



ANTI-PIRACY AND THE USE OF FORCE:
THE COHABITATION OF THE UNITED NATIONS
CONVENTION ON THE LAW OF THE SEA AND THE
EUROPEAN CONVENTION ON HUMAN RIGHTS



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INTRODUCTION

Representatives of coastal states use force in many different settings; from breaking up a fight on board a foreign registered vessel in one of its harbors, via enforcing its law on fishery management in its exclusive economic zone, to dislodging environmental campaigners having hung banners on an oil platform situated on its continental shelf. Beyond a myriad of other settings, we also have piracy; still a threat off the coast of Somalia, but currently more successful elsewhere, e.g. off West Africa.

On the high seas, enforcement jurisdiction rests in principle with the flag state under article 92 of the LOS Convention,¹ whereas article 94 enumerates the duties of the flag state. However, exceptions exist to the primacy of flag state jurisdiction on the high seas, e.g. piracy, where enforcement jurisdiction is granted to any state as long as it acts beyond the territorial sea of other states.²

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¹ United Nations Convention on the Law of the Sea of 10 December 1982 (1833 UNTS 3).

² See LOS Convention arts. 105 and 110.

This paper will address the limitations on the right to use armed force in peacetime operations. The relevant legal sources are typically found within the law of the sea itself; the LOS Convention and customary international law elaborating on the LOS Convention, both identified and interpreted in arbitration awards, soft law instruments, etc. But it is hardly controversial to argue that other fields of law apply, too. Correspondingly, this paper will look at the limitations on the use of potentially lethal force found in the law of the sea and the 1950 European Convention on Human Rights³ (ECHR) – especially as regards case law of relevance to the right to life in article 2 of the ECHR.

THE REGULATION OF THE LOS CONVENTION, ITS PREDECESSORS AND DERIVERS

The aim of this chapter is to assess the authorization in the law of the sea to use force and especially consider how much force a naval vessel may apply during a visitation or seizure of a pirate vessel.

In the pre-LOS Convention judgments of the *S.S. I'm alone* case from 1935, and the *Red Crusader* case from 1962, only a vague sketch was given of the legal use of force. In the first case, the arbitrators approved of the:

use [of] necessary and reasonable force for the purpose of effecting the objects of boarding, searching, seizing and bringing into port the suspected vessel; and if sinking should occur incidentally, as a result of the exercise of necessary and reasonable force for such purpose, the pursuing vessel might be entirely blameless. But the Commissioners think that, in the circumstances stated in paragraph eight of the Answer, the admittedly

³ Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950 (ETS 5, as amended; consolidated version available at <<http://conventions.coe.int>>).



intentional sinking of the suspected vessel was not justified by anything in the Convention.⁴

The use of force must therefore be “necessary and reasonable” for the purpose of ensuring the relevant acts which the entity is authorized under customary international law or treaty law to carry out. In the *Red Crusader* case, decided almost 30 years later, a Danish fisheries inspection vessel was found to have “exceeded legitimate use of armed force” when it fired a round of solid gun shot as a warning without first having cautioned that this would take place unless the relevant trawler stopped.⁵ Moreover, the Commission of Enquiry held that the later firing of aimed solid gun shots (not explosive shells) also left much to be desired, as “other means should have been attempted” to persuade the trawler to stop than the very use of aimed shots, which “creat[ed] danger to human life on board the “Red Crusader” without proved necessity”.⁶

Nothing explicit on this issue is nevertheless found in the LOS Convention, but as use of force is necessary in order to carry out visitation under article 110 and seizure under article 105, it is considered to follow implicitly from these provisions.⁷ The International Tribunal for the Law of the Sea (ITLOS) thus held in the *Saiga No. 2* case that:

⁴ S.S. “*I’m Alone*” (*Canada, United States*), in United Nations, Reports of International Arbitral Awards, Vol. III (New York: 2006) 1609–1618 at 1615.

⁵ *Investigation of certain incidents affecting the British trawler Red Crusader*, in United Nations, Reports of International Arbitral Awards, Vol. XXIX (New York: 2012) 521–539 at 536–538.

⁶ *Ibid.*, 536–538.

⁷ T. Treves “Piracy, law of the sea, and use of force: Developments off the coast of Somalia” (2009) 20 *European Journal of International Law* 399–414 at 413; and K. Manusama “Prosecuting Pirates in the Netherlands: the Case of the MS Samanyolu” (2010) 49 *Military Law and the Law of War Review* 141–163 at 145.

[a]lthough the Convention does not contain express provisions on the use of force in the arrest of ships, international law, which is applicable by virtue of article 293 of the Convention, requires that the use of force must be avoided as far as possible and, where force is unavoidable, it must not go beyond what is reasonable and necessary in the circumstances. Considerations of humanity must apply in the law of the sea, as they do in other areas of international law.⁸

Admittedly, the reference to “unavoidable” should be seen as highlighting an aspect of the necessity principle.

The tribunal also approved the normal use of gradually escalating measures; from auditory or visual signals to stop, via actions intended to motivate a ship to stop like shots across the bow, to – as a last resort and after appropriate warnings – the use of force, i.e. armed force directed against the vessel.⁹ Here, the ITLOS also found that the “basic principle” concerning the use of force for the purpose of effecting an arrest had been “reaffirmed” in article 22(1)(f) of the 1995 Fish Stocks Agreement,¹⁰ under which:

[t]he inspecting State shall ensure that its duly authorized inspectors [...] avoid the use of force except when and to the degree necessary to ensure the safety of the inspectors and where the inspectors are obstructed in the execution of their duties. The degree of force used shall not exceed that reasonably required in the circumstances.

⁸ *The M/V Saiga (No. 2) Case (Saint Vincent and the Grenadines v. Guinea)*, ITLOS, Judgment, 1 July 1999, para. 155 (available at <www.itlos.org>).

⁹ *Ibid.*, para. 156.

¹⁰ Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 Relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks of 4 August 1995 (2167 UNTS 3).



Applying this to the case at hand, the ITLOS held that “there is no excuse for the fact that the officers fired at the ship itself with live ammunition from a fast-moving patrol boat without issuing any of the signals and warnings required by international law and practice.”¹¹ Moreover, “[t]he Guinean officers also used excessive force on board the *Saiga*. Having boarded the ship without resistance, and although there is no evidence of the use or threat of force from the crew, they fired indiscriminately while on the deck and used gunfire to stop the engine of the ship”.¹²

This understanding of the use of force was repeated by the Arbitral Award from 2007 which decided the maritime border dispute between Guyana and Suriname. Here, the tribunal “accept[ed] the argument that in international law force may be used in law enforcement activities provided that such force is unavoidable, reasonable and necessary”.¹³

Reference should also be made to the ITLOS’s *Arctic Sunrise* case, which admittedly did not rule on the use of force.¹⁴ According to a description of what took place provided by Greenpeace International,¹⁵ a number of relevant activities can nevertheless be

¹¹ *Saiga No. 2* case, note 8 para. 157.

¹² *Ibid.*, para. 158.

¹³ Award of the Arbitral Tribunal constituted pursuant to Article 287, and in accordance with Annex VII, of the United Nations Convention on the Law of the Sea in the matter of the arbitration between Guyana and Suriname of 17 September 2007, para. 445 (available at <www.pca-cpa.org>).

¹⁴ *The Arctic Sunrise* (the Kingdom of the Netherlands v. the Russian Federation), ITLOS, Order for the prescription of provisional measures, 22 November 2013 (available at <www.itlos.org>). The merits of the case are currently before an arbitration tribunal established under Annex VII of the LOS Convention.

