidentiary chain of custody on a platform that may not have a secure storage space; obtaining witness statements and conducting other aspects of an investigation, possibly while underway; and determining whether to arrest or detain a suspect. Authorities must also identify the port to take suspects to, ensure prosecutorial interest (possibly while underway), and confirm the venue for prosecution.[32]

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[29] Dimitrios Batsalas, *Maritime Interdiction and Human Rights*, *in* CRIMES AT SEA 429, 429–456 (Efthymios Papastavridis & Kimberley Trapp eds., 2014). Warships may be equipped with "advanced electronic means which give the ability to intercept, jam, record or filter the communications of the vessels [of interest] as well as to monitor with great detail, in an audio or visual format." *Id.* at 438.

[30] Ian Urbina, *Stowaways and Crimes Aboard a Scofflaw Ship*, N.Y. TIMES (July 17, 2015), http://www.nytimes.com/2015/07/19/world/stowaway-crime-scofflaw-ship.html?smprod=nytcore-ipad&smid=nytcore-ipad-share&_r=0.

[31] *E.g.*, *U.S. Coast Guard Member Killed During Law Enforcement Operations Near Santa Cruz Island*, CBS L.A. (Dec. 2, 2012), http://losangeles.cbslocal.com/2012/12/02/us-coast-guard-killed-during-law-enforcement-operations-near-santa-cruz-island/ (reporting that a U.S. Coast Guard member was killed in a collision during an attempted boarding operation).

[32] The time potentially involved in a transit, for instance, between Norfolk, Virginia and Toulon, France (4064 nautical miles) ranges from seven to twelve days, provided there are no replenishment, environmental, or other issues involved. At fourteen knots, this transit would take twelve days, two hours; at eighteen knots, this transit would take nine days, ten hours; and at twenty-two knots, this transit would take seven days, seventeen hours. *See Calculation Tool*, SEA DISTANCES (2016), http://www.sea-distances.org/.

Judicial recognition of the unique maritime operating environment and its distinctive response spectrum is crucial to effective maritime law enforcement and legal accountability.

II. APPLICABLE HUMAN RIGHTS LAW

Human rights law does not reside in one document but, rather, is drawn from multiple accords, regional and international instruments, judicial rulings, and national policy. "Soft law" adds yet another layer of complexity to developing human rights norms.[33] This Part addresses institutions—primarily regional tribunals—and human rights provisions most operative in maritime law enforcement operations and discusses the United Nations (U.N.) system of protection of human rights. Identifying human rights obligations across an intricate array of instruments, multinational tribunals, and institutions represents the starting point for assessing how those obligations intersect with maritime law enforcement operations.

The U.N. Human Rights Council,[34] along with its Universal Period Review process and various committees (e.g., the Human Rights Committee) that supervise numerous conventions are a relatively recent development.[35] A 2006 U.N. General Assembly Resolution acknowledged and recognized "that peace and security, development and human rights are the pillars of the United Nations system and the foundations for collective security and well-being [and] that development, peace and security and human rights are interlinked and mutually reinforcing . . . ."[36]

The Human Rights Council's "institution-building package" includes a Universal Periodic Review mechanism, an Advisory Committee, and a Complaint Procedure.[37] A report of the U.N. Secretary-General stated that it is imperative to

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[33] *E.g.*, Gregory C. Shaffer & Mark A. Pollack, *Hard vs. Soft Law: Alternatives, Complements, and Antagonists in International Governanc*e, 94 MINN. L. REV. 706, 712–13, http://www.minnesotalawreview.org/wp-content/uploads/2011/08/ShafferPollack_MLR.pdf (recognizing the line can become blurred regarding "hard- and soft-law regimes . . . soft-law . . . [includes agreements] that are not legally binding . . . [or] rules of conduct which in principle, have no legally binding force but which nevertheless may have practical effects.") (internal citations omitted) (internal quotations omitted); *see also id.* at 719 ("Soft-law instruments are easier and less costly to negotiate; Soft-law instruments impose lower "sovereignty costs" on states in sensitive areas; Soft-law instruments provide greater flexibility for states to cope with uncertainty and learn over time; Soft-law instruments allow states to be more ambitious and engage in "deeper" cooperation than they would if they had to worry about enforcement; Soft-law instruments cope better with diversity; Soft-law instruments are directly available to nonstate actors, including international secretariats, state administrative agencies, sub-state public officials, and business associations and nongovernmental organizations.").

[34] The U.N. Human Rights Council was formed in 2006, effectively reconstituting the Commission on Human Rights. *See also The Global Human Rights Regime*, COUNCIL ON FOREIGN RELATIONS (June 19, 2013), http://www.cfr.org/human-rights/global-human-rights-regime/p27450.

[35] OFFICE OF THE U.N. HIGH COMMISSIONER FOR HUMAN RIGHTS, http://www.ohchr.org/EN/HRBodies/HRC/Pages/AboutCouncil.aspx; *see also* G.A. Res. 60/251 (Mar. 15, 2006), http://www2.ohchr.org/english/bodies/hrcouncil/docs/A.RES.60.251_En.pdf. The Office of the U.N. High Commissioner for Human Rights, as of December 31, 2013, included a staff of 1085 "as well as a workforce of 689 international human rights officers serving in U.N. peace missions or political offices [funded] from the United Nations regular budget and from voluntary contributions from Member States, intergovernmental organizations, foundations and individuals." *Who We Are*, OFFICE OF THE U.N. HIGH COMMISSIONER FOR HUMAN RIGHTS (2016), http://www.ohchr.org/EN/AboutUs/Pages/WhoWeAre.aspx.

[36] G.A. Res. 60/251, *supra* note 35, pmbl.

[37] *Id.* ¶ 5–6; *see also 5/1 Institution-building of the United Nations Human Rights Council*, U.N. H.R. COUNCIL, http://www.ohchr.org/EN/HRBodies/HRC/Pages/AboutCouncil.aspx.

"increase respect for human dignity in every land."[38] Toward that end, virtually every region is subject to a body responsible for supervising States' human rights obligations, including the Inter-American Commission on Human Rights,[39] the European Court of Human Rights, the African Commission on Human and Peoples' Rights,[40] and the Association of Southeast Asian Nations' (ASEAN) Intergovernmental Commission on Human Rights.[41]

Authorities on human rights obligations include the Universal Declaration of Human Rights (UDHR),[42] the Convention Relating to the Status of Refugees,[43] the International Covenant on Civil and Political Rights (ICCPR),[44] the International Covenant on Economic, Social and Cultural Rights (ICESCR),[45] and the Convention against Torture and Cruel, Inhuman or Degrading Treatment or Punishment (CAT),[46] among others.[47] Other relevant instruments include the European Convention on Human Rights (ECHR),[48] the American Convention on Human Rights (Pact

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[38] U.N. Secretary-General, Report of the Secretary-General to the General Assembly, *In Larger Freedom: Towards Development, Security and Human Rights for All*, ¶ 17 U.N. Doc. A/59/2005 (Mar. 21, 2005),

http://www.un.org/en/ga/search/view_doc.asp?symbol=A/59/2005 ("We will not enjoy development without security, we will not enjoy security without development, and we will not enjoy either without respect for human rights.").

[39] ORG. AM. STATES, *Inter-American Commission on Human Rights* (2011), http://www.oas.org/en/iachr/mandate/what.asp; *see also* MARIE-BENEDICTE DEMBOUR, WHEN HUMANS BECOME MIGRANTS, STUDY OF THE EUROPEAN COURT OF HUMAN RIGHTS WITH AN INTER-AMERICAN COUNTERPART (Oxford Scholarship Online, 2015).

[40] AFR. COMM'N HUM. & PEOPLES' RTS. (ACHPR), http://www.au.int/en/organs/cj. (The ACHPR was "established in 1987 to oversee and interpret the African Charter on Human and Peoples' Rights [also known as the Banjul Charter]. The Charter is an international human rights instrument that is intended to promote and protect human rights and basic freedoms in Africa.")

[41] ASS'N OF SOUTHEAST ASIAN NATIONS' (ASEAN) INTERGOVERNMENTAL COMM'N HUM. RTS., http://aichr.org/.

[42] G.A. Res. 217 (III) A, Universal Declaration of Human Rights (Dec. 10, 1948) (representing a "common standard of achievement for all peoples and all nations" and recognizing the inherent dignity of individuals and their inalienable rights); *see also* INT'L & OPERATIONAL L. DEP'T, THE JUDGE ADVOCATE GENERAL'S LEGAL CTR. & SCH., U.S. ARMY, OPERATIONAL LAW HANDBOOK (2015) [hereinafter OPERATIONAL LAW HANDBOOK].

[43] Convention Relating to the Status of Refugees, Jul. 28, 1951, 189 U.N.T.S. 137, and its 1967 Protocol [hereinafter, together, 1951 Refugee Convention].

[44] International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR].

[45] International Covenant on Economic, Social and Cultural Rights, December 16, 1966, 993 U.N.T.S. 3.

[46] Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, 1465 U.N.T.S. 85 [hereinafter CAT].

[47] Some instruments that are not viewed as human rights instruments nonetheless contain human rights provisions. *E.g.*, 2005 SUA Protocol, *supra* note 19, § 8*bis* (10)(a)(ii); *see also* Steven Perkins, *International Human Rights Law and Article 38(1) of the Statute of the International Court of Justice* (1999), http://intelligent-internet.info/law/icjart.html (compiling human rights law sources).

[48] Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 231 [hereinafter ECHR].

of San Jose),[49] the Africa Charter on Human and Peoples' Rights (Banjul Charter),[50] the Arab Charter on Human Rights,[51] and the ASEAN Human Rights Declaration.[52]

In addition to multinational tribunals, domestic courts are also addressing human rights in prosecutions resulting from maritime law enforcement interdictions. Key considerations in judicial rulings in the maritime law environment include determining extraterritorial jurisdiction and interpreting, among others terms, deprivation of liberty, due process, promptness, wholly exceptional circumstances, humane treatment, right to life, and non-refoulement.

European Convention on Human Rights (ECHR): Multiple provisions of just one instrument, the ECHR[53] for instance, could be interpreted by jurists following maritime law enforcement operations including Article 2, which addresses the right to life:

> Everyone's right to life shall be protected by law . . . . [d]eprivation of life shall not be regarded as inflicted in contravention of this Article when it results from the use of force which is no more than absolutely necessary . . . in defence of any person from unlawful violence or in order to effect a lawful arrest or to prevent the escape of a person lawfully detained.[54]

Article 3 provides "[n]o one shall be subjected to torture or to inhuman or degrading treatment or punishment." Article 5, guaranteeing the right to liberty and security of the person, provides:

> 1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law . . .
>
> 3. Everyone arrested or detained [for the lawful purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or where it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so] shall be brought promptly before a judge or other officer authorised by law to exer-

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[49] American Convention on Human Rights, Nov. 22, 1969, 1144 U.N.T.S. 123 [hereinafter Pact of San Jose]; *see also* American Declaration on the Rights and Duties of Man, May 12, 1948, O.A.S. Res. XXX, OEA/Serv.L/V/II.23.

[50] Banjul Charter, June 27, 1981, 1520 U.N.T.S. 217.

[51] Arab Charter on Human Rights, May 22, 2004, *reprinted in* 12 INT'L HUM. RTS. REP. 893 (2005).

[52] The ASEAN Human Rights Declaration, Nov. 18, 2012, http://aichr.org/?dl_name=ASEAN-Human-Rights-Declaration.pdf.

[53] The ECHR, *supra* note 48, is primarily examined in this Part because of its body of rulings that address human rights following maritime law enforcement operations.

[54] ECHR, *supra* note 48, art. 2

(1. Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law. 2. Deprivation of life shall not be regarded as inflicted in contravention of this Article when it results from the use of force which is no more than absolutely necessary: (a) in defence of any person from unlawful violence; (b) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained; (c) in action lawfully taken for the purpose of quelling a riot or insurrection.).

> cise judicial power and shall be entitled to trial within a reasonable time or to release pending trial . . .
>
> 4. Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of this detention shall be decided speedily by a court and his release ordered if the detention is not lawful.[55]

ECHR Article 6's right to a fair trial provides that everyone charged with a criminal offense has the following minimum rights:

> (a) [T]o be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;
>
> (b) to have adequate time and facilities for the preparation of his defence;
>
> (c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;
>
> (d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;
>
> (e) to have the free assistance of an interpreter if he cannot understand or speak the language used incourt.[56]

ECHR Article 8 provides that a public authority shall not interfere with the "right to respect for . . . private and family life," except when "in accordance with the law and . . . necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime . . . ."[57]

Article 1 of the First Protocol of the ECHR addresses property: "Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law."[58]

And ECHR Article 15, governing derogation in time of emergency, provides that:

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[55] *Id.* art. 5.

[56] *Id.* art. 6(3).

[57] *Id.* art. 8.

[58] Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms art. 1, Mar. 20, 1952, 213 U.N.T.S. 221. Article 1 further provides: "The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties." *Id.*

> In time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under this Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law.[59]

International Covenant on Civil and Political Rights (ICCPR): The ICCPR, concluded in 1966, obligates Parties to protect and preserve basic human rights, such as the right to life and human dignity; equality before the law; freedom of speech, assembly, and religion; and freedom from torture, ill treatment, and arbitrary detention, among others. A provision in the ICCPR similar to ECHR Article 5(3) requires that "[a]nyone arrested or detained on a criminal charge shall be brought promptly before a judge."[60] The word "promptly," however, is not defined in either instrument. Though international instruments do not define every term—even the word "ship" has sparked considerable debate in courts[61]—in a human rights/law enforcement context, this lack of precision has regrettably contributed to varied judicial opinions and perspectives.

Non-refoulement and extraterritorial application: The 1951 Refugee Convention provides, among other things, that a Party shall not return a person to a place where "his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion."[62] The non-refoulement concept is discussed below in Part VI(B).

The extraterritorial application of a treaty is a predicate, and often critical, focus area in judicial analysis that involves maritime law enforcement and human

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[59] ECHR, *supra* note 48, art. 15; *see also* ICCPR, *supra* note 44, art. 4 ("In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the State Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin."); EUR. CT. H.R., FACTSHEET–DEROGATION IN TIME OF EMERGENCY (2015), http://www.echr.coe.int/Documents/FS_Derogation_ENG.pdf.

[60] ICCPR, *supra* note 44, art. 9.

[61] DEFINITIONS FOR THE LAW OF THE SEA: TERMS NOT DEFINED BY THE 1982 CONVENTION 55 (George K. Walker ed., 2011); *see also* Lozman v. City of Riviera Beach, Fla., 133 S. Ct. 740 (2013) (addressing the definition of the term vessel: Not "every floating structure is a vessel. To state the obvious, a wooden washtub, a plastic dishpan, a swimming platform on pontoons, a large fishing net, a door taken off its hinges, or Pinocchio (when inside the whale) are not 'vessels,' even if they are 'artificial contrivance[s]' capable of floating, moving under tow . . . ," *id.* at 740, and concluding that the structure "does not fall within the scope of this statutory phrase unless a reasonable observer . . . would consider it designed to a practical degree for carrying people or things on the water." *Id.* at 741; *see also* Sierra Club v. Morton, 405 U.S. 727 (1972) (Douglas, J., dissenting) ("A ship has a legal personality, a fiction found useful for maritime purposes . . . so it should be as respects valleys, alpine meadows, rivers, lakes, estuaries, beaches, ridges, groves of trees, swampland, or even air that feels the destructive pressures of modern technology and modern life . . . the voice of the inanimate object, therefore, should not be stilled.").

[62] 1951 Refugee Convention, *supra* note 43, art. 33. A "refugee" is defined as a person who

> [O]wing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it. *Id.* art. 1.

rights obligations.[63] Because there is no internationally recognized treaty rule regarding when an instrument applies outside of a State's borders, courts and tribunals have "struggled to create a defensible and coherent framework for analysis."[64] Normative frameworks are largely based on treaty interpretation, though with human rights treaties the "process of doctrinal development and evolution has been decentralized to a certain degree since the various human rights instruments contain slightly different formulations for their scope of application, and there is no appellate body to harmonize the law."[65] Some instruments have provisions addressing extraterritorial jurisdiction and expressly include ships, though the absence of such text is not necessarily controlling.[66]

The CAT, for instance, provides that each State Party shall take such measures to establish jurisdiction over proscribed offenses when they "are committed in any territory under its jurisdiction or *on board a ship or aircraft registered in that State* . . . ."[67] Article 2(1) of the ICCPR requires that each Party undertake "to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the . . . Covenant," but does not include maritime-specific provisions.[68] A dispositive inquiry regarding ICCPR's extraterritorial application centered over whether the word "and" in the phrase "within its territory *and* subject to its jurisdiction" in Article 2(1) should be interpreted as drafted or construed to mean "or." In General Comment 31, the Human Rights Committee opined that the ICCPR provides "that a State party must respect and ensure the rights laid down in the Covenant to anyone within the power or effective control of that State Party, even if not situated within the territory of the State Party."[69]

The comments were not universally embraced. The United States in 2007 asserted "[w]ithout any analysis or reasoning to support its view" that General Comment 31 "dispenses with the well-established rules of treaty interpretation [and] is inconsistent with the plain text of the Covenant as well as its negotiating

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[63] Courts applying the ECHR have made use of two different conceptions: a "spatial" model, linking jurisdiction to control over a geographical area, and a "personal" model, referring to the exercise of authority over individuals. Natasha Holcroft-Emmess, *Extraterritorial Jurisdiction Under the ECHR—Smith v. MOD (2013)*, OXFORD HUM. RTS. HUB (Jun. 24, 2013), http://ohrh.law.ox.ac.uk/extraterritorial-jurisdiction-under-the-echr-smith-and-others-v-mod-2013.

[64] Beth Van Schaack, *The United States' Position on the Extraterritorial Application of Human rights Obligations: Now is the Time for Change*, 90 INT'L L. STUD. 20, 22 (2014).

[65] *Id.* at 22; *see also* Marko Milanovic, *Extraterritorial Application of Human Rights Treaties: An Overview*, EJIL: TALK! (Nov. 30, 2011), http://www.ejiltalk.org/extraterritorial-application-of-human-rights-treaties-an-overview.

[66] Challenges in terminology also exist, including determining whether there is a transfer, deportation, or extradition. *See* Vienna Convention on the Law of Treaties art. 29, May 23, 1969, 1155 U.N.T.S. 331 ("Unless a different intention appears from the treaty or is otherwise established, a treaty is binding upon each party in respect of its entire territory."); Douglas Guilfoyle, *Human Rights Issues and Non-Flag State Boarding of Suspect Ships in International Waters*, in SELECTED CONTEMPORARY ISSUES IN THE LAW OF THE SEA 83 (Clive R. Symmons ed., 2011) ("[I]t appears that the obligation to secure ECHR rights to those persons within a party's 'jurisdiction' will apply at the least to persons under that party's control in State-controlled spaces such as 'ships' . . . .").

[67] CAT, *supra* note 46, art. 5(1) (emphasis added).

[68] ICCPR, *supra* note 44, art. 2; *see also id.* art. 50 ("The provisions of the present Covenant shall extend to all parts of federal States without any limitations or exceptions."); FONS COOMANS & MENNO T. KAMMINGA, EXTRATERRITORIAL APPLICATION OF HUMAN RIGHTS TREATIES 46–49 (Fons Coomans, Menno T. Kamminga eds., 2004); Guilfoyle, *supra* note 66.

[69] Human Rights Comm., Gen. Comment 31, *Nature of the General Legal Obligation on States Parties to the Covenant*, ¶ 10 (Mar. 29, 2004), http://www.unhcr.org/4963237716.pdf.

history."[70] Moreover, the United States contended General Comment 31 was unnecessary, as "there is no ambiguity in Article 2(1) of the Covenant," and had the effect of re-writing ICCPR.[71] In 2010, however, Harold Koh—then Legal Adviser for the Department of State—authored a memo asserting the "best reading" of the ICCPR is that this instrument, contrary to existing U.S. interpretation, does "impose certain obligations on a State Party's extraterritorial conduct."[72] That said, the New York Times reported that a U.S. Government official stated the Koh opinion was "never cleared as the official State Department position [and that] agencies had unanimously concluded the existing interpretation was sound."[73] While varying positions exist, the majority view today is that the "ICCPR applies prima facie to the extraterritorial conduct of State organs, at least when exercising 'effective control of an area outside . . . national territory' or holding an individual in detention."[74]

The text of the Pact of San Jose does not expressly address extraterritoriality.[75] Article 1 provides, in part, that "States Parties to this Convention undertake to respect the rights and freedoms recognized herein and to ensure all persons subject to their jurisdiction the free and full exercise of those rights and freedoms . . . ."[76] The Inter-American Commission of Human Rights in 1999 addressed the issue of extraterritoriality in *Coard v. United States*.[77] Though *Coard* focused on conduct involving international humanitarian law concepts that occurred on land, the opinion is nevertheless informative:

> While the extraterritorial application of the American Declaration has not been placed at issue by the parties, the Commission finds it pertinent to note that, under certain circumstances, the exercise of its jurisdiction over acts with an extra-territorial locus will not only be consistent with, but required by, the norms which pertain. The fundamental rights of the individual are proclaimed in the Americas on the basis of the principles of equality and non-discrimination—'without distinction as to race, nationality, creed or sex.' Given that individual rights inhere simply by virtue of a person's humanity, each American State is obliged to uphold the protected rights of any person subject to its jurisdiction. While this most commonly

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[70] U.S. DEPT. OF STATE, U.S. OBSERVATIONS ON HUMAN RIGHTS COMMITTEE GENERAL COMMENT 31, ¶ 4 (Dec. 27, 2007), http://2001-2009.state.gov/s/l/2007/112674.htm.

[71] *Id.* ¶¶ 6, 9.

[72] Charlie Salvage, *U.S. Seems Unlikely to Accept That Rights Treaty Applies to Its Actions Abroad*, N.Y. TIMES (Mar. 6, 2014), http://www.nytimes.com/2014/03/07/world/us-seems-unlikely-to-accept-that-rights-treaty-applies-to-its-actions-abroad.html. This article also discussed a separate Harold Koh memorandum on the extraterritorial application of the CAT: "In my opinion, it is not legally available to policy makers to claim it has application abroad." *Id; see also* Van Schaack, *supra* note 64, at 64 (agreeing that the United States needed to alter its position on the extraterritorial application of human rights instruments and stating in her former State Department official capacity: "It is the right thing to do. A global human rights system that allows States to act without constraints when they are offshore is untenable. It would invite impunity and, worse, the outsourcing of violations . . . .").

[73] Salvage, *supra* note 72.

[74] Guilfoyle, *supra* note 66, at 88.

[75] *See* Pact of San Jose, s*upra* note 49.

[76] *Id.* art. 1.

[77] Coard v. United States, Inter-Am. Ct. H.R. No. 109/99 (Sept. 29, 1999). The petitioners in *Coard* alleged that "the military action led by the armed forces of the United States of America in Grenada in October of 1983 violated a series of international norms regulating the use of force by states." *Id.* ¶ 1.

> refers to persons within a state's territory, it may, under given circumstances, refer to conduct with an extraterritorial locus where the person concerned is present in the territory of one state, but subject to the control of another state—usually through the acts of the latter's agents abroad. In principle, the inquiry turns not on the presumed victim's nationality or presence within a particular geographic area, but on whether, under the specific circumstances, the State observed the rights of a person subject to its authority and control.[78]

The European Court of Human Rights in *Al-Skeini v. United Kingdom* and separately, in *Hassan v. United Kingdom*, among other cases,[79] addressed the issue of extra-territorial jurisdiction of the ECHR over alleged breaches by British forces in Iraq.[80] The Court held that, while a "State's jurisdictional competence under Article 1 is primarily territorial," there are "a number of exceptional circumstances capable of giving rise to the exercise of jurisdiction by a Contracting State outside its own territorial boundaries."[81] One of those exceptional circumstances is effective control of an area,[82] which could apply in the maritime environment. For instance, in *Medvedyev v. France*, the Strasbourg court held that a French warship's "de facto control" in a "continuous and uninterrupted manner" brought the applicants within the effective control of France for purposes of ECHR Article 1.[83]

Determining the extraterritorial application of a treaty varies according to its text, object and purpose, negotiating history, interpretations by State parties, and court or tribunal rulings.[84] While the text of an instrument should always be a central element of analysis,[85] a majority view is that "States owe human rights obligations to all individuals within the authority, power, and control of their agents or

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[78] *Id.* ¶ 37.

[79] *See also* Saadi v. Italy, App. No. 37201/06, Eur. Ct. H.R. 179 (2008), http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-85276; Bankovic v. Belgium, App. No. 52207/99, Eur. Ct. H.R. (2001), http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-22099; EUR. CT. H.R., FACTSHEET—EXTRA-TERRITORIAL JURISDICTION OF STATES PARTIES (2015), http://www.echr.coe.int/Documents/FS_Extra-territorial_jurisdiction_ENG.pdf.

[80] Al-Skeini v. United Kingdom, App. No. 55721/07, Eur. Ct. H.R. (2011), http://hudoc.echr.coe.int/fre?i=001-105607; *see also* Hassan v. United Kingdom, App. No. 29750/09, Eur. Ct. H.R. (2014), http://hudoc.echr.coe.int/eng?i=001-146501.

[81] *Al-Skeini,* App. No. 55721/07, Eur. Ct. H.R., ¶ 131–132.

[82] *Id.* ¶ 138.

[83] Medvedyev v. France, App. No. 3394/03 Eur. Ct. H.R. (2010), http://hudoc.echr.coe.int/eng?i=001-97979; *see also* Al-Saadoon v. United Kingdom, App. No. 61498/08, Eur. Ct. H.R. ¶ 88 (2009) (addressing, among other issues, jurisdiction over the applicants that were held in detention centers in Iraq: "The Court considers that*, given the total and exclusive de facto, and subsequently also de jure*, control exercised by the UK authorities over the premises in question, the individuals detained there, including the applicants, were within the United Kingdom's jurisdiction.") (emphasis added).

[84] Vienna Convention on the Law of Treaties, *supra* note 66, § 3 (Interpretation of Treaties); *see also* Van Schaack, *supra* note 64, at 22–26 ("In terms of which rights and obligations apply extraterritorially, human rights bodies are increasingly adopting a calibrated approach that hinges on the nature of the right, and the degree of control the State exercises over the territory, individuals, or transaction in question.").

[85] The United States' position in 2007 on the ICCPR, for instance, stated that "because there is no ambiguity in Article 2(1) of the Covenant, there is no need to resort to the *travaux preparatoires* to ascertain the territorial reach of the Covenant." U.S. DEP'T OF STATE, U.S. OBSERVATIONS ON HUMAN RIGHTS COMMITTEE GENERAL COMMENT 31 ¶ 6 (2007), *available at* http://2001-2009.state.gov/s/l/2007/112674.htm; *see also id.* ¶¶ 5, 25.

instrumentalities, and can be found responsible whenever they cause harm to such individuals."[86] Jurists at the International Court of Justice in the Peace Palace opined

> While the jurisdiction of States is primarily territorial, it may sometimes be exercised outside the national territory. Considering the object and purpose of the International Covenant on Civil and Political Rights, it would seem natural that, even when such is the case, States parties to the Covenant should be bound to comply with its provisions.[87]

The willingness of jurists to apply human rights treaties extraterritorially[88] when certain conditions are met, such as the exercise of authority and/or effective control,[89] is unfolding simultaneously with expanded high seas maritime law enforcement operations.

Another judicial consideration in determining the extraterritorial application of a treaty is whether a treaty is self-executing, though this issue—like extraterritorial jurisdiction—is not unique to maritime law enforcement or the maritime domain.[90]

United Nations Convention on the Law of the Sea (1982): Though the LOS Convention does not expressly include the term human rights,[91] the application of human rights in the maritime environment has been judicially recognized for dec-

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[86] Van Schaack, *supra* note 64, at 22.

[87] Int'l Court of Justice, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion*, *in* I.C.J. REPORTS 136, 179, ¶ 109 (2004), *available at* http://www.icj-cij.org/docket/files/131/1671.pdf.

[88] *See* MARKO MILANOVIC, EXTRATERRITORIAL APPLICATION OF HUMAN RIGHTS TREATIES: LAW, PRINCIPLES, AND POLICY (2011) (providing a thorough discussion of legal issues related to the extraterritorial application of human rights treaties).

