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# Fighting Maritime Piracy under the European Convention on Human Rights

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## Abstract

*On the basis of real examples of anti-piracy operations conducted in the Indian Ocean by European navies, the article examines the legal implications of such military actions and their judicial medium- and long-term consequences in the framework of the European Convention on Human Rights. The only existing authority directly addressing maritime piracy, although from the sole perspective of state jurisdiction, is the recent Grand Chamber judgment in Medvedyev and Others v. France. The Court's approach and conclusions in Medvedyev will be analysed in section 2. Section 3 will explore other important issues likely to be raised under the Convention by anti-piracy operations. Section 4 will consider the question of state responsibility, i.e., jurisdiction and attribution, in the context of anti-piracy operations carried out on the high seas or on the territory of third states.*

## 1 Introduction

On 6 April 2009 a group of Somali pirates seized a 40-foot sailing yacht, the *Tanit*, off the coasts of Somalia. Five French nationals who were on board were taken hostage. The *Tanit* was immediately chased by a French warship. Four days later French commandos stormed the yacht. One of the hostages was shot in the head and died. The pirates were taken to France and indicted on several criminal charges. The criminal investigation revealed that the hostage was accidentally shot by one of the commandos.

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In May 2010, Somali pirates seized a Russian ship. Shortly thereafter, Russian marines stormed the ship, killed one of the pirates, and captured the rest of them. The media reported that the pirates were released and left adrift and did not make shore alive.

Like France and Russia, all European nations participating in naval operations off the shores of Somalia are bound not only by international law but also by the European Convention on Human Rights ('the Convention'). All the actions performed by the French and Russian military in the circumstances mentioned above raised issues under several provisions of the Convention. So far, the European Court of Human Rights ('the Court') has never ruled on cases relating to maritime piracy. It did however deal with cases, in particular the recent case of *Medvedyev and Others v. France*,<sup>1</sup> concerning the capture and detention of people on the high seas. The second section of this article will explain that judgment in detail.

In *Medvedyev*, the Court only dealt with substantive issues under Article 5 of the Convention relating to deprivation of liberty, but the fight against piracy raises potential issues under many other provisions. The third section of this article will try to identify those issues by applying relevant case law by analogy.

The fourth section of our analysis will address the question of state responsibility, which is a rather complex one and will be exclusively addressed from the Convention perspective.

## 2 Issues Raised in *Medvedyev*

On 13 June 2002, off Cape Verde, a French warship spotted the *Winner*, a Cambodia-registered cargo ship supposed to be loaded with narcotics. France had obtained an authorization from the Cambodian Government to stop and search the ship, but her crew refused to stop and instead started jettisoning overboard large quantities of cocaine. French commandos finally managed to board the ship. When a crew member refused to obey their commands, a warning shot was fired at the ground but the bullet ricocheted and wounded the man, who died a week later. In the meantime, the Brest prosecutor had opened a criminal investigation and two investigating judges had been appointed. Upon their arrival, the suspects were immediately handed over to the police.

Before the French Court of Cassation and later before the Strasbourg Court the crew members claimed that they had been arbitrarily deprived of their liberty and that they had not been 'promptly' brought before a judge. They relied on Article 5(1) and (3) of the Convention. Strangely, the family of the deceased sailor did not bring any claim under Article 2 of the Convention (right to life).

The case was first decided in 2008 by a chamber of seven judges which found that France had violated the applicants' rights under Article 5(1) but not under Article

<sup>1</sup> App. No. 3394/03 [GC], ECHR 2010. This and all other cases cited in this article are available at: [www.echr.coe.int/ECHR/EN/Header/Case-Law/Decisions+and+judgments/Reports+of+judgments/](http://www.echr.coe.int/ECHR/EN/Header/Case-Law/Decisions+and+judgments/Reports+of+judgments/).

5(3). It was then referred to the Grand Chamber of the Court, which delivered its judgment on 29 March 2010.

### *A Issues under Article 5(1)*

Pursuant to Article 5(1) of the Convention 'everyone has the right to liberty and security of person' and no one shall be deprived of his liberty save, *inter alia*: (i) in the case of a 'lawful arrest or detention'; (ii) effected for the purpose of bringing him 'before the competent legal authority on reasonable suspicion of having committed an offence'; and (iii) in accordance with a procedure prescribed by law.

The Court noted that it was not disputed among the parties that the purpose of the deprivation of liberty on board the *Winner* had been to bring the suspects 'before the competent legal authority'. The parties disagreed, however, as to whether the facts of the case had a legal basis. That meant whether the conditions for their deprivation of liberty under domestic and/or international law had been clearly defined and whether the law itself had been foreseeable in its application to a degree that was reasonable in the circumstances of the case.

The main question that the Court had to answer was whether the United Nations Convention on the Law of the Sea, signed at Montego Bay on 10 December 1982 ('the Convention of Montego Bay'), on which the French Court of Cassation had relied in order to reject the applicants' appeal, provided a sufficient legal basis for their arrest and detention.

The way the Court addressed this issue is directly relevant in the context of anti-piracy operations. In its reasoning it opposed the very detailed anti-piracy provisions<sup>2</sup> of the Convention of Montego Bay to the 'minimal' anti-drug-trafficking provisions<sup>3</sup> contained in the same convention. The former lay down 'the principle of universal jurisdiction as an exception to the rule of exclusive jurisdiction of the flag State' and therefore authorize any state to intercept any ship suspected of piracy. The latter merely authorize states party to the Convention of Montego Bay to request the assistance of another state party in the interception of ships flying its own flag. Since Cambodia was not a party to the Convention of Montego Bay and in the absence of universal jurisdiction, France therefore had no right to intercept the *Winner*.

The Court went even further, considering that developments in public international law embracing the principle that all states have jurisdiction as an exception to the law of the flag state in the fight against the illegal trade in narcotics would bring international law on drug-trafficking into line with what had already existed for many years in respect of piracy.

Independently of the law of the sea, the Court also found that neither French law nor the Cambodian diplomatic note authorizing the French Navy to intercept and

<sup>2</sup> Arts 101–107 and 110.

