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PIRACY AND INTERNATIONAL HUMANITARIAN LAW

Legal Memorandum

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Public International Law & Policy Group

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Confidential

QUESTIONS PRESENTED

1. Do states have an obligation to investigate and prosecute alleged uses of excessive force in the apprehension of pirates?
2. How does the use of excessive force affect, if at all, the prosecution of the pirates themselves?

BRIEF ANSWER

1. States are obliged to investigate and prosecute alleged uses of excessive force when committed by their citizens or others over whom the state has jurisdiction in the apprehension of pirates. This obligation is established equally under human rights treaties and through customary international law. Treaties require investigation and prosecution under provisions which require states to “ensure and respect” that other substantive rights are protected as well as provisions which require states to provide individuals with a right to an effective remedy. The existence of a customary international law requiring investigation and prosecution is supported by domestic state practice and by analogy with the law of state responsibility for injury to aliens.
2. The effect under international law of the use of excessive force in apprehension on the prosecution of pirates depends on the circumstances in which the excessive force occurs. If the force used rises to the level of “egregious government conduct”, courts may be required to dismiss the prosecution due to the violation of the human rights of the accused pirates. However, where the level of force used is not as severe, courts are free to decide whether to recognize or reject jurisdiction. In these less extreme situations, there is also scope for courts to apply alternative remedies to dismissal such as the exclusionary rule, reduced sentencing and others.

FACTUAL AND LEGAL BACKGROUND

This memo was prepared for the Public International Law & Policy Group's High Level Working Group on Piracy. The goal of the working group is to tackle complex questions regarding piracy, particularly in East Africa, and provide research and legal assistance to states prosecuting piracy. The memo will form part of a toolkit which will be available to prosecutors and other interested persons.

Piracy is a crime subject to universal jurisdiction. As such, any official government security force may apprehend pirates on the high seas. This memo will address the obligation to investigate and prosecute the use of excessive force in the apprehension of pirates and the effect of any such excessive force on the prosecution of pirates so apprehended.

WHAT LAW APPLIES TO THE APPREHENSION OF PIRATES?

Piracy is one of a small group of crimes subject to universal jurisdiction under international law.¹ Any state may exercise jurisdiction over an alleged perpetrator of piracy irrespective of the accused's relationship with the prosecuting state. The primary modern source of law governing the arrest of pirates is Article 105 of the United Nations Convention on the Law of the Sea (hereafter UNCLOS). Article 105 states:

On the high seas, or in any place outside the jurisdiction of any State, every State may seize a pirate ship or aircraft, or a ship or aircraft taken by piracy and under the control of pirates, and arrest the persons and seize the property on board. The courts of the State which carried out the seizure may decide upon the penalties to be imposed, and may also determine the action to be taken with regard to the ships, aircraft or property, subject to the rights of third parties acting in good faith.²

¹ Bederman notes that there are numerous other crimes subject to universal jurisdiction either under treaties or through custom such as slave-trading, genocide, torture, and serious war crimes. Bederman, *International Law Frameworks*, (3rd ed, Foundation Press, 2010), at 190.

² United Nations Convention on the Law of the Sea, Dec. 10, 1982, 1833 U.N.T.S. 3.

Therefore, any state may, subject to the Article 107 requirement that apprehending ships be identifiably government authorized,³ legitimately seize vessels which either have been used to commit piracy or have been the victim of a pirate attack; seize the property on board the vessel in question; arrest and detain those allegedly guilty of piracy; and prosecute those allegedly guilty of piracy in accordance with national law.⁴

The use of force in the apprehension of pirates is subject to legal parameters established by international law and international human rights law. Except in specific situations already subsumed within or sufficiently connected to an armed conflict, piracy does not trigger the application of international humanitarian law (otherwise known as the law of armed conflict or the law of war). International Humanitarian Law only applies during an armed conflict. Unless piracy has a sufficient belligerent nexus to the armed conflict, counterpiracy efforts continue as criminal law enforcement operations and the use of force against pirates is subject to UNCLOS, criminal law, and customary international law.⁵

*WHAT ARE THE LIMITS OF REASONABLE FORCE ACCORDING TO INTERNATIONAL LAW AND
INTERNATIONAL HUMAN RIGHTS LAW?*

UNCLOS provides no explicit restraints on the nature of the force used in the apprehension of pirates. In a 2008 resolution pursuant to the UNCLOS, the Security Council authorized the Transitional Federal Government of Somalia, and other nations co-operating “in the fight against piracy and armed robbery”,⁶ to “[u]se, within the territorial waters of Somalia, *in a manner consistent with action permitted on the high seas with respect to piracy*

³ See PILPG memo number 26, Summer 2011, analyzing the potential application of IHL to piracy and counterpiracy.

⁴ See *Supra* note 2, at Article 101.

⁵ See *Supra* note 1..

⁶ S.C. Res. 1816, ¶ 7, U.N. Doc. S/RES/1851 (June 2, 2008)

under relevant international law, all necessary means to repress acts of piracy and armed robbery”⁷ (emphasis added) yet failed to clarify specifically what action was permitted under relevant international law.

In determining what is permitted under international law, international agreements, legislation, and judicial decisions provide some guidance. Among all of these sources, there is a consistent recurrence of requirements for use of the minimum force necessary and for proportionality.

