2010

Kenya's Piracy Prosecutions

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*By James Thuo Gathii**

Kenya became a primary destination for the prosecution of pirates captured off the coast of Somalia from late 2008 to late 2009.[1] Yet none of the pirates being tried in Kenya as of April 2010 were captured by Kenyan armed forces[2] but, rather, by non-Kenyan forces whose countries had signed agreements with Kenya for it to conduct such trials. In Resolution 1851 of December 16, 2008, the United Nations Security Council had urged states and regional organizations to enter into such agreements.[3] Kenya accordingly concluded agreements on prosecuting suspected pirates with the United Kingdom,[4] the United States,[5] the European Union,[6] and Denmark.[7] According to media reports, and as Kenya recently acknowledged, two others were negotiated, with China and Canada.[8] Only the EU-Kenya agreement has been

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[1] Jeffrey Gettleman, *Rounding up Suspects, the West Turns to Kenya as Piracy Criminal Court*, N.Y. TIMES, Apr. 24, 2009, at A8.

[2] *See* Celestine Achieng, *Kenya Imprisons Seven Somalis for Piracy*, REUTERS, Mar. 10, 2010, *available in* LEXIS, News Library, Individual Publications File (reporting that "[i]nternational navies trying to counter piracy off Somalia are often reluctant to take suspects to their own countries because they either lack the jurisdiction to put them on trial there, or they fear the pirates may seek asylum").

[3] UN Security Council Resolution 1851 invited "States and regional organizations fighting piracy off the coast of Somalia to conclude special agreements or arrangements with countries willing to take custody of" and prosecute pirates. SC Res. 1851, para. 3 (Dec. 16, 2008).

[4] Catherine Philp & Rob Crilly, *Allies Seek Power to Pursue Somali Pirates on Land and Sea*, TIMES (London), Dec. 12, 2008, at 54; Agence France-Presse, *Britain and Kenya Sign MOU on Piracy*, KENYA BROADCASTING CORP., Dec. 11, 2008, *at* http://www.kbc.co.ke/story.asp?ID=54429. The memorandum was signed on December 11, 2008, by Foreign Affairs Minister Moses Wetangula of Kenya and Security Minister Lord West of the United Kingdom. It formalized an ad hoc arrangement that the Kenyan government had entered into with the British in November 2008, which led to the prosecution of eight pirate suspects arrested by the British while they were allegedly trying to hijack a Danish cargo ship.

[5] U.S. Dep't of State, Fact Sheet: United States Actions to Counter Piracy off the Horn of Africa (Sept. 1, 2009), *at* http://www.state.gov/t/pm/rls/fs/128540.htm; David Morgan, *Kenya Agrees to Prosecute US-Held Pirates—Pentagon*, REUTERS, Jan. 29, 2009, *available in* LEXIS, News Library, Individual Publications File (Memorandum of Understanding, Jan. 16, 2009).

[6] 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, *reprinted in* 48 ILM 751 (2009) [hereinafter EU-Kenya Exchange of Letters].

[7] *Kenya Imposes Conditions on Acceptance of Captured Somali Pirates*, BBC, Mar. 31, 2010, *available in* LEXIS, News Library, Most Recent Two Years File [hereinafter *Kenya Imposes Conditions*]; *Danish Navy Forges Deal with Kenya over Somali Piracy*, ICE NEWS—DAILY NEWS, Aug. 27, 2009, *at* http://www.icenews.is/index.php/2009/08/27/danish-navy-forges-deal-with-kenya-over-somali-piracy.

[8] *Kenya Imposes Conditions, supra* note 7.

published. The British foreign secretary told the House of Commons that Kenya did not want its agreement with the United Kingdom to be made public.[9] Consequently, it may well be that a Kenyan preference for secrecy prevented the public release of information on the other agreements signed by Kenya.

In the wake of Kenya's agreement to prosecute pirates captured by the United States and the European Union, at least ten cases against seventy-six suspected pirates had been brought in the Mombasa law courts as of August 31, 2009.[10] These cases were referred to the magistrates' courts, Kenya's courts of first instance.[11] Jurisdiction to prosecute piracy under Kenya's Criminal Procedure Code is granted to chief magistrates, principal magistrates, and senior resident magistrates.[12]

In the first-ever piracy trial in Kenya, *Republic v. Hassan Mohamud Ahmed*, decided in 2006,[13] ten Somali suspects originally captured by the U.S. Navy were convicted of the crime of piracy and are serving a sentence of seven years. The Kenyan High Court subsequently rejected their appeal.[14] That appellate decision produced a binding precedent, finding that under international law Kenyan magistrates' courts have jurisdiction to proceed with piracy prosecutions against non-nationals captured outside the country.

In the following discussion of the Kenyan piracy trials, I first examine how international law has been applied in Kenyan courts as a backdrop to its emerging application in the piracy context. In part II, I describe how Kenyan courts applied international law in the *Ahmed* case and briefly note how a new Kenyan statute may cure some of the limitations in the current case law on the availability of jurisdiction to prosecute pirates under Kenyan law. Finally, I consider the propriety and fairness of the current trials in light of the protections of criminal defendants under Kenyan law, as well as under the protections of suspects outlined in the EU-Kenya Memorandum of Understanding.

I. INTERNATIONAL LAW IN KENYAN COURTS

The ongoing piracy trials demonstrate that Kenyan courts are readier today than previously to resort to international law derived from custom and from ratified, but undomesticated treaties as sources of law for domestic application. To that extent, dualism's hold on Kenyan courts

[9] Kenya: Piracy, Hansard, UK House of Commons Written Answers, pt. 0010, col. 921W (May 14, 2009), *available at* http://www.publications.parliament.uk/.

[10] These numbers are based on a perusal of the court files in Mombasa. In early September 2009, Vice President Kalonzo Musyoka told the press that there were one hundred piracy suspects on trial in Kenya. Anthony Kitimo, *Kenya: Piracy Suspects Appeal to VP Kalonzo*, DAILY NATION, Sept. 4, 2009, *at* http://www.allafrica.com/stories/printable/200909040838.html; *see also Kenya Imposes Conditions, supra* note 7 (placing the figure at over a hundred).

[11] Appeals from magistrates' courts go to the High Court and appeals from the High Court to the Court of Appeal, the highest court in Kenya's judicial system. Magistrates' courts are staffed by magistrates ranked by the magnitude of their jurisdiction in the following order descending from the top: chief magistrate, senior principal magistrate, principal magistrate, senior resident magistrate, resident magistrate, and district magistrate. The piracy cases are being tried by chief magistrates.

[12] Criminal Procedure Act (1987), Cap. 75, 1st sched., §69. Current Kenyan laws and cases cited below are available online at http://www.kenyalaw.org/update/, unless otherwise noted.

[13] Republic v. Hassan Mohamud Ahmed, Crim. No. 434 of 2006 (Chief Magis. Ct. Nov. 1, 2006) (Jaden, Acting Sr. Principal Mag.) (on file with author).

[14] Hassan M. Ahmed v. Republic, Crim. App. Nos. 198, 199, 201, 203, 204, 205, 206, & 207 of 2008 (High Ct. May 12, 2009) (Azangalala, J.).

now appears attenuated. Until recently, Kenyan courts did not regard international law as part of Kenyan law unless it was specifically incorporated into Kenyan law by Parliament. This was the case with the now-repealed statute that governs the current prosecutions, which expressly incorporated the offense of piracy *jure gentium*.[15] The High Court in the piracy context has definitively provided the most forceful argument in favor of considering norms of customary international law as part of Kenyan law.

Neither the Constitution nor the Judicature Act,[16] which spells out the sources of Kenyan law, makes reference to international law as being such a source. In addition, in Kenyan treaty practice treaties could historically become part of Kenyan law only if they were domesticated through implementing legislation.[17]

Kenyan courts also asserted the supremacy of the Constitution over inconsistent treaties. Thus, in the 1970 case *Okunda v. Republic*,[18] the High Court ruled that the Constitution superseded a statute of the East African Community. This decision was affirmed in a Court of Appeal decision emphasizing that the provisions of any treaty in conflict with the Constitution were void.[19]

In the recent past, Kenyan courts have increasingly resorted to international law. Parliament has also increasingly incorporated international law in a variety of statutes. Recent treaty-implementing legislation passed by Parliament includes the Statute of the International Criminal Court, the Treaty Establishing the East African Community, and the Convention on the Rights of the Child.[20]

On their part, Kenyan courts have justified their resort to international law by declaring that "[i]nternational Treaties and Conventions are not to be signed and abandoned."[21] They have

[15] Piracy, PENAL CODE, Cap. 63, §69, Penal Code (Amendment) Act, No. 24 of 1967, §6, Kenya Gazette, Supp. No. 67, Acts No. 11, at 150, 153 (1967), *reprinted in* KENYA LAW REPORTS, THE LAWS OF KENYA, GREY BOOK 43 (rev. ed. 2007) [hereinafter Repealed §69]. Under Kenyan law, the effect on ongoing cases of the repeal of a statute is provided for in §23(3)(e) of the Interpretation and General Provisions Act, Cap. 2 (1983), which states that the repeal of a statute in whole or in part shall not "affect an investigation, legal proceeding or remedy . . . , and any such investigation, legal proceeding or remedy may be instituted, continued or enforced . . . as if the repealing written law had not been made." Notably, under the common law the repeal of penal statutes grants immunity from indictment to those whose prosecutions did not result in a conviction for offenses committed while the repealed statute was in force. *See* Bennett v. Tatton, (1918) 88 L.J.K.B. 313.