<sup>3</sup> Art. 108.

search the *Winner* in the absence of any long-standing practice or any bilateral or multilateral agreement, met the standards of clarity and ‘foreseeability’ to qualify as a ‘sufficient legal basis’.

What is interesting for the purposes of this article is that the Court’s *obiter dictum* on piracy seems to imply that the anti-piracy provisions contained in the Convention of Montego Bay would pass the ‘sufficient legal basis’ test under Article 5(1) when it comes to intercepting pirate vessels and detaining their crews.

## B Issues under Article 5(3)

Article 5(3) of the Convention provides, in particular, that ‘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’. This provision is structurally concerned with two separate matters: police custody, i.e., the early stages following an arrest, and the detention pending trial before a criminal court. In *Medvedyev* only the period between the time the *Winner* was intercepted by the French warship and the moment the crew were brought before the investigating judges, 13 days in total, was at issue.

The rationale behind Article 5(3) is that during the initial stages an individual arrested or detained must be protected, through judicial control, against the risk of ill-treatment and abuse of powers by police authorities. The test is three-fold: promptness; automatic review;<sup>4</sup> characteristics and powers of the judicial officer. Only the first and third elements were particularly problematic in *Medvedyev*.

### 1 Promptness

Normally, a period of 13 days would be considered contrary to the principle of ‘promptness’. In the case of *Brogan and Others v. United Kingdom*<sup>5</sup> the Court had found that a period of four days and six hours was too long even in a case concerning terrorism-related charges. *A fortiori* in the case of *Öcalan v. Turkey*,<sup>6</sup> it found that a period of seven days was incompatible with the Convention requirements. However, in a case similar to *Medvedyev*, *Rigopoulos v. Spain*,<sup>7</sup> concerning the interception by the Spanish Navy of a ship suspected of drug-trafficking and the subsequent transfer of her crew to Spain by sea, the Court found that a period of 16 days was not incompatible with Article 5(3). The Court’s decision was based on the fact that ‘wholly exceptional circumstances’ due to the distance to be covered and the resistance of the ship’s crew made it ‘materially impossible to bring the applicant (M. Rigopoulos) physically before the investigating judge any sooner’.

<sup>4</sup> The judicial review must not be subject to the arrested or detained person’s application. Someone who had been subjected to ill-treatment or somehow incapacitated might not be in a physical or mental condition to do so.

<sup>5</sup> 29 Nov. 1988, Series A no. 145-B, 11 EHRR (1989) 117.

<sup>6</sup> App. No. 46221/99 [GC], ECHR 2005-IV, at paras 104–105.

<sup>7</sup> App. No. 37388/97 (decision on admissibility), ECHR 1999-II.

In *Medvedyev*, the Grand Chamber took a similar approach and considered that there was nothing to suggest that the transfer of the *Winner's* crew to France took longer than necessary, in particular given the weather conditions and the poor state of repair of the ship. The Grand Chamber decided that it was not for the Court to assess whether the applicants could have been taken to France or to some other country by other means, for instance by transferring them on board the French warship, which could have cruised at a much faster speed, or by airlifting them. The conclusion was that since, once on French soil, the applicants were brought before the investigating judges only about eight or nine hours after their arrival, France did not violate Article 5(3). It is to be noted that the question of alternative means of transfer to France was the main argument raised by eight judges in their partly dissenting opinion attached to the judgment.

As far as anti-piracy operations are concerned, we can conclude that, after *Medvedyev*, Article 5(3) does not impose on European states an obligation to transfer by air pirates captured thousands of miles away from where the competent judicial authority is located, nor to transfer them on board the warships involved, and not even to provide for the presence of the competent judicial authority in the operational area, whether on board the warships or in the nearest military base.

## 2 Characteristics and Powers of the Judicial Officer

The question whether the applicants had been promptly brought before a 'judge or other officer authorized by law to exercise judicial power' attracted a lot of attention in the French media and legal circles after the initial chamber judgment. The chamber had considered that the prosecutor under the supervision of whom the initial detention of the *Winner's* crew on board the ship had been carried out, and whom French law qualifies as *magistrat*, did not qualify either as a 'judge' or as another 'officer authorized by law to exercise judicial power', given the lack of independence from the Executive Power.

The Grand Chamber's interpretation of the role of the prosecutor was awaited with impatience in France, but the Grand Chamber did not directly address it since it acknowledged that the applicants were brought before the investigating judges in due time and that there were no doubts that the investigating judges qualified under Article 5(3). However, in its reasoning the Grand Chamber stressed that the 'judicial officer must offer the requisite guarantees of independence from the executive and the parties, which precludes his subsequent intervention in criminal proceedings on behalf of the prosecuting authority, and he or she must have the power to order release, after hearing the individual and reviewing the lawfulness of, and justification for, the arrest and detention'.

As for the scope of that review, the formulation which has been at the basis of the Court's long-established case law dates back to the early case of *Schiesser v. Switzerland*.<sup>8</sup>

<sup>8</sup> 4 Dec. 1979, Series A no. 34, at para. 31.

[U]nder Article 5 § 3 there is both a procedural and a substantive requirement. The procedural requirement places the ‘officer’ under the obligation of hearing himself the individual brought before him; the substantive requirement imposes on him the obligations of reviewing the circumstances militating for or against detention, of deciding, by reference to legal criteria, whether there are reasons to justify detention and of ordering release if there are no such reasons.

In *Medvedyev*, the Grand Chamber finally did not say whether a French prosecutor qualifies under Article 5(3) or not. It did not need to do so because the period during which the applicants had been detained under the sole authority of the Brest prosecutor had not been unreasonable due to the exceptional circumstances of an arrest on the high seas. The obligation to bring them before a judicial officer within the meaning of the Convention was only triggered the moment the applicants entered Brest harbour.

