

2010

# The Use of Force, Freedom of Commerce, and Double Standards in Prosecuting Pirates in Kenya

James T. Gathii

*Loyola University Chicago, School of Law, [jgathii@luc.edu](mailto:jgathii@luc.edu)*

Follow this and additional works at: <http://lawcommons.luc.edu/facpubs>



Part of the [International Law Commons](#)

---

## Recommended Citation

James T. Gathii, *The Use of Force, Freedom of Commerce, and Double Standards in Prosecuting Pirates in Kenya*, 59 *Am. U. L. Rev.* 1321 (2010).

This Article is brought to you for free and open access by LAW eCommons. It has been accepted for inclusion in Faculty Publications & Other Works by an authorized administrator of LAW eCommons. For more information, please contact [law-library@luc.edu](mailto:law-library@luc.edu).

# THE USE OF FORCE, FREEDOM OF COMMERCE, AND DOUBLE STANDARDS IN PROSECUTING PIRATES IN KENYA

JAMES THUO GATHII\*

## TABLE OF CONTENTS

Introduction .....	
I. Historical Context .....	
A. Freedom of the High Seas and Commerce .....	
B. The Case of Somali Piracy .....	
II. Prosecuting Pirates as Outlaws .....	
A. Legal Guarantees for Criminal Defendants Under Kenyan Law .....	
B. The Legality of Piracy Arrests and Extended Pre-Trial Detentions.....	
C. Arrest, Handover to Kenya, or Release: How Kenya Became the International Piracy Court.....	
III. Procedural Issues .....	
A. Witness Attendance Problems .....	
B. Who Are the Complainants in the Piracy Cases: The Flag State, Kenya, or the Capturing States? .....	
C. The Role of the UNODC, the Anti-Piracy Unit, and UN- Funded Interpreters.....	
D. Production of Video Evidence.....	
E. Defense Requests to Visit the Scene of the Crime and Judicial Notice in Place of Proof .....	
F. Allegations of Torture, Mistreatment, and Denial of Bail.....	
Conclusion.....	

---

\* Associate Dean for Research and Scholarship and Governor George E. Pataki Professor of International Economic Law, *Albany Law School*. This Article is based on a perusal of the court files of the piracy trials taking place in Mombasa, Kenya on two occasions. First, between August 26 and 28, 2009, and again between February 22 and 25, 2010. My thanks to James Kelly, Joseph Rogers, Charles Munyua, and Cedric Murithi for their research assistance.

## INTRODUCTION

Piracy on the high seas is one of the oldest problems that early jurists of international law, such as Hugo Grotius, addressed in the early part of the seventeenth century.<sup>1</sup> In addition to legal accountability, Grotius advocated for the use of force to combat piracy and robbery at sea.<sup>2</sup> Today, early in the twenty-first century, the nations of the world are again confronted with piracy on the high seas. Piracy off the coast of Somalia brings renewed attention to the relationship between the use of force and freedom of commerce. To complement the use of force in countering piracy, Kenya has until recently served as the international piracy court.<sup>3</sup> This Article examines how the use of force and the prosecution of pirates are operating in tandem in one of the latest experiments in international justice.

Just as Grotius advocated using force to safeguard Dutch freedom of commerce on the high seas, the European Union (EU) has taken steps—unprecedented in the modern era—by deciding to authorize the use of force to combat Somali piracy. The United Nations Security Council authorizations, supplemented by several EU directives, extend beyond international waters to permit hot pursuit into Somalia's territorial waters and territory.<sup>4</sup> Neighboring Kenya has also invoked its rights to use force

---

1. See 2 HUGO GROTIUS, *DE JURE BELLI AC PACIS LIBRI TRES* 631 (James Brown Scott ed., Francis W. Kelsey trans., Oceana Publ'ns, Inc. 1964) (1925) (distinguishing pirates from members of a state who act unjustly on the grounds that pirates band together for wrongdoing).

2. See *infra* Part I.A.

3. At the end of 2009, Kenya began declining to accept any more piracy suspects on the grounds that it had taken more than its fair share of the global burden in prosecuting piracy suspects. See *Somali Piracy Cases Stall Over AG Remarks*, DAILY NATION (Kenya), Apr. 6, 2010, <http://www.nation.co.ke/News/-/1056/893802/-/vsele4/-/index.html> (reporting the confusion in Kenyan courts over whether new trials were authorized); see also *AG Queried over Country's Role on Piracy Cases*, DAILY NATION (Kenya), Mar. 30, 2010, available at <http://allafrica.com/stories/201003300855.html>.

4. See Council Decision 2008/918/CFSP, art. 1, 2008 O.J. (L 330) 19 (EU) (approving European Union military operations to deter and prevent piracy off the coast of Somalia); see also Council Joint Action 2008/749/CFSP, art. 1, 2008 O.J. (L 252) 40 (EU) (directing the European Union to conduct coordinated military actions pursuant to U.N. Security Council Resolution 1816); Council Joint Action 2008/851/CFSP, art. 1, 2008 O.J. (L 301) 34 (EU) (authorizing the European Union military to operate up to 500 nautical miles from the Somali coast). The United Nations Security Council has also passed resolutions in response to Somali piracy. See S.C. Res. 1851, ¶ 6, U.N. Doc. S/RES/1851 (Dec. 16, 2008) (authorizing states to take "all necessary measures" to interdict individuals using Somali territory to plan, facilitate, or undertake piracy and armed robbery off the Somali coast, as long as they provide prior notification to Somalia's Transitional Federal Government); S.C. Res. 1846, ¶ 10, U.N. Doc. S/RES/1846 (Dec. 2, 2008) (authorizing states and international organizations to use all necessary means to combat piracy and robbery within Somalia's territorial waters and noting that such authorization was procured with the consent of Somalia's Transitional Federal Government). These authorizations run for a period of twelve months beginning on December 19, 2008. See, e.g., S.C. Res. 1853, ¶ 3, U.N. Doc.

to combat piracy off the Somali coast<sup>5</sup> while at the same time agreeing, for self-interested reasons, to prosecute piracy suspects. For analogous self-interested reasons, private security contractors argue that they are better suited to address the piracy menace and could do so at much lower costs.<sup>6</sup> Some ship owners, trade organizations, and government officials have argued that commercial vessels should be armed to ward off piracy attacks,<sup>7</sup> while others warn against such actions.<sup>8</sup> The Transitional Federal Government of Somalia has consented to forcible measures against piracy occurring within its territorial waters and territory.<sup>9</sup> For its part, the United States, which is coordinating the military effort against piracy, has announced it will use unmanned drones to aid the global antipiracy effort.<sup>10</sup>

Combating piracy exemplifies the continued expansion and legitimization of the use of force against non-state actors, in this instance to

---

S/RES/1853 (Dec. 19, 2008). For more on these resolutions, see Tullio Treves, *Piracy, Law of the Sea, and Use of Force: Developments off the Coast of Somalia*, 20 EUR. J. INT'L L. 399, 402-08 (2009) (outlining and explaining U.N. Security Council Resolutions 1816, 1851, and 1846); see also Eugene Kontorovich, *International Legal Responses to Piracy off the Coast of Somalia*, ASIL INSIGHTS, Feb. 6, 2009, <http://www.asil.org/insights090206.cfm>.

5. See James Gathii, *Kenya's Piracy Prosecutions Under International Law*, 104 AM. J. INT'L L. (forthcoming 2010).

6. See, e.g., Jerry Seper, *Blackwater USA Joins Fight Against Sea Piracy*, WASH. TIMES, Dec. 8, 2008, at B1.

7. See *Petraeus: Shippers Should Consider Armed Guards*, ASSOCIATED PRESS, Apr. 25, 2009, <http://www.foxnews.com/politics/2009/04/25/petraeus-shippers-consider-armed-guards/> (reporting that General David Petraeus, Commander of the U.S. Central Command, told a House of Representatives committee that ship owners should consider arming their crews); Jonathan Saul, *Shippers Weigh Armed Response to Somali Piracy*, REUTERS, June 3, 2009, <http://www.reuters.com/article/africaCrisis/idUSL31024866> (reporting on the growing trend of shipping companies arming their crews); Andrea Stone, *Capt. Phillips Calls for Arming Ship Officers*, USA TODAY, Apr. 30, 2009, at 4A (reporting that Captain Richard Phillips, the captain of the *Maersk Alabama* when it was taken hostage by pirates in April, 2009, "believe[s] that arming the crew, as part of an overall strategy, could provide an effective deterrent under certain circumstances").