Geiß and Petrig argue that a gradation of enforcement powers can be deduced within the UNCLOS itself.⁸ Article 110 (a) provides that a warship is not entitled to board a foreign ship which it believes to be engaged in piracy unless it has a reasonable suspicion to support such a belief.⁹ Once this reasonable suspicion is confirmed, apprehending forces attain powers of universal jurisdiction to effect an arrest and pursue prosecution under Article 105.¹⁰ Article 22 of the Agreement Concerning Co-Operation in Suppressing Illicit Maritime and Air Trafficking in Narcotic Drugs and Psychotropic Substances in the Caribbean Area (Caribbean Regional Agreement), states that:

- “1. Force may only be used if no other feasible means of resolving the situation can be applied.
2. Any force used shall be proportional to the objective for which it is employed.
3. All use of force pursuant to this Agreement shall in all cases be the minimum reasonably necessary under the circumstances.”¹¹

⁷ S.C. Res. 1816, ¶ 7, U.N. Doc. S/Res/1816 (June 2, 2008).

⁸ 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* (Oxford University Press, April 15, 2011), at 96.

⁹ See *Supra* note 2.

¹⁰ *Ibid.*

¹¹ Available at <http://www.state.gov/s/l/2005/87198.htm>.

Article 8bis of the 2005 Protocol to the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation (SUA Convention), adopted in 2005 by the International Maritime Organisation, provides that “Any use of force pursuant to this article shall not exceed the minimum degree of force which is necessary and reasonable in the circumstances.”¹² Finally, Article 9 of the UN Basic Principles on the Use of Force and Firearms by Law Enforcement Officials states that:

“Law enforcement officials shall not use firearms against persons except in self-defence or defence of others against the imminent threat of death or serious injury, to prevent the perpetration of a particularly serious crime involving grave threat to life, to arrest a person presenting such a danger and resisting their authority, or to prevent his or her escape, and *only when less extreme means are insufficient to achieve these objectives*. In any event, *intentional lethal use of firearms may only be made when strictly unavoidable in order to protect life*.”¹³ (emphasis added)

The most pertinent case dealing with the limits of the use of force in arrests on the high seas is *The M/V “Saiga” (No. 2) Case*. The International Tribunal on the Law of the Sea decided that in the absence of instructive provisions on the use of force in UNCLOS, general international law 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.”¹⁴ The Tribunal went on to adumbrate a system of “normal practice” to be

¹² Available at <http://cns.miis.edu/inventory/pdfs/aptmaritime.pdf>

¹³ Basic Principles on the Use of Force and Firearms by Law Enforcement Officials, 8th UN Congress, UN Doc. A/CONF.144/28/Rev.1, art. 9 (Aug. 27 – Sept. 7, 1990), available at <http://www2.ohchr.org/english/law/pdf/firearms.pdf>.

¹⁴ *M/V ‘Saiga’ (No. 2) (Saint Vincent and the Grenadines v. Guinea) (Judgment)* (1999) 38 ILM 1323, at 1355.

used in effecting arrests which includes requests to stop, warning shots and an eventual use of force as a last resort.¹⁵

Taken together, these sources provide clear and consistent evidence for the existence of a customary international law rule which stipulates that the use of force in the apprehension of pirates must at all times be proportional and of the minimum level necessary to achieve the legitimate objectives of security forces in the circumstances.

DISCUSSION

I.

DO STATES HAVE AN OBLIGATION UNDER INTERNATIONAL LAW TO INVESTIGATE AND PROSECUTE ALLEGATIONS OF EXCESSIVE FORCE COMMITTED BY THEIR OWN CITIZENS IN THE PROSECUTION OF PIRATES?

In the event of allegations that apprehending forces have breached the abovementioned standards governing the limits of reasonable force in apprehending pirates, the government of the security personnel's nation state(s) will be under a duty to investigate such allegations and to pursue prosecution of offenders where those allegations are well founded. Although the coordinated international effort to combat piracy is a relatively new development, numerous writers have recognized similar obligations relating to other human rights and humanitarian law violations as having their origins in both treaties and custom.¹⁶ Treaty-based obligations derive both from provisions of human rights treaties that oblige member states to "ensure and respect" the human rights guarantees within those conventions and, alternatively, through the

¹⁵ *Ibid*

¹⁶ Roht-Arriaza, *State Responsibility to Investigate and Prosecute Grave Human Rights Violations in International Law*, 78 Cal. L. Rev. 451 (1990), Orentlicher, *Settling Accounts: The Duty To Prosecute Human Rights Violations of a Prior Regime*, 100 Yale L.J. 2537 (1990-1991), Scharf, *Swapping Amnesty for Peace: Was There a Duty to Prosecute International Crimes in Haiti?*, Tex. Int'l L. J. 1 (1996).

right to an effective remedy. In addition, support for the existence of a customary rule of international law comes from treaty provisions and judicial decisions taken together, state practice and by analogy with the law of State responsibility for injury to aliens.

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A. Treaty Based Obligation

1. “Ensure and Respect” Provisions

Virtually all major human rights treaties feature a provision requiring states to ensure and/or respect the substantive human rights established by such treaties.¹⁷ Roht-Arriaza notes that “[c]ourts and commentators have interpreted treaty provisions obligating states to “ensure” political and civil rights as imposing an *affirmative* obligation to control persons and authorities acting under official auspices”,¹⁸ discrediting the view that states have no positive obligation to protect civil and political rights aside from a negative obligation to refrain from interfering with such rights. Professor Buerghenthal has previously stated that “The obligation ‘to ensure’ these rights encompasses the duty ‘to respect’ them, but it is substantially broader.... The obligation to ‘ensure’ rights creates affirmative obligations on the state—for example, to discipline its officials....”¹⁹ Such an interpretation is corroborated by the decision of the European Court of Human Rights in *Ireland v United Kingdom*, in which the court stated that the Convention “does not merely oblige the higher authorities of the Contracting States to respect for their own part the rights and freedoms it embodies... in order to secure the enjoyment of those rights and freedoms, those authorities must prevent or remedy any breach

¹⁷ Examples include the International Covenant on Civil and Political Rights, adopted Dec. 16, 1966, G.A. Res. 2200, 21 U.N. GAOR Supp. (No. 16) at 52, 999 U.N.T.S. 171; European Convention for the Protection of Human Rights and Fundamental Freedoms, *adopted* Nov. 4, 1950, 213 U.N.T.S. 221, Europ. T.S. No. 5, *reprinted in* 6 I.L.M. 368 (1967); and the American Convention on Human Rights, *adopted Jan. 7, 1970*, O.A.S. Official Records, OEA/ser.K./XVI/1.1, doc. 65 rev. I, corr. 1 (1970), *reprinted in* 9 I.L.M. 673 (1970).

