



NETwork of experts on the legal aspects
of MARitime SAFETY and security

IS 1105 COST ACTION

REGIONAL STRATEGIES TO MARITIME SECURITY

A COMPARATIVE PERSPECTIVE

Editors

EVA M^a VÁZQUEZ GÓMEZ
CLAUDIA CINELLI



UNIVERSIDAD DE CÓRDOBA



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Transfers of Piracy Suspects - A Crucial Element of the Regional Prosecution Strategy in Light of Human Rights Law

ANNA PETRIG*

Summary: I. Transfers for prosecution: rationale and current procedure; II. A conditional right not to be transferred flowing from non-refoulement; III. Current transfer procedure and the procedural dimension of non-refoulement; A. Necessity of individual non-refoulement assessment despite transfer agreement; B. Assessment of reliability and effectiveness of transfer agreements; C. No procedural framework for carrying out a non-refoulement assessment; IV. Reconciling human rights prescripts with operational constraints.

I. TRANSFERS FOR PROSECUTION: RATIONALE AND CURRENT PROCEDURE

The United Nations Security Council's call to fully¹ and durably² eliminate Somali-based piracy has been heeded by an unprecedented number of actors. States from all over the world and three multi-national missions - Operation Atalanta conducted by the European Union Naval Force (EU-

* Dr. Anna Petrig, LL.M., is a post-doc researcher at the University of Basel (Switzerland). The issue of transfers of piracy suspects to third States for their criminal prosecution is governed by both international law, namely the law of the sea and human rights law, and domestic law. While this contribution analyzes the legality of transfers from a human rights perspective, the article by Dr. Giorgia Bevilacqua entitled "Transfers of piracy suspects - a crucial element of the regional prosecution strategy in light of international law of the sea", which is included in the book at hand, covers the issue from a law of the sea perspective. The two articles are part of a larger project of the study group on law enforcement at sea, which is part of Working Group 3 on International Maritime Security and Border Surveillance of COST Action IS1105, MARSAFENET (network of experts on the legal aspects of maritime safety and security; www.marsafenet.org).

¹ UNSC Res 1846 (2 December 2008) UN Doc S/RES/1846 (UNSC Res 1846), preambular, paragraph 10.

² UNSC Res 2125 (18 November 2013) UN Doc S/RES/2125 (UNSC Res 2125), preambular, paragraph 30.

NAVFOR), the North Atlantic Treaty Organization's (NATO) Operation Ocean Shield and the Combined Task Force 151 operated by the Combined Maritime Forces - currently implement the counter-piracy law enforcement framework off the coast of Somalia and the Indian Ocean³.

The natural goal of every law enforcement operation is to bring alleged criminals to justice. However, as regards counter-piracy operations, the implementation of this basic tenet has proven difficult. Patrolling naval States taking piracy suspects captive are often unwilling or unable to prosecute them in their domestic courts. In such cases, the seizing State generally works towards surrender for prosecution of the suspects to a third State, mainly located in the region prone to piracy (so-called regional States)⁴. This implies that with each seizure, the path to prosecution has to be paved anew: a decision must be taken whether to release the seized person or to submit the case for investigation and prosecution to either the competent authorities of the seizing State or a third State. This process is referred to as "disposition procedure". To facilitate this task, various States, as well as the European Union (EU), have entered into transfer agreements with regional States in which the latter declare their general willingness to accept piracy suspects for prosecution, subject to their consent in each individual case and the fulfilment of specific conditions laid down in the respective agreement⁵. If a prosecuting State can be successfully identified in a spe-

³ UNSC, "Report of the Secretary-General on the situation with respect to piracy and armed robbery at sea off the coast of Somalia" (21 October 2013) UN Doc S/2013/623, paragraph 37 *seq.*; UNSC Res 2125, preambular, at paragraph 14.

⁴ Between the start of the operation in December 2008 and the end of January 2014, EUNAVFOR has, for example, transferred a total of 47 piracy suspects to the Seychelles: EUNAVFOR Somalia, "Suspect Pirates Apprehended by EU Naval Force Flagship Transferred To The Seychelles" (30 January 2014) <<http://eunavfor.eu/suspect-pirates-apprehended-by-eu-naval-force-flagship-transferred-to-the-seychelles/>> accessed 30 April 2014.

⁵ Anna Petrig, *Human Rights and Law Enforcement at Sea: Arrest, Detention and Transfers of Piracy Suspects* (Martinus Nijhoff Publishers, forthcoming), Part 1/III/B: Kenya was the first State to conclude a transfer agreement with the EU in March 2009: Exchange of Letters between the European Union and the Government of Kenya on the conditions and modalities for the transfer of persons suspected of having committed acts of piracy and detained by the European Union-led naval force (EUNAVFOR), and seized property in the possession of EUNAVFOR, from EUNAVFOR to Kenya and for their treatment after such transfer [2009] OJ L79/49 (EU-Kenya Transfer Agreement). Despite expiration of the agreement in September 2010, Kenya has declared its continued readiness to accept piracy suspects for prosecution on an *ad hoc* basis; in these cases, the provisions of the

cific case, transfers⁶ (rather than extraditions) are the prevalent means by which to surrender the suspects to that State.

Neither NATO nor the Combined Maritime Forces have adopted their own detain-and-transfer scheme for their respective counter-piracy operations. Rather, States contributing to these multinational missions revert back to national control for arrest and detention of piracy suspects and the disposition of their cases, i.e. the decision whether to prosecute piracy suspects in the seizing State, to opt for a transfer to a third State or to release them. This is different from EUNAVFOR, which is the sole multinational counter-piracy mission pursuing a unique transfer policy. Within this framework, the decision whether and where to prosecute the captured suspects is not a matter falling solely within the national competence of the contributing States nor is the process entirely controlled by EUNAVFOR. Rather, the disposition of these cases is characterized by a rather complex interplay between various actors, namely EUNAVFOR and the seizing State⁷.

terminated transfer agreements were applied *mutatis mutandis*: UNSC, “Report of the Secretary-General on specialized anti-piracy courts in Somalia and other States in the region” (20 January 2012) UN Doc S/2012/50, paragraph 78. The Seychelles was the second regional State to enter into a transfer agreement with the EU: Exchange of Letters between the European Union and the Republic of Seychelles on the Conditions and Modalities for the Transfer of Suspected Pirates and Armed Robbers from EUNAVFOR to the Republic of Seychelles and for their Treatment after such Transfer [2009] OJ L315/37 (EU-Seychelles Transfer Agreement). Since 2011, a transfer agreement between the EU and Mauritius is in place: Agreement between the European Union and the Republic of Mauritius on the conditions of transfer of suspected pirates and associated seized property from the European Union-led naval force to the Republic of Mauritius and on the conditions of suspected pirates after transfer [2011] OJ L254/3 (EU-Mauritius Transfer Agreement). A number of regional States concluded transfer agreements with patrolling naval States; these agreements will not be discussed here since they are not publicly available (see below III.B).