[89] *See* Manitaras and Others against Turkey, App. No. 54591/00 Eur. Ct. H.R. (2008) (decision on admissibility), http://hudoc.echr.coe.int/eng?i=001-87232. The court addressed whether Turkey's ECHR obligations were limited to actions of its soldiers and government officials in Northern Cyprus. "At the outset the Court notes that the area in which the alleged acts complained of took place belonged to the territory of the 'TRNC' (Turkish Republic of Northern Cyprus). Therefore, Ioannis Manitaras came under the authority and/or effective control, and therefore, jurisdiction, of the respondent State through its agents." *Id.* ¶ 28; *see also* Elihu Lauterpacht & Daniel Bethlehem, *The Scope and Content of the Principle of Non-Refoulement: Opinion*, *in* REFUGEE PROTECTION IN INTERNATIONAL LAW 111 (Erika Feller, Volker Turk & Frances Nicolson eds., 2003).

http://www.unhcr.org/419c75ce4.pdf. Discussing the concept of effective control as interpreted by the European Court of Human Rights, the authors noted the "general proposition that persons will come within the jurisdiction of a State in circumstances in which they can be said to be under the effective control of that State or are affected by those acting on behalf of that State more generally, wherever this occurs."

[90] *See* Carlos Manuel Vazquez, *The Four Doctrines of Self-Executing Treaties*, 89 AM. J. INT'L L. 695 (1995). Whether a treaty is self-executing "is a matter of some controversy and much confusion" and, "[a]t a general-level, a self-executing treaty may be defined as a treaty that may be enforced in the courts without prior legislation by Congress, and a non-self-executing treaty, conversely, as a treaty that may not be enforced without prior legislative implementation." *Id.* (citations omitted) (internal quotation marks omitted); *see also* OPERATIONAL LAW HANDBOOK, *supra* note 42, at 57 (observing that "U.S. courts have generally held human rights treaties to be non-self-executing and therefore not bases for causes of action in domestic courts.").

[91] *See* Bernard H. Oxman, *Human Rights and the United Nations Convention on the Law of the Sea*, 36 COLUM. J. TRANSNAT'L L. 399, 401 (1997) ("The United Nations Convention on the Law of the Sea is not ordinarily considered a human rights instrument. With few exceptions, its role in advancing human rights is not obvious or direct. But neither is its role negligible.").

ades. In 1949, the International Court of Justice held, in part, that State obligations "are based on certain general and well-recognized principles, namely: elementary considerations of humanity, even more exacting in peace than in war . . . ."[92] In 1999, and again in 2015, the International Tribunal for the Law of the Sea (ITLOS) declared that "considerations of humanity must apply in the Law of the Sea as they do in other areas of international law."[93]

Other multilateral instruments: Several conventions that do not have a primary focus on human rights include provisions that are either aspirational or expressly impose human rights-related obligations on State Parties. For example, the 2005 SUA Protocol provides that where a State Party takes measures against a ship, it shall "ensure that all persons on board are treated in a manner which preserves their basic human dignity, and in compliance with the applicable provisions of international law, including international human rights law . . . ."[94] The Terrorism Financing Convention and the Terrorist Bombings Convention have similar provisions.[95]

The Arms Trade Treaty (ATT), which entered into force on December 24, 2014, provides that a State Party, in the context of sanctioning the exportation of covered conventional arms, shall "assess the potential that the conventional arms or items . . . would contribute to or undermine peace and security [or] could be used to . . . commit or facilitate a serious violation of international human rights law" and "take appropriate measures to regulate, where necessary and feasible, the transit or trans-shipment under its jurisdiction of conventional arms covered under Article 2(1) through its territory in accordance with relevant international law."[96]

The ATT explicitly addresses human rights, providing that even where an export is not proscribed, an exporting State Party shall assess the potential that the

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[92] The International Court of Justice addressed the right of innocent passage, loss of life, jurisdiction, and mining, among other issues, and held, in part, that State obligations "are based . . . on certain general and well-recognized principles, namely: elementary considerations of humanity, even more exacting in peace than in war . . . ." Corfu Channel (U.K. v. Alb.), 1949 I.C.J. 4, ¶ 22 (Apr. 9).

[93] The "Enrica Lexie" Incident (Italy v. India), Case No. 24, Order of Aug. 24, 2015, ¶ 133, https://www.itlos.org/cases/list-of-cases/case-no-24/; M/V Saiga (No. 2) (St. Vincent v. Guinea), Judgment of July 1, 1999, 120 ITLOS Rep. 143 ¶ 155; *see also* Juno Trader (St. Vincent v. Guinea-Bissau), Case No. 13, Judgment of Dec. 18, 2004, ICGJ 346 ¶ 77; Tullio Treves, *Human Rights and the Law of the Sea*, 28 BERKELEY J. INT'L L. 1, 12 (2010) (asserting "[t]he Law of the Sea and the law of human rights are not separate planets rotating in different orbits. Instead, they meet in many situations. Rules of the Law of the Sea are sometimes inspired by human rights considerations and may or must be interpreted in light of such considerations."); Oxman, *supra* note 91, at 423.

[94] 2005 SUA Protocol, *supra* note 19, art. 8bis ¶ 10.a.ii.; *see also id.* art. 9 ¶ 2 ("Any person who is taken into custody, or regarding whom any other measures are taken or proceedings are being carried out pursuant to this Convention, shall be guaranteed fair treatment, including enjoyment of all rights and guarantees in conformity with the law of the State in the territory of which that person is present and applicable provisions of international law, including international human rights law.").

[95] International Convention for the Suppression of the Financing of Terrorism art. 17, Dec. 9, 1999, 2178 U.N.T.S. 237; International Convention for the Suppression of Terrorist Bombings art. 14, Dec. 15, 1997, S. TREATY DOC. NO. 106-6, 2149 U.N.T.S. 256; *see also* Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children pmbl., Nov. 15, 2000, T.I.A.S. 13127, 2237 U.N.T.S. 319.

[96] United Nations Arms Trade Treaty art. 7 ¶ 1, Apr. 2, 2013, 52 I.L.M. 988; *id.* art. 9. As of October, 20, 2015, 130 States have signed the treaty and 77 States have ratified it.

conventional arms or items could be used to "commit or facilitate a serious violation of international human rights law . . . ."[97]

Even instruments without a security focus are referencing humane treatment and humanity. Member States at the International Maritime Organization (IMO) amended the Safety of Life at Sea (SOLAS) Convention in 2004 to provide that "masters of ships who have embarked persons in distress at sea shall treat them with humanity, within the capabilities and limitations of the ship."[98] IMO Member States in 2004 also approved Guidelines on the Treatment of Persons Rescued at Sea.[99]

United Nations Security Council: Several U.N.S.C. Resolutions relevant to the maritime environment have addressed human rights.[100] Regarding the Somali piracy threat, for instance, U.N.S.C. Resolution 2184 stressed that "measures undertaken pursuant to this paragraph shall be consistent with applicable international law, in particular international human rights law . . . ."[101] U.N.S.C. Resolution 2018 focused on piracy and armed robbery in the Gulf of Guinea, and similarly referenced human rights when it called on States to cooperate "in the prosecution of alleged perpetrators, including facilitators and financiers of acts of piracy and armed robbery at sea committed off the coast of the Gulf of Guinea, in accordance with applicable international law, including human rights law . . . ."[102]

As the majority of rulings addressing the intersection of human rights with maritime law enforcement operations have unfolded in European venues, it is instructive to examine the ECHR, European national opinions, and the European Court of Human Rights. Among other things, the European Court of Human Rights may award "just satisfaction" and declare "that certain actions, omissions, law or court decisions on the part of a State violate the Convention."[103] Jurists at Strasbourg, however, are "not empowered to overrule national decisions or annul nation-

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[97] *Id.* art. 7 ¶ 1.b.ii. One ATT principle provides that State Parties respect "human rights in accordance with, *inter alia*, the Charter of the United Nations and the Universal Declaration of Human Rights . . . ." *Id.* pmbl.

[98] International Maritime Organization Res. MSC.153(78), Amendments to the International Convention for the Safety of Life at Sea, MSC.78/26/Add.1, Annex 3, Reg. 33 ¶ 6 (May 20, 2004).

[99] International Maritime Organization Res. MSC.167(78), Guidelines on the Treatment of Persons Rescued at Sea, MSC 78/26/Add.2, Annex 34 (May 20, 2004). These guidelines provide, in part, that shipmasters should "do everything possible, within the capabilities and limitations of the ship, to treat the survivors humanely and to meet their immediate needs." *Id.* ¶ 5.1.2.

[100] *E.g.*, *United Nations Documents on Piracy*, UNITED NATIONS DIVISION FOR OCEAN AFF. & L. SEA (May 24, 2012), http://www.un.org/depts/los/piracy/piracy_documents.htm; *see also* Brian Wilson, *The Mediterranean Migrant Crisis: Key Considerations for the U.N. Security Council*, HARV. NAT'L SECURITY J. (Oct. 7, 2015), http://harvardnsj.org/2015/10/mediterranean-migrant-crisis/ (chronicling U.N.S.C. Resolutions over the past 50 years on security threats in the maritime environment).

[101] S.C. Res. 2184, ¶ 7 (Nov. 12, 2014).

[102] S.C. Res. 2018, ¶ 5 (Oct. 31, 2011); *see also* S.C. Res. 2170, pmbl. (Aug. 15, 2014) (addressing counter-terrorism, not specifically in the maritime context, and reaffirming "that effective counter-terrorism measures and respect for human rights, fundamental freedoms and the rule of law are complementary and mutually reinforcing, and are an essential part of a successful counter-terrorism effort . . . .").

[103] ECHR, *supra* note 48, art. 41 ("If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party."); *see also* COUNCIL OF BARS & LAW SOC'YS OF EUROPE, THE EUROPEAN COURT OF HUMAN RIGHTS: QUESTIONS & ANSWERS FOR LAWYERS, questions 23 and 36 (2014), http://www.echr.coe.int/Documents/Guide_ECHR_lawyers_ENG.pdf.

al laws," [104] but can ask the respective state to re-open the case along with granting a compensation award.[105] In this regard, the court provides 'open remedies', a term comprising "a range of declaratory mechanisms by which courts communicate their conclusion that human rights have been violated but instead of devising an executory order or invalidating legislation, they invite other branches of government to decide how to address the identified human rights problem."[106] The European Court of Human Rights is "best understood not as a supreme arbiter of human rights protection in Europe, but as a supervisory court which plays an important but ultimately subsidiary or supporting role."[107]

The current legal and judicial landscape, which includes multiple conventions and court rulings, represents a broad and uneven array of authorities that impose varying human rights considerations in maritime law enforcement in drug trafficking, piracy, maritime migration, and fisheries enforcement.

III. DRUG TRAFFICKING

A. Background

A United Nations Office on Drugs and Crime (UNODC) report estimated 243 million people annually use illicit drugs.[108] Supplying this market, which could generate as much as US$400 billion annually, frequently depends on smuggling illicit drugs on the water and across national borders.[109] Another UNODC report noted that for all the "caveats that one may put on such a figure, it is still larger than the individual GDPs of nearly ninety percent of the countries of the world. This is not a small enemy against which we struggle. It is a monster."[110] Because of the expansive and global distribution network, both a high seas presence and maritime interdictions are required to meaningfully combat the illicit transport of narcotics.

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[104] *Id.* question 38 (2014); *see also* EUROPEAN COURT OF HUMAN RIGHTS, QUESTIONS & ANSWERS 11, http://www.echr.coe.int/Documents/Questions_Answers_ENG.pdf; ELISABETH LAMBERT-ABDELGAWAD, THE EXECUTION OF JUDGMENTS OF THE EUROPEAN COURT OF HUMAN RIGHTS 17–18, (2002), http://www.echr.coe.int/LibraryDocs/DG2/HRFILES/DG2-EN-HRFILES-19(2002).pdf ("The re-opening of the proceedings in criminal matters has resulted in the acquittal of the person concerned and the removal of his conviction from his police record, or more rarely in his conviction, and in some cases the penalty, being upheld . . . The re-opening of the proceedings has been regarded by the European Court as a measure as close to *restitutio in integrum* as was possible."). *See generally* EUROPEAN COURT OF HUMAN RIGHTS, PRACTICAL GUIDE ON ADMISSIBILITY CRITERIA 9–10 (2014), http://www.echr.coe.int/Documents/Admissibility_guide_ ENG.pdf (summarizing court rules and case-law regarding procedural and substantive issues, including two flow-charts that are particularly instructive).

[105] COUNCIL OF BARS AND LAW SOCIETIES OF EUROPE, *supra* note 103, at questions 23 & 38.

[106] ARUNA SATHANAPALLY, BEYOND DISAGREEMENT: OPEN REMEDIES IN HUMAN RIGHTS ADJUDICATION 3 (2012).

[107] *Id.* at 115.

[108] U.N. OFF. DRUGS & CRIME, WORLD DRUG REPORT 2014, at 1, U.N. Sales No. E.14.XI.7 (June 2014), https://www.unodc.org/documents/wdr2014/World_Drug_Report_2014_web.pdf.

[109] U.N. OFF. DRUGS & CRIME, ESTIMATING ILLICIT FINANCIAL FLOWS RESULTING FROM DRUG TRAFFICKING AND OTHER TRANSNATIONAL ORGANIZED CRIMES, at 32 (Oct. 2011), http://www.unodc.org/documents/data-and-analysis/Studies/Illicit_financial_flows_2011_web.pdf.

[110] U.N. OFFICE ON DRUGS AND CRIME, WORLD DRUG REPORT, at 2, U.N. Sales No. E.05.XI.10 (2005), http://www.unodc.org/pdf/WDR_2005/volume_1_web.pdf.

The "violence, corruption, and harm" caused by certain drug traffickers prompted multiple U.S. Presidents to declare a national emergency to address the threat.[111] Executive Order 12978, continued most recently on October 19, 2015, found that significant narcotics traffickers centered in Colombia "constitute an unusual and extraordinary threat to the national security, foreign policy, and economy of the United States . . . ."[112]

The transnational distribution of cocaine underscores its financial benefits and the contemporaneous need for high seas maritime law enforcement. While the wholesale value of a kilogram of cocaine in Peru and Colombia is approximately $1300 and $2300, respectively, the same kilogram yields approximately $27,000 in the United States, $60,000 in Europe, $148,000 in Russia, and more than $170,000 in Saudi Arabia.[113]

The local production and consumption of illicit narcotics generally yields minimal profit. As such, transporting products—either by land, sea or air—to more profitable destinations without detection is a key objective of transnational criminal organizations operating in South America. These groups recognize the unparalleled value of the oceans, given the anonymity a ship enjoys over large, ungoverned stretches of space, complexities in jurisdiction, and the limited capacity of most countries' coastal law enforcement.[114] Tracking and targeting traffickers on the water is significantly enhanced when interdictions are not limited to internal waters or the territorial sea, but also include the high seas. However, high seas operations generally result in lengthier transit times to bring a suspect ashore and frequently generate evidentiary challenges and detention considerations.

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[111] Continuation of National Emergency with Respect to Significant Narcotics Traffickers Centered in Colombia, 80 Fed. Reg. 63,663, 63,665 (Oct. 19, 2015), https://www.federalregister.gov/articles/2015/10/20/2015-26846/continuation-of-the-national-emergency-with-respect-to-significant-narcotics-traffickers-centered-in.

[112] Executive Order 12978 of October 21, 1995, Blocking Assets and Prohibiting Transactions with Significant Narcotics Traffickers, President Clinton, Fed. Reg. 54,579, 54, 579 (Oct. 21, 1995), https://www.gpo.gov/fdsys/pkg/FR-1995-10-24/pdf/95-26569.pdf.

[113] U.N. OFF. DRUGS & CRIME, WORLD DRUG REPORT, at 170, U.N. Sales No. E.10.XI.13 (2010), http://www.unodc.org/documents/wdr/WDR_2010/World_Drug_Report_2010_lo-res.pdf. One maritime platform could hold more than $100 million in cocaine if distributed in the United States; *see* Dane Schiller, *Experts Reveal Secrets from Captured Narco Sub*, HOUS. CHRON. (Feb. 6, 2011), http://www.chron.com/disp/story.mpl/chronicle/7415756.html.

[114] Brian Wilson, *Submersibles and Transnational Criminal Organizations*, 17 OCEANS & COASTAL L.J. 1, 5 (2011), http://ssrn.com/abstract=2019496; *see also* U.S. GOV'T ACCOUNTABILITY OFF., GAO-11-661, HOMELAND DEFENSE: ACTIONS NEEDED TO IMPROVE DOD PLANNING AND COORDINATION FOR MARITIME OPERATIONS 7 (2011), http://www.gao.gov/products/GAO-11-661 (noting that "[c]hallenges unique to the maritime domain include the need for international cooperation to ensure improved transparency in the registration of vessels and identification of ownership, cargoes, and crew of the world's multinational, multiflag merchant marine. Environmental factors unique to the maritime domain also contribute to maritime domain awareness challenges, such as the vastness of the oceans, the great length of shorelines, and the size of port areas that can provide concealment and numerous access points to the land."). *See generally* Jeremy Haken, *Transnational Crime in the Developing World*, GLOBAL FIN. INTEGRITY, at 4 (Feb. 2011), http://www.gfip.org/storage/gfip/documents/reports/transcrime/gfi_transnational_crime_web.pdf.

B. Discussion

Several cases have examined human rights in the context of maritime law enforcement operations that successfully interdicted drug traffickers. The most prominent case is *Medvedyev v. France*, where the European Court of Human Rights addressed human rights following a French court's conviction for drug trafficking. The Court ruled on two issues: The right to liberty and security, and promptness.[115] *Medvedyev* involved crew members acting as traffickers plying the high seas on a Cambodian-flagged merchant ship (*Winner*) with the "intention of transferring [contraband] to speedboats off the Canary Islands for subsequent delivery to the coasts of Europe."[116]

Responding to a French request, Cambodia authorized French authorities "to intercept, inspect and take legal action" against *Winner*.[117] Because Cambodia was not a party to the Vienna Drug Convention,[118] the French court correctly treated their consent as an ad hoc agreement.[119] French authorities subsequently interdicted *Winner* on the high seas, seized 100 kilograms of cocaine, and detained the crew (characterized as a "de facto restriction" on their movement[120]) during their thirteen-day voyage to Brest, France. "Because of its poor state of repair and the weather conditions, the ship was incapable of speeds faster than five knots."[121]

A French court found the six suspects guilty of drug smuggling. The convicted traffickers then brought proceedings before the European Court of Human Rights challenging the legality of their detention at sea and the delay involved in bringing them before a court under ECHR articles 5(1) (the right to liberty and security) and 5(3) (the right to be brought promptly before a judge or other authorized officer).[122]

The European Court of Human Rights first addressed whether Cambodia's diplomatic note provided France with authorization to intercept, inspect, and take legal action. The Court held that "the fate of the crew was not covered sufficiently clearly by the note and so it is not established that their deprivation of liberty was the subject of an agreement between the two States that could be considered to represent a 'clearly defined law' within the meaning of the Court's case-law."[123] Legal commentators have appropriately characterized this portion of the ruling as astonishing and inconsistent with the internationally recognized practice that a flag state

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[115] Medvedyev v. France, App. No. 3394/03 Eur. Ct. H.R. ¶ 3 (2010), http://hudoc.echr.coe.int/eng?i=001-97979.

[116] *Id.* ¶ 9.

[117] *Id.* ¶ 10.

[118] Vienna Drug Convention, *supra* note 17.

[119] *Medvedyev*, App. No. 3394/03 ¶ 93.

[120] *Id.* ¶ 74.

[121] *Id.* ¶ 14.

[122] ECHR, *supra* note 48, arts. 5(1), 5(3).

[123] *Medvedyev*, App. No. 3394/03 ¶ 99. By a vote of 10–7, the European Court of Human Rights held there was a violation of Article 5(1) of the Convention and awarded each of the six crew members EUR 5000 in damages and, collectively, EUR 10,000 for costs and expenses (to be calculated with interest). The majority held, in part, that "[i]t is regrettable, in the Court's view, that the international effort to combat drug trafficking on the high seas is not better coordinated bearing in mind the increasingly global dimension to the problem." *Id.* ¶ 101. A number of judges dissented, however, opining that "[t]he actions expressly authorised by Cambodia (interception, inspection, legal action) necessarily concerned the crew members." *Id.* ¶ 7 (Tulkens, J., dissenting in part).

may waive jurisdiction to enable a State conducting the interdiction to apply its laws to the vessel.[124] The ruling on ECHR 5(1)'s right to liberty and security inexplicably dismissed bilateral diplomacy, and instead, appeared to recognize only treaty-level obligations to "prevent the application of foreign law from being arbitrary."[125]

A number of judges dissenting from the ECHR 5(1) holding sagely remarked, "[w]hen there is sufficient concurring evidence to suspect that a ship on the high seas, thousands of miles from the State thus authorised to board it, is engaged in international trafficking to which all countries want to put a stop, it is without a doubt legitimate not to place as narrow an interpretation on the legal basis as one would inside the territory of the State concerned."[126]

Regarding ECHR 5(3)'s right to promptness and whether exceptional circumstances existed, the *Medvedyev* opinion expressly acknowledged fundamental challenges in at-sea operations, a recognition that would resonate in subsequent cases. The court summarized the government's argument that the "unpredictability of navigation and the vastness of the oceans made it impossible to provide in detail for every eventuality when ships were rerouted," adding, "[a]s to the idea of transferring them to a French naval vessel to make the journey faster, it is not for the Court to assess the feasibility of such an operation . . . ."[127] The *Medvedyev* court narrowly held, by a vote of 9–8, that there was no violation of 5(3). A dissenting opinion on this issue, however, noted an

> unwillingness to endorse unnecessary abridgements of fundamental human rights in the fight against [drug trafficking]. Such abridgements add nothing to the efficacy of the battle against narcotics but subtract, substantially, from the battle against the diminution of human rights protection . . . . The Government argued that the weather conditions at the relevant time and the poor state of repair of the *Winner* accounted for the very slow speed of the vessel and, thus, for the protracted period of time that passed before its crew was brought before a judge. Such factors may explain the delay involved, but they do not justify it. There was no evidence adduced before the Court that the French authorities had even considered, let alone examined, any other options which would have enabled the applicants to have been brought promptly before a judge.[128]

The disparate opinions in *Medvedyev* underline the challenges of judicially harmonizing human rights considerations with maritime law enforcement operations. A dissenting opinion observed,

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[124] *See, e.g.*, Guilfoyle, *supra* note 66, at 95 (stating "[o]ne might wonder how it is possible to grant authority to detain a vessel on the high seas but not those aboard it . . . . The Grand Chamber effectively held that in such cases only a bilateral or multilateral treaty could ever suffice to give adequate notice.").

[125] *Id.*

[126] *Medvedyev*, App. No. 3394/03 ¶ 10 (Tulkens, J., dissenting in part).

[127] *Id.* ¶¶ 59, 131.

[128] *Id.* ¶¶ 2, 7 (Tulkens, J., dissenting in part).

> [t]he French authorities, very laudably, made every effort to place on board [their frigate] impressive technical and military manpower to ensure the capture and detention of the suspects. It is regrettable that they made no effort at all to place the proceedings under some form of judicial control which would have ensured that the capture and detention of the suspects was as legitimate as it was successful.[129]

Varying judicial perspectives in court rulings are commonplace; what is noteworthy about the dissenting opinions in *Medvedyev* is that they provide no guidance as to what French authorities were supposed to have done to attach the "judicial control" desired by the jurist.

Medvedyev isn't the first case to discuss human rights in the context of maritime law enforcement operations, but it represents a baseline for subsequent judicial analysis involving the issues of promptness, and for determining wholly exceptional circumstances, particularly due to its insightful recognition of challenges associated with maritime law enforcement operations.[130] *Medvedyev* properly did not impose a prescriptive timeline for transits ashore or wade into distinctly operational matters, such as the viability of transferring suspects to another platform. Further, *Medvedyev* explicitly noted "the fight against drug trafficking on the high seas . . . undoubtedly presents special problems."[131] However, because the court misinterpreted the legal ability of a flag state to waive jurisdiction under international law, its authoritative force is diminished.

Rigopoulos v. Spain is another European Court of Human Rights case that involved a challenge of promptness in a maritime law enforcement counter-drug trafficking operation.[132] In this case, decided approximately eleven years before *Medvedyev*, a Spanish customs vessel interdiction of drug traffickers on the high seas led to a sixteen-day, 3000-nautical mile transit to Las Palmas (Grand Canary). The accused was convicted in a Spanish court and subsequently asserted before the European Court of Human Rights that the duration between his interdiction and the date he was brought before a judge violated ECHR's promptness provision.[133]

The *Rigopoulos* court noted: "[E]ach case has to be examined according to its special features in order to determine whether the authorities have complied with the requirement of promptness . . . [and] the applicant was undoubtedly deprived of his liberty, since he was detained on a vessel belonging to the Spanish customs, and that the detention lasted for sixteen days without his being 'brought promptly' before the investigating judge."[134]

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[129] *Id.* ¶ 13 (Tulkens, J., dissenting in part).

[130] *See* EFTHYMIOS PAPASTAVRIDIS, THE INTERCEPTION OF VESSELS ON THE HIGH SEAS: CONTEMPORARY CHALLENGES TO THE LEGAL ORDER OF THE OCEANS 245 (2013) (noting that "[t]he significance of the *Medvedyev* case lies in the fact that it resoundingly introduced human rights and the rule of law to contemporary discourse over the fight against drug trafficking on the highs seas," and arguing that *Medvedyev* is "also praiseworthy for another reason: it stressed the importance of the establishment of jurisdiction over drug offences on the high seas, which presupposes the existence of foreseeable and sufficiently precise national laws.").

[131] *Medvedyev*, App. No. 3394/03 ¶ 126.

[132] Rigopoulos v. Spain, App. No. 37388/97 Eur. Ct. H.R. (1999), http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-5625.

[133] *Id.*

[134] *Id.*

The court continued:

> "[T]he applicant himself acknowledged that, owing to the resistance put up by certain members of the crew, the *Archangelos* could not set sail again until forty-three hours after it had been boarded. That delay cannot therefore be attributed to the Spanish authorities . . . . The Court considers unrealistic the applicant's suggestion that the Spanish authorities could have requested assistance from the British authorities to divert the *Archangelos* to Ascension Island, which is after all approximately 890 nautical miles from where the vessel was boarded."[135]

In dismissing the allegation, the court concluded ". . . it was therefore materially impossible to bring the applicant physically before the investigating judge any sooner . . . . [and] the time which elapsed between placing the applicant in detention and bringing him before the investigating judge cannot be said to have breached the requirement of promptness . . . ."[136] *Rigopoulos* effectively examined at-sea challenges, identified operational issues, and addressed human rights considerations.

The European Court of Human Rights also addressed the duration of detention in *Vassis v. France*, where a high seas interdiction for drug trafficking resulted in the recovery of 3.2 tons of cocaine.[137] The transit from south of Conakry (Guinea) to Brest, France, included escorting the Panamanian-flagged vessel, *Junior*, more than 4000 miles.[138] A French court convicted and sentenced the accused to sixteen years of imprisonment.[139]

The Court focused on whether ECHR Article 5(3)'s requirement 'to be brought promptly before a judge' was violated based on the eighteen-day transit to port, and separately, on the passage of forty-eight hours until the accused were brought before a judge after arrival in port.

Regarding the eighteen-day transit, the French Government submitted it was "materially impossible to physically bring the applicants before the judicial authority any more promptly."[140] After arrival in port, the French Government asserted the suspects were in "custody for forty-eight hours before being brought before a judge responsible for detention matters" because of the "number of persons concerned and the need for interpreters for the different acts and steps in the proceedings."[141]

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[135] *Id.*

[136] *Id.*

[137] Vassis v. France, Judgment, App. No. 62736/09, Eur. Ct. H.R. (2013), http://hudoc.echr.coe.int/sites/eng-press/pages/search.aspx?i=003-4415485-5305927.