¹⁵ Greenpeace International, Statement of facts concerning the boarding and detention of the MY *Arctic Sunrise* and the judicial proceedings against all 30 persons onboard, 19 June 2013, Annex 2 to *The Arctic Sunrise* (the Kingdom of the Netherlands v. the Russian Federation) Request for the prescription of provisional measures under Article 290, paragraph 5, of the Unit-

identified. Shots were allegedly fired by AK47 assault rifles with bullet impacts close to inflatable ribs, artillery cannons allegedly fired warnings shots, a threat to fire at the ship was allegedly issued unless it allowed a boarding, and during the helicopter boarding the crew of the vessel were allegedly held at gunpoint.¹⁶ It might be useful to compare this with the rather low-keyed Norwegian reaction to illegal demonstrations by Greenpeace in May 2014,¹⁷ but that will have to be left for another occasion.

The ITLOS revisited the regulation on the use of force in the *M/V Virginia G* case, where it held that “[d]uring boarding, the use of force did not go beyond what was reasonable and necessary in the circumstances”.¹⁸ The necessity and reasonableness test thus constitutes the test applied by the ITLOS.

Of relevance is also the 1988 Convention on the Suppression of Unlawful Acts of Violence against the Safety of Maritime Navigation, as revised by a protocol from 2005,¹⁹ whose article 8bis(9) states that:

[w]hen carrying out the authorized actions under this article, the use of force shall be avoided except when necessary to ensure the safety of its officials and persons on board, or where the officials are obstructed in the execution of the authorized actions. Any

ed Nations Convention on the Law of the Sea of 21 October 2013 (available at <www.itlos.org>).

¹⁶ Ibid., paras. 17, 22, 25 and 33.

¹⁷ “Norsk politi avsluttet Greenpeace-aksjon” *Aftenposten*, 29 May 2014 (available at <www.aftenposten.no/nyheter/iriks/Norsk-politi-avsluttet-Greenpeace-aksjon-7585161.html#.U8zIL02KBaS>).

¹⁸ *The M/V “Virginia G” Case* (Panama/Guinea-Bissau), ITLOS, Judgment of 14 April 2014, para. 361 (available at <www.itlos.org>).

¹⁹ Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation of 10 March 1988 (1678 UNTS 221), and the 2005 Protocol to the 1988 Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation of 14 October 2005 (IMO Doc. LEG/CONF.15/21).



use of force pursuant to this article shall not exceed the minimum degree of force which is necessary and reasonable in the circumstances.

As this provision is considered to reflect the current regulation on the use of force,²⁰ it will have relevance also for the LOS Convention.²¹

By way of comparison, one could also mention the reference to the use of force in the 2012 soft law document of the International Maritime Organization (IMO) titled “Revised interim guidance to ship owners, ship operators and shipmasters on the use of privately contracted armed security personnel on board ships in the high risk area”:

PMSC [private maritime security companies] should require their personnel to take all reasonable steps to avoid the use of force. If force is used, it should be in a manner consistent with applicable law. In no case should the use of force exceed what is strictly necessary and reasonable in the circumstances. Care

²⁰ Consideration of: A draft protocol to the Convention for the suppression of unlawful acts against the safety of maritime navigation, 1988 and a draft protocol to the protocol for the suppression of unlawful acts against the safety of fixed Platforms located on the continental shelf, 1988: Comments on counter-terrorism, non-proliferation and boarding provisions Submitted by the United States IMO Doc. LEG/CONF.15/15 of 22 September 2005. The document is mentioned in H. Tuerk “Combating terrorism at sea – the suppression of unlawful acts against the safety of maritime navigation” (2007-2008) 15 *University of Miami International Law and Comparative Law Review* 337-367 at 362. Guilfoyle gives a similar interpretation of customary international law, see D. Guilfoyle *Shipping Interdiction and the Law of the Sea* (Cambridge University Press, Cambridge: 2009) 271.

²¹ A good example of the gradually escalating use of force is found in the “Guidance on the Selection of Private Security Companies (PSC)” of 29 March 2011 of the Norwegian Shipowners’ Mutual War Risk Insurance Association 10-12 (Example of pro forma rules for the use of force), paras. 3 and 4 (available at <lignesdedefense.blogs.ouest-france.fr/files/Norwegian-PSCGuidanceApril11.pdf>).

should be taken to minimize damage and injury and preserve human life.

PMSC should require that their personnel not use firearms against persons except in self-defence or defence of others.²²

In the words of the UN Secretary-General, this IMO guidance:

provided a basis for the development, by the International Organization for Standardization (ISO), of the ISO/Publicly Avail-

²² Revised interim guidance to shipowners, ship operators and shipmasters on the use of privately contracted armed security personnel on board ships in the High Risk Area, IMO Doc. MSC.1/Circ.1405/Rev.2 of 25 May 2012, Annex, 7, paras. 5.14 and 5.15. In a somewhat modified wording, the essence of this guidance is continued in the *Interim guidance to private maritime security companies providing privately contracted armed security personnel on board ships in the High Risk Area*, IMO Doc. MSC.1/Circ.1443 of 25 May 2012, Annex, 9, para. 5.15. This has been addressed by the *Indian Guidelines on Deployment of Armed Security Guards on Merchant Ships* from 2011 in para. 6.9: “PMSC should require their personnel to take all responsible steps to avoid the use of force. If force is used, it should be in a manner consistent with applicable law. In no case should the use of force exceed what is strictly necessary, and in all cases should be proportionate to the severity of threat and actual situation at hand at the material point of time. PMSC should require that their personnel not use firearms against persons except in self defence or defence of others against the imminent threat of death or serious injury, or to prevent the preparation of a particularly serious crime involving grave threat to life.” (available at <psm.du.edu/media/documents/national_regulations/countries/asia_pacific/india/india_guidelines_on_security_shipping.pdf>). The issue has also been addressed by the United Kingdom, Department for Transport, *Interim Guidance to UK Flagged Shipping on the Use of Armed Guards to Defend Against the Threat of Piracy in Exceptional Circumstances*, version 1.2, May 2013, 35, paras. 8.3 and 8.5: “The security team’s function is to prevent illegal boarding of the vessel in order to protect the lives of those onboard, using the minimum force necessary to do so. These rules should provide for a graduated response, each stage of which is considered to be a reasonable, proportionate and necessary response to the threat; and which at no point will needlessly escalate a situation. Any measures to display capability to use force (e.g. making firearms visible, verbal warnings, warning shots etc) should be implemented in such a way so as not to be taken as acts of aggression”.



able Specification (PAS) 28007 on guidelines for private maritime security companies providing privately contracted armed security personnel on board ships, published in December 2012. A crucial component of ISO/PAS 28007 is the guidance on rules for the use of force.²³

These are referred to by Kraska in the following way:

Generally, private security on board ships should take “reasonable steps to avoid and deter the use of lethal force”. PCASP [private contracted armed security personnel] should implement a “graduated approach,” taking steps that are reasonable and proportionate, and that include non-lethal options, such as warning shots. Lethal forces [sic] should be used only in self-defense and be necessary and proportionate to the perceived threat. In particular, the “decisions [made by the Master concerning the use of force] will be binding, without derogating from the inherent right of self-defense”. Furthermore, if the Master “judges that there is a risk to the safety of the ship, crew and or environment, he has the authority to order the security personnel to cease firing”. If the Master is not available, the senior officer in command on the ship assumes the Master’s authority.²⁴

Also from the private sector, reference should be made of the Baltic and International Maritime Council (BIMCO), which issued its Guardcon (contract for the employment of security

²³ UNSG, *Report of the Secretary-General on the situation with respect to piracy and armed robbery at sea off the coast of Somalia*, UN Doc. No. S/2013/623 of 21 October 2013, para. 42.

