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Potential Procedural Problems With Applying International Standards in Domestic Kenyan Courts

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MEMORANDUM FOR THE MOMBASA LAW COURT OF KENYA RE: PIRACY TRIALS

Issue: Potential Procedural Problems With Applying International
Standards in Domestic Kenyan Courts

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I. INTRODUCTION

a. Scope[*]

This memorandum explores Kenya's assumed responsibility for prosecuting apprehended Somali piracy suspects from capturing nation states through bilateral agreements and the conflicts that might arise when incorporating international legal norms. This memorandum also includes a discussion on the evolution of piracy in international law, Kenya's domestication of international maritime law, and the procedural issues that may arise from trying piracy and applying international legal norms in Kenyan domestic courts. The issues include human rights, the sovereign rights of states, international maritime law, international criminal legal standards, global security and economic concerns, as well as a "new" pirate. Also, in an attempt to explore other possible issues that may arise for the Kenyan courts during the piracy trials, this memorandum provides brief case studies of other domestic courts, which have in the past or are currently adhering to international criminal law standards. Lastly, this memorandum examines ways in which the Kenyan courts can address the obstacles presented.

b. Summary of Conclusions

i. Kenya has jurisdiction to prosecute pirates under international law.

Ample Kenyan legal authority exists to establish jurisdiction over the piracy proceedings. As a precautionary measure during the country's transition any deviation, by the court, from national law will need to be articulated and justified under an international framework. Maritime

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[*] Address potential procedural problems with applying international legal standards on piracy in trials held by the domestic courts of Kenya. Include review of international maritime law and its adoption into the domestic law of Kenya. Also include examination of previous or current situations of individual nation states applying international criminal law standards in domestic trials. Create a possible inventory of issues, which might arise in Kenya's prosecution of international piracy, and suggestions on how such issues could best be addressed.

Memo Prepared by Kimberly M. Brown, J.D. Candidate, 2012, (Fall Semester, 2010).

piracy has long been recognized as a *jus cogen* crime that is triable by any nation under the customary international legal principle of universal jurisdiction. Although Kenya's authority to try transferred pirates captured by third party forces is relatively new issue, the authority arises from bilateral agreements and the principle of transferable jurisdiction. Further bolstering Kenya's actions are international instruments including the United Nations Convention on the Law of the Sea (UNCLOS) and the Convention for the Suppression of Unlawful Acts (SUA), both of which Kenya is a party to. Lastly, Kenya and cooperating nations are acting in response to and with the authority of U.N. Security Council Chapter VII Resolutions sanctioning the suppression of international piracy through necessary means.

ii. Recent developments under Kenyan law demonstrate a natural progression towards a monist approach of implementing international legal standards.

Kenya's adoption of international legal standards is a natural progression. Kenyan statutes, jurisprudence and the new constitution of August 2010 highlight the incorporation of international legal standards. The approach of the new constitution moves Kenya from a dualist system to a more monist approach of international law, allowing for the automatic domestic application of international law so long as it is not in clear violation of constitutional provisions. Furthermore, because of the nature of cooperation already established between Kenya and individual nation states, the European Union (EU) and other international organizations, including the U.N. Office on Drugs and Crime (UNODC), pertaining to the prosecution of Somali pirates, Kenyan domestic courts are already assenting to international legal standards. Finally, by adhering to international legal standards consistently throughout the domestic Kenyan piracy trials, the decisions of the Kenyan courts will engender more credence at the international level.

iii. *Most issues that can and have arisen from the prosecution of piracy suspects under Kenyan law can be dealt with through the articulation of standard procedure and applicable rules governing the piracy trials.*

During this transitory time in Kenyan governance, it is crucial for the piracy trials to establish consistent legal standards that produce fair and efficient trials, especially if additional suspects will be surrendered to Kenyan authorities. Formalizing the process will further stabilize the piracy trials as a pseudo domestic tribunal and help to combat some of the real financial and logistical limitations faced by the piracy trials today. While some trials are applying recently repealed penal code provisions, which criminalized piracy *jure gentium*, Kenya's new legislation governing piracy, including the Shipping Merchant Act of 2009 and the 2010 Prevention of Organized Crime Bill, provide much more expansive provisions and guidance pertaining to jurisdiction and the definition of piracy. Establishing legal standards and a structure of adherence is crucial in responding to criticisms to pertaining to prolonged detainment, lengthy trial delays, adequate representation, evidentiary complications, bail denial, and appropriate treatment of prisoners. The issue of non-refoulment upon release of acquitted Somali suspects or those pirates that have completed their prison terms, also has the potential to become an issue of concern.

iv. *Other domestic courts have grappled with and successfully incorporated international legal norms in past and recent times.*

When examining recent international legal developments, domestic courts have grappled with the incorporation of international criminal law and human rights standards. International legal norms have successfully been incorporated at the domestic level in several instances, especially when dealing with the prevailing international human rights framework. Helping to bolster these conclusions are case studies from regional neighbors South Africa, Malawi and Uganda, as well as recent developments in the war on terror and in piracy jurisprudence in the United States.

v. Even in light of the November 9, 2010 Judgment from High Court of Kenya at Mombasa, Kenyan Courts Can Exercise Jurisdiction Through the Incorporation of International Law.

In the recent case, *In Re Mohamud Mohamed Hashi Alias Dhodi & 8 Others*, the court released nine piracy suspects when Judge Ibrahim found that Kenyan courts lack sufficient jurisdiction to try pirates apprehended on the high seas.[1] In his decision, Judge Ibrahim primarily relies upon Kenyan legislation, and only gives fleeting reference to international law. Had he relied upon established international legal principles, such as the U.N. Convention on the Law of the Sea, which Kenya ratified in 1989, and other authorities to be discussed, a different interpretation of the §69 of the Penal Code could easily have been reached. The judgment overlooks the fact that piracy on the high seas has long been recognized as the first international crime and is considered a crime against all of mankind. Therefore any nation can exercise jurisdiction over piratical acts. Further supporting the court's ability to turn to such authority, the Kenyan legal system has incorporated international law in both legislation and jurisprudence.[2]

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[1] *In re: Mohamud Mohamed Dashi & 8 Others*, (2010) eKLR (Kenya) (Note, the accused were arrested on the high seas between Somalia and Yemen by German authorities with the help of the U.S. Navy in March 2009.) [Electronic copy provided in accompanying USB flash drive at Source 36].

[2] For example, the Kenyan High Court and Court of Appeal have both applied "ratified but undomesticated treaties to resolve ambiguities or gaps in domestic statutes." *See* James Thuo Gathii, *Jurisdiction to Prosecute Non-National Pirates Captured by Third States Under Kenyan and International Law*, 31 LOY. L.A. INT'L & COMP. L. REV. 363, 377-78 (2009) (Referring to *Rep. v. Hassan Mohamud Ahmed*) [Electronic copy provided in accompanying USB flash drive at Source 56].

II. FACTUAL BACKGROUND

Piracy has long been considered the first international crime, with laws arising during ancient Athenian times and jurisprudence dating back to the Roman Empire.[3] Hugo Grotius helped to advocate for the use of force to combat piracy on the high seas through his dissertation *Freedom of the Seas*.[4] Today the world is faced with a powerful threat off the coast of Somalia, which contributes substantially to the devastating $25 billion loss piracy has on the global economy each year.[5]

Somali piracy began surfacing as a global economic and security concern throughout the Gulf of Aden and the Indian Ocean in the 1990s. Things continued to escalate and in 2003 the International Chamber of Commerce's International Maritime Bureau issued a safety advisory notice for ships to remain 50 nautical miles from the Somali coast, which was soon increased to a distance of 200 nautical miles.[6] The waters at risk of attack are not only heavily trafficked international trade routes, but also the means by which Somalia receives 95% of its humanitarian

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[3] Michael Davey, *A Pirate Looks at the Twenty-First Century: The Legal Status of Somali Pirates in an Age of Sovereign Seas and Human Rights*, 85 NOTRE DAME L. REV. 1197, 1200 (2010) [Electronic copy provided in accompanying USB flash drive at Source 65].

[4] *See* Hugo Grotius, THE FREEDOM OF THE SEAS (James Brown Scott ed., Ralph Van Deman Magoffin trans., Oxford Univ. Press 1916) (1608) [Electronic copy provided in accompanying USB flash drive at Source 45].

[5] *See* Jon D. Peppetti, *Building the Global Maritime Security Network*: *A Multinational Legal Structure to Combat Transnational Threats*, 55 NAVAL L. REV. 73 (2008) [Electronic copy provided in accompanying USB flash drive at Source 54].

[6] *See* J. Ndumbe Anyu & Samuel Moki, *Africa: The Piracy Hot Spot and Its Implication for Global Security*, 20 MEDITERRANEAN Q. 95, 102-103 (2009) [Electronic copy provided in accompanying USB flash drive at Source 60].

food aid.[7] While the situation continued to escalate, the international community began grappling with how to apprehend and prosecute piracy suspects and further deter the crime from threatening international trade and security.

At first, piracy suspects were largely released upon capture because of the lack of will to prosecute and the general ambiguity that surrounded the re-emergence of piracy in international law. Because legal repercussions were scarce, the possibility of harm increased as Somali pirates grew more emboldened, increasingly violent and costly.[8] In 2008 the U.N. Secretary General told the Security Council, "we must be mindful that piracy is a symptom of the state of anarchy which has persisted in that country for over 17 years."[9] That same year, the international consensus to address and deter piracy was solidified through various U.N. Security Council Resolutions regarding the proliferation of piracy and robbery at sea off the coast of Somalia.[10]

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[7] M.D. Fink & R.J. Galvin, *Combating Pirates Off the Coast of Somalia: Current Legal Challenges*, 56 NETH. INT'L L. J. 367, 377 (2009) [Electronic copy provided in accompanying USB flash drive at Source 55].

[8] One Somali pirate "claims that the pirates "know international law,'' which is to say that the pirates are not concerned about the possibility of arrest by foreign navies because they believe that they will be promptly released on a Somali beach upon capture." Davey, *supra* note 3, at 1212 [Electronic copy provided in accompanying USB flash drive at Source 65].

[9] Fink, *supra* note 7, at 377 [Electronic copy provided in accompanying USB flash drive at Source 55].

[10] *See* S.C. Res. 1814, U.N. Doc. S/RES/1814 (May 15, 2008) (Discusses the instability of Somalia and the troubles faced by its transitional government. Also deals with World Food Programme maritime convoys and calls upon states and regional orgs to protect humanitarian aid) [Electronic copy provided in accompanying USB flash drive at Source 15]. *See also* S.C. Res. 1816, U.N. Doc. S/RES/1816 (June 2, 2008) (Notes that piracy exacerbates the Somali situation which threatens peace and security in the region and authorizes six months for forces to fight piracy using all necessary means. This included entering territorial waters to repress piracy, which closed the gap between the high seas and mainland. The resolution also included the proviso that necessary consent from Somalia's Transitional Government was necessary to pursue within territorial waters. Furthermore the resolution explicitly noted that such actions were not to

Several related resolutions have been adopted over the past two years, which have helped to extend the muscle of international forces in their pursuit of pirates into Somalia's territorial waters and onto land.[11]

In recent times, the naval forces actively patrolling the waters at issue have included Russia, France, Norway, Great Britain, Turkey, Germany, India, China, South Korea, Iran, Canada, Malaysia, United States, Kenya, and even European Union naval forces.[12] With the extended authority of the Security Council resolutions and the support of the UNODC, these forces continue to exercise international cooperation when pursuing, detaining, and prosecuting Somali pirate suspects.[13] Since 2006, Kenya has become the "preferred" nation of prosecution in light of its stable infrastructure, regional proximity to the failed state of Somalia, and its interest in deterring piracy.[14]

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establish customary international law) [Electronic copy provided in accompanying USB flash drive at Source 16].

[11] *See* S.C. Res. 1851, U.N. Doc. S/RES/1851 (Dec. 16, 2008) (Granted authority until 12/2009 to undertake all necessary measures that are appropriate in Somalia, for the purpose of suppressing acts of piracy and armed robbery at sea. Permits use of airspace and extends the scope of hot pursuit into waters, and onto dry land, so long as consistent with human rights and humanitarian law. Note, will be discussed below, but was renewed by S.C. Res. 1897 on Nov. 30, 2009) [Electronic copy provided in accompanying USB flash drive at Source 20].

[12] Gathii, *supra* note 2, at 398-99 [Electronic copy provided in accompanying USB flash drive at Source 56].

[13] UNODC's Counter-Piracy Programme is meant to "enhance criminal justice capacity among Somalia's neighbours and ensure that the trial and imprisonment of suspected pirates passed to them is humane and efficient and take place within a sound rule of law framework. UNODC is also investing in the long-term solution: the restoration of the rule of law in Somalia." UNODC, *Counter-Piracy Programme: Support to the Trial and Related Treatment of Piracy Suspects*, (July 2010) [Electronic copy provided in accompanying USB flash drive at Source 78].

[14] *See generally* Gathii, *supra* note 2, at 363-64, 392, 402 (noting also that Kenya reserves right to accept piracy suspects so as to avoid becoming the dumping ground for all suspects) [Electronic copy provided in accompanying USB flash drive at Source 56]. *See also* James Thuo

Most recently, on July 26, 2010, the U.N. Secretary General issued a report to the Security Council containing seven possible options to "further the aim of prosecuting and imprisoning persons responsible for acts of piracy and armed robbery at sea off the coast of Somalia," which includes a discussion of the efforts already made in Kenya with the opening of the new Shimo La Tewa prison and high security courtroom in Mombasa.[15] In light of the ways Kenya became an international venue for prosecution of Somali piracy suspects in the region, it is important to note the issues that may arise when applying international legal standards in Kenyan domestic courts.

III. DEFINING PIRACY AND ITS SCOPE

a. Historical Origins of Today's International Framework

As discussed above, maritime piracy has been an international problem for thousands of years. Cicero famously declared pirates to be "*hostis humani generi*" or the enemy of all mankind.[16] Being the first to implement a legal framework dealing with piracy, the Roman Republic's efforts have endured through time, including both the basic definition and the

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Gathii, *The Use of Force, Freedom of Commerce, and Double Standards in Prosecuting Pirates in Kenya*, 59 AM. U. L. REV. 1321 (2010) (Noting "legal foundation is still a bit murky, but the idea is that suspects are arrested and detained at sea based on universal jurisdiction, transferred based on bilateral agreements, and prosecuted under Kenyan domestic law) [Electronic copy provided in accompanying USB flash drive at Source 67].