But there could be a difference between the geographical situation in *Medvedyev* and that in some piracy case where the events took place off the coast of Somalia. France has been running a relatively big military base in Djibouti for many years. That base is the biggest French permanent military presence outside French territory and is frequently used by the armed forces of other European states for the purposes of their anti-piracy or hostage-rescuing operations. It is likely that any pirates captured in that part of the Indian Ocean either by France or by other European forces would be transferred to Djibouti prior to be airlifted to Europe. The ‘exceptional circumstances’ theory that the Court has applied to the high seas in *Medvedyev* and *Rigopoulos* could hardly be applied to a transfer zone within the French military base in Djibouti. The question whether Article 5(3) would require the presence of an independent judicial officer *in loco* is therefore on the table and would probably depend on the length of the suspects’ presence in the transfer zone.

### 3 Other Possible Issues: A Non-exhaustive Survey

Apart from the Article 5 issues settled in *Medvedyev*, the fight against maritime piracy by military and judicial means raises many other questions under several Convention provisions.

As a preliminary remark, I would recall that in *Medvedyev* the only obligations in question were France’s obligations *vis-à-vis* the *Wimmer’s* crew. There were no third parties involved. In piracy cases, however, it is likely that the pirates would not be the only stakeholders. Their victims, whether hostages, ship owners, etc., could also have rights under the Convention.

The typical anti-piracy operational scenario could be described as follows: (A) surveillance; (B) boarding; (C) capture and detention; (D) trial; and (E) punishment. With two important variables applying to each of these phases: possible physical harm for the pirates and their hostages, and (F) destruction or seizure of property.

#### *A Surveillance*

Before intercepting suspected pirates, the military usually put them under surveillance. All sorts of craft are subject to radar, video, photo, and audio monitoring.

Radio and cellular phone communications, maybe emails, including those exchanged within Somali territory, are probably being intercepted as the reader reads these lines.

Assuming that state jurisdiction can be established, all these actions might fall within the scope of Article 8 of the Convention, which protects the right to respect for private life. If Citizen X and his girlfriend are sunbathing on the deck of their sailing yacht off the beaches of the Seychelles, can they be video-taped from a helicopter or a drone? Can they be recorded when they talk on the phone? Does that type of surveillance breach their right to privacy?

The Court considers the interception of people's conversations as an interference with their right to privacy. The same is true for secret video surveillance.<sup>9</sup> According to well established case law, such an interference will breach Article 8 unless: (i) it is 'in accordance with the law', (ii) pursues one or more of the legitimate aims referred to in paragraph (2) of that provision (national security, public safety, etc.); and (iii) is 'necessary in a democratic society' to achieve those aims.

Following *Medvedyev*, we can say that surveillance of suspect pirates finds its legal basis in customary international law.

As to the question whether an interference is 'necessary in a democratic society' in pursuit of a legitimate aim, the Court considers that powers to instruct secret surveillance are tolerated under Article 8 only to the extent that they are subject to adequate and effective guarantees against abuse, the assessment of which depends on all the circumstances of the case, such as the nature, scope, and duration of the measures; the grounds required for ordering them; the authorities competent to authorize, carry out, and supervise them; and the kind of remedy provided by national law.<sup>10</sup>

It is safe to assume that the fight against maritime piracy would be considered by the Court as a legitimate aim. It is even safe to assume that the forms of surveillance that I have just mentioned would be considered necessary when monitoring maritime zones affected by strong pirate activities. However, there could be a problem when it comes to the procedures for supervising those surveillance measures as well as for their duration and scope.

The Court considers interception of communications as a field where abuse is potentially very easy. It therefore requires that it be subject, in principle, to the supervision of a judge or, exceptionally, of another independent authority. To qualify under Article 8, such an authority must be independent of the Executive Power and be given 'sufficient powers and competence to exercise effective and continuous control'. For instance, a mixed parliamentary commission of the *Bundestag*<sup>11</sup> and the British Interception of Communications Commissioner did pass the Court's test,<sup>12</sup> while public prosecutors in Romania did not.<sup>13</sup>

<sup>9</sup> See, for instance, App. No. 35394/97, *Khan v. United Kingdom*, ECHR 2000-V, at paras 26–28.

<sup>10</sup> See, for instance, *Klass and Others v. Germany*, 6 Sept. 1978, Series A no. 28, at paras 49, 50, and App. No. 54934/00, *Weber and Saravia v. Germany* (decision on admissibility), ECHR 2006-XI, at para. 106.

<sup>11</sup> See *Klass and Others v. Germany*, *supra* note 10, at para. 56.

<sup>12</sup> App. No. 26839/05, *Kennedy v. the United Kingdom*, ECHR 2010, at para. 169.

<sup>13</sup> See, for instance, App. No. 71525/01, *Dumitru Popescu v. Romania* (no. 2), 26 Apr. 2007, at para. 71, and *Vasilescu v. Romania*, 22 May 1998, Reports of Judgments and Decisions 1998-III, at paras 40–41.

The question might therefore arise whether the interception of pirates' communications by European navies has been duly authorized and supervised by a judge or some other independent authority; which, in the affirmative, triggers a second question: what should be the scope of surveillance powers delegated to the military? Could a judge authorize navy commanders to intercept all telephone communications in the areas under their responsibility and for the whole duration of their assignment, irrespective of any *prima facie* criminal evidence?

## **B Interception and Boarding**

The interception, boarding, and searching of a ship, which is private property, definitely raise privacy issues under Article 8 but, since they involve the use of some degree of force, may also raise issues under Articles 2 (right to life) and 3 (prohibition of torture and of other inhuman and degrading treatment) of the Convention.

### *1 The Right to Privacy*

The recent case of *Gillan and Quinton v. United Kingdom*<sup>14</sup> is in my opinion very relevant to anti-piracy operations. The case concerned police powers under sections 44–47 of the Terrorism Act 2000 to stop and search individuals without reasonable suspicion of wrongdoing. A senior police officer could issue an authorization permitting any uniformed police officer within a defined geographical area to stop and search any person. The search could take place in public and failure to submit to it amounted to an offence.

The applicants had been stopped and searched during a demonstration without further inconvenience. The Court considered that the wide discretion conferred on the police under the 2000 Act, in terms both of the authorization of the power to stop and search and its application in practice, had not been curbed by adequate legal safeguards so as to offer the individual adequate protection against arbitrary interference. It concluded that because the police enjoyed too much discretion there was a risk of arbitrariness, and therefore the powers in question were not 'in accordance with the law' within the meaning of Article 8.