²⁴ J. Kraska “International Regulation of Private Maritime Security Companies” (2013) *U.S. Naval War College Information Paper Series* No. 13-4 at 5 (brackets by Kraska and the original footnotes have been omitted).

guards on vessel) in 2012. Here, the fundamental understanding on the use of force reflects the ‘graduated and proportionate force’ principle; that non-violent means should be applied first, respect for human dignity and human rights should prevail, and that any use of force must be limited to what it necessary and proportionate.²⁵ Examples of non-violent measures are making the armed guards visible to the pirates, and the use of flares, lasers or long range acoustic signaling devices.²⁶

Lastly, the UN Security Council (UNSC) resolutions on the issue of piracy off the coast of Somalia routinely refer to “all necessary means”²⁷ and “all necessary measures”,²⁸ but now in a more indirect manner through a reference in the relevant resolutions to resolutions 1846 and 1851 from 2008.²⁹ However, as these references to all necessary means/measures are linked to references to, respectively, “in a manner consistent with action permitted on the high seas with respect to piracy under relevant international law” and “applicable international humanitarian and human rights law” (and the pirates are currently not a party to any armed conflict), these resolutions do not authorize the use of force beyond that which was already legal.

According to Guilfoyle, there hardly exists in international law generally agreed upon rules for the use of weapons during visitation, and he therefore instead refers to the national law of the state undertaking a boarding.³⁰ In a later publication, he and Murdoch refer to most of the former mentioned international

²⁵ *Piracy and armed robbery against ships – “Guardcon”: A standard contract for the employment of security guards on ships*, IMO Doc. MSC/90/INF.5 of 13 March 2012, Annex II, para. 7.

²⁶ *Ibid.*

²⁷ UNSC res. 1816 (2008) para. 7 (b).

²⁸ UNSC res. 1851 (2008) para. 6.

²⁹ See e.g. UNSC res. 2125 (2013) para. 12.

³⁰ Guilfoyle, note 20 at 291.



sources as “[...] standards [that] are far from a detailed code and might be thought to have more to say about the outer limits at which the use of force becomes impermissible, rather than providing clear guidance as to when force is permitted”.³¹

It is nevertheless submitted that legal use of armed force covers the following: first, that it is limited to situations where the vessel against which force is used seeks to avoid visitation or seizure which the relevant state is entitled to carry out under international law. Second, that those who use force do not apply more force than (strictly) necessary. This would include an obligation to avoid the use of force as far as possible. A more uncertain issue is whether there is also a third aspect, i.e. that even where force may be necessary, it might nevertheless fail to be reasonable. The use of variations of the words “necessary” and “reasonable” might give such an impression, perhaps also the occasional reference to considerations of humanity, but it would rather seem as if the terms have been used as loose synonyms. In fact, it is hard to find cases where necessary acts have been censured.

Now, this would not be unique to the law of the sea; the conditions of proportionality under self-defense following article 51 of the UN Charter³² seem in practice to have largely been absorbed by the necessity principle,³³ and a similar issue arises with limitations on human rights under the ECHR – e.g. article 8 – where it is difficult to identify a clear limit between the necessity

³¹ A. Murdoch and D. Guilfoyle “Capture and disruption operations: the use of force in counter-piracy off Somalia” in D. Guilfoyle (ed) *Modern Piracy: Legal Challenges and Responses* (Edward Elgar Publishing, Cheltenham: 2013) 147–171 at 152.

³² Charter of the United Nations and Statute of the International Court of Justice of 26 June 1945 (1 UNTS XVI).

³³ C. Gray *International Law and the Use of Force* 3rd (Oxford University Press, Oxford: 2008) 150.

and proportionality considerations in relation to “necessary in a democratic society”.³⁴

Here, it will be natural to glide upwards on the ‘escalation ladder’ in parallel to an intensification of the situation. To the extent possible, non-lethal measures and warning shots should thus be used before aimed shots are applied.³⁵ Moreover – time allowing – it is natural to start with aimed shots at non-vital parts of the vessel in which the pirates are found, before more vital parts of the vessels are aimed at.³⁶ This will seldom allow for more than making the pirate vessel unseaworthy.³⁷ Lastly, when aiming at individuals, the shots should – if possible – seek to injure rather than kill.

In order to avoid an attack on a merchant vessel, it might therefore be necessary to use lethal force when the vessel comes within the range of the pirates’ weapons, provided the pirates show a will to use them, and no alternative to the use of weapons are at hand. The important issue is not whether the vessel may be injured by the pirates’ use of force, but rather which threat to life and health of the crew and passengers on board exists as a consequence of the pirates’ use of weapons.³⁸

³⁴ Y. Arai “Chapter 5. The System of Restriction” in P. van Dijk et al (eds) *Theory and Practice of the European Convention on Human Rights 4th* (Intersentia, Antwerpen: 2006) 333–350 at 341.

³⁵ For a similar view, see H. Tuerk “The resurgence of piracy: A phenomenon of modern times” (2009) 17 *University of Miami International Law and Comparative Law Review* 1–41 at 35, and C.R. Symmons “Embarking Vessel Protection Detachments and Private Armed Guards on Board Commercial Vessels: International Legal Consequences and Problems under the Law of the Sea” (2012) 51/1 *Military Law and the Law of War Review* 21–37 at 44–49 with further references.

³⁶ Murdock and Guilfoyle, note 31 at 166.

³⁷ R. Geiß and A. Petrig *Piracy and Armed Robbery at Sea: The Legal Framework for Counter-Piracy Operations in Somalia and the Gulf of Aden* (Oxford University Press, Oxford: 2011) 69. For a similar view, see Guilfoyle, note 20 at 293.

³⁸ For the view that the use of sniper weapons at targets located far away from the operator would not constitute self-defense, see K. Neri “The Use of Force



THE RIGHT TO LIFE UNDER THE EUROPEAN CONVENTION ON HUMAN RIGHTS

General Aspects

International human rights law allows for a rather narrow use of potentially lethal force, and to a large extent these limitations have been factored into the instruments mentioned above. Illustrative are various non-legally binding instruments from the UN, which would seem to limit law enforcers' use of fire arms to situations where this is required in order to avoid that the perpetrator constitutes a lethal threat.³⁹

One preliminary issue is whether acts undertaken abroad generate responsibility for a state under the relevant instrument. As is well known, for the purpose of the ECHR this issue is regulated by article 1, which states that “[t]he High Contracting Parties shall secure to everyone within their jurisdiction the rights and

by Military Vessel Protection Detachments” (2012) 51/1 *Military Law and Law of War Review* 74–92 at 86. Compare here with the scenarios indicated by Guardcon: (1) Firing directly at the MV or persons on board in circumstances where the attackers have failed to heed warning shots or other deterrent measures (assuming there was sufficient time for such measures). (2) Preparing to fire or firing at the vessel whilst clearly demonstrating an intention to close with vessel in an attempt to board, by positioning very close or alongside and preparing climbing ladders for that purpose. (3) Aiming, launching, rocket propelled grenade or equivalent: IMO, note 25 para. 7 (i).