[15] S.C. Report of Secretary-General, 394, U.N. Doc S/2010/394 (July 26, 2010) (Report included particular options such as the creation of special domestic chambers possibly with international components, a regional tribunal or an international tribunal and corresponding imprisonment arrangements, the existing practice in establishing international and mixed tribunals. Also it noted the time and resources necessary to achieve and sustain substantive results) [Electronic copy provided in accompanying USB flash drive at Source 25].

[16] Douglas R. Burgess, Jr., *Hostis Humani Generi: Piracy, Terrorism and a New International Law*, 13 U. MIAMI INT'L & COMP. L. REV. 293, 301-02 (2006) [Electronic copy provided in accompanying USB flash drive at Source 50].

application of the law of nations through universal jurisdiction.[17] More recently, the 1856 Declaration of Paris became the first contemporary international instrument condemning piracy and defined it as a mutual threat to the European imperial powers.[18]

While customary international law clearly includes principles pertaining to piracy, as the modern international legal system developed, there was debate as to whether piracy remained as a pressing concern for the global community worth codification and integration in the emerging system.[19] In harmony with the birth of the modern international legal community and framework, the U.N. held its first diplomatic conference on the laws of the sea in Geneva in 1958, of which

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[17] "The Romans, already mindful of the efficacy of piracy as a tool of hostile governments, gave the offence a common jurisdiction exceeding traditional legal boundaries, thus, in effect creating a very early example of international law. The claim that *pirata est hostis generis humani* is in fact drawn from a larger argument by Cicero that *pirata non est ex perdullium numero definitus, sed communis hostis omnium*. The twin concepts of *hostis humani generis* and the law of nations led to the following conclusions in Roman law: (a) all... crimes which constitute 'piracy' [must] occur in areas outside the municipal jurisdictional competence of any nation; (b) the 'pirate' is... [, consequently,] an enemy of [no individual state but] the [entire] human race; (c) the pirate [must and] should be prosecuted under municipal law... after capture, but the right to prosecute is common to all nations and singular to none… the Romans must be credited with introducing the central element of international criminal law: universal jurisdiction. It is interesting to note that piracy is not merely one of the crimes for which such jurisdiction is applied (the others being slavery, genocide and crimes of aggression) but the first such crime." *Id*. at 301.

[18] "The Declaration abolished all forms of piracy, privateering and government sponsorship. The Declaration would seem to be the decisive turning point in the ambivalence of states towards piracy, and to affirm a universal prohibition. It also seemed to lay to rest any previously harbored selfish interest on the part of states to utilize piracy." Lawrence Azubuike, *International Law Regime Against Piracy*, 15 ANN. SURV. INT'L & COMP. L. 43 (2009) [Electronic copy provided in accompanying USB flash drive at Source 57].

[19] "The Assembly of the League of Nations attempted to codify the international law of piracy in 1924; however, the effort failed based on a perception that the issue was no longer pressing for the international community." Peppetti, *supra* note 5, at 90 [Electronic copy provided in accompanying USB flash drive at Source 54].

the Geneva Convention on the High Seas was a product.[20] Article 15 of the Convention defined piracy as:

> 1) Any illegal acts of violence, detention or any act of depredation, committed for private ends by the crew or the passengers of a private ship or a private aircraft, and directed: (a) On the high seas, against another ship or aircraft, or against persons or property on board such ship or aircraft; (b) Against a ship, aircraft, persons or property in a place outside the jurisdiction of any State; (2) Any act of voluntary participation in the operation of a ship or of an aircraft with knowledge of facts making it a pirate ship or aircraft; (3) Any act of inciting or of intentionally facilitating an act described in sub-paragraph 1 or sub-paragraph 2 of this article.[21]

b. The Modern International Legal Framework for Combating Piracy

In 1982 the U.N. Convention on the Law of the Sea (UNCLOS) became the primary and most comprehensive international instrument governing maritime law, and its article 101 replicates article 5 of the Geneva Convention on the High Seas.[22] UNCLOS article 100 mandates the dutiful cooperation of all states to "the fullest possible extent in the repression of piracy on the high seas or in any other place outside the jurisdiction of any State."[23] UNCLOS also clarifies the principle of universal jurisdiction, entitling all states to the arrest and prosecution of pirates apprehended on the high seas, regardless of nationality or location of the crime. While UNCLOS has only been ratified by 161 nation states, there is a consensus that "a rule of customary international law can emerge… once a convention is signed by a vast majority of the international community… [since] such signatures are… clear evidence of an *opinio juris* that

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[20] Geneva Convention on the High Seas, Apr. 29, 1958, U.N. Doc. A/CONF. 131/53 (1958) [Electronic copy provided in accompanying USB flash drive at Source 1].

[21] *Id*.

[22] *See* United Nations Convention on the Law of the Sea, Dec. 10, 1982, 1833 U.N.T.S. 397 (hereinafter referred to as UNCLOS) (Ratified by 161 nations, including Kenya and Somalia) [Electronic copy provided in accompanying USB flash drive at Source 2].

[23] *Id*.

the convention contains generally acceptable principles."[24] Thus, UNCLOS is largely referred to as embodying customary international legal principles and deviation is relatively limited.[25]

While UNCLOS made significant strides in helping codify the suppression of piracy in international law, there were weaknesses in its definitive scope and therefore its application to combating piracy. Four main limitations exist within article 101's definition of piracy: 1) the geographical limitation of "the high seas" 2) the requirement of an "illegal" act of violence, 3) the requirement that the act be committed for "private ends" and 4) the requirement that two vessels be involved.[26] Expanding upon the geographical limitation, as noted, universal jurisdiction over piracy under UNCLOS only extends to the high seas, that is, the area beyond the territorial waters of the coastal states. While limiting for the purposes of combating piracy, this requirement respects the international principle of a state's sovereign territory. With this in mind, UNCLOS also defines a state's territorial waters as extending twelve miles into the sea

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[24] Louis B. Sohn, *The Law of the Sea: Customary International Law Developments,* 34 AM. U. L. REV. 271, 278 (1985) [Electronic copy provided in accompanying USB flash drive at Source 46]. *See also Chronological lists of ratifications of, accessions and successions to the Convention and the related Agreements as at 05 October 2010*, Division for Ocean Affairs and the Law of the Sea, Office of Legal Affairs, United Nations (Oct. 20, 2010, 11:30pm) [Electronic copy provided in accompanying USB flash drive at Source 26].

[25] *See generally* Sohn, *supra* note 24, at 271-80 [Electronic copy provided in accompanying USB flash drive at Source 46].

[26] Peppetti, *supra* note 5, at 92 ("The "private ends" restriction has led to a commonly held view that acts of violence committed on religious or ethnic grounds or for political reasons - typical motivations for modern terrorism - cannot be treated as piracy…Additionally, the meaning of the word "illegal"… is unclear and the legislative history is not enlightening. Ultimately, therefore, "it is for the courts of the prosecuting states to decide whether the act of violence under consideration was illegal under international law or the law of the prosecuting states.") [Electronic copy provided in accompanying USB flash drive at Source 54].

from the coastline.[27] Furthermore, it is the state's responsibility to police and maintain the security of these waters.[28] But, controversy arises when a state is unwilling or unable to prevent piratical acts within its territorial waters. Such is the case with Somalia, which is where the actions of the U.N. Security Council have come into play to address the situation to expand the jurisdiction over piratical acts within the sovereign territory.[29]

While article 101 defines the crime of piracy, article 105 of UNCLOS permits the state seizing the pirate ship or hijacked vessel to arrest suspects and seize related property.

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[27] UNCLOS, *supra* note 22, at art. 3 (Note, within the territorial waters, sovereignty extends to the air space and subsoil of area. The coastal state has the duty to not hamper innocent passage of foreign ships and "shall give appropriate publicity to any danger to navigation, of which it has knowledge." After the first 12 nautical miles that make up the territorial waters, the next 12 miles (not to exceed 24 from the coastline), makes up the contiguous zone, where a state may "prevent infringement of its customs, fiscal, immigration or sanitary laws and regulations within its territory or territorial sea…[and] punish infringement of the above laws and regulations committed within its territory or territorial sea." Under art. 57, extending 200 miles out from the coastline, is a state's exclusive economic zone where they have "sovereign rights for the purpose of exploring and exploiting, conserving and managing the natural resources, whether living or non-living, of the waters superjacent to the seabed and of the seabed and its subsoil, and with regard to other activities for the economic exploitation and exploration of the zone, such as the production of energy from the water, currents and winds." Also the coastal state has jurisdiction with regard to: "the establishment and use of artificial islands, installations and structures; marine scientific research; the protection and preservation of the marine environment; and other rights and duties provided for in this Convention." Article 58(2), extends the provisions related to the high seas, including piracy to the exclusive economic zone.) [Electronic copy provided in accompanying USB flash drive at Source 2]. *See also Legal Framework for the Repression of Piracy Under UNCLOS*, Oceans and Law of the Sea: Division for Ocean Affairs and the Law of the Sea (Sep. 9, 2010) (Noting, under UNCLOS, attacks occurring within the coastal state's territorial waters are considered "armed robbery against ships.") [Electronic copy provided in accompanying USB flash drive at Source 27].

[28] Azubuike, *supra* note 18, at 50-52 (In light of UNCLOS's limitations, if piratical acts are committed within a state's territorial waters, the state of the attacked vessel is only permitted to demand that the state with authority over its territorial waters prosecute the actors or provide redress, as an obligation under the principle of state responsibility) [Electronic copy provided in accompanying USB flash drive at Source 57].

[29] *Id*.

Furthermore, 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."[30] While UNCLOS is clear on the rights of the capturing nation to try pirates, it is silent as to the jurisdictional rights provided to forces that apprehend Somali pirates and transfer suspects by way of bilateral agreements to Kenya or other partner countries for trial.[31]

Following the 1985 hijacking of the *Achille Lauro*, which highlighted gaps in UNCLOS, the International Maritime Organization (IMO) convened to create the 1988 Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation (SUA Convention).[32] The SUA Convention expands the protection of secure seafaring and helps

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[30] UNCLOS, *supra* note 22, at art. 105 [Electronic copy provided in accompanying USB flash drive at Source 2].

[31] *Id*. *See also* Milena Sterio, *The Somali Piracy Problem: A Global Puzzle Necessitating a Global Solution*, 59 AM. U. L. REV. 1449, 1469 (2010) ("Under these conventions, however, the capturing nation may not transfer seized pirates to a third country for prosecution. The idea of universal jurisdiction, therefore, gives limited options to piracy-fighting states, as their authority to pursue pirates ceases to exist outside the high seas, and the opportunity to prosecute pirates arises only in cases where the capturing state is also willing to prosecute." Therefore, the traditional notions of universal jurisdiction over piracy require closer scrutiny to ensure adaptation to the situation faced by Kenya today) [Electronic copy provided in accompanying USB flash drive at Source 66].

[32] *See* Justin S.C. Mellor, *Missing the Boat: The Legal and Practical Problems of the Prevention of Maritime Terrorism*, 18 AM. U. INT'L L. REV. 344 n.9 (2002) (Palestinians from the Popular Liberation Front hijacked the *Achille Lauro*, an Italian registered cruise ship, in Egypt's territorial waters, and asked for the release of Palestinian prisoners from Israeli jails. Following death of hostage, Egypt negotiated release of remaining hostages and apprehended terrorists but did not arrest them. Shortly thereafter, the terrorists boarded a plane, which landed in a NATO airfield and resulted in a jurisdictional standoff between U.S. and Italian authorities. U.S. was denied extradition and Italy tried hijackers, although leader of operation was allowed to leave Italy via Yugoslavia. Some didn't perceive the acts as piracy because of the political, not private, motive behind the act) [Electronic copy provided in accompanying USB flash drive at Source 49]. *See also* Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation, Mar. 10, 1988, S. Treaty Doc. No. 101-1 (1989), 1678 U.N.T.S. 222 (hereinafter

to "aid states in their fight against maritime violence by broadening the jurisdictional basis for the capture and prosecution of maritime aggressors."[33] Also, the SUA Convention removes the limitations of the "two vessel," "private ends," and "illegal" provisions of UNCLOS. While the term "piracy" is not explicitly used in the SUA Convention, article 3(1) defines an international offense to include when a perpetrator intentionally and unlawfully:

> a) seizes or exercises control over a ship by force or threat thereof or any other form of intimidation; or
> b) performs an act of violence against a person on board a ship if that act is likely to endanger the safe navigation of that ship; or
> c) destroys a ship or causes damage to a ship or to its cargo which is likely to endanger the safe navigation of that ship; or
> d) places or causes to be placed on a ship, by any means whatsoever, a device or substance which is likely to destroy that ship, or cause damage to that ship or its cargo which endangers or is likely to endanger the safe navigation of that ship; or
> e) destroys or seriously damages maritime navigational facilities or seriously interferes with their operation, if any such act is likely to endanger the safe navigation of a ship; or
> f) communicates information which he knows to be false, thereby endangering the safe navigation of a ship; or
> g) injures or kills any person, in connection with the commission or the attempted commission of any of the offences set forth in subparagraphs (a) to (f).[34]

Additionally the convention articulates a positive obligation of member states to prosecute or extradite perpetrators for violations of the convention.[35]

The SUA Convention differs most notably in its expansion of jurisdiction, focusing "on the exertion of jurisdiction after the fact…[and] establishes three grounds for mandatory

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referred to as the SUA Convention) [Electronic copy provided in accompanying USB flash drive at Source 3].

[33] Sterio, *supra* note 31, at 1470 [Electronic copy provided in accompanying USB flash drive at Source 66].

[34] SUA Convention, *supra* note 32, art. 3(1) [Electronic copy provided in accompanying USB flash drive at Source 3].

[35] *Id.* at articles 6 & 11.

jurisdiction and three for permissive jurisdiction over an offender."[36] Articles 6(1) and 6(2) articulate these jurisdictional expansions, stating:

> (1) Each State Party shall take such measures as may be necessary to establish its jurisdiction over the offences set forth in article 3 when the offence is committed: a) against or on board a ship flying the flag of the State at the time the offence is committed; or b) in the territory of that State, including its territorial sea; or c) by a national of that State;
> (2) A State Party may also establish its jurisdiction over any such offence when: a) it is committed by a stateless person whose habitual residence is in that State; or b) during its commission a national of that State is seized, threatened, injured or killed; or c) it is committed in an attempt to compel that State to do or abstain from doing any act.[37]

In light of the positive expansions of the SUA Convention, criticisms include that it "is reactive, as opposed to preventative, in nature… [offering] little guidance for the creation of a regime to prevent terrorism on the high seas or within the territorial waters of states."[38] Furthermore, while the convention attempts to address the notable pitfalls of UNCLOS, it is not considered international customary law and is only binding upon states that are a party to the convention.[39] Kenya is a party to the convention, however, Somalia is not.[40]

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[36] Mellor, *supra* note 32, at 383-84 (Noting the issue of nexus to establish jurisdiction under article 6 of the SUA Convention) [Electronic copy provided in accompanying USB flash drive at Source 49].