I am not sure whether we can compare the powers to stop and search individuals walking on the streets of London with the powers to stop and search vessels cruising in pirate-affected areas, but there is food for thought.

### *2 Issues under Articles 2 and 3*

The interception and searching of a ship on the high seas not only raises issues under Article 8 but, since it implies the use of some degree of force, it raises serious issues also under Articles 2 and 3. There are general issues relating to the use of force (a) and issues specifically linked to hostage-rescue operations (b).

<sup>14</sup> App. No. 4158/05, ECHR 2010 (published in extract only).



## (a) General issues relating to the use of force

Article 2 forbids states intentionally to deprive someone of his or her life unless it is 'no more than absolutely necessary', in particular 'in defence of any person from unlawful violence' or 'in order to effect a lawful arrest'.

The first obvious question is whether, in order to stop a pirate vessel, the military can simply fire at her, putting the lives of the people on board at risk or, on the contrary, should take all steps in order to avoid unnecessary harm. The Court's case law on the use of lethal force is well-established.

In a landmark judgment of 1995, *McCann and Others v. United Kingdom*,<sup>15</sup> the Court considered that deprivations of life must be subject to the most careful scrutiny, particularly where deliberate lethal force is used, taking into consideration not only the actions of the agents of the state who actually administer the force but also all the surrounding circumstances, including such matters as the planning and control of the actions under examination. In *McCann*, British SAS soldiers had been told that IRA members had planted a car bomb somewhere in Gibraltar which they intended to detonate. They were told the suspects were all carrying devices that could remotely detonate the bomb from anywhere in town and that they would not hesitate to do so when facing arrest. That information pushed the soldiers to shoot almost immediately, giving little chance to the suspects to surrender. It turned out that the IRA team had neither weapons nor remote controls. The Court accepted that the soldiers honestly believed that it was necessary to shoot the suspects. However, it found that the anti-terrorist operation as a whole, in particular the intelligence assessment, had been poorly prepared and had led to the use of lethal force which was not 'more than absolutely necessary'.

Coming back to our piracy cases it would be hard to argue that the destruction of a pirate ship quietly docked in some Somali harbour by a surface-to-surface missile fired at long distance would meet the 'more than absolutely necessary' test. But the conclusion could be different if armed pirates were fired at while shooting at some cargo or while trying to board their prey.

## (b) Specific issues relating to hostage-rescuing

In the event of death or injury of the hostages or of the hostage takers resulting from the use of lethal force by state authorities, the Court will have to assess in detail whether such action was more than absolutely necessary and whether it was planned and carried out appropriately.

In *Andronicou and Constantinou v. Cyprus*,<sup>16</sup> the Court found that a police operation which resulted in the death of the hostage, a young woman, and the hostage taker did not breach Article 2. The Court examined the circumstances of the case in great detail and concluded that the police had consistently tried to reason with the hostage taker and that it was only when there were elements leading them to believe that the life of the hostage was at serious risk that the authorities had decided to intervene.

<sup>15</sup> 27 Sept. 1995, Series A no. 324.

<sup>16</sup> 9 Oct. 1997, Reports of Judgments and Decisions 1997-VI.

Moreover, the operation had been carried out by specially trained officers who had been specifically instructed not to use their weapons or to use them only if they feared for the hostage's life or for their own lives. While examining the behaviour of each individual officer during the action, the Court found that they had 'honestly believed' that it was necessary to kill the hostage taker 'in order to save the life of [the hostage] and their own lives and to fire at him repeatedly in order to remove any risk that he might reach for a weapon'.

In piracy cases, the assumption is that European governments do not really negotiate the release of hostages. They would certainly have contacts with the pirates and try to reason with them or trick them into some kind of ambush, but ultimately they would not bend to their demands. The options are therefore pretty limited: either the authorities resort to some sort of rescue mission or the hostages are left to their fate in the pirates' hands.

In the latter case, things get even more complicated, as under Article 2 of the Convention states not only have a negative obligation ('no one shall be deprived of his life intentionally') but also a positive obligation to protect the lives of those under their jurisdiction.<sup>17</sup> What if Somali pirates capture some passengers on a Danish or Italian cruise ship and, given the Governments' inaction, the hostages are taken to Somalia where they are enslaved, tortured, raped, executed, or they die from some other cause. Do Denmark and Italy, where the ships are registered and which have sent warships into that part of the world precisely to combat piracy, have an obligation to rescue the hostages? This is a difficult question.

The Court has accepted several times that Article 2 of the Convention may also imply in certain well-defined circumstances a positive obligation on the authorities to take preventive operational measures to protect an individual whose life is at risk from the criminal acts of another individual (see, for instance, *Maiorano and Others v. Italy*<sup>18</sup>, *Opuz v. Turkey*<sup>19</sup> and *Rantsev v. Cyprus and Russia*<sup>20</sup>).

As for the existence of any positive obligations to rescue hostages, there is not much in the Court's case law. Two recent Russian cases do raise the issue, and at least one of them could lead to the recognition of such an obligation. The cases of *Finogenov and Others v. Russia*<sup>21</sup> and *Chernetsova and Others v. Russia*<sup>22</sup> concern the hostage taking of the *Dubrovka* theatre in October 2002, in Moscow, and the subsequent rescue operation launched by Russian Special Forces which resulted in the death of the hostage-takers and the death and injury of several hostages. In *Finogenov*, the applicants argued *inter alia* that Russian authorities had failed to prevent the hostage-taking by terrorists. The Court considered that 'a duty to take specific preventive action [arose] only if the authorities knew or ought to have known at the time of the existence of

<sup>17</sup> See, for instance, *Osman v. United Kingdom*, 28 Oct. 1998, Reports of Judgments and Decisions 1998-VIII, at paras 115–116.

<sup>18</sup> App. No. 28634/06, 15 Dec. 2009.

<sup>19</sup> App. No. 33401/02, ECHR 2009.

<sup>20</sup> App. No. 25965/04, ECHR 2010 (published in extract only).