[16] Judicature Act, Cap. 8 (1967), provides a hierarchical source of Kenya's law. At the apex is the Constitution, *id.* §3(1)(a); followed, respectively, by laws as passed by Parliament, *id.* §3(1)(b); statutes of general application in force as of August 12, 1897, *id.* §3(1)(c); the common law, *id.*; and customary law norms (that is, African customary, or indigenous, law) to the extent they are not repugnant to notions of justice and morality, *id.* §3(2). African customary laws here refer to cultural and religious norms in family law areas, such as marriage, divorce, and devolution of property on death. *See* Celestine Nyamu, *How Should Human Rights and Development Respond to Cultural Legitimization of Gender Hierarchy in Developing Countries?* 41 HARV. INT'L L.J. 381, 401–07 (2000).

[17] David Mugadu Isabirye, *The Status of Treaties in Kenya*, 20 INDIAN J. INT'L L. 63, 75 (1980) (noting that for "dualists international law is never available to a municipal court as a body of rules to be applied by it in the determination of an issue unless the constitution so provides").

[18] Okunda v. Republic, [1970] E. Afr. L.R. 453.

[19] E. Afr. Cmty. v. Republic, [1970] E. Afr. L.R. 457.

[20] International Crimes Act, Cap. 16 (2008), KENYA GAZETTE, Supp. No. 100 (2008); Treaty for the Establishment of the East African Community Act, Cap. 2 (2000); Children Act, Cap. 8 (2001).

[21] *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 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.

also held that litigants can rely on treaty-created rights that were ratified without reservations even where the treaty has not been domesticated by Parliament.[22] In addition, as will be seen in part II, Kenyan courts have gone even further by embracing universal jurisdiction over piracy as a norm of international law.

Kenyan courts' assumption of jurisdiction over non-Kenyan pirates captured on the high seas by foreign forces may be seen in light of this new trend regarding international law. This trend may have laid the foundation for Kenyan courts to invoke customary international law to justify their assumption of such jurisdiction. In *R.M. v. Attorney General*, the High Court, citing the Bangalore Principles,[23] held that where a treaty has been ratified but not domesticated through implementing legislation, a court may take it into account "in seeking to interpret ambiguous provisions in . . . municipal law."[24] The court also quoted a House of Lords case to buttress its argument that "Parliament does not intend to act in breach of international law, including, specific treaty obligations."[25] This principle is referred to as the *Charming Betsy* doctrine in the United States and holds that an "act of Congress ought never to be construed to violate the law of nations if any other possible construction remains."[26] Even though in *R.M. v. Attorney General* the Kenyan High Court invoked the principle of conforming a domestic statute to international law by virtue of the Children Act's having been passed to implement the Convention on the Rights of the Child, it nonetheless declined to give relief since there was no ambiguity in the Act that could be resolved on the basis of rights declared in the Convention.[27]

The court also noted that Parliament was under "no obligation to adopt, line hook and sinker," all the provisions of the Convention on the Rights of the Child because in construing

[22] One court in this context borrowed from the Bangalore Principles, *infra*, and summarized this principle in the following terms: "It is only where an Act intended to bring a Treaty into effect is itself ambiguous or one interpretation is compatible with the term of the treaty while others are not that the former will be adopted." R.M. [Rose Moraa] v. Attorney Gen., Civ. No. 1351 of 2002, [2006] eKLR at 27 (High Ct.), [2008] 1 KLR (G&F) 574. The Bangalore Principles were formulated at a high-level judicial colloquium on the domestic application of international human rights norms, held from February 24 to 26, 1988, and organized by the Commonwealth Secretariat and convened by P. N. Bhagwati, the former chief justice of India. The principles represent Justice Bhagwati's summary of the discussions. Bangalore Principles on the Domestic Application of International Human Rights Norms, *reprinted in* 3 DEVELOPING HUMAN RIGHTS JURISPRUDENCE 151 (1991) [hereinafter Bangalore Principles].

[23] Principle 7 of the Bangalore Principles, *supra* note 22, states: "It is within the proper nature of the judicial process and well-established judicial functions for national courts to have regard to international obligations which a country undertakes—whether or not they have been incorporated into domestic law—for the purpose of removing ambiguity or uncertainty from national constitutions, legislation or common law."

[24] R.M. v. Attorney Gen., [2006] eKLR at 27–28 (quoting R v. Chief Immigration Officer, Heathrow Airport, *ex parte* Bibi, [1976] 3 All E.R. 843 (C.A.)).

[25] *Id.* at 27 (quoting Solomon v. Comm'r of Customs, [1967] 2 Q.B. 116, 143 (H.L.), and also noting that this is a "presumption in our law that legislation is to be construed to avoid a conflict with international law").

[26] Murray v. Schooner Charming Betsy, 6 U.S. (2 Cranch) 64, 118 (1804), which has been relied on in other cases such as Fundicao Tupy S.A. v. United States, 11 C.I.T. 23, 29 (1987), to the effect that absent express congressional intent, statutes should not be interpreted to conflict with international obligations. For an analysis of this and related matters, see also James Gathii, *Foreign Precedents in the Federal Judiciary: The Case of the World Trade Organization's DSB Decisions*, 34 GA. J. INT'L & COMP. L. 1, 14–19 (2005).

[27] R.M. v. Attorney Gen., [2006] eKLR at 30. The applicant in the case had argued that §24(3) of the Act, which initially assigns parental responsibility to the mother, to the exclusion of the father in situations mentioned in that section (relating to what is termed "illegitimacy"), was not discriminatory, as it was based on a legitimate purpose. *Id.* at 31.

the Constitution, it enjoyed a "margin of appreciation."[28] Within this margin, the court held, the "living tree principle of the interpretation of the Constitution" enabled it to adopt a broad view in case of "ambiguity, inconsistencies, unreasonableness, lack of legislative purpose or obvious imbalance or lack of proportionality or absurd situations."[29]

The Court of Appeal affirmed this approach to interpretation in *Rono v. Rono*.[30] In reversing a discriminatory order on the distribution of an intestate estate between girls and boys, the Court noted that "[a]s a member of the international community, Kenya subscribes to international customary laws and has ratified various international covenants and treaties."[31] According to the Court, "current thinking on the common law theory is that both international customary and treaty law can be applied by state courts where there is no conflict with existing state law, even in the absence of implementing legislation."[32] The Court of Appeal referred to the following instruments as relevant to its decision in this case, although Parliament had not passed implementing legislation for any of them: the Universal Declaration of Human Rights; the International Covenant on Civil and Political Rights; the International Covenant on Economic, Social and Cultural Rights; and the Convention on the Elimination of All Forms of Discrimination Against Women; as well as the African Charter on Human and Peoples' Rights. Grounding itself on this body of international law, the Court concluded that Kenya was in "tandem with emerging global culture, particularly on gender issues,"[33] and, therefore, that in resolving the central question of discrimination in the case, the Court could not rely on domestic law alone but would also take into consideration "the relevant international laws which Kenya has ratified."[34] Thus, ratification without the passage of implementing legislation or domestication was sufficient for a court to have regard to the norms contained in the ratified treaty. Because Kenya has ratified the United Nations Convention on the Law of the Sea[35] (LOS Convention) without domesticating it through implementing legislation, these precedents are relevant to whether Kenyan courts can resort to that Convention as an available source of law, a question that figures in the piracy cases discussed below.

These judicial decisions evidence a decisive break from the strict dualism of the 1970 decision in *Okunda v. Republic*.[36] While not cited in the first-ever piracy judgment on appeal in the High Court,[37] these decisions are consistent with the invocation of customary international law to justify the jurisdiction of Kenyan courts over non-national pirates captured on the high seas by foreign forces. It is in that context, I believe, that such resort to customary international law should be seen.

[28] *Id.* at 34.

[29] *Id.*

[30] Rono v. Rono, Civ. App. No. 66 of 2002, [2005] eKLR, [2008] 1 KLR (G&F) 803, *rev'g* Eldoret High Ct. Probate & Admin. Cause No. 40 of 1988 (High Ct. June 12, 1997).

[31] *Id.* at 10.

[32] *Id.* at 11.

[33] *Id.*

[34] *Id.* at 12.

[35] United Nations Convention on the Law of the Sea, *opened for signature* Dec. 10, 1982, 1833 UNTS 397, *available at* http://www.un.org/Depts/los/index.htm [hereinafter LOS Convention].

[36] Okunda v. Republic, [1970] E. Afr. L.R. 453 (High Ct.).

[37] Republic v. Hassan Mohamud Ahmed, *supra* note 13.

II. JUDICIAL INCORPORATION OF THE INTERNATIONAL LAW OF PIRACY INTO KENYAN LAW

Article 101 of the LOS Convention limits the definition of piracy to the high seas or a place outside the jurisdiction of any state. That article and the other piracy provisions are found in Part VII of the LOS Convention. Pursuant to Article 86, the provisions of Part VII apply seaward of the exclusive economic zone; pursuant to Article 58(2), most of these provisions, including those concerning piracy, also apply within the exclusive economic zone. The piracy provisions do not apply to waters landward of the exclusive economic zone, notably internal waters, archipelagic waters, and the territorial sea.