[37] SUA Convention, *supra* note 28, article 6(1) & 6(2) ("[Electronic copy provided in accompanying USB flash drive at Source 3].

[38] Mellor, *supra* note 32, at 384 [Electronic copy provided in accompanying USB flash drive at Source 49].

[39] Azubuike, *supra* note 18, at 56 [Electronic copy provided in accompanying USB flash drive at Source 57].

[40] Int'l Maritime Org. [IMO], *Implementation of Instruments and Related Matters: Status of Conventions*, MSC 87/INF.8 (Mar. 3, 2010) [Electronic copy provided in accompanying USB flash drive at Source 29]. *See also* Sterio, *supra* note 31, at 1472 (It is worth noting that in 2005, as a result of an escalating global problem with maritime piracy, the SUA Convention was amended "by adding protocols that called for member states to develop the capacity to capture and prosecute offenders and required member states to designate which government officials

Also of note is an International Court of Justice opinion that incorporated a discussion of jurisdictional issues pertaining to piracy in the February 14, 2002, *Case Concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)*.[41] In his opinion, Judge Ranjeva of Madagascar stated:

> Under international law, the same requirement of a connection *ratione loci* again applies to the exercise of universal jurisdiction. Maritime piracy affords the sole traditional example where universal jurisdiction exists under customary law. Article 19 of the Geneva Convention of 29 April 1958 and Article 105 of the Montego Bay Convention of 10 December 1982 provide: "On the high seas, or in any other 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…" Universal jurisdiction under those circumstances may be explained by the lack of any predetermined sovereignty over the high seas and by the régime of their freedom; thus, normally, the jurisdiction of the flag State serves as the mechanism which ensures respect for the law. But since piracy by definition involves the pirate's denial and evasion of the jurisdiction of any State system, the exercise of universal jurisdiction enables the legal order to be re-established. Thus, in this particular situation the conferring of universal jurisdiction on national courts to try pirates and acts of piracy is explained by the harm done to the international system of State jurisdiction. The inherent seriousness of the offence itself has, however, not been deemed sufficient *per se* to establish universal jurisdiction. Universal jurisdiction has not been established over any other offence committed on the high seas.[42]

Furthermore, in President Guillame's opinion, he states "international law knows only one true

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were authorized to receive and respond to requests for assistance, confirm offenders' nationality, and take other appropriate measures to curb pirate activity."[40] But, neither Kenya nor Somalia have ratified the new amendments) [Electronic copy provided in accompanying USB flash drive at Source 66].

[41] Arrest Warrant of 11 April, 2000 (Dem. Rep. Congo v. Belg.), 2002 I.C.J. 121 (Feb. 14) (Case regarding Belgium's enactment a law of universal jurisdiction so that its courts could try war criminals, and those suspected of crimes against humanity or genocide. ICJ ultimately ruled warrant invalid due to immunity under criminal jurisdiction and recognized principles of international law) [Electronic copy provided in accompanying USB flash drive at Source 30].

[42] *Id*. at 55-56.

case of universal jurisdiction: piracy."[43] Both statements affirm the solid foundation under international law for applying universal jurisdiction over piracy suspects in Kenyan courts.

c. Expansions of the International Framework Governing Somali Piracy Authorized by Chapter VII Resolutions of the U.N. Security Council

Even in light of the significant international instruments governing the law of maritime piracy, the situation in the Gulf of Aden and off the coast of Somali has tested this framework considerably and often has incited frustration as to the limited options available for prosecuting captured piracy suspects.[44] Contributing to the Security Council's involvement in the situation is Somalia's depleted capacity to combat the scourge of piracy on its own given its volatile political situation and lack of viable infrastructure.[45] In 2008, the U.N. Security Council began expanding permissible international actions against Somali piracy by strengthening methods of pursuit and deterrence through five separate resolutions.[46] These resolutions, and those following, have been adopted by the Security Council "pursuant to Chapter VII of the U.N. Charter, under which the

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[43] *Id*. at 42 (While this discussion positively impacts efforts to apply universal jurisdiction when combating piracy, President Guillame's opinion also notes the importance of a nexus in the classic formulation of jurisdiction over offenses committed abroad under international law, "normally… at the very least the victim, has the nationality of that State or if the crime threatens its internal or external security.")

[44] Eugene Kontorovich, *International Legal Responses to Piracy off the Coast of Somalia*, ASIL Insights, Feb. 6, 2009 [Electronic copy provided in accompanying USB flash drive at Source 73].

[45] *See generally Id*.

[46] *Id*. These resolutions include: S.C. Res. 1816, *supra* note 10 [Electronic copy provided in accompanying USB flash drive at Source 16]; S.C. Res. 1838, U.N. Doc. S/RES/1838 (Oct. 7, 2008) [Electronic copy provided in accompanying USB flash drive at Source 17]; S.C. Res. 1844, U.N. Doc. S/RES/1844 (Nov. 20, 2008) [Electronic copy provided in accompanying USB flash drive at Source 18]; S.C. Res. 1846, U.N. Doc. S/RES/1846 (Dec. 2, 2008) [Electronic copy provided in accompanying USB flash drive at Source 19]; S.C. Res 1851, *supra* note 11 [Electronic copy provided in accompanying USB flash drive at Source 20].

Council may authorize the use of military force against threats to international security."[47]

The first measure taken by the Security Council was embodied in resolution 1816, which authorized nation states to take "all necessary measures" to combat piracy beyond the UNCLOS geographical restriction to the "high seas" in order to permit entrance to "the territorial waters of Somalia for the purpose of repressing acts of piracy and armed robbery at sea, in a manner consistent with such action permitted on the high seas with respect to piracy under relevant international law."[48] Notably, the Security Council emphasized that this permissible encroachment into territorial waters "shall not be considered as establishing customary international law" and noted the explicit consent of the Transitional Federal Government (TFG) of Somalia.[49]

In December 2008, recognizing the growing presence of the IMO and other regional organizations in the fight against Somali piracy, the Security Council issued resolution 1846, which asserts that: "states and regional organizations cooperating with the TFG in the fight against piracy and armed robbery at sea off the coast of Somalia… may: enter into the territorial waters of Somalia… and use…all necessary means to repress acts of piracy and armed robbery at sea."[50] The inclusion of regional organizations continued when resolution 1851 granted authority

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[47] Kontorovich, *supra* note 44 [Electronic copy provided in accompanying USB flash drive at Source 73].

[48] S.C. Res. 1816, *supra* note 10 (The resolution included the following caveats: requires mandatory cooperation and communication with the Transitional Federal Government of Somalia prior to encroaching territorial waters and also provided for six month time frame for this expansion of pursuit. Note that S.C. Res. 1846 expanded the timeframe.) [Electronic copy provided in accompanying USB flash drive at Source 16].

[49] *Id*. at ¶ 9.

[50] S.C. Res. 1846, *supra* note 46, at ¶ 4 (This resolution also urges "states and regional organizations that have the capacity to do so, to take part actively in the fight against piracy and

to take "all necessary measures that are appropriate in Somalia, for the purpose of suppressing acts of piracy and armed robbery at sea, pursuant to the request of the TFG, provided, however, that any measures [must be] consistent with applicable international humanitarian and human rights law."[51] The resolution also "broadens the scope of permissible 'hot pursuit,' allowing pirates to be chased from the high seas into Somali waters and farther onto dry land" by collective forces.[52]

In May 2009, while still noting the gravity of the piracy situation off the coast of Somalia, the Security Council adopted resolution 1872, which more aptly expresses the Security Council's concern for and the collective interest in securing stability in Somalia through the TFG.[53] In November 2009, the Security Council issued resolution 1897, under which it renewed its prior authorizations made through resolutions 1846 and 1851, and invited involved parties fighting Somali piracy:

To conclude special agreements or arrangements with countries willing to take custody of

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armed robbery at sea off the coast of Somalia, in particular, consistent with this resolution and relevant international law, by deploying naval vessels and military aircraft, and through seizure and disposition of boats, vessels, arms and other related equipment used in the commission of piracy and armed robbery off the coast of Somalia, or for which there is reasonable ground for suspecting such use." This resolution was enacted for a period of 12 months.) [Electronic copy provided in accompanying USB flash drive at Source 19].

[51] S.C. Res 1851, *supra* note 11, at ¶ 6 (Note also that ¶8 "encourages Member States to work to enhance the capacity of relevant states in the region to combat piracy, including judicial capacity.") [Electronic copy provided in accompanying USB flash drive at Source 20].

[52] Kontorovich, *supra* note 44 [Electronic copy provided in accompanying USB flash drive at Source 73].

[53] S.C. Res. 1872, U.N. Doc. S/RES/1872 (May 26, 2009) (Note that while this resolution is largely about the security of the region and the establishment of a functioning state in Somalia, the Security Council "welcomes the efforts of the Contact Group for Piracy off the Coast of Somalia (CGPCS), States and international and regional organizations, in collectively combating piracy.") [Electronic copy provided in accompanying USB flash drive at Source 21].

> pirates in order to embark law enforcement officials ("shipriders") from the latter countries, in particular countries in the region, to facilitate the investigation and prosecution of persons detained as a result of operations conducted under this resolution for acts of piracy and armed robbery at sea off the coast of Somalia, provided that the advance consent of the TFG is obtained for the exercise of third state jurisdiction by shipriders in Somali territorial waters and that such agreements or arrangements do not prejudice the effective implementation of the SUA Convention.[54]

The same resolution also praises Kenya's prosecutorial efforts of suspected pirates through its national courts, and appreciatively notes the involvement of the UNODC and other international organizations and donors in such efforts. Furthermore, it urges these parties to coordinate with the Contact Group on Piracy off the Coast of Somalia (CGPCS), "to support Kenya, Somalia and other States in the region... [taking steps to prosecute] captured pirates consistent with applicable international human rights law."[55]

The most recent Security Council resolution issued on the topic in April 2010 continues to praise Kenya for its prosecution of suspects but also for its imprisonment of convicted persons.[56] Furthermore the Council acknowledges the "difficulties Kenya encounters" but encourages Kenya to continue these efforts.[57] Overall, resolution 1918 is increasingly more concerned with the need for effective judicial deterrence through the successful prosecution of piracy suspects, and "calls on all States… to criminalize piracy under their domestic law and…

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[54] S.C. Res. 1897, U.N. Doc. S/RES/1897 (Nov. 30, 2009) [Electronic copy provided in accompanying USB flash drive at Source 22].

[55] *Id*. *See also* S.C. Res. 1910, U.N. Doc. S/RES/1910 (Jan. 28, 2010) (Resolution stresses the need for a "comprehensive response to tackle piracy and its underlying causes, by the international community, including through the training of the Somali coastguard and [welcomes] the efforts of the CGPCS, States and international and regional organizations.") [Electronic copy provided in accompanying USB flash drive at Source 23].

[56] S.C. Res. 1918, U.N. Doc. S/RES/1918 (Apr. 27, 2010) [Electronic copy provided in accompanying USB flash drive at Source 24].

[57] *Id*.

consider the prosecution of suspected, and imprisonment of convicted, pirates apprehended off the coast of Somalia."[58]

These resolutions signify a global consensus to combat piracy off the coast of Somalia and an extension beyond the international jurisdictional limitations of UNCLOS, permitting the prosecution of piracy suspects by third parties.[59] These resolutions, "authorizing armed action against pirates in sovereign territory [were] an unprecedented measure [taken] by the Security Council."[60] In light of the novel situation faced by those combating piracy, and because of the Security Council's continued affirmation of Kenya's efforts and the Secretary-General's July 2010 report that hails Kenya as a viable option to crafting a solution, Kenya prevails as an instrumental part of the process. Through Chapter VII resolutions, the international legal framework is adapting to the weaknesses in the current piracy legal regime to bolster an internationally legitimized response to a force that has potential to further destabilize the region.

d. Further Efforts by the IMO to Articulate International Framework for Combating Piracy

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[58] *Id*. at ¶ 1-2 ("*Affirms* that the failure to prosecute persons responsible for acts of piracy and armed robbery at sea off the coast of Somalia undermines anti-piracy efforts of the international community." Also notes the necessary consistency with international human rights law. Also 1918 contains the formal request by the Security Council to the Secretary General of a report on possible "options to further the aim of prosecuting and imprisoning persons responsible for acts of piracy and armed robbery at sea off the coast of Somalia.") *See also* S.C. Report of Secretary-General, 394, *supra* note 15 (this is the report issued on July 26, 2010 in response to Security Council Resolution 1918) [Electronic copy provided in accompanying USB flash drive at Source 25].

[59]*See* S.C. Res. 1897, *supra* note 54 ("Invites all States and regional organizations fighting piracy off the coast of Somalia to conclude special agreements or arrangements with countries willing to take custody of pirates.") [Electronic copy provided in accompanying USB flash drive at Source 22].

[60] Kontorovich, *supra* note 44 [Electronic copy provided in accompanying USB flash drive at Source 73].

While the International Maritime Organization's initiatives on the Somali piracy problem date back to 2005, in 2009 they convened seventeen nation states from the Western Indian Ocean, Gulf of Aden and Red Sea regional areas in Djibouti to help address the issues of piracy and armed robbery in the region.[61] From this meeting of states, the Djibouti Code of Conduct concerning the Repression of Piracy and Armed Robbery against Ships in the Western Indian Ocean and the Gulf of Aden was formulated.[62] Thereafter, the multilateral treaty was signed by Kenya, Somalia, Djibouti, Ethiopia, Madagascar, Maldives, Seychelles, Tanzania and Yemen in January of 2009.

The code acknowledges and promotes Security Council resolutions 1816, 1838, 1846 and 1851, and affirms the intent of signatories to cooperate in tandem with international law regarding the "investigation, arrest and prosecution of persons, who are reasonably suspected of having committed acts of piracy and armed robbery against ships, including those inciting or intentionally facilitating such acts."[63] Other provisions pertain to the treatment of seized property, rescue operations and the facilitation of cooperative efforts between states. Lastly, signatories agreed to ensure the implementation of domestic legislation criminalizing piracy and armed robbery against ships with "adequate provisions for the exercise of jurisdiction, conduct of

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[61] *High-level Meeting in Djibouti Adopts a Code of Conduct to Repress Acts of Piracy and Armed Robbery Against Ships*, IMO Briefing, Jan. 20, 2009, available at: http://www5.imo.org/SharePoint/mainframe.asp?topic_id=1773&doc_id=10933 [Electronic copy provided in accompanying USB flash drive at Source 71].

