Concluding Remarks

It has been submitted in this study that the "extraordinary suspect" approach to arrest and detention of piracy suspects, and the practice of treating them as mere objects of proceedings potentially resulting in their transfer, stands in contradiction and defiance of the idea that piracy suspects too are holders of international individual rights, most notably stemming from international human rights law.

This hypothesis has been confirmed in the foregoing analysis. The failure to perceive piracy suspects as *subjects* of the disposition procedure amounts to a violation of a number of individual rights with a procedural component: the "extraordinary suspect" approach to arrest and detention most notably conflicts with various prescripts flowing from the right to liberty. Moreover, piracy suspects are not in any way associated with the proceedings concerning their potential transfer and are not granted a non-refoulement assessment on an individual basis, which is incompatible with the procedural dimension of the principle of non-refoulement and procedural minimum safeguards relating to expulsion. On a more general level, to perceive piracy suspects as mere objects rather than subjects of decisions and proceedings during the disposition of their cases implies that they "are in practice deprived of their capacity to exercise entitlements under law" – and the Human Rights Committee has found this to be in breach of Article 16 ICCPR.[1]

The findings of the study at hand are surprising for one reason in particular: in a purely domestic and land-based setting, the States whose disposition practices were analysed here, have, as a general rule, completely accepted and implemented the basic idea that criminal suspects deprived of their liberty and persons subject to surrender for prosecution have "a right to have rights".[2] This

1 *Kimouche v Algeria* Comm no 1328/2004 (HRC, 10 July 2007) para 7.8; *Grioua v Algeria* Comm no 1327/2004 (HRC, 10 July 2007) para 7.8.

2 This expression stems from Hannah Arendt, who is quoted by Judge Pinto de Albuquerque in his concurring opinion in *Hirsi Jamaa and Others v Italy* App no 27765/09 (Grand Chamber, ECtHR, 23 February 2012), which is a decision of great relevance in the context of removal of persons intercepted at sea; on the expression

begs the question why arrest, detention and transfers by these very same States in the context of counter-piracy operations off the coast of Somalia and the region are *not* based on this premise. A conclusive and definite answer to this question is not readily available, yet the foregoing analysis reveals various factors that, taken together, may contribute to the current approach to the arrest, detention and transfer of piracy suspects.

To ascribe the fact that piracy suspects are not granted the procedural protection required by international law during the disposition of their cases to a lack of will on the part of patrolling naval States to do so is far too simplistic. It may have its truth that singular actors deploying ships and assets to the area prone to Somali-based piracy are pursuing goals other than the suppression of piracy suspects – and that they are therefore not entirely resolved or prepared to discharge their obligations notably stemming from human rights law, which ensue when intercepting and detaining piracy suspects. Yet, it would be incorrect and unjust to state that the majority of actors pursue a hidden agenda when contributing to the counter-piracy operations off the coast of Somalia and the region. Rather, they deploy personnel and assets with the genuine intention of protecting vulnerable ships and their crews in areas prone to Somali-based piracy and to further the (certainly ambitious) goal that the Security Council set: the full and durable eradication of piracy.

One partial explanation of the current approach to arrest, detention and transfers may be that military forces are responsible for enforcing the law off the coast of Somalia and the region rather than the "ordinary" domestic law enforcement authorities, that is, police and prosecutorial authorities. The law of the sea, notably Article 107 UNCLOS, perfectly accepts the idea that the military is the main actor in counter-piracy operations for that it reserves the entitlement to seize on account of piracy to "warships or military aircraft, or other ships or aircraft clearly marked and identifiable as being on government service and authorized to that effect". And yet, domestic law pertaining to deprivation of liberty on suspicion of criminal activity in some States is such that it does not cover the military *ratione personae*. This lack of coordination between the authorization to use military means and personnel for counter-piracy operations on the level of international law and the scope of application of the domestic legal frameworks pertaining to law enforcement results in a normative gap. Hence, not only does the procedure leading to arrest and detention lack a clear legal basis in States not pursuing a criminal law approach to arrest and detention, but so does the granting of procedural safeguards to persons subject to deprivation of liberty – with the consequence that arrested and detained piracy suspects are stripped of protection in procedural terms.

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coined by Arendt, see also Anne Peters, 'Membership in the Global Constitutional Community' in Jan Klabbers, Anne Peters and Geir Ulfstein (eds), *The Constitutionalization of International Law* (OUP 2009) 158–59.

That it is the military enforcing the law against alleged Somali-based pirates not only has repercussions on the level of competencies and the applicability of domestic law. It also has repercussions on the quality of the law on which deprivation of liberty during disposition and the transfer procedure rests. Deprivation of liberty on suspicion of criminal activity carried out by the "ordinary" law enforcement authorities is, as a general rule, governed by legal bases that are democratically legitimized, duly published and, thus, publicly accessible. By and large, the same holds true for surrender for prosecution by means of extradition carried out by administrative and/or judicial authorities. However, in the context of counter-piracy operations, arrest, detention and transfer are to a large extent regulated and governed by classified documents, such as rules on engagement and standard operating procedures. This challenges the basic assumption that legal bases authorizing enforcement powers must be of a certain quality – notably be sufficiently accessible and thus foreseeable – in order to satisfy the fundamental principles of legal certainty and rule of law.