[138] *Id.* at 6 ("[T]he interception was carried out approximately 300 km to the south-west of Conakry (Guinea)"); *id.* at 37 ("The applicants observed that the supervision conducted had to include effective safeguards against the risk of ill-treatment, which was at its greatest in the case of detainees isolated on the high seas under the surveillance of military personnel who were not trained to guard prisoners, and any kind of independent supervision.").

[139] *Id.* at 23.

[140] *Id.* at 47.

[141] *Id.* at 20.

The *Vassis* court acknowledged that "there is nothing to suggest" the transit to France "took any longer than necessary, given that the *Junior* is a vessel originally designated for coastal rather than long-distance sailing."[142] Moreover, on the French not diplomatically approaching Senegal, or pursuing other options to potentially reduce the applicant's time at sea, the European Court of Human Rights held that "it is not for the Court to assess their feasibility in the specific circumstances of the case."[143]

Eighteen days to transport the suspects to port, the *Vassis* court said, is "not incompatible with the 'brought promptly before a judge' concept set out in Article 5(3) of the Convention in view of 'wholly exceptional circumstances' which justified such a lapse of time."[144]

However, a two-day delay in the applicant's first appearance before a judge after their arrival in port was deemed particularly troubling in light of an eighteen-day transit, which ". . . allowed France to be prepared with foresight."[145] The court thus held that "[t]here is no justification for such an additional delay of some forty-eight hours under the circumstances of the case."[146] The *Vassis* court continued: "[T]he purpose of Article 5(3) of the Convention is to facilitate the detection of any ill-treatment and to minimise any unjustified interference with individual liberty, in order to protect the individual, by means of an automatic initial review, within a strict time-frame leaving little room for flexible interpretation . . . ."[147]

Because of the ECHR 5(3) violation, the applicants were awarded approximately EUR 5000.[148] The European Court of Human Rights balanced human rights and maritime law enforcement in this case by recognizing that necessary high seas operations may constitute wholly exceptional circumstances in the context of transit times, yet imposing strict time constraints regarding when a suspect is brought before a judge or magistrate once ashore.

Courts in the United States have addressed the issue of transit times and delays in maritime law enforcement, though not under the prism of human rights treaty obligations. Federal Rule of Criminal Procedure 5(a) requires that a defendant be taken to a magistrate judge 'without unnecessary delay' following an arrest.[149] While no court has ruled on whether a specific period of time would be automatically deemed unnecessary delay, the Court of Appeals for the Fifth Circuit recognized that operational delays in transporting suspects from the deck of a U.S. Coast Guard cutter to the United States were not unreasonable, and that any delay must be unnecessary before it will require remedy in the courts.[150]

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[142] *Id.* at 55.

[143] *Id.*

[144] *Id.* at 54 (citing favorably the judgments in *Rigopoulos* and *Mevedyev*).

[145] *Id.* at 58, 60.

[146] *Id.* at 59.

[147] *Id.* at 61.

[148] *Id.* at 69.

[149] FED. R. CRIM. P. 5(a)(1) (stating that "[a] person making an arrest outside the United States must take the defendant without unnecessary delay before a magistrate judge, unless a statute provides otherwise.").

[150] United States v. Odom, 526 F.2d 339, 343 (5th Cir. 1976) ("Under the unique circumstances in this case, we do not think there was unnecessary delay in presenting Odom before a U.S. Magistrate: (1) Odom was arrested 200 miles from the nearest American territory; (2) the helicopter that brought Drug Enforcement Administration agent Miller to the '*Valiant*' was too large to land, so it would have

In *United States v. Zakharov*, the Ninth Circuit rejected the defendant's claims that the U.S. Government's failure to "utilize helicopters, radios, fax machines, and other technology to obtain a probable cause determination before he was physically present in the United States constituted undue delay under the 4th Amendment."[151] And, the Southern District of California held in *United States v. Savchenko*, that "[w]hereas sixteen days might be deemed unreasonable for the delay in a first appearance concerning the arrest at the international border with Mexico, some sixteen miles south of the courthouse, the sixteen days is more than reasonable for the transport of the fishing vessel from the high seas approximately 500 nautical miles from Mexico to this district under these facts and circumstances."[152]

In the case of a high seas interdiction, U.S. authorities are not required to present defendants immediately upon their arrival in port. Provided they are not subjected to custodial interrogation during the period between initial interdiction and ultimate presentment to the magistrate, no remedy for these delays is generally available to defendants.

Pursuit of transnational criminal organizations[153] and traffickers involves more than just seizing illicit drugs. "[I]t is widely understood that groups engaging in drug trafficking also engage in other sorts of violent and criminal enterprise, from mass murders and human smuggling in Mexico, to the funding of militant insurgents and terrorists . . . ."[154] The Vienna Drug Convention contains guidance regarding partnering and cooperation and requires State parties to establish criminal offenses for the production, manufacture, sale, distribution, delivery, importation, and exportation of narcotic drugs.[155]

As discussed above, to meaningfully combat drug trafficking and transnational criminal organizations—and effectively protect security interests—government law enforcement and naval vessels must conduct interdictions on the high seas where criminals often operate, far from land-based enforcement assets, far from land-based courtrooms, and frequently in operationally dangerous conditions. While certain delays are intolerable, particularly when in port, judicial recognition of unique maritime challenges that a warship may encounter while underway—such as transiting a vast operating space, replenishment requirements, and unpredictable weather—must be a key element of judicial analysis when balancing human rights with maritime law enforcement.

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been difficult and possibly dangerous to attempt to fly Odom to an American port; and (3) Odom was presented before a magistrate immediately after the '*Valiant'* arrived in Tampa."). The Odom court quoted from *Mallory v. United States*, 354 U.S. 449 (1957), which did not involve maritime law enforcement, though it is nevertheless instructive. The *Mallory* court held that "[t]he duty enjoined upon arresting officers to arraign without unnecessary delay indicates that the command does not call for mechanical or automatic obedience.").

[151] United States v. Zakharov, 468 F.3d 1171, 1179 (9th Cir. 2006).

[152] United States v. Savchenko, 201 F.R.D. 503, 506 (S.D. Cal. 2001).

[153] An organized criminal group is defined as "a structured group of three or more persons, existing for a period of time and acting in concert with the aim of committing one or more serious crimes or offences established in accordance with this Convention, in order to obtain, directly or indirectly, a financial or other material benefit." United Nations Convention Against Transnational Organized Crime, Nov. 15, 2000, 2225 U.N.T.S. 209.

[154] Haken, *supra* note 114, at 3.

[155] Vienna Drug Convention, *supra* note 17, art. 17 (providing, in part, that "[p]arties shall cooperate to the fullest extent possible to suppress illicit traffic by sea, in conformity with the international law of the sea.").

IV. PIRACY

A. Background

Between 1984 and 2010, more than five thousand incidents of piracy or armed robbery, including attempts, occurred against ships throughout the world.[156] Piracy methods vary: Some operate by holding a vessel until a ransom payment is made (known as kidnapping for ransom, or KFR[157]); others covertly re-flag vessels; and a third method involves stealing the vessel's cargo or robbing money and property from passengers. Regardless of the method, piracy is corrosive to trade, navigational freedoms, and governance.[158] One area, the East Coast of Africa, highlights the global impact of piracy: Vessels carrying nearly ten percent of the world's daily oil supply, along with other valuable commodities, transit the Gulf of Aden,[159] operating in close proximity to crushing poverty, famine, ungoverned areas, and criminals.[160]

The threat posed by Somali piracy, in part, prompted U.S. President Barack Obama to declare a national emergency.[161] The Executive Order stated that Somali

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[156] INT'L MAR. ORG., REPORTS ON ACTS OF PIRACY AND ARMED ROBBERY AGAINST SHIPS, ANNUAL REPORT – 2010, at 2, MSC.4/Circ.169 (Apr. 1, 2011), http://www.imo.org/blast/blastDataHelper.asp?data_id=30548&filename=169.pdf.

[157] *See* S.C. Res. 2133, pmbl. (Jan. 27, 2014) (discussing kidnapping for ransom in the context of terrorism, and recognizing human rights considerations and

> the need to further strengthen efforts to support victims and those affected by incidents of kidnapping for ransom and hostage-taking committed by terrorist groups and to give careful consideration to protecting the lives of hostages and those kidnapped, and *reaffirming* that States must ensure that any measures taken to counter terrorism comply with their obligations under international law, in particular international human rights law, refugee law, and international humanitarian law, as appropriate . . . .).

[158] *See* U.S. MAR. ADMIN., U.S. COUNTER PIRACY AND MARITIME SECURITY ACTION PLAN (2014), http://www.marad.dot.gov/wp-content/uploads/pdf/USCounterPiracyMaritimeSecurityActionPlan2014.pdf ("Piracy and related maritime crime endanger maritime interests on a global scale, and countering this threat is a shared global responsibility."); *see generally* ANDREW PALMER, THE NEW PIRATES: MODERN GLOBAL PIRACY FROM SOMALIA TO THE SOUTH CHINA SEA (2014). There have been many books written on piracy over the past decade. Mr. Palmer's volume stands atop a crowded field for its insight, expansive scope, and clarity.

[159] The Bab-El Mandeb Strait is eighteen miles at its narrowest width. U.S. ENERGY INFO. ADMIN., WORLD OIL TRANSIT CHOKEPOINTS (Nov. 10, 2014), http://www.eia.gov/beta/international/analysis_includes/special_topics/World_Oil_Transit_Chokepoints/wotc.pdf.

[160] *See* Andrew J. Shapiro, Assistant Sec'y of State for Political-Military Affairs, Remarks to the Global Maritime Information Sharing Symposium, National Defense University: Taking Diplomatic Action Against Piracy (Sept. 16, 2009), http://www.state.gov/t/pm/rls/rm/129258.htm ("Each year, 33,000 commercial ships pass through the Gulf of Aden, making it one of the world's busiest shipping lanes.").

[161] Exec. Order No. 13536 (Apr. 12, 2010), Blocking Property of Certain Persons Contributing to Conflict in Somalia, https://www.whitehouse.gov/the-press-office/executive-order-concerning-somalia. Additionally, after a horrific kidnapping by Somali pirates in 2010 that spanned eight months, crew members asserted "they had suffered extreme abuse, including being tied up in the sun for hours, locked in freezers and having their fingernails pulled out with pliers." Ben Farmer, *The Human Cost of Piracy: Broken Victims of Violence*, THE TELEGRAPH (Feb. 10, 2014),

piracy and the deteriorating security situation in Somalia represent "an unusual and extraordinary threat to the national security and foreign policy of the United States."[162]

The personal toll from one instance of piracy that involved a victim being held 238 days in captivity is described in this narrative:

> They kept us in a state of terror. Even when I could not see the torturing, I could hear the screams . . . . We were confined to a tiny corner of the control room. We were fed, but only enough to keep us alive—basic meals of potatoes and onions . . . we were beaten constantly with metal poles. I managed to avoid the worst violence, but I saw my crewmates being thrashed with sticks and having electric probes attached to their genitals, and one man was suspended by ropes from the ship's mast for several hours. Even when I could not see the torturing, I could hear the screams. I can still hear the screams to this day.[163]

B. Discussion

The increased naval response to Somali piracy stoked criminal prosecutions across the globe. While piracy is not confined to one geographic area, the prohibitive majority of reported cases involving this universal crime from 2009–15 involve Somali suspects. Several opinions in piracy prosecutions address human rights and humane treatment: Judges have dismissed criminal charges because of the time that elapsed to bring suspects ashore following a high seas interdiction, and some have ordered financial remuneration to suspected pirates for being detained in excess of twenty-four hours aboard an underway warship and separately, for being transferred to a prison in a third State with conditions deemed inhumane. The opinions discussed in this Part include national decisions from Asia, Europe, Africa, and North America, as well as the European Court of Human Rights.

In December 2014, a Danish prosecutor expressed his regret over the arrest of suspected Somali pirates and for their detention aboard a warship when he announced that the Government would pay more than $3000 to each of the nine suspects.[164] "The Public Prosecutor apologized for the long drawn out process and

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http://www.telegraph.co.uk/sponsored/culture/captain-phillips-film/10388296/somali-piracy-victims.html. This attack spawned an unsuccessful lawsuit in the United States against the vessel's owner for, among other things, Jones Act negligence for "intentionally encountering known risks by navigating through pirate-infested waters . . . in order to save time and/or money . . . failure to use reasonable care to provide Plaintiffs a reasonably safe place to work [and] failure to ascertain the cause of prior similar incidents so as to take measures to prevent their re-occurrence." Pleading at 24, Chirag v. MT Marida Maguerite Schiffarhrts, 2012 WL 2169498 (D. Conn. 2012) (No. 3:12 CV00879). The Second Circuit Court of Appeals affirmed the case's dismissal. Chirag v. MT Marida Marguerite Schiffahrts, 604 Fed. Appx. 16, 18 (2d Cir. 2015).

[162] Exec. Order No. 13536 (Apr. 12, 2010), Blocking Property of Certain Persons Contributing to Conflict in Somalia, https://www.whitehouse.gov/the-press-office/executive-order-concerning-somalia.

[163] Wendy Laursen, *Piracy Update: There's Men with Guns, but Piracy Is Not War*, SAVEOURSEAFARERS, http://www.saveourseafarers.com/piracy-update-theres-men-with-guns-but-piracy-is-not-war-part-2.html (last visited May 25, 2016.)

[164] *Denmark Pays Compensation to Alleged Pirates*, DR DK (Dec. 9, 2014), http://www.dr.dk/Nyheder/Andre_sprog/English/2014/12/09/141028.htm; *see also Denmark Compen-*

stated that the concerned parties had been awarded compensation for their unlawful detention."[165] The Somali pirates had been detained for thirteen days on the Danish Navy support ship *Esben Snarr*e following their interdiction for unsuccessfully attempting to hijack the tanker vessel *Torm Kansas*, as well as their suspected involvement in another attempted attack.[166] Danish law provides that a "citizen cannot be held in custody for more than twenty-four hours without being brought bebefore a judge."[167] The Danish High Court "agreed with counsel for the defence that the defendants' fundamental legal rights had been significantly ignored."[168] During a videolink with a judge, the "nine Somalis said they were fishermen and they had lost their gear." [169] Remarkably, these self-serving representations and "other circumstances persuaded the prosecution to drop the case."[170]

Two piracy cases in Europe that similarly involved human rights issues were also decided in December 2014, unfolding before the European Court Of Human Rights. These cases stemmed from French actions against pirates, including a Somali group that had secured a $2.1 million ransom.[171] The applicants asserted ECHR breaches based on:

> ECHR 5(1) because French authorities had "no legal basis" to detain and arrest nor any rule defining the conditions regarding the deprivation of liberty;[172]
>
> ECHR 5(3) because they were not "brought promptly before a judge;"[173] and
>
> ECHR 5(4) because they did not have access to a court to challenge the lawfulness of their arrest in Somalia or their detention until taken into po-

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sates Suspected Pirates for Overly Long Detention, REUTERS (Dec. 8, 2014), http://www.reuters.com/article/2014/12/08/us-denmark-piracy-idUSKBN0JM2A920141208.

[165] *Denmark Pays Compensation to Alleged Pirates*, DR DK (Dec. 9, 2014), http://www.dr.dk/Nyheder/Andre_sprog/English/2014/12/09/141028.htm.

[166] *Id.*

[167] *Id.*

[168] *Id.*

[169] *Id.*

[170] *Id.*

[171] Samatar v. France, App. Nos. 17110/10, 17301/10, Eur. Ct. H.R. (2014), http://hudoc.echr.coe.int/eng?i=001-148290; Hassan v. France, App. Nos. 46695/10, 54588/10, Eur. Ct. H.R. (2014), http://hudoc.echr.coe.int/eng?i=001-148289. One group was "arrested in Somalia," flown to France, and approximately forty-eight hours later, taken before an investigating judge and placed under judicial investigation. Another group was "interdicted" in the Somali territorial sea and flown to France.

[172] Samatar v. France, App. Nos. 17110/10, 17301/10, Eur. Ct. H.R. (2014). An official press statement regarding both opinions noted the *Hassan* Court held that the applicants had "undergone a lawful arrest or detention effected for the purpose of bringing them before the competent legal authority with the meaning of [ECHR] 5 1(c), noting in particular that there had been plausible reasons to suspect them of committing offenses against a French vessel and French citizens." Press Release, Eur. Ct. H.R., Suspects of Piracy Against French Vessels, Apprehended in Somalia by the French Authorities, Should Have Been Brought Before a Legal Authority as soon as They Arrived in France (Apr. 12, 2014), http://hudoc.echr.coe.int/app/conversion/pdf/?library=ECHR&id=003-4953701-6068335&filename=003-4953701-6068335.pdf (citations omitted) (internal quotation marks omitted).

[173] *Id.*

> lice custody in France (right to have lawfulness of detention "decided speedily").[174]

The European Court of Human Rights accepted that the French authorities' intervention in the Somali territorial sea was "foreseeable" on the basis of U.N. Security Council Resolution 1816.[175] However, the court found that French law did not include any rule defining the conditions of deprivation of liberty that would be imposed on the suspects pending their appearance before the competent legal authority. It is unclear whether courts in future cases will unilaterally impose specific requirements for such a rule, such as obligatory details, compulsory format, or essential methods of implementation.

In *Samatar*, the European Court of Human Rights concluded that Article 5(1) was violated, because the legal system in France did not provide sufficient protection against arbitrary interference with the right to liberty.[176] On a separate issue, the court said that, while it was prepared to admit that "wholly exceptional circumstances explained the length of detention between the arrest of the Somali pirates and their arrival in France," after entering French port

> the applicants [were] taken into police custody for 48 hours rather than being brought immediately before an investigating judge. There was nothing to justify that additional delay in either of the two cases. Eleven days in the case of *Ali Samatar* and at least eighteen days in *Hassan* had thus passed between the decision to intervene and the applicants' arrival in France, and the French authorities could have made use of that time to prepare for them to be brought "promptly" before the competent legal authority . . . The purpose of Article 5(3) was to facilitate the detection of any ill-treatment and to minimise any unjustified interference with individual liberty, in order to protect the individual, by means of an automatic initial review, within a strict time-frame leaving little flexibility in interpretation.[177]

Though criticized,[178] this reasoned opinion, consistent with *Vassis*, discussed above, effectively balanced human rights obligations with maritime law enforcement by correctly imposing a considerably higher standard in bringing a suspect before a judge or magistrate once ashore.

A district court in Rotterdam held in 2010 that the passage of forty days to bring Somali suspects interdicted in the Gulf of Aden before a judge in the Nether-

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[174] *Id.*

[175] *Id.*; S.C. Res. 1816, ¶¶ 2–4 & 7 (June 2, 2008); *see also* Douglas Guilfoyle, *ECHR Rights at Sea: Medvedyev and Others v. France*, EJIL: TALK! (Apr. 19, 2010), http://www.ejiltalk.org/echr-rights-at-sea-medvedyev-and-others-v-france/ (defining foreseeability as "that those to whom it was applied could have predicted its application.").

[176] Samatar v. France, App. Nos. 17110/10, 17301/10, Eur. Ct. H.R. (2014), http://hudoc.echr.coe.int/eng?i=001-148290.

[177] *Id.*

[178] *E.g.*, Gauvin van Marle, *Disbelief as Court Orders France to Pay Compensation to Captured Somali Pirates*, LOAD STAR (Dec. 8, 2014), http://theloadstar.co.uk/european-court-human-rights-somali-pirates/ (discussing, in part, those who labeled the judgment as "repugnant.").

lands was too long.[179] The court held that because evidence was not presented that a "speedier presentation of the suspect to a European Judge would have been impossible" there was a breach of ECHR Article 5(3) ("promptness").[180] Of particular concern is that this opinion could be misconstrued as providing a bright line determination of expected operational transit times for a challenging out-of-area deployment that is 6,500 nautical miles from homeport, includes transiting the Suez Canal, and likely involved underway replenishment/port considerations.

Operational issues were presented,[181] and though the duration of the transit to the Netherlands did not result in a dismissal of the charges,[182] this case is emblematic of judicial discomfort with lengthy transits that are inherent in a blue water naval mission.[183] The challenge is protecting human rights obligations while avoiding a prescriptive, rigid, and inflexible time limit within which a warship must return to port.

The court correctly did not hold there is an explicit time within which a suspect must be brought before a judge, stating on more than ten occasions that its ruling was tethered to the facts "in this particular case."[184] The court also noted that when the "Dutch Prosecutor became formally responsible for the suspect's detention, the suspect was brought before a Judge within one day."[185]

The court imposed a five-year prison sentence, discussing both the gravity of the offense and the difficulty of being confined at a location far from home.[186]

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[179] *Judgement [sic] Case Somali Pirates*, LJN: BM8116, Rotterdam Dist. Ct., 10/600012-09 (June 17, 2010) (copy on file with author).

[180] *Id.* (internal quotations omitted) (noting, "[a]t the very least, the Dutch Public Prosecutor could have been expected to discuss with the Danes the necessity of a prompt presentation before a Judge. It has not been argued, nor is there any evidence that such would have happened.").

[181] *Id.* The Public Prosecutor submitted that the "highly exceptional circumstances [included] that the naval ship of the Danes sailed on the high seas, the naval ship did not have as its purpose the apprehension of suspects, the nearest ports were not appropriate to bring the suspects before a judge in a manner that was 'ECHR-proof' and the naval vessel could not leave the international mission in which it was participating." Logistics issues are particularly challenging in counter piracy operations that unfold out of area. *See also* TERRY MCKNIGHT & MICHAEL HIRSH, PIRATE ALLEY 93–94 (2012) (discussing the Dutch interdiction:

> The first major issue: how do you get the suspected pirates to the Netherlands? Fortunately, the [warship] *Absalon* was returning to Bahrain for a port visit . . . once the suspected pirates boarded the KLM flight to Amsterdam, the pilot asked who these young chaps were. Pirates he was told. Not on my plane, he said. The pirates' cover broken, everyone headed back to *Absalon*. The pirates finally made their trip to the Netherlands on a Dutch military aircraft.).

[182] *Judgement [sic] Case Somali Pirates*, LJN: BM8116, Rotterdam Dist. Ct., 10/600012-09 (June 17, 2010) (copy on file with author). During the transit to the Netherlands, the court noted, "no criminal procedures activities took place that would have required legal aid, as the first hearing of the suspect took place on 10 February [while the interdiction occurred on January 16]. It has not been argued, nor was there any evidence that there have been any other such compelling needs for legal aid during this time that by such failure to provide legal aid the criminal procedure of the suspect would have been affected to the extent that there no longer was a fair trial as a whole, in the sense of article 6 ECHR." *Id.* at 7.

[183] *Id.* (noting that the operational circumstances were "not so exceptional [that] a time span of 40 days can still be regarded as 'promptly', not even in view of a combination of these circumstances.").

[184] *Id.*

[185] *Id.*

[186] *Id.*

The court stated that the accused set "out to sea in a boat [with] automatic firearms, a rocket launcher and a ladder . . . . It counts strongly against the suspect and his co-suspects that they only had their own financial gains in mind and did not care about the harm, damage, and nuisance they caused to the injured parties."[187] And, the court also stated, "Detention in the Netherlands is burdensome for the suspect, because . . . [he] . . . is far from home and family, has no visitors at the Penitentiary Institution and maintaining contact with his family is impossible or at least extremely difficult."[188]

Other human rights considerations in a piracy context include potential linguistic and cultural challenges that may accompany the prosecution of suspects who both reside in, and were interdicted at, great distances from court. In Hamburg, Germany, for instance, pirates stated their place of birth as "under a tree" and their date of birth as "during the rainy season."[189] Along with a judge potentially viewing these issues in e*xtenuation and mitigation* for sentencing purposes, such as in the Rotterdam case,[190] these issues may also implicate provisions of human rights treaties, notably, ECHR's prohibition of inhuman and degrading treatment.[191]

Kenyan Judge M. Odero, in a 2010 case involving six Somali pirates, noted that "[w]e cannot ignore the fact that these are suspects who having been arrested by foreign naval forces on the High Seas are brought to Kenya for trial. They are strangers in the country, do not understand the legal system, may not know what their rights are and do not understand the language."[192] Because the Kenyan Constitution authorizes government-provided defense counsel only to suspects in murder trials, Judge Odero recommended:

> With such barriers it would in my view be crucial that the Kenyan Government and the international partners supporting these trials put in place a system to provide free legal representation for the suspects in these piracy

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[187] *Id.*

[188] *Id.* (noting that the suspect "received messages that his family is in an emergency situation, partly because of his absence, and that he leads a very isolated life in detention," yet acknowledged "it was found impossible to verify the personal circumstances of the individual suspects.").

[189] Beate Lakotta, *An Expensive Farce: Germany's Somali Pirate Trial Is Pointless*, SPIEGEL ONLINE (Sept. 12, 2012), http://www.spiegel.de/international/germany/german-trial-of-somali-pirates-turns-into-pointless-and-expensive-farce-a-855252.html.

[190] *Judgement [sic] Case Somali Pirates*, LJN: BM8116, Rotterdam Dist. Ct., 10/600012-09 (June 17, 2010) (copy on file with author).

[191] ECHR, *supra* note 48, art. 3; *see also* ICCPR, *supra* note 44, art. 10 ("All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person.").

[192] Republic of Kenya v. Hassan Jama Haleys and 5 Others, Criminal Misc. App. 105 (2010) (Kenya), http://www.unicri.it/topics/piracy/database/Kenya_2010_Crim_No_105%20(2010)%20Ruling%20on%20legal%20representation.pdf. Judge Odero quashed an order compelling the Attorney General to provide defense counsel to the suspects, holding it was "ultra vires" and without "legal basis." The judge noted, however, "it would be desirable to have a Legal Aid Scheme in place in this country to cater for suspects who may be unable to engage legal counsel for themselves . . . .". Six Somalis were charged with committing piracy before the Chief Magistrate's Court Mombasa in 2010. *Id.*

> trials. This is the only way that their rights to a fair trial can be guaranteed.[193]

For instance, Article 6 of the ECHR, Right to a Fair Trial, provides that a person charged with a criminal offense have, among other things, "the free assistance of an interpreter if he cannot understand or speak the language used in court."[194] Access to an interpreter[195] as well as legal counsel must be legally separated from the issue of whether a human rights treaty obligation has been breached when a suspect is arrested for committing piracy, a universal crime, and subsequently prosecuted by a country that speaks a different language. Similarly, a suspect's prior insight into a nation's legal system should not reasonably be a dispositive human rights inquiry, even where the prosecution occurs thousands of miles from the alleged criminal act.

Another human rights issue in piracy, and specifically ECHR Article 6, involves the prosecution of a child.[196] An NGO noted, "[c]hildren may be at risk of Article 6 breaches when the justice system does not cater for the child's ability to understand and participate in court proceedings."[197] It is a particularly relevant issue in East Africa, where it is estimated that one-third of Somali pirates are under the age of 18.[198] In 2012, the Indian Navy announced that twenty-five of the sixty-one pirates they arrested were below the age of fifteen, and "at least four of them are just 11 [sic] or so."[199] Further, in 2012 a court in the Seychelles acquitted an

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[193] *Id.*; *see also* Paul Musili Wambua, *The Jurisdictional Challenges to the Prosecution of Piracy Cases in Kenya: Mixed Fortunes for a Perfect Model in the Global War Against Piracy*, 11 WORLD MAR. U. J. MAR. AFF. 95, 110 (2012), http://link.springer.com/article/10.1007%2Fs13437-012-0021-6; *see generally*, Rosemelle Mutoka, *Assessing Current Trends and Efforts to Combat Piracy: A Case Study on Kenya*, 46 CASE WES. RES. J. INT'L L. 125, 133 (2013) (discussing jurisdictional challenges, which include defective charges and insufficiency of evidence: "For instance, Kenyan jurisdiction does not expressly recognise evidence that is photographic or video-based. As a result of this, accused pirates are often released due to technicalities or provisions of evidence rules fall outside existing laws."). A separate concern exists with regard to the Kenyan Children's Department, which in Mutoka's view, "has made little to no concerted effort to ensure that the fundamental rights of the minors charged with piracy are upheld." *Id.* at 134.

[194] ECHR, *supra* note 48, art. 6.

[195] The intersection of human rights and providing an interpreter is discussed in detail, *infra*, pp. 51–52.