8. See Anita Powell, *Ships Have Few Options Against Somali Pirates*, USA TODAY, Apr. 10, 2009, [http://www.usatoday.com/news/world/africa/2009-04-10-4236836427\\_x.htm](http://www.usatoday.com/news/world/africa/2009-04-10-4236836427_x.htm) (reporting that Noel Choong, director of the International Maritime Bureau, believes that arming ships would only increase risks); MARITIME SAFETY COMMITTEE, INTERNATIONAL MARITIME ORGANIZATION, REVISED GUIDANCE ON COMBATING PIRACY AGREED BY IMO MARITIME SAFETY COMMITTEE (2009), [http://www.imo.org/Newsroom/mainframe.asp?topic\\_id=1773&doc\\_id=11478](http://www.imo.org/Newsroom/mainframe.asp?topic_id=1773&doc_id=11478) (urging "[s]tates [to] strongly discourage the carrying and use of firearms by seafarers for personal protection or for the protection of a ship. Seafarers . . . are civilians and the use of firearms requires special training and aptitudes and the risk of accidents with firearms carried on board ship is great. Carriage of arms on board ship may encourage attackers to carry firearms or even more dangerous weapons, thereby escalating an already dangerous situation. Any firearm on board may itself become an attractive target for an attacker. Carriage of firearms may pose an even greater danger if the ship is carrying flammable cargo or similar types of dangerous goods").

9. See *infra* Part II.C.

10. Mark Thompson, *The Pentagon's Newest Weapon Against Pirates*, TIME, Sept. 4, 2009, <http://www.time.com/time/nation/article/0,8599,1920459,00.html>.

protect freedom of commerce on the high seas.<sup>11</sup> The use of force is one of the best examples of a *jus cogens* norm, or “the most fundamental and highly valued interests of international society.”<sup>12</sup> Using force to safeguard freedom of commerce on the high seas demonstrates the primacy and significance of the issue, not only under international law, but also as expressed by the United Nations Security Council and the European Union. Problematically, the same importance has not been placed on the reconstruction of the Somali government, the instability of which is directly related to the expansion of piracy.<sup>13</sup> By embracing the use of force to combat piracy off the coast of Somalia, states have favored the interests of safety in commerce—undoubtedly an important goal—while paying much less attention to the crisis that has engulfed Somalia.

This Article has two primary objectives. The first is to trace the use of force to protect the freedom of traversing the high seas and the right to engage in commerce. This historical context shows that the use of force against piracy off the coast of Somalia is not unprecedented. However, given the increase in military capabilities and the lethality of war since Grotius’s time in the early seventeenth century and of Thomas Jefferson in the early nineteenth century, the use of force against piracy must adhere to the requirements of necessity and proportionality. As Judge Tullio Treves of the International Tribunal for the Law of the Sea has recently argued, force to combat piracy must be deployed in a manner that respects international human rights.<sup>14</sup>

The second objective of this Article is to explore the many double

---

11. Terrorism is another context in which the use of force against nonstate actors has arisen. See James Gathii, *Irregulars and the Use of Force*, in *THE MEANING OF ARMED CONFLICT IN INTERNATIONAL LAW* (Mary O’Connell ed., forthcoming 2010).

12. Gordon Christenson, *Jus Cogens: Guarding Interests Fundamental to International Society*, 28 VA. J. INT’L L. 585, 587 (1988). But see Evan J. Criddle & Evan Fox-Decent, *A Fiduciary Theory of Jus Cogens*, 34 YALE J. INT’L L. 331, 376 (2009) (arguing that the prohibition of piracy is not a *jus cogens* norm because piracy is a private, not state-sponsored, act).

13. See Press Release, Security Council, Security Council Expresses Intention to Establish Peacekeeping Mission in Somalia, U.N. Doc. SC/9574 (Jan. 16, 2009), <http://www.un.org/News/Press/docs/2009/sc9574.doc.htm> (reporting the views of Somalia’s United Nations representative that “if the international community placed the acknowledged priority of a comprehensive peace on the ground ahead of its efforts to help the Somali Government promote and ensure stability and political progress in the meantime, ‘it might take another 10 years’”).

14. See Treves, *supra* note 4, at 414 (noting that the consideration of human rights issues is a growing trend in Law of the Sea decisions); see also Michael Bahar, *As Necessity Creates the Rule: Eisentrager, Boumediene, and the Enemy—How Strategic Realities Can Constitutionally Require Greater Rights for Detainees in the Wars of the Twenty-First Century*, 11 U. PA. J. CONST. L. 277, 286-89 (2009) (arguing that at the time the U.S. Constitution was signed, “[a]ny nation had a right and obligation to repress pirates, with their warships, wherever on the seas they were found—a rule [that is] still in effect today[.]” and that “[p]irates could not be detained indefinitely as prisoners of war, but were to be prosecuted according to domestic piracy statutes and criminal procedures”).

standards faced by piracy suspects captured off the coast of Somalia during their ongoing prosecutions in Kenya. I argue that the relatively lower protections for defendants under Kenyan law provide an important safety valve for successful piracy prosecutions that would be hard fought in the United States and Europe. In so doing, this Article examines the problems besetting the piracy prosecutions in Kenya, including the propriety of long periods of pre-trial detention; the complications of gathering evidence on the high seas; the problem of witness attendance at the trials and its implications on the right to speedy trials; the legal issues relating to identifying the proper complainants; the overreaching of the United Nations Office on Drugs and Crime (UNODC) as a third party in the prosecutions; the legal limitations on the production of video evidence; the decision by Kenyan courts to take judicial notice of certain facts rather than have the prosecution prove them; and the allegations of torture and mistreatment of the piracy suspects.

Part I of this Article examines the justification for the use of force at sea, beginning primarily with Hugo Grotius's work. This section also lays out some of the historical context regarding Somali piracy. Part II then examines how capturing states have used Kenya's self-serving assumption of jurisdiction over piracy suspects to avoid the more stringent procedural and substantive legal protections for criminal defendants in the United States and Europe. Part III provides an in-depth look at some particular procedural hurdles that the Kenyan piracy prosecutions face. The Article concludes that this grand experiment in international justice is proceeding less than smoothly.

## I. HISTORICAL CONTEXT

### A. *Freedom of the High Seas and Commerce*

Modern international lawyers often trace the idea of freedom of the high seas to Hugo Grotius.<sup>15</sup> Grotius's support for freedom of the high seas in

---

15. See, e.g., R.P. Anand, *Maritime Practice in South-East Asia Until 1600 A.D. and the Modern Law of the Sea*, 30 INT'L & COMP. L.Q. 440, 440 (1981) (referencing Grotius's *Mare Liberum*, which was published in 1609); David B. Kopel, Paul Gallant & Joanne D. Eisen, *The Human Right of Self-Defense*, 22 BYU J. PUB. L. 43, 78-79 (2007) (explaining that Grotius linked freedom of the high seas to "the essential natural laws of self-defense and self-preservation"); Ileana M. Porras, *Constructing International Law in the East Indian Seas: Property, Sovereignty, Commerce and War in Hugo Grotius' De Iure Praedae—The Law of Prize and Booty, or "On How to Distinguish Merchants from Pirates"*, 31 BROOK. J. INT'L L. 741, 742-73 (2006) (calling Grotius "the father of international law" as a result of his development of such principles as freedom of the high seas); Cdr. David G. Wilson, *Interdiction on the High Seas: The Role and Authority of a Master in the Boarding and Searching of his Ship by Foreign Warships*, 55 NAVAL L. REV. 157, 162-63 (2008) (noting that Grotius developed the idea that the sea be open to all nations engaged in activities such as maritime commerce).

the early seventeenth century, when many European countries were not committed to such an idea, directly related to advice solicited from him by his client, the Dutch East India Company.<sup>16</sup> Grotius argued against privatizing ownership of the seas because it was in the best interests of Dutch trade in the East Indies. Rather than merely argue that only the Dutch had a right to freedom of the seas, he defended the rights of the Dutch on the premise that the seas belonged to mankind as a whole. For Grotius, private ownership only applied to objects that had “definite limits.”<sup>17</sup> Grotius argued that because the sea encompassed the globe and bordered every land mass occupied by humankind, it was incapable of private ownership.<sup>18</sup>