³⁹ Code of Conduct for Law Enforcement Officials, UN General Assembly Resolution No. 34/169 of 17 December 1979, Art. 3, commentary text para. (c), where admittedly the text is made somewhat vague through the use of the phrase “[i]n general”. See also Basic Principles on the Use of Force and Firearms by Law Enforcement Officials, adopted by the 8th United Nations Congress on the Prevention of Crime and the Treatment of Offenders held on Cuba from 27 August 1990 to 7 September 1990, paras. 9 and 16. Of less help is on the other hand the presumably nevertheless most relevant soft law instrument from the Council of Europe; Council of Europe – Committee of Ministers, The European Code of Police Ethics, Recommendation Rec(2001)10, paras. 29 and 37 with corresponding commentaries.

freedoms defined in Section I of this Convention”.⁴⁰ To make a long story short, a state is found to hold jurisdiction abroad when it holds authority and control over an individual, or effective (overall) control over a territory.⁴¹

Admittedly, some read parts of the *Al-Skeini* judgment to require more than mere authority and control over an individual before jurisdiction arises.⁴² However, it is submitted that the reference to the “exercise of some of the public powers normally to be exercised by a sovereign government”, i.e. in particular “authority and responsibility for the maintenance of security in South East Iraq”,⁴³ should rather be seen as context specific reasoning required to establish jurisdiction. Such would be required since the facts of the case did not fit easily within the two exceptions to the non-application of the ECHR abroad, as these had been previously elaborated. This would especially seem to be the case as there is little indication of any change in this direction in the reasoning of the European Court of Human Rights (the Court) on the authority and control concept in paragraphs 133–137 of the judgment.

The case law regarding vessels may here be illustrative. Jurisdiction is thus found to exist where a naval vessel takes control over another vessel on the high seas, and obligates this foreign ship to

⁴⁰ Provisions are found in the protocols to the ECHR which extend the reach of Article 1 to the provisions of those protocols, e.g. Protocol 1, art. 5.

⁴¹ *Al-Skeini and Others v. the United Kingdom*, Application No. 55721/07, Grand Chamber Judgment of 7 July 2011, paras. 133–140. The newest case from the Court on this issue is *Hassan v. the United Kingdom*, Application No. 29750/09, Grand Chamber Judgment of 16 September 2014, paras. 74–80. For more on this, see e.g. Directorate-General for External Policies (Policy Department) *Human rights implications of the usage of drones and unmanned robots in warfare* (European Union, Brussels: 2013) 16–18.

⁴² Neri, note 38 at 88–89.

⁴³ *Al-Skeini and Others*, note 41 para. 149.



dock at a port belonging to that state party.⁴⁴ Likewise, when persons are taken on board a naval vessel belonging to a state party during a rescue operation on the high seas,⁴⁵ and when a vessel is hindered from entering the territorial sea of a state party by the naval vessels of that state.⁴⁶ Similarly, there will be jurisdiction where a state party consents to the control of its flagged vessels by another state party, and a vessel from this other state party navigates in the territorial sea of the first state in such a way that damage is inflicted on a vessel with resulting loss of life.⁴⁷

As regards privately owned vessels, these will not lead to the establishment of jurisdiction under the ECHR for acts committed abroad as easily as do public vessels. This is due to them not fitting easily within the two exceptions from the non-extra-territorial application of the ECHR, as construed by the Court in the *Al-Skeini* case. However, flag state jurisdiction is one of the well-recognized bases for a state's exercise of jurisdiction abroad, although naturally "defined and limited by the sovereign territorial rights of the other relevant states".⁴⁸ To the extent that the relevant vessel is on the high seas, other states would only exceptionally be entitled to exercise enforcement jurisdiction with respect to that vessel. Moreover, as the flag state holds jurisdic-

⁴⁴ *Rigopoulos v. Spain*, Application No. 37388/97, Chamber Decision of 12 January 1999, and *Medvedyev and Others v. France*, Application No. 3394/03, Grand Chamber Judgment of 29 March 2010.

⁴⁵ *Hirsi Jamaa and Others v. Italy*, Application No. 27765/09, Grand Chamber Judgment of 23 February 2012.

⁴⁶ *Women on Waves and Others v. Portugal*, Application No. 31276/05, Judgment of 3 February 2009 (only available in French). See in relation to this Geiß and Petrig, note 37 at 110–111.

⁴⁷ *Xhavare and Others v. Italy and Albania*, Application No. 39473/98, Chamber Decision of 11 January 2001 (only available in French). See in relation to this Geiß and Petrig, note 37 at 114.

⁴⁸ See e.g. *Banković with Others v. Belgium with Others*, Application No. 52207/99, Grand Chamber Decision of 12 December 2001, para. 59.

tion under general international law over such vessels, it would also be entitled – and even obliged under, *inter alia*, Article 94 of the LOS Convention – to pass necessary legislation to direct the activities of its vessels. With such legislative jurisdiction comes also – to the extent that it is not limited by the sovereign territorial rights of the other relevant states – enforcement jurisdiction. The flag state could thus be seen as having acted in a way which produces effects outside its own territory.⁴⁹ This is probably the rationale for the reference to extraterritorial jurisdiction in relation to acts “onboard craft and vessels registered in, or flying the flag of, that State” throughout much of the case law of the Court.⁵⁰ However, as the relevant crews can only exceptionally be

⁴⁹ *Drozd and Janousek v. France and Spain*, Application No. 12747/87, Plenary Court Judgment of 26 June 1992, para. 91. It is submitted that when such effects take place somewhere more closely connected with the state party than foreign territory, the latter typically having been the case in the relevant case law, this argues for the establishment of jurisdiction. Moreover, vessels are not regulated by the special regime under art. 56, which requires a specific notification before jurisdiction is established.

⁵⁰ See e.g. *Banković*, note 48 para. 73; *Al-Saadoon and Mufdhi v. the United Kingdom*, Application No. 61498/08, Chamber Decision of 30 June 2009, para.85; *Medvedyev and Others*, note 44 para. 65; and *Hirsi Jamaa and Others*; note 45 para. 75. Admittedly, the quote is often preceded by a reference to “the activities of its diplomatic or consular agents abroad”, but as the cases dealing with vessels and aircraft do not seem to have involved direct acts of diplomats or consuls, the reference to crafts and vessels is – it is submitted – not limited to instances where such representatives of states act. It should nevertheless be noted that the Court now categorizes its earlier case law regarding jurisdiction in relation to acts taking place on vessels flagged by a state party as “authority and control”; *Al-Skeini and Others v. the United Kingdom*, Application No. 55721/07, Grand Chamber Judgment of 7 July 2011, para. 136. As a consequence thereof, the state is not obliged to provide the individual with all the rights and freedoms of the ECHR, but rather only those “that are relevant to the situation of that individual” (para. 137). However, the Court here dealt with acts of state officials and that should be differentiated from the setting where the flagged vessel is privately owned and the relevant act is not undertaken directly by a state official. In this case, the application of the ECHR could only indirectly be said



construed as state officials and thereby directly establish jurisdiction under the ECHR (“negative obligations”), any responsibility for the flag state would seem to be limited to positive obligations under the ECHR. To a certain extent, it is thus submitted that such vessels could be seen as either the quasi-territory of the flag state, or through some other legal construction be able to bring about the jurisdiction of the flag state.⁵¹

To the extent that a naval vessel does no more than approach the foreign vessel and contact it on the radio, this is probably not enough to establish jurisdiction.⁵² This is probably also the case where a naval vessel only carries out visitation under article 110 of the LOS Convention.⁵³ The threshold has nevertheless been crossed if a boarding party apprehends the crew, wholly or par-

to follow from the “authority and control” alternative (this would in fact require the relevant individuals on board the vessel to somehow represent the flag state), and would have to follow from that of “effective control over an area” if jurisdiction is to exist. Due to the jurisdiction of the flag state over its vessels under the law of the sea, and especially its enforcement jurisdiction whenever the vessel is outside of the territorial sea of other states, it would seem proper to consider these privately owned vessels as quasi-territory for the purpose of the second exception to the non-extraterritorial application of the ECHR.