¹⁸ Naomi Roht-Arriaza, *State Responsibility to Investigate and Prosecute Grave Human Rights Violations in International Law*, 78 Cal. L. Rev. 451 (1990), at 467.

¹⁹ Buerghenthal, *State Obligations and Permissible Derogations*, The International Bill of Rights 72, (L. Henkin, ed. 1981), at 77.

at subordinate levels.”²⁰ Similarly, the Inter-American Court held in the *Velasquez-Rodriguez Case* that “[a]ny impairment of those rights [established by the Convention], which can be attributed... to the action or omission of a public authority, constitutes an act imputable to the State, which assumes responsibility in the terms provided by the Convention itself.”²¹

Numerous international tribunals and enforcement bodies have gone further and held, specifically, that a state’s duty to act positively to respect and ensure protection for human rights includes an obligation to investigate and prosecute alleged abuses. In the *Velasquez* case, the Inter-American Court interpreted the language of Article 1.1 of the Convention²² as encompassing a “legal duty to take reasonable steps to prevent human rights violations and to use the means at its disposal to carry out a serious investigation of violations committed within its jurisdiction, to identify those responsible, to impose the appropriate punishment and to ensure the victim adequate compensation.”²³ States wishing to comply with this obligation must, according to the court, undertake the investigation “in a serious manner” as opposed to an investigation which is a “mere formality preordained to be ineffective.”²⁴

A series of decisions of the Human Rights Committee addressing issues of torture, extra-legal killings and disappearances, have consistently required member states to both investigate allegations of abuses and to prosecute guilty parties and in some cases has also required compensation for victims as well as a commitment on the part of the infringing state

²⁰ Ireland v. United Kingdom, 25 Eur. Ct. H.R., (ser. A), ¶ 239 (1978) (judgment).

²¹ Velasquez Rodriguez Case, Inter-Am. Ct. H.R. 35, OAS/ser. L/V/III. 19, doc. 13, app.VI (1988), at 164.

²² Article 1.1:

The States Parties to this Convention undertake to respect the rights and freedoms recognized herein and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms, without any discrimination for reasons of race, color, sex, language, religion, political or other opinion, national or social origin, economic status, birth, or any other social condition.

²³ See *Supra* note 21, at para. 174.

²⁴ *Ibid*, at para. 177.

to prevent similar violations in the future.²⁵ In each of these cases the Committee refrained from furnishing a legal justification for its conclusions. However, as Orentlicher notes, “[i]mplicit in the Committee's decisions is the view that investigation and prosecution are the most effective means of securing the right to life and the right to be free from torture and forced disappearance. In view of the paramount importance that the Committee has attached to these three rights, it is reasonable to assume that States Parties must use the most effective means available to ensure their enjoyment.”²⁶ Interpreting Article 7 of the International Covenant on Civil and Political Rights in conjunction with Article 2, the Human Rights Committee has also stated that:

“[I]t is not sufficient for the implementation of [article 7] to prohibit [torture or other cruel, inhuman or degrading] treatment or punishment or to make it a crime... it follows from article 7, read together with article 2 of the Covenant, that States must ensure an effective protection through some machinery of control. Complaints about ill-treatment must be investigated effectively by competent authorities. Those found guilty must be held responsible...”²⁷

In *X and Y v. Netherlands*, the European Court of Human Rights determined that the Netherlands’ failure in allowing a gap to form in its criminal law, which permitted the applicant’s assailant rapist to avoid prosecution, resulted in a violation of the Netherlands’ affirmative duty to ensure that the applicant’s right to respect for private life was sufficiently protected.²⁸ The European Commission stated in *Mrs. W. v United Kingdom* held that “[t]he

²⁵ *Bleier v. Uruguay*, Comm. No. R.7/30, 37 U.N. GAOR Supp. (No. 40) Annex X, U.N. Doc A/37/40 (1982); *Quinteros v. Uruguay*, Comm. No. 107/1981, 38 U.N. GAOR Supp. (No. 40) Annex QI, U.N. Doc. A/38/40 (1983); and *Baboeram v. Suriname*, Comm. Nos. 146/1983 and 148-154/1983, 40 U.N. GAOR Supp. (No. 40) Annex X, para. 13.2, U.N. Doc. A/40/40 (1985).

²⁶ Diane F. Orentlicher, *Settling Accounts: The Duty To Prosecute Human Rights Violations of a Prior Regime*, 100 Yale L.J. 2537 (1990-1991), at 2575.

²⁷ Report of the Human Rights Committee, 37 U.N. GAOR Supp. (No. 40) Annex V, general comment 7(16), para. I, U.N. Doc. E/CN.4/Sub.2/Add.1/963 (1982).

²⁸ 91 Eur. Ct. H.R. (ser. A), para. 24 (1985) (judgment).

obligation to protect the right to life is not limited for the High Contracting to the duty to prosecute those who put life in danger but implies positive preventive measures appropriate to the general situation,”²⁹ which necessarily implies that the obligation to protect the right to life includes the duty to prosecute those who put life in danger.