Grotius advanced a medley of reasons for the existence of freedom of the high seas—though some of his justifications were rather curious. For example, he wrote that private ownership of the seas was not possible because “when the lands were first divided[,] the sea was still for the greater part unknown.”<sup>19</sup> It followed that such widely-separated races could not have had any common agreement as to the division of the seas.<sup>20</sup> Without any prior agreement, the Sea, in Grotius’s view, belonged to all nations.<sup>21</sup>

Closely related to Grotius’s ideas about the private ownership of property and the common ownership of the seas by all nations was the right of all mankind to engage in commerce.<sup>22</sup> According to Grotius, man had a right to traverse the sea, as well as lands that were privately owned, for legitimate reasons.<sup>23</sup> Trade and commerce with other nations were among such legitimate reasons to traverse the seas.<sup>24</sup> He argued that:

[T]he right to engage in commerce pertains equally to all peoples; and

---

16. See Martine Julia van Ittersum, *Mare Liberum Versus the Propriety of the Seas? The Debate Between Hugo Grotius (1583-1645) and William Welwood (1552-1624) and its Impact on Anglo-Scotto-Dutch Fishery Disputes in the Second Half of the Seventeenth Century*, 10 EDINBURGH L. REV. 239, 240 (2006) (explaining Grotius’s justification for Dutch expansion was based on a desire to serve his country in any way he could); see also Porras, *supra* note 15, at 764-66 (noting that Grotius advanced the “doctrine of the providential function of commerce,” which depicted commercial pursuits as inherently good for humanity and interferences with it as an affront to God’s design).

17. GROTIUS, *supra* note 1, at 190-91.

18. *Id.* at 191.

19. *Id.*

20. *Id.*

21. *Id.*

22. See HUGO GROTIUS, *DE IURE PRAEDAE COMMENTARIUS* 218 (James Brown Scott ed., Gladys L. Williams & Walter H. Zeydel trans., Oceana Publ’ns, Inc. 1964) (1604) (arguing that God distributed various talents and resources to various regions to foster human interaction, including commerce). *De Jure Praedae* was written by Grotius between 1604 and 1608, but was never published during his life. *Mare Liberum* was published in 1609.

23. *Id.*

24. *Id.*

jurisconsults of the greatest renown extend the application of this principle to the point where they deny that any state or prince has the power to issue a general prohibition forbidding others to enjoy access to or trade with the subjects of that state or prince. This doctrine is the source of the sacrosanct law of hospitality.<sup>25</sup>

Grotius argued that permission must first be sought when traversing privately held land or water.<sup>26</sup> If it was denied, the traveler still retained the right to pass even if the passage required violence.<sup>27</sup> According to Grotius, this right to passage applied equally to goods in trade, and “[n]o one, in fact, ha[d] the right to hinder any nation from carrying on commerce with any other nation at a distance.”<sup>28</sup> Grotius rationalized that the right of unhindered trade benefited all of mankind and “human society.”<sup>29</sup> Navigation and commercial access to distant lands could not be impeded without causing harm.<sup>30</sup> Thus, according to Grotius, the right to engage in commerce in the high seas could be defended through war.<sup>31</sup>

In *De Jure Praedae*, or *Commentary on The Law of Prize and Booty*, Grotius gave legal advice following the capture by an East India Company vessel of a Portuguese trading vessel, the *Santa Catarina*, in the East Indies during the very early part of the seventeenth century.<sup>32</sup> Grotius advanced multiple arguments for the capture, including public and private war for interfering with the freedom to traverse the seas and to engage in commerce.<sup>33</sup> From the advice he gave regarding the *Santa Catarina*, Grotius extrapolated rules of international law, not only on the freedom of the seas but also on the law of war.

Grotius posited that there was no need to justify war against pirates because it was not customary or necessary to declare war “against tyrants, robbers, pirates, and all persons who do not form part of a foreign state.”<sup>34</sup> In fact, for Grotius, “no warning notification [was] necessary for war

---

25. *Id.* at 218-19.

26. GROTIUS, *supra* note 1, at 198.

27. *Id.*

28. *Id.* at 199.

29. *Id.* at 199-200 (discussing the idea that trade is a necessary action for human beings to engage in, because, as Libanius stated, “God did not bestow all products upon all parts of the earth, but distributed His gifts over different regions, to the end that men might cultivate a social relationship because one would have need of the help of another”).

30. *Id.* at 200.

31. *Id.* at 171, 179.

32. See GROTIUS, *supra* note 22, at 1-7 (arguing that the capture was permissible).

33. For a critical and insightful assessment, see Peter Borschberg, *Hugo Grotius’ Theory of Trans-Oceanic Trade Regulation: Revisiting Mare Liberum (1609)* 20-26 (Institute for Int’l Law & Justice, Working Paper No. 14, 2005), available at <http://www.iilj.org/publications/documents/2005.14Borschberg.pdf>; see also MARTINE JULIA VAN ITTERSUM, PROFIT AND PRINCIPLE: HUGO GROTIUS, NATURAL RIGHTS THEORIES AND THE RISE OF DUTCH POWER IN THE EAST INDIES, 1595-1615, at 21-30, 43-52 (2006) (providing detailed historical context for Grotius’s legal conclusions and motivations).

34. GROTIUS, *supra* note 22, at 97.

against persons who [were] already conducting themselves as enemies of [the] state.”<sup>35</sup> Within this framework, Grotius justified the Dutch capture of the valuable Portuguese vessel, the *Santa Catarina*. Despite the fact that the capturing vessel was not a licensed privateer, Grotius nevertheless justified its seizure as consistent with the Netherlands’s right to traverse the seas unhindered.<sup>36</sup> For Grotius, these depredations were similar to those caused by pirates:

[E]ven if [the Portuguese] were the owners of the regions sought by the Dutch, [they] would nevertheless be inflicting an injury if they prevented the Dutch from entering those regions and engaging in commerce therein. How much more unjust, then, is the existing situation, in which persons desirous of commerce with peoples who share that desire, are cut off from the latter by the intervention of men who are not invested with power either over the said peoples or over the route to be followed! For there is no stronger reason underlying our abhorrence even of robbers and pirates than the fact that they besiege and render unsafe the thoroughfares of human intercourse.<sup>37</sup>

Put simply, any state could punish pirates and robbers because their interference with commerce harmed humanity as a whole.<sup>38</sup>

### B. *The Case of Somali Piracy*

Piracy off the coast of Somalia has bedeviled shipping in the important Gulf of Aden transit corridor since the 1990s, when the government of Somalia collapsed and the country became embroiled in chaos.<sup>39</sup> Although nation-building and post-war reconstruction increasingly came into vogue after the end of the Cold War,<sup>40</sup> Somalia has not been favored with such

---

35. *Id.* at 101.

36. *Id.* at 1-7.

37. *Id.* at 219-20.

38. *Id.* at 326; *see also* ALFRED P. RUBIN, *THE LAW OF PIRACY* 318 (2d ed. 1998) (arguing that twentieth-century efforts by European powers to combat piracy “continued British assertion, now shared with France, of a special authority to safeguard international commerce based on the special interest, military strength and moral assertiveness of the British alone.”) Further, Rubin notes that the support for universal jurisdiction to prosecute pirates in these agreements reflected “a conception of special military or political rights to impose order on the high seas in the interests of general commerce and to confine rebellion to national borders of a single state, to the profit of third country merchants.” *Id.* at 319.

39. *Somali Regions Vow to Oust Pirates from Enclaves*, N.Y. TIMES, Apr. 13, 2010, <http://www.nytimes.com/reuters/2010/04/13/world/international-us-somalia-piracy.html?scp=2&sq=somalia%20piracy%2090s&st=cse>. *See also* JOHN DRYSDALE, *WHATEVER HAPPENED TO SOMALIA?: A TALE OF TRAGIC BLUNDERS* (1994) (arguing “When Somali government institutions collapse and clan cohesion fragments there are no deterrents to robbery, with or without violence.” *id.* 20).