⁶ The notion of “transfer” is not of a technical nature with a precise meaning. Rather, it is an umbrella term referring to the various techniques and procedures used to bring a piracy suspect within the jurisdiction of a third State for prosecution *without* having to resort to formal extradition proceedings. As we will see later in this article, the procedures in which transfers of piracy suspects are decided vary depending on the actors involved and sometimes even from one situation to another; however, they feature some common characteristics, which will be presented in this article and based on which the present human rights analysis rests.

⁷ Petrig, n. 5 above, at Part 2, contains two case studies based on expert interviews, which describe in detail two disposition frameworks: that of Denmark, which contributes to NATO and the Combined Maritime Forces, as an example for disposi-

The disposition practices of the various actors contributing to counter-piracy operations off the coast of Somalia and the region differ. And yet, the procedure in which transfers of piracy suspects to third States are evaluated, negotiated and decided upon has some common features, regardless of the framework in which it takes place. First of all, the decision to transfer is issued in a procedure that fundamentally differs from extradition, which is the traditional and formal mechanism to surrender an alleged criminal for prosecution. A transfer is the result of negotiation and cooperation between two States or between a State and EUNAVFOR, rather than a surrender in execution of a decision issued by an administrative and/or judicial body in a formalized procedure described in a legal act. Another common feature is that the decision to transfer is not subject to judicial review. Moreover, the potential transferee is not party to the process that may ultimately result in his transfer. Consequently, he does not benefit from any procedural safeguards before the seizing State's authorities, such as the right to submit reasons against his transfer or to be represented by counsel. At most, the piracy suspect is informed of the fact that attempts are being made to identify a prosecution venue or that his surrender is imminent. A second important characteristic of the current transfer process is that no individual non-refoulement assessment takes place. Rather, it is argued that suspects are only transferred to States with which transfer agreements have been concluded. Such agreements, in turn, are only concluded if the respective State's human rights record in the relevant fields does not give rise to any concerns. Put differently, it is argued that the global non-refoulement assessment carried out when concluding a transfer agreement makes an individual non-refoulement assessment regarding a specific piracy suspect to be transferred obsolete. What is more, transferring States generally do not request individual assurances from the receiving State requiring, for instance, that a specific transferee is actually detained in one of the prisons specifically refurbished for the purpose of hosting alleged pirates⁸. Rather, it is maintained that the respective transfer agreement in combination with the exercise of monitoring rights are sufficient to ensure

tion taking place in an interstate setting and that of EUNAVFOR, which provides insights into disposition occurring in a multinational context. The article at hand focuses on the EUNAVFOR transfer framework.

⁸ The UNODC played an active role in the refurbishment of prisons used to house persons suspected or convicted of acts of piracy: UNODC, "Counter Piracy Programme: Support to the Trial and Related Treatment of Piracy Suspects" (March 2013) <www.unodc.org/documents/easternafrika//piracy/UNODC_Brochure_Issue_11_wv.pdf> accessed 30 April 2014.

that transferred persons are not subject to human rights violations in the receiving State during investigation, trial and the potential enforcement of their sentences⁹.

This article explores - from a human rights perspective - the legality of transfers of piracy suspects *as such* (II.) and, in greater detail, the legality of the transfer *procedure* currently being pursued in counter-piracy operations off the coast of Somalia and the region (III.). The main legal yardstick applied is the principle of non-refoulement in its substantive and procedural dimensions as granted by the European Convention on Human Rights (ECHR), the International Covenant on Civil and Political Rights (ICCPR) and the Convention Against Torture (CAT)¹⁰. The conclusion will be that human rights law (similar to the law of the sea¹¹) does not offer an absolute right not to be transferred for prosecution at all, but that the principle of non-refoulement can bar the transfer of a specific suspect to a specific destination. We will further assert that the current transfer procedure is not necessarily in line with the procedural requirements flowing from the principle of non-refoulement. In light of this, a discussion follows whether and how respect for these procedural precepts granted by virtue of the prohibition of refoulement can be reconciled with the operational constraints and specificities of counter-piracy operations, most notably that suspects are detained on board law enforcement vessels and never enter the land territory of the transferring State (IV).

II. A CONDITIONAL RIGHT NOT TO BE TRANSFERRED FLOWING FROM NON-REFOULEMENT

Human rights law – specifically the ECHR, ICCPR and CAT – does not confer alleged criminals an absolute right not to be surrendered for prose-

⁹ Petrig, n. 5 above, at Part 2/III.

¹⁰ Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) (1950) 213 UNTS 221 (ECHR); International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR); Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (adopted 10 December 1984, entered into force 26 June 1987) 1465 UNTS 113 (CAT).

¹¹ See Robin Geiss and Anna Petrig, *Piracy and Armed Robbery at Sea: The Legal Framework for Counter-Piracy Operations in Somalia and the Gulf of Aden* (2011), 148-149 and 197.

cution to a third State¹². Consequently, transfers of piracy suspects are not *per se* in breach of human rights law. Both the European Commission of Human Rights and the European Court of Human Rights have repeatedly opined that the right not to be surrendered for prosecution is not included as such among the rights and freedoms of the ECHR¹³. Rather, the Strasbourg organs have recognized the “beneficial purpose of extradition in preventing fugitive offenders from evading justice” and have held that it is in the interest of all nations that fugitives are brought to justice¹⁴. Similarly, the ICCPR does not contain an absolute right against surrender for prosecution. In the words of the Human Rights Committee: “There is no provision of the Covenant making it unlawful for a State party to seek extradition of a person from another country”¹⁵. On the contrary, extradition is considered to be “an important instrument of cooperation in the administration of justice”, which aims at preventing so-called safe havens “for those who seek to evade fair trial for criminal offences”¹⁶. Finally, an absolute right not to be surrendered for prosecution is also absent from the CAT¹⁷.