Therefore, in order to adequately respect the substantive rights guaranteed by international instruments and to ensure their protection, states are required to conduct investigations and pursue prosecutions of alleged abuses committed by their own citizens or others over whom the state has jurisdiction, against citizens of any other state. Thus, in a situation of excessive force used in the apprehension of pirates, states must conduct investigations into allegations of abuse on the part of their own citizens or others over whom they have jurisdiction and to follow up with prosecutions.

The limits of a state’s obligation to investigate and prosecute alleged uses of excessive force are set by the limits of jurisdiction. The obligation persists in all situations in which a state retains jurisdiction over the alleged guilty individual(s). Thus, states are bound by this obligation to investigate and prosecute the use of excessive force by their own citizens regardless of where the abuse occurred.³⁰ If the person guilty of excessive force is not a citizen of the state in question, that state’s obligations depend on the location at which the violation took place. The obligation will remain binding for alleged abuses committed within a state’s territorial waters because such waters are considered to be “assimilated to that nation’s full territorial sovereignty.”³¹ In the territorial sea, jurisdiction is limited by Article

²⁹ 32 Collection of Decisions 190, 190 (1983).

³⁰ See *Blackmer v. United States*, 284 U.S. 421 (1932), in which the Supreme Court found the refusal of a U.S. citizen living in Paris to obey a U.S. subpoena requiring him to return to the U.S. to give evidence amounted to contempt of court and was within U.S. jurisdiction.

³¹ Bederman, *International Law Frameworks*, (3rd ed, Foundation Press, 2010), at 126-127.

17 of the UNCLOS which establishes the right to innocent passage.³² However, the use of excessive force in the apprehension of pirates is likely to be interpreted in most cases as a breach of innocent passage because it may be both a “threat or use of force against the sovereignty... of the coastal state” under Article 19.2 (a) and, more likely, an “exercise or practice with weapons of any kind” under Article 19.2 (b).³³ Beyond these limits, states no longer retain jurisdiction over criminal and security matters and so the obligation rests exclusively with the guilty individuals’ nation states. Thus, states are bound by the obligation to investigate and prosecute the alleged use of excessive force by their own citizens in all situations and in most cases by other citizens in that state’s internal waters and territorial seas.

2. The Right to an Effective Remedy

In viewing the obligation to conduct investigations and prosecutions from the perspective of the individual and his or her rights as opposed to the perspective of the state and its responsibility to the individual, an alternative basis for a treaty obligation may be presented under the right to an effective remedy, which features in many of the major human rights instruments including the Universal Declaration of Human Rights,³⁴ the International Covenant on Civil and Political Rights,³⁵ the American Convention on Human Rights³⁶ and the European Convention for the Protection of Human Rights and Fundamental Freedoms.³⁷ The authoritative interpreting tribunals of each of these instruments have consistently held, as demonstrated in the following decisions that the right to an effective remedy includes the obligation for states to investigate and prosecute abuses.

³² See *Supra* note 2.

³³ *Ibid*

³⁴ Universal Declaration of Human Rights, G.A. Res. 217 (11), art. 6, U.N. Doc. A/810, at 71 (1948).

³⁵ International Covenant on Civil and Political Rights, Dec. 19, 1966, 999 U.N.T.S. 171, Art. 2(a).

³⁶ American Convention on Human Rights, Nov. 22, 1969, 36 O.A.S.T.S. 1, OEA/ser. L./V/II.23, doc. 21 rev. 6 (1979).

³⁷ European Convention for the Protection of Human Rights and Fundamental Freedoms, *adopted* Nov. 4, 1950, 213 U.N.T.S. 221, Europ. T.S. No. 5.

In two separate cases, one dealing with a disappearance in Guatemala and the other dealing with torture and unlawful detention, the Inter-American Court used the language of Article 25 of the Convention which establishes the right to “right to simple and prompt recourse”³⁸ to require exhaustive and impartial investigations so that responsibility can be established and that guilty parties can be sanctioned.³⁹ Similarly, the European Court of Human Rights has taken the view that the right to an effective remedy under Article 13 requires a state to ensure a remedy under national law which determines whether or not the rights of the individual under the convention have been violated and to provide redress to the individual in the event of violation.⁴⁰ The European Commission also held in *Donnelly v United Kingdom* that where violations occur, a state is required to put in place a system which prevents the recurrence of similar violations in the future.⁴¹

If the above rationale to the situation of excessive force used in the apprehension of piracy, it is clear that some form of investigation and prosecution of excessive force used is an adequate and effective remedy. Excessive force and brutality is universally viewed as a crime for which a remedy is warranted like any other. The alleged pirates continue to have their own human rights both during and after any apprehension and are entitled to the protection of those rights through measures such as the right to an effective remedy. These rights form the source, therefore – through the right to an effective remedy – for additional support for an obligation by states to investigate and prosecute the use of excessive force when it occurs within their jurisdiction such that they owe the right of an effective remedy to the alleged

³⁸ See *Supra* note 32.

³⁹ Luis Federico Castillo Mauricio v. Guatemala, Case 7821, Inter-Am. Comm’n H.R., Resolution No. 17/82... available at <http://www.cidh.org/annualrep/81.82eng/Guatemala7821.htm>; Fénélon v. Haiti, Case 6586, Inter-Am. Comm’n H.R., Resolution No. 48/82... available at <http://www.cidh.org/annualrep/82.83eng/Haiti6586.htm>

⁴⁰ Case of Klass and Others (F.R.G.), 28 Eur. Ct. H.R. (ser. A) (1978)

⁴¹ *Donnelly v. United Kingdom*, 1976 Y.B. EUR. CONV. ON HUM. RTS. (Eur. Comm'n on Hum. Rts.) 84.

pirates. Indeed, the imprisonment, which the pirates themselves are likely to endure if found guilty, renders investigation and prosecution imperative because various alternative forms of remedy are unsuitable, such as compensation and future undertakings.