40. *See* Ruth Gordon, *Saving Failed States: Sometimes a Neocolonialist Notion*, 12 AM. U. J. INT’L L. & POL’Y 903, 960 (1997) (noting that theories of modernization in the post-colonial era “largely reflected the ideological hegemony of Western capitalism”).

attention.<sup>41</sup> The United States precipitously withdrew from the country following the downing of its black hawk helicopters in 1993,<sup>42</sup> and the United Nations mission in Somalia similarly faltered.<sup>43</sup> Today, the Transitional Federal Government of Somalia is in dire need of support in establishing control of the country—even of Mogadishu, the Somali capital. At the United Nations, Somalia’s representative has stressed the importance of international assistance in the Djibouti Peace Process and the rebuilding of the country as a means of addressing the persistent piracy off its coast.<sup>44</sup>

Quantifying the economic ramifications of piracy off the coast of Somalia is difficult. The International Maritime Organization notes that the burden piracy places on global commerce is enormous.<sup>45</sup> Indeed, the cost

---

41. See Press Release, Amnesty International, Somalia: Amnesty International Calls for Accountability and Safeguards on Arms Transfers to Somalia’s Transitional Federal Government (Aug. 11, 2009), <http://www.amnesty.org/en/library/asset/AFR52/006/2009/en/06ab18f3-984e-4a9f-9df2-9f0e93c5e14e/afr520062009en.pdf> (claiming that the United States’ involvement in the Djibouti Peace Process—the international effort to improve conditions in Somalia that began with the October 2008 signing of the Djibouti Agreement—has been limited to U.S. Secretary of State Hillary Clinton’s pledge of military support to the Somali Transitional Federal Government and the provision of “40 tons of weapons and ammunition to Somalia”); see also GERALD LEMELLE & MICHAEL STULMAN, AFRICA POLICY OUTLOOK 2009, at 2-3 (2009), [http://www.africaaction.org/uploads/3/0/7/6/3076893/africa-outlook\\_final1.pdf](http://www.africaaction.org/uploads/3/0/7/6/3076893/africa-outlook_final1.pdf) (arguing that “U.S. involvement has directly undermined the cause of peace and stability [in Somalia]” and that “long-lasting peace and stability can only be reached when the root causes of poverty are addressed and a government responsive to the needs of Somalis first is in place.”) Moreover, the United States’ only response to the “overwhelming disaster” in Somalia has been with its military, which “is neither a policymaker nor a humanitarian agency.” LEMELLE & STULMAN, *supra*, at 2-3; see also Daud Ed Osman, *Djibouti Peace Agreement: A Blueprint for a National Unity Government*, HIRAAN ONLINE, Aug. 19, 2008, [http://www.hiiraan.com/op2/2008/aug/djibouti\\_peace\\_agreement\\_a\\_blueprint\\_for\\_a\\_national\\_unity\\_government.aspx](http://www.hiiraan.com/op2/2008/aug/djibouti_peace_agreement_a_blueprint_for_a_national_unity_government.aspx) (arguing that, at least until recently, the “‘international community’ and their narrative of the Somali crisis, including their reluctance to accept the incompetence of the [Somali Transitional Federal Government.]” has led to “the worst humanitarian disaster in the world”). But see J. Peter Pham, *Somaliland: What Somalia Could Be*, WORLD DEFENSE REVIEW, July 16, 2009, <http://worlddefensereview.com/pham071609.shtml> (“If the failure so far of no fewer than fourteen internationally-sponsored attempts at establishing a national government indicates anything, it is the futility of the notion that outsiders can impose a regime on Somalia.”).

42. U.S. Looks at Diplomatic Presence in Somalia, REUTERS, Feb. 1, 2007, <http://uk.reuters.com/article/idUKN0149690320070201>.

43. See LEARNING FROM SOMALIA: THE LESSONS OF ARMED HUMANITARIAN INTERVENTION 4 (Walter Clarke & Jeffrey Herbst eds., 1997) (linking the failure of the UN mission to its narrow mandate of “force protection”); JOHN DRYSDALE, WHATEVER HAPPENED TO SOMALIA?: A TALE OF TRAGIC BLUNDERS (1994). (arguing that Somalia got itself into ‘a horrible mess’ ‘partly due to UN inaction’ and because of “partisan UN policy and practice, and the ill-advised pursuit of the doctrine of peace-enforcement,” *id.* at 2)

44. See Press Release, *supra* note 13 (describing the recent spate of piracy as connected to the “nearly 20 years of instability” in Somalia).

45. See International Maritime Organization, Piracy in Waters Off the Coast of Somalia, [http://www.imo.org/dynamic/mainframe.asp?topic\\_id=1178](http://www.imo.org/dynamic/mainframe.asp?topic_id=1178) (last visited Apr. 4, 2010) (explaining that pirate attacks threaten the integrity of the Gulf of Aden, which facilitates roughly eight percent of the world’s trade in goods and materials).

of maritime insurance has risen sharply,<sup>46</sup> and the delivery of humanitarian assistance through the Gulf of Aden has been adversely affected.<sup>47</sup> The reach of piracy's impact on commerce stretches all the way from the Gulf of Aden down to Southern Africa, as the alternative route between these areas would require ships to navigate around West Africa—a much more expensive and time-consuming prospect.

Some ship owners argue that the costs and aggravation caused by piratical attacks are avoidable simply by complying with the pirates and paying the ransom demanded.<sup>48</sup> Similarly, in response to the early-nineteenth-century Barbary pirate attacks, some argued there was wisdom in paying the lesser fee of £250,000.00 to the pirates in order to save the larger £1 million expense of providing military protection for European commerce.<sup>49</sup> The U.S. President at the time, Thomas Jefferson, believed however that waging war, killing the Barbary pirates, and destroying their property was the best way to deter piratical attacks against American merchant ships within the Mediterranean region.<sup>50</sup>

Jefferson also repudiated the practice of the Adams administration that preceded him. The Adams administration purchased treaties of protection with Tripoli, Algiers, and Tunis to save American ships and crewmen from capture and enslavement by the Barbary pirates. Jefferson, by contrast, sought and received congressional authorization to have unlimited discretion in dealing with the Barbary States in a law entitled, the “Act for the Protection of the Commerce and Seamen of the United States, Against Tripolitan Cruisers.”<sup>51</sup> Rather than pay tributes in return for protection like President Adams, Jefferson, under pressure to protect the honor of the

---

46. See Artwell Dlamini, *Piracy Pushes Up Maritime Insurance Costs*, BUSINESS DAY (Johannesburg), Nov. 19, 2008, <http://allafrica.com/stories/200811190613.html> (noting that “insurance costs were rising to the point where some ship owners refused to sail their vessels in pirate-infested waters, especially around the Horn of Africa”).

47. Mark Mazzetti and Sharon Otterman, *U.S. Captain Is Hostage of Pirates; Navy Ship Arrives*, N.Y. TIMES, Apr. 6, 2009, at A6 (discussing the Alabama Attack).

48. See Rev. J. Loring Carpenter, *The Tough Lessons Piracy Teaches*, DAILY NEWS (Newburyport, MA), July 11, 2009, available at [http://www.newburyportnews.com/punews/local\\_story\\_191221617.html/](http://www.newburyportnews.com/punews/local_story_191221617.html/) (explaining that ship owners regularly pay the requested ransom of pirates because doing so protects human life and allows for the cargo to continue to its destination); *Larry King Live: American Captain Held Hostage by Pirates; Interview with Dr. Laura Schlessinger* (CNN television broadcast Apr. 8, 2009), available at <http://transcripts.cnn.com/TRANSCRIPTS/0904/08/lk1.01.html> (“[T]he shipping companies pay the ransom because it’s the easiest and cheapest way out. They get their crew back and they also get their ships back.”).

49. Robert F. Turner, *State Responsibility and the War on Terror: The Legacy of Thomas Jefferson and the Barbary Pirates*, 4 CHI. J. INT’L L. 121, 125 (2003).

50. See *id.* (suggesting that concerns of dignity and respect also informed Jefferson’s aggressive approach toward pirates).

51. David A. Carson, *Jefferson, Congress, and the Question of Leadership in the Tripolitan War*, 94 VA. MAG. HIST. & BIOGRAPHY 409, 415 (1986).

young nation against the pirates, ultimately prevailed in a military victory over the Barbary pirates. The United States agreed to a peace treaty with the pirates in which no tribute was paid.<sup>52</sup> Historians have argued that since the Barbary wars, it has become clear that “the only effective argument with a buccaneer [is] force.”<sup>53</sup>

Piracy today, as in the nineteenth century, continues to be hugely profitable to pirates. Piracy involves externalizing costs while internalizing huge pay-offs when a ransom is paid for releasing a ship held as collateral.<sup>54</sup> The more-organized Somali pirates are financed by rich investors outside Somalia who reap the benefits of their investment without having to take any risks themselves.<sup>55</sup> These pirates must succeed in getting a ransom payment periodically to make it a lucrative business for the financiers.<sup>56</sup> Thus, combating piracy to protect legitimate commerce on the high seas often involves attempts to control the lucrative ransom extraction business.