⁵¹ For perhaps the same view, see S.P. Bodini “Fighting maritime piracy under the European Convention on Human Rights” (2011) 22 *European Journal of International Law* 829–848 at 846–847, and D. Guilfoyle, “Shooting fishermen mistaken for pirates: jurisdiction, immunity and State responsibility”, 2 March 2012 (available at <www.ejil.org>). Their application of the ECHR to the acts of private armed guards on board private vessels would seemingly presuppose that the vessels themselves were within the jurisdiction of the state, or that the guards somehow were seen as representatives of the state.

⁵² D. Guilfoyle “Human Rights Issues and Non-Flag State Boarding of Suspect Ships in International Waters” in C.R. Symmons (ed) *Selected Contemporary Issues in the Law of the Sea* (Martinus Nijhoff Publishers, Leiden: 2011) 83–104 at 89.

⁵³ *Ibid.*

tially, even if the crew stays on board their own vessel.⁵⁴ Likewise when the vessel is made difficult to navigate on its own.⁵⁵

On land, the Court has found that jurisdiction is established where officials fire across the border into another state and kill an individual on the latter's territory.⁵⁶ At least, this would seem to be the case where the foreign state is a party to the ECHR, or where a state party holds effective (overall) control over the foreign territory.⁵⁷ In the *Bankovic* decision, the Court held that

⁵⁴ Guilfoyle, note 20 at 271; Manusama, note 7 at 156; and Guilfoyle, note 52 at 89.

⁵⁵ Guilfoyle, note 52 at 89.

⁵⁶ *Andreou v. Turkey*, Application No. 45653/99, Chamber Decision of 3 June 2008, 11. This understanding was upheld when the Court decided the substantive issues of the case (see *Andreou v. Turkey*, Application No. 45653/99, Chamber Judgment of 27 October 2009, para. 25). *Pad* resembles this scenario somewhat (*Pad and Others v. Turkey*, Application No. 60167/00, Chamber Decision of 28 June 2007). Here, Turkish helicopters used missiles and/or hand weapons against a group of suspected terrorists. Both parties agreed that the group was within the jurisdiction of Turkey, but they disagreed as to whether the group at that point in time was within Turkish or Iranian territory. Turkey held that its officers had not acted extraterritorially. The Court did not find the need to state its view on this issue, as "the Government had already admitted that the fire discharged from the helicopters had caused the killing of the applicants' relatives, who had been suspected of being terrorists" (see *Pad*, para. 54). Thus, *Pad* is hardly a strong argument for establishing jurisdiction in relation to episodes of shooting across an international border. For a different view, see M. Milanovic "Al-Skeini and Al-Jedda in Strasbourg" (2012) *European Journal of International Law* 121-139, at 124.

⁵⁷ This since the victims are often beyond the "authority and control" of the relevant state. See M. Frostad "The Responsibility of Sending States for Human Rights Violations during Peace Support Operations and the Issue of Detention" (2011) 50 *Military Law and Law of War Review* 129-88 at 149. For a different view, see C. Droege "The Interplay between International Humanitarian Law and International Human Rights Law in Situations of Armed Conflict" (2007) 40 *Israel Law Review* 310-55 at 334-335. No reference is made to *Pad* in *Al-Skeini* and the only reference to *Andreou* is found in the description of the applicant's argument on p. 54; *Al-Skeini and Others*, note 41.



the mere firing of a missile against a target on the ground in a foreign territory did not bring the target within the jurisdiction of the state party.⁵⁸ If we compare the *Banković* and the *Andreou* cases, it would seem that proximity to target, choice of weapon (missile vs. hand weapons), and the target as such (building vs. individual) may be of importance to establishing jurisdiction.⁵⁹ Applied to anti-piracy operations, it would seem that the use of fighter jets, helicopters and armed drones do not necessarily bring the target within the jurisdiction of the state party. The same would probably be the case where naval vessels use missiles or cannons, whereas it might be easier to argue for jurisdiction where hand weapons etc. are used against a target in the water or onboard another vessel. On the other hand, in such cross-border shootings, or shootings undertaken beyond the territorial sea of a state party, the Court could decide instead to focus on whether the territory on which the injury/damage occurs belongs to a state party, and a vessel would here possibly constitute the quasi-territory of its flag state.⁶⁰

As regards the question of *ratione personae*,⁶¹ the Court does

⁵⁸ *Banković with Others*, note 48 para. 75.

⁵⁹ *Frostad*, note 57 at 149.

⁶⁰ As regards the question of whether injury/damage which occurs in this way on board a vessel is legally speaking occurring on the territory of a state party, the Court is likely to focus on the jurisdiction held by the flag state over its vessels and especially its enforcement jurisdiction whenever the vessel is outside of the territorial sea of other states.

⁶¹ See e.g. T. Stein “Kosovo and the International Community. The Attribution of Possible Internationally Wrongful Acts: Responsibility of NATO or of its Member States?” in C. Tomuschat (ed) *Kosovo and the International Community: A Legal Assessment* (Kluwer Law International, The Hague: 2002) 181-192; K.M. Larsen “Attribution of Conduct in Peace Operations: The ‘Ultimate Authority and Control’ Test” (2008) 19 *European Journal of International Law* 509-531; D. van der Toorn “Attribution of Conduct by State Armed Forces Participating in UN-authorized Operations: The Impact

not seem very inclined to share the responsibility between multiple states or other entities.⁶² It is rather a question of one state being held responsible, or none. The degree of control which must be held by the other entity before the sending state is relieved of responsibility, is referred to by the Court as the rather vague “ultimate authority and control”,⁶³ although the Court has recently to a larger extent than before, referred to and applied the effective control test of the International Law Commission.⁶⁴

To the extent that a state wishes to avoid responsibility under the ECHR, it might seek to temporarily transfer its vessels to a UN led force like the maritime part of the peace support operation in Lebanon (UNIFIL). Currently, there is no such force off Somalia, so the question is rather if participation in any of the at least three multinational naval anti-piracy operations will suffice. The answer will probably depend on whether the operation resembles KFOR (“Kosovo Force” as figured in the *Behrami and*

of *Behrami and Al-Jedda*” (2008) 15 *Australian International Law Journal* 9–27; C.A. Bell “Reassessing Multiple Attribution: The International Law Commission and the *Behrami and Saramati* Decision” (2009–2010) 42 *New York University Journal of International Law and Politics* 501–548; Guilfoyle, note 52 at 89–92; Geiß and Petrig, note 37 at 116–130; and Frostad, note 57 at 129–188. This is not only a question of who is responsible for a breach of human rights, but may lead to there not having been a violation of the Convention at all if e.g. an intergovernmental organization would have to be considered as responsible. Since the relevant organization is probably not party to the relevant agreements, have few if any human rights obligation in its own constitutive instrument, and there may not be relevant international customary law binding such a subject of international law.

⁶² *Behrami, Behrami and Saramati v. France, Germany and Norway*, Application Nos. 71412/01 and 78166/01, Grand Chamber Decision of 2 May 2007; and *Al-Jedda v. the United Kingdom*, Application No. 27021/08, Grand Chamber Judgment of 7 July 2011.

⁶³ *Behrami, Behrami and Saramati*, note 62 paras. 133–4.

⁶⁴ *Al-Jedda*, note 62 para. 84.