While there is no absolute right not to be surrendered to a third State for prosecution under human rights law, transfers do not fall outside the material scope of the mentioned human rights treaties either. For instance, the European Court of Human Rights decided that “in so far as a measure of extradition has consequences adversely affecting the enjoyment of a Convention right, it may, assuming that the consequences are not too remote, attract the obligations of a Contracting State under the relevant Convention guarantee”¹⁸. Hence, under certain circumstances, the ECHR indirectly prohibits a specific transfer if its effects would potentially vio-

¹² Geoff Gilbert, *Responding to International Crime* (2006), 139-140.

¹³ For the European Commission on Human Rights see, e.g., *Lynas v Switzerland*, App no 7317/75 (ECom Decision, 6 October 1976), 1. of the legal considerations; for the Court see, e.g., *Soering v the United Kingdom*, App no 14038/88 (ECtHR, 7 July 1989), paragraph 85; and *Shamayev and others v Georgia and Russia*, App no 36378/02 (ECtHR, 12 April 2005), paragraph 427.

¹⁴ *Soering v the United Kingdom*, n. 13 above, at paragraphs 86 and 89.

¹⁵ *MA v Italy*, Comm no 117/1981 (HRC, 10 April 1984), paragraph 13.4.

¹⁶ *Cox v Canada*, Comm no 539/1993 (HRC, 31 October 1994), paragraph 13.4.

¹⁷ Isabelle Moulrier, “Extraordinary Renditions and the United Nations Convention against Torture”, in M. Nowak and R. Schmidt (eds.), *Extraordinary Renditions and the Protection of Human Rights* (2010), 151.

¹⁸ See, e.g., *Soering v the United Kingdom*, n. 13 above, at paragraph 85; and *Gonzalez v Spain*, App no 43544/98 (ECtHR, 29 June 1999), 4. of the legal considerations.

late one or several rights guaranteed by it. Similarly, different provisions of the ICCPR may operate to the effect that a transfer is prohibited in a concrete case. Emphasizing that “extradition as such does not fall outside the protection of the Covenant”¹⁹, the Human Rights Committee found communications to be admissible *ratione materiae* where the author did “not claim that extradition *as such* violates the Covenant, but rather that the particular circumstances related to the *effects* of his extradition would raise issues under specific provisions of the Covenant”²⁰. On the merits, the Human Rights Committee has decided in various cases that extradition is prohibited where substantial grounds exist for believing that the individual to be surrendered faces a real risk of irreparable harm in the receiving State, such as those risks prohibited by the right to life²¹ and the right not to be subjected to torture and other forms of ill-treatment²². Thus, while the ICCPR does not outlaw surrenders for prosecution as such, a specific transfer may be prohibited if it would violate specific rights under the Covenant. Lastly, similar to the ECHR and ICCPR, a concrete measure of removal for the purpose of criminal prosecution in the receiving State may be prohibited because it violates Article 3(1) CAT stipulating that “[n]o State Party shall expel, return (“refouler”) or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture”²³.

In sum, human rights law does not provide piracy suspects with an absolute right against surrender for prosecution. But various human rights provisions implicitly or explicitly prohibit the seizing entity from transferring a specific piracy suspect to a specific destination if there is a real risk that certain of his rights and freedoms will be violated in the receiving State²⁴. This conditional right not to be surrendered for prosecution is embodied in what is referred to as the prohibition of refoulement.

¹⁹ *Everett v Spain*, Comm no 961/2000 (HRC, 9 July 2004), paragraph 6.4.

²⁰ See, e.g., *Kindler v Canada*, Comm no 470/1991 (HRC, 30 July 1993), paragraph 6.1 (emphasis added); and *Cox v Canada*, n. 16 above, at paragraph 10.3 (emphasis added).

²¹ Article 6 ICCPR.

²² Article 7 ICCPR.

²³ Moullet, n. 17 above, at 151.

²⁴ While Article 3 CAT mentions the principle explicitly, various provisions of the ICCPR and ECHR have been interpreted as containing a refoulement prohibition.

III. CURRENT TRANSFER PROCEDURE AND THE PROCEDURAL DIMENSION OF NON-REFOULEMENT

Essentially, the principle of non-refoulement prohibits the forced removal of a person to a State or territory where he risks being subjected to certain human rights violations. Which potential human rights violations may bar a specific surrender for prosecution depends on the specific treaty; among them are the risks of being subjected to ill-treatment and torture - notably by exposure to harsh prison conditions or corporal punishment - or to the death penalty. The risk may be present in the State receiving the suspect for prosecution (direct removal: transfers) or in any other State he may ultimately be transferred to, notably for the enforcement of his sentence (indirect removal: re-transfers)²⁵. The latter type of surrender is important against the background that various regional States accepting piracy suspects for prosecution require convicted pirates to be transferred to another State to serve their sentences²⁶. For instance, the Seychelles entered into a transfer for enforcement agreement with the Somali Transitional Federal Government, Puntland and Somaliland²⁷.

This substantive obligation of the principle of non-refoulement is complemented by a procedural dimension²⁸, which is a *création purement prétorienne*²⁹ and quintessential to the actual implementation of the protection afforded by the prohibition of refoulement. The gist of it is that national authorities of the State exercising effective control over the person subject to removal are under an obligation to determine whether there is a risk of the person being subjected to certain human rights violations upon surrender³⁰. This obligation has to be discharged *proprio motu* and on an

²⁵ Kees Wouters, *International Legal Standards for the Protection from Refoulement* (2009), 25-26.

²⁶ UNSC, "Report of the Secretary-General on the situation with respect to piracy and armed robbery at sea off the coast of Somalia", n. 3 above, at paragraph 48.

²⁷ UNSC, "Report of the Secretary-General pursuant to Security Council resolution 1950 (2010)" (25 October 2011) UN Doc S/2011/662, paragraph 67.

²⁸ Cordula Droege, "Transfers of detainees: legal framework, non-refoulement and contemporary challenges", 90 *International Review of the Red Cross* (2008), 669, 679.

²⁹ The notion is used by Frédéric Sudre, "Article 3", in E. Decaux, P. H. Imbert and L. Pettiti (eds.), *La Convention européenne des droits de l'homme: Commentaire article par article* (2nd edn., 1999), 161, regarding the interpretation of Article 3 ECHR as to include a non-refoulement component.

³⁰ Emanuela-Chiara Gillard, "There's no place like home: States' obligations in relation to transfers of persons", 90 *International Review of the Red Cross* (2008), 703, 731.

individual basis, that is with regard to the specific person to be removed and regarding a specific removal destination. This, in turn, requires the establishment of respective assessment procedures, including the review of a negative removal decision.