[62] Int'l Maritime Org. [IMO], *Djibouti Code of Conduct Concerning the Repression of Piracy and Armed Robbery Against Ships in the Western Indian Ocean and the Gulf of Aden*, C 102/14 (April 3, 2009) [Electronic copy provided in accompanying USB flash drive at Source 28].

[63] *Id.*

investigations and prosecution of alleged offenders."[64] Overall the Code solidifies regional and international cooperative efforts to combat maritime piracy off the coast of Somalia.

e. Kenya's Adoption of International Maritime Law Governing Piracy

In addition to the various international instruments governing maritime law that Kenya is a party to, Kenya's national laws have long dealt explicitly with piracy through both the repealed § 69 of the 1967 Kenyan Penal Code and the 1987 Criminal Procedure Code. The Penal Code's definition of piracy extended to "any person who, in territorial waters or upon the high seas, commits any act of piracy *jure gentium* is guilty of the offence of piracy."[65] This signifies Kenya's acceptance of universal jurisdiction over the crime of piracy. Also, the Criminal Procedure Code states that the punishment for piracy under the penal code is "imprisonment for life," that police may arrest without a warrant, and it delegates prosecutorial jurisdiction over piracy cases to "subordinate courts of the first class presided over by a chief magistrate, a senior principal magistrate, a principal magistrate, or a senior resident magistrate."[66] The Code also lays out the proceedings for "Offenses by Foreigners within Territorial Waters" under §143.[67]

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[64] *Id*.

[65] *See* Penal Code, Cap. 63, §69(1) (1967) (*Repealed by 4 of 2009, s. 454*) (Kenya) (Note the expansion of the common definition of piracy only applying to the high seas to incorporate territorial waters as well. Also note the broad term of piracy *jur gentium*.) [Electronic copy provided in accompanying USB flash drive at Source 7]. *See also* Michael H. Passman, *Protections Afforded to Captured Pirates Under the Law of War and International Law*, 33 TUL. MAR. L.J. 1, at n. 228 (2008) ("In re Piracy Jure Gentium, [1934] A.C. 586 (P.C.) (per Viscount Sankey L.C.) (appeal taken from H.K.) ("[A pirate] is no longer a national, but hostis humani generis, and as such he is justiciable by any State anywhere.") [Electronic copy provided in accompanying USB flash drive at Source 53].

[66] Criminal Procedure Code, (2009) Cap. 75 (Kenya) [Electronic copy provided in accompanying USB flash drive at Source 10].

[67] *Id*. at § 143 ("(1) Proceedings for the trial of a person who is not a Kenya citizen for an offence committed within exclusive economic zone and the territorial waters shall not be instituted in any

In the last two years alone, Kenya has made significant efforts to meet its obligations under both UNCLOS and the SUA Convention. In 2009, the Merchant Shipping Act was passed. The Act repeals the former governing provisions dealing with piracy under the Penal Code and codifies regulations ensuring maritime security.[68] Part XVI of the Act, section 369, pertaining to the interpretation of Maritime Security conforms to section 101 of UNCLOS, stating:

> 369. (1) In this Part—"armed robbery against ships" means any unlawful act of violence or detention or any act of depredation, or threat thereof, other than an act of piracy, directed against persons or property on board such a ship, within territorial waters or waters under Kenya's jurisdiction; "piracy" means—
> (a) any act of violence or detention, or any act of depredation, committed for private ends by the crew or the passengers of a private ship or a private aircraft, and directed—
> (i) against another ship or aircraft, or against persons or property on board such ship or aircraft; or (ii) against a ship, aircraft, persons or property in a place outside the jurisdiction of any State;
> (b) any voluntary act of participation in the operation of a ship or of an aircraft with knowledge of facts making it a pirate ship or aircraft; or

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court except with the leave of the Attorney-General and upon his certificate that it is expedient that proceedings should be instituted: Provided that - (i) proceedings before a subordinate court previous to the committal of an accused person for trial or to the determination of the court that the offender is to be put upon his trial shall not be deemed proceedings for the trial of the offence committed by the offender for the purposes of the consent and certificate; (ii) it shall not be necessary to aver in a charge or information that the consent or certificate of the Attorney-General required by this section has been given, and the fact of their having been given shall be presumed unless disputed by the accused person at the trial; and the production of a document purporting to be signed by the Attorney-General and containing the consent and certificate shall be sufficient evidence for all the purposes of this section of that consent and certificate; (iii) this section shall not prejudice or affect the trial of an act of piracy as defined by the Law of Nations. (2) In this section, "offence" means an act, neglect or default of such a description as would, if committed in England, be punishable on indictment according to the law of England for the time being in force.")

[68] *See* Penal Code, *supra* note 65 ("§69(1); remaining repealed provisions §69(2) & (3) provide: "(2) Any person who, being the master, an officer or a member of the crew of any ship and a citizen of Kenya-- (a) unlawfully runs away with the ship; or (b) unlawfully yields it voluntarily to any other person; or (c) hinders the master, an officer or any member of the crew in defending the ship or its complement, passengers or cargo; or (d) incites a mutiny or disobedience with a view to depriving the master of his command, is guilty of the offence of piracy. (3) Any person who is guilty of the offence of piracy is liable to imprisonment for life.") [Electronic copy provided in accompanying USB flash drive at Source 7].

> (c) any act of inciting or of intentionally facilitating an act described in paragraph (*a*) or (*b*);"pirate ship or aircraft" means a ship or aircraft under the dominant control of persons who—(i) intend to use such ship or aircraft for piracy; or (ii) have used such ship or aircraft for piracy, so long as it remains under the control of those persons; "private ship" and "private aircraft" means a ship or aircraft that is not owned by the Government or held by a person on behalf of, or for the benefit of, the Government; and "UNCLOS" means the United Nations Convention on the Law of the Sea, 1982.
> (2) Piracy committed by a warship, government ship or government aircraft whose crew has mutinied and taken control of the ship or aircraft is assimilated to piracy committed by a private ship or aircraft.
> (3) This Part applies to aircraft only when they are on the high seas, that is to say, in those parts of the sea to which Part VII of UNCLOS is applicable, in accordance with Article 86 of UNCLOS.[69]

Section 370 deals more expansively with the security of vessels, defining the crimes related to hijacking and destroying of ships and largely mirrors the SUA Convention. "Offenses Against the Safety of Ships: Hijacking and Destroying of Ships." Section 370(4) also expands jurisdiction by stating the definition of such applies, "whether the ship referred to in those subsections is in Kenya or elsewhere, whether any such act as is mentioned in those subsections is committed in Kenya or elsewhere; and whatever the nationality of the person committing the act."[70] Overall, the Merchant Shipping Act eliminates "any doubt about jurisdiction over non-Kenyan pirates arrested extraterritorially, and is not limited in this respect by the nexus requirements for jurisdiction set forth in Article 6 of SUA."[71]

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[69] Merchant Shipping Act (2009) (Kenya) (Became law June 1, 2009) [Electronic copy provided in accompanying USB flash drive at Source 9].

[70] *Id*. at § 370 (It is worth noting that § 371 goes on to lay out the offenses of piracy and armed robbery and its punishment. "Any person who – (a) commits any act of piracy; (b) in territorial waters, commits any act of armed robbery against ships shall be liable, upon conviction, to imprisonment for life." This punishment aligns with the former punishment that correlated with the repealed portion of the penal code.)

[71] James Thuo Gathii, *Kenya's Piracy Prosecutions*, 104 AM. J. INT'L L. 416, 430 (2010) [Electronic copy provided in accompanying USB flash drive at Source 62].

In 2010, the Kenyan Parliament enacted the Prevention of Organized Crime Bill, which categorizes "Piracy and Similar Offences" as an extradition offense and defines "piracy by the law of nations" as the following:

> Sinking or destroying a vessel at sea or an aircraft in the air, or attempting or conspiring to do so; Assault on board a ship on the high seas or an aircraft in the air with intent to destroy life or to do grievous bodily harm. Revolt or conspiracy to revolt, by two or more persons, on board a ship on the high seas or an aircraft in the air against the authority of the master, or captain of the aircraft; Hijacking and offences committed in relation thereto offences relating to aircraft set out in section 5 of the Protection of Aircraft Act.[72]

While this legislation only recently became law, the purpose behind the bill was to "ensure it plugged the holes in the current laws" that exist to combat the growing organized criminal nature of "extortion, abductions, drug and child trafficking, piracy, bribery and rape" in Kenya.[73]

Kenya is a party to both UNCLOS and the SUA Convention, and both the 2010 Prevention of Organized Crime Bill and the 2009 Merchant Shipping Act signify a broader incorporation of the international legal framework to combat maritime piracy. However, the Kenyan courts previously failed to view the codification of UNCLOS as having a limiting effect on its Penal Code provisions dealing with piracy, and "understood the Convention as 'amplifying what is already provided for.'"[74] Lastly, in light of these promising legislative expansions, "the current piracy prosecutions are all being conducted under the repealed piracy provisions of the

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[72] Prevention of Organized Crime Bill, (2010) (Kenya) [Electronic copy provided in accompanying USB flash drive at Source 12].

[73] *House Steps Up Fight Against Organised Crime*, Daily Nation, June 17, 2010 [Electronic copy provided in accompanying USB flash drive at Source 76]. *See also Kibaki Declines to Sign Bill to Control Prices*, Daily Nation, September 1, 2010 (confirming presidential assent to the bill as of 9/1/10) [Electronic copy provided in accompanying USB flash drive at Source 80].

[74] Gathii, *supra* note 71, at 423 (referring to 2006 piracy judgment in *Republic v. Hassan Mohamud Ahmed*, Crim. No. 434 of 2006 (Chief Magis. Ct. Nov. 1, 2006) (Jaden, Acting Sr. Principal Mag.) (Kenya)) [Electronic copy provided in accompanying USB flash drive at Source 62].

Penal Code, rather than the new Merchant Shipping Act."[75] Such discrepancies support suggestions that Kenya should articulate in a clear and public manner the applicable laws and procedures being applied in the prosecution of piracy suspects to avoid any uncertainties in the international community.

At the judicial level, the definition of piracy has been applied in a handful of cases pertaining to the recent trials of Somali pirates, but also in a civil matter. In *Omar Shariff Abdalla v. Corporate Insurance Co. Ltd.*, the court cites to the UNCLOS definition of piracy, providing the following definition:

> Primarily the pirate is a man who satisfies his personal greed or his personal vengeance by robbery or murder in places beyond the jurisdiction of a state. The man who acts with a public object may do like acts to a certain extent but his moral attitude is different, and the acts themselves will be kept within well-marked bounds. He is not only the enemy of the human race but he is the enemy solely of a particular state.[76]

In *Republic v. Hassan Mohamud Ahmed*, Kenya's first piracy trial under Penal Code §69, the court rejected the notion that because UNCLOS had not been domesticated into Kenyan law at the time, the court had no jurisdiction over piratical crimes beyond Kenya's territory.[77] The court upheld the weight of §69 and "agreed with the prosecution that any act of piracy *jure gentium* is

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[75] *Id*. at 430.

[76] *Omar Shariff Abdalla v. Corporate Insurance Co. Ltd.,* (2005) eKLR (Kenya) (deals with insurance claim from a piracy attack and grapples with the articulation of what the crime is) [Electronic copy provided in accompanying USB flash drive at Source 31].

[77] "Concerned ten Somali nationals handed over to Kenyan authorities by the United States after they were captured "approximately 200 miles from the Somali coast" by the guided-missile destroyer USS *Winston S. Churchill*. The suspects were charged before a senior principal magistrate in Mombasa for hijacking the Indian-flagged and -registered vessel MV *Safina al Bisarat* on the high seas on January 16, 2006, threatening the lives of its crew, and demanding a ransom of fifty thousand U.S. dollars. The accused were alleged to have captured the *Al Bisarat* 300 nautical miles off the coast of Somalia by attacking the vessel from small speedboats…" Gathii, *supra* note 71, at 422 [Electronic copy provided in accompanying USB flash drive at Source 62].

a crime against mankind which lies beyond the protection of any State."[78]

f. Expansion of Maritime Laws Governing Piracy Through Bilateral Agreements with Nation States or Regional/International Organizations

Kenya has entered into bilateral agreements with various nation states pertaining to the transfer and prosecution of apprehended piracy suspects by third parties. After Security Council Resolution 1851 urging the establishment of regional agreements, Kenya entered into agreements regarding the prosecution of piracy suspects with the United Kingdom, the United States, the European Union, and Denmark.[79] According to media reports, Kenya also has acknowledged the existence of similar agreements with China and Canada, but to date, only the EU-Kenya agreement is available to the public.[80] Aside from Kenya, the Seychelles and Yemen have agreed to prosecute suspected pirates captured by foreign forces, but neither has risen to the same level of involvement as Kenya in the regional fight against piracy.[81]

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[78] *Id*. at 423 (In their defense, the accused pirates had argued that they were stranded fishermen engaged in peaceful fishing and that they had been held by the crew of the *Al Bisarat*.)

[79] *Id*. at 116-17 ("The British foreign secretary told the House of Commons that Kenya did not want its agreement with the United Kingdom to be made public. Consequently, it may well be that a Kenyan preference for secrecy prevented the public release of information on the other agreements signed by Kenya.")

[80] *Id*.

[81] *Kenya Acquits 17 Suspected Somali Pirates*, AFP, Nov. 5, 2010 [Electronic copy provided in accompanying USB flash drive at Source 84]. *See also* Brian Murphy, *U.S. Admiral: Pact Near for Somali Pirate Trials*, USA Today, Jan. 23, 2009, available at: http://www.usatoday.com/news/world/2009-01-23-somalia-pirates_N.htm [Electronic copy provided in accompanying USB flash drive at Source 72]. *See also* Radio Bar Kulan, *Yemen Court Sentences Somali Pirates to Five Years in Prison*, Suna Times, Nov. 2, 2010, available at: http://www.sunatimes.com/view.php?id=562 (Yemen has accepted pirate suspects from Indian authorities. Recently: "The men were tried in a specialized criminal court that handles issues involving piracy, terrorism and hostage-taking. However, the accused argue that they were fishermen and were illegally arrested by coast guards who were looking for pirates…There are seven other groups of pirate suspects held in Yemen waiting to answer charges of piracy.")