Under the provisions in effect from 1967 until September 1, 2009, Kenya's Penal Code criminalized piracy, both in Kenya's territorial waters and on the high seas.[38] Piracy is often understood at international law as a crime committed on the high seas rather than in territorial waters or ports.[39] Thus, the definition of piracy under the repealed provisions of the Kenyan Penal Code was broader than the definition under international law since it included the crime within Kenya's territorial waters. The Kenyan statute provided in the relevant part that "[a]ny person who, in territorial waters or upon the high seas, commits any act of piracy *jure gentium* is guilty of the offence of piracy."[40] The maximum penalty for those found guilty of this offense was life imprisonment.[41] As will be discussed below, the repealed piracy provisions of the Penal Code were replaced by more elaborate piracy provisions in Kenya's 2009 Merchant Shipping Act.

The first piracy trial in Kenya pursuant to the repealed provisions of section 69 of the Penal Code, *Republic v. Hassan Mohamud Ahmed*,[42] concerned ten Somali nationals handed over to Kenyan authorities by the United States after they were captured "approximately 200 miles

[38] The repealed provisions on piracy in the Kenyan Penal Code provided:

> (1) 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.
>
> (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.

Repealed §69, *supra* note 15. Section 69 was repealed by the Merchant Shipping Act of 2009, *infra* note 89.

[39] *See* M. Cherif Bassiouni, *Universal Jurisdiction for International Crimes: Historical Perspectives and Contemporary Practice*, 42 VA. J. INT'L L. 81, 136–51 (2001) (arguing that universal jurisdiction over piracy is firmly established under international law and that it developed in part in the national laws and practices of major seafaring nations). Notably, Article 86 of the LOS Convention, *supra* note 35, excludes exclusive economic zones, territorial seas, and internal waters of a state from the applicability of Part VII of the Convention. Article 58(2) applies the provisions relating to piracy to the exclusive economic zone. Attacks within territorial waters are referred to as armed robbery against ships. *See* International Maritime Organization [IMO], Code of Practice for the Investigation of Crimes of Piracy and Armed Robbery Against Ships, para. 2.2, Res. A.1025(26), annex (Dec. 2, 2009), IMO Doc. A 26/Res.1025 (Jan. 18, 2010).

[40] Repealed §69, *supra* note 15, para. 1.

[41] *Id.*, para. 3.

[42] Republic v. Hassan Mohamud Ahmed, *supra* note 13.

from the Somali coast" by the guided-missile destroyer USS *Winston S. Churchill.*[43] 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. They allegedly held its crew captive for two days, during which time they assaulted the prisoners. They were intercepted by the *Churchill*, which had received distress calls from another vessel attacked by the suspects.

The court took into account evidence that when they were intercepted, the accused were armed with revolvers, rocket-propelled grenade launchers, and AK-47 assault rifles, and a ladder that they allegedly used to climb onto the *Al Bisarat.*[44] The court found that the accused had used the *Al Bisarat* to launch attacks on other vessels.[45] 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.* The court rejected this defense and the claim by one of the ten that he was a child.[46] On the basis of the evidence supplied by the Indian crew members and the U.S. naval personnel who rescued them, the Somali pirates were convicted and sentenced to seven years' imprisonment each on November 1, 2006.[47]

Most significant, the court was not persuaded by the defense argument that a Kenyan court did not have jurisdiction over non-Kenyan nationals captured on the high seas for offenses committed outside Kenya. The piracy suspects had argued before Mombasa acting senior principal magistrate B. T. Jaden that although piracy is defined as an offense under the LOS Convention, no Kenyan court had jurisdiction because the Convention had not been domesticated through implementing legislation.[48] On behalf of the pirates, it was also argued that the offense of piracy, as provided for under the Kenyan Penal Code, did not conform with international maritime law. In addition, the accused persons argued that magistrates' courts in Kenya did not have admiralty jurisdiction since that jurisdiction was exclusively vested in the High Court.[49]

With regard to the claim that only the High Court was vested with jurisdiction over maritime offenses, the court held that since the first schedule of the Criminal Procedure Code provided that a magistrates' court could try the offense of piracy, it had been properly seized of jurisdiction.[50] In response to the argument that Kenyan courts had no jurisdiction over piracy, the court noted that the defense had failed to demonstrate how the codification of customary international law under the LOS Convention negated the provisions of section 69 of the Penal Code, which provided for the offense of piracy *jure gentium.* Rather, the court understood the

[43] *See Capture of Suspected Somali Pirates*, US FED NEWS, Feb. 2, 2006, *available in* LEXIS, News Library, Wire Service Stories File.

[44] Republic v. Hassan Mohamud Ahmed, *supra* note 13, at 147–48, 153.

[45] *Id.* at 153. Notably, the accused persons decided to give unsworn statements when they put on their defense. Under Kenyan law, unsworn statements given in defense are not subject to cross-examination. The magistrate found the unsworn statements "not convincing in view of the overwhelming evidence from the prosecution witnesses." *Id.* at 152.

[46] *Id.* at 152, 156–57.

[47] *Id.* at 157.

[48] *Id.* at 153–54.

[49] *Id.* at 154.

[50] *Id.* The Criminal Procedure Code, *supra* note 12, schedule 1, specifies which courts have jurisdiction over particular offenses.

Convention as "amplif[ying] what is already provided for" under the Penal Code regarding piracy.[51] The court recalled that section 69(1) of the Penal Code referred to both territorial waters and the high seas, and that under section 2 of the Penal Code, a person could be tried and punished under any law in force in Kenya relating to the jurisdiction of the courts of Kenya for an offense committed beyond the Kenyan courts' ordinary jurisdiction. Principal Magistrate Jaden "therefore agree[d] with the prosecution that any act of piracy *jure gentium* is a crime against mankind which lies beyond the protection of any State."[52] Moreover, "[i]t is a crime with international dimensions."[53] Describing piratical acts as including violence, detention, and the causing of harm or damage, the court invoked the definition of piracy under Article 101 of the LOS Convention for the proposition that the offense consists of those acts.[54]

From this decision, an appeal was filed to the High Court contesting the jurisdiction of the Principal Magistrate's Court over the accused on the grounds that they were non-Kenyans and that the acts of piracy they had been convicted of had been committed outside Kenya.[55] Just as in the trial below, the government argued that it did not matter where the crimes had been committed or who had committed them since, as the lower court had held, piracy was "a crime against mankind which lies beyond the protection of any state."[56] By this, the court was perhaps adverting to the claim that pirates and pirate ships forfeit the protection of the flag state, and any boarding, or arresting or prosecution of pirates would not breach the exclusive jurisdiction of that state.[57] The High Court, in upholding the court below, noted that section 69(1) of the Penal Code, which provides that "any person" on the "high seas" may be found guilty of the offense of piracy, was broad enough to cover the prosecution of non-national suspects captured 300 kilometers off the Somali coast in international waters.[58] The court buttressed its holding by referring to another statute, the Kenyan Criminal Procedure Code. Echoing the lower court, the High Court observed that the first schedule of that statute grants jurisdiction to try such cases to the Kenyan magistrates' courts.[59] For this reason, as well as under relevant provisions of international law, the High Court concluded that the ground of appeal based "on want of jurisdiction must fail."[60]

[51] Republic v. Hassan Mohamud Ahmed, *supra* note 13, at 154.

[52] *Id.* at 155. The prosecution had argued that "there is universal jurisdiction irrespective of where the crime occurs or the nationality of the person committing it. That it's a crime against mankind which lies beyond the protection of any state." *Id.* at 154.

[53] *Id.* at 155.

[54] *Id.*

[55] Hassan M. Ahmed v. Republic, *supra* note 14, at 2. The other grounds of appeal related to alleged inadequacies in the evaluation of and reliance on the evidence presented to the lower court as the basis for convicting the accused, dismissing their defense, and imposing an excessive punishment. *Id.*

[56] *Id.* at 5 (quoting *Hassan Mohamud Ahmed, supra* note 13, at 155).

[57] Article 92 of the LOS Convention, *supra* note 35, provides that a ship is subject to the exclusive jurisdiction of its flag state on the high seas. However, Article 110 provides that warships or vessels belonging to any government may board a foreign ship, other than those entitled to complete immunity, that is suspected of piracy. Article 110 is therefore an exception to the rule on the exclusive jurisdiction of the flag state.

[58] Hassan M. Ahmed v. Republic, *supra* note 14, at 9.

[59] *Id.* at 10. This reasoning on the basis of a schedule to a Kenyan statute is very doubtful in my view. For further exploration of this point, see James Gathii, *Jurisdiction to Prosecute Non-National Pirates*, 31 LOY. L.A. INT'L & COMP. L. REV. 363 (2010) (also arguing that the High Court rather than courts of first instance is the appropriate venue for piracy trials under Kenyan law).

[60] Hassan M. Ahmed v. Republic, *supra* note 14, at 12.

Turning to international law, the High Court recalled the government's statement at trial that Kenya had ratified and domesticated the LOS Convention, and the apparent acceptance of that statement by counsel for the appellants.[61]

> I must hold that the Learned Principal Magistrate was bound to apply the provisions of the [LOS] Convention should there have been deficiencies in our Penal Code and Criminal Procedure Code.
>
> I would go further and hold that even if the Convention had not been ratified and domesticated, the Learned Principal Magistrate was bound to apply international norms and Instruments since Kenya is a member of the civilized world and is not expected to act in contradiction to expectations of member states of the United Nations.[62]

Significantly, the High Court was saying that even if the magistrate did not have jurisdiction based on an explicit statute, jurisdiction would be available under the LOS Convention, whether or not Kenya had domesticated the Convention. This reasoning, while consistent with earlier decisions mentioned above in which the High Court and Court of Appeal applied ratified, but undomesticated treaties to resolve ambiguities or gaps in domestic statutes,[63] is nonetheless broader than those decisions for at least two reasons. First, previous decisions that applied ratified, but undomesticated treaties or norms of customary international law largely used them as an additional backdrop against which statutory interpretation was undertaken. In the piracy context, the LOS Convention is used to affirm the existence of universal jurisdiction over piracy as an independent basis for exercising jurisdiction over non-Kenyan nationals charged with committing offenses on the high seas. Thus, international law, rather than domestic law, is invoked not simply to fill a statutory gap or to help in interpreting a statute but as a legal justification establishing the piracy jurisdiction of Kenyan courts over non-nationals who had committed the offense extraterritorially and been captured by foreign forces.