Unlike the early-seventeenth-century Dutch or early-nineteenth-century American war efforts to combat piracy, combating piracy in the early twenty-first century poses challenges of a different magnitude. In the early nineteenth century, the American navy was in its infancy. Two centuries later, the American military has unprecedented capabilities, including both

---

52. Turner, *supra* note 49, at 136.

53. Louis B. Wright & Julia H. Macleod, *First American Campaign in North Africa*, 7 HUNTINGTON LIB. Q. 281, 281 (1944). These two historians maintain that “[i]n the end, the United States set an example to the other maritime nations by exacting at the point of cannon a lasting peace from the corsairs.” *Id.* at 281-82. Of the ultimate American victory at Derna, they argue that it was “the most favorable peace that an Occidental nation had yet exacted from a Barbary power. That peace paved the way for the complete cessation of corsair depredations on American commerce.” *Id.* at 305.

54. *Cf.* Turner, *supra* note 49, at 132-33 (discussing the similar economic incentives motivating tyrants to go to war).

55. See Nick Wadhams, *Somali Pirates Take the Money and Run to Kenya* (National Public Radio broadcast May 7, 2010), available at <http://www.npr.org/templates/story/story.php?storyId=126510891> (reporting that “pirates say operations are now run by warlords and financiers around the world. The men who do the dirty work get only a tiny piece of those multi-million dollar ransoms”). On April 13, 2010, President Obama signed an Executive Order declaring that piracy and armed robbery at sea off the coast of Somalia was a threat to the peace, security and stability of Somalia and prohibited the contributions of funds, goods and services in connection thereto. See Exec. Order Concerning Somalia, Blocking Property of Certain Persons Contributing to the Conflict in Somalia, Apr. 13, 2010, available at <http://www.whitehouse.gov/the-press-office/executive-order-concerning-somalia>.

56. *Marketplace: More to Piracy than “Maritime Mugging”* (American Public Media radio broadcast May 21, 2009), available at [http://marketplace.publicradio.org/display/web/2009/05/21/pm\\_invisible\\_hook\\_q/](http://marketplace.publicradio.org/display/web/2009/05/21/pm_invisible_hook_q/) (providing Peter T. Leeson’s views on the differences between eighteenth-century and modern pirates and how pirates are financed). See PETER T. LEESON, *THE INVISIBLE HOOK: THE HIDDEN ECONOMICS OF PIRATES* 204 (2009) (“Modern day pirates tend to sail in very small groups and don’t live, sleep, and interact together on their ships for months, weeks, or even days on end, they don’t constitute a society and consequently face few, if any, of the problems of their forefathers.”).

manned and unmanned airpower to support its land and sea operations.<sup>57</sup> In responding to the threat posed by Somali piracy, whether the use of force is necessary at all and, if it is, what response is proportional and appropriate remain open questions. In addition, the use of force against pirates raises human rights issues, particularly given the allegations of torture upon capture and detention in Kenya.<sup>58</sup> I address these issues in Part II below.

The use of force against piracy safeguards the freedom of commerce on the high seas.<sup>59</sup> Hugo Grotius claimed such use of force in favor of Dutch commerce in the East Indies in the early seventeenth century.<sup>60</sup> Thomas Jefferson claimed it for the fledgling United States against the Barbary pirates in the early twentieth century.<sup>61</sup> Today it is claimed ostensibly for global commerce—mostly ships coming from Europe, the Middle East, and elsewhere to Africa—against Somali pirates. The use of force against Somali pirates remains a central response despite a combination of other measures being deployed, such as increased prosecutions.<sup>62</sup>

In this era of almost unlimited war-making potential, safeguards against its abuse under international law are vital. Protecting freedom of commerce should not become the latest occasion to jettison international law's limits on the use of force and to expand the permissible scope of force as envisaged under the United Nations Charter system. In addition, protecting freedom of commerce through the use of force should not shift international attention away from the reconstruction of Somalia. Further, the prevention of illegal fishing and the dumping of toxic waste off Somali's coast is necessary in order to fully address the escalation of piracy in the region.<sup>63</sup>

---

57. Thomas W. Smith, *The New Law of War: Legitimizing Hi-Tech and Infrastructural Violence*, 46 INT'L STUD. Q. 255 (2002).

58. See MILITARY EXPENDITURE: SIPRI YEARBOOK 2008: ARMAMENTS, DISARMAMENT AND INTERNATIONAL SECURITY (2008), appx. 5A (noting that the United States had 41.5% of the world's share of military expenditures in 2008).

59. See generally JAMES GATHII, WAR, COMMERCE, AND INTERNATIONAL LAW (2010) (discussing in greater detail the relationship between war and commerce).

60. See *supra* Part I.A.

61. Turner, *supra* note 47, at 125 (explaining that in Jefferson believed "justice and honor" called for military action against pirates).

62. See S.C. Res. 1851, ¶ 4, U.N. Doc. S/RES/1851 (Dec. 16, 2008) (encouraging the formation of the international cooperation mechanism that later became the Contact Group on Piracy Off the Coast of Somalia); see also Press Release, Department of State, Contact Group on Piracy Off the Coast of Somalia (Jan. 14, 2009), <http://www.state.gov/t/pm/rls/othr/misc/121054.htm> (explaining that the Contact Group was designed to focus on initiatives such as military and operational conduct, information sharing and capacity building, judicial issues, commercial industry coordination, and public information).

63. See *Dutch Free Yemeni Captives from Pirates*, N.Y. TIMES, Apr. 18, 2009, at A10 (reporting that Abdirahman Mohamed Farole, the president of the self-governing state of Puntland within Somalia, said that "the root cause of this piracy, as everyone knows, is

## II. PROSECUTING PIRATES AS OUTLAWS

This section examines the prosecution of Somali pirates in Kenyan courts by comparing the guaranteed rights of criminal defendants under Kenyan and international law. The prosecutions in Kenya raise two concerns. First, Somali nationals are charged in Kenyan courts as non-nationals captured on the high seas and therefore have extremely tenuous links to Kenya. The added caseload strains an already-burdened criminal justice system and thus presents a challenge for Kenya to ensure the fairness and propriety of these trials. Kenya's role in safeguarding freedom of commerce, a role many other countries can share equally, is extremely problematic, and its self-interest in attracting foreign aid should not trump its duty to ensure fair trials.<sup>64</sup>

A second concern is that while Kenya has become the international piracy court, Article 105 of the United Nations Convention on the Law of the Sea (UNCLOS) gives primary jurisdiction to the states that capture these pirates.<sup>65</sup> As such, no established legal framework governs the arrest and detention of suspected pirates prior to being handed over to Kenya for prosecution. The transfer of suspected pirates to Kenya is currently

---

illegal fishing . . . . That situation still exists, so any activity directed at eliminating piracy should also be combined with the elimination of illegal fishing by foreign trawlers'"); *see also* Jeffrey Gettleman, *Somalia's Pirates Flourish in a Lawless Nation*, N.Y. TIMES, Oct. 30, 2008, at A1 (reporting that fishermen in the Gulf of Aden believe that the illegal dumping of "barrels of toxic waste . . . and rogue fishing trawlers [that] suck[] up not just fish and lobsters but also the coral and the plants that sustain them . . . [may have] turned [Somali] fishermen into pirates"); Mohamed Abshir Waldo, *The Two Piracies in Somalia: Why the World Ignores the Other?*, WARDHEER NEWS (Somalia), Jan. 8, 2009, [http://wardheernews.com/Articles\\_09/Jan/Waldo/08\\_The\\_two\\_piracies\\_in\\_Somalia.html](http://wardheernews.com/Articles_09/Jan/Waldo/08_The_two_piracies_in_Somalia.html) (discussing the link between illegal fishing in Somalia's waters and the proliferation of piracy off its coast); Press Release, Security Council, Chairs of Security Council Subsidiary Bodies Brief Members As Two-Year Tenures Approach Conclusion, U.N. Doc. SC/9537 (Dec. 15, 2008), <http://www.un.org/News/Press/docs/2008/sc9537.doc.htm> ("[P]irates invoked legitimate Somalia grievances about illegal fishing in Somali waters by foreign ships and the illegal dumping of toxic waste off the coast. Those grievances had earned the pirates general support among Somali society."). *But see* J. Peter Pham, *Pondering Somali Piracy*, WORLD DEFENSE REVIEW, Apr. 23, 2009, <http://worlddefensereview.com/pham042309.shtml> (insisting that the notion "that the [Somalian pirates are] modern-day Robin Hoods defending Somali waters from reported incidents of illegal commercial fishing and toxic waste disposal" is completely wrong).