Saramati decision)⁶⁵ or MNF (“Multinational Force” in Iraq as figured in the *Al-Skeini* judgment). In the first case, the UN was held to be the sole entity holding responsibility, whereas the UK was held responsible in relation to the latter case.⁶⁶

An important question is the degree of control which has been exercised by the sending state in relation to the specific case at hand. Friman and Lindborg argue for the force being seen as a single unit in relation to transfers between the different parts of the force, whereas transfer outside of the force – e.g. to a state close to the area of operations – should be treated by the ordinary rules, e.g. in accordance with the European Arrest Warrant.⁶⁷

The German trial judgment in the *MV Courier* case is illustrative in this regard.⁶⁸ The German government argued that the relevant deprivation of freedom and later transfer should be seen as the responsibility of the EU, since they were carried out by German officials participating in the EU operation EUNAVFOR.⁶⁹ The court did not establish who actually undertook the apprehension of the suspects, but held that Germany had decisive influence on the question of transferring those apprehended to Kenya.⁷⁰ Explicit orders were given to that effect by Germany.⁷¹

⁶⁵ This is also expected to be the outcome of a future case in relation to acts of ISAF soldiers in Afghanistan, see *Serdar Mohammed v. Ministry of Defence*, High Court of Justice Queen’s Bench Division Judgment of 2 May 2014, [2014] EWHC 1369 (QB), para. 178.

⁶⁶ For an assessment of this issue for the time predating the establishment of MNF in Iraq, see *Hassan*, note 41 paras. 74–80.

⁶⁷ H. Friman and J. Lindborg “Initiating criminal proceedings with military forces: Some legal aspects of policing Somali pirates by navies” in D. Guilefoyle (ed) *Modern Piracy: Legal Challenges and Responses* (Edward Elgar, Cheltenham: 2013) 172–201 at 192.

⁶⁸ *Ali Mohammed Aw-Dahir v. Germany*, Verwaltungsgericht Köln, Case No. 25 K 4280/09 of 11 November 2011.

⁶⁹ *Ibid.*, paras. 24–25.

⁷⁰ *Ibid.*, paras. 35, 41 and 54–62

⁷¹ *Ibid.*, para. 60.

Thus, Germany incurred responsibility for the risk faced by the transferees of treatment in violation of Article 3 of the ECHR due to substandard Kenyan prisons.⁷²

Likewise, the Dutch Supreme Court held in the *Nuhanović* case that the Netherlands had jurisdiction over Dutch troops in the proximity of Srebrenica during the fall of the enclave to Bosnian–Serb troops in July 1995. The court stressed that the UN force was granted permission to operate in Srebrenica by an agreement entered into by the UN and the authorities in Bosnia–Herzegovina, while the Bosnia–Serb forces seemed to respect the control held by the Dutch forces over their own camp area.⁷³ Since the Netherlands was considered to have effective control over the acts of its troops in relation to the issue covered by that specific case,⁷⁴ the court held that the Netherlands exercised sufficient jurisdiction.⁷⁵

Thus, the real question is whether the use of force was authorized by the organization or the home state, or potentially by both.

⁷² *Ibid.*, paras. 74–79. This finding was upheld by the appeal court in its decision of 18. September 2014 (available as a press briefing at <www.ovg.nrw.de/behoerde/presse/pressemitteilungen/27_140918/index.php> (the full text of the decision was not available at the time of finishing this manuscript)).

⁷³ *The State of the Netherlands v. Hasan Nuhanovic*, Supreme Court of the Netherlands, Application No. 12/03324, Judgment of 1 September 2013, paras. 3.17.3.

⁷⁴ *Ibid.*, para. 3.12.2–3. See e.g. the press release of Amnesty International UK regarding this case (available at <www.amnesty.org.uk/news_details.asp?NewsID=20956>).

⁷⁵ *Ibid.*, para. 3.17.1–3. See also the corresponding reasoning in *Stichting Mothers of Srebrenica et al v. the State of the Netherlands and the United Nations*, Hague District Court, Case No. /C/09/295247/HA ZA 07–2973, Judgment of 16 July 2014, paras. 4.87, 4.144, 4.158–4.161, 4.322 and 4.338.



When Responding to an Attack by Pirates

To the extent that jurisdiction is found to exist, the central question now is whether article 2 of the ECHR allows for potentially lethal use of force in the fight against pirates, as well as if sufficient measures have been undertaken in order to avoid hostage situations which risk being a violation of the right to life.⁷⁶ More specifically, may potentially lethal force be used in order to avoid a piracy attempt from succeeding? As pirates on several occasions have been killed during firefights with naval vessels, this is a question of practical relevance.⁷⁷

De Vidts refers to the right to self-defense as a fundamental human right, but in relation to piracy he stresses that “[t]he right to self-defence is limited to situations where the immediate threat of violence cannot be prevented by those authorized to do so in practice because no law-enforcement officer would be present at that moment”.⁷⁸ Depending on national law, naval personnel may or may not be authorized to undertake law enforcement. Be that as it may, if force is applied by naval personnel, the question of a potential violation of the so-called negative obligation of the right to life will arise. Any such use of force by the crew of a private vessel or by civilian armed guards on board may on the other hand establish responsibility for the flag state under its positive obligations in relation to the right to life.

⁷⁶ Bodini, note 51 at 837–839.

⁷⁷ Guilfoyle, note 20 at 71.

⁷⁸ B. De Vidts in C. Altafin (ed), *The threat of contemporary piracy and the role of the international community* (Documenti Istituto Affari Internazionali, No. 2014/01) 11.

In article 2(2) of the ECHR, three exceptions to the right to life are found, beyond the now seemingly defunct reference to capital punishment in paragraph 1. The chapeau of the paragraph states that “[d]eprivation of life shall not be regarded as inflicted in contravention of this Article when it results from the use of force which is no more than absolutely necessary”, followed by the exceptions to the right to life.⁷⁹ The Court has established that it will suffice if the use of force is potentially lethal. That death was or would have been an unintended outcome is not enough to make the act fall outside of article 2.⁸⁰

Pursuant to article 2(2)(a), life may, where absolutely necessary, be taken “in defence of any person from unlawful violence”. The very wording shows that this alternative may not be used to protect anything besides a person, i.e. not in defense of equipment or real estate. But is this exception limited to a threat to life, or will a threat of serious bodily injury suffice? The Court seems to allow for even the latter. Admittedly, the *Giuliani and Gaggio* case concerned a presumed threat to the life of a policeman,⁸¹ but the Court held that the policeman who shot the demonstrator “acted in honest belief that his own life *and physical integrity*, and those of his colleagues, were in danger [...]”.⁸²

In relation to piracy, the International Tankers Parcel Association pointed out in a document submitted to the IMO that “[p]irates now fire indiscriminately upon vessels, which largely

⁷⁹ Melzer refers here to the principles of strict necessity, proportionality and precaution which may be open to restrictive or extensive interpretation; Directorate-General for External Policies, note 41 at 30–34 (N Melzer is the sole author).

⁸⁰ See e.g. *Andronicou and Constantinou v. Cyprus*, Application No. 86/1996/705/897, Chamber Judgment of 9 October 1997, para. 171

⁸¹ *Giuliani and Gaggio v. Italy*, Application No. 23458/02, Grand Chamber Judgment of 24 March 2011, para. 191.