<sup>21</sup> App. No. 18299/03 (decision on admissibility), 18 Mar. 2010.

<sup>22</sup> App. No. 27311/03 (decision on admissibility), 18 Mar. 2010.

a real and imminent risk' to life. In the absence of any evidence that the authorities had any information in this respect, the Court concluded that the application on that account was manifestly ill-founded. The application was considered admissible as far as the loss of life due to the rescue operation itself (an *Andronicou* type of situation) was concerned and is currently pending.

If we take the Court's reasoning in the *Finogenov* decision *a contrario* we can argue that, had the authorities known about a real and imminent risk of a life-threatening hostage-taking, Russia's positive obligation to protect the hostages would have been triggered. In piracy cases, if the military know that a group of pirates is about to board a ship and do not do anything to prevent the boarding, there could be an issue under Article 2.

Governments facing hostage-taking, whether by terrorists or pirates, are therefore facing a serious dilemma. If they try to rescue the hostages by military means something may go wrong and their responsibility under Article 2 may be triggered, *vis-à-vis* both the hostages and the hostage-takers. But if they fail to rescue the hostages their responsibility under Article 2 may also be triggered. The same reasoning can be applied *mutatis mutandis* to Article 3 and, to the extent that pirates are involved in the trafficking of human-beings, to Article 4 of the Convention (see *Rantsev v. Cyprus and Russia* cited above).

### C Arrest and Detention

We covered the early stages of detention in our analysis of *Medvedyev and Others v. France*. One remaining aspect of the right to liberty and security which may be problematic in the context of anti-piracy operations is the right of any arrested person to be 'informed promptly, in a language that he understands, of the reasons of his arrest and of any charges against him' (Article 5(2) of the Convention). The Court considers that this provision contains 'the elementary safeguard that any person arrested should know why he is being deprived of his liberty', implying that any person arrested must be told, 'in simple, non-technical language that he can understand, the essential legal and factual grounds for his arrest, so as to be able, if he sees fit, to apply to a court to challenge its lawfulness'. However, while this information 'must be conveyed promptly (in French: "*dans le plus court délai*")', it need not be related in its entirety by the arresting officer at the very moment of the arrest. Whether the content and promptness of the information conveyed were sufficient is to be assessed in each case according to its special features'.<sup>23</sup>

There is no question about the fact that Somali pirates must be informed in a language that they understand. The only question is when. In *Medvedyev*, the Court accepted that it might take 13 days before a person arrested on the high seas could be presented before a judge or another qualified officer. The judgment did not address at all any issue under Article 5(2). Would the Court allow the same wide margin of appreciation in the context of that provision? After all, it is not unreasonable to

<sup>23</sup> App. No. 11036/03, *Ladent v. Poland*, ECHR 2008 (published in extract only), at para. 63.

imagine that when fighting Somali pirates, European navies would embark Somali and Arabic speaking personnel or even personnel fluent in the *Benaadir* coastal dialect. Most probably that is already the case. And it is a good thing because failure to provide intelligible information under Article 5(2) may have long-term effects on the fairness of any subsequent trial.<sup>24</sup>

## D Trial

Once they have been brought before the judiciary, pirates, like other offenders, enjoy a right to a 'fair trial' (Article 6 of the Convention). The case law on this provision is very extensive, but we will focus on only a couple of issues that may pose a particular problem in piracy cases: access to legal assistance while in custody, and collection and admissibility at trial of criminal evidence.

### 1 Access to Legal Assistance

In a landmark judgment, *Salduz v. Turkey*,<sup>25</sup> the Court found a violation of Article 6 on account of the lack of legal assistance while in police custody. The Court considered that even where compelling reasons might exceptionally justify the denial of access to a lawyer, such restriction, whatever its justification, must not have unduly prejudiced the rights of the accused. The rationale behind *Salduz*, delivered more than 40 years after the US Supreme Court's ruling in *Miranda v. Arizona*,<sup>26</sup> is that the rights of the defence would in principle be irretrievably prejudiced when incriminating statements made during a police interview without access to a lawyer were used as a basis for a conviction.

After *Medvedyev*, where the Court did not apply very strict scrutiny under Article 5 on account of the 'exceptional circumstances' of an arrest on the high seas, we can assume that the same would be true in the context of Article 6. If exceptional circumstances may justify delays in bringing pirates before a judge or another officer authorized to exercise judicial powers, it makes sense that the same reasoning be applied to legal assistance. With one nuance, though: what would be the lawfulness of any statement made by pirates while detained on board a ship without any form of legal assistance, even by radio or telephone? This question opens a wider discussion on the collection and admissibility at trial of criminal evidence, which could be particularly problematic when the very initial phases of a criminal investigation are conducted on the high seas and by non-specialized military personnel.

### 2 Collection and Admissibility of Criminal Evidence

The question of the admissibility of evidence and its role in the fairness of criminal trials is not a new one. The relevant case law has been clearly summarized and extended

<sup>24</sup> See App. No. 25444/94, *Pélissier and Sassi v. France* [GC], ECHR 1999-II, at para. 51, and *Kamasinski v. Austria*, 19 Dec. 1989, Series A no. 168, at paras 72–77.

<sup>25</sup> App. No. 36391/02 [GC], 27 Nov. 2008.

<sup>26</sup> 384 US 436 (1966).

in a very recent Grand Chamber case, *Gäfgen v. Germany*.<sup>27</sup> The applicant had kidnapped a child and had been arrested while trying to collect the ransom. In a rush to rescue the child the police threatened him with torture. The applicant confessed to the murder of the child and led the investigators to a location where the police found the corpse and relevant 'real evidence'. The German courts refused to admit the confession obtained under duress but did not bar the use of the 'real evidence' obtained following the extorted confession. The Court had therefore to determine whether the use of the real evidence at trial had breached Mr Gäfgen's rights under Article 6.

The Grand Chamber recalled that, under Article 6, the Court should not examine the admissibility of evidence as such, which is left to the domestic courts, but only examine its impact on the overall fairness of the proceedings. It then confirmed that confessions obtained by methods in breach of Article 3, like the threat of torture, could never be admitted at trial because they rendered the proceedings as a whole unfair, irrespective of whether or not they were the only element relied upon.

