What follows is an analysis of arrest and detention of piracy suspects during the disposition of their cases in light of international individual rights. Thereby, a distinction is drawn between two types of deprivation of liberty that potentially occur during disposition while on board a law enforcement vessel of the seizing State: arrest and detention on suspicion of criminal activity on the one hand and with a view to transfer on the other.

The first part of the analysis focuses on the legality of arrest and detention in light of the individual rights of piracy suspects – in doing so, the obvious legal benchmark to apply is the right to liberty and security. Since only a deprivation (and not a mere restriction) of liberty triggers the application of the right to liberty, the discussion first centres on the question whether and, if so, from what moment piracy suspects intercepted by patrolling naval States and later brought on board their warship for disposition are deprived of their liberty. What then follows is an analysis of which justificatory ground deprivation of liberty can be based on during the different phases of disposition. The case essentially lies in limbo during disposition since its very purpose is to determine the fate of a specific case involving an incident of piracy – that is, whether to release the suspects or submit them for prosecution, and thus involving another decision on whether to prosecute them in the courts of the seizing State or to transfer them to a third State. This, taken together with the cooperative approach to law enforcement in the realm of piracy, makes determining the ground for detention, namely whether deprivation of liberty is on suspicion of criminal activity or with a view to transfer, highly intricate. We will then engage in a discussion of the lawfulness of arrest and detention and the requirement that it be free from arbitrariness. While some States apply their ordinary domestic criminal law framework to arrest and detention of piracy suspects, others consider them to be “extraordinary suspects” falling outside the scope of ordinarily applicable rules. This latter approach begs the question whether international rules are available, which are of a certain quality as required by the lawfulness element of the right to liberty, in order to fill the normative gap resulting from the “extraordinary suspect” approach to arrest and detention. The same question will be discussed with regard to detention
pending transfer where, as a general rule, there is an absence of specific domestic law governing this type of detention.

The second part of the analysis pertains to the issue of the procedural safeguards that must be granted to piracy suspects subject to arrest and detention on board a law enforcement vessel of the seizing State. In addition to exploring the various procedural safeguards stipulated in the different provisions enshrining the right to liberty – notably the right to information and the right to judicial review and control of deprivation of liberty – we enquire into whether piracy suspects have a right to consular assistance, which is understood to have the character of an international individual right given that they are foreign detainees vis-à-vis the seizing State.

I. Arrest and Detention of Piracy Suspects in Light of the Right to Liberty

What follows is an analysis whether arrest and detention of piracy suspects during disposition of their cases is in line with the right to liberty, which protects the classical “freedom to come and go”,1 and the mistier concept of personal security.2 The right to liberty and security is enshrined in various human rights provisions, namely Article 5 ECHR, Article 9 ICCPR, Article 6 CFREU and Article 37 CRC. None of these provisions protect an absolute right to liberty. Rather, they set forth the conditions under which a person can exceptionally be deprived of his liberty.3 Hence, they limit the State’s ability to interfere with the right to free movement of persons by prohibiting unlawful or arbitrary deprivation of liberty. The approaches to doing so differ among the various legal norms mentioned.

Article 5(1) ECHR contains an exhaustive list of grounds that justify a deprivation of liberty. In other words, a person cannot be deprived of his liberty except for one of the reasons listed in the provision.4 Further, Article 5(1) ECHR expressly stipulates that deprivation of liberty must be lawful.5 According to the case law of the Strasbourg organs, every deprivation of liberty must also be free from arbitrariness. Article 9(1) ICCPR, in turn, stipulates that no one shall be deprived of his liberty “except on such grounds ... as are established by law”.6

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1 Medvedyev and Others v France App no 3394/03 (Grand Chamber, EctHR, 29 March 2010) para 74.
2 The main focus is on the right to liberty while the right to security is only referred to incidentally.
3 Article 5(1) ECHR and Article 9(1) ICCPR.
4 Article 5(1)(a)-(f) ECHR.
5 See the second sentence of Article 5(1) ECHR stipulating that deprivation of liberty can only take place “in accordance with a procedure prescribed by law” and the list of justificatory grounds in Article 5(1)(a)-(f) ECHR, each of which requires that arrest, detention or the order for detention be “lawful”.
6 Third sentence of Article 9(1) ICCPR.