Second, the High Court's statement that Kenya was expected to "apply international norms and Instruments" as a member of the civilized world and the United Nations is a rather broad and bold claim. It is broad because the court did not give guidance on which international norms and instruments Kenyan courts would be expected to heed in future.

[61] *Id.* at 10–11. On behalf of the state, it was inaccurately argued both before the principal magistrate and the High Court that Kenya had domesticated the LOS Convention. While Kenya had ratified the Convention in 1989, it was not until September 1, 2009, when the Merchant Shipping Act of 2009 came into effect, that that treaty was domesticated in Kenya. The High Court noted that neither in the lower court nor on appeal was a "contrary view . . . given by counsel for the appellants" on domestication of the LOS Convention. *Id.* at 10. This observation by the High Court gives further credence to my argument that piracy has occasioned a decisive break with dualism even though the two courts' reasoning finding jurisdiction over non-national pirates captured outside Kenya leaves much room for doubt.

[62] *Id.* at 10–11 (emphasis added) (fortifying its decision by quoting MARTIN DIXON, TEXTBOOK ON INTERNATIONAL LAW 76–77 (1990), for the proposition that certain crimes such as piracy are considered so destructive of the international order that under customary international law any state may exercise jurisdiction over them, regardless of where the alleged crimes took place or the nationality of the perpetrators; and that this universal principle of jurisdiction is based on the nature of the alleged crime rather than the identity of the perpetrator or the place of commission). *See also infra* note 87 and corresponding text.

[63] For example, in *Rono v. Rono, supra* note 30, at 10, the Court of Appeal, noting Kenya's endorsement of customary international law and "ratification" of various international covenants and treaties, stated that even if some of these treaties had not been domesticated, they should be taken into account in resolving the central question of discrimination when that was in issue.

While Somalia may not be able to prosecute these piracy suspects in its own courts, the Kenyan High Court decision in *Hassan Mohamud Ahmed* strongly suggests that Kenya is obliged to prosecute them even if their connection to Kenya is not as strong as it arguably is to the states whose military forces arrested the suspects and brought them to Kenya, as contemplated under Article 105 of the LOS Convention. Although the court did not refer to it, such an obligation could also be said to arise from the duty to suppress piracy under Article 100 of the LOS Convention.[64]

The Kenyan High Court also did not refer to the prosecution agreement that Kenya had entered into with the United States, though the agreement had been concluded earlier that year.[65] This agreement could arguably have been invoked to justify jurisdiction over the piracy suspects.[66] On this point, there is a notable contrast between Kenya's willingness to assume jurisdiction over the suspects and the practice so far adopted by the United States. The prosecution of the lone suspect who survived the 2009 attack on the *Maersk Alabama* suggests that the United States itself may try suspected pirates who attack U.S. vessels and U.S. nationals off the coast of Somalia, but not others.[67] Indeed, for nearly two hundred years before 2008, the United States never invoked universal jurisdiction over piracy.[68] The Kenyan High Court's assertion of jurisdiction over piracy thus differs from that of states like the United States and those of the European Union that have seized suspected pirates and have far more resources and long-established judiciaries to deal with such prosecutions. Clearly, though, there are logistical and other difficulties for these prosecutions to be conducted in distant states whose warships have captured piracy suspects in the Gulf of Aden.[69]

[64] LOS Convention, *supra* note 35, Art. 100. UN Security Council Resolution 1816 (June 2, 2008) calls upon states in paragraph 11 to "cooperate in determining jurisdiction, and in the investigation and prosecution of persons responsible for acts of piracy and armed robbery off the coast of Somalia consistent with applicable international law."

[65] Jurisdiction of national courts can be provided for by agreement, as with status-of-forces agreements. *See* LORI F. DAMROSCH ET AL., INTERNATIONAL LAW: CASES AND MATERIALS 830–35 (5th ed. 2009).

[66] The High Court did not refer to the agreement between Kenya and the United States of January 2009, or the one with the European Union of April 2009, as additional reasons for finding jurisdiction over the pirates. Thus, the court seemed to assume that since the offense was defined under international law, jurisdiction was automatically available in Kenya. It made no distinction between having the jurisdiction and exercising it. For considerations national courts ought to take into account in exercising universal jurisdiction, see Michael Kirby, *Universal Jurisdiction and Judicial Reluctance: A New "Fourteen Points," in* UNIVERSAL JURISDICTION: NATIONAL COURTS AND THE PROSECUTION OF SERIOUS CRIMES UNDER INTERNATIONAL LAW 240 (Stephen Macedo ed., 2004).

[67] *See* United States v. Abduwali Abdukhadir Musé, No. 9-CR-512 (S.D.N.Y. filed May 19, 2009) (charging the defendant, inter alia, with piracy against the U.S.-flagged M/V *Maersk Alabama* on the high seas and, armed with a firearm, hijacking it by force and detaining its captain in a lifeboat on or about Apr. 8–12, 2009), Superseding Indictment (S.D.N.Y. filed Jan. 12, 2010) (adding charge of hijacking two non-U.S.-flagged ships before the *Maersk Alabama*); *see also* Press Release, U.S. Attorney, Southern District of New York, Manhattan U.S. Attorney Files Superseding Indictment Against Alleged Somali Pirate Charging Involvement in Two Additional Hijackings (Jan. 12, 2010), *available at* http://www.justice.gov/usao/nys/pressreleases/; note 132 *infra* and corresponding text. For the disposition of the *Musé* case, see, in this Agora, J. Ashley Roach, *Countering Piracy off Somalia: International Law and International Institutions*, 104 AJIL $$$, $$$ n.107 (2010). *But see* Eugene Kontorovich, Case Report: United States v. Shi, *in* 103 AJIL 734, 739 (2009) (arguing that the prosecution in the *Shi* case may be "a one-off occurrence" in light of the reluctance of the United States to exercise "universal jurisdiction over criminal violence on the high seas").

[68] Kontorovich, *supra* note 67, at 734.

[69] *See, e.g.*, John Knott, *United Kingdom: Piracy off Somalia: Prosecutions, Procrastinations and Progress*, MONDAQ BUSINESS BRIEFING, Jan. 21, 2010, *available in* LEXIS, News Library, Wire Service Stories File (noting that many countries involved in the capture and detention of piracy suspects have been unwilling to prosecute them because of problems relating to the conditions in which they are held, the acquisition of evidence, and the possibility that

Remarkably, Kenyan courts, which until recently were wedded to dualism, have assumed jurisdiction over piracy while neither the Constitution nor any written law until September 1, 2009, unambiguously established jurisdiction over non-nationals for acts committed on the high seas in the same way as the Merchant Shipping Act of 2009—particularly, by explicitly and extensively referring to the offense of piracy as defined in Article 101 of the LOS Convention, and by providing in addition that the offense applies to non-nationals who committed piratical attacks outside Kenya and that they may be tried in Kenya.[70]

Kenya's proscription of piracy on the high seas in the now-repealed section 69 of the Penal Code, which was based on a colonial model code dating back to the end of the nineteenth century, may be argued to have incorporated the customary international law prohibition on piracy before September 1, 2009. Historical inquiry, however, reveals that this argument leaves open many questions about the content of that customary international law and the intended jurisdictional reach of the statute. Kenya's Penal Code was first enacted in 1930.[71] While the 1930 code was undoubtedly British in origin, the British influence was modified to suit local circumstances and conform to similar criminal codes in other British colonies such as Nigeria, from whose code the Kenyan Penal Code was derived.[72] The Nigerian and Kenyan Penal Codes were descended from the Queensland Criminal Code (also referred to as the Griffith Model Penal Code), crafted by Sir Samuel Griffith and adopted in many British colonies, including Queensland, Cyprus, Palestine, Northern Rhodesia, and Tanganyika.[73] The Griffith code was the first effort to codify British criminal law and has remained influential in many Commonwealth jurisdictions.[74] Thus, to the extent that the Kenyan Penal Code provided for an offense of piracy, it was based on the British law of piracy as of 1930.[75]

There was no agreement by states regarding the definition of piracy at the time of the enactment of the Kenyan statute in 1930 or in the immediately prior period.[76] For example, the

they may be given asylum); *see also* James Thuo Gathii, *The Use of Force, Freedom of Commerce and Double Standards in Prosecuting Pirates in Kenya*, 59 AM. U. L. REV. 1317 (2010); Mike Corder, *EU to Push for Piracy Prosecutions in Africa*, AP, Apr. 26, 2010, *available at* http://www.salon.com/wires/world/2010/04/26/D9FANG9G3_piracy/index.html (citing reluctance of EU nations to pay for transporting suspects to Europe for trial and difficulty of prosecuting them successfully unless they are caught in the act of hijacking or attacking a ship).

[70] In contrast to Kenya, the United States in its Constitution gives Congress the power to "define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations." U.S. CONST. Art. 1, §8, cl. 10.