[196] Convention on the Rights of the Child, Nov. 20, 1989, 1577 U.N.T.S. 3, art. 1, http://www.ohchr.org/en/professionalinterest/pages/crc.aspx ("[A] child means every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier."); *see generally* Danielle Fritz, Note, *Child Pirates from Somalia: A Call for the International Community to Support the Further Development of Juvenile Justice Systems in Puntland and Somaliland*, 44 CASE W. RES. J. INT'L L. 891 (2012); EUR. CT. H. R., FACTSHEET – PROTECTION OF MINORS (2015), http://www.echr.coe.int/Documents/FS_Minors_ENG.pdf.

[197] *Article 6: The Right to a Fair Trial*, HUM. RTS. REV. 217, 219 (2012), Equality and Human Rights Commission, https://www.equalityhumanrights.com/sites/default/files/ehrc_hrr_full_v1.pdf.

[198] Mark Drumbl, *Child Pirates: Rehabilitation, Reintegration, and Accountability*, 46 CASE W. RES. J. INT'L L. 235, 249 (2013).

[199] Rajat Pandit, *25 of 61 Pirates Arrested by Navy at Sea Are Children Below 15 yrs*, TIMES OF INDIA (Mar. 17, 2011), http://timesofindia.indiatimes.com/india/25-of-61-pirates-arrested-by-Navy-at-sea-are-children-below-15-yrs/articleshow/7723224.cms; *see also* Fritz, *supra* note 196.

eleven-year-old suspected pirate due to his age, opting, however, to provisionally release a twelve-year-old suspect "based upon his being sent back to Somalia."[200]

Prosecuting a minor has triggered discussions at the United Nations and other venues. Though there is no international consensus regarding when a minor can be held criminally responsible for his or her actions, "some commentators argue that the internationally agreed upon prohibition against conscripting children under the age of fifteen into armed forces implies that if a child is too young to fight, then he or she is too young to be held criminally responsible for his actions."[201] In Somalia, for example, those fifteen and over can be criminally charged.[202] A lack of policy guidance in Kenya, for example, on prosecuting child pirates prompted Judge Mutoka to remark, "[t]he [Kenyan] Children's department has made little to no concerted effort to ensure that the fundamental rights of the minors charged with piracy are upheld."[203]

A separate issue involves the transfer of suspected criminals to a third state. An administrative court in Cologne, Germany, in the 2011 case *25 K 4280/09*, addressed whether such action violated the ECHR prohibition on torture, inhuman, and degrading treatment.[204] The German frigate *Rhineland Pfalz* transferred nine suspected Somali pirates to Kenyan authorities.

The Cologne court also addressed and dismissed two other assertions: that the arrest of the pirates violated their human rights and that the transit time to Kenya was not prompt.[205] The court, citing *Medvedyev*, held that there was no evidence to indicate the transfer took any longer than necessary.[206] On the second issue, the court found a sufficient basis for reasonably suspecting piracy and subsequent interdiction, in accordance with the LOS Convention and domestic law.[207] By not imposing a rigid timeline for operational transits, the court appropriately evaluated the issue of promptness.

Regarding the jail where the suspects were transferred, the court held that conditions at Shimo-La-Tewa were "generally" inhuman and degrading, and thus a

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[200] *Captured Child Pirates Sent Back to Somalia*, THE GUARDIAN (Aug. 13, 2012), http://www.theguardian.com/world/2012/aug/14/somalia-middleeast (reporting that "the U.N. Office on Drugs and Crime was helping fly the two back to their families in northern Somalia.").

[201] *Id.*; *see also* Fritz, *supra* note 196 ("The court in the U.S. Office of Military Commissions against Omar Khadr recognized this [age] distinction, holding that neither customary international law nor international treaties binding upon the United States prohibit the trial of a person for alleged violations of the law of nations committed when he was fifteen years of age.").

[202] Letter from Ban Ki-Moon, U.N. Secretary-General, to the President of the Security Council, (Jan. 24, 2011), at 35 n.55, U.N. Doc. S/2011/30 (Jan. 25, 2011), http://cil.nus.edu.sg/wp/wp-content/uploads/2010/10/Lang_report_S-2011-301.pdf.

[203] Mutoka, *supra* note 193, at 134; *see also* Shelly Whitman & Carl Conradi, *Children in Marine Piracy: Our Work in 2013*, THE ROMEO DALLAIRE CHILD SOLDIERS INITIATIVE at 3–4 (Jan. 2014), http://www.childsoldiers.org/wp-content/uploads/2014/02/Piracy_Web.pdf.

[204] Verwaltungsgericht Köln [VG] [Cologne Administrative Court], Nov. 11, 2011, 25 K 4280/09, http://www.justiz.nrw.de/nrwe/ovgs/vg_koeln/j2011/25_K_4280_09urteil20111111.html (Ger.); ECHR, *supra* note 48, art. 3 ("No one shall be subjected to torture or to inhuman or degrading treatment or punishment."); *see also Adjudicating Somali Piracy Cases – German Courts in a Double Bind*, CAMBRIDGE J. INT'L & COMP. L. (Jan. 3, 2013), http://cjicl.org.uk/2013/01/03/adjudicating-somali-piracy-cases-german-courts-in-a-double-bind-2/.

[205] Verwaltungsgericht Köln [VG] [Cologne Administrative Court]], Nov. 11, 2011, 25 K 4280/09, http://www.justiz.nrw.de/nrwe/ovgs/vg_koeln/j2011/25_K_4280_09urteil20111111.html (Ger.).

[206] *Id.*

[207] *Id.*

breach of ECHR Article 3.[208] In June 2015, prison facilities in Kenya, which had been built to house 16,000, were occupied by 53,000.[209] Personnel from an interdicting unit, however, may not reasonably have awareness of land-based prison conditions in another country, if, for example, the transfer occurs pierside or afloat. Regardless, this issue is a legitimate judicial consideration that will continue to be addressed in transfers following maritime law enforcement interdictions.

A similar consideration, a future violation of human rights by another State, could be raised with deportation or transfer to a third state either following a conviction or upon completion of a prison sentence.[210] In a case involving the potential deportation of a drug trafficker from Australia to Iran, the Human Rights Committee established in accordance with the ICCPR applied a standard of "necessary and foreseeable" and "real risk (that is, a necessary and foreseeable consequence) of a violation of his rights under the Covenant."[211]

An additional focus area in a transfer, or surrender, of suspects is the right to an effective remedy. ECHR Article 13 provides, "[e]veryone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity."[212] This functionally requires "a remedy which may prevent transfer and the relevant national authority must be able to examine the Convention compatibility of the transfer order prior to its implementation."[213]

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[208] *Id.*; *see also* United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Standard Minimum Rules for the Treatment of Prisoners, July 31, 1957, http://www.ohchr.org/EN/ProfessionalInterest/Pages/TreatmentOfPrisoners.aspx (providing guidance on accommodations, sanitation, bathing and shower installations, personal hygiene, clothing and bedding, food, exercise and sport, medical services, discipline and punishment, religious practice, and instruments of restraint, among other areas).

[209] Andrew Mwangura, *Somali Pirate Releases Raise Concerns*, IHS MARITIME 360 (July 14, 2015), http://www.ihsmaritime360.com/article/18623/somali-pirate-releases-raise-concerns.

[210] *See* Hum. Rts. Comm., Communication No. 692/1996 A.R.J. v. Australia, U.N. Doc. CCPR/C/D/692/1996 (1997), http://www1.umn.edu/humanrts/undocs/692-1996.html). The Committee noted that the Refugee Review Tribunal, on August 10, 1994, held:

> While it has sympathy for the applicant in that should he return to Iran it is likely that he would face treatment of an extremely harsh nature, the applicant cannot be considered to be a refugee. The applicant must have a well founded fear of being persecuted for one of the reasons stated in the Convention, that is, race, religion, nationality, membership of a particular social group or political opinion. The applicant's fear does not arise for any of those reasons . . . [but] solely out of his conviction for a criminal act . . . . *Id.* at ¶ 2.4.

[211] *Id.* ¶¶ 6.8, 6.10.

[212] ECHR, *supra* note 48, art. 13.

[213] *See* Guilfoyle, *supra* note 66, at 102. Examples of oversight mechanisms include:

> [Italy, which has] brought captured pirates aboard a warship before a judge by video conference for disposition. Similarly, the Netherlands apparently considers Dutch extradition law applicable to cases where pirates are transferred to third States and has law-enforcement personnel and an assistant district attorney embarked on government vessels in the region. While the UK has no such specific oversight mechanism in place . . . foreign detainees held extraterritorially by UK forces may challenge their proposed transfer through judicial review proceedings and seek an interim injunction to prevent their transfer pending hearing.

An interdiction in 2008 by Denmark that resulted in the detention of ten Somali pirates was prescient about the challenges of balancing human rights considerations with operational interdictions. In this case

> After six days of detention and the confiscation of their weapons, ladders, and other implements used to board ships, the Danish government decided to free the pirates by putting them ashore on a Somali beach. The Danish authorities had come to the conclusion that the pirates risked torture and the death penalty if surrendered to [whatever] Somali authorities.[214]

The U.K. Parliament's European Union Committee examined human rights considerations with the potential transfer of a pirate to a third State. The committee asked witnesses whether human rights standards were being met for the transfer, prosecution, and detention of suspected and convicted pirates. Lord Malloch-Brown (then Foreign and Commonwealth Office Minister) provided assurances that U.K. policy "was not to allow transfer to third states of suspected pirates for prosecution" unless the United Kingdom was "satisfied that they would not be subject to cruel treatment, the death penalty or face a trial which was grossly unfair."[215]

A special report of the U.N. Secretary-General on the disposition of Somali pirates and prosecution noted that when a warship transfers a suspect to another State, that person "must be treated in accordance with applicable international human rights obligations . . . ."[216] A bilateral agreement between the European Union (E.U.) and Kenya on transferring Somali pirates included a provision that stated:

> The signatories confirm that they will treat persons transferred under this Exchange of Letters, both prior to and following transfer, humanely and in accordance with international human rights obligations, including the prohibition against torture and cruel, inhumane and degrading treatment or punishment, the prohibition of arbitrary detention and in accordance with the requirement to have a fair trial.
>
> Any transferred person will be treated humanely and will not be subjected to torture or cruel, inhuman or degrading treatment or punishment, will re-

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[214] Tullio Treves, *Piracy, Law of the Sea and Use of Force: Developments off the Coast of Somalia*, 28 BERKELEY J. INT'L L. 1, 13 (2009).

[215] *Combating Somali Piracy: the EU's Naval Operation Atalanta*, UK PARLIAMENT – EU COMM. (2009), http://www.publications.parliament.uk/pa/ld200910/ldselect/ldeucom/103/10304.htm (noting challenges in terminology also exist, including determining whether there is a transfer, deportation, or extradition); *see also* Guilfoyle, *supra* note 66, at 97 (explaining:

> The starting position under both the ECHR and the CAT would then appear congruent: mere words of assurance are insufficient to discharge the obligation. The question is whether assurances can provide 'in their practical application [in individual cases], a sufficient guarantee that [a transferee] would be protected against the risk of [prohibited] treatment.' This involves a wide-ranging contextual assessment, including any monitoring mechanisms established under assurances given.).

[216] U.N. Secretary-General, *Report of the Secretary-General on Specialized Anti-piracy Courts in Somalia and Other States in the Region*, U.N. Doc. S/2012/50 (Jan. 20, 2012), http://www.un.org/en/ga/search/view_doc.asp?symbol=S/2012/50.

> ceive adequate accommodation and nourishment, access to medical treatment and will be able to carry out religious observance. No transferred person will be liable to suffer the death sentence. Kenya will, in accordance with the applicable laws, take steps to ensure that any death sentence is commuted to a sentence of imprisonment.[217]

In a criminal prosecution that involved the imposition of the death penalty, pirates hijacked the *Qana*, a Yemeni oil tanker, and murdered a crewmember in 2009.[218] Following a successful naval interdiction, a Yemini court sentenced six Somali pirates to death.[219] The pirates were also ordered to compensate the victims' families and the company that owned the hijacked vessel.[220] Prior to the *Qana* sentence, Yemen had received more than a dozen suspected pirates for prosecution from various countries, including Russia and Denmark.[221] Following the verdict in Yemen, such transfers from a European warship could not now likely take place (even assuming there was an agreement) because of their imposition of the death penalty.[222]

The punishment for piracy in the United States under 18 U.S.C. § 1651 is imprisonment for life,[223] a sentence that has prompted challenges in court. A federal district court judge in 2014 opted not to impose a life sentence, asserting that such a punishment would contravene the Eighth Amendment's prohibition against cruel and unusual punishment.[224] In part, the court "assessed whether an inference of gross disproportionality arose upon comparing the proposed life sentences with the gravity of the defendants' 1651 piracy offenses."[225] An appellate court in 2015 reversed the district court's punishment, holding that the lower court erred when it invalidated the statute's mandatory life sentence for piracy, and, as a matter of law, is "obliged to impose" a sentence of imprisonment for life.[226]

The appellate court held: "In deciding whether a punishment is cruel and unusual, we must examine the evolving standards of decency that mark the progress of a maturing society. A punishment is cruel and unusual not only when it is inherently barbaric, but also when it is disproportionate to the crime."[227] In part, the court held that the piracy statute "reflects a rational legislative judgment, entitled to

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[217] Agreement on Transfer of Suspected Pirates, E.U.-Kenya, June 3, 2009, http://ec.europa.eu/world/agreements/downloadFile.do?fullText=yes&treatyTransId=13445. *But see* Sarah McGregor, *EU-Kenya Somali-Pirate Treaty 'Violates Rights,' Lawyers Say*, BLOOMBERG.COM (Aug. 19, 2009) (criticizing the accord and quoting Lawyers of the World, an NGO that has represented at least forty-three suspected Somali pirates, stating, "without . . . implementation, the trials will be without legitimacy and a gross violation of the rights of the accused.").

[218] *Yemen Court Sentences Six Somali Pirates to Death*, REUTERS (May 18, 2010), http://www.reuters.com/article/2010/05/18/us-yemen-piracy-idUSTRE64H3EL20100518.

[219] *Id.*

[220] *Id.*

[221] *Id.*

[222] *EU's Naval Operation Atalanta*, *supra* note 215.

[223] 18 U.S.C. § 1651 (2016) (providing "whoever, on the high seas, commits the crime of piracy as defined by the law of nations, and is afterwards brought into or found in the United States, shall be imprisoned for life.").

[224] United States v. Said, 3 F. Supp. 3d 515 (E.D. Va. 2014), *rev'd* 798 F.3d 182 (4th Cir. 2015).

[225] United States v. Said, 798 F.3d 182, 192 (4th Cir. 2015).

[226] *Id.* at 200.

[227] *Id.* at 196 (quoting Graham v. Florida, 560 U.S. 48, 58 (2010)).

deference that piracy in international waters is a crime deserving of one of the harshest of penalties."[228] The court further held:

> Victims of piracy are robbed of their vessels, kidnapped, held hostage, and even tortured and murdered, while pirates are often able to find safe refuge in the territorial waters off Somalia and collect multi-million dollar ransom payments. In these circumstances, we agree with the government that Congress could with reason conclude [that piracy] calls for the strong medicine of a life sentence for those who are apprehended.[229]

In November 2014, an Intermediate Court in Mauritius acquitted twelve Somali piracy suspects charged with attacking the Panama-flagged *MSC Jasmine*, interdicted by a French naval vessel, due to a finding there was insufficient evidence—a peculiar issue related to the Mauritian definition of piracy[230]—and breaches of human rights requirements.[231] Largely overshadowed by the two European Court of Human Rights cases in December 2014 that awarded financial compensation to convicted pirates, the forty-five-page opinion in *Police v. Abdeoulkader* held, in part, that there were "grave" and "flagrant" human rights breaches.[232] Regarding the detention of pirates on a warship following their attack against *MSC Jasmine*, the court held:

> [W]e have found no provisions as regards contact with a lawyer or family. In short, these twelve persons were kept completely incommunicado during the several days on board the [French frigate] *Surcouf*, based on the domes-

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[228] *Id.* at 199 (citation omitted) (internal quotation omitted) (noting that "piracy was of such significance to the Framers that they expressly accorded Congress, in what is known as the Define and Punish Clause, the power to define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations."). The court favorably quoted Judge Wilkinson's decision in *United States v. Beyle*, stating,

> [t]he United States and its allies are engaged in a multinational battle against piracy in the waters off the Horn of Africa. Through the Gulf of Aden and much of the Indian Ocean, Somalia-based pirates have launched attacks against commercial and recreational vessels, from large freighters to personal yachts. Piracy poses a threat not only to the free flow of global commerce, but also to the individuals who navigate the seas." *Id.* (quoting 782 F.3d 159 (4th Cir. 2015)).

[229] *Id.* at 199–200 (citation omitted) (internal quotation omitted).

[230] Police v. Abdeoulkader, 2014 INT 311, Case No. 850/2013 (2014), *rev'd and remitted* Director of Public Prosecutions v. Abdeoulkader, 2015 S.C.J. 452, Rec. No. 8702, Dec. 8, 2015 (Mauritius) (copy on file with author). The prosecutor, despite acknowledging that "for private ends" is an element of piracy, believed that they did not need to present evidence to prove "for private ends," a position with which the court did not agree. The court held that under Mauritius' Piracy and Maritime Violence Act, "high seas" includes only waters outside of two hundred nautical miles from a coast. Because the court held the attack occurred 140 miles from the Somali coast, it concluded there could be no violation under Mauritian law. *Id.* In contrast, the U.S. Fourth Circuit in *United States v. Beyle*, 782 F.3d 159, 173 (4th Cir. 2015), affirmed convictions for, *inter alia*, piracy and murder. The *Beyle* court held that "[t]he 'high seas' include areas of the seas that are outside the territorial seas of any nation. A nation's territorial seas are generally limited to an area within 12 nautical miles of the nation's coast." *Id.* at 168.

[231] Police v. Abdeoulkader, 2014 INT 311, Cause No. 850/2013 (2014), *rev'd and remitted* Director of Public Prosecutions v. Abdeoulkader, 2015 S.C.J. 452, Rec. No. 8702, Dec. 8, 2015 (Mauritius) (copy on file with author).

[232] *Id.* ¶ 139.

> tic French laws mentioned by the Commandant. Thus, several question marks might be raised as to whether, and in fact, the detention was not arbitrary.[233]

The court in *Police v. Abdeoulkader* also asserted, citing to Medvedyev, "judicial control on the first appearance of an arrested individual must above all be prompt [and includes] a strict time constraint [that] leave little flexibility in interpretation."[234] The court based its assertion on ECHR Article 5(3): "Everyone arrested or detained in accordance with the provisions of paragraph 1(c) of this Article shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial."[235]

The Mauritian Court looked to European Court of Human Rights cases to compare geographic distances covered. "We do not find [the distance plied by the *Surcouf*] to be comparable with the considerable distance that have to be covered by the vessels in *Rigopoulos* and *Medvedyev.*"[236] The court continued, "There is no evidence whatsoever of sea conditions having being rough, which would have prevented the swift navigation of the French vessel to the near land."[237]

While the Mauritian court looked to *Rigopoulos*, it selectively opted not to consider the finding that it was unrealistic to expect Spanish authorities to request assistance from the British authorities to divert the *Archangelos*. The court in *Police v. Abdeoulkader* held ". . . these twelve accused parties could have been brought to land within a shorter delay either to Kenya, Seychelles or even Mauritius."[238] In reaching this conclusion, the court dismissed operational decisions made by naval commanders: "There is no doubt that the French Navy or other military vessels present in the region in the operation against piracy had such transport facilities, *including air transport*, to bring them much sooner before a judicial authority."[239]

Police v. Abdeoulkader also cited France's previous use of air assets in recent counter piracy operations, but not in this instance, to conclude that wholly exceptional circumstances did not exist that would justify the delay in bringing pirates to a magistrate. The court held that there was no evidence that "during this period of detention on board *Surcouf* [the suspects] were informed of their situation and advised of their rights . . . ."[240] The court also held that "all these circumstances make it clear that there is a flagrant breach of the requirement guaranteed under section 5(3) of the Constitution as well as Article 5(3) of the ECHR."[241]

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[233] *Id.* ¶ 132.

[234] *Id.* ¶ 133.

[235] ECHR, *supra* note 48, art. 5.

[236] Police v. Abdeoulkader, 2014 INT 311, Cause No. 850/2013 ¶ 135 (2014), *rev'd and remitted* Director of Public Prosecutions v. Abdeoulkader, 2015 S.C.J. 452, Rec. No. 8702, Dec. 8, 2015 (Mauritius) (copy on file with author).

[237] *Id.*

[238] *Id.*

[239] *Id.* (emphasis added).

[240] *Id.*

[241] *Id.* ¶ 138.

In *Director of Public Prosecutions v. Abdeoulkader*, the Supreme Court of Mauritius in 2015 correctly quashed the decision in *Police v. Abdeoulkader*, citing to numerous errors on the law of the sea, evidence, and human rights.[242] In a piercing opinion, the Supreme Court held, among other things, that the trial court erred in

> Findings unsupported by evidence and based on speculation, on the detention issue . . .
>
> Wrongly [applying] the law and placed undue reliance on the dissenting opinion in *Medvedyev* to conclude that there was undue delay in relation to the detention.
>
> Concluding that the period of detention would have warranted a stay of proceedings 'outright' against all accused parties.
>
> Failing to appreciate the existence of 'wholly exceptional circumstances' relating to apprehension at sea in a piracy context and which would justify delay, if any.
>
> [Failing] to appreciate that delay during detention, if any, was not a ground justifying the dismissal of the information.
>
> [Exceeding] its jurisdiction in declaring a breach of Article 5(3) of the European Convention on Human Rights in relation to the detention period.[243]

The sweeping repudiation by the Supreme Court was legally appropriate to judicial overreach on, among other issues, the type of platform a command must employ following a counter-piracy interdiction during a steady sea state and when collaboration should occur between partner nations. Thus far, opinions that seek to supplant operational and diplomatic decisions remain anomalies in the small but growing body of human rights in the context of maritime law enforcement.

In other venues, Somali pirates asserted in a U.S. federal district court that they had been mistreated following an interdiction, with claims that U.S. Navy sailors "threatened to feed them to sharks, held them in painful positions, and physically and verbally abused them."[244] Additional claims included being blindfolded, being forced to "urinate overboard" and "defecate in buckets while under constant watch by armed guards," being made to wear Navy-issued "poopy suits," and being forced to sleep outside.[245] A federal district court in Virginia concluded that, contrary to assertions, the evidence demonstrated that the defendants were "safely and

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[242] Director of Public Prosecutions v. Abdeoulkader, 2015 S.C.J. 452, Rec. No. 8702, Dec. 8, 2015 (Mauritius) (copy on file with author).

[243] *Id.* at 20.

[244] *Sailors Defend Pirate Suspects Treatment*, VIRGINIAN-PILOT (Sept. 10, 2010) (copy on file with author); *see also* Tim McGlone, *Sailor Says Somalis Were Stripped, Cuffed*, HAMPTON ROADS (Nov. 17, 2010), http://hamptonroads.com/2010/11/sailor-says-somalis-were-stripped-cuffed#.

[245] *Sailors Defend Pirate Suspects Treatment*, *supra* note 244.

humanely treated during their time on board the USS Nicholas, and were not subjected to any abuse, threats, or mistreatment . . . ."[246]

Human rights issues have similarly surfaced in Asia during prosecutions for piracy. In a 2011 piracy prosecution in Malaysia, the defense unsuccessfully raised challenges on due process, fair treatment, and charging a minor.[247] The accused was convicted for his involvement in an attack on "a Panamanian-flagged, Malaysian-chartered, Filipino-crewed, Singapore-bound tanker, the *MT Bunga Laurel* " in the Gulf of Aden.[248]

South Korean courts in piracy prosecutions have addressed legal basis and sentence appropriateness, though a 2011 opinion, for example, didn't explicitly use the term human rights. The Busan High Court, First Criminal Investigation Department affirmed convictions in 2011 of four Somali pirates for

> launching a collective and systematic attack upon Korean armed forces lawfully dispatched for the participation in international efforts for the safety of international waters, as well as support for safe activities of our vessels; further aiming to get rich quick, with precious human lives as collateral, a motivation which is extremely selfish and avaricious; and the daring and indiscriminate nature of the acts of piracy in this case have already paid dire consequences as eight pirates including the leader were shot dead during the navy's second rescue operation.[249]

On the issue of sentence appropriateness, which included, among other judgments, life in prison for maritime robbery and attempted murder, the Korean court held, "the punishments mandated by the trial court, directly reflecting the majority opinion of the jury, was within the reasonable scope of assessment and does not appear to be too light or too heavy."[250] In other venues, a Malaysian court awarded "ten years in jail and a whipping" to nine Indonesians convicted of the January 2015 hijacking of the chemical tanker *Sun Birdie*, and a Spanish court in 2011 sentenced Somali pirates to confinement for a term of 439 years.[251]

The human rights issue of an interpreter, or translator, in the context of Somali piracy prosecutions has unfolded in Japanese and South Korean courtrooms. Prosecutors in Japan were forced to delay a criminal case against four Somali pi-

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[246] United States v. Hasan, 747 F. Supp. 2d 642, 661 (E.D. Va. 2010). *See also id.* at 672, where the court remarked that "video footage of the initial processing of Hasan, Ali, and Dire upon their capture by the crew of the USS Nicholas, as well as of the destruction of the assault boat . . . reflects no mistreatment of, or threats against, those Defendants."

[247] *See Sea Views*, MARITIME INST. MALAYSIA, Feb. 21, 2011, at 3, http://www.mima.gov.my/v2/data/pdf/sea_view/39.2-2011%20walking%20the%20plank%20mm%2021feb11.pdf.

[248] *Id.*

[249] Busan High Court [Busan High Ct.], 2011No349, Sept. 9, 2011 (S. Kor.).

[250] *Id.*

[251] Sam Chambers, *Ten Years in Jail and a Whipping for Indonesian Pirates*, SPLASH 24/7 (June 25, 2015), http://splash247.com/ten-years-in-jail-and-a-whipping-for-indonesian-pirates/; Al Goodman, *Somali Pirates Get 439-year Sentences*, CNN (May 3, 2011), http://www.cnn.com/2011/WORLD/europe/05/03/spain.pirates.convicted/index.html.

rates in order to obtain Somali interpreters.[252] Because there were no known Somali-Japanese interpreters, the prosecutors had to secure several Somali-English interpreters and then joined them with English-Japanese interpreters. A naval interdiction in March 2011 rescued a hijacked Bahamian-flagged oil tanker that was operated by a Japanese company, though the trial did not begin until January 2013, prompting a defense attorney to assert "the lack of interpreters for the defendants infringes on their human rights."[253]

ICCPR Article 14 provides that a defendant shall be entitled "[t]o have the free assistance of an interpreter if he cannot understand or speak the language used in court . . . ."[254] Each of the lawyers in the case in Japan (between 2011 and 2013) sought their own interpreters, and "struggled with the cases, not only because of the language barrier but also because they had no access to the crime scene—the middle of the Arabian Sea—nor could they invite relatives to testify on behalf of their clients."[255]

Defense counsel access to a crime scene is not a fundamental human rights issue, and in fact, it can sufficiently be addressed through a variety of judicial and procedural safeguards, though the issue of having a timely and competent interpreter represents a valid concern. "In several recent criminal trials, some interpreters had trouble understanding the English spoken by native speakers, often interrupting the proceedings to ask that statements be repeated, or they sometimes misinterpreted remarks without correction. Japanese interpreters often had trouble translating into English, unable to find the right words or condensing the contents. Some even struggled to form sentences in English."[256] The four pirates were convicted by a Japanese court and sentenced to between five-year and eleven-year prison terms.[257]

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[252] Masami Ito, *Somali Pirates' Trials Highlight Role of Interpreters: Language Barrier Compromises Fairness, Defendants' Lawyers Say*, JAPAN TIMES (Mar. 21, 2013), http://www.japantimes.co.jp/news/2013/03/21/national/somali-pirates-trials-highlight-role-of-interpreters/#.VNfZLlPF-Hx.

[253] *Id.*; *see also* Setsuko Kamiya, *Court Hands Somali Pirates 10-year Term*, JAPAN TIMES (Feb. 2, 2013), http://www.japantimes.co.jp/news/2013/02/02/national/court-hands-somali-pirates-10-year-term/#.VNfjI1PF-Hw.