On the other hand, as far as 'real evidence' is concerned, the test is somehow less strict. In *Gäfgen*, it was the applicant's new confession at the trial – after having been informed that all his earlier statements could not be used as evidence against him – which formed the basis for his conviction and his sentence. The 'real evidence' in dispute had not been necessary to prove him guilty or determine his sentence. The proceedings as a whole had therefore not been unfair.

The sensitive issue of the collection of evidence, whether oral or 'real', must therefore be monitored with special care in the context of anti-piracy operations, in particular, because such operations are generally carried out not by experienced criminal investigators but by crack military units which may be more concerned with the tactical success of their actions than with their long-term judicial effects.

## E Punishment

One issue which could particularly affect pirates as opposed to the average other offender detained in a state party to the Convention is the possibility of extradition or deportation. The Court has long considered that extradition or deportation to countries where an individual's life and safety would be at 'real risk' would breach Articles 2 and 3. The list is quite long, starting from the case of *Soering v. United Kingdom*<sup>28</sup> in 1989, to the series of recent Italian and British cases concerning the deportation of suspected terrorists to Tunisia, Algeria, or Iraq.

The issue is very sensitive as far as Somali pirates are concerned, since Somalia is among the countries which the Court considers unsafe. There have been a few cases, like *Salah Sheek v. Netherlands*,<sup>29</sup> where the Court concluded that deporting an individual to Somalia, given the dangerous situation in certain areas and the risks incurred by certain categories of people, would breach Article 3. Moreover, it is interesting to note that requests for provisional measures, submitted under Rule 39 of the

<sup>27</sup> App. No. 22978/05 [GC], ECHR 2010.

<sup>28</sup> 7 July 1989, Series A no. 161.

<sup>29</sup> App. No. 1948/04, ECHR 2007-I (published in extract only).

Rules of Court and aiming at preventing deportations to Somalia, are granted most of the time.

European governments could then be faced with another serious dilemma. If they decide to bring Somali pirates to Europe, they may be forced to grant them some kind of residence permit, whatever the outcome of the criminal proceedings. If they decide not to bring them to Europe, they will have to land them in some other place safe enough to meet the Convention tests.

### F *Protection of Property*

The peaceful enjoyment of property is protected by Article 1 of Protocol no. 1 to the Convention. The relevant test adopted by the Court in the context of that provision is the following: (i) whether there has been an interference with property rights; (ii) whether the interference has a legal basis; (iii) whether it is in the general interest; and (iv) whether it is proportionate, i.e., whether a fair balance has been struck between the individual right and the general interest.

We can imagine all sorts of scenarios on what might happen to pirate vessels following an anti-piracy operation. They could be destroyed during or after interception, abandoned in the middle of the Ocean, or formally confiscated. These actions would be considered interferences with property rights.

After *Medvedyev*, the anti-piracy rules of public international law can definitely qualify as an appropriate legal basis. We can also assume that the Court would consider the fight against piracy 'in accordance with the general interest'. There could be problems, however, when it comes to proportionality, in particular where the military displayed a disproportionate use of force in order to stop a vessel<sup>30</sup> or where a ship captured by pirates but belonging to someone else would not be returned to the legitimate *bona fide* owner after having been seized by a state's authorities.<sup>31</sup> An even bigger problem could arise in the event of an acquittal. A recent Spanish case sets a very clear principle in this respect. In *Tendam v. Spain*,<sup>32</sup> a man indicted on several criminal charges and later acquitted was denied compensation by Spanish judicial authorities for property seized during the criminal proceedings and never returned or returned in poor condition. The Court found for the first time that judicial authorities were responsible for the property seized and had a duty to inventory it and maintain it with good care. Moreover, it found that the burden of proof regarding missing or damaged property lay with those authorities.

## 4 State Responsibility

For an application to be admissible before the Court, several admissibility conditions must be met. The questions which seem to me the most relevant in the context of

<sup>30</sup> See, *mutatis mutandis*, *Akdivar and Others v. Turkey*, 16 Sept. 1996, Reports of Judgments and Decisions 1996-IV, at para. 88, and App. Nos 57947, 57948, and 57949/00, *Isayeva and Others v. Russia*, 24 Feb. 2005, at para. 233.

<sup>31</sup> See, *mutatis mutandis*, App. No. 1946/06, *Bowler International Unit v. France*, 23 July 2009, at para. 46.

<sup>32</sup> App. No. 25720/05, *Tendam v. Spain*, 13 July 2010, at paras 53–57.

anti-piracy operations are linked to state responsibility. Did the respondent state have jurisdiction over the applicants? And may the events which adversely affected the applicants be attributed to that state?

### *A Jurisdiction*

Pursuant to Article 1 of the Convention the 'High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention'. In its judgment in the case of *Soering v. United Kingdom* (cited above), the Court explained that Article 1 set a limit, 'notably territorial, on the reach of the Convention'. The principle is therefore that states are bound to secure the rights and freedoms provided in the Convention to all people within their territories. However, the Court has accepted in exceptional cases that 'the acts of Contracting States performed, or producing effects, outside their territories can constitute an exercise of jurisdiction by them'.<sup>33</sup>

The exception of extra-territorial jurisdiction is what we are interested in when we deal with anti-piracy operations on the high seas or on the territory of a third state, like Somalia. In *Medvedyev*, which is the most relevant case in this respect so far, the Court extensively referred to international law and acknowledged that instances of extra-territorial jurisdiction included activities on board aircraft and ships registered in, or flying the flag of a state.<sup>34</sup> A rescue mission launched, for instance, by Danish commandos on board a Danish ship on the high seas seems to fall within this category. But what happens when the commandos actually board a pirate ship that is not flying a flag or is flying a foreign flag? What test would the Court actually apply to establish Danish jurisdiction?