[71] The Penal Code, Ordinance No. X of 1930, established "a Code of Criminal Law in the Colony based on English criminal law and in substitution for the Indian Penal Code." P. F. Branigan, *Review of Legislation 1930. East Africa, Kenya*, 14 J. COMP. LEGIS. & INT'L L. (3d ser.), pt. III, at 155 (1932).

[72] For an excellent exposition of the several influences on the 1930 Kenyan Penal Code, see H. F. Morris, *A History of the Adoption of Codes of Criminal Law and Procedure in British Colonial Africa, 1876–1935*, 18 J. AFR. L. 6, 9, 11 (1974).

[73] SAMUEL WALKER GRIFFITH, DRAFT OF A CODE OF CRIMINAL LAW PREPARED FOR THE GOVERNMENT OF QUEENSLAND, TOGETHER WITH AN EXPLANATORY LETTER TO THE HONOURABLE THE ATTORNEY GENERAL, A TABLE OF CONTENTS, AND A TABLE OF THE STATUTORY PROVISIONS PROPOSED TO BE SUPERSEDED BY THE CODE at x (1897) [hereinafter GRIFFITH DRAFT CODE]; *see also* Harry Gibbs, *Queensland Criminal Code: From Italy to Zanzibar*, 77 AUSTL. L.J. 232 (2003).

[74] ROBIN S. O'REGAN, *The Migration of the Griffith Code, in* NEW ESSAYS ON THE AUSTRALIAN CRIMINAL CODES 103 (1988).

[75] The 1930 provision on piracy read as follows: "Any person who is guilty of piracy or any crime connected with or relating or akin to piracy shall be liable to be tried and punished according to the law of England for the time being in force." 9 KENYA, ORDINANCES 1930 (n.s.), §63 (1931).

[76] It was not until the adoption of the LOS Convention that a standard definition of piracy (Article 101) gained broad acceptance. Article 101 of the LOS Convention, *supra* note 35, is closely modeled on Article 15 of the Geneva

description of what constitutes piracy in the 1899 Queensland Criminal Code is very extensive. The statute specifically mentioned that piracy consisted, among other things, of unlawfully boarding a ship "travelling at sea" without the master's consent and with intent to commit robbery or to act in a way that would endanger the safe use of the ship; boarding a ship without such consent and committing robbery or endangering its safe use; stealing a ship or indirectly taking control of it; confining the master against his will; and trading or supplying provisions to a pirate or building a ship with the intention of using it to commit an act of piracy.[77] By contrast, the repealed section 69 of the Kenyan Penal Code merely provided that "[a]ny person who, in territorial waters or upon the high seas, commits any act of piracy *jure gentium* is guilty of the offence of piracy."[78] This divergence in the definition of the offense of piracy at the end of the nineteenth century and in the first part of the twentieth century characterized not only the legislation of different countries,[79] but also jurists, who differed over the elements that constituted the offense, as well as the extent to which the law of nations could be used in prosecutions before municipal courts to construe a domestic statute that defined the crime of piracy.[80]

Kenyan courts have now adopted the view that they have jurisdiction to prosecute pirates irrespective of their territorial or nationality links, which is consistent with one line of early Commonwealth cases that construed the applicable piracy statutes as embodying universal jurisdiction. This was not always the view of courts in the British Commonwealth whose members had adopted the Griffith code. In fact, in his 1897 draft code on which the 1899 code was based, Griffith reviewed a series of English statutory provisions with a variety of piracy definitions.[81] As attorney general in 1875, he had relied on some of these statutes to argue against reversal of a piracy conviction.[82] Noting that the offense had occurred within Queensland's territorial jurisdiction, the Queensland Supreme Court ruled against Griffith on the basis that such acts would be punishable as piracy only if they had occurred on the high seas.[83] In one instance of the divergences mentioned above, notwithstanding the derivation of the Kenyan

Convention on the High Seas, Apr. 29, 1958, 13 UST 2312, 450 UNTS 82. There were 63 states parties to the Geneva Convention as of April 16, 2010, and 160 states parties to the LOS Convention as of January 1, 2010.

[77] CRIM. CODE §79 (1899) (Qld.), *available at* http://www.austlii.edu.au/au/legis/qld/consol_act/cc189994/.

[78] Repealed §69, *supra* note 15.

[79] For example, after reviewing several definitions of piracy in the United States and elsewhere in the period, Edwin D. Dickinson concluded:

> It is evident that some our definitions, taken literally, are much too broad. There may be robberies or murders upon the seas which are not appropriate subjects of an international jurisdiction. The distinction may be made with difficulty in some cases. But the difficulty should not be insuperable if it is remembered that piracy *jure gentium*, while it involves grievous wrong to individual rights of person or property and a grave offence against the state most immediately concerned, is primarily and above all an offence against the security of trade or travel upon the international highways of the sea.

Edwin D. Dickinson, *Is the Crime of Piracy Obsolete?* 38 HARV. L. REV. 334, 357 (1924–25).

[80] James J. Lenoir, *Piracy Cases in the Supreme Court*, 25 J. CRIM. L. & CRIMINOLOGY 532 (1934–35). One of the first efforts at codification, which arose from the lack of clarity surrounding the definition of piracy, was the Harvard Research in International Law, Part IV—Piracy, 26 AJIL Supp. 739 (1932).

[81] GRIFFITH DRAFT CODE, *supra* note 73, at 36–37.

[82] R v. Jimmy, (1875) 4 Q.S. Ct. R. 130, (1860–1907) Q. Crim. Rep. 93.

[83] (1860–1907) Q. Crim. Rep. at 94. According to the Court, it was not piracy if the alleged offense occurred within a creek or port that was part of the colony. Notably, in *R v. Gomez*, (1880) 5 Q.S. Ct. R. 189, (1860–1907) Q. Crim. Rep. 119, Griffith, then acting as defense counsel, had made the opposite argument (albeit in a murder case that had taken place outside the territorial boundaries of the Queensland Supreme Court), that the laws of Queensland did not reach the islands where the offense had been committed because the Crown, without the Queensland legislature's consent, had annexed the islands. Griffith lost that appeal.

Penal Code from the Queensland code, section 69 of the 1930 Kenyan Penal Code (as amended in 1967) defined piracy to include the requisite acts performed within Kenya's territorial waters, as well as on the high seas.[84]

The *Hassan Mohamud Ahmed* decision might have been more convincing if the High Court had invoked common law precedents, which are persuasive authority to resolve the jurisdictional question in a Kenyan court. For example, in the 1934 House of Lords decision *In re Piracy Jure Gentium*, the Law Lords held that "[w]ith regard to crimes as defined by international law, that law has no means of trying or punishing them. The recognition of them as constituting crimes, and the trial and punishment of criminals, are left to the municipal courts of each country."[85] Moving from this premise, the High Court might have argued that section 69 of the Penal Code was the domestic statute that provided for trial and punishment in Kenya. While such reasoning would not have definitively answered whether the Penal Code applied to non-Kenyan nationals,[86] this reasoning would have avoided resorting to Article 101 of the LOS Convention to establish the jurisdiction of Kenyan courts over piracy committed on the high seas by non-nationals who had been captured by foreign forces.[87] Notably, in a subsequent piracy conviction, *Republic v. Aid Mohammed Ahmed*, decided in March 2010, a lower court declined to follow the High Court's invocation of universal jurisdiction by reference to Article 101 of the LOS Convention and instead decided that Kenyan law sufficed to establish jurisdiction over non-Kenyan nationals for offenses committed outside Kenya.[88]

[84] The Griffith criminal code was also influenced by English criminal statutes of the time. These statutes mainly made piracy punishable for British subjects or people owing allegiance to the Crown. For example, the 1880 Criminal Code specifically referred to British subjects as liable "in any place where the Admiral has jurisdiction," further suggesting that this was the period before these criminal codes embraced universal jurisdiction. CRIM. CODE, 43 Vict. §106(b) (1880). In fact, as Alfred Rubin has argued, piracy acquired so many meanings in the second half of the nineteenth century in British practice that "it came to be used routinely . . . with regard to nearly any acts of foreigners against whom some forcible political action was directed." ALFRED P. RUBIN, THE LAW OF PIRACY 313 (2d ed. 1998). The 1967 amendments to the Kenyan Penal Code introducing the now-repealed section 69 were justified as necessary because piracy was defined at the time by reference to the law of England, and it was thought necessary that it "should be properly defined in the context of an independent Kenya." 12 REPUBLIC OF KENYA, THE NATIONAL ASSEMBLY OFFICIAL REPORT, pt. II, col. 1753 (1967) (comments of Attorney-General Njonjo).

[85] *In re* Piracy Jure Gentium, [1934] A.C. 586 (P.C.); *see also* United States v. Smith, 18 U.S. (5 Wheat.) 153 (1820) (upholding a conviction for piracy as defined by the law of nations, without a specific statutory definition thereof); *cf.* United States v. Hudson & Goodwin, 11 U.S. (7 Cranch) 32, 34 (1812) (holding that a person cannot be tried for an international crime in the United States unless Congress adopts a statute).