[254] ICCPR, *supra* note 44, art. 14(f); *see also* ECHR, *supra* note 48, art. 6 ("Everyone charged with a criminal offense has the following minimum rights . . . to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him [and] to have the free assistance of an interpreter if he cannot understand or speak the language used in court."); Michael P. Scharf, *Talking Foreign Policy on Piracy*, 46 CASE W. RES. J. INT'L L. 411, 427 (2015), http://scholarlycommons.law.case.edu/cgi/viewcontent.cgi?article=1045&context=jil (including a discussion by Judge Rosemelle Mutoka of a Kenyan criminal prosecution involving the intersection of three languages).

[255] Ito, *supra* note 252.

[256] *Id.*; *see also* Kamiya, *supra* note 253 ("There were 4,067 interpreters handling 62 languages nationwide (in Japan) on the Supreme Court's list . . . including Chinese, English, Tagalog, and Korean. Other relatively uncommon languages, such as Hebrew, Swahili and Arabic were also covered. But not Somali.").

[257] Ito, *supra* note 252. Two pirates received ten-year terms, one received an eleven-year term, and the fourth was sentenced to between five and nine years. *Id.* An eighteen-year old Somali, "considered a minor under Japanese law," was sentenced to confinement for five to nine years. *Somalia: Japanese Court Sentences Teenage Somali Pirate*, ALLAFRICA (Feb. 26, 2013), http://allafrica.com/stories/201302270812.html; *see also Japanese Court Sentences Suspected Somali Pirate to 11 Years Imprisonment*, INFORMATIONNIGERIA (Apr. 12, 2013), http://www.informationng.com/2013/04/japanese-court-sentences-suspected-somali-pirate-to-11-years-imprisonment.html.

A separate focus area is the imposition of human rights obligations, and specifically, a duty to investigate, on a State for the conduct of privately contracted armed security personnel (PCASP) on the high seas.[258] The European Court of Human Rights judgment in *Gray v. Germany,*[259] factually unrelated to the maritime environment, is nevertheless instructive on whether a duty could exist to investigate actions taken by PCASP on vessels under its registry.[260]

Gray v. Germany involved allegations of medical malpractice by a German doctor in the United Kingdom that resulted in the death of a patient.[261] The doctor subsequently returned to Germany, where the Germans investigated, refused an extradition request from the United Kingdom, and imposed punishment. The petitioners challenged the sufficiency and transparency of the German investigation and the punishment, raising breaches of ECHR Article 2(1) ("Everyone's right to life shall be protected by law . . . .").[262]

Though the Grand Chamber did not find a human rights violation, of relevance to regulating and overseeing the conduct of PCASP is the holding that a "State's obligation under Article 2 of the [ECHR] Convention will not be satisfied if the protection afforded by domestic law exists only in theory: Above all, it must also operate effectively in practice and that requires a prompt examination of the case without unnecessary delays."[263]

To fill a policy void, NGOs in June 2015 drafted non-binding guidance for the private sector regarding deprivation of liberty at sea.[264] The fifteen-page docu-

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[258] Jessica N.M. Schechinger, *Responsibility For Human Rights Violations Arising From the Use of Privately Contracted Armed Security Personnel Against Piracy: Re-Emphasizing the Primary Role and Obligation of Flag States* 11, 16 (Amsterdam L. Sch., Research Paper No.2014-58, 2014), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2528502. The article states, in part:

> Although concepts of jurisdiction differ and complicate matters . . . this does not detract from the obligation flag states have to abide by the human rights standards and to monitor their vessels on the high seas. In order for the obligation to investigate to be triggered, a jurisdictional link must exist. This means that in the case of a flag state, the obligation arises to investigate incidents that have occurred on vessels flying its flag . . . . [W]hile in principle there is nothing wrong with outsourcing security at sea, there is a risk that flag states do nothing in response to, or even turn a blind eye to, human rights violations that may take place as a consequence. Such outsourcing does not absolve flag states from their obligations under international law regarding PCASP, to whom they have *de facto* delegated the task of providing security.

[259] Gray v. Germany, App. No. 49278/09, Eur. Ct. H.R. (2014), http://hudoc.echr.coe.int/app/conversion/pdf/?library=ECHR&id=001-144123&filename=001-144123.pdf.

[260] Ben Hardman & David Hammond, *Human Rights Case Has Maritime Implications*, MARITIME EXECUTIVE (Feb. 23, 2015), http://www.maritime-executive.com/features/human-rights-case-has-maritime-implications.

[261] Gray v. Germany, App. No. 49278/09, Eur. Ct. H.R. ¶ 4 , (2014), http://hudoc.echr.coe.int/app/conversion/pdf/?library=ECHR&id=001-144123&filename=001-144123.pdf.

[262] *Id.* ¶ 60 (raising Article 8 in the alternative: "Everyone has the right to respect for his private and family life, his home and his correspondence . . . .").

[263] *Id.* ¶ 82; *see also id.* ¶ 95 ("The Court concludes that in the present case the German authorities have provided for effective remedies with a view to determining the cause of the applicants' father's death as well as U.'s related responsibility. There is further nothing to establish that the criminal investigations and proceedings instituted on the initiative of the German authorities in relation to Mr. Gray's death fell short of the procedural guarantees inherent in article 2, § 1 of the Convention.").

[264] David Hammond & Anna Petrig, *Deprivation of Liberty at Sea: Independent International Guidance on Deprivation of Liberty at Sea by Shipmasters, Crew and/or Privately Contracted Armed*

ment includes several sections with explicit recommendations to protect human rights.[265]

The UNODC estimated in 2013 that more than 1200 suspected or convicted Somali pirates were detained in twenty-one nations throughout the world.[266] Jack Lang addressed human rights in his report to the U.N. Security Council on issues related to prosecuting Somali pirates: "Respect for international human rights law, which requires, at the judicial level, a judgment rendered by an independent and impartial court within a reasonable time and with due protection of defendants' rights and, at the correctional level, conditions of detention that meet international standards, provisions for social reintegration and criminal punishment that excludes the death penalty . . . ."[267] Mr. Lang's report proposed the adoption of a legal framework for detention at sea that is in "compliance with international human rights law and *compatible with operational constraints*."[268] Further, and importantly, Mr. Lang added, "The procedure must not be subject to deadlines incompatible with operational constraints."[269] Mr. Lang insightfully, and correctly, identified that judicial opinions on human rights protections must include operational considerations.

Many of the judicial decisions regarding pirates addressed human rights, though clear guidance on the maritime law enforcement/human rights intersection has yet to be forged. Well-documented injuries inflicted upon the victims of piracy, as well as the devastating effects on their families, and significant economic costs exist alongside court rulings that are increasingly turning the high seas into a consequence-free zone where illicit conduct cannot sufficiently be addressed through

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Personnel, HUM. RTS. AT SEA (2015), https://www.humanrightsatsea.org/wp-content/uploads/2015/06/HRAS_DoL-dps.pdf.

[265] *E.g.*, *id.* ¶ 15 (stating that specific human rights to be respected include:

Shipmasters, crew and PCASP responsible for the supervision and handling of criminal suspects deprived of their liberty on board a private vessel must respect fundamental principles of relevant human rights which include, as a minimum, the following: Humane Treatment. They must treat criminal suspects with humanity and with respect for their inherent dignity.).

[266] U.N. OFFICE ON DRUGS AND CRIME, *Counter Piracy Programme: Support to the Trial and Related Treatment of Piracy Suspects* (Mar. 2013), http://www.unodc.org/documents/easternafrica/piracy/UNODC_Brochure_Issue_11_wv.pdf.

[267] U.N. Secretary-General Letter, *supra* note 202, ¶ 10.

[268] *Id.* at 3 (emphasis added); *see also id.* ¶ 53–55 (reporting:

> The detention of suspected pirates at sea involves a number of operational difficulties. Warships do not always have a secure location in which to keep such persons, so naval forces must be able to transfer them swiftly. However, where the relevant agreements are not applied automatically, a series of procedures must be initiated in each potential host State, and there is often no positive outcome for several days. In addition, there are often constitutional constraints limiting the deprivation of liberty to one day or 48 hours from capture to appearance before a judge (examples are Germany, Kenya, the Russian Federation and Spain). Moreover, most States do not have a legal framework for detention at sea. This is true even of States members of the European Union, which are bound by Article 5 of the European Convention for the Protection of Human Rights and Fundamental Freedoms. The requirement for a legal framework for detention at sea was reiterated by the European Court of Human Rights in its judgments of 10 July 2008 and 29 March 2009 on the *Medvedyev* case. Legislative reform aimed at introducing procedures for detention at sea are therefore desirable where constitutionally permitted. Such reform must guarantee respect for human rights on board through external control. The swift determination of jurisdiction is an important factor in order to streamline the procedure.).

[269] *Id.* ¶ 55.

judicial process. If it is a violation of ECHR Article 3 to transfer Somali pirates to Kenya for prosecution, for example, and transporting prisoners to European venues could pose an undue burden on the accused due to the distance from their families during incarceration or challenges with respect to translation and legal services, some countries may reasonably, and unfortunately, view the release of prisoners (and their escape of judicial accountability) as the only viable solution. Judicial recognition of underway challenges and acknowledgement that operations occurring far from homeport present difficult logistics issues may very well represent an enduring legacy of counter-piracy operations in the Horn of Africa.

V. MARITIME MIGRATION

A. Background

The numbers are both staggering and disturbing: The United Nations High Commissioner for Refugees (UNHCR) estimates that approximately 348,000 people in 2014 sought to migrate via maritime conveyances, frequently in exceedingly dangerous conditions.[270] In just one geographic area, the Mediterranean Sea, an estimated 3500 migrants died in 2014.[271] In 2015 and 2016, the situation worsened.[272] The International Organization for Migration reported there were more than one million arrivals to Europe by sea in 2015—with 3770 dead or missing—and in the first five months of 2016, 1655 migrants were dead or missing.[273] International

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[270] Press Release, U.N. High Comm'r for Refugees, Focus on Saving Lives, Says UNHCR (Dec. 10, 2014), http://www.unhcr.org/5481bf796.html.

[271] *Need for Action to Address Unsafe Migration by Sea*, SAFETY4SEA (Feb. 16, 2015), http://www.safety4sea.com/need-for-action-to-address-unsafe-migration-by-sea-23470; *see also* Jethro Mullen & Ashley Fantz, *Hundreds of Migrant Deaths at Sea: What Is Europe Going to Do?,* CNN (Apr. 20, 2015), http://www.cnn.com/2015/04/20/africa/italy-migrant-boat-capsizes (stating that "[s]ince the beginning of 2015, more than 35,000 refugees and migrants have crossed the Mediterranean Sea – 23,500 have landed in Italy and more than 12,000 in Greece.").

[272] Press Release, Int'l. Org. for Migration (IOM), With Increasing Child Deaths at Sea, IOM and U.N. Partner Agencies Urge Greater Protection for Migrants and Refugees (Feb. 19, 2016), http://www.iom.int/news/increasing-child-deaths-sea-iom-and-un-partner-agencies-urge-greater-protection-migrants-and ("An average of two children have drowned everyday since September 2015 [through February 19, 2016] as their families try to cross the eastern Mediterranean, and the number of child deaths is growing . . . . During the first six weeks of 2016, 410 people drowned out of the 80,000 cross the eastern Mediterranean. This amounts to a 35-fold increase year-on-year from 2015."); *see also* Robert-Jan Bartunek, *Europe Struggles to Respond as Migrants Numbers Rise Threefold*, REUTERS (Aug. 18, 2015), http://www.reuters.com/article/2015/08/18/us-europe-migrants-idUSKCN0QN1WH20150818 (reporting:

> [m]ore than three times as many migrants were tracked entering the European Union by irregular means last month than a year ago, official data showed on Tuesday, many of them landing on Greek islands after fleeing conflict in Syria. While the increase recorded by the European Union's border control agency Frontex may be partly due to better monitoring, it highlighted the scale of a crisis that has led to more than 2,000 deaths this year as desperate migrants take to rickety boats.).

[273] International Organization for Migration (IOM), Compilation of Available Data and Information: Reporting Period 2015, https://www.iom.int/sites/default/files/situation_reports/file/Mixed-Flows-Mediterranean-and-Beyond-Compilation-Overview-2015.pdf; *see also* IOM Global Migration Data Analysis Centre, IOM Missing migrants Project, http://iomgmdac.org/missing-migrants-

Maritime Organization (IMO) Secretary General Koji Sekimizu stated, "it is time to stop illegal, unregulated passage arranged by people smugglers. Not only do they put lives of the migrants in danger, they also endanger the rescue services and merchant shipping which take part in the rescue operations . . . . It is putting an intolerable strain on rescue services and on merchant vessels."[274]

The U.N. Security Council and IMO, among others, frequently cite the 1951 Refugee Convention and its 1967 Protocol (together, "1951 Convention"), in the context of maritime migration.[275] Nations and scholars, however, disagree on the relevance of an instrument "designed in and for a different era."[276]

The challenge is much broader, however, than the application of one convention. UNHCR observed, "States face considerable challenges as they try and reconcile their obligations under the [1951] Convention with problems raised by the mixed nature of migratory movements, misuse of the asylum system, increasing costs, the growth in smuggling and trafficking of people, and the struggle to manifest international solidarity to resolve the refugee situation."[277]

Boardings on the water occur every day by law enforcement assets across the world for safety reasons—to rescue distressed mariners, crew, and passengers—as well as for security and enforcement to pursue criminals or safeguard national borders. Maritime interdictions in the context of migrants[278] may occur to rescue those on an unsafe vessel (or in the water), arrest those who profit from, or organ-

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project/(reporting that "over 5,400 migrants around the world lost their lives while migrating in 2015.") (last visited May 26, 2016).

[274] *Need for Action*, *supra* note 271. Mr. Sekimizu added, "we do not seek to prevent migration. People have the human right to migrate." *Id. See also, EU Operational Guidelines on Places of Refuge,* Version 3 – Final 13 November 2015, http://ec.europa.eu/transport/modes/maritime/digital-services/doc/por-operational-guidelines.pdf. The E.U. guidelines provide "procedures for international coordination and decision-making" to "accommodate ships in need of assistance." *Id.* 4.

[275] *See, e.g*, S.C. Res. 2240 (Oct. 9, 2015); IMO, UNHCR, & INT'L CHAMBER OF SHIPPING, RESCUE AT SEA: A GUIDE TO PRINCIPLES AND PRACTICE APPLIED TO REFUGEES AND MIGRANTS (Jan. 2015), http://www.ics-shipping.org/docs/default-source/resources/safety-security-and-operations/imo-unhcr-ics-rescue-at-sea-guide-to-principles-and-practice-as-applied-to-refugees-and-migrants.pdf?sfvrsn=23.

[276] Adrienne Milbank, *Research Paper*, *The Problem with the 1951 Refugee Convention*, Parliament of Australia, Social Policy Group, (Sept. 5, 2000), http://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/pubs/rp/rp0001/01RP05#major; s*ee also* Sreya Sen, *Re-Conceptualizing Refugees & Forced Migration in the 21st Century*, REFUGEE REVIEW, https://refugeereview2.wordpress.com/opinion-pieces/understanding-indias-refusal-to-accede-to-the-1951-refugee-convention-context-and-critique-by-sreya-sen/. And, Thailand "has long refused to ratify the 1951 Refugee Convention, citing national security concerns." Editorial, *Recognise Refugees Now*, BANGKOK POST (Oct. 9, 2015), http://www.unhcr.org/cgi-bin/texis/vtx/refdaily?pass=52fc6fbd5&id=55f268ef5.

[277] U.N. High Comm'r for Refugees, Note on International Protection, U.N. Doc. A/AC.96/830 (Sept. 7, 1994), http://www.unhcr.org/3f0a935f2.html.

[278] Use of the word "migrants" has sparked considerable debate. For instance, "[n]ews website al-Jazeera has decided it will not use migrants and 'will instead where appropriate, say refugee.' An online editor for the network wrote 'it has evolved from its dictionary definitions into a tool that dehumanizes and distances, a blunt pejorative.' A Washington Post piece asked if it was time to ditch the word . . . . There are some who dislike the term because it implies something voluntary but that it is applied to people fleeing danger." Camila Ruz, *The Battle Over the Words Used to Describe Migrants*, BBC (Aug. 28, 2015), http://www.bbc.com/news/magazine-34061097?post_id=1454757634854405_1454757624854406. The phrases illegal immigrant or illegal migrant are even "more controversial" prompting the U.N. and E.U. parliament calls to end the use of the phrase. Others, however, "disagree, saying the phrase can be a useful description." *Id.*

ize, illegal transits, or to stop a vessel from reaching a nation's border.[279] Such interdictions have been the subject of judicial proceedings, impassioned debates in multinational venues, and extensive media coverage. Thus, four distinct, potentially overlapping, areas in a maritime migration interdiction spectrum include:

(1) Conducting a rescue;[280]

(2) Protecting border security and national interests;[281]

(3) Arresting (and potentially detaining aboard a government vessel) those illicitly transporting migrants; and

(4) Resolving asylum claims and determining disposition.[282]

While a duty to render assistance is contained in the SOLAS, Salvage, and LOS Conventions, and implemented through the SAR Convention, the U.N. Convention Against Transnational Organized Crime and its 2000 Protocol Against the Smuggling of Migrants by Land, Air, and Sea provides authority to pursue criminal activity associated with illegal transportation.[283] Although maritime enforcement assets may be involved in a boarding solely to conduct a rescue, this Article does not address issues associated with maritime search and rescue (SAR). "Rescue at sea is different from the act of maritime enforcement amounting to interception, differing in both intention and purpose."[284] There is overlap, though, when the rescue coincides with protecting borders, enforcing national laws, or involves disposition decisions, prompting the IMO to note that the array of considerations include:

> [T]he need for States to respect and ensure respect for the rights and dignity of the persons rescued at sea regardless of their status; their legitimate interest to maintain effective border and immigration controls and to prevent and combat transnational organized crimes such as the smuggling of migrants and trafficking in human beings; the need to meet the immediate humanitarian requirements of rescued persons . . . [and] the need to maintain security and stability in international shipping.[285]

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[279] PATRICIA MALLIA, MIGRANT SMUGGLING BY SEA: COMBATING A CURRENT THREAT TO MARITIME SECURITY THROUGH THE CREATION OF A COOPERATIVE FRAMEWORK 79–109 (2010); *see also* Milbank, *supra* note 276.

[280] Issues related to delivery to a place of safety are outside the scope of this Article.

[281] MALLIA, *supra* note 279.

[282] *Id.*

[283] The Protocol provides: "A State Party that has reasonable grounds to suspect that a vessel is engaged in the smuggling of migrants by sea and is without nationality or may be assimilated to a vessel without nationality may board and search the vessel. If evidence confirming the suspicion is found, that State Party shall take appropriate measures in accordance with relevant domestic and international law." Protocol Against the Smuggling of Migrants by Land, Sea and Air, art. 8, ¶ 7, Nov. 15, 2000, 2241 U.N.T.S. 507.

[284] MALLIA, *supra* note 279, at 99; s*ee also* Milbank, *supra* note 276.

[285] *Oceans and the Law of the Sea*, ¶ 95, U.N. Doc. A/58/65.

B. Discussion

The tremendous and tragic increase in maritime migration has not, unfortunately, clarified how to balance border security considerations with SAR, humanitarian, and criminal action. Judicial opinions examined in this Part include *Musa v. Malta*, *Issa v. Turkey*, *Sharifi v. Italy*, *Sale v. Haitian Ctrs. Council*, *Haitian Centre for Human Rights v. United States*, *CPCF v Minister for Immigration and Border Protection*, and *Saadi v. Italy*, among others.[286] These cases addressed effective control and State responsibility, obligations when transferring to a third State, criteria for "assurances," and ensuring safety of life.

Suso Musa involved a Sierra Leone national who entered Malta in an irregular manner by boat, prompting Malta to assert, "detention was necessary to safeguard national security, to ensure the smooth provision of services and to guarantee an efficient asylum procedure" and strongly object to the European Court of Human Rights allowing applicants to circumvent domestic remedies.[287] With parallels to detention conditions that were addressed in the Cologne, Germany Kenyan piracy case (*25 K 4280/09*), the court in *Suso Musa* noted that Safi B-Block

> was an apartment-style building entirely closed off by chicken wire and constantly guarded by soldiers or security officers . . . . Living conditions were cramped, access to natural light was insufficient and ventilation very poor. Further, access to running water was limited, as well as access to hot water, the latter being unavailable for prolonged periods.[288]

The *Suso Musa* court held that the Maltese "national system failed as a whole to protect the applicant from arbitrary detention, and . . . his prolonged detention following the determination of his asylum claim [is not compatible] with [ECHR 5(1)]."[289] Thus, the "Maltese legal system did not provide for a procedure capable of avoiding the risk of arbitrary detention pending deportation."[290] The court also specifically held that barracks conditions were a violation of ECHR 5(1) and recommended that Malta "order a mechanism which allows individuals taking proceedings to determine the lawfulness of their detention to obtain of their claim within Convention-compatible time-limits."[291]

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[286] Sale v. Haitian Centers Council, Inc., 509 U.S. 155 (1993); *CPCF v. Minister for Immigration and Border Protection* [2015] HCA 1 (Austl.), http://eresources.hcourt.gov.au/downloadPdf/2015/HCA/1; Sharifi v. Italy, App. No. 16643/09, Eur. Ct. H.R. (2014), http://hudoc.echr.coe.int/eng#{"display":[2],"languageisocode":["ENG"],"appno":["16643/09"],"itemid":["002-10215"]}; Musa v. Malta, App. No. 42337/12, Eur. Ct. H.R. (2013), http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-122893; Saadi v. Italy, App. No. 37201/06, Eur. Ct. H.R. 179 (2008), http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-85276; Haitian Centre for Human Rights v. United States, Merits, Judgment, Inter-Am. H.R. No. 51/96 (Mar. 13, 1997), https://www1.umn.edu/humanrts/cases/1996/unitedstates51-96.htm.

[287] Musa v. Malta, App. No. 42337/12, Eur. Ct. H.R. 73 (2013), http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-122893.

[288] *Id.* at 60.

[289] *Id.* at 106.

[290] *Id.* at 105.

[291] *Id.* at 122.

In *Sharifi*, the court held that an

> automatic return, implemented by Italian authorities in the ports of the Adriatic Sea, of persons who, in the majority of cases, were handed over to ferry captains with a view to being removed to Greece [deprived the migrants] of any procedural and substantive rights . . . . The Italian authorities ought to have carried out an individual analysis of the situation of each applicant, rather than deporting them all."[292]

The court held the applicants were thus subjected to "collective and indiscriminate expulsions" and awarded a judgment of five thousand Euros each.[293]

On the issue of extraterritorial jurisdiction, though a land-based event, the European Court of Human Rights in *Issa v. Turkey* addressed whether a Government could be held responsible for actions committed outside of its national borders.[294] The applicants in *Issa*, surviving relatives, complained that Turkey violated the ECHR for actions that included "unlawful arrest, detention, ill-treatment and subsequent killing . . . in the course of a military operation conducted by the Turkish army in northern Iraq in April 1995."[295] Turkey, in part, responded that its jurisdiction "did not extend to northern Iraq for alleged violations of the Convention and its protocols and that Convention responsibility for the incident . . . could not therefore be imputed to Turkey."[296]

The European Court of Human Rights held that a

> State's responsibility may be engaged where, as a consequence of military action—whether lawful or unlawful—that State in practice exercises effective control of an area situated outside its national territory . . . . A State may also be held accountable for violation of the [ECHR] Convention rights and freedoms of persons who are in the territory of another State but who are found to be under the former State's authority and control through its agents operating—whether lawfully or unlawfully—in the latter State.[297]

A key inquiry in *Issa* centered upon "whether the applicants' relatives were under the authority and/or effective control, and therefore, within the jurisdiction, of the respondent State of the result of the latter's extra-territorial acts."[298] The *Issa* court noted, "[i]n exceptional circumstances the acts of Contracting States performed outside their territory or which produce effects there ('extra-territorial act') may amount to exercise by them of their jurisdiction within the meaning of Article

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[292] Sharifi v. Italy, App. No. 16643/09, Eur. Ct. H.R. (2014), http://hudoc.echr.coe.int/eng#{"display":[2],"languageisocode":["ENG"],"appno":["16643/09"],"itemid":["002-10215"]}.

[293] *Id.*

[294] Issa v. Turkey, App. No. 31821/96, Eur. Ct. H.R. ¶¶ 69–70 (2004), http://hudoc.echr.coe.int/eng?i=001-67460.

[295] *Id.* ¶ 4.

[296] *Id.* ¶ 61.

[297] *Id.* ¶¶ 69, 71 (citations omitted) (internal quotation marks and ellipsis omitted).

[298] Issa v. Turkey, App. No. 31821/96, Eur. Ct. H.R. ¶ 72 (2004), http://hudoc.echr.coe.int/eng?i=001-67460.

1 of the [ECHR] Convention."[299] While *Issa* addresses a land-based event and is solely authoritative for ECHR member states, the case is nevertheless instructive for judicial assessment of actions on the high seas.[300]

The European Court of Human Rights in *Hirsi Jamaa v. Italy* addressed assertions that Italy violated the human rights of eleven Somali nationals and thirteen Eritrean nationals, interdicted at sea and subsequently transferred to Libya in accordance with a bilateral agreement.[301]

The *Hirsi Jamaa* court first examined jurisdiction. The Italians "acknowledged that the events in question had taken place on board Italian military ships. However, they denied that the Italian authorities had exercised absolute and exclusive control over the applicants. [The Italians] submitted that the vessels carrying the applicants had been intercepted in the context of the rescue on the high seas of persons in distress . . . and could in no circumstances be described as a maritime police operation."[302] Italy maintained that a search and rescue is distinguishable from maritime law enforcement for purposes of jurisdiction.[303]

The European Court of Human Rights disagreed, noting that, "whenever the State through its agents operating outside its territory exercises control and authority over an individual, and thus jurisdiction, the State is under an obligation under Article 1 to secure to that individual the rights and freedoms under Section I of the Convention that are relevant to the situation of that individual."[304] The *Hirsi Jamaa* opinion further noted that the European Court of Human Rights "has already stated that the special nature of the maritime environment cannot justify an area outside the law where individuals are covered by no legal system capable of affording them enjoyment of rights and guarantees protected by the Convention which the States have undertaken to secure to everyone within their jurisdiction."[305] As such, the Strasbourg jurists held that the government's actions "constitute a case of extraterritorial exercise of jurisdiction by Italy capable of engaging that State's responsibility under the Convention."[306]

The next issue examined was whether returning the applicants to Libya violated ECHR Article 3 ("No one shall be subjected to torture or to inhuman or degrading treatment or punishment."). The Court observed, "Confronted with the dis-

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[299] *Id.* ¶ 68.

[300] *See also* EUR. CT. H.R., *Factsheet – Extra-territorial Jurisdiction of States Parties to the European Convention on Human Rights* (2015), http://www.echr.coe.int/Documents/FS_Extra-territorial_jurisdiction_ENG.pdf.

[301] Hirsi Jamaa v. Italy, App. No. 27765/09, Eur. Ct. H.R., February 23, 2012, http://hudoc.echr.coe.int/eng-press#{"dmdocnumber":["900989"],"itemid":["001-109231"]}, at ¶¶ 1,3.

[302] *Id.* ¶¶ 64, 65. The Italians "argued that the obligation to save human lives on the high seas, as required under the [LOS] Convention, did not in itself create a link between the State and the persons concerned establishing the State's jurisdiction." ¶ 65.

[303] *Id.* ¶ 66.

[304] *Id.* ¶ 74. The court also recognized that the "jurisdiction of a State, within the meaning of Article 1, is essentially territorial. It is presumed to be exercised normally throughout the State's territory. In keeping with the essentially territorial notion of jurisdiction, the Court has accepted only in exceptional cases that acts of the Contracting States performed, or producing effects, outside their territories can constitute an exercise of jurisdiction by them within the meaning of Article 1 of the Convention." (citations omitted) (internal quotations omitted) ¶¶ 71–72.

[305] *Id.* ¶ 178 (citing to Medvedyev v. France, App. No. 3394/03 Eur. Ct. H.R. ¶ 3 (2010) and others).