64. *See* OSCAR SCHACHTER, INTERNATIONAL LAW IN THEORY AND PRACTICE 269-70 (1991) (arguing that the exercise of universal jurisdiction by a state with no territorial or nationality links "should require" such a state to fully meet the "criteria of a fair trial and the limits of 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) (contending that states employing universal jurisdiction to prosecute crimes must pay particular attention to the defendant's rights because "[e]xercising universal jurisdiction may present special problems that bear on the fairness and propriety of the judicial proceedings in a State removed from the site of the crime and having no link of nationality to the accused").

65. James Gathii, *Jurisdiction to Prosecute Non-National Pirates Captured By Third States Under Kenyan and International Law*, 32 LOY. L.A. INT'L & COMP. L. REV. (forthcoming 2010).

governed by bilateral agreements with the capturing states, while prosecutions are being conducted under Kenyan law. Thus, the rules governing the apprehension, treatment, and detention of piracy suspects prior to being transferred to Kenya is largely unsettled. The United Nations Office on Drugs and Crime (UNODC), with assistance from the European Union, has drafted guidelines for countries transferring piracy suspects to Kenya.<sup>66</sup> Unfortunately, these guidelines do not resolve a number of important questions, such as the length of time piracy suspects may be legally detained before being handed over to Kenya for prosecution. Nor do the guidelines address the legality of interrogation procedures and techniques conducted by foreign militaries, the results of which are forwarded to civilian authorities as evidence in piracy trials.

*A. Legal Guarantees for Criminal Defendants Under Kenyan Law*

While the legal basis surrounding the arrest and transfer of suspected pirates is ambiguous, prosecutions are conducted within established Kenyan law.<sup>67</sup> The rights of criminal defendants in Kenya are, on paper, analogous to those guaranteed under international law.<sup>68</sup> These include the right to a fair trial within a reasonable time by an impartial tribunal;<sup>69</sup> the presumption of innocence;<sup>70</sup> the right to be informed of the charges in a language the accused understands;<sup>71</sup> the right to have adequate time and facilities to prepare a defense;<sup>72</sup> the right to defend oneself or to have legal representation of one's choice;<sup>73</sup> the right to cross-examine witnesses;<sup>74</sup> the right to an interpreter;<sup>75</sup> and the right not to give incriminating evidence

---

66. These guidelines have been accepted by the European Union. See Posting of Sarah Mielke to Summer Associate Blog, <http://law.wlu.edu/blog/> (July 15, 2009, 14:27 EST) (explaining that these guidelines were drafted collectively by EU legal counsel and Kenyan prosecutors).

67. See Gathii, *supra* note 60 (questioning the jurisdictional basis for trying piracy suspects before the magistrate's court rather than the High Court of Kenya).

68. Cf. International Covenant on Civil and Political Rights arts. 9-11, Dec. 19, 1966, 999 U.N.T.S. 171, 175-76 [hereinafter ICCPR] (detailing certain rights of criminal defendants in states that are parties to the convention); African Charter on Human and Peoples' Rights art. 7, June 27, 1981, 1520 U.N.T.S. 217, 247 [hereinafter Banjul Charter] (agreeing to provide specific legal rights to citizens of states that are members of the Organization of African Unity). Kenya ratified the ICCPR on May 1, 1972. ICCPR, *supra*, at 172 n.1. The Banjul Charter entered into force on October 21, 1986. Banjul Charter, *supra*, at 245 n.1.

69. CONSTITUTION, Art. 77(1) (2008) (Kenya).

70. *Id.* Art. 77(2)(a).

71. *Id.* Art. 77(2)(b).

72. *Id.* Art. 77(2)(c).

73. *Id.* Art. 77(2)(d). However, there is no right to legal representation for indigent defendants unless they are charged with offenses such as murder or violent robbery, which are punishable by death. See *id.* Art. 77(14) ("Nothing contained in subsection (2)(d) shall be construed as entitling a person to legal representation at public expense.")

74. *Id.* Art. 77(2)(e).

75. *Id.* Art. 77(2)(d).

against oneself.<sup>76</sup> The Kenyan Constitution also prohibits torture and inhumane or degrading treatment.<sup>77</sup>

Suspected pirates on trial in Kenya are held in the now much-reformed Shimo La Tewa prison in Mombasa, with funding from the EU-UNODC program in Nairobi.<sup>78</sup> When Kenyan Vice President Kalonzo Musyoka visited the prison toward the end of last year, piracy suspects complained that their trial were taking too long.<sup>79</sup> A French nongovernmental organization, Lawyers of the World, has begun pressing the EU to take action, citing violations of the pirates' rights as guaranteed in the EU's agreement with Kenya.<sup>80</sup> Lawyers of the World have sought audience in one of the piracy cases to represent the suspected pirates.<sup>81</sup> If Lawyers of the World is allowed an audience in a Kenyan court, the rights specified in the EU-Kenyan Agreement are likely to be invoked and their status as binding authority will be tested. If this occurs, the rights guaranteed under the agreement will finally play a part in the Kenyan judicial system. To date, these rights have only been invoked in the diplomatic realm.

*B. Arrest, Handover to Kenya, or Release: How Kenya Became the International Piracy Court*

While the aforesaid EU-Kenya Memorandum of Understanding provides the legal basis for Kenya to prosecute piracy suspects captured by EU-led forces, the general framework justifying the arrest, detention, and handover of piracy suspects for prosecution in Kenya remains very unclear. According to one person involved in the drafting of this framework:

The 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

76. *Id.* Art. 77(7).

77. *Id.* Art. 74(1).

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

79. Antony Kitimo, *Kenya: Piracy Suspects Appeal to VP Kalonzo*, DAILY NATION (Nairobi), Sept. 4, 2009, available at <http://www.allafrica.com/stories/printable/200909040838.html> (reporting that since Kenya began its prosecutions in 2006, "only ten out of 110 suspected pirates have been tried and sentence[d]").

80. Sarah McGregor, *EU, Kenya Somali-Pirate Treaty "Violates Rights," Lawyers Say*, BLOOMBERG.COM, Aug. 19, 2009, [http://www.bloomberg.com/apps/news?pid=newsarchive&sid=aDs\\_bA4DXiTg](http://www.bloomberg.com/apps/news?pid=newsarchive&sid=aDs_bA4DXiTg); see Otto Bakano, *Piracy Trials in Kenya Beset by Legal Obstacles*, DAILY TELEGRAPH (London), Mar. 8, 2010, available at <http://www.telegraph.co.uk/expat/expatnews/7398594/Piracy-trials-in-Kenya-beset-by-legal-obstacles.html> (noting concerns with possible corruption and lack of due process in Kenyan courts).

81. Sarah McGregor, *Aid Group to Defend Piracy Suspects, Ensure Fair Trials*, BLOOMBERG.COM, Aug. 3, 2009, <http://www.bloomberg.com/apps/news?pid=newsarchive&sid=a5wQ7mzHZEEY>.

law.<sup>82</sup>

The notion that universal jurisdiction justifies the detention of suspects for long periods of time, such as those in the piracy cases identified above, is particularly flawed. The entire purpose of universal jurisdiction is to arrest suspects and charge them with the offense for which they have been arrested rather than to detain them. Universal jurisdiction as defined in Article 105 of UNCLOS certainly gives capturing states the authority to arrest piracy suspects but it is another matter entirely to argue that universal jurisdiction also allows military detention.<sup>83</sup> No justification exists for the argument of Kenyan courts' that time starts running once the suspects are handed over to Kenyan authorities and not upon their arrest.

Before Kenya started accepting piracy suspects for prosecution, many piracy suspects were released in what became known as a "catch and release" policy.<sup>84</sup> The vagueness surrounding indefinite detentions contributed directly to this practice. No arguments were advanced to justify indefinite detentions—as have been used in the terrorism context—and before Kenya offered to prosecute piracy suspects, many governments patrolling the coast of Somalia simply instructed their forces to release them.<sup>85</sup> In addition, the capturing states feared that pirates would seek asylum should prosecutions be unsuccessful or after they had served their sentences.<sup>86</sup>

In the ongoing Spanish trial of two Somali pirates referenced above, the court dropped charges against the pirates that would have entitled them to

---

82. Mielke, *supra* note 66.

83. See UNCLOS, *supra* note 130 at 397 (UNCLOS provides that "every State" may arrest people found on board a vessel that is either used by pirates or that has been taken over by pirates, then, the courts of the capturing State "may decide upon the penalties to be imposed").