B. Customary Obligations

As a preliminary matter, there is a strong consensus that the prevalence of the duty to investigate or prosecute either explicitly or implicitly, in one of the means discussed above, in human rights instruments suggests the development of a customary international norm, particularly because many of these instruments are viewed by academics as having formed customary international law in their entirety.⁴²

1. State Domestic Practice

State practice provides extensive and consistent support for this conclusion. Customary international law arises as a result of “a general and consistent practice of states followed by them from a sense of legal obligation.”⁴³ Recent state practice relating to the investigation and prosecution of the use of excessive force in the apprehension of pirates is too minimal and inconclusive to provide adequate direction on the customary status of such a specific issue. However, by way of close analogy, state practice relating to the investigation and prosecution of the use of excessive force in ordinary police operations is overwhelmingly in favor. Virtually all developed and civilized countries worldwide criminalize the use of excessive force by police and security forces by statute or common law, as the following examples illustrate. In addition, there is no evidence of any widespread contradictory state practice that provides legally established immunity for police and security forces who use excessive force.

⁴² See *supra* note 18, at 492; See *supra* 26, at 2582.

⁴³ Restatement (Third) of Foreign Relations Law § 102(2) (1987); Statute of the International Court of Justice, art. 38(1)(b), 59 Stat. 1055, 1060 (1945).

A 2005 Conference on Police Accountability and the Quality of Oversight organized by Altus, an international organization dedicated to the promotion of global justice, provides a number of accounts of modern state practice. Kabanov highlights the significance of the launch of several “tens [of] criminal cases and a special interrogation group including investigators of the Russian General Prosecutor’s Office”⁴⁴ against police officers guilty of police brutality in the Bashkiria region, which the author describes as “one of the most unfavorable in relation of observing human rights”⁴⁵ and featuring “all signs of the totalitarian nation”.⁴⁶ District Attorneys in the US regularly prosecute police officers for police misconduct following recommendations from Internal Affairs units, which are present in the majority of police departments.⁴⁷ Vilks characterizes the Latvian Public Prosecutor Courts as an “outer control structure”⁴⁸ over police authorities in Latvia. In 2002, the Mexico City Police established the General Office of Internal Affairs to respond to civilian complaints against the police, investigate such complaints and, if necessary, refer the case Honor and Justice Council who may take administrative disciplinary action or pass the case on to the office of the Public Prosecutor.⁴⁹ In Brazil, like many other countries, a lack of transparency in police institutions unfortunately means that police misconduct often goes unpunished.⁵⁰ However, this is not an official policy. In fact, Brazil’s Constitution accords the responsibility of controlling police authority to the Public Prosecutor’s Office.⁵¹ In addition, many countries,

⁴⁴ Kabanov, *Police abuse in Blagoveshensk and work of Rapid reaction commission as an example of Social control over police authorities in Russia*, available at http://www.altus.org/pdf/r_k_en.pdf, at 2.

⁴⁵ *Ibid*, at 2.

⁴⁶ *Ibid*, at 3.

⁴⁷ Bobb, *Internal and External Police Oversight in the United States*, available at http://www.altus.org/pdf/us_mb_pousf_en.pdf.

⁴⁸ Vilks, *Control over police authorities of the Latvian Republic as newly established EC country member: traditional model and new one*, available at http://www.altus.org/pdf/l_av_en.pdf.

⁴⁹ Klarh, *International Conference on Police Accountability and the Quality of Oversight: Global Trends in National Context*, available at http://www.altus.org/pdf/m_mlk_en.pdf.

⁵⁰ Cano, *Police Oversight in Brazil*, available at http://www.altus.org/pdf/b_ic_en.pdf.

⁵¹ *Ibid*, at 4.

such as France⁵² and the U.S.,⁵³ have gone one step further and have established civil remedies for victims of abuse from state officials. The unanimity of consistency in which states view the use of excessive force as illegal and worthy of investigation and prosecution provides strong support for the existence of a customary rule of international law mandating the investigation and prosecution of allegations of the use of excessive force in apprehending pirates.

2. Analogy with State Responsibility for Injury to Aliens

Roht-Azzaria argues that the long-standing international law principle of state-responsibility for injury to aliens has expanded under human rights law to form an international obligation to investigate and prosecute human rights abuses irrespective of whether the victim is the citizen of a foreign state or the state itself. States are liable for injuries to aliens committed within its territory under the law of diplomatic protection⁵⁴. Roht-Azzaria notes that the requirement for states to conduct investigations and prosecutions received major support in a number of decisions of the United States-Mexican General Claims Commission.⁵⁵ In the *Neer Case*,⁵⁶ the *West Case*⁵⁷ and the *Janes Case*⁵⁸ the Commission held that the Mexican government had failed in its international legal duty to take affirmative action to investigate and apprehend offenders. In the *Janes Case*, the Commission justified this obligation on the basis that the failure to properly investigate and prosecute offenders was

⁵² See L. Hurwitz, *The State as Defendant* (Greenwood Press 1981), at 194.

⁵³ 42 U.S.C. § 1983.

⁵⁴ See *supra* note 18, at 500.

⁵⁵ *Ibid*, at 501.

⁵⁶ *Neer Case* (U.S. v. Mex.), 1927 United States and Mexico General Claims Commission 71, 4 R. Int'l Arb. Awards 60 (1926).