[306] *Id.* ¶ 78. The court also held that "Italy cannot circumvent its jurisdiction under the [ECHR] Convention by describing the events in issue as rescue operations on the high seas." *Id.* ¶ 79.

turbing picture painted by the various international organizations," Italy nevertheless asserted Libya was "at the material time, a safe destination for migrants intercepted on the high seas." [307] The court stated "the existence of the risk must be assessed primarily with reference to those facts which were known or ought to have been known to the Contracting State at the time of removal."[308]

The court thus held that "by transferring the applicants to Libya, the Italian authorities, in full knowledge of the facts, exposed them to treatment proscribed by the [ECHR] Convention."[309] The court also found a separate ECHR Article 3 violation as a result of exposing "the applicants to the risk of arbitrary repatriation."[310] The court further found a violation of Article 4 of Protocol No. 4 to the Convention as a result of collective expulsion.[311] Additionally, the court found that Italy violated ECHR Article 13 by not providing an effective remedy to the applicants "to lodge their complaints under [the ECHR] with a competent authority and to obtain a thorough and rigorous assessment of their requests before the removal measure was enforced."[312]

A concurring opinion by Judge Pinto de Albuquerque expressly addressed the application of ECHR Article 4 of Protocol 4 in the maritime environment: "The purpose of the provision would be easily frustrated if a State could place a warship on the high seas or at the limit of the national territorial waters and proceed to apply a collective and blanket refusal of any refugee claim or even omit any assessment of refugee status."[313] The decision has been characterized as a "landmark judgment" in the treatment of migrants and State obligations, particularly in the maritime environment,[314] though *Hirsi Jamaa* involves distinctive facts that included no examina-

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[307] *Id.* ¶ 127 (internal quotations omitted). Italy further asserted the "Italian-Libyan Friendship Treaty of 2008, in accordance with which clandestine migrants were returned to Libya, made specific reference to compliance with the provisions of international human rights law and other international conventions in which Libya was party." *Id.* The Court observed Italy "cannot evade its own responsibility by relying on its obligations arising out of bilateral agreements with Libya." *Id.* ¶ 129.

[308] *Id.* ¶ 121. The Court noted that "the existence of domestic laws and the ratification of international treaties guaranteeing respect for fundamental rights are not in themselves sufficient to ensure adequate protection against the risk of ill-treatment where, as in the present case, reliable sources have reported practices resorted to or tolerated by the authorities which are manifestly contrary to the principles of the Convention. . ." *Id.* ¶ 128. After discussing the circumstances in Libya, the Court held that "when the applicants were transferred to Libya, the Italian authorities knew or should have known that there were insufficient guarantees protecting the parties concerned from the risk of being arbitrarily returned to their countries of origin . . . .". *Id.* ¶ 156.

[309] *Id.* ¶¶ 137–8.

[310] *Id.* ¶ 158.

[311] *Id.* ¶ 186. This provision provides that, "[c]ollective expulsion of aliens is prohibited." In part, the court noted, "the transfer of the applicants to Libya was carried out without any form of examination of each applicant's individual situation . . . .". Moreover, the Court notes that the personnel aboard the military ships were not trained to conduct individual interviews and were not assisted by interpreters or legal advisers. That is sufficient for the Court to rule out the existence of sufficient guarantees ensuring that the individual circumstances of each of those concerned were actually the subject of a detailed examination." *Id.* ¶ 185.

[312] *Id.* ¶¶ 205, 207.

[313] Hirsi Jamaa v. Italy, App. No. 27765/09, Eur. Ct. H.R., February 23, 2012, at 75.

[314] UNHCR, Press Release, 23 February 2012, Landmark judgment of the Strasbourg Court on push-backs in the Mediterranean Sea, http://www.unhcr.org/cgi-bin/texis/vtx/search?page=search&docid=4f4619f76&query=+european%20+states%20+border%20+control.

tion of any applicant, no identification procedure, no interpreters, no legal advisers, and no crew training.[315]

Saadi v. Italy, which examined non-refoulement,[316] represents an instructive, yet land-based, European Court of Human Rights case.[317] *Saadi* addressed, among other issues, whether diplomatic assurances provide sufficient protection:

> Contracting States have the right to control the entry, residence and removal of aliens . . . . However, expulsion by a Contracting State may give rise to an issue under Article 3, and hence engage the responsibility of that State under the convention, where substantial grounds have been shown for believing that the person concerned, if deported, faces a real risk of being subjected to treatment contrary to Article 3.[318]

Assurances may therefore be insufficient, particularly "where there are credible reports of widespread torture and a failure to investigate such abuses."[319] Because assurances are frequently determined on a case-by-case basis, the operative

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[315] *Id.* Hirsi Jamaa v. Italy, App. No. 27765/09, Eur. Ct. H.R., February 23, 2012, at 185, 186; *see also* Khlaifia and Others v. Italy, App. No. 16483/12, Eur. Ct. H.R., September 1, 2015, http://hudoc.echr.coe.int/eng?i=001-157277 (Migrants that were interdicted at sea challenged the conditions of detention and that they were denied the possibility of challenging the lawfulness of their deprivation of liberty in Italian courts, among other issues. The Italians asserted their responses were "prompted by an emergency or a state of absolute necessity." *Id.* ¶ 56. While stating the "Court does not under-estimate the problems encountered by the Contracting States when faced with exceptional waves of immigration such as that which underlies the present case," the opinion noted, "those factors cannot, however, exempt the respondent State from its obligation to guarantee conditions that are compatible with respect for human dignity to all individuals who, like the applicants, find themselves deprived of their liberty." *Id.* ¶ 127–128. The court found multiple violations of the Convention. *Id.* at 49, 50. The Joint Partly Dissenting Opinion of Judges Sajo and Vucinic is noteworthy, particularly with regard to their insightful and persuasive analysis regarding detention conditions and collective expulsion. *Id.* ¶¶ 6, 7, 9.)

[316] For a definition of non-refoulement, see Elihu Lauterpacht & Daniel Bethlehem, *The Scope and Content of the Principle of Non-Refoulement: Opinion*, *in* REFUGEE PROTECTION IN INTERNATIONAL LAW 87, 89 (Erika Feller et al. eds., 2001) (explaining that non-refoulement is defined as a "[c]"oncept which prohibits States from returning a refugee or asylum seeker to territories where there is a risk that his or her life or freedom would be threatened on account of race, religion, nationality, membership of a particular social group, or political opinion."). *See also* U.N. High Comm'r for Refugees [UNHCR], General Legal Considerations of Relevance to NATO's Engagement with the Refugee and Migrant Movements in the Aegean Sea, March 8, 2016, at 3 (highlighting that the "UNHCR's Executive Committee has emphasized the fundamental importance of fully respecting the principle of non-refoulement for people at sea . . . ."), *available at* http://www.refworld.org/docid/56f3eeee4.html.

[317] Saadi v. Italy, App. No. 37201/06, Eur. Ct. H.R. 179 (2008), http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-85276.

[318] *Id.* ¶¶ 124–25. With regard to the standard for determining whether an applicant faces a risk of ill-treatment, the ECHR reiterated in *Saadi* that "[t]he Court must examine the foreseeable consequences of sending the applicant to the receiving country, bearing in mind the general situation there and his personal circumstances." *Id.* ¶130. *See also* Network of Experts on the Legal Aspects of Maritime Safety and Security (MARSAFENET) & Jean Monnet Ctr. of Excellence on Migrants' Rts. in the Mediterranean (JMCE), THE CHARTER OF NAPLES: THE WAY FORWARD TO DEAL WITH MIGRATION IN THE MEDITERRANEAN SEA (June 20, 2015), https://www.humanrightsatsea.org/wp-content/uploads/2015/07/Charter-of-Naples.pdf (recommending "criteria used to assess the place of safety and the notion of distress in line with refugee and human rights law standards, to avoid instances of non-refoulement and other serious harm.").

[319] Saadi v. Italy, *supra* note 317, at ¶¶ 143–48. *See* Guilfoyle, *supra* note 66, at 98; *see also* Hum. Rts. Comm., No. 692/1996 A.R.J. v. Australia, U.N. Doc. CCPR/C/D/692/1996 (1997), http://www1.umn.edu/humanrts/undocs/692-1996.html).

question becomes "under what circumstances, then, might assurances sufficiently guarantee an individual's safety?"[320] An additional consideration is the potential for post-return monitoring in maritime migration, as well as, potentially, in drug trafficking and piracy.

In 1997, the Inter-American Commission on Human Rights ruled on the propriety of U.S. treatment of Haitian migrants interdicted at sea.[321] The issues raised almost two decades ago are relevant today as courts address the intersection between protecting State security interests and safeguarding its borders, and human rights obligations. The plaintiffs claimed at-sea interdictions by the U.S. Coast Guard and subsequent return to Haiti deprived them "of a fair opportunity to articulate and substantiate claims for political asylum."[322] The plaintiffs asserted, "since the inception of the program over 361 boats carrying 21,461 Haitians have been intercepted, and only six Haitians have been allowed to come to the U.S. to file asylum claims."[323] The context of the "at sea interdictions" was an important element of Haitian Centre discussions.[324]

The United States responded that its interdiction program is "consistent with the human rights standards of the American Declaration of the Rights and Duties of Man and is a proper exercise of the United States' sovereign right to prevent illegal immigration to the United States."[325]

The plaintiffs asked the Commission to find multiple breaches of "internationally protected human rights," including the American Declaration of the Rights and Duties of Man (American Declaration), the Pact of San Jose, the United Nations Charter (articles 55 and 56), the U.N. Refugee Convention (Articles 3, 16(1), and 33), the U.N. Refugee Protocol, the U.N. Universal Declaration of Human Rights (Articles 8, 13(2), and 14), as well as customary international law.[326]

Regarding the applicability of the U.N. Refugee Convention, the United States stated that "[i]t was recognized then [during treaty negotiations], and continues to be so today, that control over unlawful immigration is a fundamental attribute of state sovereignty, the prerogatives of which states are unwilling to cede."[327] Oth-

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[320] Guilfoyle*, supra* note 66, at 98.

[321] The Haitian Ctr. for Hum. Rts.. et al. v. United States, Case No. 10.675, Inter-Am. Comm'n H.R., Report No. 51/96, OEA/Ser.L./V/II.95, doc. 7 rev. 550, http://www.cidh.org/annualrep/96eng/USA10675.htm.

[322] *Id.* ¶¶ 6–7.

[323] *Id.* ¶ 5.

[324] *Id.* ¶ 53 (noting that the United States asserted that the policy of the United States is "a lawful and humane means of controlling illegal immigration by sea, a phenomenon which is exacerbated by the fact that the voyage is undertaken at great risk to life.").

[325] *Id.* ¶ 51. The U.S. response further provided that:

> But for the efforts of the United States Coast Guard, countless more Haitians would have lost their lives at sea. Even with these efforts, it is estimated conservatively that since December of 1982, approximately 435 Haitians have drowned en route to the U.S. shores. Suspending interdiction would be tantamount to adopting a policy of promoting an exodus at the cost of potentially large losses of life.

Id. ¶ 54. Moreover, "[t]he United States does not believe, however, that the American Declaration has binding legal force as would an international treaty." *Id.* ¶ 67.

[326] *Id.* ¶¶ 10–11.

[327] *Id.* ¶ 71.

er countries have raised valid concerns with the broad application of the U.N. Refugee Convention to circumstances today that were not contemplated during the instrument's development.[328]

On the issue of customary international law, the United States responded that:

> It is not enough that certain international declarations espouse a general rule, for custom must derive from the repetition of acts by the community of states as a whole taken out of a sense of legal obligation. Other than their unsubstantiated assertion, petitioners have pointed to no evidence suggesting the existence of such widespread and concordant practice regarding the obligation of states to refugees outside their borders . . . . To reach the level of a customary norm, state practice must also be such, or be carried out in such a way, as to be evidence that this practice is rendered obligatory by the existence of a rule of law requiring it.[329]

The United States further asserted that reliance on the UDHR and the U.N. Charter is misplaced:

> The Declaration . . . is not a Treaty; it is not and does not purport to be a statement of law or of legal obligation . . . . The Universal Declaration is authoritative only in so far as it reflects customary international law; as noted above, there is no relevant customary international law. While the United Nations Charter is a treaty, the provisions cited by petitioners (articles 55 & 56) are far too general to create binding legal obligations with respect to the specific rights asserted in this case.[330]

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[328] *Id.* ¶¶ 77–78. *See also* Milbank, *supra* note 276:

> The problem with the [1951 Refugee] Convention is that it was designed in and for a different era. A number of resultant specific problems in its implementation in today's very different world have been identified by academics and researchers:
>
> - The Convention definition of refugee is outdated, as is its notion of exile as a solution to refugee problems;
> - it confers no right of assistance on refugees unless and until they reach a signatory country, it imposes no obligation on countries not to persecute or expel their citizens, and it imposes no requirement for burden sharing between states;
> - the asylum channel is providing an avenue for irregular migration and is linked with people smuggling and criminality;
> - the Convention takes no account of the impact (political, financial, social) of large numbers of asylum seekers on receiving countries . . . .
>
> While the Convention-based asylum system may have operated well enough until the end of the Cold War, it was not designed with today's mass refugee outflows or migratory movements in mind.

[329] The Haitian Ctr. for Hum. Rts. et al. v. United States, *supra* note 321, at ¶ 77–78.

[330] *Id.* ¶ 79 (citations omitted) (internal quotations omitted).

On the issue of a right to equality before the law, expressed in Article II of the American Declaration, the United States noted that "even with respect to particular rights, Article II, like comparable articles in other human rights instruments, does not forbid every difference in treatment in the exercise of rights and freedoms recognized . . . in the Declaration, provided that the difference is objective and reasonable."[331]

The Inter-American Commission on Human Rights held:

> Even if it is true, as the United States Supreme Court decided, that the President possesses inherent constitutional authority to turn back from the United States Government's gates any alien, such a power does not authorize the interdiction and summary return of refugees who are far from, and by no means necessarily heading for the United States . . . . The Commission finds that the United States Government has violated the right to equality before the law with respect to the following matters:
>
> (a) The interdiction of Haitians on the high seas in contradistinction to the position of Cubans and nationals of other countries who so far from being interdicted are favorably treated by being brought into the United States by the United States Coast Guard.
>
> (b) The failure to grant Haitians interdicted on the high seas any hearing, or any adequate hearing as to their claim for refugee status; in contradistinction to cuban [sic.] asylum seekers and nationals of other countries who are intercepted on the high seas and brought to the United States for their claims to be processed by the United States Immigration and Naturalization Service.[332]

The Commission recommended that the United States "provide adequate compensation to the victims for the breaches . . . ."[333] The U.S. Supreme Court's 1993 decision in *Sale v. Haitian Centers Council, Inc.,* which addressed comparable issues, is also instructive. [334] The context of both *Sale* and *Haitian Centre* were

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[331] *Id.* ¶ 100 (citations omitted) (internal quotations omitted).

[332] *Id.* ¶¶ 146, 177. The Commission further held that the U.S. government's "act of interdicting Haitians on the high seas, placing them in vessels under their jurisdiction, returning them to Haiti, and leaving them exposed to acts of brutality by the Haitian military and its supporters constitutes a breach of the right to security of the Haitian refugees." *Id.* ¶ 171.

[333] *Id.* ¶ 189.

[334] The Court in *Sale* discussed the situation confronting the U.S. government:

> [F]acilities at Guantanamo and available Coast Guard cutters [were] saturated, and with the number of Haitian emigrants in unseaworthy craft increasing (many had drowned as they attempted the trip to Florida), the Government could no longer both protect our borders and offer the Haitians even a modified screening process. It had to choose between allowing Haitians into the United States for the screening process or repatriating them without giving them any opportunity to establish their qualifications as refugees. In the judgment of the President's advisers, the first choice not only would have defeated the original purpose of the program (controlling illegal immigration), but also would have impeded diplomatic efforts to restore democratic government in Haiti, and would have posed a life-threatening danger to thousands of persons embarking on long voyages in dangerous craft. The second choice would have advanced those policies but deprived the

maritime interdictions conducted by the U.S. Coast Guard of migrants plying the high seas on dangerous platforms.

The U.S. Supreme Court held that "[t]he wisdom of the policy choices made by Presidents Reagan, Bush, and Clinton is not a matter for our consideration. We must decide only whether Executive Order No. 12807, which reflects and implements those choices, is consistent" with U.S. regulations on the matter.[335] The *Sale* opinion continued:

> It is perfectly clear that 8 U.S.C. 1182(f) grants the President ample power to establish a naval blockade that would simply deny illegal Haitian migrants the ability to disembark on our shores. Whether the President's chosen method of preventing the "attempted mass migration" of thousands of Haitians . . . poses a greater risk of harm to Haitians who might otherwise face a long and dangerous return voyage is irrelevant to the scope of his authority to take action that neither the Convention nor the statute clearly prohibits.[336]

Accordingly, the Court held that "[t]his case presents a painfully common situation in which desperate people, convinced that they can no longer remain in their homeland, take desperate measures to escape. Although the human crisis is compelling, there is no solution to be found in a judicial remedy."[337]

More recently, the Australian High Court ruled (by a 4–3 majority) in 2015 that the detention of migrants by an Australian Customs vessel was lawful and, as such, awarded no damages to the plaintiffs.[338] *CPCF v. Minister for Immigration and Border Protection* (*CPCF*) involved a suit brought by a Sri Lankan of Tamil ethnicity who was one of "157 people removed from an unseaworthy Indian flagged vessel in Australia's contiguous zone to a Commonwealth ship on 29 June 2014, about sixteen nautical miles from Christmas Island. None of the persons on the Indian vessel had a visa entitling him or her to enter Australia."[339]

> fleeing Haitians of any screening process at a time when a significant minority of them were being screened in.

Sale v. Haitian Ctrs. Council, Inc., 509 U.S. 155, 163–64 (1993) (alteration provided).

[335] *Id.* at 165–66.

[336] *Id.* at 187–88 (citation omitted).

[337] *Id.* at 188 (quoting *Haitian Refugee Ctr. v. Gracey*, 809 F.2d 794, 841 (D.C. Cir. 1987) (Edwards, J., concurring in part and dissenting in part)). In dissent, Justice Harry Blackmun remarked:

> The refugees attempting to escape from Haiti do not claim a right of admission to this country. They do not even argue that the Government has no right to intercept their boats. They demand only that the United States, land of refugees and guardian of freedom, cease forcibly driving them back to detention, abuse, and death. That is a modest plea, vindicated by the treaty and the statute. We should not close our ears to it.

Id. at 208 (Blackmun, J., dissenting).

[338] *CPCF v. Minister for Immigr. & Border Protection* [2015] HCA 1, 22 (Austl.), http://eresources.hcourt.gov.au/downloadPdf/2015/HCA/1.

[339] *Id.* at 55.

The *CPCF* plaintiff asserted that his detention by Australia was unlawful, constituting wrongful imprisonment, when he was aboard the Australian government vessel.[340] The High Court stated:

> It may be accepted that exercising the control necessary to prevent infringement of laws of the kind described in Art. 33 of UNCLOS [Contiguous Zone] would include a coastal state stopping in its contiguous zone an inward-bound vessel reasonably suspected of being involved in an intended contravention of one of those laws.[341]

The High Court went on to hold the following: "For immediate purposes it is enough to observe that the lawfulness of the plaintiff's detention directs attention to whether coming under the control of the commander of the Commonwealth ship for the period the plaintiff was on board that ship was lawful."[342] And it continued, "[t]here is no express statutory requirement that a person detained . . . be taken to a place as soon as practicable."[343]

The High Court cited Australian legislation, which provides that "[a] maritime officer must not place or keep a person in a place, unless the officer is satisfied, on reasonable grounds, that it is safe for the person to be in that place."[344] Moreover, "[a] person arrested, detained or otherwise held under this Act must be treated with humanity and respect for human dignity, and must not be subject to cruel, inhuman or degrading treatment."[345]

The *CPCF* opinion did not turn on the issue of effective control, but instead focused on procedural obligations, the prevention of violations of law, and the timeliness of disposition action. The Australian High Court was also cognizant of other considerations, such as "the requirement that a person not be placed in a place which is not safe, and the need for treatment consonant with human dignity . . . [and] the need to exercise the power within a reasonable time."[346] Further, Australian officials "are not empowered to take [migrants] to any place on the earth's surface."[347] Particularly relevant to this Article is the High Court's acknowledgement—in the context of evaluating promptness—that:

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[340] *Id.* at 2.

[341] *Id.* at 28. The Court further clarified that:

> Because there must be a power to stop the vessel, it may be accepted that there is a power to detain the vessel (at least for the purposes of investigating whether there is a threat of a relevant contravention). But whether, for the purposes of international law, Art. 33 [Contiguous Zone] permits the coastal state to take persons on the vessel into its custody or to take command of the vessel or tow it out of the contiguous zone remains controversial.

Id. at 29.

[342] *Id.* at 51.

[343] *Id.* at 59.

[344] *See id.* at 2 (quoting *Maritime Powers Act 2013* (Cth) s 74 (Austl.)).

[345] *See id.* at 59 (alteration in original) (quoting *Maritime Powers Act 2013* (Cth) s 95 (Austl.)).

[346] *Id.* at 63 (footnotes omitted).

[347] *Id.*

> Enforcement operations in maritime areas frequently occur in remote locations, isolated from the support normally available to land-based operations and constrained by the practicalities involved in sea-based work . . . . [T]he unique aspects of the maritime environment merit a tailored approach to maritime powers, helping to ensure flexibility in their exercise and to assist maritime officers to deal with quickly changing circumstances and often difficult and dangerous situations.[348]

Human rights considerations in the context of maritime migration will remain a visible, high-profile, and politically significant issue, where safety of life must remain the first priority.[349] That being said, there is an immediate need to develop uniformly recognized standards to balance the full spectrum of a response with human rights considerations.[350]

VI. FISHERIES ENFORCEMENT

A. Background

Illegal, unregulated, and unreported (IUU) fishing across the globe is lucrative for criminals and transnational criminal organizations, securing between $10 and $23 billion annually.[351] The protection of natural resources, fish, and fish stocks intersects with State interests in economic development, governance, law enforcement, national security, and human rights.

There is considerable national, regional, and international attention focused on preventing IUU fishing. U.S. President Barack Obama asserted that IUU fishing "continues to undermine the economic and environmental sustainability of fisheries and fish stocks, both in the United States and around the world."[352]

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[348] *See id.* at 64 (quoting Commonwealth, *Parliamentary Debates*, House of Representatives, May 30, 2012, 6224 (Nicola Louise Roxon, Attorney-General and Minister for Emergency Management) (Austl.)).

[349] *See* Natalie Klein, *Assessing Australia's Push Back the Boats Policy Under International Law: Legality and Accountability for Maritime Interceptions of Irregular Migrants*, 15 MELB. J. INT'L L. 414, 443 (2014) (asserting that "[m]aritime interception operations against irregular migrants cannot be assessed for their legality when they are divorced from international human rights and refugee obligations. These bodies of international law must instead be harmonised [sic.] in order to achieve the goals of both state security and human dignity.").

[350] A Council of Europe report following a tragic migrant event in the Mediterranean, for example, called on States to "adopt clear, binding and enforceable common standards with regard to search and rescue operations, including disembarkation, fully consistent with international maritime law and international human rights and refugee law obligations." EUR. PARL. ASS., COMM. ON MIGRATION, REFUGEES & DISPLACED PERSONS, THE LEFT TO DIE BOAT: ACTIONS AND REACTIONS ¶ 5.1.1 (June 9, 2014), http://www.assembly.coe.int/nw/xml/XRef/X2H-Xref-ViewPDF.asp?FileID=20940&lang=en (last visited May 26, 2016).

[351] *IUU Fishing–Frequently Asked Questions*, NAT'L OCEANIC & ATMOSPHERIC ADMIN. FISHERIES, http://www.nmfs.noaa.gov/ia/iuu/faqs.html.

[352] Memorandum Establishing a Comprehensive Framework to Combat Illegal, Unreported, and Unregulated Fishing and Seafood Fraud, 2014 DAILY COMP. PRES. DOC. 1, (June 17, 2014), https://www.whitehouse.gov/the-press-office/2014/06/17/presidential-memorandum-comprehensive-framework-combat-illegal-unreporte.

State response actions that are not in conformity with international law represent another element of the fishing challenge. An ITLOS judge insightfully summarized:

> Faced with an increase in illegal, unreported and unregulated fishing in their waters, coastal States have been resorting to harsh measures in order to better protect their resources from being plundered and to avoid over-exploitation. In many cases, it is believed that fines imposed have not acted as a significant deterrent, as might have been expected, for effectively controlling and preventing illegal fishing.[353]

The LOS Convention is the foundational document for international fisheries enforcement, IUU collaboration, and the management of living marine resources on the high seas. Under the auspices of the Fisheries Department of the Food and Agriculture Organization of the United Nations, agreements include the U.N. General Assembly Resolution on Large-Scale Pelagic Drift Net Fishing and Its Impact on the Living Marine Resources of the World's Oceans and Seas (1991);[354] the Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 Relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks (1995);[355] the Code of Conduct for Responsible Fisheries (1995);[356] and the Agreement to Promote Compliance with International Conservation and Management Measures by Fishing Vessels on the High Seas (1993).[357]

B. Discussion

The fishing industry is lucrative, multifaceted, and vulnerable to abuses. Areas examined include those with express guidance that are nevertheless not al-

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[353] The "Tominmaru" Case (Japan v. Russian Federation), Case No. 15, Judgment of Aug. 6, 2007, 2007 ITLOS Rep. 74, 105 ¶ 2 (separate opinion of Jesus, J.), https://www.itlos.org/fileadmin/itlos/documents/cases/case_no_15/15_judgment_060807_sep_op_Jesus_en.pdf. [hereinafter The Tominmaru Case].

[354] G.A. Res. 46/215 (Dec. 20, 1991).

[355] Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 Relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks, Aug. 4, 1995, 2167 U.N.T.S. 3.

[356] FOOD & AGRIC. ORG. (FAO), CODE OF CONDUCT FOR RESPONSIBLE FISHERIES (1995), http://www.fao.org/docrep/005/v9878e/v9878e00.htm.

[357] Agreement to Promote Compliance with International Conservation and Management Measures by Fishing Vessels on the High Seas, Nov. 24, 1993, 2221 U.N.T.S. 91. *See also* PRESIDENTIAL TASK FORCE ON COMBATING IUU FISHING & SEAFOOD FRAUD, ACTION PLAN FOR IMPLEMENTING THE TASK FORCE RECOMMENDATIONS 4 (2015), http://www.nmfs.noaa.gov/ia/iuu/noaa_taskforce_report_final.pdf (explaining that "*Illegal* fishing refers to fishing activities conducted in contravention of applicable laws and regulations, including those laws and rules adopted at the regional and international level. *Unreported* fishing refers to those fishing activities that are not reported or are misreported to relevant authorities in contravention of national laws and regulations or reporting procedures of a relevant RFMO [Regional Fishery Management Organization]. Finally, *unregulated* fishing occurs in areas or for fish stocks for which there are no applicable conservation or management measures and where such fishing activities are conducted in a manner inconsistent with State responsibilities for the conservation of living marine resources under international law.").

ways followed (imprisonment of fishermen and use of force), areas that pose enforcement and oversight challenges (illegal work conditions), and areas without any express guidance (vessel destruction as enforcement action).