The bilateral agreements mentioned above currently govern the transfer of suspected pirates to Kenya with "the capturing states, while prosecutions are being conducted under Kenyan law."[82] Such agreements help to incorporate international legal norms as the suspected pirates face trial in Kenyan domestic courts. The Exchange of Letters between the European Union and the Government of Kenya applies international law to the conditions and modalities for the transfer of piracy suspects and their treatment thereafter, including Security Council resolutions, UNCLOS, and human rights instruments, such as the International Covenant on Civil and Political Rights and the 1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.[83] Since the bilateral agreements with the U.S. and other authorities have not been released for examination, a closer examination will be given to the exchange of letters between the European Union forces and the Kenyan government.

The Exchange of Letters refers to transferred persons and defines them as "any person suspected of intending to commit, committing, or having committed, acts of piracy transferred by EUNAVFOR to Kenya under this Exchange of Letters." Such text can be seen to extend jurisdiction over attempted piratical acts. Furthermore, both EU and Kenyan forces confirm "that they will treat persons transferred… both prior to and following… humanely and in accordance

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[Electronic copy provided in accompanying USB flash drive at Source 83]. *See also* Douglas Guilfoyle, *Counter-Piracy Law Enforcement and Human Rights*, 59 Int'l & Comp. L.Q. 141 (2010) (Notes that China transfers captured suspects to the TFG in Somalia) [Electronic copy provided in accompanying USB flash drive at Source 70].

[82] *See* Gathii, *supra* note 14, at 1334 [Electronic copy provided in accompanying USB flash drive at Source 67].

[83] Exchange of Letters on the Conditions and Modalities for the Transfer of Persons Suspected of Having Committed Acts of Piracy and Detained by the European Union--Led Naval Force (EUNAVFOR), and Seized Property in the Possession of EUNAVFOR, from EUNAVFOR to Kenya for Their Treatment After Such Transfer, EU-Kenya, Mar. 6, 2009, 2009 O.J. (L 79) 49 (2009) [Electronic copy provided in accompanying USB flash drive at Source 6].

with international human rights obligations, including.. the prohibition of arbitrary detention and in accordance with the requirement to have a fair trial."[84] The agreement also stipulates that transferred subjects will receive adequate accommodation and nourishment, accessible medical treatment and permission to carry out religious observances.[85]

The agreement also proscribes that all suspects will promptly have an audience with a judge or other authorized power that will determine whether the detention is lawful or if the suspect should be released.[86] Additionally suspects are entitled to a timely trial or release, and following the determination of charges, all suspects are innocent until proven guilty and are "entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law."[87] Section (f) of the agreement's annex specifies minimum guaranteed rights for each suspected pirate transferee, including:

> (1) to be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him; (2) to have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choice; (3) to be tried without undue delay; (4) to be tried in his presence, and to defend himself in person or through legal assistance of his own choice; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it; (5) to examine, or have examined, all evidence against him, including affidavits of witnesses who conducted the arrest, and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him; (6) to have the free assistance of an interpreter if he cannot understand or speak the language used in court; (7) not to be compelled to testify against

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[84] *Id.*

[85] *Id.*

[86] *Id.*

[87] *Id.*

himself or to confess guilt.[88]

Kenya agreed to these and other remaining provisions contained in the letters on March 9, 2009, including the protocol for the termination of such agreements. In an October 2010 news interview, Patrick Wamoto, the diplomatic secretary and director of political affairs in Kenya's Ministry of Foreign Affairs, announced that Kenyan authorities had terminated bilateral agreements with six countries/regional powers, including the EU, USA, Canada, UK, China and Denmark.[89] Wamoto also stressed that this did not mean that Kenya would not take part in future anti-piracy efforts, instead it was a message to the international community that it had to be an international effort. The July 2010 report from the Secretary General which provided suggested options for dealing with the Somali piracy issue to the Security Council is slated to be debated before the end of the year, which includes the option of pursuing and building upon Kenya's efforts.[90]

IV. KENYA'S EVOLVING ADAPTATION TO INTERNATIONAL LAW SIGNIFIES A NATURAL PROGRESSION TOWARDS THE ACCEPTANCE OF INTERNATIONAL LEGAL STANDARDS.

Kenya has made significant strides to conform to international standards by passing applicable domestic legislation, including the area of maritime law. Kenya's recent

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[88] *Id*. (The annex continues by describing the right of each convicted or sentenced suspect to appellate review under Kenyan law. Also articulated is the strict prohibition of the death penalty for any transferred piracy suspects).

[89] Walter Menya, *Why Kenya Broke Deal on Piracy Trials*, Daily Nation, Oct. 9, 2010 (The government cited the lack of international cooperation as troublesome for the operation of courts and the country's overall security. "There was a fundamental change in circumstances after we signed the agreements. Kenya became a dumping ground for pirates arrested by the combined naval forces.") [Electronic copy provided in accompanying USB flash drive at Source 82].

[90] *Id*.

domestication of international treaties through legislation, recent Kenyan jurisprudence and the new 2010 Constitution of Kenya, together magnify Kenya's evolving robust adaptation of international legal standards.[91] Furthermore, Kenya's expansive cooperation with international organizations and nation states when dealing with the prosecution and imprisonment of Somali piracy suspects signifies acquiescence to the internationalization of the piracy trials.

The most striking shift towards Kenya's acceptance of international legal standards is embodied in the adoption of its new Constitution of August 2010.[92] The language of the constitution incorporates international law in a variety of areas, but also provides for extensive coverage through § 1(4) & (5), which states: "(4) Any law, including customary law, that is inconsistent with this Constitution is void to the extent of the inconsistency, and any act or omission in contravention of this Constitution is invalid. (5) *The general rules of international law shall form part of the law of Kenya*."[93] Further, section 4 states that Kenya "shall enact and

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[91] *See generally* Gathii, *supra* note 2 [Electronic copy provided in accompanying USB flash drive at Source 56].

[92] *See* Jeffery Gettleman, *Kenyans Approve New Constitution*, N.Y. Times, Aug. 6, 2010, at A7 (67% of Kenyans voted yes in a referendum to adopt the new constitution) [Electronic copy provided in accompanying USB flash drive at Source 79].

[93] Constitution (2010) (Kenya) (*emphasis added*) (Other provisions highlighting the commitment to international law include: §50(n) re: fair hearing: "not to be convicted for an act or omission that at the time it was committed or omitted was not— (i) an offence in Kenya; or (ii) a crime under *international law*"; §51(3) re: rights of persons detained, held in custody or imprisoned: "Parliament shall enact legislation that— (*a*) provides for the humane treatment of persons detained, held in custody or imprisoned; and (*b*) takes into account the relevant *international human rights instruments*"; §58(6) re: State Emergencies: "any legislation enacted in consequence of a declaration of a state of emergency–(*a*) may limit a right or fundamental freedom in the Bill of Rights only to the extent that— (i) the limitation is strictly required by the emergency; and (ii) the legislation is consistent with the Republic's obligations under international law applicable to a state of emergency; and (*b*) shall not take effect until it is published in the *Gazette*"; §132(1)(c)(iii) - States the functions of the president, and that once every year, shall "submit a report for debate to the National Assembly on the progress made in fulfilling the *international obligations* of the Republic"; §132(5) - The President shall ensure that

implement legislation to fulfill its *international obligations* in respect of human rights and fundamental freedoms."[94] While it will take up to five years for the Constitution of Kenya to be fully implemented through various Parliamentarian actions, these provisions alone are indicative of the direction Kenya's legal system is taking.

In light of this, the argument can be made that Kenya, through its new constitution, abandoned dualism in order to become a monist system, where "international and domestic law constitute a single legal system."[95] Furthermore, "the national executive is obliged to take care that international law be faithfully executed. Domestic courts must give effect to international law, anything in the domestic constitution or laws to the contrary notwithstanding."[96] This definition mirrors the text of the constitutional provisions, and the shift away from a dualist orientation when incorporating international law is also occurring throughout the jurisprudence of other common law courts, which are traditionally strictly dualistic.[97]

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the *international obligations* of the Republic are fulfilled through the actions of the relevant Cabinet Secretaries; Under the new Constitution, removal from office is also permissible for certain officials "where there are serious reasons for believing that the [official] has committed a crime under national or *international* law." There are such provisions for the president, the deputy president, cabinet secretaries and governors.) [Electronic copy provided in accompanying USB flash drive at Source 11].

[94] *Id*. (emphasis added).

[95] *See* Louis Henkin, *The Constitution and United States Sovereignty: A Century of Chinese Exclusion and Its Progeny*, 100 HARV. L. REV. 853, 864 (1987) ("By contrast, dualists view international law as a discrete legal system... A nation-state is responsible to other nation-states for carrying out its obligations to them. But each state determines for itself by what means and in what forms it will carry out its obligations.") [Electronic copy provided in accompanying USB flash drive at Source 47].

[96] *Id*.

[97] *See* Melissa A. Waters, *Creeping Monism: The Judicial Trend Toward Interpretive Incorporation of Human Rights Treaties*, 107 COLUM. L. REV. 628 (2007) (provides a discussion

Specific legislative initiatives further the notion that adopting international legal standards would be natural for the Kenyan courts. In 2001, Kenya's Parliament enacted the Children's Act in order to domesticate the both the U.N. Convention on the Rights of the Child and the African Charter on the Rights and Welfare of the Child.[98] Also for consideration, in 2010, Parliament enacted the Counter-Trafficking in Persons Bill, which implemented Kenya's obligations under the United Nations Convention Against Transnational Organized Crime particularly its Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children.[99] While these examples closely resemble the habits of the dualistic system pre-new constitution, they also signify a wider acknowledgment of international legal standards that are applicable at the domestic level.

Kenyan courts have also contributed to the legitimization of international standards by stating, "international Treaties and Conventions are not to be signed and abandoned."[100]

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of "creeping monism" when it comes to implementation of human rights treaties) [Electronic copy provided in accompanying USB flash drive at Source 51].

[98] The Children's Act (2001)(Kenya) (At the start of the bill, Parliament states that this is an "act of parliament to make provision for parental responsibility, fostering, adoption, custody, maintenance, guardianship, care and protection of children; to make provision for the administration of children's institutions; to give effect to the principles of the Convention on the Rights of the Child and the African Charter on the Rights and Welfare of the Child and for connected purposes.") [Electronic copy provided in accompanying USB flash drive at Source 8].

[99] The Counter-Trafficking in Persons Bill (2010)(Kenya) ("An act of Parliament to implement Kenya's obligations under the United Nations Convention Against Transnational Organized Crime particularly its Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children; to provide for the offences relating to trafficking in persons and for connected purposes.) [Electronic copy provided in accompanying USB flash drive at Source 13].

[100] Gathii, *supra* note 71, at 419 (referring to "*In re* Sugar Act 2001 (No. 10 of 2001), *ex parte* Mat Int'l Ltd, Misc. Civ. App. No. 192 of 2004, [2004] eKLR at 12 (High Ct.). Similarly, in *Juma Ganzori v. Commissioner General Kenya Revenue Authority*, App. No. 60 of 2006, the court applied a provision of the East African Parliament's East African Community Customs Act

Additionally the courts have permitted the use of "treaty-created rights that were ratified without reservations even where the treaty has not been domesticated by Parliament."[101] In light of the legislative examples and judicial acceptance of such norms, Kenya should not have any issue integrating international criminal legal norms into its system.

V. CRITICISMS AND LIKELY PROCEDURAL PROBLEMS FACING KENYA IN THE PROSECUTION OF PIRACY SUSPECTS

The criticisms and potential procedural problems facing Kenya's piracy trials are varied and include jurisdictional issues as well an overburdened judicial system that perpetuates delays and evidentiary complications. Despite this, there have been legitimate efforts to ensure fairness throughout the trials and to guarantee fundamental human rights. Because of the current volatility of the courts and Kenya's limited political will to carry out these trials and the current overall volatility of the courts, addressing these issues is crucial to maintaining international legitimacy.

a. Jurisdiction

One of the first issues pertains to whether the international standards governing universal jurisdiction over suspected pirates applies regardless of where the ships were, where the acts occurred, and the nationality of suspected pirates. For the reasons discussed above, Kenya can establish jurisdiction over transferred suspects using both international law and domestic legislation. Some critics of the Kenyan piracy trials have questioned the ability of capturing nation states to "transfer" their prosecutorial rights of suspected pirates through these

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of 2004, and thus affirmed its supremacy over the Kenyan customs law it had replaced. Cases such as *Juma Ganzori* are heralding a whole new area of law where regional law is beginning to take precedence over domestic law.") [Electronic copy provided in accompanying USB flash drive at Source 62].

[101] *Id*.

agreements, but no "general rule of international law prohibit transfers of piracy suspects between equally competent jurisdictions."[102]

According to international legal scholar Michael Scharf,[103] "international law recognizes the authority of the state where a crime occurs to delegate its territorial based jurisdiction to a third state or international tribunal."[104] When reflecting upon the universality of the crime of piracy and the apparent ability of states to establish jurisdiction over pirates, he states that even though historical debate surrounds the definition of piracy as a universal crime, it "does not deprive the offense of its universal character."[105] Furthermore, upon analysis of the European Convention on the Transfer of Proceedings in Criminal Matters in relation to "universal crimes," he observes that the "requesting state's jurisdiction is 'transferred' to the requested state [because the] Convention prohibits the requesting state from subsequently prosecuting the suspect for the offense in question [and that] "there are no compelling policy reasons why territorial jurisdiction

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[102] Guilfoyle, *supra* note 81 at 152 [Electronic copy provided in accompanying USB flash drive at Source 70].

[103] Michael Scharf is the John Deaver Drinko - Baker & Hostetler Professor of Law and Director of the Frederick K. Cox International Law Center at Case Western Reserve University School of Law; formerly Attorney-Adviser for UN Affairs at the U.S. Department of State during the Bush I and Clinton Administrations. In 2005, six governments and an international criminal tribunal nominated Scharf and the Public International Law and Policy Group, an NGO dedicated to international justice, which he co-founded, for the Nobel Peace Prize.

[104] Michael P. Scharf, *The ICC's Jurisdiction Over the Nationals of Non-Party States: A Critique of the U.S. Position*, 64-WTR LAW & CONTEMP. PROBS. 67 (2001) (Note: "The first widely accepted crime of universal jurisdiction was piracy. For more than three centuries, states have exercised jurisdiction over piratical acts on the high seas, even when neither the pirates nor their victims were nationals of the prosecuting state.") [Electronic copy provided in accompanying USB flash drive at Source 48].