84. For an analysis, see generally Eugene Kontorovich, "A Guantanamo at Sea": *The Difficulty of Prosecuting Pirates and Terrorists*, 98 CAL. L. REV. 243 (2010); Mohamed Ahmed, *NATO Frees Pirate Hostages, Belgian Ship Seized*, REUTERS, Apr. 18, 2009, <http://uk.reuters.com/article/idUKLI170695>. For an argument against catch and release, and for a vigilant antipiracy military policy, see Ruth Wedgwood, *What Do You Do With a Captured Pirate?*, DEFINING IDEAS, 2009, available at <http://www.hoover.org/publications/definingideas/63130762.html>.

85. Kontorovich, *supra* note **Error! Bookmark not defined.**

86. See *Somali Pirates to Request Asylum in Netherlands*, EARTHTIMES, May 18, 2009, <http://www.earthtimes.org/articles/show/269283,somali-pirates-to-request-asylum-in-netherlands.html> (noting that five suspected Somali pirates standing trial in the Netherlands announced their plans to seek asylum there); Bruno Waterfield, *Somali Pirates Embrace Capture as Route to Europe*, TELEGRAPH (United Kingdom), May 19, 2009, <http://www.telegraph.co.uk/news/worldnews/piracy/5350183/Somali-pirates-embrace-capture-as-route-to-Europe.html> (noting that some Somali pirates might allow themselves to be captured in order to take advantage of European asylum laws); Marie Woolf, *Pirates Can Claim UK Asylum*, SUNDAY TIMES (London) at 1, Apr. 13, 2008, available at <http://www.timesonline.co.uk/tol/news/uk/article3736239.ece> (noting that the British Foreign Office advised the Royal Navy that pirates should not be detained or sent back to Somalia because doing so could subject them to beheading and murder, and bringing pirates to the UK could entitle them to asylum).

be considered for asylum upon being released.<sup>87</sup> These countries also worried that piracy suspects would claim they were peaceful fishermen, which would create evidentiary problems that could threaten successful prosecutions.<sup>88</sup> Naval officers off the coast of Somalia continue to release Somali nationals captured on the high seas if they were interdicted and arrested in a skiff near a pirate mother ship but not engaged in a piratical attack at the time. This is because Kenyan law does not provide for prosecutions of those who might be engaged in a conspiracy to commit piracy.<sup>89</sup> As one British Rear Admiral has put it:

The issue is that when I detain a mother ship in the middle of the ocean how do I get those pirates into a court of law? My aircraft has flown over it, I've seen skiffs, fuel, ladders, 15 pirates and no fishing gear, so it's not out there for a Sunday afternoon sail [but] they haven't committed an act of piracy.<sup>90</sup>

This demonstrates the importance of objections raised by defense lawyers in the piracy prosecutions in Kenya with regard to video-taped evidence or with a view to establishing where exactly the offenses were committed. These evidentiary issues are developed more fully below.<sup>91</sup>

The EU-Kenya Memorandum of Understanding under which Kenya accepted jurisdiction over suspected Somali pirates was quickly negotiated

---

87. See Woolls, *supra* note 137 (describing how hijackers held a Spanish fishing vessel hostage and demanded the release of their two "colleagues" held in custody in Madrid).

88. Matthias Gebauer & Holger Stark, *Policing the Gulf of Aden: Somali Pirate Trial Tests Limits of EU Mission*, SPIEGEL ONLINE, Apr. 1, 2009, <http://www.spiegel.de/international/world/0,1518,616760,00.html>; see also Otto Bakano, *Piracy Trials in Kenya Beset by Legal Obstacles*, TELEGRAPH (United Kingdom), Mar. 8, 2010, <http://www.telegraph.co.uk/expat/expatnews/7398594/Piracy-trials-in-Kenya-beset-by-legal-obstacles.html> (noting, for instance, the inadmissibility of U.S. officers' statements in Kenyan court).

89. See Tristan McConnell, *Kenyan Courts on Legal Front Line in Battle to Stop Somali Pirates*, TIMES ONLINE, Dec. 10, 2009, <http://www.timesonline.co.uk/tol/news/world/africa/article6950951.ece> (noting the difficulty of proving conspiracy to commit piracy and explaining that a conviction is usually only possible if the suspects are caught while actually engaged in the act of piracy).

90. *Id.* This position of adding conspiracy to be part of the crime of piracy was advocated for by a senior governmental official. See Andrew Shapiro, Keynote Address at the American University Law Review Symposium: Counter-Piracy Policy: Delivering Judicial Consequences (Mar. 31, 2009), available at <http://www.state.gov/t/pm/rls/rm/139326.htm> (arguing one way of meeting contemporary piracy challenges is to "to infer the intent to commit an act of piracy from the possession of piracy-related equipment and the circumstances in which the suspects are encountered"). See also, Eugene Kontorovich, *Equipment Articles for the Prosecution of Maritime Piracy*, A Discussion Paper of the One Earth Future, Oceans Beyond Piracy Project, 17 May, 2010 available at <http://www.oneearthfuture.org/images/imagefiles/EQUIPMENT%20ARTICLES%20FOR%20THE%20PROSECUTION%20OF%20MARITIME%20PIRACY.pdf> (also arguing in favor of expanding the definition of piracy to make it a prosecutable offense to have equipment that can be used in a piratical attack using the analogy of equipment articles in the anti-slavery context)

91. See *infra* Part III.

by the German Ambassador to Kenya after a German warship, the *Rheinland-Pfalz*, captured nine Somali piracy suspects and held them for three days without instructions on how to proceed.<sup>92</sup> During a twelve-day detention period, while the fate of the pirates was publicly and acrimoniously debated in Germany, a deal was procured under which they were handed over to Kenya.<sup>93</sup> During this period, a state prosecutor in Hamburg, Germany had announced it would prosecute the pirates.<sup>94</sup> Chancellor Angela Merkel's Christian Democrats and Frank-Walter Steinmeier's Social Democrats disagreed on how to handle an attack on a "ship owned by a German company but registered under a foreign flag and manned by a non-German crew."<sup>95</sup> A Frankfurt lawyer, Oliver Wallasch, summarized the stakes in the disagreement:

This was not a judicial decision about where to try them. It was purely political . . . Elections [were] coming up in Germany . . . The average German [would not] understand why Somalis captured in international waters should be tried at German taxpayers' expense . . .<sup>96</sup>

The EU-Kenya Memorandum of Understanding negotiated by the German Ambassador to Kenya with the Kenyan government was therefore a perfect solution to the lack of political will in the capturing states to assume the responsibility of prosecuting the piracy suspects. In large part, capturing states are hesitant to assume the responsibility because of the procedural and substantive rights criminal defendants are entitled to in the United States and in Europe.<sup>97</sup> Kenya offers many advantages. For example, prosecutions in the United States must overcome challenges relating to the taking of evidence, handling of exhibits, and holding of suspects in appropriate conditions until they can be handed over for prosecution.<sup>98</sup> In addition, unlike the populations in the countries of capturing states, which have little political will to support the cost of piracy prosecutions in their own countries, prosecutions in Kenya were not until

---

92. Horand Knaup & Alexander Szandar, *Berlin Spared Embarrassment by Kenya Deal on Pirates*, SPIEGEL ONLINE, Mar. 9, 2009, <http://www.spiegel.de/international/world/0,1518,612168,00.html>.

93. *Id.*

94. *Id.*

95. *Id.*

96. Diana Fong, *Politics Influences the Jurisdiction for Somali Pirate Trials*, DEUTSCHE WELLE (Germany), Apr. 22, 2009, <http://www.dw-world.de/dw/article/0,,4198300,00.html>.

97. See McConnell, *supra* note **Error! Bookmark not defined.** (referring to the proceedings in Kenya as "sluggish"). For an extensive overview of due process protections in a variety of jurisdictions, see generally ROZA PATI, *DUE PROCESS AND INTERNATIONAL TERRORISM: AN INTERNATIONAL LEGAL ANALYSIS* (2009). For a discussion of the shortcomings of Kenya's old evidence rules in piracy trials, see Michael Bahar, *Attaining Optimal Deterrence at Sea: A Legal and Strategic Theory for Naval Anti-Piracy Operations*, 40 VAND. J. TRANSNAT'L L. 1, 82-85 (2007).