Article 73(3) of the LOS Convention provides: "Coastal State penalties for violations of fisheries laws and regulations in the EEZ *may not include imprisonment*, in the absence of agreements to the contrary by the States concerned, or any other form of corporal punishment."[358] Despite this provision,

> [a] wide variety of measures have been enacted by coastal States to enforce their laws and regulations relating to fishing in the exclusive economic zone. Some of those measures continue to provide for imprisonment for violations of these laws and regulations despite the prohibition in article 73. Those provisions thus are not consistent with article 73.[359]

A separate LOS Convention provision provides that "[a]rrested vessels and their crews shall be promptly released upon the posting of reasonable bond or other security."[360] Some coastal States authorize imprisonment for fisheries violations if a bond or administrative penalty is not paid or authorize imprisonment for resisting arrest.[361] A NGO study lamented that fishermen were being detained for as long as three years by India and Pakistan.[362] "The practice of apprehending each other's fishermen, along with their boats, has been followed by Pakistani and Indian forces since the time of the partition . . . ."[363] However, as "[t]here is no consolidated information about detained fishermen because it is not updated regularly," the Asian Human Rights Commission recommended that "there should be a record somewhere, which consists of all the names of all the detained fishermen with their particulars including date of arrest & release and the address of the jail."[364]

Comparable to bilateral accords in counter-piracy, bilateral fisheries agreements recognize human rights obligations. The E.U.-Mauritania fishing

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[358] LOS Convention, *supra* note 16, art. 73(3) (emphasis added). *See also id.* art. 230(1) (providing "categorically that [m]onetary penalties only may be imposed with respect to violations of national law and regulations or applicable international rules and standards for the prevention, reduction and control of pollution of the marine environment . . . ."); 2 UNITED NATIONS CONVENTION ON THE LAW OF THE SEA 1982: A COMMENTARY 795 (Satya N. Nandan & Shabti Rosenne, eds., 1993) [hereinafter Virginia Commentary].

[359] Virginia Commentary, *supra* note 332, at 795. *See also* The Tominmaru Case, *supra* note 353, at 106 ¶ 7 (separate opinion of Jesus, J.) (observing, "Measures of the coastal States that would not be in conformity with the Convention are, for example, those referred to in paragraph 3 of article 73, that is to say, the imposition of the penalty of imprisonment, in the absence of agreements to the contrary by the States concerned, or any other form of corporal punishment, for fisheries violations committed in the EEZ.").

[360] LOS Convention, *supra* note 16, art. 73(2) (providing, "Arrested vessels and their crews shall be promptly released upon the posting of reasonable bond or other security.").

[361] TROY ANDERSON, CAUGHT: HOOK, LINE AND SINKER – THE PROSECUTION OF FISH POACHERS IN AUSTRALIAN WATERS, DLA PHILLIPS FOX 6–8 (2007), http://www.mlaanz.org/uploads/06_anderson_116600734_0256404_tda01_2-10-07_amended_mlaanz_paper.pdf.

[362] Qurat Mirza, *Fishermen on Both Sides of the Pak-India Maritime Borders Are Treated as Prisoners of War – A Story of Tears*, ASIAN HUM. RTS. COMM'N (Feb. 3, 2012), http://reliefweb.int/report/pakistan/fishermen-both-sides-pak-india-maritime-borders-are-treated-prisoners-war-story.

[363] *Id.*

[364] *Id.*

agreement expressly refers to human rights.[365] While the E.U.-Kenya piracy accord provides that persons transferred will be treated humanely and in accordance with international human rights obligations,[366] the E.U.-Mauritania agreement focuses on "proven" human rights violations, providing that cooperation may continue unless a human rights violation is proven, and even then, cooperation may continue.[367]

The Food and Agriculture Organization (FAO) of the United Nations addressed human rights in their development of guidelines for securing sustainable small-scale fisheries.[368] One of the overarching goals of the Guidelines is "to enhance the contribution of small-scale fisheries to food security and nutrition . . . by empowering [them to] . . . enjoy their human rights, and assume responsibilities for sustainable use of fishery resources."[369] During the discussions with eighty-seven FAO members and other attendees, countries provided remarks. The United States asserted that they understood the human rights-based approach to mean that: "States should undertake fisheries-related policies in a manner consistent with their obligations under international human rights law. Likewise, a 'human rights based approach' is understood to mean an approach anchored in a system of rights and corresponding obligations established by international human rights law."[370] And Bangladesh "noted its concerns that the human rights of fish-workers who are in detention because of entry into foreign waters due to lack of awareness have not been addressed."[371]

In 2005, the Australian Human Rights Commission held that Australia violated the human rights of Indonesian fishermen detained on vessels in Darwin Harbour.[372] Since 1988, the Commonwealth detained fishermen suspected of illegally

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[365] *See* Council Decision 2012/827/EU of Dec. 18, 2012, on the Signing, on Behalf of the European Union, and on the Provisional Application of the Protocol Setting Out the Fishing Opportunities and Financial Contribution Provided for in the Fisheries Partnership Agreement Between the European Union and the Islamic Republic of Mauritania for a Period of Two Years, 2012 O.J. (L 361) 43, 43–46 [hereinafter E.U. – Mauritania Agreement], http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=OJ:L:2012:361:FULL&from=EN (attaching the text of the Protocol).

[366] Agreement on Transfer of Suspected Pirates, *supra* note 217, at Annex 2(c).

[367] E.U. – Mauritania Agreement, *supra* note 365, art. 7(5) ("The parties agree that in the event of a proven human rights violation, this Protocol may be suspended . . . ."); *see also* Council Decision 2012/826 (2012) (EU) (attaching the text of the Protocol agreed between the European Union and the Republic of Madagascar setting out fishing opportunities and the financial contribution provided for in the Fisheries Partnership Agreement between the two parties currently in force). This decision is a fisheries agreement between the European Union and the Republic of Madagascar also approved in 2012 that provided stronger language regarding the effect of a human rights violation ("if the Union notes that there has been a violation of the essential and fundamental human rights . . . all E.U. fishing vessel activities in the waters of Madagascar shall be suspended."); Partnership Agreement Between the Members of the Africa, Caribbean and Pacific Group of States of the One Part, and the European Community and its Member States, of the Other Part § 96, Jun 23, 2000 (including consultation procedures if a Part fails to "fulfill an obligation stemming from respect for human rights), *available at* https://ec.europa.eu/europeaid/sites/devco/files/cotonou-agreement-2000_en.pdf.

[368] COMM. ON FISHERIES, FOOD & AGRIC. ASS'N, CHAIRPERSON'S REPORT OF THE TECHNICAL CONSULTATION ON INTERNATIONAL GUIDELINES FOR SECURING SUSTAINABLE SMALL-SCALE FISHERIES (2015), *available at* http://www.fao.org/cofi/23885-09a60857a289b96d28c31433643996c84.pdf.

[369] *Id.* at 9.

[370] *Id.* at 4.

[371] *Id.*

[372] AUSTRALIAN HUM. RTS. COMM'N, REPORT OF AN INQUIRY: MR ZACHARIAS MANONGGA (Sept. 2005) [hereinafter MANONGGA], *available at* https://www.humanrights.gov.au/publications/report-inquiry-mr-zacharias-manongga.

operating in the Australian territorial sea and EEZ.[373] For the most part, detained fishermen would remain aboard their vessels awaiting disposition, which generally included posting a financial bond that in some instances could take more than a month. The primary issue addressed by the Human Rights Commission was whether detention aboard a suspect's vessel violates ICCPR and national detention standards.[374] ICCPR article 10(1) provides: "All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person."[375]

Some of the complaints raised by fishermen included poor bedding ("old foam mattresses with torn covers and one or two blankets and pillows"); a lack of fresh water; insufficient exercise time (one fisherman noted that they were only taken off their boats one day a week to play soccer); insufficient reading material (the same fisherman added: "we were given nothing to read on the boats"); and insufficient toilet/bathing facilities ("fishers go to the toilet on the boat by either defecating or urinating off the edge of the boat or through a hole cut in the deck of the vessel").[376] Australia explained in their response that:

> [F]ishers held in boat-based detention are provided with safety and hygiene products, toiletries, mattresses (suitable within the practical constraints of the limited spaces on boats and exposure to the environment), new clothing, lamp oil and kerosene to fuel stoves on arrival in Darwin Harbour. [Further,] each fisher is also provided with a blanket and, on arrival into Darwin Harbour, given an appropriate briefing. Tarpaulins for protection and cover during inclement weather and additional cooking and heating fuel are made available on request.[377]

The Commission held that:

> The practice by the Commonwealth of detaining Indonesian fishers on their vessels in Darwin Harbour in the conditions and arrangements observed in June 2004 constitutes a breach of human rights under article 10(1) of the ICCPR, even for short periods of detention. Those conditions do not constitute humane conditions of detention as required by this article and are inconsistent with a number of [Australia's regulations on detention].[378]

The Commission also specifically held that "[t]he sanitary and shower/bathing arrangements in place on the vessels were not consistent with human rights . . . . Fishers were not able to shower or bath [sic] at a temperature suitable to the climate."[379]

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[373] *Id.* § 6.1.
[374] *Id.* § 6.1–6.3.
[375] ICCPR, *supra* note 44, art. 10(1).
[376] MANONGGA, *supra* note 372, § 6.2.
[377] *Id.* § 4.3(2).
[378] *Id.* § 6.3(1).
[379] *Id.* § 6.3(4).

The Commission acknowledged identical conditions on boats detained in Darwin Harbour, Australia, as well as on boats plying the waters on fishing journeys:

> What this means is that the vessels themselves become the detention facilities provided by the Commonwealth . . . . While fishing at sea, the fishers are engaged in employment, they are free to decide where they sail and where and when they moor their boats and for how long. This is not the case when they are detained in their boats in Darwin Harbour.[380]

The Australian Human Rights Commission report underlines the potential that government action—even if ostensibly reasonable—against those who have violated the law may trigger human rights obligations in maritime law enforcement.

Destruction of property—the intentional sinking of a ship—has sparked considerable attention in fisheries enforcement and other maritime law enforcement action.[381] The inherent challenge is that there is no uniformly recognized standard for vessel destruction. The right to property is addressed in, among other instruments, Article 1 of the Protocol to the ECHR, though some human rights documents are silent on the issue. The ECHR provides: "Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law."[382]

The intersection of vessel destruction and human rights begins with first identifying an operative human rights instrument and then determining the basis for government action: safety (e.g., the vessel posed a navigational hazard), enforcement of a U.N.S.C. Resolution (e.g., where the operative provisions provide explicit authority to destroy), or security (e.g., law enforcement action).

The LOS Convention does not expressly address intentional vessel destruction. LOS Convention Article 73(2), however, does address "prompt release" of a vessel and crew.[383] ITLOS rulings on prompt release issues (in the context of enforcement action) highlight due process of law considerations and the need to allow for judicial recourse. The court in *Tominmaru* held, in part, that:

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[380] *Id.* § 6.1.

[381] This Article does not explore legal authorities related to vessel destruction in another nation's EEZ.

[382] ECHR, *supra* note 48, Protocol, art. 1. The remainder of this article provides: "The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties." *Id; see also* MONICA CARSS-FRISK, THE RIGHT TO PROPERTY: A GUIDE TO THE IMPLEMENTATION OF ARTICLE 1 OF PROTOCOL NO. 1 TO THE EUROPEAN CONVENTION ON HUMAN RIGHTS 6 (2001), *available at* http://www.echr.coe.int/LibraryDocs/DG2/HRHAND/DG2-EN-HRHAND-04(2003).pdf ("The first thing to bear in mind when considering Article 1 of Protocol No. 1 is that the concept of property, or 'possessions', is very broadly interpreted."); Jacob Mchangama, *The Right to Property in Global Human Rights Law*, CATO INST. (May–June 2011), http://www.cato.org/policy-report/mayjune-2011/right-property-global-human-rights-law (discussing the importance and impact of recognizing a human right to property, as well as judicial and academic interpretations, and specific instruments); Universal Declaration of Human Rights, *supra* note 42, art. 17 ("1. Everyone has the right to own property alone as well as in association with others. 2. No one shall be arbitrarily deprived of his property."). *But see* ICCPR, *supra* note 44 (containing no provision related to property rights).

[383] LOS Convention, *supra* note 16, art. 73(2).

> A decision to confiscate eliminates the provisional character of the detention of the vessel rendering the procedure for its prompt release without object. Such a decision should not be taken in such a way as to prevent the shipowner from having recourse to available domestic judicial remedies, or as to prevent the flag State from resorting to the prompt release procedure set forth in the Convention; nor should it be taken through proceedings inconsistent with international standards of due process of law. In particular, a confiscation decided in unjustified haste would jeopardize the operation of article 292 of the Convention.[384]

The International Convention on the Removal of Wrecks (the Nairobi Convention), which entered into force on April 14, 2015, defines a hazard.[385] However, because the Convention applies to stranded ships following a maritime casualty, it is not dispositive for the issues examined in this Part. That said, the Nairobi Convention's detailed criteria on determining a hazard and the measures to facilitate removal of a hazard is instructive.[386] The Nairobi Convention defines a hazard as a vessel that "poses a danger or impediment to navigation; or may reasonably be expected to result in major harmful consequences to the marine environment, or damage to the coastline or related interests of one or more States."[387] The Author is unaware of a judicial challenge to destruction conducted in accordance with the Nairobi Convention.

The U.N. Security Council (U.N.S.C.), consistent with authority provided under the U.N. Charter, has approved resolutions in accordance with Chapter VII

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[384] The Tominmaru Case, Case No. 15, Judgment of Aug. 6, 2007, 2007 ITLOS Rep. 74, 86 ¶ 2 (separate opinion of Jesus, J.), https://www.itlos.org/fileadmin/itlos/documents/cases/case_no_15/15_judgment_060807_sep_op_Jesus_en.pdf.

[385] International Maritime Organization, Nairobi International Convention on the Removal of Wrecks art. 1(5), May 18, 2007, 46 I.L.M. 694 [hereinafter The Nairobi Convention], *available at* http://www.mit.gov.it/mit/mop_all.php?p_id=10297.

[386] *Id.* art. 6. "[D]etermination of hazard" provides:

> When determining whether a wreck poses a hazard, the following criteria should be taken into account by the Affected State: (a) the type, size and construction of the wreck; (b) depth of the water in the area; (c) tidal range and currents in the area; (d) particularly sensitive sea areas identified and, as appropriate, designated in accordance with guidelines adopted by the Organization, or a clearly defined area of the exclusive economic zone where special mandatory measures have been adopted pursuant to article 211, paragraph 6, of the United Nations Convention on the Law of the Sea, 1982; (e) proximity of shipping routes or established traffic lanes; (f) traffic density and frequency; (g) type of traffic; (h) nature and quantity of the wreck's cargo, the amount and types of oil (such as bunker oil and lubricating oil) on board the wreck and, in particular, the damage likely to result should the cargo or oil be released into the marine environment;(i) vulnerability of port facilities; (j) prevailing meteorological and hydrographical conditions; (k) submarine topography of the area; (l) height of the wreck above or below the surface of the water at lowest astronomical tide; (m) acoustic and magnetic profiles of the wreck; (n) proximity of offshore installations, pipelines, telecommunications cables and similar structures; and (o) any other circumstances that might necessitate the removal of the wreck.

[387] *Id.* art. 1(5).

authorizing the destruction of property associated with illicit activity in the maritime environment.[388] U.N.S.C. Resolution 2184, for instance, called upon States to:

> [T]ake part in the fight against piracy and armed robbery at sea off the coast of Somalia, consistent with this resolution and international law, by . . . seizing and *disposing* of boats, vessels, arms, and other related equipment used in the commission of piracy and armed robbery at sea off the coastal of Somalia, or for which there are reasonable grounds for suspecting such use . . . .[389]

This Resolution addressed a specific threat in a defined geographic area, yet 2184, similar to U.N.S.C. Resolutions 1846, 1851, 1897, and 1976,[390] has resonance well beyond Somali piracy because it provided U.N.S.C. support for the concept of intentional vessel destruction.

In 2015, a U.N.S.C. Resolution addressing migrant smuggling from Libya failed to provide express language authorizing vessel destruction. Paragraph 8 of U.N.S.C. Resolution 2240 stated that where a vessel is confirmed as being used for migrant smuggling or human trafficking from Libya, further action, including "disposal", will be taken in accordance with "applicable international law," but was silent on operative instruments.[391] Resolution 2240, despite its vague language, affirmed the understanding that U.N.S.C. actions are not the only lever by which the intentional vessel destruction could be internationally authorized.

Li-Shou v. United States, a tort suit in the U.S. Court of Appeals for the Fourth Circuit involved the intentional destruction of JCT 68, a fishing vessel, among other issues.[392] The plaintiff criticized the *U.S.S. Stephen W. Groves (FFG-29)*, operating in NATO Task Force 508, in part, for "using exploding ordnance on the fishing boat rather than inert ordnance and firing into central compartments rather than at the skiffs on the bow or the boat's engines."[393] On the issue of vessel destruction, the *Li-Shou* court held:

> We do not know how a decision to tow and not to sink the JCT 68 would have affected the task force's mission by tying down valuable naval resources. We do not know the extent of the disruption to commercial shipping caused by any single ship or by Somali-based piracy generally. What

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[388] U.N. Charter arts. 39, 41, 42; *see also* Rossana Deplano, *The Use of International Law by the United Nations Council: An Empirical Framework for Analysis*, 29 EMORY INT'L L. REV. 2085, 2087 (2015).

[389] S.C. Res. 2184, ¶ 11 (Nov. 12, 2014) (emphasis added).

[390] S.C. Res. 1976, pmbl. (Apr. 11, 2011); S.C. Res. 1897, ¶ 3 (Nov. 30, 2009); S.C. Res. 1851, ¶ 2 (Dec. 16, 2008); S.C. Res. 1846, ¶ 9 (Dec. 2, 2008).

[391] Relevant international instruments on the issue of vessel destruction include, but are not limited to: the International Convention on the Removal of Wrecks, and the Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter and its Protocol. *See supra* notes 376, 381, and *infra* notes 413, 415. Claims are a separate issue.

[392] Li-Shou v. United States, 777 F.3d 175, 179 (4th Cir. 2015). Pirates illegally seized the fishing vessel *Jin Chun Tsai 68* (JCT 68) and remained aboard it for more than a year. The twenty-four pirates launched strikes from JCT 68 against vessels that had the misfortune of transiting within its vicinity. A NATO counter-piracy mission, deployed to rescue this vessel and its crew, resulted in the unintentional death of JCT 68's master, Wu Lai-Yu, and subsequent destruction of the vessel. *Id.*

[393] *Id.* at 180.

> we do know is that we are not naval commanders. These are questions not intended to be answered through the vehicle of a tort suit[394]

A Government pleading in *Li-Shou* noted the ten U.N.S.C. Resolutions "urging Member States to take action to combat piracy . . . [and that] near the time of the incident alleged here, the U.N.S.C. adopted Resolution 1976, expressing grave concern about the growing threat of piracy off the coast of Somalia."[395] The Government pleading specifically referenced U.N.S.C. Resolution 1976's call upon Member States "to take part in the fight against piracy through, among other things, seizures and disposition of boats used in the commission of piracy and armed robbery at sea off the coast of Somalia, or for which there are reasonable grounds for suspecting such use."[396]

Issues related to the differences between naval operations and maritime law enforcement, particularly regarding enforcement of a U.N.S.C. Resolution, are outside the scope of this Article.[397] Regardless, Resolutions with a maritime focus are instructive for maritime law enforcement due to the authoritative force of Security Council actions in international law.

Turning to safety, a vessel that poses a hazard to navigation represents a threat to the maritime environment, shipping, and shipping lanes. Such a vessel could adversely affect public safety or national security interests. No international document expressly imposes a requirement that a vessel must pose an imminent hazard. Nor should there be, as unmanned, unseaworthy, or significantly damaged vessels have the potential to rapidly and unexpectedly interfere with the maritime environment, shipping, and shipping lanes.

A general principle of the Nairobi Convention is that "measures taken . . . shall be proportionate to the hazard."[398] Further, ECHR 8(2) recognizes that "interference by a public authority may be necessary in a democratic society to protect national security or public safety interests."[399] Thus, vessel destruction that is necessary and reasonable to address a navigational hazard should not be considered a human rights issue.

Government destruction of a vessel believed to be engaged in illicit or proscribed activity—in contrast to the destruction of a navigational hazard—raises separate considerations. As noted above, property rights are not a universally recognized human rights concept. Regardless of whether a human rights instrument is expressly implicated, fundamental fairness and due process of law necessitate that a capability exist to first challenge the State action administratively or judicially, un-

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[394] *Id.* at 181.

[395] U.S. Memorandum in Support of its Motion to Dismiss at 8–9, Li-Shou v. United States, 777 F.3d 175, (4th Cir. 2015) (No. 14-1510) [hereinafter Li Shou].

[396] *Id.* at 25; *see also* S.C. Res. 1976, pmbl. (Apr. 11, 2011).

[397] European judicial venues that have addressed the intersection of U.N.S.C. Resolutions with government action tend "to guarantee the primacy of decisions of the United Nations [SC]—under Chapter VII of the U.N. Charter—even at the expense of the legal order of the European Convention on Human Rights." Pasquale De Sena & Maria Chiara Vitucci, *The European Courts and the Security Council: Between Dedoublement Fonctionnel and Balancing of Values*, 20 EUR. J. INT'L L. 193, 193–94 (2009).

[398] The Nairobi Convention, *supra* note 382, art. 2(2).

[399] ECHR, *supra* note 48, art 8(2).

less taken in accordance with internationally provided authority (such as a U.N.S.C. Resolution) or to address a navigational hazard.

In *Tominmaru*, discussed above, which involved a vessel seizure and crew detention, the ITLOS noted domestic action "inconsistent with international standards of due process of law could breach . . . the Convention."[400] Another ITLOS case, M/V "Louisa" (*Saint Vincent v. Spain*), which did not address intentional vessel destruction, suggests how the tribunal might examine the issue: "States are required to fulfill their obligations in international law, in particular human rights law, and that considerations of due process of law must be applied in all circumstances."[401]

Vessel destruction has also been addressed in national venues. In a civil suit, an Australian Federal Court in *Sahring v. Australia,* examined the propriety of the Royal Australian Navy's seizure of the fishing vessel *(F/V) Eka Sakti*, its subsequent destruction, and the detention of its crew.[402]

Australian law "provides for the automatic forfeiture of foreign boats used in certain offences, and the automatic forfeiture of nets, traps, equipment and fish on such a boat or involved in the commission of such an offence."[403] Australian law also provides that notice must state that the thing or vessel "will be condemned as forfeited unless the owner of the thing or the person who had possession, custody or control of the thing immediately before it was seized gives the Managing Director of AFMA (Australian Fisheries Management Authority) within 30 days a written claim in English for the thing."[404]

Sahring discussed location, the type of fish being caught, veracity of government officials, and the authority to conduct the seizure, concluding the boarding team was not "entitled to seize the boat or its equipment [under Australian law] either because it was forfeited . . . or [because the boarding officer] had reasonable grounds to believe that it had been forfeited . . . ."[405]

The *Sahring* opinion further described the formation of reasonable grounds with respect to vessel destruction as obliging a government official to make "due inquiry to obtain material likely to be relevant to the formation of that belief" and

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[400] The Tominmaru Case, Case No. 15, Judgment of Aug. 6, 2007, 2007 ITLOS Rep. 74, 90–91 ¶ 48 (separate opinion of Jesus, J.), https://www.itlos.org/fileadmin/itlos/documents/cases/case_no_15/15_judgment_060807_sep_op_Jesus_en.pdf (providing in part: "Where the authorities of a State Party have detained a vessel flying the flag of another State Party and it is alleged that the detaining State has not complied with the provisions of this Convention for the prompt release of the vessel or its crew upon the posting of a reasonable bond or other financial security, the question of release from detention may be submitted to any court or tribunal agreed upon by the parties or, failing such agreement within 10 days from the time of detention, to a court or tribunal accepted by the detaining State under article 287 or to the International Tribunal for the Law of the Sea, unless the parties otherwise agree.").

[401] M/V "Louisa" (St. Vincent v. Spain), Case No. 18, Judgment of May 28 2013, ¶ 155 [hereinafter M/V Louisa] https://www.itlos.org/fileadmin/itlos/documents/cases/case_no_18_merits/judgment/C18_Judgment_28_05_13-orig.pdf; *see also* The "Enrica Lexie" Incident (It. v. India), Case No. 24, Order of Aug. 24, 2015, ¶¶ 115–16, 120 [hereinafter The Enrica Lexie Incident], https://www.itlos.org/cases/list-of-cases/case-no-24/.

[402] *Sahring v Commonwealth* [2014] FCA 246 (Austl.).

[403] *Id.* ¶ 32.

[404] *Id.* ¶ 34.

[405] *Id.* ¶¶ 50, 67, 75.

that such a conclusion may not be formed "capriciously or irresponsibly . . . [or] based upon preconceptions or assumptions."[406]

Turning to a vessel's destruction, the court noted that the "AFMA made the decision to destroy the boat because it was believed to be unseaworthy."[407] The judge concluded that the boarding officers had "reasonable grounds to believe . . . the boat was unseaworthy on the basis of the [fishing report]."[408] Judge John Ronald Mansfield found in favor of the plaintiff and awarded damages, but made "allowance for the fact that the *Eka Sakti* was apparently in poor condition and at least potentially not seaworthy."[409]

Whether boarding a ship purportedly in accordance with enforcement authorities is, in fact, a subterfuge to take "safety" action that includes vessel destruction will likely continue to be an area of judicial scrutiny. *Sahring's* reasoned, insightful opinion is noteworthy because it involved the intersection of safety and security considerations in the vessel destruction continuum, providing a template by which to examine these hybrid cases, as well as articulating a judicial standard to measure reasonable grounds.[410]

The Indonesian government has destroyed dozens of vessels for fishing illegally in its territorial sea or EEZ.[411] Article 69 of Indonesian Law No. 45/2009, which does not address due process, provides, in part:

> (3) A fishing control ship is entitled to stop, investigate, and detain a ship suspected or worth to be suspected that it had committed a violation within the fishery management zone of the State of the Republic of Indonesia and force it to the nearest port for further process.
>
> (4) In the performance of functions [previously] referred . . . , the investigator and/or Fishery Controller is entitled to take special actions in the form of burning and/or sinking a fishing ship flying a foreign flag based on sufficient initial proof.[412]

An Indonesian Maritime Affairs and Fisheries Ministry official reported in August 2015 that thirty-seven ships were "ready for sinking across the country" following judicial determinations that fishermen on the vessels were guilty of "poach-

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[406] *Id.* ¶¶ 20, 77.

[407] *Id.* ¶ 84.

[408] *Id.* ¶ 85.

[409] *Id.* ¶ 90.

[410] A human rights group asserted that *Sahring* is notable because "[t]his case demonstrates a clear example of the Australian navy breaching Indonesian waters and overreaching in the enforcement of Australia's rights." *Foreign Fishers*, AUSTRALIAN LAW. ALLIANCE, https://www.lawyersalliance.com.au/ourwork/foreign-fishers (last visited June 28, 2016).

[411] *See* Nani Afrida, *Navy to Sink 12 Illegal Fishing Boats*, JAKARTA POST (Oct. 19, 2015), http://www.thejakartapost.com/news/2015/10/19/navy-sink-12-illegal-fishing-boats.html; Prashanth Parameswaran, *Explaining Indonesia's 'Sink the Vessels' Policy Under Jokowi*, DIPLOMAT (Jan. 13, 2015), http://thediplomat.com/2015/01/explaining-indonesias-sink-the-vessels-policy-under-jokowi/.

[412] R.I. Law No. 45 Year 2009, art. 69 (Indonesia), *available at* http://www.ilo.org/dyn/natlex/natlex4.detail?p_lang=en&p_isn=89346&p_country=IDN&p_count=611.

ing or poaching-related offenses."[413] The head of an Indonesian Task Force for the prevention and eradication of IUU fishing noted that along with court fines for illegal fishing, vessel destruction represented "the final step in a comprehensive legal process, and for which prior consent had been sought with the presiding court,"[414] but did not elaborate on due process requirements.

In the United States, 14 U.S.C. § 88 provides the U.S. Coast Guard with statutory authority to "destroy or tow into port sunken or floating dangers to navigation."[415] Considerations associated with a Coast Guard decision to scuttle a vessel include, but are not limited to: safety, environmental issues, permit requirements (as appropriate), the Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter and its Protocol,[416] domestic legislation (including, e.g., the Marine Protection, Research and Sanctuaries Act),[417] claims for damage,[418] and actions that may be taken short of destruction.[419]

One example of a response by the U.S. Coast Guard involved the *RYOU-UN MARU*, a "derelict 200-foot unmanned and unlit Japanese fishing vessel," drifting toward a shipping lane.[420] Dixon's Entrance included 800 transits over the past six months, making the *RYOU-UN MARU's* "condition, location, and projected

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[413] Tama Salim, *RI to Sink 37 Foreign Ships on National Day*, JAKARTA POST (Aug. 16, 2015), http://www.thejakartapost.com/news/2015/08/16/ri-sink-37-foreign-ships-national-day.html.