[86] Under repealed section 69, the second paragraph of the statute applied only to Kenyan citizens, while the first paragraph applies to "[a]ny person" without specification as to citizenship. Repealed §69, *supra* note 15, para. 2. In addition, the Kenyan Penal Code does not make it explicitly clear that it applies to crimes committed extraterritorially. *See* Offences Committed Partly Within and Partly Beyond the Jurisdiction, PENAL CODE, Cap. 63, §6 (rev. ed. 2009) (providing that "[w]hen an act which, if wholly done within the jurisdiction of the court, would be an offence against this Code, is done partly within and partly beyond the jurisdiction, every person who within the jurisdiction does or makes any part of such act may be tried and punished under this Code in the same manner as if such act had been done wholly within the jurisdiction," which strongly suggests that for an offense to come within the jurisdiction of a Kenyan court, it must have been either wholly or partially committed within the jurisdiction of the court trying the offender). For a discussion in this issue of the early history of U.S. piracy laws and their interpretation, see John H. Knox, *Extraterritoriality and Its Discontents: Limiting the Reach of U.S. Law*, 104 AJIL \$\$\$, \$\$\$–\$\$ (2010).

[87] *See* Jurisdiction of Local Courts, PENAL CODE, Cap. 63, §5 (rev. ed. 2009) (providing that "[t]he jurisdiction of the courts of Kenya for the purposes of this Code extends to every place within Kenya, including territorial waters").

[88] Republic v. Aid Mohamed Ahmed (aka Sicid Mahamud Ahmed), at 10–11, Crim. No. 3486 of 2008 (Chief Magis. Ct. Mombasa, Mar. 10, 2010) (holding that §6 of the Penal Code extends to offenses "that are partly committed beyond" Kenya's territorial jurisdiction and that "[i]t is not a matter of the court having universal jurisdiction to try pirates but the domestic law has conferred the jurisdiction to this court").

On June 1, 2009, the Kenyan president signed the Merchant Shipping Act, which definitively establishes jurisdiction in Kenyan courts over non-nationals captured on the high seas and entered into effect on September 1, 2009.[89] The new law brought Kenya into compliance with parts of the LOS Convention and several conventions of the International Maritime Organization, such as the 1988 Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation (SUA).[90] Section 369 of the Merchant Shipping Act adopts the definition of piracy contained in Article 101 of the LOS Convention. Section 370 lists as offenses those contained in Article 3 of the SUA Convention on hijacking and destroying ships with some minor modifications.[91] To address non-Kenyan suspects operating outside Kenya's territorial and maritime jurisdiction, section 370(4) provides that the law shall apply to these offenses "whether the ship . . . is in Kenya or elsewhere," whether the acts were "committed in Kenya or elsewhere," and "whatever the nationality of the person committing the act."[92] The new law therefore removes 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.

As noted above, however, the current piracy prosecutions are all being conducted under the repealed piracy provisions of the Penal Code, rather than the new Merchant Shipping Act. Questions can be asked about these prosecutions besides those raised about the appropriate jurisdictional bases.

[89] Merchant Shipping Act, Act No. 4 of 2009.

[90] Kenya has also ratified the 1988 SUA Protocol. *See* IMO, Status of Conventions by Country (Mar. 31, 2010), *available at* http://www.imo.org/. The other treaties the new law has domesticated include the International Convention for the Safety of Life at Sea (SOLAS) of 1974 and its Protocols of 1978 and 1988. The new law is part of a major overhaul of the maritime sector in Kenya. The authority had initially been established in subsidiary legislation in 2004. Kenya Maritime Authority Order, Legal Notice No. 79 (June 21, 2004), *available at* http://faolex.fao.org/. In 2006 the Kenyan Parliament passed the Kenya Maritime Authority Act, which established the Kenya Maritime Authority and a director general to run it, as well as a Registrar of Ships, a Registrar of Seafarers, a Principal Receiver of Wreck, and a Principal Surveyor of Ships. In my view, these reforms, while long overdue, represented very successful lobbying by interest groups in the maritime industry. The passage of the Merchant Shipping Act was given impetus by the need for a framework for prosecution of pirates off the coast of Somalia. In addition, the IMO encouraged Kenya to pass the new law so that it could "qualify for the 'White List' of countries deemed to be properly fulfilling their obligations under the International Convention on Standards of Training, Certification and Watchkeeping for Seafarers." Efthimios E. Mitropoulos, IMO Secretary General, Meeting with H.E. Hon. Mwai Kibaki, President of the Republic of Kenya (May 4, 2006), *available at* http://www.imo.org/About/mainframe.asp?topic_id=1322&doc_id=6315; *see also* Kenya Maritime Authority Act, Cap. 5 (2006).

[91] Merchant Shipping Act, *supra* note 89, §370(1) (providing that "[s]ubject to subsection (5), a person who unlawfully, by use of force or by threats of any kind seizes a ship or exercises control of it commits the offence of hijacking a ship. (2) Subject to subsection (5), a person commits an offence if he unlawfully and intentionally—(a) destroys a ship; (b) damages a ship or its cargo so as to endanger, or to be likely to endanger, the safe navigation of the ship; (c) commits, on board a ship, an act of violence which is likely to endanger the safe navigation of the ship; or (d) places or causes to be placed on a ship any device or substance which is likely to destroy the ship or is likely so to damage it or its cargo as to endanger its safe navigation. (3) Nothing in subsection (2)(d) is to be construed as limiting the circumstances in which the commission of any act may constitute—(a) an offence under subsection (2)(a), (b) or (c); or (b) attempting or conspiring to commit, or aiding, abetting, counselling, procuring or inciting, or being of and part in, the commission of such an offence."). Article 5 of SUA provides that "[e]ach State Party shall make the offences set forth in article 3 punishable by appropriate penalties which take into account the grave nature of those offences." Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation, Art. 5, Mar. 10, 1988, S. TREATY DOC. NO. 101-1 (1989), 1678 UNTS 221.

[92] Merchant Shipping Act, *supra* note 89, §370(4)(a), (b), (c).

III. STATUS, FAIRNESS, AND PROPRIETY OF THE PIRACY PROSECUTIONS IN KENYA

As mentioned in the introduction, as of August 31, 2009, there were ten ongoing piracy prosecutions in Kenya involving at least seventy-six suspects, all before the Chief Magistrate's Court in Mombasa. Each of the accused persons was charged with committing the crime of piracy contrary to section 69(1) as read with section 69(3) of the Penal Code. The suspects were all denied bail and, with the exception of those in one case, are in custody awaiting the hearing of their trials, most of which began in earnest in September and October 2009. The exceptional case is the recently decided *Republic v. Aid Mohammed Ahmed*, which became the second completed piracy trial in Kenya's history. Aid Mohamed Ahmed had been charged with seven others with attacking and detaining the Yemeni-flagged *Waadi Omar 2* on the night of November 8–9, 2008, and for attempting to hijack the Danish MV *Powerful* on November 11, 2008.[93] On March 10, 2010, the Chief Magistrate's Court in Mombasa sentenced the eight defendants to twenty years' imprisonment each.[94]

The remaining cases are *Republic v. Said Abdallah Haji*, charged with eight others with attacking the Saint Vincent and the Grenadines–flagged MV *Maria K* on May 22, 2009;[95] *Republic v. Mohamed Hassan Ali* and *Republic v. Aidid Mohamed Mohamud*, together charged with five others with committing piracy against the Maltese vessel *Anny Petrakis* on May 7, 2009;[96] *Republic v. Liban Ahmed Ali*, charged with ten others with attacking the Liberian-flagged *Safmarine Asia* with rocket-propelled grenades and gunfire on April 15, 2009;[97] *Republic v. Jama Abdikadir Farah*, charged with six others with the attempted hijacking of the Panamanian *Nepheli* on May 6, 2009;[98] *Republic v. Ahmed Abdikadir Hersi*, charged with ten others with attempting to attack the French naval vessel FNS *Nivôse* on May 3, 2009;[99]

[93] Republic v. Said [*sic*] Mohamed Ahmed, Crim. No. 3486 (Chief Magis. Ct. filed Nov. 19, 2008). The accused were arrested on November 11, 2008, by the Royal British Marines from the HMS *Cumberland* and turned over to Kenyan officials on November 19, 2008. Bruce Zagaris, *French Capture 9 Somali Pirates and NATO and Russia Send Naval Patrols to Gulf of Aden,* Int'l Enforcement L. Rep., Jan. 2009, §Int'l Maritime Piracy, n.11, *available in* LEXIS, News Library, Most Recent Two Years File.

[94] Republic v. Aid Mohamed Ahmed, *supra* note 88, at 18.

[95] Republic v. Said Abdallah Haji, Crim. No. 2127 (Chief Magis. Ct. filed June 26, 2009). The accused were apprehended by the Italian naval warship *Maestrale*, and turned over to Kenyan officials on June 25, 2009. *See* U.S. Office of Naval Intelligence: Civil Maritime Analysis Dep't, Worldwide Threat to Shipping Mariner Warning Information (June 10, 2009), *available at* http://www.nga.mil/MSISiteContent/StaticFiles/MISC/wwtts/wwtts_20090610100000.txt.

[96] Republic v. Mohamed Hassan Ali, Crim. No. 1694 (Chief Magis. Ct. filed May 18, 2009), and Republic v. Aidid Mohamed Mohamud, Crim. No. 1784 (Chief Magis. Ct. filed May 27, 2009) (consolidated by the court's order of Sept. 2, 2009). The accused were arrested on May 7, 2009, by the Spanish Navy. *Spanish Naval Ship Captures Another Seven Pirates*, ANSAMED, May 8, 2009, *available in* LEXIS, News Library, Wire Service Stores File. The accused were turned over to Kenyan authorities on May 16, 2009.