[105] *Id*. at 81.

cannot be delegated."[106] Also, the Rome Statute governs the ways in which the International Criminal Court can obtain jurisdiction over a matter, including the transfer of jurisdiction from an involved party to the court.[107]

And while explicit authority does not govern the transference of jurisdiction to third parties absent a nexus, there is nothing restraining such international cooperative efforts and support for such can be found in Article 100 of UNCLOS, stating: "all States shall cooperate to the fullest possible extent in the repression of piracy."[108] Also, one scholar asserts that "formal extradition is not a requirement for such a transfer: consent may be granted by an exchange of diplomatic notes or other ad hoc agreement."[109] Therefore, jurisdiction over piracy suspects can be transferred to Kenya using established principles in international law.

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[106] *Id*. at 116, n. 266.

[107] Michael A. Newton, *The Complementary Conundrum: Are We Watching Evolution or Evisceration?*, 8 SANTA CLARA J. INT'L L. 115 (2010) (Ways in which jurisdiction is administered: "First, and perhaps most importantly, any state becoming party to the Rome Statute accepts the jurisdiction of the Court where the case is admissible. In addition, the Court will have jurisdiction in a case where either (a) the *actus reus* for the alleged crime occurred on the territory of a State Party to the Rome Statute; or (b) the perpetrator is a national of a State Party. Finally, any state who is not party to the ICC but consents to the Court's jurisdiction will serve as adequate means to transfer jurisdiction to the ICC.") [Electronic copy provided in accompanying USB flash drive at Source 68].

[108] J. Ashley Roach, *Countering Piracy Off Somalia: International Law and International Institutions,* 104 AM. J. INT'L L. 397 (2010) ("The argument that only the state of the capturing force has international jurisdiction to try the pirates is inconsistent with the strong duty of cooperation in the international law of piracy articulated by Article 100. The practice of states reflected in their arrangements with Kenya indicates that they believe cooperation includes transfers ashore to third states for trial and that they are permitted under international law. In addition, the U.N. Security Council resolutions continue to call for such cooperation.") [Electronic copy provided in accompanying USB flash drive at Source 63].

[109]Guilfoyle, *supra* note 81 (Douglas Guilfoyle, is a faculty member at the University College London and conducted his doctoral dissertation at the University of Cambridge. His areas of expertise include law of the sea issues especially related to piracy, continental shelf claims and the use of force at sea. He recently prepared a report and compilation of texts on treaty-based

b. Detainment and Right to Prompt Judicial Hearing for Charges

Under ICCPR article 9(3), a suspected pirate "detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release. It shall not be the general rule that persons awaiting trial shall be detained in custody..."[110] Once pirate suspects are apprehended at sea, there is typically a period of detainment while capturing forces and collaborating nation states make decisions regarding where suspects will be detained and which state will exercise jurisdiction.[111] These time delays can be problematic for the rights of the pirate. Under the ICCPR though, the words *promptly* and *reasonable* can be applied to circumstantial evidence surrounding the detainment of piracy suspects. The problem lies in the new 2010 Kenyan constitution, which explicitly gives an arrested person the right "to be brought before a court as soon as reasonably possible, but not later than…twenty-four hours after being arrested; or…if the twenty-four hours ends outside ordinary court hours, or on a day that is not an ordinary court

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jurisdiction over pirates for the legal issues working group of the Contact Group on Piracy off Somalia) [Electronic copy provided in accompanying USB flash drive at Source 70].

[110] International Covenant on Civil and Political Rights, art. 9(3), Mar. 23, 1976, 999 U.N.T.S. 171 (Kenya acceded to May 1, 1972) [hereinafter ICCPR] [Electronic copy provided in accompanying USB flash drive at Source 4]. *See also* Exchange of Letters, *supra* note 83 (Additionally, as discussed above, section (f)(1) of the bilateral agreement between Kenya and the EU guarantees a similar right to transferred pirates, "to be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him.") [Electronic copy provided in accompanying USB flash drive at Source 6].

[111] Guilfoyle, *supra* note 81 at 159 (For example: "In May 2009 it was reported that the Russian navy ha[d] been holding 29 suspected pirates aboard one of its warships for three weeks while it determines whether to prosecute them in Russia.") [Electronic copy provided in accompanying USB flash drive at Source 70].

day, the end of the next court day."[112] But, Somali pirates captured at sea typically experience days of detainment before being brought before a court.

One expert cites the U.N. Security Council resolutions calling "for States operating on the high seas off Somalia to use 'necessary means . . . for the repression of . . . piracy' [as likely authorization for] 'necessary' detention, especially given the Council's express concern regarding 'pirates being released without facing justice'.[113] To additionally support reasonable delays in detainment, Guilfoyle examined jurisprudence from the European Court of Human Rights (ECHR) for guidance where the court held that delays that were materially impossible to avoid are not a violation of rights.[114] In one case, *Medvedyev*, "French authorities interdicted a Cambodian vessel suspected of drug smuggling on the basis of Cambodian consent; [and] those on board were confined aboard their vessel while it was escorted to a French port, a voyage taking 13 days."[115] The court in *Medvedyev* made a point to signify the importance of national legal authority justifying detention at sea and the need for "express textual authority [in] public international law to justify boarding the vessel, detaining persons aboard and subsequently

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[112] Constitution (2010) (Kenya), *supra* note 93 at § 49(f) [Electronic copy provided in accompanying USB flash drive at Source 11]. *See also* Gathii, *supra* note 14, at n. 108 (Citing the former Constitution, which was more forgiving and open for interpretation: "A person who is arrested or detained ... upon reasonable suspicion of his having committed, or being about to commit, a criminal offence, and who is not released, shall be brought before a court as soon as is reasonably practicable, and where he is not brought before a court within twenty-four hours of his arrest or from the commencement of his detention… the burden of proving that the person arrested or detained has been brought before a court as soon as is reasonably practicable shall rest upon any person alleging that the provisions of this subsection have been complied with.") [Electronic copy provided in accompanying USB flash drive at Source 67].

[113] *Id*.

[114] *Id*. (Provisions of the European Charter on Human Rights guarantees a similar right).

[115] *Id*. (Also, in another case, *Rigopolous*, there was a "Spanish high-seas interdiction of drug smugglers and a 16-day voyage to port.")

prosecuting them."[116] Guilfoyle concludes that UNCLOS's provisions on piracy pass the test applied by the ECHR because it contemplates criminal law sanctions.[117]

c. Concerning the Fair Administration of Justice

Piracy suspects held on criminal charges are entitled to a fair trial under the ICCPR, the 2010 Kenyan Constitution and the bilateral agreement between the EU and Kenya.[118] However, the reality of the already overburdened Kenyan legal system is one that threatens the potential of fairness from the outset, with a backlog of cases over 870,000 and with the system handling over 53,000 prisoners to date while the national capacity only allows for roughly 16,000.[119] The limited number of Kenyan prosecutors available, coupled with the need for specialized assistance in the form of paralegal case management and legal research, contribute to logistical concerns. Furthermore, "Kenya's capacity to expeditiously adjudicate piracy cases is hindered by what its own authorities admit are outdated and formal rules of evidence which render inadmissible many modern forms of evidence or make other forms of evidence admissible only through onerous

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[116] *Id.*

[117] *Id.*

[118] *See* ICCPR, *supra* note 110, at art. 14 ("entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law") [Electronic copy provided in accompanying USB flash drive at Source 4]. *See also* Constitution (2010) (Kenya), *supra* note 93 at § 50 ("Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body.") [Electronic copy provided in accompanying USB flash drive at Source 11]. *See also* Exchange of Letters, *supra* note 83 (mirrors ICCPR text) [Electronic copy provided in accompanying USB flash drive at Source 6].

[119] Yvonne M. Dutton, *Bringing Pirates to Justice: A Case for Including Piracy Within the Jurisdiction of the International Criminal Court*, 11 CHI. J. INT'L L. 197, 220 (2010) [Electronic copy provided in accompanying USB flash drive at Source 64].

procedures."[120] The Internal Security Minister of Kenya recently "complained that the piracy cases it already has to deal with have overstretched the capacity of Kenya's security agencies and courts."[121]

Legal representation for piracy suspects has also been raised as an issue of concern because of the existing difference between international instruments and Kenya domestic law. Under the ICCPR, defendant has a right "to have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing."[122] The African Charter on Human and Peoples' Rights, narrows by permitting "the right to defense, including the right to be defended by counsel of his choice."[123] Under Kenyan law, defendants are not explicitly entitled to legal aid except in capital cases or under the 2010 Constitution, the right to "have an advocate assigned to the accused…by the State and at State expense, if substantial injustice would otherwise result."[124] A recent July 15, 2010 decision from the High Court of Kenya at Mombasa in *Republic v. Hassan Jamal & 5 Others* pertains to the right of representation for

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[120] *Id*.

[121] *Id*.

[122] *See* ICCPR, *supra* note 110 at art. 14 [Electronic copy provided in accompanying USB flash drive at Source 4].

[123] African (Banjul) Charter on Human and Peoples' Rights, June 27, 1981, OAU Doc. CAB/LEG/67/3 rev.5, 21 ILM 58 (1982) (ratified Jan. 23, 1992) [Electronic copy provided in accompanying USB flash drive at Source 5].

[124] Constitution (2010) (Kenya), *supra* note 93 at § 50(2)(h) [Electronic copy provided in accompanying USB flash drive at Source 11]. *See also Paris-based Group Says Accused Somali Pirates Denied Rights*, VOANews.com, Aug. 27, 2009, available at: http://www.voanews.com/english/news/a-13-2009-08-27-voa36-68754822.html [Electronic copy provided in accompanying USB flash drive at Source 74].

piracy defendants.[125] In *Hassan*, the court took into consideration the former Constitutional provision that stated: "every person who is charged with a criminal offence…shall be permitted to defend himself before the court in person or by legal representative of his own choice."[126] The court held that the law did not extend the right of definitive representation for all accused persons, and only applied to suspects in murder trials. Further, it noted unique challenges created under the Kenyan legal system by the piracy trials:

> We cannot ignore the fact that these are suspects who having been arrested by foreign naval forces on the High Seas are brought to Kenya for trial. They are strangers in the country, do not understand the legal system, may not know what their rights are and do not understand the language. With such barriers it would in my view be crucial that the Kenyan Government and the International partners supporting these trials put in place a system to provide free legal representation for the suspects in these piracy trials. This is the only way that their rights to a fair trial can be guaranteed.[127]

Representation has not been a prevalent issue yet, as most piracy suspects have received legal representation, but the guarantee of legal counsel for piracy suspects should considered a priority for the Kenyan piracy trials.[128]

Scholar James Gathii,[129] has also provided significant insight to other issues facing the administration of justice in Kenya's piracy trials. He notes that lengthy delays, occurring due to

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[125] *Republic v. Hassan Jamal & 5 Others*, (2010) 29 eKLR 105 (Kenya) [Electronic copy provided in accompanying USB flash drive at Source 32].

[126] *Id*.

[127] *Id*. (Also discusses the desirability of a legal aid scheme in Kenya for those who are unable to acquire legal counsel on their own).

[128] Gathii, *supra* note 71 at 432 [Electronic copy provided in accompanying USB flash drive at Source 62].

[129] James Thuo Gathii is the Associate Dean for Research and Scholarship and the Governor George E. Pataki Chair of International Commercial Law at Albany Law School, where he has been on the faculty since 2001. His research and expertise are in the areas of public international law, international economic, international intellectual property and trade law as well as on issues

witness attendance issues tend to be commonplace.[130] Kenya's High Court has held that such delays contravene both the former Constitution as well as the Universal Declaration of Human Rights.[131] In *Republic v. Martin Nyongesa Wefwafwa*, the court stated that an accused individual "cannot be detained in custody forever at the whims of the prosecution [and] . . . adjournments should not be granted as a matter of course even when it is evident that the police . . . are sleeping on their job and are not making any efforts to have the witnesses come to court. Other continuing reasons for delays and sporadic court hearings have been the result of the "nonappearance of accused persons in court… sometimes even of their defense counsel, as well as congestion in the court calendar."[132]

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of good governance and legal reform as they relate to the third world and sub-Saharan Africa in particular. Gathii received his LL.B. from the University of Nairobi and his LL.M. and S.J.D. from Harvard Law School. Recently his work on the topic was cited more than 10 times in *U.S. v. Hasan*.

[130] *See* Gathii, *supra* note 14 at 1348-49 (Gathii cites the following as examples: "August 19, 2009, when a hearing was scheduled to begin in Said Mohamed Ahmed, the hearing could not proceed because the prosecution was unable to procure the attendance of witnesses from Yemen. Witnesses from Yemen were also not available for the trial in *Republic v. Mohamed Hassan Ali & 5 Others* that was scheduled to begin September 23, 2009. As of February 2, 2010, five prosecution witnesses had been heard in this case. In Said Abdallah Haji, the prosecution was unable to proceed, citing a breakdown with the EU Command Liaison on production of witnesses. On December 10, 2009 prosecution witnesses expected from Nairobi did not show up. Delays related to witness attendance from France in Liban Ahmed Ali have also arisen. When the prosecution repeatedly sought hearing dates convenient for the witnesses to testify, the defense objected to the delays but was overruled by the court.") [Electronic copy provided in accompanying USB flash drive at Source 67].

[131] *Id*. at 1349 (Citing decision in *Republic v. William Maina Wamondo*, note Art. 10 of the UDHR is mentioned. Court "declined to give the prosecution a request for an adjournment since the case had been fixed for hearing one year before, and the prosecution failed to produce the witnesses and evidence necessary to successfully prosecute its case.")

[132] *Id*.

In addition to capacity concerns, the treatment of prisoners has received attention from a French legal aid network, Lawyers of the World, who have noted that the "prisons are overcrowded and at least some accused pirates were held for months without adequate access to medical care or basic amenities, such as soap."[133] Gathii notes that court files demonstrate that in most cases suspects complain of "ill treatment by prison authorities and the other prisoners with whom they are held…[as well as the] lack of medical attention and food."[134] In Kenya's agreement with the EU, provisions govern the humane treatment and "adequate accommodation and nourishment, [and] access to medical treatment" of all transferred piracy suspects.[135] For the most part the courts have sought to remedy these concerns by ordering medical attention or that prisoners be fed, but have, limited or prohibited the contact suspects have with relatives in Somalia.[136] Kenyan courts should prioritize the human rights of detained piracy suspects in order to domesticate their ratification of relevant international instruments as well as their bilateral agreements with other nation states.