[414] Tama Salim, *Ministry to Notify Foreign Govts* [sic.] *of Vessel Seizures*, JAKARTA POST (May 30, 2015), http://www.thejakartapost.com/news/2015/05/30/ministry-notify-foreign-govts-vessel-seizures.html. The article also discussed fines imposed by Indonesian courts for illegal fishing, ranging from $7500–$15,000. "To guard against such disappointing verdicts in the future, Achmad said the ministry was in the process of improving interinstitutional synergy and coordination, capacity building for law enforcers and the implementation of corporate criminal liability." *Id.*

[415] 14 U.S.C. § 88(a)(4) (2016).

[416] Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter, Aug. 30, 1975, 26 U.S.T. 2403, 1046 U.N.T.S. 120, *available at* http://www.imo.org/en/OurWork/Environment/LCLP/Documents/LC1972.pdf. Also referred to as the "London Convention," this instrument and its Protocol seek to, "promote the effective control of all sources of marine pollution, and pledge themselves especially to take all practicable steps to prevent the pollution of the sea by dumping wastes and other matter. . . ." *Id.* art. I.

[417] 16 U.S.C. § 1431–1445; 33 U.S.C. § 1401–1445.

[418] U.S. law provides several resources for recovery from damage, harm, or loss arising from ship-boarding operations. See, for example, the Foreign Claims Act, 10 U.S.C. § 2734, with respect to claims arising from U.S. boardings of non-U.S.-flagged vessels. *See also* Suits in Admiralty Act, 10 U.S.C. § 2731; Federal Tort Claims Act, 28 U.S.C. §§ 1346, 2671; Military Claims Act, 10 U.S.C. § 2731–2740

[419] The Author is unaware of any judicial challenge to U.S. Coast Guard action taken with respect to vessel destruction in accordance with 14 U.S.C. § 88. An admiralty action initiated by the United States to recover costs incurred in the removal of a sunken fishing vessel by the U.S. Army Corps of Engineers (Corps) is not directly applicable to the issue of destroying a fishing vessel, yet is instructive on judicial considerations regarding action in response to a hazard. *See* United States v. Rafael, 349 F. Supp. 2d 84, 95 (D. Mass. 2004) (holding that "the Corps may act if a sunken vessel endangers, i.e., poses a potential hazard to navigation under conditions which may be reasonably anticipated to occur . . . ."). Separately, the U.S. Coast Guard and the Corps signed "a Memorandum of Understanding (MOU) on October 5, 2012, outlining procedures for determining a hazard to navigation and coordinating mitigation actions when a hazard to navigation exists." NAT'L RESPONSE TEAM, ABANDONED VESSEL AUTHORITIES AND BEST PRACTICES GUIDANCE (2014), *available at* https://www.nrt.org/sites/2/files/NRT_Abandoned_Vessel_Authorities_and_Best_Practices_Guidance_FINAL.pdf.

[420] *Stemming the Tide: The U.S. Response to Tsunami Related Marine Debris Before the Subcomm. on Oceans, Atmosphere, Fisheries, & Coast Guard of the Comm. on Commerce, Sci. & Trans.*, 112th Cong. 22 (2012) (testimony of Rear Admiral Cari B. Thomas, Assistant Commandant for Response Policy), *available at* https://www.gpo.gov/fdsys/pkg/CHRG-112shrg80375/pdf/CHRG-112shrg80375.pdf.

track . . . a serious threat to the safe navigation of other vessels in the vicinity."[421] Further, prior to a response, the U.S. Coast Guard consulted with NOAA and separately, with the "Department of State to ensure that any action would not have adverse international implications . . . [sinking the *RYOU-UN MARU*] at sea on April 5, 2012, to ensure the safety of navigation."[422]

The *RYOU-UN MARU* response underscores vessel destruction, regardless of the basis, has legal, operational, and diplomatic elements.[423]

Another concern with fisheries enforcement and human rights is violence. The Associated Press reported that the South Korean Coast Guard killed the Captain of a fishing boat suspected of illegal fishing in its EEZ who had resisted the boarding.[424] In this violent exchange that occurred in 2014, Chinese fisherman "wielded knives and beer bottles" and choked South Korean officers "after knocking off their helmets, according to a coast guard statement. Five South Korean officers received minor injuries."[425]

Following the death of a Taiwanese fisherman by "Philippine Coast Guard personnel" in the part of the South China Sea where their EEZs overlap, the two countries signed an agreement to cooperate on fisheries matters in 2015.[426]

Private security may also act on behalf of the coastal state for, among other things, fisheries enforcement. Southern Cross Security (SCS) protected the waters of Sierra Leone for a fifteen-month period at the turn of the century, conducting boardings and issuing approximately fifty fines for fisheries violations.[427] A compensation plan was drafted to allow SCS to keep "seventy-five percent of the fines levied against trawlers boarded and charged with operating illegally [which would

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[421] *Id.*

[422] *Id; see also* Justin McCurry, *Ryou-Un Maru's Voyage Across the Pacific Ocean Ends After a Year Floating in Busy Shipping Lanes*, GUARDIAN (Apr. 6, 2012), http://www.theguardian.com/world/2012/apr/06/tsunami-ghost-ship-sunk-us (explaining that "[t]he National Oceanic and Atmospheric Administration and the Environmental Protection Agency studied the problem and decided it was safer to sink the ship and let the fuel evaporate in the open water.").

[423] Arbitration represents a potential additional consideration with vessel destruction. *See, e.g.*, S.S. "I'm Alone" (U.S. v. Can.), 3 R.I.A.A. 1609, 1617 (1935). This arbitration proceeding involved, among other issues, the intentional sinking of a vessel in accordance with the Convention between the United States and Great Britain to aid in the prevention of smuggling intoxicating liquors into the United States. The Joint Final Report of the Commissioners, in part, stated:

> [I]f sinking (of the suspect vessel) should occur incidentally, as a result of the exercise of necessary and reasonable force for such purpose (of effecting the objects of boarding, searching, seizing and bringing the suspect vessel into port), the pursuing vessel might be entirely blameless. But the Commissioners think . . . the intentional sinking of the suspected vessel was not justified by anything in the Convention. *Id.*

[424] Kim Tong-Hyung, *S. Korean Coast Guard Kills Chinese Boat Captain*, ASSOCIATED PRESS (Oct. 10, 2014), http://bigstory.ap.org/article/fca3c497e23745948ba6237cc5070fe4/s-korean-coast-guard-kills-chinese-boat-captain.

[425] *Id.*

[426] Joseph Yeh, *Pact with Philippines Signed to Ensure End to Fisheries Conflicts*, CHINA POST (Nov. 20, 2015), http://www.chinapost.com.tw/taiwan/foreign-affairs/2015/11/20/451400/Pact-with.htm (relaying that "[i]n August 2013, the Philippines released the results of its investigations, which recommended homicide charges be brought against the eight men involved in the shooting and that punishments be imposed on four others for allegedly trying to tamper with evidence.").

[427] Patrick Cullen, *Privatized Maritime Security in Governance in War-torn Sierra Leone*, *in* MARITIME PRIVATE SECURITY: MARKET RESPONSES TO PIRACY, TERRORISM AND WATERBORNE SECURITY RISKS IN THE 21ST CENTURY 110 (Claude Berube & Patrick Cullen, eds., 2012).

be reduced to] fifty percent," ultimately moving to a "structured, salaried position directly administered by a government officer in the Marine Resources Ministry."[428]

Challenges with this "institutionally hybrid security actor," include awareness of legal authorities.[429] The SCS Managing Director acknowledged his lack of concern:

> Of course there could have been legal problems . . . . [W]hat was the legal situation of having a Sierra Leone policeman working for me . . . . [sic] Basically, I don't give a rat's ass about the legal problems. We were doing a tiny, ad hoc operation, under conditions of a state of war, and we did a good job protecting Sierra Leone's fisheries and stopping piracy.[430]

Separately, unconscionable and illegal treatment of fishermen[431] by their masters and ship owners is fueling State action. "Shocking revelations about the international fishing industry's reliance on slave labor [have] led the United States to . . . clamp down on the use of indentured workers and discourage other unlawful activities on the high seas . . . ."[432]

The fishing industry involves a unique intersection of the private sector, human rights considerations, and government enforcement action. Increased awareness of human rights abuses is a positive development. More can be done, however, to develop uniform standards and oversight protocols to prevent forced evictions and detention without trial, to clarify the conditions under which vessels may be destroyed, and to hold those accountable for violations.[433]

VII. USE OF FORCE

Multilateral instruments and jurists recognize that force may be employed in maritime law enforcement and have forged standards for its use. The use of force, particularly deadly force, has the potential to trigger human rights considerations, even in instruments that do not expressly contain human rights provisions.

The ICCPR provides that "[e]very human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of

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[428] *Id.* at 105, 106. Patrick Cullen noted that rather than focusing on preventative actions, SCS placed an emphasis "on a coercive and punitive enforcement mechanism . . . An alternative and complementary strategy arguably lay in preventative rather than punitive action."

[429] *Id.* at 106.

[430] *Id.* at 109.

[431] Blake D. Ratner et al., *Fishing for Justice: Human Rights, Development and Fisheries Sector Reform*, 27 GLOBAL ENVTL. CHANGE 120, 123–25 (2014), *available at* http://ac.els-cdn.com/S0959378014001010/1-s2.0-S0959378014001010-main.pdf?_tid=924e4820-da5f-11e4-88bd-00000aab0f26&acdnat=1428106654_17a39ec96f2612f0169b83e1b59eb30c.

[432] Editorial, *Slave Labor on the High Seas*, N.Y. TIMES, Feb. 20, 2016, http://www.nytimes.com/2016/02/21/opinion/sunday/slave-labor-on-the-high-seas.html?mwrsm=Email&_r=0 (highlighting that "President Obama is expected to sign legislation that effectively bans U.S. imports of fish caught by force labor in Southeast Asia . . . The president recently signed an agreement allowing officials to deny port services to foreign vessels suspected of illegal fishing . . . . These and even stronger reforms are needed to respond to the dark side of a multibillion-dollar industry that employs more than 650,000 people in Thailand alone.").

[433] Ratner et al., *supra* note 431.

his life."[434] The Pact of San Jose provides, "[e]very person has the right to have his life respected. This right shall be protected by law and . . . [n]o one shall be arbitrarily deprived of his life."[435] Similarly, the ECHR provides that "[e]veryone's right to life shall be protected by law . . . Deprivation of life shall not be regarded as inflicted in contravention of this Article when it results from the use of force which is no more than absolutely necessary . . . ."[436]

The issue of whether the use of force at sea should be examined under the law of armed conflict and U.N. Charter article 2(4)[437] or maritime law enforcement is largely outside the scope of this Article.[438] That said, where actions in question involve maritime law enforcement, the ITLOS ruling in *M/V Saiga* represents the seminal case on the use force.[439] *M/V Saiga* is particularly noteworthy, as no provi-

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[434] ICCPR, *supra* note 44, art. 6.

[435] American Convention on Human Rights, Pact of San Jose, *supra* note 49, art. 4(1).

[436] ECHR, *supra* note 48, art. 2.

[437] U.N. Charter, art. 2 ¶ 4 ("All members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.").

[438] *See* Guyana v. Suriname, 47 I.L.M. 164, ¶ 431–46 (Perm. Ct. Arb. 2007), http://www.pca-cpa.org/Guyana-Suriname%20Award70f6.pdf?fil_id=664 (explaining that "[t]he Tribunal accepts the argument that in international law force may be used in law enforcement activities provided that such force is unavoidable, reasonable and necessary. However in the circumstances of the present case, this Tribunal is of the view that the action mounted by Suriname on 3 June 2000 seemed more akin to a threat of military action rather than a mere law enforcement activity . . . . Suriname's action therefore constituted a threat of the use of force in contravention of the Convention, the U.N. Charter and general international law."). A U.S. Government pleading opposing a petition for a writ of certiorari in *Li-Shou*, which involved a counter piracy mission to rescue a hijacked fishing vessel, discussed that:

> The primary focus of the NATO counter-piracy operation was stopping the pirates and furthering international maritime security. The operation thus was not a traditional maritime rescue analogous to a Coast Guard rescue of distressed mariners. Nor was the operation analogous to a traditional police action such as Coast Guard drug interdiction: as the court of appeals correctly concluded, the "international forces and threat involved" and the "military command structure and equipment deployed" are inconsistent with that characterization . . . The rules that would govern such actions were therefore inapplicable here.

Li Shou, *supra* note 395, at 11–12; *see also* Brief for the United States, Li-Shou v. United States, 777 F.3d 175 (4th Cir. 2015) (No. 14-1510), *available at* https://www.justice.gov/sites/default/files/osg/briefs/2015/08/31/14-1510_wu.pdf. The government pleadings noted, "the court of appeals correctly held that 'this controversy lacks discernible rules and standards for judicial resolution,' because it would require the court to determine how a reasonable military force engaged in counter-piracy activities would have conducted the operation." *Id.* at 11; *see also* Fisheries Jurisdiction (Spain v. Can.), Judgment, 1998 I.C.J. Rep. 438, (Dec. 4) ("Lastly, we noted that the use of force in arresting the Estai and in harassing other Spanish vessels on the high seas, as well as the use of force contemplated in Canadian Bills . . . can also not be included in the Canadian reservation, because it contravenes the provisions of the Charter."); Patricia Jimenez Kwast, *Maritime Law Enforcement and the Use of Force: Reflections on the Categorisation of Forcible Action at Sea in the Light of the Guyana/Suriname Award*, 13 J. CONFLICT & SECURITY L. 49, 52, 72 (2008) (characterizing the issue as largely unexplored, the article asserted that

> "[c]lear international legal conceptualisation of the criteria for distinguishing maritime policing from (more provocative) military action may serve to minimise such dangers . . . [and] the traditional role of police forces to uphold law and order differs considerably from the primary duty of the military to defend the nation against (external) armed threats.").

[439] M/V Saiga (No. 2) (St. Vincent v. Guinea), Case No. 2, Judgment of July 1, 1999, 120 ITLOS Rep. 143 [hereinafter M/V Saiga]; *see also* Guyana v. Suriname, 47 I.L.M. ¶ 431–46. The Tribunal in *Guyana,* citing favorably *M/V Saiga* and *S.S. "I'm Alone", "*among others, recognized that "in interna-

sion of the LOS Convention expressly addresses the use of force.[440] The oil tanker *Saiga*, registered in Saint Vincent and the Grenadines, operated as a bunkering service in West Africa.[441] Officers from Guinea fired on *Saiga*, boarded it, and arrested the crew approximately twenty-two miles from their coast. The Hamburg court held that "the use of force must be avoided as far as possible and, where force is unavoidable, it must not go beyond what is reasonable and necessary in the circumstances. Considerations of humanity must apply in the law of the sea, as they do in other areas of international law."[442]

Juno Trader involved a dispute before the ITLOS in 2004 regarding the detention of a fishing vessel and its crew for alleged illegal fishing in the EEZ of Guinea-Bissau.[443] Judge Treves, in a separate opinion, wrote that "unnecessary use of force and violations of human rights and due process of law are elements that must also be taken into consideration in fixing a bond or guarantee that can be considered as reasonable."[444]

More recently, in the *The "Enrica Lexie" Incident* order, ITLOS in 2015 reaffirmed "its view that the considerations of humanity must apply in the law of the sea as they do in other areas of international law."[445]

Two international instruments explicitly address use of force in a maritime law enforcement context, both articulating a *necessary and reasonable* standard where force cannot be avoided (as stated in *Saiga*). The 2005 SUA Protocols provides:

> When carrying out the authorized actions under this article, the use of force shall be avoided except when necessary to ensure the safety of its officials and persons on board, or where the officials are obstructed in the execution of the authorized actions. Any use of force pursuant to this article shall not exceed the minimum degree of force which is necessary and reasonable in the circumstances.[446]

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tional law force may be used in law enforcement activities provided such force is unavoidable, reasonable, and necessary." *Id.* ¶ 445. Commissioners in the 1933–35 arbitration hearing *S.S. "I'm Alone"* used the term "reasonable and necessary." S.S. "I'm Alone" (U.S. v. Can.), 3 R.I.A.A. 1609, 1617 (1935). And, in the Investigation of Certain Incidents Affecting the British Trawler *Red Crusader* the Commission used the term "necessity." Red Crusader (U.K. v. Den.) 35 I.L.R. 485, 523, 538 (Comm. of Enquiry 1962).

[440] *See* Dolliver M. Nelson, President of the Int'l Tribunal for the L. of the Sea, Statement to the Fifty-Seventh Session of the U.N.G.A. (Dec. 9, 2002) [hereinafter Dolliver Statement], https://www.itlos.org/fileadmin/itlos/documents/statements_of_president/nelson/ga_091202_eng.pdf.

[441] M/V Saiga, 120 ITLOS Rep. 143.

[442] *Id.* at 155; *see also* Dolliver Statement, *supra* note 440, at 7 ¶ 24 (remarking on *M/V Saiga*, among other issues, at the United Nations General Assembly on December 9, 2002. The *M/V Saiga* passage that "considerations of humanity must apply in the law of the sea, as they do in other areas of international law," represented "dictum whose intent is to protect the human rights of the members of the crew.").

[443] "Juno Trader" (St. Vincent v. Guinea-Bissau), Case No. 13, Judgment of Dec. 18, 2004, ITLOS Rep. 2004.

[444] *Id.* at 73 (separate opinion of Treves, J.).

[445] The "Enrica Lexie" Incident (It. v. India), Case No. 24, Order of Aug. 24, 2015, ¶ 133, https://www.itlos.org/cases/list-of-cases/case-no-24/.

[446] 2005 SUA Protocol, *supra* note 19, art. 8(9).

And, the U.N. Fish Stocks Agreement provides an inspecting State shall ensure that its duly authorized inspectors "avoid the use of force except when and to the degree necessary to ensure the safety of the inspectors and where the inspectors are obstructed in the execution of their duty. The degree of force used shall not exceed that reasonably required in the circumstances."[447]

Generally accepted standards for the use of force in maritime law enforcement have developed over the past two decades. While not every scenario has been addressed—notably private sector oversight and the use of force during rescue operations—the existence of generally accepted standards supports consistent training, uniform employment, and importantly, compliance with human rights.

CONCLUSION

Judges now address elements of maritime law enforcement operations—countering drug trafficking and piracy as well as migrant interdictions and fisheries enforcement—that previously resided under the exclusive ambit of government officials and operational commanders. The question whether human rights obligations can be harmonized with maritime law enforcement is a false dilemma. Rather, the probative inquiry today is identifying an effective methodology to balance human rights obligations with maritime law enforcement.

The most eventful period in human rights/maritime law enforcement jurisprudence, 2010–2015, portends continued judicial attention and a probable increase in the number of litigated issues. Rather than addressing the intersection of human rights and maritime law enforcement arbitrarily, courts and government officials have an opportunity to forge a new period in human rights jurisprudence by developing a consistent methodology. Recognizing that a single, formal, and rigid methodology is not realistic, (primarily because of varied national courts and multilateral tribunals) a consistent, even if informal, approach is achievable.

Development of such a methodology begins with recognition of the unique maritime environment. A joint partly dissenting opinion in *Medvedyev* remains instructive on judicially analyzing underway, operational challenges: "It is necessary to be realistic in such exceptional circumstances . . . ."[448] A separate European Court of Human Rights case that addressed a land-based issue has particular relevance to maritime operations: "The [European Convention on Human Rights] cannot be interpreted in a vacuum and should so far as possible be interpreted in har-

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[447] U.N. Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 Relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks art. 22(1)(f), Dec. 4, 1995, 2167 U.N.T.S. 88; *see also* W. & CENT. PACIFIC FISHERIES COMM'N, CONSERVATION AND MANAGEMENT MEASURES (CMMS) AND RESOLUTIONS OF THE WESTERN AND CENTRAL PACIFIC FISHERIES COMMISSION (WCPFC) (2016), *available at* https://www.wcpfc.int/system/files/booklets/31/CMM%20and%20Resolutions.pdf (stating in ¶ 28 that "[t]he use of force shall be avoided except when and to the degree necessary to ensure the safety of the inspectors and where the inspectors are obstructed in the execution of their duties. The degree of force used shall not exceed that reasonably required under the circumstances.").

[448] Medvedyev v. France, App. No. 3394/03. Eur. Ct. H.R. (2010), http://hudoc.echr.coe.int/eng?i=001-97979, (Costa, J., dissenting); *see also* Guilfoyle, *supra* note 66, at 103.

mony with other rules of international law of which it forms part."[449] And, on the broader issue of the intersection of courts with maritime operations, *Li-Shou*, a U.S. tort suit that stemmed from a counter-piracy interdiction, stated:

As judges, we are just not equipped to second-guess such small-bore tactical decisions. We also are ill-suited to evaluate more strategic considerations. We do not know the waters. We do not know the respective capabilities of individual pirate ships or naval frigates . . . . What we do know is that we are not naval commanders.[450]

Along with recognition of the unique maritime environment, elements of a realistic human rights approach include the expectation that transits to port will be expeditious and without unnecessary delay and that there will be a prompt appearance before a judge or magistrate following the government platform's arrival in port. Though words and terms such as "expeditious," "prompt," and "without unnecessary delay" have a level of subjectivity, judicial examination of the specific circumstances are preferable to prescriptive time limits principally because of the uniquely challenging maritime environment and distances involved. Further considerations include the existence of national policy and law on the conditions associated with the deprivation of liberty and that laws are foreseeable in their application.

European Court of Human Rights opinions, collectively, represent the most thorough and instructive body of law on maritime law enforcement and human rights.[451] European Court of Human Rights opinions do not, however, address every issue, nor do they create a recognized standard across multiple venues. National rulings, such as those in Mauritius, Germany, and Denmark, as well as those in North America and Asia, are, in part, tethered to unique domestic statutes, policy guidance, and regulations.

Though a number of human rights issues have been addressed, not every type in the maritime environment has been raised. For instance, judges will likely be asked to rule on whether there is a human rights obligation to affirmatively conduct maritime search and rescue operations, particularly where a person in distress dies (separate from the legal issue of responsibility for a negligently conducted rescue). ICCPR Article 6 provides, "every human being has the inherent right to life,"

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[449] Hassan v. France, App. Nos. 46695/10, 54588/10, Eur. Ct. H.R. (2014), http://hudoc.echr.coe.int/eng?i=001-148289; *see also* "Monte Confurco" (Sey. v. Fr.), Case No. 6, Judgement of December 18, 2000, ITLOS Rep. 2000, ¶ 74, https://www.itlos.org/fileadmin/itlos/documents/cases/case_no_6/Judgment.18.12.00.E.pdf (asserting that "[r]easonableness cannot be determined in isolation from facts.").

[450] Li-Shou v. United States, 777 F.3d 175, 181 (4th Cir. 2015).

[451] *See, e.g.*, Jecius v. Lithuania, App. No. 34578/97, Eur. Ct. H.R. ¶ 56 (2000), http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-58781 (providing that

> "[t]he Court must moreover ascertain whether domestic law itself is in conformity with the Convention, including the general principles expressed or implied therein. On this last point, the Court stresses that, where deprivation of liberty is concerned, it is particularly important that the general principle of legal certainty be satisfied. It is therefore essential that the conditions for deprivation of liberty under domestic law be clearly defined and that the law itself be foreseeable in its application, so that it meets the standard of "lawfulness" set by the Convention, a standard which requires that all law be sufficiently precise to allow the person—if need be, with appropriate advice—to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail . . . .") (internal quotations and citations omitted).

and comparable provisions exist in the European Convention on Human Rights and the Pact of San Jose.

Rendering assistance to those in distress at sea is a time-honored obligation, reflects customary international law, and is expressly codified in a number of instruments. Though the global search and rescue system is outside the scope of this Article, this area of law is well established, with well-defined obligations and responsibilities. Humanitarian considerations absolutely apply on the water, yet if courts unilaterally and effectively add express obligations to existing treaties, they should not do so in a vacuum. Such judicial action could unintentionally disrupt years of collaborative efforts to ensure compliance. Moreover, a court may not address the full spectrum of collateral issues, including use of force, delivery to a place of safety or medical care that are inevitable considerations for a boarding team. The value of the global SAR system, in part, is its consistent application across multiple geographic areas. Decisions made by and for one geographic area would erode the authoritative force of SAR instruments. Thus, the issue is not whether humanitarian considerations apply to rescues on the water—they do—but rather, whether greater ambiguity will result from judicial alteration of existing international legal instruments in an ad hoc manner, a concern that resonates in multiple maritime response areas.

Additionally, a right to privacy[452] on the high seas (for example, in maritime domain/situational awareness and information acquisition activities[453] or during a boarding), the use of force (both in maritime law enforcement and in conducting search and rescue operations), detention-related issues, sufficiency of medical treatment, destructive searches, nighttime boardings, communications and video teleconferences, biometrics collection and storage,[454] burial at sea, damage to the maritime environment during operations, pollution, adequacy of an investigation, regulating the conduct of privately contracted armed security personnel, intentionally destroying vessels, responding to a passenger/crew member potentially infected with a contagion, the timeliness of laboratory testing, and the seizure of property (including bulk cash), among others, are issues that could be examined through a human rights prism. Other issues, such as judicial acceptance of a government-provided human rights waiver form signed by those on an interdicted vessel, whether a flag State (or vessel owner) has an affirmative human rights obligation to take reasonable action to secure the release of a hijacked vessel, or the sufficiency

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[452] DAVID BANISAR & SIMON DAVIES, PRIVACY AND HUMAN RIGHTS: AN INTERNATIONAL SURVEY OF PRIVACY LAWS AND PRACTICE: OVERVIEW, *available at* http://gilc.org/privacy/survey/intro.html.

[453] *See, e.g.*, THE U.S. NATIONAL MARITIME DOMAIN AWARENESS PLAN FOR THE NATIONAL STRATEGY FOR MARITIME SECURITY (2013), https://www.whitehouse.gov/sites/default/files/docs/national_maritime_domain_awareness_plan.pdf.

[454] *Fingerprints and Other Biometrics*, U.S. FED. BUREAU INVESTIGATION, http://www.fbi.gov/about-us/cjis/fingerprints_biometrics (last visited June 29, 2016) (explaining that

> "[b]iometrics are the measurable biological (anatomical and physiological) or behavioral characteristics used for identification of an individual. Fingerprints are a common biometric modality, but others include things like DNA, irises, voice patterns, palmprints, and facial patterns. . .Over the years, biometrics has been incredibly useful to the FBI and its partners in the law enforcement and intelligence communities—not only to authenticate an individual's identity (you are who are say you are), but more importantly, to figure out who someone is (by a fingerprint left on a murder weapon or a bomb, for example), typically by scanning a database of records for a match.").

of compensation for a mariner seeking damages also represent potential future areas for examination.

As the number of courtroom challenges to law enforcement action on the high seas increases, we unfortunately may also see calls to amend widely accepted and operationally and diplomatically successful conventions to include prescriptive time limits or provisions that afford no interpretative latitude to ensure alignment with human rights treaties (or that purport to clarify human rights provisions within a treaty). Such efforts will consume considerable time, not be capable of resolving every issue, raise new questions, and likely (though unintentionally) reduce the number of deployed maritime law enforcement assets. As such, they would be disruptive to ensuring legal accountability, yet this future of maritime law enforcement is not that far away. A similarly misplaced measure would be a requirement to dismiss charges if a judge is unable to affirmatively confirm that the human rights of those detained were not violated, even in the absence of an assertion by the defendant.

Rigid application of precedents that govern operations ashore without evaluating and including the context of the maritime environment runs the very real risk that these "context-free" decisions may unintentionally turn the high seas into a "consequence-free zone." If nations cannot prosecute suspects interdicted at sea, or risk breaching human rights in their pursuit of transnational criminal organizations, illicit traffickers, and pirates, for example, due to the application of unnecessarily rigid shore-side standards, judicial rulings will have, though not deliberately, increased the potential for high seas anarchy. Fortunately, that is not the current operating environment. Going forward, recognition of human rights obligations and blue water naval challenges, as well as policy guidance that includes comprehensive training requirements represent crucial steps to positively shape the next phase of harmonizing human rights obligations with maritime law enforcement.