⁵⁷ *Janes Case* (U.S. v. Mex.), 1927 United States and Mexico General Claims Commission 108, 114-19, 4 R. Int'l Arb. Awards 82 (1926)

⁵⁸ *West Case* (U.S. v. Mex.), 1927 United States and Mexico General Claims Commission 404, 4 R. Int'l Arb. Awards 270 (1927).

a second offence on the part of the state in addition to the original violation.⁵⁹ As a result, the court awarded separate additional damages to the family for the lack of punishment.⁶⁰

While these cases relate to circumstances in which the victim of the violation of human rights was a citizen of a foreign country to the offending state, there is strong academic support for the proposition that the development of human rights law since World War II has circumscribed the doctrine of state responsibility for injury to aliens and that states are now equally responsible for injuries to their own citizens in the same manner as foreign citizens. Jessup states that “[t]he topic formerly known in international law as “the responsibility of states for injuries to aliens” might be transformed into “the responsibility of states for injuries to individuals.””⁶¹ Similarly, Roht-Azzaria notes that the International Law Commission’s Draft Articles of 1976⁶² on state responsibility do not distinguish between aliens and citizens.⁶³

Thus, many argue that the doctrine of state responsibility now provides a clear basis for the existence of a customary international norm requiring states to investigate and prosecute allegations of excessive force used in the apprehension of pirates. At the very minimum, the doctrine and supporting academic commentary provide, by way of analogy, yet another basis for support alongside the other bases discussed above.

II.

⁵⁹ See *supra* note 53, at 87

⁶⁰ *Ibid.*, at 89.

⁶¹ Jessup, *Responsibility of States for Injuries to Individuals*, 46 Colum. L. Rev. 903, 904-10 (1946);

⁶² Int’l Law Comm’n, *Draft Articles on State Responsibility*, [1976] 2 Y.B. Int’l L. Comm’n 95, art. 19, U.N. Doc. A/CN.4/SER.A/1976/Add.1 (Part 2).

⁶³ See *supra* note 18, at 503

HOW DOES THE USE OF EXCESSIVE FORCE AFFECT, IF AT ALL, THE PROSECUTION OF THE PIRATES THEMSELVES?

With no treaty provisions directly on point and with little to no domestic practice upon which we can base any customary approach, the development of a legal framework in which to assess this issue must come by way of analogy with other aspects of the law. The two most appropriate approximations to this question, and the two issues which this section will address, are the law surrounding extraordinary rendition and various other forms of unfair pre-trial treatment. Secondly, this section will highlight any consistent principles that emerge from these issues from which the likely international law requirements in situations of excessive force used in the prosecution of pirates can be predicted.

A. Extraordinary rendition and the doctrine of *male captus bene detentus*

The traditional common law doctrine of *male captus bene detentus*, according to the International Criminal Tribunal for Yugoslavia, “expresses the principle that a court may exercise jurisdiction over an accused person regardless of how that person has come into the jurisdiction of that court”.⁶⁴ This doctrine is a very controversial one. Many countries, including the UK, Zimbabwe, Switzerland, and to a certain extent Australia and New Zealand, have chosen to part ways with the doctrine in favor of an approach that treats the rendition of the accused with more scrutiny while others have chosen to stick firmly with the doctrine and show no signs of impending reprieve.

⁶⁴ Prosecutor v. Nikolic, Case No. IT-94-2-PT, Decision on the Defence Motion Challenging the Exercise of Jurisdiction by the Tribunal, 85 n.93 (Oct. 9, 2002), available at http://www.icty.org/x/cases/dragan_nikolic/tdec/en/10131553.htm.

In *re Argoud*, following a trial conducted in abstentia in which the accused was sentenced to death, the French courts refused to stay proceedings on the basis that the accused had been brought back to France from Germany, where he had fled, by private individuals.⁶⁵ Similarly, the German Constitutional Court saw no fault with *Argoud* and recognized jurisdiction over a German citizen who had been illegally transferred back to Germany from France.⁶⁶ A more extreme example comes from the Israeli decision in *Eichmann*, in which the accused's objections to jurisdiction were refused and the death penalty carried out irrespective of the fact that Israeli authorities apprehended the accused and brought him from Argentina and despite a Security Council resolution calling for reparations to be turned over to the Argentinean government.⁶⁷

A series of decisions from US courts provides a strong example of a clear and continuous endorsement of the *male captus* doctrine. The clearest origin of the modern line of cases is *Ker v. Illinois*,⁶⁸ in which the accused was brought before the court as a result of forcible abduction, ignoring an established and pre-existing extradition process. After determining that the accused was not entitled to dismissal under the extradition treaty between the US and Peru,⁶⁹ the Supreme Court declared more broadly that the "such forcible abduction is no sufficient reason why the party should not answer when brought within the jurisdiction of the court which has the right to try him for such an offence, and presents no valid objection to his trial in such court."⁷⁰ This reasoning was adopted again in *Frisbie v Collins*, a case involving the abduction of a defendant by Michigan police from Chicago to face trial in Michigan, in which the court stated that previous decisions such as *Ker*:

⁶⁵ In *Re Argoud*, Cour de Cassation 4 June 1964, 45 ILR 90 (Cass Crim 1964), Clunet, JDI 92 (1965).

⁶⁶ Bundesverfassungsgericht, Decision of 17 July 1985 – 2 BvR 1190/84, in: *EuGRZ* 1986.

⁶⁷ 1960 UN Yearbook 196, UN Doc. S/4349.

⁶⁸ 119 U. S. 436 (1886).

⁶⁹ *Ibid*, at 443.

⁷⁰ *Ibid*, at 444.