In *Medvedyev*, the Grand Chamber unanimously held at paragraph 67 that since France had 'exercised full and exclusive control over the *Winner* and its crew, at least *de facto*, from the time of its interception, in a continuous and uninterrupted manner until they were tried in France, the applicants were effectively within France's jurisdiction for the purposes of Article 1 of the Convention'. It therefore applied the so-called 'authority and control' test which the Court had previously applied in several other cases like *Öcalan v. Turkey*,<sup>35</sup> concerning the handing over of the PKK leader by Kenyan authorities to Turkish agents at Nairobi airport, or in the recent case of *Al-Saddoon and Mufdhi v. United Kingdom*,<sup>36</sup> which concerned Iraqi rebels captured by British forces in Iraq, detained in British-controlled facilities, and then handed over to Iraqi authorities.

The next question is how does the Court assess whether an area, a person, or a group of persons were under the authority and control of a state. The answer

<sup>33</sup> See for instance: *Loizidou v. Turkey* (preliminary objections) [GC], 23 Mar. 1995, Series A no. 310, at para. 62.

<sup>34</sup> This had already been acknowledged in App. No. 52207/99, *Banković and Others v. Belgium and 16 Other Contracting States* (decision on admissibility) [GC], ECHR 2001-XII.

<sup>35</sup> [GC], *supra* note 6, at para. 91.

<sup>36</sup> App. No. 61498/08 (decision on admissibility), 30 June 2009.

is relatively easy in situations where people are physically under the control of state agents, as in *Medvedyev*, *Öcalan*, and *Al-Sadoon*. But what would be the answer, for instance, if a warship fired on a pirate vessel or if a fighter jet bombed a pirates' stronghold in Somalia?

The Court had to deal with a similar issue in a case relating to the 1999 Kosovo war. In *Bankovic* (cited above) the Court had to decide whether the bombing of a Serbian TV station in Belgrade by NATO forces, which had resulted in the deaths of 16 civilians and serious injuries for 16 others, established the jurisdiction of the 17 NATO Member States which were party to the Convention at the material time. After reaffirming the principle that state jurisdiction was 'primarily territorial', the Court concluded that the mere fact that the applicants were adversely affected by the firing of a missile was not sufficient to establish effective control, and therefore state jurisdiction. Accepting the applicants' argument would have meant adopting a 'cause-and-effect' test which was not contemplated by Article 1 of the Convention. To reach its conclusion, the Grand Chamber compared the applicant's situation with situations where it had already accepted extra-territorial jurisdiction in the context of military operations, like the Turkish massive military occupation of Northern Cyprus (see *Loizidou*, cited above).

The *Bankovic* approach is very relevant to our piracy cases because it was confirmed in *Medvedyev* where, in paragraph 64, the Grand Chamber considered that the exercise of jurisdiction excluded situations where 'what was at issue was an instantaneous extraterritorial act, as the provisions of Article 1 did not admit of a cause-and-effect notion of jurisdiction'.

The provocative conclusion that one could draw from *Bankovic* and *Medvedyev* is that the military could fire on pirate vessels and even on pirate strongholds in Somalia without establishing jurisdiction. There is a nuance though.

It could certainly be argued that firing a cruise missile on some Somali village from an attack submarine somewhere in the Indian Ocean is no different from firing a cruise missile into the heart of Belgrade from an attack submarine somewhere in the Adriatic Sea. There could be a difference, however, when dealing with a warship, a submarine, or an aircraft firing on a pirate vessel in the middle of the ocean, as it could be argued that that type of military presence does establish overall control over an area similar to that in the *Loizidou* case (cited above).<sup>37</sup> A pre-*Medvedyev* case seems to point in that direction. In *Pad and Others v. Turkey*,<sup>38</sup> even if it ultimately declared the application inadmissible for failure to exhaust domestic remedies, the Court held that fire discharged by two Turkish gunship helicopters on a group of people inside Iranian territory was an act establishing extra-territorial jurisdiction.

In piracy cases, it could be argued that a modern warship exercises effective control over the maritime zone within its firing range. The same would obviously apply to fighter jets or armed helicopters. In my opinion though, for that kind of reasoning to apply it would be necessary to establish that the military capacity of the pirates or

<sup>37</sup> See also App. No. 31821/96, *Issa and Others v. Turkey*, 16 Nov. 2004.

<sup>38</sup> App. No. 60167/00 (decision on admissibility), ECHR 2007-VI.



of some other hostile force present in the area was not capable of opposing the state's capacity to exercise 'full and effective' control.

## B Attribution

In principle, for an act to be imputable to a Contracting State the people who have actually accomplished it must qualify as state agents. In *Medvedyev* there was little doubt: the interception of the *Winner* and the arrest and detention of her crew had been carried out by French military personnel under the orders of the French authorities. The question was not even raised. But the situation in the Indian Ocean is far from being as clear as that. What happens if European military personnel involved in anti-piracy operations off the coast of Somalia operate under the authority, not of their respective governments, but of some international organization, like the EU, which is not yet party to the Convention, or the UN? And what happens if private contractors on board a ship flying the flag of a Contracting State fire on and kill a group of pirates?

### *1 State Responsibility in the Context of Anti-piracy Operations Carried Out by International Organizations*

The European Union is currently conducting a wide anti-piracy military operation in an area south of the Red Sea. The operation is called European Union Naval Force Somalia – Operation ATALANTA – and was launched in support of Resolutions 1814, 1816, 1838, and 1846 which were adopted in 2008 by the United Nations Security Council. It is due to continue until December 2012. Several European states are participating in Operation ATALANTA under an integrated EU command. Although negotiations between the EU and the Council of Europe on the EU's accession to the Convention have officially begun, the EU is not yet party to it. The question whether EU Member States might be held accountable for any breach of the Convention resulting from the actions of their military personnel deployed in the context of Operation ATALANTA is a tricky one.

In *Behrami and Behrami v. France and Saramati v. France, Germany and Norway*,<sup>39</sup> the Court found that the applicants' complaints for alleged violations of the Convention resulting from the actions of French, German, and Norwegian military personnel belonging to KFOR<sup>40</sup> and UNMIK<sup>41</sup> forces operating in Kosovo were incompatible *ratione personae* with the Convention because these personnel were not acting on behalf of their respective states but on the basis of powers belonging to the UN Security Council under Chapter VII of the UN Charter. The acts in question were therefore in principle attributable to the UN.