[97] Republic v. Liban Ahmed Ali, Crim. No. 1374 (Chief Magis. Ct. filed Apr. 23, 2009). The accused were arrested by the French Navy on April 15, 2009, and turned over to Kenyan officials on April 22, 2009. Sharon Otterman & Mark McDonald, *French Navy Seizes 11 Accused of Pirate Attacks off Somalia*, N.Y. TIMES, Apr. 16, 2009, at A8; *Trials of 11 Suspected Somali Pirates Begin in Kenya*, BBC, Apr. 22, 2009, *available in* LEXIS, News Library, Most Recent Two Years File [hereinafter *Trials of 11 Begin*].

[98] Republic v. Jama Abdikadir Farah, Crim. No. 1695 (Chief Magis. Ct. filed May 18, 2009). The accused were arrested on May 7, 2009, by the Spanish Navy. Their boat allegedly capsized as a result of evasive action taken by the *Nepheli* and they were pulled out of the water by the crew of the *Marqués de la Ensenada*, a ship that had responded to the *Nepheli*'s distress signal. *Spanish Navy Detains Suspected Pirates off Somalia*, AFR. NEWS DAILY, May 8, 2009, *at* http://www.africanewsdaily.com/newsdetails.php?newsid=1315.

[99] Republic v. Ahmed Abdikadir Hersi, Crim. No. 1582 (Chief Magis. Ct. filed May 11, 2009). The accused were arrested by the French Navy on May 3, 2009, when they mistook the French FNS *Nivôse* for a commercial vessel

Republic v. Mohamud Abdi Kheyre, charged with six others with attacking the Marshall Islands MV *Polaris* on February 11, 2009;[100] *Republic v. Shafili Hirsi Ahmed*, charged with six others with attempting to hijack the Greek-flagged MV *Antonis* on May 26, 2009;[101] and *Republic v. Mohamud Mohamed Hashi*, charged with eight others with attacking the German MV *Courier* on March 3, 2009.[102]

In many of these cases,[103] beginning the proceedings has been delayed more than once. Delays have arisen because of the distance of witnesses. In one case witnesses were noted to have returned to France, and in another to Yemen,[104] after their piracy ordeals. In another case, two lawyers claim to have received conflicting instructions regarding their representation from the same set of suspects.[105] Mostly, though, the suspects have joined thousands of Kenyan suspects on the crowded court calendar who are awaiting their trials.

The longer the trials, the longer the pretrial detention is likely to be. A perusal of the court files shows that in almost all the cases, the suspects have continually complained of ill treatment by prison authorities and the other prisoners with whom they are held. They have also complained of lack of medical attention and food.[106] These complaints have been raised in the monthly court appearances required under Kenyan law for all suspects held and awaiting trial by the state. The responses of the various magistrates before whom these suspects have made these complaints have not been consistent. The courts have generally ordered that the piracy suspects receive medical attention and be fed.[107] In at least one case, however, they declined to order that the suspects be permitted to contact their families in Somalia.[108] In another, the

and made a run at it, but were trapped by a helicopter before they could fire or flee. Anne Barrowclough, *Pirates Sent Packing by Friends in High Places; Somalia*, TIMES (London), May 5, 2009, at 33.

[100] Republic v. Mohamud Abdi Kheyre, Crim. No. 791 (Chief Magis. Ct. filed Mar. 6, 2009). The accused were arrested by the United States Navy on February 11, 2009. *Piracy on the High Seas: Hearing Before the Subcomm. on Surface Transportation and Merchant Marine Infrastructure, Safety, and Security of the S. Comm. on Commerce, Science and Transportation*, 111th Cong. (May 5, 2009) (testimony by Brian Salerno, assistant commandant, U.S. Coast Guard), *available in* LEXIS, News Library, Most Recent Two Years File.

[101] Republic v. Shafili Hirsi Ahmed, Crim. No. 2463 (Chief Magis. Ct., originally filed as Crim. No. 825, May 9, 2009, in Malindi, Kenya). The accused were arrested by the Swedish Navy on May 26, 2009, and handed over to Kenyan officials on June 9, 2009. The order to transfer the case to Mombasa was issued by Judge Omondi on July 21, 2009. An issue that arose in this case is that of one of the accused was allegedly fourteen years old. The magistrate hearing the matter ordered on June 9, 2009, that the accused be remanded to the Children's Remand Home. However, on the same afternoon, the accused asserted that he was sixteen and the court referred him for age assessment.

[102] Republic v. Mohamud Mohamed Hashi, Crim. No. 840 (Chief Magis. Ct. filed Mar. 11, 2009). On March 3, 2009, the accused were arrested by the German Navy. Their trial began on April 22, 2009, according to an unattributed report, *see Trials of 11 Begin*, *supra* note 97, but they were later reported to be awaiting trial, *see* André Jensen, Editorial, *Prison No Deterrent to Piracy*, HERALD (S. Afr.), May 4, 2009.

[103] These observations are based on a perusal of the court files on two occasions, first, between August 26 and 28, 2009, and again between February 22 and 25, 2010.

[104] *Republic v. Ahmed Abdikadir Hersi*, *supra* note 99, and *Republic v. Aid Mohamed Ahmed*, *supra* note 88, respectively.

[105] *Republic v. Liban Ahmed Ali*, *supra* note 97.

[106] For example, in *Republic v. Liban Ahmed Ali*, *supra* note 97, on their appearance in court on May 25, 2009, the accused told the court they had not eaten for the previous forty-eight hours.

[107] For example, in *Republic v. Said Abdallah Haji*, *supra* note 95, the magistrate ordered on August 20, 2009, that the accused receive medical treatment in the prison clinic.

[108] For example, when the accused made such an application on May 25, 2009, in *Republic v. Liban Ahmed Ali*, *supra* note 97, the court noted that this was a question for the prison authorities to decide.

suspects were allowed to communicate with their relatives in Somalia in the presence of an investigating officer and an interpreter provided by the court.[109]

While all the suspects enjoy legal representation, in one case the defense lawyer notified the court that upon commencement of the trial he will file an application under the Vienna Convention on Consular Relations for the Transitional Federal Government of Somalia to provide legal representation for one of the accused.[110] In another, the court was notified of a jurisdictional challenge when trial begins suggesting that, notwithstanding the High Court's 2009 decision in *Hassan M. Ahmed v. Republic*, the question of jurisdiction is likely to continue to be raised and may be heard again in the High Court and perhaps go all the way to the Court of Appeal, Kenya's highest court.

One additional point relating to the status of these cases is that the prosecution is not being conducted by police inspectors, who have little legal training, particularly in matters of international law, but by state counsel, who are all lawyers deputized from the Office of the Deputy Public Prosecutor in the attorney general's chambers.[111] State counsel potentially offer far superior prosecution of these cases than police inspectors. They have received support from the counterpiracy program of the EU–United Nations Office on Drugs and Crime (EU-UNODC) in Kenya. The EU-UNODC counterpiracy program has provided support for prosecutors dedicated to pursuing piracy cases in terms of "office improvements, evidence handover routines and training in the Law of the Sea."[112] However, the heavy caseloads and the likelihood that the witnesses in these cases have already left Kenya do not make them amenable to expeditious prosecution without the EU-UNODC's assistance in ensuring the delivery of witnesses to trial, providing interpreters, and overcoming other bottlenecks.

Kenyan law guarantees criminal defendants rights that are for the most part analogous to those guaranteed under Kenya's international law obligations.[113] These include the rights of all accused persons to a fair trial within a reasonable time by an impartial tribunal;[114] to the presumption of innocence; to be informed in a language they understand of the charges against them; to have adequate time and facilities to prepare a defense; to defend themselves or to have

[109] Republic v. Mohamed Abdi Kheyre, *supra* note 100 (Order of T. Gesora, magis., July 1, 2009) (on file with author).

[110] Republic v. Liban Ahmed Ali, *supra* note 97.

[111] *See* Maureen Mudi, *Wako Says Police Prosecutors Will Be Dumped*, STANDARD (Nairobi), Sept. 14, 2009, *available at* http://www.eastandard.net/business/InsidePage.php?id=1144023923&cid=4& (noting that Attorney General Amos Wako planned to reduce reliance on the three hundred police prosecutors in the country who handle more than 90 percent of all the criminal cases, yet lack the legal expertise to do so, and that efforts to phase out police prosecutors had failed by the end of 2008 since only 52 of the planned increase in state counsel to 150 had been employed because of inadequate funding); *see also* Philip Muyanga, *Death Knell Tolls for Prosecutors*, NATION (Kenya), Sept. 13, 2009, *available in* LEXIS, News Library, Most Recent Two Years File.

[112] United Nations Office on Drugs and Crime, UNODC and Piracy, *available at* http://www.unodc.org/easternafrica/en/piracy/index.html?ref=menuside.

[113] Kenya is party to the International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 UNTS 171 (acceded May 1, 1972), and the 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). The fact that the Somali nationals now charged in Kenyan courts are foreigners calls for Kenya to ensure that the trials are conducted fairly and properly. OSCAR SCHACHTER, INTERNATIONAL LAW IN THEORY AND PRACTICE 269–70 (1991) (arguing that exercise of universal jurisdiction by a state with no territorial or nationality links "should require" that such a state fully meet the "criteria of a fair trial and the limits on punitive action that are part of basic human rights"); *see also* Kenneth C. Randall, *Universal Jurisdiction Under International Law*, 66 TEX. L. REV. 785, 840 (1988).

