Patrolling naval States are only exceptionally willing and able to prosecute the suspects they take captive in their domestic courts. The vast majority of suspects are instead prosecuted by third States, mainly from the region prone to piracy – and transfers serve as the prevalent means by which to put alleged pirates in the hands of the ultimately prosecuting State.

The current transfer practice features two main characteristics, which need closer scrutiny in terms of the international individual rights of piracy suspects. Firstly, piracy suspects are not in any way associated to the proceedings in which their potential transfer is decided. As a consequence, they cannot exercise any procedural rights during these proceedings. Another feature of the current transfer practice is that no individual non-refoulement assessment takes place. Rather, actors involved in transfers of piracy suspect consider the non-refoulement principle to be respected by the very fact that they have concluded a transfer agreement with the receiving State. Whether current transfer practice is in line with the international individual rights of piracy suspects is analysed in the following.

Thereby, it is first discussed whether international law provides piracy suspects with either an absolute or a conditional right not to be surrendered for prosecution to a third State. The conclusion is that no absolute prohibition of transfer of piracy suspects exists, but that the principle of non-refoulement may prohibit a specific transfer for prosecution if there is a real risk that certain human rights of the specific piracy suspect will be violated upon transfer. In light of this conditional right not to be transferred flowing from the non-refoulement principle, we will then probe the argument that a non-refoulement assessment on an individual basis, i.e. with regard to a specific piracy suspect, is unnecessary since a global non-refoulement assessment has already taken place, as a precondition to concluding a transfer agreement with the regional State. Lastly, it is discussed whether it is compatible with current human rights law that piracy suspects are not associated to proceedings potentially leading to their transfer and, as a consequence, that they are not granted any procedural safeguards – except for being informed that their transfer is considered or imminent.
I. A Conditional Right Not to Be Transferred: Non-Refoulement

This following analysis focuses on whether international law provides piracy suspects with either an absolute right or a conditional right not to be surrendered to a third State for prosecution. As a first step, the argument put forward by some scholars that the piracy provisions of the law of the sea—concretely Article 105 UNCLOS and Article 19 of the Convention on the High Seas—prohibit transfers to third States as such is confuted. Secondly, it discusses how human rights law—similar to the law of the sea—does not contain an absolute right not to be surrendered for prosecution either. However, it will be shown that the prohibition of refoulement explicitly or implicitly contained in human rights law may bar a specific transfer if there is a real risk that certain rights of the piracy suspect will be violated upon transfer. It will further demonstrate that this conditional right not to be surrendered to a third State for prosecution flowing from the principle of non-refoulement applies to piracy suspects, and describe the harms potentially inflicted upon transfer that may bar a specific transfer.

A. No Transfer Prohibition Flowing from the Law of the Sea

Some scholars argue that according to Article 105 UNCLOS (and the identically worded Article 19 of the Convention on the High Seas), only the seizing State is competent to criminally prosecute piracy suspects. In other words, these provisions only provide the seizing State—that is, the *forum deprehensionis*—with adjudicative jurisdiction at the exclusion of any other State. Consequently, these provisions prohibit transfers of piracy suspects to third States for criminal prosecution *as such*, regardless of the means employed or the State alleged pirates are transferred to.

Article 105 UNCLOS and Article 19 of the Convention on the High Seas are the only provisions of the law of the sea dealing with the criminal prosecution of piracy suspects upon seizure. The second sentence of both provisions reads: “The courts of the State which carried out the seizure may decide upon penalties to be imposed, and may also determine the action to be taken with regard to the ships, aircraft or property, subject to rights of third parties acting in good faith.” It is submitted here that Article 105 UNCLOS and Article 19 of the Convention on the High Seas cannot be read as precluding the surrender of suspects to third States

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