⁸² *Ibid.*, para. 189 (italics by author).



negates the argument about avoiding a firefight”.⁸³ Obviously, the use of weapons also constitutes a risk to the health of crew etc., but would the prospect of being held hostage in itself suffice as a valid reason to use potentially lethal force to counter it? The Court does not seem to have dealt with this issue under article 2(2)(a), and to the extent that individuals are merely taken prisoners and not mistreated, no right to use potentially lethal force arguably exists. As the pirates are primarily motivated by profit, they will seek to keep the hostages alive, since the hostages will not generate much revenue if they are dead. And few hostages have so far been killed by pirates.⁸⁴

However, in its 2011 submission, the International Tankers Parcel Association held that “where in the past there was a level of confidence that, providing the vessel owners were prepared to enter into negotiations with the pirates, the crew would not be harmed, we are now hearing more and more reports of torture and even murder of crew members”.⁸⁵ This fear is echoed by the UN Secretary-General’s report of 21 October 2013 on piracy and armed robbery at sea off the coast of Somalia, where he highlights that “[h]ostages held by Somali pirates endure dire conditions in captivity; sometimes, pirates torture and threaten hostages in an effort to extract the maximum ransom” and – referring to a working paper by two NGOs – “all hostages held captive by Somali pirates at the time of writing had been held for over one year and were considered to be at high risk owing to physical abuse

⁸³ *Piracy and armed robbery against ships: Employment of private armed security provider*, IMO Doc. MSC/89/18/11 of 22 March 2011, para 5. Also, U.S. law would seem to limit lethal force to threat of great bodily harm or death: Kraska, note 24 at 5.

⁸⁴ Somali pirates are nevertheless reported to have killed 35 hostages in 2011, one of them as a negotiating tactic. See A. Taylor, *Piracy today: An update*, October 2012 at 2-3 (available at <www.comitemaritime.org/Acts-of-Piracy-and-Maritime-Violence/0,2734,13432,00.html>).

⁸⁵ IMO, note 83 para 5.

and health problems resulting from limited access to food, water and medical support for over a year. Upon release, the vast majority of crew members report having undergone some form of physical violence and psychological abuse, while others have experienced direct threats of execution or other extreme stressors.”⁸⁶ For its sake, the UNSC referred in Resolution 2125 (2013) to “the inhuman conditions hostages face in captivity”.⁸⁷

Acts of torture will typically lead to short- or long-term serious somatic and/or psychological health problems. To the extent that the treatment of hostages *generally* leads to such health damages – and there is nothing in the specific situation which would seem to indicate that the relevant treatment in this case would differ in a significantly positive manner from the general treatment – it is submitted that potentially lethal use of force may be used to avoid capture.

The second alternative under article 2(2) of the ECHR relates to lawful arrests and prevention of escapes of a person lawfully detained (subparagraph (b)). According to the Court, potentially lethal force may only be used under this alternative in order to protect life and health.⁸⁸ In other words, a certain degree of threat to health must exist before potentially lethal force may be applied.

The reference to life and health is often followed by the phrase “*and is not suspected of having committed a violent offence*”.⁸⁹ The connector “and” could seem to require that both the above-

⁸⁶ UNSG, note 23 paras. 9–10.

⁸⁷ UNSC Res. 2125 (2013) of 18 November 2013, 4, para. 3.

⁸⁸ *Nachova and Others v. Bulgaria*, Application Nos. 43577/98 and 43579/98, Grand Chamber Judgment of 6 July 2005, para. 95. The European Commission on Human Rights expressed a similar point of view in *Kelly v. the United Kingdom*, Application No. 17579/90, Commission Decision of 13 January 1993, 8: “The situation facing the soldiers, however, had developed with little or no warning and involved conduct by the driver putting them and others at considerable risk of injury”.

⁸⁹ *Nachova and Others*, note 88 para. 95 (italics by author).



mentioned risks and a relevant suspicion must exist before such use of force would be legal, but such an understanding would be exceedingly strange. Why should it matter if the perpetrator has undertaken violent acts before, if there is no reason to believe that he or she will repeat them? The real issue would rather be whether there are reasonable grounds for fearing a future threat to life or health.⁹⁰ The presumably correct way to interpret subparagraph (b) is thus that it requires a threat to life or at the very least a threat of serious health-injuries, and that earlier undertaken acts of violence provide the background for the consideration of likely future acts.

As regards subparagraph (c), rebellion does not seem to have generated much case law of relevance to the issue of threat to health.

How will this play out in practice? If pirates fire their weapons against a vessel, there will typically be a threat to life and health on board that vessel, and thus it will often be in accordance with the right to life to return fire – even *in extremis* with aimed shoots. But what if the pirates manage to get on board the vessel, perhaps sneaking on board during nighttime, without them seemingly being inclined to use their weapons unless the crew/guards resist? Obviously, one may seek to disarm the pirates, but may one shoot them? Besides the ‘easy’ situation where the standoff escalates into imminent actual use of weapons, and where a threat to life may thus be considered to exist, the answer

⁹⁰ See in this regard L. Zwaak “Chapter 6: Right to life (Article 2)” in P. van Dijk et al (eds) *Theory and Practice of the European Convention on Human Rights* 4th (Intersentia, Antwerpen: 2006) 351–403 at 395; and E. Wicks *The Right to Life and Conflicting Interests* (Oxford University Press, Oxford: 2010) 64. Such an understanding of the rule may lead some to read “and” as if it rather said “or”. If that was the case, one would presumably be authorized to use the said force where the individual had at an earlier point in time carried out a violent act, but where he no longer constitutes a threat to anyone’s life or health. This would however violate the requirement that use of force must be absolutely necessary.

will routinely depend on which threat to health is likely to follow from being taken hostage and perhaps held for a prolonged time. Currently, it would seem as if the threat is sufficient to allow for the use of potentially lethal force to avoid such capture.

An example of how authorities have sought to regulate the use of potentially lethal force by private armed guards through soft law instruments is the interim guidance to UK flagged ships on the use of armed guards to defend against the threat of piracy in exceptional circumstances, as revised in 2013.⁹¹ Here, it follows from Section 8.9 that reasonable force may be used under English and Welsh law to protect property and prevent criminal acts, but footnote 17 provides that “[u]nder Scots law, defence of property will not justify assault by firearms. It may justify infliction of minor violence”. Moreover, Section 8.10 holds that:

The law does not preclude the use of lethal force – including through the use of legally held firearms – when acting in self defence or protecting the lives of other people, but a person can only use force that is proportionate and reasonable in the circumstances as they genuinely believed them to be. Care should be taken to minimise injury and to respect and preserve human life.

In relation to the term “self defence” a reference is made to a footnote where it states that “[u]nder Scots law, use of lethal force will only be justified in defence of life (one’s own or that of another) or by a victim resisting rape”. This might be understood as a contradistinction to English and Welsh law, which seem to allow for the use of lethal force also in other situations.⁹² Thus, Scots law might seem to better reflect the obligations of the ECHR. Another example of presumably ECHR-conform rules is the “Guidance

⁹¹ United Kingdom, note 22 para. 8.10.

⁹² Ibid., paras. 8.9–8.10, and at 37, footnotes 17–20.



on the Selection of Private Security Companies (PSC)” issued by the Norwegian Shipowners’ Mutual War Risks Insurance Association (Den Norske Krigsforsikring for Skib) in 2011.⁹³

When Going on the Offensive

A relevant question would be whether air strikes against pirates are in conformity with article 2 of the ECHR. One such attack was undertaken by two fighter jets in 2012 against a presumed pirate base in northern Somalia,⁹⁴ where allegedly at least two persons were injured.⁹⁵ It is a bit unclear where these fighter jets came from, but on 23 March 2012 the Council of the European Union authorized the naval vessels and air assets contributed by member states to the EU Naval Force ATALANTA to attack fuel depots, boats, trucks and other equipment on land which is used in support of piracy.⁹⁶ As a consequence of this authorization, helicopters of EU member states attacked five fast-going pirate vessels in May 2012.⁹⁷

As already mentioned, the ECHR might not apply to such situations, since the use of air weapons – at least when ammuni-

⁹³ The Norwegian Shipowners’ Mutual War Risks Insurance Association, note 21 paras. 3 and 4.

⁹⁴ “Luftangrep mot piratbase” *Aftenposten* 18 April 2012, 18.