Up to now, there is no specific case law by the European Court of Human Rights, the Human Rights Committee or the Committee against Torture on the procedural dimension of the principle of non-refoulement in the context of transfers of piracy suspects. In light of this, it is important to note that the prohibition of refoulement found in the ECHR, ICCPR and CAT respectively applies to all forms of removal. Furthermore, the principle of non-refoulement as it has developed in relation to one form of removal (e.g. expulsions in the realm of immigration) also applies *mutatis mutandis* to other forms of removal (e.g. extradition), including rather new forms such as “renditions to justice” occurring in counter-terrorism operations or transfers of piracy suspects³¹.

A. Necessity of individual non-refoulement assessment despite transfer agreement

The transfer procedure as currently pursued does not grant piracy suspects an individual non-refoulement assessment. Transferring entities take the stance that by concluding transfer agreements with prosecuting States of the region, which prohibit ill-treatment, torture and the imposition of the death penalty on transferred piracy suspects, respect for the principle of non-refoulement is sufficiently ensured. They argue that such agreements are only concluded if the State or the EU respectively deems the prison conditions and the manner in which criminal cases are investigated and prosecuted by the receiving State to be in line with international human rights law generally and the guarantees protected by the prohibitions of refoulement specifically. Such a general assessment of the human rights situation in the receiving State makes a non-refoulement assessment with regard to a specific piracy suspect to be transferred obsolete. In other words, according to EUNAVFOR, an individual non-refoulement assessment ta-

³¹ Manfred Nowak and Elisabeth McArthur, *The United Nations Convention Against Torture: A Commentary* (2008), 195-196; Wouters, n. 25 above, at 29 (in general) and 317-318 (on Article 3 ECHR specifically); Droegge, n. 28 above, at 671; Jacques Hartmann, “The European Convention on Human Rights and Extradition”, in K. H. Kaikobad and M. Bohlander (eds.), *International Law and Power: Perspectives on Legal Order and Justice: Essays in Honour of Colin Warbrick* (2009), 25-26.

king into account the specificities of a given case is not deemed necessary in light of the global non-refoulement assessment, which is carried out before the conclusion of a transfer agreement with regard to the whole country and all persons potentially transferred to it in the future³².

Any discussion surrounding the argument that an individual non-refoulement assessment can be dispensed with because of the existence of a transfer agreement first necessitates a thorough understanding of the content of such agreements. As a general rule, transfer agreements concluded between patrolling naval entities and regional States contain a clause in which the latter declares its willingness to accept piracy suspects for prosecution, subject to its consent in each individual case³³. Moreover, they determine the obligations of the seizing entity, most notably that it provides assistance to the regional State in the investigation and prosecution of transferred piracy suspects, and contains technical rules on the implementation of transfer decisions³⁴. Of greater interest in the context of the non-refoulement principle is that transfer agreements generally stipulate that transferred persons must be treated humanely and not be subjected to torture or other forms of ill-treatment, notably while detained, and must be granted certain rights regarding the investigation and prosecution of their cases³⁵. Furthermore, various transfer agreements, particularly those with retentionist States, contain a clause prohibiting the imposition of the death penalty³⁶. Finally, the agreements regulate the issues of tracing and monitoring³⁷ and re-transfer to States other than the prosecuting State³⁸.

Actors involved in the transfer of piracy suspects generally do not label transfer agreements as diplomatic assurances³⁹. However, these agreements are concluded specifically to prevent transfers from taking place in violation of the principle of non-refoulement. This is evidenced by Article 12(3) CJA Operation Atalanta, which is invoked as the legal basis for the

³² Petrig, n. 5 above, at Part 2/III.

³³ See, e.g., Article 1 EU-Mauritius Transfer Agreement.

³⁴ See, e.g., Articles 3 and 7 EU-Mauritius Transfer Agreement.

³⁵ See, e.g., Article 4 EU-Mauritius Transfer Agreement.

³⁶ Even though Mauritius is an abolitionist State, Article 5 EU-Mauritius Transfer Agreement prohibits imposition of the death penalty against transferred persons.

³⁷ See, e.g., Article 6 EU-Mauritius Transfer Agreement.

³⁸ See, e.g., Article 4(8) EU-Mauritius Transfer Agreement.

³⁹ For an exception where transfer agreements are explicitly designated as diplomatic assurances, see *Re 'MV Courier'*, 25 K 4280/09 (Verwaltungsgericht Köln, 25. Kammer, 11 November 2011), paragraph 23.

transfer agreements entered into by the EU⁴⁰, stipulating that “[n]o persons ... may be transferred to a third State unless the conditions for the transfer have been agreed with that third State in a manner consistent with relevant international law, notably international law on human rights, in order to guarantee in particular that no one shall be subjected to the death penalty, to torture or to any cruel, inhuman or degrading treatment”⁴¹.

The rationale of transfer agreements - especially their clauses stipulating the human rights obligations of the receiving State - is to exclude or minimize the risk of transferred piracy suspects being subjected to human rights violations upon surrender that amount to a violation of the principle of non-refoulement. Since transfer agreements are concluded in order to enable surrender for prosecution to regional States and thus appear to have the same function and purpose as diplomatic assurances, we must apply the principles developed for evaluating the latter as regards their reliability and their effectiveness in preventing a violation of the principle of non-refoulement. The same holds true for the question whether a transfer agreement can replace an individual non-refoulement assessment, as entities engaging in transfers of piracy suspects suggest.

The case law of the European Court of Human Rights suggests that the mere receipt of diplomatic assurances does not allow a removing State to claim compliance with the principle of non-refoulement. This holds true even if the receiving State is party to international human rights treaties. In *Saadi v Italy*, as well as in more than a dozen subsequent cases, the Court refused to allow the removing State to discharge its obligations flowing from the principle of non-refoulement by simple reference to the diplomatic assurances it obtained. The same follows from the views of the Committee against Torture. Rather, diplomatic assurances are but *one piece of evidence* to be taken into account when assessing whether there is a real risk that

⁴⁰ See third preambular consideration of Council Decision 2011/640/CFSP of 12 July 2011 on the signing and conclusion of the Agreement between the European Union and the Republic of Mauritius on the conditions of transfer of suspected pirates and associated seized property from the European Union-led naval force to the Republic of Mauritius and on the conditions of suspected pirates after transfer [2011] OJ L254/1 (Council Decision 2011/640/CFSP).

⁴¹ Article 12(3) Council Decision 2008/918/CFSP of 8 December 2008 on the launch of a European Union military operation to contribute to the deterrence, prevention and repression of acts of piracy and armed robbery off the Somali coast (Atalanta) [2008] OJ L330/19 (Council Decision 2008/918/CFSP).

certain human rights of the person subject to removal will be violated upon surrender⁴².