[114] CONST. §77(1).

legal representation of their choice;[115] to cross-examine prosecution witnesses; to be provided at no cost with an interpreter to enable them to understand the language used at trial;[116] and not to give incriminating evidence against themselves.[117] The Kenyan Constitution also prohibits torture and inhuman or degrading treatment.[118]

In the agreement Kenya signed with the European Union, Kenya committed itself to ensuring that the piracy suspects would be humanely treated and provided with "adequate accommodation and nourishment, [as well as] access to medical treatment."[119] The agreement provides that the suspects will be treated "in accordance with international human rights obligations, including the prohibition against torture and cruel, inhumane and degrading treatment or punishment, the prohibition of arbitrary detention and in accordance with the requirement to have a fair trial."[120] The agreement further specifies in more detail than Kenyan law that the piracy suspects have the right not only to be tried promptly, but to be released if it is determined that their detention is unlawful.[121] For its part, the European Union agreed to assist in securing the attendance of witnesses.[122] The agreement also provides that national and humanitarian agencies, and representatives of the European Union and the European Union Naval Force Somalia, shall have access to persons detained pursuant to the agreement.[123] An EU delegation visited Kenya between March 29 and April 1, 2009, to assess Kenya's needs for the detention and trial of the suspects and an amount of 1.74 million euros was promised.[124] These funds are being devoted to the EU-UNODC counterpiracy program.

Among the beneficiaries of this funding is the now much-reformed Shimo la Tewa prison in Mombasa, where the piracy suspects are being held while awaiting trial.[125] Although the suspects had complained earlier about their inhumane treatment by both the prison authorities and other detainees, when actor Nicholas Cage, as a UN goodwill ambassador, visited the prison in November 2009 at the invitation of the EU-UNODC counterpiracy program, he declared it the "warmest prison in the world."[126] At the same time, a French nongovernmental

[115] *Id.* §77(2) (a), (b), (c), (d), respectively. However, there is no right to legal representation for indigent defendants unless they are charged with offenses such as murder and robbery with violence, which are punishable by death.

[116] *Id.* §77(2)(e), (f).

[117] *Id.* §77(7).

[118] *Id.* §74(1) ("No person shall be subject to torture or to inhuman or degrading punishment or other treatment.").

[119] EU-Kenya Exchange of Letters, *supra* note 6, Annex (Provisions on the Conditions of Transfer of Suspected Pirates and Seized Property from the EU-Led Naval Force to the Republic of Kenya), para. 3(a), 2009 O.J. (L 79) 51.

[120] *Id.*, para. 2(c).

[121] *Id.*, para. 3(c).

[122] *Id.*, paras. 6(a) & (b)(2) & (3).

[123] *Id.*, para. 5(f) & (e), respectively.

[124] Kenya: Piracy, *supra* note 9, pt. 0007, col. 465W–466W (May 8, 2009). In another response to a question, the British secretary of state for foreign affairs told the House of Commons that the German ambassador to Kenya had visited pirates transferred to Kenya by German forces on March 10 and April 8, 2009. *Id.*, pt. 0010, col. 921W (May 14, 2009).

[125] Before the EU-UNODC funding, this prison was notorious for crowding and unsanitary conditions in the humid and sweltering heat of Mombasa.

[126] *Nicholas Cage Visits Kenyan Prison*, AFRICA NEWS, Nov. 17, 2009, *available in* LEXIS, News Library, Most Recent Two Years File.

organization (NGO), Lawyers of the World, was reported in August 2009 to have been pressing the European Union about violations of the pirates' rights, as guaranteed in the EU agreement with Kenya.[127] The NGO was said to be seeking to represent twenty-four suspected pirates, and the hearing of one of the cases for the first eleven was reported to be starting on August 3.[128] If this French NGO was allowed audience in the courts, the rights specified in the EU-Kenyan agreement were likely to have been invoked in court and their bindingness on Kenya tested. In that case, the rights guaranteed under this agreement would have entered the judicial system. Until that time, these rights had been invoked only in the diplomatic realm.

IV. CONCLUSION

Kenyan courts have justified the piracy prosecutions as authorized under Kenya's Penal Code, supplemented by Article 101 of the LOS Convention. While Kenyan law criminalizes piracy on the high seas, prior to the first prosecution of Somali pirates in 2006, there was no judicial precedent regarding whether jurisdiction existed over piracy suspects with no nationality or territorial links to Kenya who had been captured by foreign forces. Thus, the appeal against the first-ever piracy conviction to the High Court was expected. In upholding the jurisdiction of Kenyan courts over piracy on the high seas when a Kenyan territorial or nationality nexus was lacking, the High Court cited the LOS Convention. Kenya's Parliament subsequently passed a new law that is consistent with this extremely broad jurisdiction over piracy.

The current piracy trials have joined the huge backlog of cases in Kenya's criminal justice system. Although the suspects continue to allege mistreatment, lack of medical attention, and lack of confidence in Kenya's judicial system, the EU-UNODC program has made efforts to alleviate these problems. If the problems are eventually addressed, the suspects will be assured of the right to an expeditious trial with the facilities and support that would be available in any EU member country or the United States. Finally, it is apposite to note that the assumption by Kenyan courts of jurisdiction over piracy demonstrates an unprecedented resort to international law. Only two short decades ago, Kenyan courts took the view that the Kenyan constitutional system required domestication of ratified treaties before they could be judicially applied.[129] By invoking the LOS Convention, a ratified, but undomesticated treaty, to justify jurisdiction over these pirates, Kenyan courts seem to have finally wrestled free of their attachment to dualism.

Having done so, Kenya has nevertheless declined to accept any more piracy suspects from non-Kenyan naval forces since late 2009. In late March 2010, the attorney general revealed that he had not been consulted when the prosecution agreements were entered into and that Kenya was shouldering more than its fair share of the burden in prosecuting piracy.[130] Soon thereafter, the minister of foreign affairs, who had negotiated the agreements, announced that Kenya had not received the assistance in bearing that burden promised by its partners in those agreements.

[127] Sarah McGregor, *EU, Kenya Somali-Pirate Treaty "Violates Rights", Lawyers Say*, BLOOMBERG NEWS, Aug. 19, 2009, *available at* http://www.bloomberg.com/apps/news?pid=newsarchive&sid=aDs_bA4DXiTg.

[128] Sarah McGregor, *Aid Group to Defend Somali Piracy Suspects, Ensure Fair Trials*, BLOOMBERG NEWS, Aug. 3, 2009, *available at* http://www.bloomberg.com/apps/news?pid=newsarchive&sid=a5wQ7mzHZEEY.

[129] Okunda v. Republic, [1970] E. Afr. L.R. 453, 457.

[130] *Somali Piracy Cases Stall over AG Remarks*, DAILY NATION (Kenya), Apr. 6, 2010, *available at* http://www.nation.co.ke/News/-/1056/893802/-/vsele4/-/index.html; *see also AG Queried over Country's Role on Piracy Cases, id.*, Mar. 30, 2010, *available at* http://allafrica.com/stories/201003300855.html.

For this reason, the minister announced that Kenya would no longer accept any piracy suspects.[131]

Kenya's recent refusal to undertake further piracy prosecutions has already resulted in indictments in the United States and Germany, countries that had previously relied primarily on Kenya for that purpose.[132] It is unclear at this point whether these indictments will mark the beginning of a new trend in which countries whose navies capture suspected pirates for attacks on their flag vessels will undertake their prosecution themselves. A Security Council resolution of April 27, 2010, "acknowledg[ed] the difficulties Kenya [has] encounter[ed]" in prosecuting suspected pirates and imprisoning those who are convicted and called on all nations to take on those burdens. Moreover, the Security Council requested that the Secretary-General report to it on other possible options for dealing with the situation off the coast of Somalia, including the creation of a regional or international antipiracy court.[133] The challenges presented by Kenya's piracy prosecutions and the lessons learned from them can therefore be seen as already opening a conversation about alternatives to national piracy prosecutions in general, and to those confronting Kenya in particular.

[131] *See Kenya Ends Somali Pirates' Trials*, BBC, Apr. 1, 2010, *available at* http://news.bbc.co.uk/2/hi/africa/8599347.stm. For example, a member of Kenya's Parliamentary Committee on Defence and Foreign Relations stated that the failure to deliver promised funds for constructing the water and sewage system and painting the Shimo la Tewa prison where the piracy suspects are held was a reason to withdraw from the prosecution agreements. *AG Queried over Country's Role on Piracy Cases, supra* note 130. Later, Kenya reportedly agreed to "resume taking on new piracy cases." Tom Maliti, *UN: Donors to Spend $3.9 Million to Prosecute Somali Piracy Suspects in Kenya, Seychelles*, CANADIAN PRESS, June 15, 2010, *at* http://ca.news.yahoo.com/s/capress/100615/world/piracy.

[132] United States v. Mohammed Modin Hasan, No. 10-CR-56 (E.D. Va. filed Apr. 21, 2010) (charging accused, inter alia, with piracy on the high seas, attacking USS *Nicholas* on the high seas, and assaulting its crew with firearms within the special maritime and territorial jurisdiction of the United States on or about Mar. 31, 2010); United States v. Maxamad Cali Saciid (aka Mohammed Said), No. 10-CR-57 (E.D. Va. filed Apr. 21, 2010) (charging accused, inter alia, with piracy on the high seas, attacking USS *Ashland* on the high seas, and assaulting its crew with firearms in the special maritime and territorial jurisdiction of the United States on or about Apr. 10, 2010); Matthias Gebauer, Horand Knaup, & Marcel Rosenbach, *First Trial of Somali Pirates Poses Headache for Germany*, DER SPIEGEL, Apr. 20, 2010, *available at* http://www.globalpolicy.org/.

[133] SC Res. 1918, pmbl. & op. para. 4 (Apr. 27, 2010).