⁹⁵ “Puntland blames anti-piracy task forces on airstrike in Bari region”, AMISOM daily media monitoring, 19 April 2012 (available at <somaliamedia-monitoring.org/april-19-2012-morning-headlines>).

⁹⁶ *Council extends EU counter-piracy operation Atalanta*, Council of the European Union Doc. 7216/12 of 23 March 2012 (available at <www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/EN/foraff/129216.pdf>); “Somalia pirates: EU approves attacks on land bases” *BBC News* 23 March 2012 (available at <www.bbc.co.uk/news/world-africa-17487767>); and “Luftangrep mot piratbase” *Aftenposten* 18 April 2012, 18. It might seem as if Operation Atalanta will be prolonged to 2016: “Kapringer” *Aftenposten* 20 January 2014, 14–15 at 14.

⁹⁷ “EU-styrke har angrepet piratmål” *Aftenposten* 16 May 2012, 13, and “Kapringer” *Aftenposten*, 20 January 2014, 14–15 at 14.

tion travel a certain distance – has been seen on some occasions as insufficient to establish jurisdiction under article 1 of the ECHR.⁹⁸ If the ECHR would nevertheless be applicable, however, the use of such weapon systems outside of an armed conflict and without derogating from the ECHR is not looked upon too kindly by the Court.⁹⁹ Numerous cases against Russia show this.¹⁰⁰ Of importance here are the considerations made in advance of the attack in relation to choosing the target, time of attack and selection of weapon system. A lot has nevertheless been done to adapt naval assets to their enforcement tasks off Somalia.¹⁰¹

Positive Obligations

The positive human rights obligations flowing from the right to life will admittedly seldom lead to a state being found at fault for not having done enough to avoid a hostage situation. This issue is more likely to play an active role in relation to how a hostage rescue operation is conducted, as the state must take into consideration the threat to the life of the hostages which the operation may generate.¹⁰² Among the other positive obligations, one may men-

⁹⁸ Compare here *Banković and others*, note 48 supra, *Andreou*, note 56 supra, as well as *Pad and Others*, note 56.

⁹⁹ As regards the question of derogations in relation to territory not belonging to the derogating state, see Frostad, note 57 at 152–157.

¹⁰⁰ See e.g. *Isayeva v. Russia*, Application No. 57950/00, Chamber Judgment of 24 February 2005, and *Abuyeva and Others v. Russia*, Application No. 27065/05, Chamber Judgment of 2 December 2010.

¹⁰¹ A. Murdoch “Recent Legal Issues and Problems Relating to Acts of Piracy off the Coast of Somalia” in C.R. Symmons (ed) *Selected Contemporary Issues in the Law of the Sea* (Martinus Nijhoff Publishers, Leiden: 2011) 139–168 at 148.

¹⁰² Compare here with *Finogenov and Others v. Russia*, Application Nos. 18299/03 and 27311/03, Chamber Judgment of 20 December 2011, where a hostage rescue operation was found to have been in violation of ECHR art. 2.



tion the obligation to ensure that private actors do not violate the right to life. This could obligate a state party to regulate the use of force by private armed guards sailing on vessels flying its flag.

Other classic positive obligations refer to the possible risk of capital punishment which pirates may face if they are handed over to the authorities of another state. This will strictly speaking depend on whether the sending state is bound by protocols 6 and 13, but also on whether the right to use capital punishment has been terminated through the interpretation of the Court in the *Al-Saadoon* case.¹⁰³ Even in case captured pirates are released rather than prosecuted, the positive obligations of the flag state must still be upheld, even though the real issue here would often be whether the pirates risk treatment in violation of the flag states' positive obligations under article 3.¹⁰⁴ The risk of treatment in violation of article 2 and/or article 3 may nevertheless be reduced through the use of political assurances, etc.¹⁰⁵ Of importance is here how likely it is that the insurances will be upheld.¹⁰⁶

A related issue is the obligation to save pirates if they are injured or suffer distress following the activities of the crew or security personnel on board the vessel which the pirates sought to capture, or as a consequence of naval vessels in anti-piracy operations. As long as the requirements of jurisdiction *ratione loci* and *ratione personae* are satisfied, it would be in violation

¹⁰³ *Al-Saadoon and Mufdhi v. the United Kingdom*, Application No. 61498/08, Chamber Judgment of 2 March 2010, para. 120.

¹⁰⁴ M. Tondini "Some Legal and Non-Legal Reflections on the Use of Armed Protection Teams on Board Merchant Vessels: An Introduction to the Topic" (2012) 51/1 *Military Law and the Law of War Review* 7-19 at 13.

¹⁰⁵ *Othman (Abu Qatada) v. the United Kingdom*, Application No. 8139/09, Chamber Judgment of 17 February 2012, paras. 138-189.

¹⁰⁶ For a similar view, see H. Friman and J. Lindborg "Initiating criminal proceedings with military forces: Some legal aspects of policing Somali pirates by navies" in D. Guilefoyle (ed) *Modern Piracy: Legal Challenges and Responses* (Edward Elgar, Cheltenham: 2013) 172-201 at 195.

of the positive obligations of a state under article 2 if the crew and personnel do not adequately protect the life and health of the pirates. The Court will probably not consider it of much importance that the pirates find themselves in distress as a consequence of acts they have initiated themselves.

Another issue here is the obligation on the flag state to investigate situations where life has been lost as a consequence of the use of force, or where this might have been a consequence of the said acts.¹⁰⁷ The state must itself initiate the investigation,¹⁰⁸ and this requires that the appropriate authorities receive information on the use of force having taken place between the crew/personnel of a vessel and the presumed pirates. Consequently, this positive obligation would seem to require the establishment of a system of notification to the appropriate authorities whenever death occurs or is likely to have occurred in such settings. Disciplinary measures and civil liabilities may be sufficient consequences for the purpose of article 2 if the acts were not intentional,¹⁰⁹ but the state would be on more secure ground if it opens criminal investigations where e.g. a presumed pirate has been shot by private armed security operators on board the vessel.

In relation to improper use of force, the rules on immunity may nevertheless limit the ability of the state to undertake prosecutions¹¹⁰ – e.g. where Russian soldiers provide convoy protection and as a consequence thereof are temporarily stationed on board a Norwegian flagged vessel from which they shoot and kill a person suspected of a piracy attempt against the Norwegian vessel.

¹⁰⁷ For a similar view, see “Norge plikter å etterforske drapet” *Aftenposten* 16 December 2013, 10 (interview with K. M. Larsen).

¹⁰⁸ J. Meyer-Ladewig *EMRK Europäische Menschenrechtskonvention Handkommentar* 3rd (Nomos Verlagsgesellschaft, Baden-Baden: 2011) 54.

¹⁰⁹ *Ibid.*, 56.

¹¹⁰ For a similar view, see Guilfoyle, note 20 at 318–323.



CONCLUSIONS

To a large extent, the ECHR might be seen as adding a bit of detail to the picture drawn up by the LOS Convention, customary international law and related instruments. The key caveat is whether the relevant acts come within the jurisdiction of the relevant state party. Beyond cases of defense against hostile use of weapons, where the use of lethal force will often be allowed, it is worthwhile to mention that currently even the threat of being taken hostage might suffice in order to – where absolutely necessary – use potentially lethal force to avoid capture.

Of importance are nevertheless the positive obligations, like providing article 2-conform regulations for the use of force by private armed guards, and ensuring the reporting of all incidents where there is a risk that suspected pirates have been injured or killed as a consequence of the acts of e.g. private armed guards. There is probably reason to believe that we currently see a degree of underreporting in this respect.