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[133] Dutton, *supra* note 119 [Electronic copy provided in accompanying USB flash drive at Source 64].

[134] Gathii, *supra* note 71 at 432 [Electronic copy provided in accompanying USB flash drive at Source 62].

[135] Exchange of Letters, *supra* note 83 [Electronic copy provided in accompanying USB flash drive at Source 6].

[136] Gathii, *supra* note 71 at 432 (Discusses that in once case, suspects were denied permission to contact families in Somalia. In another case, contact was permitted in the presence of an interpreter and an investigating officer.) [Electronic copy provided in accompanying USB flash drive at Source 62].

There have also been concerns over bail, which has so far, routinely been denied to piracy suspects.[137] While the international legal consensus on bail is not absolute, in the denial of bail, a criminal defendant is entitled to an expeditious trial.[138] A justice in the Supreme Court of Canada has said, "When bail is denied to an individual who is merely accused of a criminal offence, the presumption of innocence is necessarily infringed."[139]

Recently, following the denial of bail for four piracy suspects, Alexander Muteti, a prosecutor before the Mombasa court, stated: "the right to bail is not absolute, like all other rights, the same is subject to limitation in the interest of justice."[140] Other arguments supporting the denial of bail put forth by prosecutors include the seriousness offenses suspects are being charged with, the unknown nature of their residency and identities. But the Kenyan High Court has sought other means for the denial based in the former constitutional provisions, holding: "unless it can be shown that an accused person will be tried within a reasonable time, if he is facing any offence not punishable by death, then he is entitled to bail as a matter of law… discretion [only] given to the court is as to whether the accused should be released

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[137]*See* Gathii, *supra* note 14 at 1342 [Electronic copy provided in accompanying USB flash drive at Source 67].

[138] *See* ICCPR, *supra* note 110 at art. 9(4) ("Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.") [Electronic copy provided in accompanying USB flash drive at Source 4].

[139] *See generally* Caroline L. Davidson, *No Shortcuts on Human Rights: Bail and the International Criminal Trial*, 60 AM. U. L. REV. 1 (2010) [Electronic copy provided in accompanying USB flash drive at Source 61].

[140] Gideon Maundu, *Mombasa Court Denies Bail to Somali Pirates*, Daily Nation, Oct. 1, 2010 [Electronic copy provided in accompanying USB flash drive at Source 81].

unconditionally or conditionally."[141] The new Constitution does not provide for the absolute right to bail either, merely states, "an arrested person has the right…to be released on bond or bail, on reasonable conditions, pending a charge or trial, unless there are compelling reasons not to be released."[142]

Lastly, there are a handful of other issues that critics of the Kenyan piracy proceedings cite to, including the "lack of credible evidence, the unavailability of prosecution witnesses, language barriers and disparities in the legal standards of the states involved."[143] Noting the restraints of the Kenyan judicial system, the UNODC has stated "Kenyan authorities have reported that the current Evidence Act is generally outdated and too formal…that "some modern forms of evidence may not be admissible while others may only be admitted through onerous procedures," [and] recommends "urgent legislative review."[144] In his articles about the topic, Gathii has noted that hurried creation of the Kenyan piracy trials is problematic given the issues that have arisen, which "demonstrate[s] that this experiment in international justice is still in its infancy and far from operating efficiently."[145]

d. Concerns Upon Release

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[141] Gathii, *supra* note 14 at 1360 [Electronic copy provided in accompanying USB flash drive at Source 67].

[142] *See also* Constitution (2010) (Kenya), *supra* note 93 at § 49 [Electronic copy provided in accompanying USB flash drive at Source 11].

[143] Otto Bakano, *Piracy Trials in Kenya Beset by Legal Obstacles*, Telegraph.co.uk, Mar. 8, 2010 [Electronic copy provided in accompanying USB flash drive at Source 75].

[144] *See generally* Gathii, *supra* note 14 at 1356 (The article also discusses the need for possible introduction of video evidence as well as the possibility) [Electronic copy provided in accompanying USB flash drive at Source 67].

[145] *See generally Id*.

Upon serving out criminal sentences, a pirate's "citizenship is reinstated, and, *ceteris paribus*, [he] should be returned to the state of which he is a citizen."[146] But, upon release, States may further be "bound by obligations arising under applicable treaties, including the Convention against Torture, the Refugee Convention, the European Convention on Human Rights, and the International Covenant on Civil and Political Rights not to return or expel persons to a place where they face a real risk of prohibited treatment."[147] This is largely known as the principle of non-refoulment, based on the U.N. Convention Against Torture article 3(1), which states, "no State Party shall expel, return or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture."[148] Some European states, "have expressed concern that repatriation would conflict with the sending state's obligations" under these treaties.[149] Because Somalia has a questionable human rights record and no central government to be held accountable for the administration of fairness, this could emerge as a growing concern after pirates begin to complete their sentences in Kenyan prisons. Even so, some dispose of this argument by stating that, in light of obligations arising under international instruments, states may repatriate Somali citizens "provided that reasonable diplomatic assurances are made that either torture is not likely to occur in the territory of the

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[146] Davey, *supra* note 3 at 1224 [Electronic copy provided in accompanying USB flash drive at Source 65].

[147] Guilfoyle, *supra* note 81 at 153 [Electronic copy provided in accompanying USB flash drive at Source 70].

[148] Kontorovich, *supra* note 44 [Electronic copy provided in accompanying USB flash drive at Source 73].

[149] Eugene Kontorovich, *"A* Guantánamo *on the Sea": The Difficulty of Prosecuting Pirates and Terrorists*, 98 CAL. L. REV. 243 (2010) [Electronic copy provided in accompanying USB flash drive at Source 69].

particular government or that…[if] torture…is plausible, persons acting in an official governmental capacity are acting to suppress such tortuous acts."[150] Notably, France, regularly "resorts to repatriation of pirates to Somalia, relying on assurances that they will not be tortured."[151]

e. Escalating Somali Terrorism Concerns

Somalia has been a volatile region since the government fell in 1991, and the recently escalating situation with terrorist organizations such as al-Shabab might draw closer attention to the region especially as they grow more emboldened outside Somali territory.[152] In light of this, the international community will be watching closely for any link between extremist organizations and Somali pirates because of the enormous role of international waterways for both national security and global economic reasons.[153] Currently, it remains unclear whether all maritime attacks off the Somali coast can be associated with al-Shabab, but the "group does have control of…[a] town where pirates have been known to bring hijacked vessels [and] even if perpetrators…are not explicitly associated with al-Shabab, their activities have brought money

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[150] Davey, *supra* note 3 at 1225 [Electronic copy provided in accompanying USB flash drive at Source 65].

[151] *Id*.

[152] *See generally* Nicole Stillwell, *Robbers or Robinhoods?: A Study of the Somali Piracy Crisis and a Call to Develop and International Framework to Combat Maritime Terrorism*, 7 LOY. MAR. L.J. 127 (2009) ("Radical Islamist group, al-Shabab, has dominated most of Somalia for a number of years. [FN94] Al-Shabab is threatening to overrun the country's south and center, and the Ethiopian-backed T.F.G. is rapidly losing power and influence.") [Electronic copy provided in accompanying USB flash drive at Source 59].

[153] *Id*. (Potential for international harm is tremendous, 60% percent of the world's crude oil moves by ship.)

and guns to Somalia in violation of a U.N. imposed arms embargo."[154] Furthermore, there is "speculation that pirates are providing training for the maritime wing of al-Shabab and…are using pirates to smuggle and steal arms."[155] While presently it is merely a concern, should links develop between terrorist organizations and Somali pirates, the dynamic and approach to combating piracy might change.

VI. OTHER NATION STATES GRAPPLING WITH IMPLEMENTING INTERNATIONAL CRIMINAL LEGAL STANDARDS

a. The United States & Piracy

The United States has recently faced Somali piracy cases as well, which might be instructive for Kenyan courts dealing with piracy. The U.S. Constitution explicitly grants Congress the power to "define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations."[156] At the time of the nation's founding, piracy was still rampant on the high seas and until recent times, United States courts had not prosecuted the crime of piracy since 1885.[157] In an 1820 case, the Supreme Court cited to an act of Congress which expanded the legislative powers to punish piracy: "if any person or persons whatsoever, shall, upon the high seas, commit the crime of piracy, as defined by the law of nations, and such

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[154] *Id*. at 141 (Also, evidence exists that pirates share ransom funds with al-Shabab in exchange for protection.)

[155] *Id*. ("In April 2008, a jihad website pointed out that maritime terrorism is a strategic necessary." Also, some security experts fear they will begin to employ Somali pirates or their strategies to destabilize the international economy.)

[156] U.S. Const., Art. I, § 8, cl. 10 [Electronic copy provided in accompanying USB flash drive at Source 14].

[157] *U.S. v. Hasan*, Crim. No. 2:10cr56, 2010 WL 4281892, at n. 3 (E.D. VA. Oct. 29, 2010) (1885 case was *The Ambrose Light*. Note, a U.S. court in the Philippine Islands dealt with a piracy conviction appeal in 1922) [Electronic copy provided in accompanying USB flash drive at Source 35].

offender or offenders shall be brought into, or found in the United States, every such offender… upon conviction thereof, & be punished with death."[158]

In October 2010, the Eastern District of Virginia court dealt with issues arising from the prosecution of Somali pirate suspects.[159] The court denied the defendants' motion to dismiss pursuant to the statutory definition of piracy and engaged in a lengthy discussion on the legal and historical evolution of piracy in U.S. courts. While the establishment of jurisdiction was not at issue, the decision discussed the doctrine of universal jurisdiction under which, "a state may "define and prescribe punishment for" any offense "recognized by the community of nations" as having "universal concern" even where there is no traditional basis for jurisdiction."[160] The court also examined piracy generally, stating the "paradigmatic universal jurisdiction offense, and one that has been familiar to the international community for centuries, is the offense of general piracy."[161] In short, the court denied the motion to dismiss the charge of piracy because of the

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[158] *U.S. v. Smith*, 18 U.S. 153 (1820) (citing to 18 U.S.C.A. § 481. Court also stated: "A pirate, being hostis humani generis, is of no nation or [s]tate.... All the [s]tates of the world are engaged in a tacit alliance against them. An offense committed by them against any individual nation, is an offense against all. It is punishable in the [c]ourts of all. So, in the present case, the offense committed on board a piratical vessel, by a pirate, against a subject of Denmark, is an offense against the United States, which the [c]ourts of this country are authorized and bound to punish.") [Electronic copy provided in accompanying USB flash drive at Source 37].

[159] *U.S. v. Hasan, supra* note 157 at 1 (In March 2010, on the high seas between Somalia and the Seychelles, the defendants opened fire on and pursued what they thought was a merchant vessel, but was actually the USS Nicholas (a U.S. Navy ship). They were apprehended and in addition to being charged with piracy, the indictment includes various other crimes such as violence, assault with a dangerous weapon and illegal possession of a firearm/explosive device. The defendants sought to dismiss the count one of the indictment, charging them with piracy) [Electronic copy provided in accompanying USB flash drive at Source 35].

[160] *Id*. at 7 ("Universal jurisdiction applies only to those crimes that the international community has universally condemned *and* has also agreed, as a procedural matter, deserve to be made universally cognizable.")

[161] *Id*.

weighty jurisprudential support for the definition and charge under American and international law.[162]

b. The War on Terror and the U.S.

Following 9/11 terrorist attacks on New York City and Washington D.C., the "Global War on Terror" commenced with military operations in Afghanistan. Typically, under International Humanitarian Law, the 1949 Geneva Convention III articulates the standard of care for the overall treatment and detention of prisoners of war.[163] The U.S. counterterrorism strategies raised international concern and debate surrounding the treatment, status of and long-term detention of combatants held in custody at Guantánamo Bay and other detention centers.[164] But the status of detainees was in flux at first, which raised questions as to whether they would be afforded protections guaranteed by the Convention.

The Geneva Convention holds soldiers who mistreat prisoners legally accountable. Further, it defines prisoners of war (POW/s) as anyone who has "fallen into the power of the

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[162] *See also U.S. v. Laden*, 92 F.Supp.2d 189 (2nd Cir. 2000) (Defendants moved to dismiss charges arising from the bombings of the U.S. Embassies in Kenya and Tanzania. Here, the 2nd circuit referred to jurisdiction under the universality principle as the power "to define and prescribe punishment for certain offenses recognized by the community of nations as of universal concern, such as piracy, slave trade, attacks on or hijacking of aircraft, genocide, war crimes, and perhaps certain acts of terrorism, regardless of the locus of their occurrence.") [Electronic copy provided in accompanying USB flash drive at Source 33]. *See also Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004) (Describing the attention of the first congress to the law of nations, including "murder or robbery, or other capital crimes, punishable as piracy if committed on the high seas.") [Electronic copy provided in accompanying USB flash drive at Source 34].

[163] *Id.*

[164] *See generally* Barbara J. Falk, *The Global War on Terror and the Detention Debate: The Applicability of Geneva Convention III*, 3 J. INT'L L. & INT'L REL. 31 (2007) [Electronic copy provided in accompanying USB flash drive at Source 52].

enemy," whether soldier, militia, volunteer corps member or member of an organized resistance, so long as they satisfy conditions set out in Article 4(2).[165] Upon capture, POWs receive significant protection under the Convention:

> [They] can no longer be considered a target and receive full combat immunity…[they] must at all times be humanely treated and cannot be denied medical treatment. At the beginning of captivity, a POW is required to provide only her or his name, rank, date of birth and army, regimental, personal or serial number, or equivalent information... Significantly, no physical or mental torture, nor any other form of coercion, may be inflicted on prisoners of war to secure from them information of any kind whatever. They cannot be held in danger in a combat zone… cannot be used as human shields…and must be quartered under the same, or as favourable, conditions as forces of the detaining power who are in the same area.[166]

Following a November 2001 military order concerning the "Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism," tension escalated between members of the Bush Administration's cabinet as to whether or not Afghanistan Taliban detainees were POWs and therefore afforded the protections of the Geneva Convention.[167] In February 2002, President Bush ended the debate in a memorandum, stating "that none of the provisions of Geneva apply to our conflict with al Qaeda in Afghanistan and, while reserving the right under the Constitution to

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[165] *Id*. (There are four conditions for prisoners under 4(2): "(a) that of being commanded by a person responsible for his subordinates; (b) that of having a fixed distinctive sign recognizable at a distance; (c) that of carrying arms openly; (d) that of conducting their operations in accordance with the laws and customs of war." Furthermore, the convention states that if there be any doubt as to the status of the individual and satisfying the four conditions, "such persons shall enjoy the protection of the present convention until such time as their status has been determined by a competent tribunal.") [Electronic copy provided in accompanying USB flash drive at Source 52].