From this follows that the assessment of whether a real risk exists that the human rights of a transferee will be violated upon his transfer and whether assurances received can remove such a risk must both be assessed with regard to a *specific* person subject to removal⁴³. Against this background, we must reject the proposition of actors involved in transfers of piracy suspects that no individual non-refoulement assessment is necessary in light of the global non-refoulement assessment carried out prior to concluding a transfer agreement. Rather, the seizing State must determine with regard to each piracy suspect subject to transfer whether there is a risk that certain of his human rights will be violated post-transfer and whether the respective transfer agreement can remove such a risk⁴⁴. Answering the latter question requires an evaluation of the assurances in transfer agreements in terms of their reliability and effectiveness in securing the human rights of the transferee upon surrender.

B. Assessment of reliability and effectiveness of transfer agreements

As regards the assessment of the reliability and effectiveness of diplomatic assurances - which transfer agreements essentially are when looking at their function and purpose - various criteria have been developed in the

⁴² For the ECtHR, see *Saadi v Italy*, App no 37201/06 (ECtHR, 28 February 2008), paragraphs 147-148; Alice Izumo, "Diplomatic Assurances against Torture and Ill Treatment: European Court of Human Rights Jurisprudence", 42 *Columbia Human Rights Law Review* (2010-2011), 233, 258-259; Alexander Lorz and Heiko Sauer, "Wann genau steht Art. 3 EMRK einer Auslieferung oder Ausweisung entgegen?: Eine Systematisierung der Rechtsprechung des EGMR zu den Beweisanforderungen für die Konventionswidrigkeit aufenthaltsbeendender Massnahmen", 37 *Europäische Grundrechte-Zeitschrift* (2010), 389, 404; Gillard, n. 30 above, at 743. For the Committee against Torture, see Nowak and McArthur, n. 31 above, at 150.

⁴³ Lorz and Sauer, n. 42 above, at 404.

⁴⁴ In *Re 'MV Courier'*, n. 39 above, at paragraph 23, Germany, the respondent State, refers to the EU-Kenya Transfer Agreement and states that diplomatic assurances are, in principle, an appropriate and effective means to exclude a certain type of treatment that could potentially violate certain human rights upon transfer; however, it then states that this would not relieve the State of the obligation to assess whether the assurances provide sufficient protection *in the individual case*.

jurisprudence of human rights supervisory bodies, some of which are internal and others external to the assurances⁴⁵.

One external factor of utmost importance for the assessment of the reliability and effectiveness of diplomatic assurances is the human rights situation in the receiving State⁴⁶. An evaluation of whether regional States investigating and prosecuting piracy cases or enforcing sentences against convicted pirates generally respect human rights in these fields goes beyond the scope of the present article, but is an important piece of the overall assessment.

Among the internal factors for the assessment of the reliability and effectiveness of diplomatic assurances is their consistency and content, which must be sufficiently specific, explicit and clear⁴⁷. Yet transfer agreements are not without ambiguities, notably in terms of their scope of application. For instance, the wording of the EU-Kenya Transfer Agreement suggests that it only applies to persons suspected of piracy but not those persons suspected of armed robbery at sea - even if such distinction does not appear to be made in practice⁴⁸. Moreover, the scope of application of the EU-Mauritius Transfer Agreement can be read in different ways. Article 1(a) defines the conditions and modalities for “the transfer of persons suspected of attempting to commit, committing or having committed acts of piracy within the area of operation of EUNAVFOR, on the high seas off the territorial seas of Mauritius, Madagascar, the Comoros Islands, Seychelles and Réunion Island, and detained by EUNAVFOR”.

This provision can be understood as encompassing persons involved in pirate attacks carried out on the high seas in general and, if so, the transfer agreement would then have a broad scope of application. However, if read this way, the specification “off the territorial seas of Mauritius, Madagascar, the Comoros Island, Seychelles and Réunion Island” would be superfluous. This suggests a narrower interpretation, according to which the provision aims at delimiting the area covered by the agreement to a specific part of the high seas. This latter interpretation would be in line with the Govern-

⁴⁵ Izumo, n. 42 above, at 260.

⁴⁶ *Ibid*, at 264-273; Lorz and Sauer, n. 42 above, at 406.

⁴⁷ Izumo, n. 42 above, at 264; Lorz and Sauer, n. 42 above, at 405.

⁴⁸ Geiss and Petrig, n. 11 above, at 200-201.

ment of Mauritius' reading of the clause, taking the view that the defined area covers the exclusive economic zones of the mentioned States⁴⁹.

Another ambiguity relates to the important issue whether the consent of the seizing State (or the EU) is necessary in cases of re-transfer of suspected pirates to a third State for investigation and prosecution or the re-transfer of convicted pirates from the regional prosecuting State to a third State for the enforcement of their sentences. The answers are not clearly found in any of the publicly available transfer agreements. The EU-Kenya Transfer Agreement stipulates that transfers for the purpose of investigation or prosecution from Kenya to any other State are subject to prior written consent from EUNAVFOR⁵⁰. However, the agreement does not contain a similar provision requiring the consent of EUNAVFOR in order to transfer a convicted pirate to another jurisdiction for enforcement of his sentence. The re-transfer clause in the agreement between the EU and the Seychelles is formulated in a broader fashion and stipulates that the latter "will not transfer any transferred person to any other State without prior written consent from EUNAVFOR". As a result, the consent requirement is not explicitly limited to transfers for the purpose of investigation or prosecution⁵¹. The provision can thus be read as subjecting transfers for enforcement of sentences to the consent of EUNAVFOR, which is important since the Seychelles is generally unwilling to enforce the sentences of transferred persons and concluded transfer for enforcement agreements with Somalia, Puntland and Somaliland⁵². Finally, the EU-Mauritius Transfer Agreement includes a clause on transfers of suspects to a third State for enforcement of their sentences⁵³, but none regarding re-transfers for investigation or prosecution. While under the other two transfer agreements "prior written consent from EUNAVFOR" is necessary in order to transfer persons to a third State⁵⁴, the threshold is lower in the EU-Mauritius Transfer Agreement which reads: "Mauritius may, *after consultation with the EU*, transfer such persons convicted and serving sentence in Mauritius to another State ... with a view to serving the remainder of the sentence in that other

⁴⁹ UNSC, "Report of the Secretary-General on specialized anti-piracy courts in Somalia and other States in the region", n. 5 above, at paragraph 96.