Another reason for not giving international individual rights of piracy suspects due respect during the disposition of their cases arguably stems from the rather unique nature of counter-piracy operations. They are arguably the first truly internationalized law enforcement operation, aimed at preventing and suppressing an entire criminal phenomenon occurring in foreign waters or on the high seas. Thus, counter-piracy operations cannot be compared to transnational police operations, which are (generally) directed at specific individual(s) who allegedly participated in a past criminal venture or intend to prevent a concrete, imminent criminal act. Rather, counter-piracy operations aim to secure the sea by patrolling and engaging in surveillance activities.

Hence, one of the characteristics of counter-piracy operations is that they take place extraterritorially and in a maritime context. The idea that human rights law may apply to a State acting beyond its borders has gained firm ground over the last several decades. And yet, most writings and the bulk of the case law pertains to the extraterritorial application of human rights law in land-based operations. Hence, the meaning of the criteria of "effective control" over persons or territory – instances where a State exercises jurisdiction in the sense of the jurisdictional clauses of human rights treaties – is not well-developed for the maritime context. This may involve some uncertainty regarding the application of human rights law to acts leading to the arrest of piracy suspects at sea. While human rights law undeniably applies by virtue of the flag State principle to acts and decisions taken on board a law enforcement vessel of the seizing State , this is less clear for acts taking place beyond the railing.

The extraterritorial, maritime context in which counter-piracy operations take place, and specifically the fact that proceedings involving deprivation of liberty and transfers largely occur on board a warship of the seizing State, has a dimension beyond the applicability of human rights as such – many of the human rights provisions relevant to arrest, detention and transfers contain a "territorial element". To briefly recall, this namely holds true for Article 13 ICCPR, the ap-

plication of which is predicated on the lawful presence of the person subject to removal "in the territory" of the surrendering State. As regards arrest and detention, the granting of consular rights presupposes that the person is present in the consular district of the national State (VCCR) or is in the territory of the custodial State (SUA Convention and Hostage Convention). Whether these implicit or explicit references to territory can be interpreted teleologically to mean "jurisdiction" – what the seizing State undoubtedly has on board its warship by virtue of the flag State principle – remains to be seen. This uncertainty as to the meaning of a specific notion in an entirely new context evidences the fact that the law governing law enforcement and its authoritative interpretation by courts often lags seriously behind operational realities.

The cooperative nature of counter-piracy operations off the coast of Somalia and the region adds another layer of intricacy to the interpretation of different human rights provisions, which, when applied in a purely domestic and land-based law enforcement operation, have fairly clear content and meaning. This holds particularly true for the right to liberty enshrined in Article 5 ECHR. Some States takes the stance that the obligations arising from this provision – the fulfilment of which would be incumbent on them in an "ordinary" law enforcement setting – can be discharged by third States. Without repeating the findings made in this respect, we must recall that this approach calls into question the whole assumption on which provisions establishing the right to liberty rests: that the power to deprive a person of his liberty and the obligation to subject arrest and detention to judicial control must always be glued together – otherwise protection against arbitrary and unjustified deprivation of liberty is seriously weakened.

A final reason as to why piracy suspects are not perceived as subjects but mere objects of decisions and procedures during the disposition of their cases, may go back to a basic characteristic of the body of law, from which counter-piracy enforcement powers stem – the law of the sea. A shortcoming identified with regard to the UNCLOS pertains to the "difficulty to configure persons as the beneficiaries of right and the recipient of duties" within this treaty and "the ensuing uncertain subjectivity of persons under the law of the sea".[3] It is argued that persons are considered solely "as the object of protection ... or repression" – and with regard to "repression" reference is made to Article 105 UNCLOS,[4] which serves as the legal cornerstone for arrest, detention and transfer of piracy suspects. Yet, even though explicit mention of persons is made in Article 105 UNCLOS, we demonstrated earlier that its content is largely inspired by a provision drafted in the early 1930s and thus at a time when the individual rights of persons subject to law enforcement measures were not a primary concern. Hence, counter-piracy operations rest to a large extent on a set of provisions which are based on neither the assumption of subjectivity of the person nor the idea that

3 Irini Papanicolopulu, 'The Law of the Sea Convention: No Place for Persons?' (2012) 27 International Journal of Marine and Coastal Law 867, 867.

4 ibid 873.

international individual rights of persons against whom enforcement measures are directed constrain these powers. Essentially, the current approach to arrest, detention and transfer is, to a certain extent, reflective of the law of the sea, which equally relegates persons to a lesser status.

To conclude, the precise origins of and justification behind the current approach to arrest, detention and transfer of piracy suspects cannot be determined with certainty. Yet, what can be affirmed with certainty is that international law as it stands today grants international individual rights to every criminal suspect deprived of his liberty and to every person subject to surrender for prosecution. Hence, piracy suspects have "a right to have rights", and it is out of the question to perceive and treat them as "scorners of the law of nations" that "can find no protection in law"[5] – as Gentili suggested many centuries ago.

5 Alberico Gentili, *De iure belli libri tres: The translation of the edition of 1612* (John Rolfe tr, Clarendon Press 1933) 423, para 697.