“rest on the sound basis that due process of law is satisfied when one present in court is convicted of crime after having been fairly apprized of the charges against him and after a fair trial in accordance with constitutional procedural safeguards. There is nothing in the Constitution that requires a court to permit a guilty person rightfully convicted to escape justice because he was brought to trial against his will.”⁷¹

The harshness of this doctrine is alleviated somewhat by the decision in *United States v. Toscanino*.⁷² In *Toscanino*, an Italian citizen was abducted in Uruguay, taken to Brazil to be tortured for close to three weeks and then brought to the US for prosecution with the complicity of the US authorities. The court stated that “we view due process as now requiring a court to divest itself of jurisdiction over the person of a defendant where it has been acquired as the result of the Government’s deliberate, unnecessary and unreasonable invasion of the accused’s constitutional rights”.⁷³ However, as the ICTY noted in the *Nikolic* case, the reason for this decision is related to the manner in which the accused was abducted and not the mere fact of his abduction. In addition, the threshold for the application of the *Toscanino* decision was set very high by the U.S. Supreme Court’s decision in *United States v. Alvarez-Machain*.⁷⁴ In *Alvarez-Machain* US government agents ignored ordinary extradition procedures and opted to involve themselves in the abduction of a Mexican citizen who, it was alleged, was guilty of the murder of a US Drug Enforcement Administration agent. The majority of the court applied the rule in *Ker* allowing for the recognition of

⁷¹ 342 U. S. 519, at 522

⁷² 500 F 2d 267 (1974)

⁷³ *Ibid*, at 275

⁷⁴ 504 U.S. 655 (1992)

jurisdiction, despite Mexican objections regarding violation of the extradition treaty and Mexican national sovereignty.⁷⁵

However, in recent years, the courts in numerous countries have demonstrated an increase willingness to abandon the *male captus* doctrine. Louise Arbour, the former UN High Commissioner for Human Rights, argues that the decision of the New Zealand Court of Appeal in *R v Hartley*,⁷⁶ in which the court described an illegal arrest as an abuse of process and granted discretion to the trial court to order a stay of proceedings, represents the point at which the doctrine began to unravel throughout the Commonwealth.⁷⁷ *Hartley* precipitated a series of approving decisions throughout the Commonwealth in Australia,⁷⁸ South Africa,⁷⁹ Canada,⁸⁰ and the UK.⁸¹ Strong and cogent reasoning for such a move is provided by the Zimbabwean decision in *State v. Beahan* in which the court states that:

“In my opinion it is essential that, in order to promote confidence in and respect for the administration of justice and preserve the judicial process from contamination, a court should decline to compel an accused person to undergo trial in circumstances where his appearance before it has been facilitated by an act of abduction undertaken by the prosecuting State... A contrary view would amount to a declaration that the end justifies the means, thereby encouraging States to become law-breakers in order to secure the conviction of a private individual.”⁸²

⁷⁵ *Ibid*, at 662.

⁷⁶ [1978] 2 NZLR 199 (CA).

⁷⁷ Arbour, 55 Int'l & Comp. L.Q. 511 (2006), at 513

⁷⁸ *Levinge v Director of Custodial Services* (1987) 9 NSWLR 546

⁷⁹ *State v Ebrahim* [1991] 2 SA 553 (S Afr App Div).

⁸⁰ *R v Jewitt* [1985] 2 SCR 128; *O'Connor v The Queen* [1995] 4 SCR 411.

⁸¹ *R v Horseferry Road Magistrates' Court, exp Bennett* [1993] 3 All ER 138 (HL).

⁸² *State v. Beahan*, 1992, (1) SACR 307 (A), at 317.

Similarly, in the House of Lords decision in *Bennett*, Lord Griffiths declared that “the judiciary accept a responsibility for the maintenance of the rule of law that embraces a willingness to oversee executive action and to refuse to countenance behaviour that threatens either basic human rights or the rule of law.”⁸³

On the international level, the International Criminal Tribunal for Yugoslavia addressed the issue of transnational abduction comprehensively in *Prosecutor v. Nikolic*.⁸⁴ In ultimately upholding jurisdiction, the Trial Chamber noted that once the accused came under the control of the Nato-led Stabilisation Force (SFOR), the SFOR was bound not to release him.⁸⁵ In the course of its decision, the court extracted a number of factors common to the domestic case law which supported the imposition of jurisdiction. First, the court noted that its vertical relation with states meant that no issue of violation of state sovereignty arose and that no complaint from the “victim state” was possible or necessary.⁸⁶ Secondly, the court found that the fundamental rights of the accused had not been so “egregiously violated” as to require dismissal.⁸⁷ The Appeals Chamber agreed with the decision of the Trial Chamber and added that in situations involving war crimes, state sovereignty and the human rights of the accused ought to be balanced against the societal interest in prosecuting such guilty persons.⁸⁸ Taking note of the decision in *Toscanino v United States*, the Appeals Chamber held that serious mistreatment was required in order to warrant a refusal of jurisdiction.⁸⁹

⁸³ *Supra* note 95, at 61-62.

⁸⁴ See *supra* note 60.

⁸⁵ *Ibid*, Paragraph 55.

⁸⁶ *Ibid* Paragraph 105.

⁸⁷ *Ibid* paragraph 111, 112 and 115.

⁸⁸ *Prosecutor v. Nikolic*, Case IT-94-2-AR73, Decision on Interlocutory Appeal Concerning Legality of Arrest (June 5, 2003), available at http://www.icty.org/x/cases/dragan_nikolic/acdec/en/030605.pdf.

⁸⁹ *Id.* 28-29.

Viewing these decisions collectively, it is clear that there is not a sufficient level of unanimity of opinion and practice to support the emergence of a clear black-letter customary international rule one way or the other. While there appears to be no clear state practice that continues to recognize jurisdiction even in instances of *Toscanino* level egregious treatment with the complicity of the state, the issue becomes considerably murkier below this threshold with different states coming to contradicting conclusions on the same issue. Therefore, in situations in which excessive force is used in the apprehension of pirates, dismissal may be necessary where the force used amounted to an egregious violation of the alleged pirates' human rights. However, in less extreme situations, the prosecuting court has free rein at this point to decide whether or not to apply the *male captus* doctrine.