⁵⁰ Article 3(h) Annex to EU-Kenya Transfer Agreement.

⁵¹ Article 3(h) EU-Kenya Transfer Agreement.

⁵² See above text relating to FN 27.

⁵³ Article 4(8) EU-Mauritius Transfer Agreement.

⁵⁴ Article 3(h) EU-Kenya Transfer Agreement; EU-Seychelles Transfer Agreement.

State”⁵⁵. Should the human rights situation in the receiving State raise serious human rights concern, no transfer shall take place “before a *satisfactory solution* will have been found *through consultations* between the Parties to address the concerns expressed”⁵⁶. How this actually works in practice remains to be seen, but the EU assumes that if it were to oppose a transfer for enforcement to a specific State, Mauritius would (for political rather than legal reasons) not engage in doing so⁵⁷.

Another important factor for evaluating the effectiveness and reliability of diplomatic assurances is whether their provider is in a capacity to actually ensure their respect⁵⁸. In the context of piracy, the internal actor responsible for negotiating and concluding transfer agreements is generally the executive branch (Ministry of Foreign Affairs). Thus, it is notably questionable whether the assurance that the death penalty will not be imposed is binding upon the judiciary ultimately sentencing convicted pirates.

An additional crucial factor to consider regarding the reliability and effectiveness of diplomatic assurances is the possibility of monitoring compliance with such assurances post-surrender⁵⁹. In this context, it bears mentioning that the EU-Seychelles Transfer Agreement does not contain any provisions on tracing and monitoring and that they can only be found in a Declaration issued by the European Union⁶⁰. Since the Declaration was neither explicitly refused nor openly accepted by the Seychelles, it is, however, unclear whether the Seychelles considers itself bound by it⁶¹. Furthermore, from a law of treaties perspective, it seems obvious that a treaty may not impose an obligation on a State not party to it absent consent (*pacta tertiis nec nocent nec prosunt*)⁶². However, against the background that a prosecuting State may re-transfer convicted pirates to third States for en-

⁵⁵ Article 4(8) EU-Mauritius Transfer Agreement (emphasis added).

⁵⁶ Article 8(4) EU-Mauritius Transfer Agreement (emphasis added).

⁵⁷ Petrig, n. 5 above, at Part 2/II/B/6/b.

⁵⁸ Izumo, n. 42 above, at 261; Lorz and Sauer, n. 42 above, at 405.

⁵⁹ Izumo, n. 42 above, at 262-263; Lorz and Sauer, n. 42 above, at 405-406.

⁶⁰ Declaration by the European Union on the Occasion of the Signature of the Exchange of Letters between the European Union and the Republic of Seychelles on the Conditions and Modalities for the Transfer of Suspected Pirates and Armed Robbers from EUNAVFOR to the Republic of Seychelles and for their Treatment after Such Transfer [2009] OJ L315/43 (Declaration).

⁶¹ Petrig, n. 5 above, at Part 2/II/B/6/a/aa.

⁶² Malcolm Shaw, *International Law* (6th edn., 2008), 928.

forcement of their sentences, the limitation that monitoring rights only apply vis-à-vis the prosecuting State, with whom the transfer agreement has been concluded, bears mentioning. For transfers by EUNAVFOR to Kenya, this may be even more problematic since (as we have just seen) re-transfers do not seem to require EUNAVFOR's consent. An added ambiguity regarding monitoring ensues from the fact that the transfer agreements entered into by the EU do not explicitly mention the transferring State as a beneficiary of the monitoring rights in addition to the EU and EUNAVFOR. Furthermore, not all of these transfer agreements specify who may exercise the monitoring rights once Operation Atalanta is terminated and EUNAVFOR dissolved⁶³.

The doubts expressed so far about the reliability and effectiveness of the assurances contained in transfer agreements concluded in the context of counter-piracy operations pertains to *publicly available* agreements. However, not all transfer agreements are public. While those entered into between the EU and regional States are published in the Official Journal of the European Union, the agreements concluded bilaterally between two States are not public, with the exception of the agreement between Denmark and Kenya, which was released upon its termination. This contradicts the requirement formulated by various supervisory bodies that the issuance of diplomatic assurances must not involve any secrecy and that they must be open to judicial control⁶⁴.

We rejected earlier the proposition that transfer agreements can replace an individual non-refoulement assessment. The transferring entity must rather assess in each specific case whether there is a real risk of human rights violations upon transfer and whether the assurances contained in the respective transfer agreement can remove such risk. In order to answer the latter question, assurances must be evaluated in terms of their reliability and effectiveness. Without reaching a definite conclusion in this respect, it must be stressed that the criteria speaking in favour of reliable and effective assurances are not always fulfilled regarding transfer agreements concluded between the EU and regional States. In other words, whether they can in fact remove the risk of human rights violations upon transfer must be questioned at the very least.

⁶³ Petrig, n. 5 above, at Part 2/II/B/6/a/bb.

⁶⁴ Nowak and McArthur, n. 31 above, at 150.

C. No procedural framework for carrying out a non-refoulement assessment

An individual non-refoulement assessment (part of which pertains to the question whether the assurances in transfer agreements can remove the risk of human rights violations upon surrender) can only be carried out if an appropriate procedural framework is in place. In cases where alleged offenders are surrendered by means of extradition, these proceedings provide an appropriate framework for arguing against surrender based on non-refoulement considerations⁶⁵ and for a non-refoulement assessment. Similarly, appropriate procedures for carrying out an initial non-refoulement assessment are generally also in place in the realm of immigration law: most States provide for a refugee status determination procedure by a specific authority during which a non-refoulement claim can be formulated and assessed⁶⁶. Yet, in the context of piracy where surrender for prosecution is obtained by transfer rather than extradition and where transferees usually do not qualify as refugees⁶⁷, it may not be readily obvious within which framework, by whom and how the required non-refoulement assessment must be carried out. Generally, no specific procedural framework exists.

However, seizing States are, by virtue of the procedural component of the principle of non-refoulement (and the broader obligation to respect and ensure human rights)⁶⁸, under an obligation to provide for an appropriate framework for an initial non-refoulement assessment. This implies that they must establish appropriate procedures and designate an authority competent to carry out the initial non-refoulement assessment⁶⁹.