So far, the Court has not yet examined the question of military operations conducted by the armed forces of Council of Europe Member States under some EU

<sup>39</sup> App. Nos 71412/01 and 78166/01 (joined cases), ECHR 2007.

<sup>40</sup> The NATO Kosovo Force.

<sup>41</sup> United Nation Interim Administration Mission in Kosovo.

command, as in Operation ATALANTA. It is reasonable to believe that it would follow *Behrami* and *Sarmati*: not only is the operation conducted by the EU and not by individual EU Member States but it is conducted by the EU pursuant to a series of UN Security Council Resolutions adopted under Chapter VII of the UN Charter. The whole rationale of the *Behrami* and *Sarmati* decision is that the military personnel involved did not act as ‘agents of their respective states’ but as agents of the international organization responsible for the operation.

However, there is a nuance in the Court’s case law: if states’ authorities intervene at some point, either directly or indirectly, in the acts which result in the alleged violations of the Convention, that intervention could, if we use corporate law terminology, ‘pierce the corporate veil’. This concept was developed by the Grand Chamber in *Bosphorus v. Ireland*,<sup>42</sup> and later confirmed and explained in detail in a recent German case, *Rambus Inc. v. Germany*.<sup>43</sup>

In the context of a possible short- or medium-term EU accession to the Convention, maritime piracy could open wide and unprecedented doors for the development of the Court’s case law on the question of dual attribution. What would happen if a pirate captured in the context of Operation ATALANTA or a similar operation died while being transferred on board an Italian warship. Would the death be imputable to the EU, which had overall responsibility for the operation, or to Italy to which the warship belonged? To what extent do commanders obey the EU integrated command and their own headquarters? What if the applicants took to Strasbourg a case only against the EU and not also against Italy? Would the EU claim that the application was incompatible *ratione personae* because in those particular circumstances the Italian government somehow had a direct or indirect role in the facts of the case?

## 2 Acts of Private Individuals

The question whether private contractors acting on board a ship registered in one of the Contracting States may trigger that state’s responsibility is particularly relevant as shipowners increasingly resort to private security. The Court has long considered that it must subject deprivations of life to the most careful scrutiny, taking into consideration not only the actions of state agents but also all the surrounding circumstances.<sup>44</sup> According to well-established case law, ‘the acquiescence or connivance of the authorities of a Contracting State in the acts of private individuals which violate the Convention rights of other individuals within its jurisdiction may engage that State’s responsibility under the Convention’. That principle has been applied, for instance, to private individuals and local authorities in Northern Cyprus which had no direct link with the Turkish occupying authorities (see *Cyprus v. Turkey*<sup>45</sup> and many other Turkish cases). The acquiescence or connivance test could therefore very well be applied

<sup>42</sup> App. No. 45036/98, *Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi v. Ireland* [GC], ECHR 2005-VI.

<sup>43</sup> App. No. 40382/04 (decision on admissibility), 16 June 2009.

<sup>44</sup> See, among other authorities, App. No. 25657/94, *Avşar v. Turkey*, ECHR 2001-VII, at para. 391.

<sup>45</sup> App. No. 25781/94 [GC], ECHR 2001-IV, at para. 81.

in cases where armed contractors operate on board commercial ships, whether their activities have been officially authorized or whether the flag state has simply turned a blind eye to them. Some contractors seem to have anticipated the problem since they use smaller vessels flying the flag of a third state to escort their clients' ships.

## 5 Conclusion

The only existing authority addressing the issue of piracy on the high seas is *Medvedyev and Others v. France*, and only as far as the question of the legal basis for the interception of a suspect pirate vessel is concerned. The questions of state jurisdiction and of the detention of pirates while they are being transferred to Europe also seem to have been settled by *Medvedyev*. The answers to all or some of the other questions raised in this article will have to wait until the Court examines a real piracy case, which could be relatively soon.

## Postscript

The Court's position on state responsibility has been further elaborated in two very recent judgments delivered well after this article was finalized: *Al-Skeini and Others v. United Kingdom*<sup>46</sup> and *Al-Jedda v. United Kingdom*.<sup>47</sup> Both cases relate to British military operations in Iraq involving the killing or detention of individuals, and in both cases the Court found that the United Kingdom was responsible under Article 1 of the Convention.

In *Al-Skeini*, the Court confirmed the exceptional nature of extra-territorial jurisdiction along the lines of *Banković* and *Medvedyev* and somehow made it even more restrictive. On the one hand, it extended the notion of 'full and effective control' of state agents considering, at para. 136, that state jurisdiction does not solely arise from the control exercised by state agents over a physical space (buildings, ships, etc.) but requires the 'exercise of physical power and control over the person in question'. On the other hand, at para. 149, the Court acknowledged the extra-territorial jurisdiction of the United Kingdom only in the light of the 'exceptional circumstances' arising from the fact that following the fall of the previous regime the United Kingdom had 'assumed in Iraq the exercise of some of the public powers normally to be exercised by a sovereign government'. In particular, it had assumed 'authority and responsibility for the maintenance of security in South East Iraq'. Both these conditions – exercise of physical power and control on individuals, and assumption of authority and responsibility for the maintenance of security – might prove problematic for the establishment of extra-territorial jurisdiction when firing at a pirate vessel on the high seas.

<sup>46</sup> App. No. 55721/07, 7 July 2011.

<sup>47</sup> App. No. 27021/08, 7 July 2011.

In *Al-Jedda*, the Court found that the applicant's detention in Iraq was attributable to the United Kingdom, despite the Government's argument (of a *Behrami* and *Saramati* type) that British troops had been acting under UN Security Council resolutions. The Court considered that at the material time the UN was merely providing humanitarian relief, supporting the reconstruction of Iraq and helping the formation of an Iraqi interim government. It had therefore neither effective control nor ultimate authority and control over security operations carried out by British troops present in Iraq. The same would obviously not be true in the case of Operation ATALANTA, the purpose of which is precisely for the European Union to exercise control over troops made available to it by its Member States.