At a more fundamental level, courts which are forced to assess arguments challenging jurisdiction to prosecute pirates on the basis of excessive force in their apprehension must consider whether analogies to basic principles underlying the law regarding extraordinary rendition apply. For unless it can be said, as is the case with extraordinary rendition, that the pirates themselves would never have been brought before the court without the use of excessive force, the justification for dismissal is weakened substantially. In such a situation, the only reason for dismissal would be to send a clear deterrent message to states and security forces to prevent such abuses in the future. It is questionable whether such an additional deterrent is necessary to protect human rights when, as established above, states already have an international law duty to investigate and prosecute those offenders anyway.

B. Other Forms of Unfair Pre-Trial Treatment

The *male captus* doctrine deals with jurisdiction where an accused person has been brought before the court as a result of international abduction. This section will look to the

approaches taken by the courts, particularly the European Court of Human Rights (ECHR), in response to jurisdictional challenges based on other forms of unfair pre-trial treatment similar to the use of unreasonable force, such as torture, inhumane treatment and invasions of privacy. The case of *Jalloh v Germany*⁹⁰ provides the clearest and most comprehensive illustration of the overall approach with which the ECHR treats these issues. In *Jalloh*, the court assessed the legality of a prosecution for drug possession using evidence obtained through the use of emetics to force regurgitation of swallowed substances. The court determined that the applicant's Article 6 right to a fair trial had been violated because his conviction resulted from the use of evidence obtained in violation of the Article 3 right to protection from inhuman and degrading treatment.⁹¹ The court also held that "[w]hile Article 6 guarantees the right to a fair hearing, it does not lay down any rules on the admissibility of evidence as such, which is primarily a matter for regulation under national law"⁹² and that "[t]he question which must be answered is whether the proceedings as a whole, including the way in which the evidence was obtained, were fair."⁹³ This case, is notably similar to the decision of the US Supreme Court in *Rochin v California*⁹⁴ in which the court determined that the use of emetics in a similar way "shock[ed] the conscience" to the extent that the conviction was overturned for violation of the Fourteenth Amendment due process guarantee. Moreover, in *Sacettin Yildiz v Turkey*,⁹⁵ the ECHR took the view that that evidence obtained using the administering of electric shocks and beating of the soles of the applicants feet could, and did in this case, establish a violation of Article 6 of the convention even if such evidence was not instrumental in leading to a conviction.

⁹⁰ (App no. 54810/00), judgment, July 11 2006; 44 EHRR 32 (2007).

⁹¹ *Ibid*

⁹² *Ibid*

⁹³ *Ibid*

⁹⁴ 342 U.S. 165 (1952)

⁹⁵ App no. 38419/02, judgment, June 5 2006, not reported.

A more versatile approach is provided by the US Military Law doctrine of outrageous government conduct,⁹⁶ which usually forbids the government from using evidence against the accused where such evidence is obtained in a conscience shocking manner. In *United States v. Fulton*, the court stated that in extreme cases, dismissal may be an appropriate remedy. However, in seeking the middle ground and avoiding an all or nothing dichotomy the court held that:

“[W]hen other remedies are available to adequately address the wrong, dismissal should be the last of an escalating list of options. Here, the Commission finds other remedies are available to adequately address the wrong inflicted upon the Accused, including, but not limited to, sentence credit towards any approved period of confinement, excluding statements and any evidence derived from the abusive treatment, and prohibiting persons who may have been involved in any improper actions against the Accused from testifying at trial.”⁹⁷

Thus, in a situation of unreasonable force used in the apprehension of piracy, courts may be forced to divest themselves of jurisdiction if such force would lead to an unfair trial. Where the excessive force is so extreme, as in *Yildiz*, it may be impossible for a fair trial to proceed. However, complete dismissal may be avoided in cases such as *Jalloh* where the effect of the use of excessive force can be remedied by applying the exclusionary rule to evidence obtained through such treatment. In addition, the decision in *Fulton* provides a useful selection of potential alternative remedies to dismissal in situations where the excessive force does not rise to the level of extremity in *Yildiz*.

⁹⁶ *Rochin v. California*, 342 U.S. 165, 172 (1952); *United States v. Fulton*, 55 M.J. 88, 89 (C.A.A.F. 2001); Government Response to Defense Motion to Dismiss Based on Torture of Detainee Pursuant to R.M.C. 907 at 4-6, *Jawad* (Military Comm'n, Guantanamo Bay, Cuba filed June 4, 2008).

⁹⁷ *United States v. Fulton*, 55 M.J. 88, 89 (C.A.A.F. 2001).

III.

CONCLUSION

From on the above analysis, two clear conclusions emerge. First, all states have an obligation under international law to investigate and prosecute allegations of unreasonable force used in the apprehension of pirates by any individual over which those states have jurisdiction. This obligation may derive under treaties through ‘ensure and respect’ provisions or through the right to an effective remedy. Customary international law may provide an equal basis for such an obligation through ordinary domestic state practice and by analogy with the law of state responsibility for injury to aliens. Secondly, the effect which the use of unreasonable force will have on the prosecution of pirates will depend on the circumstances. In cases akin to extraordinary rendition, there is no undisputed obligation to dismiss. However, the likelihood of dismissal will be higher in cases of egregious government conduct. Courts may also apply the exclusionary rule or other alternative remedies in situations where the excessive force violated the accused pirate’s right to a fair trial in other ways.