Generally speaking, piracy suspects are likely unaware of the existence of the prohibition of refoulement and how to avail themselves of its protection. In light of this, it is important to stress that transferring States must arguably undertake a non-refoulement assessment *ex proprio motu* - that is,

⁶⁵ An argument against removal based on non-refoulement considerations can be made by either invoking human rights provisions containing a non-refoulement component (Sibylle Kapferer, *The Interface Between Extradition and Asylum* (2003), 41-43) or by relying on a ground for refusal of extradition, which incorporates the idea of non-refoulement (see, e.g., Sections 5 and 6 UNODC, "Model Law on Extradition" (2004) <www.unodc.org/pdf/model_law_extradition.pdf> accessed 30 April 2014) during extradition proceedings.

⁶⁶ Gillard, n. 30 above, at 731.

⁶⁷ Petrig, n. 5 above, at Part 3/II.

⁶⁸ See, e.g., Article 2(1) ICCPR.

⁶⁹ Wouters, n. 25 above, at 411; Gillard, n. 30 above, at 731.

regardless of whether a person expresses his fears concerning a potential transfer or formulates a non-refoulement claim. This has been stressed by the Grand Chamber of the European Court of Human Rights in *Hirsi Jamaa and others v Italy*, a case concerning a push-back operation at sea involving more than 200 persons⁷⁰. At the very least, the seizing State is under an obligation to inform piracy suspects in a timely manner about the existence of the non-refoulement principle and how to claim protection from it⁷¹.

Furthermore, the individual has a right to challenge his removal decision⁷². Under the ECHR and ICCPR, the right to have a transfer decision reviewed follows from a combined reading of the respective prohibitions of refoulement and the right to an effective remedy⁷³. Even though the CAT does not contain a free-standing right to an effective remedy, the Committee against Torture interprets Article 3 CAT - the non-refoulement provision of the convention - as implicitly containing a right to an effective remedy⁷⁴. All three human rights treaties provide indications as to the

⁷⁰ *Hirsi Jamaa and Others v Italy*, App no 27765/09 (Grand Chamber, ECtHR, 23 February 2012), paragraphs 132-33, where the Grand Chamber rejected the proposition of the respondent State that the persons removed did not expressly request asylum and held that “it was for the national authorities, faced with a situation in which human rights were being systematically violated ... to find out about the treatment to which the applicants would be exposed after their return”. It then concluded that the absence of an express claim for protection does not exempt the removing State from its obligations flowing from the principle of non-refoulement. See also Gillard, n. 30 above, at 731; and Droege, n. 28 above, at 679.

⁷¹ For a summary of the obligation to provide information about the existence of rights (notably the principle of non-refoulement) and procedural aspects in the context of asylum procedures, see, e.g., UNHCR, “Statement on the Right to an Effective Remedy in Relation to Accelerated Asylum Procedures: Issued in the context of the preliminary ruling reference to the Court of Justice of the European Union from the Luxembourg Administrative Tribunal regarding the interpretation of Article 39, Asylum Procedures Directive (APD), and Articles 6 and 13 ECHR” (21 May 2010) <www.unhcr.org/4deccc639.pdf> accessed 30 April 2014, paragraphs 14-15.

⁷² Wouters, n. 25 above, at 412; Gillard, n. 30 above, at 731.

⁷³ For the ECHR, see Wouters, n. 25 above, at 331-342; for the ICCPR, see Wouters, n. 25 above, at 412. Arguably, Article 13 ICCPR, which explicitly stipulates a right to have a removal decision reviewed, applies to piracy suspects subject to transfer: Petrig, n. 5 above, Part 5/III/C/2/a.

⁷⁴ CAT Committee, “Conclusions and Recommendations of the Committee against Torture: United States of America” (25 July 2006) UN Doc CAT/C/USA/CO/2, paragraph 20; *Agiza v Sweden*, Comm no 233/2003 (CAT Committee, 20 May 2005), paragraph 13.7; *Akazu v France*, Comm no 63/1997 (CAT Committee, 9 November 1999), paragraph 11.5.

characteristics such review procedures must feature. Above all, the right to review must be “effective”⁷⁵. Effectiveness notably implies that the remedy must be granted prior to removal and have suspensive effect⁷⁶. In the context of piracy, two interests potentially clash with respect to granting a right to lodge an appeal with suspensive effect prior to surrender. On the one hand, patrolling naval States are interested in keeping detention on board their ships short in duration, not only because warships generally lack facilities specifically designed for detention or only have adequate detention facilities for a modest amount of suspects, but also because detention absorbs the already scarce resources, notably in terms of personnel. On the other hand, transferring piracy suspects before their non-refoulement claims are thoroughly assessed may expose them to a risk of irreparable harm, which cannot (or can only partially) be compensated with a remedy only available in the receiving State, the exercise of which is more illusory than real in the context of Somali-based piracy. Another component of the effectiveness of the remedy is that it must be accessible, i.e. available in both law and practice⁷⁷. Special efforts may be necessary in the context of piracy in order to make the remedy accessible - such as providing piracy suspects subject to transfer not only with sufficient information about the existence of such remedy, but with translation services and access to free legal representation as well⁷⁸.

⁷⁵ See, e.g., *Agiza v Sweden*, n. 74 above, at paragraph 13.8.

⁷⁶ For the ECHR, see *Wouters*, n. 25 above, at 341-342, citing *Gebremedhin [Gaberamadhien] v France*, App no 25389/05 (ECtHR, 26 April 2007), paragraph 66. Domestic authorities must thus provide a remedy capable of preventing the execution of a removal measure, either by setting forth that the ordinary appeal proceedings have automatic suspensive effect or by enabling the person subject to removal to apply for a provisional measure, i.e. an urgent procedure that brings the execution of a removal order to a halt. For the ICCPR, see, e.g., *Alzery v Sweden*, Comm no 1416/2005 (HRC, 25 October 2006), paragraph 11.8, where the Human Rights Committee emphasized that the opportunity to appeal the removal decision must be granted *prior* to surrender. The remedy would otherwise be ineffective because it could not “avoid irreparable harm to the individual” - rather, it would be “otiose and devoid of meaning”.

⁷⁷ HRC, “General Comment No. 31: The Nature of the General Legal Obligations Imposed on States Parties to the Covenant”, in *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*: Vol. I (2008), paragraph 15.

⁷⁸ *Wouters*, n. 25 above, at 413: in concluding observations, the Committee has stated that asylum-seekers must have full access to early and free legal representation so that their rights under the Covenant receive full protection.