[166] *Id*. at 33-34.

[167] *See Id*. at 36-41 (Discusses Gonzales (former White House Counsel) and Bybee (former Assistant Attn'y General) memos which argued for the U.S.'s non application of the Geneva Convention to Taliban detainees, as well as Ashcroft's (former Attn'y General) support for such. Also discusses responsive memos from Powell (former Secretary of State) and Taft (former Legal Advisor to State Dept.) who advocated for the application of the Geneva Convention).

suspend Geneva in the conflict between the U.S. and Afghanistan, declined to do so."[168] Furthermore, Bush uniformly determined that Taliban and al Qaeda detainees were to be considered "unlawful combatants" not eligible for Geneva or POW protection.[169]

This position by the Bush Administration allowed for POWs to be tried by military commissions, permitted loose restrictions surrounding "effective" interrogations and removed the required release of detainees upon cessation of the conflict.[170] Additionally, the Administration authorized coercive interrogative techniques that closely resembled torture.[171] In the years that followed, national and international concerns were raised about the detainment of "enemy combatants" at Guantánamo detention facility pertaining to both the treatment of detainees and as to the fairness of proceedings before the ongoing military commissions.[172]

In 2006, these practices suffered a significant blow by the U.S. Supreme Court in *Hamdan v. Rumsfeld*, where the military commissions were struck down as illegal for not complying with the minimum international legal standards proscribed in both the Geneva

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[168] *Id*. at 41.

[169] *Id*. (Bush memo also states that as "a matter of *policy*, the United States Armed Forces shall continue to treat detainees humanely and, to the extent appropriate and consistent with military necessity, in a manner consistent with the principles of Geneva.")

[170] *Id.* at 44.

[171] *See* Ved P. Nanda, *Introductory Essay: International Law Implications of the United States' "War on Terror,"* 37 DENV. J. INT'L L. & POL'Y 513, 522 (2009) (Furthermore, "International Committee of the Red Cross issued a report on the treatment of the "high-value" detainees held by the CIA, concluding that in many cases the detainees had been tortured.") [Electronic copy provided in accompanying USB flash drive at Source 58].

[172] *Id*. at 516.

Convention and the Uniform Code of Military Justice.[173] By doing so, the Court extended Geneva protections over al Qaeda, a non signatory, stating that those captured in connection with the war on terror were "entitled to protection of article of Geneva Conventions prohibiting 'the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples.'"[174] These protections included those afforded under Common Article 3 of the Geneva Convention, "including the right of the accused to be present at trial and to have access to evidence of guilt."[175]

In January 2009, shortly after being sworn into office, President Obama issued an Executive Order closing the Guantánamo detention facility within a year and requiring a timely review of each detainee.[176] Forcefully reinstating the United States' compliance with international human rights standards, the Order also stated that relevant laws and treaties apply to the treatment of detainees, including the Convention Against Torture and the Geneva Convention. President Obama stated that "US detention policies must embody "clear, defensible, and lawful standards" in line with the rule of law, with fair procedures and a thorough process of

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[173] *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006) (Background: Hamdan was formerly Osama bin Laden's chauffeur and was captured by Afghani forces and imprisoned by the U.S. military in Guantanamo Bay. A military commission had designated him as an enemy combatant. Also, note that the Court understood the Geneva Convention as including the barest trial protections and principles under international customary law. "The procedures adopted to try Hamdan deviate from those governing courts-martial in ways not justified by practical need, and thus fail to afford the requisite guarantees.") [Electronic copy provided in accompanying USB flash drive at Source 38].

[174] *Id*.

[175] *See generally* Nanda, *supra* note 171 at 525 [Electronic copy provided in accompanying USB flash drive at Source 58].

[176] *Id*. at 516.

periodic review to carefully evaluate and justify any prolonged detention… [suggesting] that there will be adequate safeguards [preventing a] detainees' treatment [from] an arbitrary decision process."[177]

Some reports note that during the period under the Bush administration that the U.S. derogated from international human rights standards, such as the Geneva Convention and the Convention Against Torture, it not only prevented the fair administration of justice but also "damaged our ability to collect accurate intelligence that could save lives, strengthened the hand of our enemies compromised our moral authority."[178] The U.S. has struggled with the international application of law for detainees from the War on Terror and has suffered tremendous grief from the international legal community for their failure to guarantee adequate treatment and fair access to justice. In light of these concerns and the intensive reparative steps that continue to be made in order to address the failed U.S. policies that did not adhere to international standards, it is in Kenya's best interest to adhere to international human rights standards when dealing with detained piracy suspects both at sea, while awaiting trial and during trial proceedings.

c. Other African States Grappling with International Standards

Recent jurisprudence from other African nation states can also serve as examples when examining the successful implementation of international legal standards. Particularly, recent decisions from the courts of South Africa, Malawi and Uganda and help support the notion that Kenya's efforts to adhere to international standards reflects a regional acceptance of internationalized legal standards.

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[177] *Id*. at 520.

[178] *Id*. at 518.

In South Africa, following the conviction of two child rapists under the Sexual Offenses Act, the high court consolidated the two cases at sentencing to deal with whether provisions in the Criminal Procedure Act protecting child complainant/victims by permitting testimony via camera, via an intermediary, testimony without oath are in violation of a defendant's constitutional rights.[179] The court decided that the provisions were not a violation of the constitution, which states: "A child's best interests are of paramount importance in every matter concerning the child."[180] During the court's analysis, it referred to international and regional instruments and the South African Constitutional provisions that require international "always be" considered when interpreting the Bill of Rights or any legislation.[181]

In a separate case, *Kaunda and Others v. President of the Rep. of S. Afr.*, roughly 69 South African citizens – detained in Zimbabwe, held on charges of being mercenaries in a planned coup against the government of Equatorial Guinea - sought extradition to South Africa because they were suffering ill treatment, wanted to obtain a fair trial and to avoid death penalty sentencing.[182] The court held that South Africa had no obligation to apply for the extradition and that they had satisfactorily addressed the prisoners poor treatment in accordance with

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[179] *Dir. of Pub. Prosecutions, Transvaal v. Minister for Justice and Constitutional Dev. and Others* 2009 (4) SA 222 (CC) (S. Afr.) [Electronic copy provided in accompanying USB flash drive at Source 39]. *See also Maneli v. Maneli* 2010 (7) BCLR 703 (GSJ) (S. Afr.) [Electronic copy provided in accompanying USB flash drive at Source 40].

[180] *Id*.

[181] *Id*. (These instruments include the United Nations Convention on the Rights of the Child and the African Charter on the Rights and the Welfare of the Child.)

[182] *Kaunda and Others v. President of the Rep. of S. Afr.* 2005 (4) SA 235 (CC) (S. Afr.) [Electronic copy provided in accompanying USB flash drive at Source 41].

international legal standards by the South African High Commission.[183] In coming to such a conclusion, the court turned to a variety of international sources for guidance.

In the court referenced Section 233 of the South African constitution, which states “when interpreting any legislation, every court must prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law.”[184] There was also significant discussion about the international abolitionist movement and the firm recognition of the legal permissibility of capital punishment in both Zimbabwe and Equatorial Guinea. The court asserted that the “right to diplomatic protection is not referred to in the Universal Declaration of Human Rights, nor is it a right contained in any international agreement of which I am aware, including the international human rights treaties to which South Africa is a party, such as the African Charter on Human and Peoples Rights13 or the International Covenant on Civil and Political Rights.”[185]

Also, in a criminal case in Malawi, the High Court sought to examine the case of police officers charged with manslaughter for the use of force or firearms.[186] In the decision, the court relied upon arguments made by the Malawi Human Rights Committee, who stated that every human being has the “right to life, dignity, personal liberty and freedom and security of the person,” all of which are rights established under the constitution, the African Charter of Human and People’s Rights, the International Covenant on Civil and Political Rights, and the Universal

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[183] *Id*.

[184] *Id*.

[185] *Id*.

[186] *Republic v. R Cheuka & Others* (Crim. Case No. 73 of 2008) [2009] MWHC 49 (Malawi) [Electronic copy provided in accompanying USB flash drive at Source 42].

Declaration of Human Rights.[187] In addition to examining Malawi's Police Act which governs the use of firearms, the court also stated that the "leading instrument…would be the United Nations Basic Principles on the use of Force and Firearms by Law Enforcement Officials.[188] The use of international instruments helped to guide the court's decision.

In 2008, a Malawi High Court considered a criminal case involving two defendants, charged with treason and conspiracy to commit murder, which required the court to deal with the procedural trial rights of the arrested suspects.[189] Certain limitations were placed on the public's access to the trial and the defendant's argued that it violated the right to a fair trial. The court sought to analyze whether the state made an adequate case to warrant the defendants' deprival of a public trial. In addition to using domestic law in its analysis, the court also employed Article 14 of the ICCPR, which states, "all persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law."[190]

Additionally, in 2009, the Ugandan Supreme Court employed the ICCPR, discussing the constitutionality of the death penalty and the assertion by some that it was an exercise of cruel, inhuman and degrading treatment and punishment.[191] The court engaged in a dialogue on the

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[187] *Id*.

[188] *Id*.

[189] *Right Hon. Dr. Cassim Chilumpha SC v. Matumula*, (Crim. Case No. 13 of 2006) [2008] MWHC 6 (Malawi) [Electronic copy provided in accompanying USB flash drive at Source 43].

[190] *Id*.

[191] *Att'y Gen. v. Susan Kigula & 417 Others* (Constitutional Appeal No. 03 of 2006) [2009] UGSC 6 (Uganda) [Electronic copy provided in accompanying USB flash drive at Source 44].

history of the death penalty and international instruments that help to combat the arbitrary imposition of such a penalty, including the Universal Declaration of Human Rights, which states everyone has the right to life, liberty and security of person.[192] Other instruments included: the ICCPR's provisions on the right to life protected by law; the Optional Protocol to the Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment; and the African Charter on Human and Peoples Rights.[193] In assuming the continued application of the death penalty, the court concluded that the methods by which executions are carried out in Uganda, should the death penalty remain, should be guided by appropriate parliamentary measures.[194]

Furthermore, Uganda has recently created a Special War Crimes Division under the High Court of Uganda, where they will exercise jurisdiction over Ugandan war criminals, rebels from the Lord's Resistance Army.[195] The court will be implementing domestic laws, such as the penal code, as well as international standards such as the Geneva Conventions Act of 1964.[196] Also, the special court has abolished the use of the death penalty for their cases in order to adhere to

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[192] *Id*.

[193] *Id*.

[194] *Id*.

[195] High Court Divisions: The Special War Crimes Division of the High Court of Uganda, The Judiciary of the Republic of Kenya, available at: http://www.judicature.go.ug/index.php?option =com_content&task=view&id=117&Itemid=154 [Electronic copy provided in accompanying USB flash drive at Source 85].

[196] *Id*.

international standards.[197] These cases help to illustrate that international legal standards are being incorporated to some extent in the jurisprudence of neighboring African states.

VII. POLICY CONSIDERATIONS, RECOMMENDATIONS & CONCLUSIONS

Solving the issue of maritime piracy off the coast of Somali will require a comprehensive approach that addresses Somalia's instability and impoverished state that helped to create conditions where piracy thrives. This includes the successful prosecution and punishment of Somali pirates apprehended and tried by the Kenyan courts and any other efforts to adjudicate these crimes, which will require the pledged assistance of the international community.

The universal adherence to international legal standards should be the priority for the Kenyan courts. As discussed, such efforts would not contradict Kenyan law and would further legitimize the efforts to combat piracy on a global scale. Furthermore, given the transitory nature of the Kenyan legal system, the Kenyan courts should consider the articulation of a uniform policy that will apply to all maritime piracy suspects being tried after transference from a third party. Noting Kenya's limited resources and overburdened criminal justice system, abandoning the prosecution of pirates should not be an option given the investment already made by Kenya and foreign sources to date.[198] Although Kenya has declined to accept any more piracy suspects from any forces other than Kenyan as of 2009, the emphasis should be put on what Kenya needs

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[197] Frank Nyakairu, *Uganda Sets Up War Crimes Tribunal for Rebels*, Reuters, May 27, 2008 [Electronic copy provided in accompanying USB flash drive at Source 86].

[198] *See Kenya Opens Fast-Track Piracy Court in Mombasa*, BBC, June 24, 2010 (The 2010 opening of the Shimo la Tewa courtroom and neighboring facilities have been supported by roughly $5 million from several donors, including UNODC, the EU, Australia and Canada) [Electronic copy provided in accompanying USB flash drive at Source 77].

to successfully carry out the prosecution and imprisonment of piracy.[199] This includes available attorneys sufficiently trained for such matters, financial resources, logistical support and resources relating to the imprisonment of the prisoners post prosecution.

When anticipating criticisms on the global scale, it is crucial that Kenya complies with international standards pertaining to the due process rights of the suspected and convicted pirates in order to reinforce the power of legal mechanisms over the pervasive "lawlessness" perpetuated by piracy. On the same note, the Kenyan courts should strive for the articulation of clear procedural parameters guiding the arrest, detainment and trial of suspected pirates. Establishing and sustaining a prevailing international legal order will help serve as a deterrent and will help stabilize the international shipping market and global economy impacted by piracy. And, in order for the Kenyan piracy trials to be renowned at an international level, the domestic procedural issues will need to be overcome so that the execution of justice can be internationally legitimized. With this in mind, international legal standards demand fair standards, not perfect ones, and under Kenyan domestic law and in light of the limitations faced by the burdened justice system, for the most part Kenya has been in compliance and sought to remedy when the situation strays from fairness.

In conclusion, Kenya has jurisdiction to prosecute pirates under both domestic and international law, especially when used concurrently. Also, recent developments under Kenyan law demonstrate a natural progression towards a monist approach of international legal standards and a generalized incorporation of international legal standards. In recent history, other domestic courts have successfully incorporated international criminal legal norms, further supporting Kenya's interest in embracing "internationalized" operational standards for the detainment,

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[199] Gathii, *supra* note 71, at 128 [Electronic copy provided in accompanying USB flash drive at Source 62].

prosecution and imprisonment of piracy suspects. The piracy trials of Kenya would benefit greatly from the articulation of standard procedure and applicable laws governing proceedings, leaving little room for international speculation. The higher standards of operation Kenyan courts adhere to for the piracy trials, the stronger the perception of international legitimacy will be.