IV. RECONCILING HUMAN RIGHTS PRESCRIPTS WITH OPERATIONAL CONSTRAINTS

Human rights law, and specifically the procedural component of the principle of non-refoulement, is unequivocal: States are under an obligation to carry out an initial non-refoulement assessment on an individual basis and they must grant an effective remedy against the removal decision. The existence of transfer agreements, which contain clauses that are tantamount to diplomatic assurances, does not release transferring entities from these obligations. Neither does the special maritime context alter these requirements *per se*. The ECHR, ICCPR and CAT apply extraterritorially and in a maritime context based on the exercise of *de jure* jurisdiction by the seizing State through the flag State principle and/or the exercise of *de facto* jurisdiction by virtue of effective control wielded over piracy suspects⁷⁹. The same holds true for the principle of non-refoulement contained in these treaties. Since the decision to transfer, i.e. the phase of disposition where the principle of non-refoulement is of utmost importance, is generally taken vis-à-vis piracy suspects held on board the law enforcement vessel of the seizing State, the prohibition of refoulement applies extraterritorially *qua* the flag State principle. Furthermore, when a State is in a position to transfer a person to a third State for prosecution, it can be said to exercise the requisite level of effective control over such a person for its human rights obligations to apply extraterritorially based on the exercise of *de facto* jurisdiction⁸⁰. In *Hirsi Jamaa and others v Italy*, the European Court of Human Rights applied Article 3 ECHR to applicants held on board a warship on the high seas⁸¹. While the Grand Chamber discussed the extraterritorial application of the rights and freedoms of the Convention on board vessels in general⁸², Judge Pinto de Albuquerque explicitly stated in his concu-

⁷⁹ Petrig, n. 5 above, at Part 3/III/A.

⁸⁰ Anja Klug and Tim Howe, "The Concept of State Jurisdiction and the Applicability of the *Non-Refoulement* Principle to Extraterritorial Interception Measures", in B. Ryan and V. Mitsilegas (eds.), *Extraterritorial Immigration Control: Legal Challenges* (2010) 91-96 ("4. The applicability of the non-refoulement principle in the context of extraterritorial interception measures"). For Article 3 CAT, see, e.g., *Sonko v Spain*, Comm no 368/2008 (CAT Committee, 25 November 2011), paragraphs 10.2 and 10.3, and *JHA v Spain*, Comm no 323/2007 (CAT Committee, 21 November 2008), paragraph 8.2. On the extraterritorial application of the non-refoulement provisions of the ECHR, see Wouters, n. 25 above, at 217-221, specifically with regard to persons held on board ships, see 219.

⁸¹ *Hirsi Jamaa and Others v Italy*, n. 70 above, at paragraphs 110-138.

⁸² *Ibid*, at paragraphs 70-82.

ring opinion that “[t]he prohibition of refoulement is not limited to the territory of a State, but also applies to extra-territorial State action, including action occurring on the high seas”⁸³.

Despite the clearly formulated procedural obligations arising from the principle of non-refoulement and their applicability to persons subject to surrender, who are held on board a warship and who will never enter the land territory of the removing State, operational challenges arise in the implementation of these prescripts. The question thus arises how and whether the human rights prescripts set out in this article can be reconciled with the operational constraints and specificities of counter-piracy operations.

Among the operational challenges are that the case is in limbo during disposition, the very objective of which is to determine whether and, if so, in which criminal forum the criminal prosecution of the particular piracy suspect will take place. Only once the latter issue is decided, will it be clear whether and to which destination a transfer will take place and a non-refoulement assessment can begin. Until such a decision is taken, a considerable amount of time may pass⁸⁴. Then, the assessment and review of the removal decision as such may be time consuming, notably due to the difficulty in establishing the facts - such as the identity and personal situation of the suspects and the situation in the receiving entity (especially as regards Somalia, Somaliland and Puntland). This implies that the suspects could potentially be detained on board the warship for a rather long period of time - a situation for which most deployed ships are not equipped since their intended use is for conduct of hostilities rather than law enforcement operations. Some States contributing to the counter-piracy operations, however, have adapted their ships specifically for counter-piracy operations. For instance, Norway constructed cells on board its frigate *Fridtjof Nansen*⁸⁵.

Another challenge may arise from the fact that the personnel on board a warship is not necessarily trained to properly carry out non-refoulement

⁸³ *Ibid*, concurring opinion, at 68-69 (regarding the CAT and ICCPR) and 78 (regarding the principle of non-refoulement under the ECHR).

⁸⁴ For instance, in the case of the piracy suspects seized by Danish forces on 2 January 2009 and physically handed over to the Netherlands on 10 February 2009, 40 days elapsed between arrest and transfer: *Re ‘MS Samanyolu’ (Judgment)*, LJN: BM8116 (Rotterdam District Court, 17 June 2010), English translation provided by UNICRI.

⁸⁵ Petrig, n. 5 above, at Part 4/I/A/2/a/aa.

assessments and that there may be language barriers between them and the transferee. Thus, the Grand Chamber criticized the respondent State in *Hirsi Jamaa and others v Italy* because “the personnel on board the military ship were not trained to conduct individual interviews and were not assisted by interpreters or legal advisers”⁸⁶. An alternative to providing specific training to military personnel deployed to counter-piracy operations - as States seem to be under an obligation to do regarding every person tasked with carrying out a non-refoulement assessment⁸⁷ - consists of deploying civilian officers (and translators), who are responsible for conducting the relevant procedures if they take place on dry land. Instead of deploying civilian officers, there is the option of using video-link. Spain and Denmark have used video-link not for non-refoulement assessments, but in order “to bring” the piracy suspects before a judge within hours after seizure and thus as a means to safeguard the right to liberty⁸⁸.

In the realm of transfers of piracy suspects, the procedural dimension of the principle of non-refoulement currently has little effect. Arguably, the exceptionality of the circumstances in which surrenders for prosecution of piracy suspects are decided - notably that the alleged offenders are often detained on board law enforcement vessels and never enter the land territory of the transferring State - require some concessions regarding the granting of procedural rights. However, a lower standard seem unjustified where the failure to grant procedural safeguards flowing from the prohibition of refoulement is essentially due to a lack of planning and preparation because of missing practice, legal bases or political will.

⁸⁶ *Hirsi Jamaa and Others v Italy*, n. 70 above, at paragraph 185.

⁸⁷ The Committee against Torture has stressed that State officials carrying out the initial assessment must be adequately trained: Wouters, n. 25 above, at 515.

⁸⁸ For Denmark, see *Re ‘MV Elly Mærsk’*, U.2011.3066H, TfK2011.923/1 (Højesteret - Supreme Court of Denmark); for Spain, see Petrig, n. 5 above, at Part 2/II/C/3/a.