98. See *infra* Part III.

recently publicly debated either in Parliament or elsewhere.<sup>99</sup> The Kenyan government saw the prospect of receiving funding for its archaic criminal justice system and embraced the opportunity. However, when Parliament began questioning the government's decision to prosecute the piracy trials, the government announced that it was no longer going to accept piracy suspects.<sup>100</sup>

With an eye toward presenting cases for trial in Kenya, the UNODC has crafted handover guidance procedures for the militaries patrolling the waters off the coast of Somalia.<sup>101</sup> The procedures instruct the foreign navies on what evidence to gather and how to prepare it, with a view to supporting their prosecution, not in accordance with the requirements of their own countries, but rather with regard to Kenya (and now the Seychelles).<sup>102</sup> These handover guidance procedures are confidential.<sup>103</sup>

Although the UNODC seems to proceed on the assumption that the arrest and detention of the piracy suspects is based on universal jurisdiction, the navies patrolling the waters off the coast of Somalia are clearly exercising powers akin to those exercised in war.<sup>104</sup> When the suspects are brought to Kenya, however, they are treated as ordinary criminals.<sup>105</sup> As a result, there is great variance between what Kenyan law anticipates to be the proper mode of arrest and search and the procedures actually deployed on the high seas in undertaking the arrests. The arrest and detention of pirates on the high seas conflicts with the rules governing

---

99. 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 Defense 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.

100. *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*, DAILY NATION (Kenya), Mar. 30, 2010, available at <http://allafrica.com/stories/201003300855.html>.

101. E-mail from Alan Cole, EU/UNODC Counter-Piracy Programme Coordinator, UNODC Regional Office for Eastern Africa, to Robert Emery, Reference Librarian, Albany Law School (Mar. 5, 2010, 04:23 EAT) (on file with author).

102. *Id.* A recent security council resolution has authorized an examination of the establishment of an international piracy court. See S.C. Res. 1918, ¶4 (Apr. 27, 2010). Seychelles is already in the process of establishing UN-backed piracy courts. See *Seychelles to Set up Courts to Fight Piracy: UN*, AFP, May 5, 2010, available at [http://ca.news.yahoo.com/s/afp/100505/world/somalia\\_piracy\\_shipping\\_un\\_seychelles?printer=1](http://ca.news.yahoo.com/s/afp/100505/world/somalia_piracy_shipping_un_seychelles?printer=1).

103. *Id.*

104. For a good analysis of pirate activities rising to a level of gravity that may have triggered a right of self defense among states, see 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, 1218–1224 (2010). UN Security Council resolutions, however, remain the best legal justification for the use of force.

105. See *infra* Part III.A (discussing procedural issues and witness attendance issues in piracy trials).

arrest and detention of suspects prior to being formally charged in Kenyan courts, notwithstanding the confidential UNODC crafted handover guidance procedures.<sup>106</sup> The fact that UNODC is crafting procedures regarding how evidence should be prepared for prosecutions in Kenya, while neither the Kenyan Evidence Act<sup>107</sup> nor any other Kenyan law addresses this issue, strongly suggests that the Kenyan Parliament's role is being usurped by an international organization. Circumventing the Kenyan government constitutes an unconstitutional delegation of the country's law-making power to an international organization.

C. *The Legality of Piracy Arrests and Extended Pre-Trial Detentions*

Kenyan law requires that suspects be charged before a court of law within twenty-four hours of their arrest.<sup>108</sup> Thus, the extended detentions of piracy suspects without a formal charge violates both section 72(3)(b) of the Kenyan Constitution and section 36 of the Criminal Procedure Code. In *Republic v. Said Abdallah Haji & 8 Others*,<sup>109</sup> for example, the piracy suspects made exactly this argument in an application for dismissal of their case. The suspects argued that they were not properly before the court since they had been held for more than twenty-four hours before being charged in court. The suspects were interdicted in the Gulf of Aden on May 22, 2009 and were handed over to Kenyan authorities on June 25, 2009.<sup>110</sup> Thirty-three days passed before they were eventually surrendered to Kenyan authorities, and thirty-four days before they were finally charged in court.

The court rejected the argument, holding that the twenty-four-hour

---

106. See *infra* Part III.B (discussing Kenyan arrest procedures).

107. Evidence Act, (2009) Cap. 80 (Kenya).

108. CONSTITUTION, Art. 72(3)(b) (2008) (Kenya). This section provides:

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.

*Id.*; see also Criminal Procedure Code, (2009) Cap. 75 § 36 (Kenya) (reiterating the same).

109. (2009) Crim. Case No. 2127 (Chief Magis. Ct.) (Mombasa, Kenya). The accused are charged with piracy in relation to the *Maria K* vessel. The attack occurred on May 22, 2009, and the pirates were apprehended by the Italian warship *Maestrone*. See CIVIL MARITIME ANALYSIS DEPARTMENT, U.S. OFFICE OF NAVAL INTELLIGENCE, WORLDWIDE THREAT TO SHIPPING; MARINER WARNING INFORMATION ¶ 8 (2009), [http://www.nga.mil/MSISiteContent/StaticFiles/MISC/wwtts/wwtts\\_20090610100000.txt](http://www.nga.mil/MSISiteContent/StaticFiles/MISC/wwtts/wwtts_20090610100000.txt) (explaining that the pirates were turned over to Kenyan officials on June 25, 2009 and that charges were proffered the next day).

110. CIVIL MARITIME ANALYSIS DEPARTMENT, *supra* note 109.

period started upon the suspects being handed over to Kenyan authorities for prosecution rather than the time of interdiction and arrest on the high seas. The court conveniently declined to squarely address the legality of the thirty-three-day detention of the suspects prior to being brought to Kenya. The court declined to respond to the defense's argument that the delay in charging the suspects could affect their right to receive a fair trial.

Delays in bringing suspects before Kenyan courts is not uncommon, although thirty-three days is excessive. In *Chacha Mwita & 4 Others v. Commissioner of Police*,<sup>111</sup> the High Court of Kenya found that three suspects who had been held by the police for twenty-four hours without being charged were entitled to "anticipatory bail," or bail pending charges against them, to avoid the abridgement of their fundamental rights and freedoms under the Kenyan Constitution.<sup>112</sup> More to the point, in *Ann Njogu & 5 Others v. Republic*,<sup>113</sup> the High Court held that a one-day delay in bringing suspects before the court automatically voided any charges that might have been brought against the suspects, however meritorious the prosecution evidence. The High Court ordered the accused set free without the threat of re-arrest on the basis of the initial evidence.

The cases involving piracy suspects are analogous to *Albanus Mwasia Mutua v. Republic*,<sup>114</sup> where the accused was held without charge for eight months. The Kenyan Court of Appeal held that section 73(3)(b) of the Constitution, as read with section 77(1), entitles an accused person to a fair hearing within a reasonable time. If this requirement is not met, the accused must be released.<sup>115</sup> In *Republic v. Amos Karuga Karatu*,<sup>116</sup> an investigating officer conceded that he held a suspect for six months before eventually bringing charges. The High Court held that:

A period of 6 months delay cannot be explained away on the basis that the investigating officer's hands were tied and could do nothing due to the procedure of processing the investigations file in their systems. The constitutional and fundamental rights of an accused person cannot be sacrificed at the alter of the so called police procedures.<sup>117</sup>

In this context, the rejection of an analogous argument on behalf of the

---

111. (2006) Misc. Applic. No. 110 (H.C.K.)(Kenya).

112. *Id.*

113. (2007) Misc. Applic. No. 551 (H.C.K.) (Kenya).

114. (2006) Crim. App. No. 120 (H.C.K.) (Kenya). See Paul Mwangi Murungu v. Republic, (2006) Crim. App. No. 35 (C.A.K.) (Kenya) (citing the court's decision in *Albanus Mwasia Mutua* to find that an unexplained delay of ten days before a suspect was brought to court justified his release); Gerald Macharia Githuku v. Republic, (2004) Crim. App. No. 119 (C.A.K.) (Nairobi, Kenya) (quoting the High Court of Kenya's opinion from *Albanus Mwasia Mutua*).

115. See *Republic v. Amos Karuga Karatu*, (2006) Crim. App. No. 12 (H.C.K.) (Kenya) (citing the High Court of Kenya's holding in *Albanus Mwasia Mutua* verbatim).

116. (2006) Crim. App. No. 12 (H.C.K.) (Kenya).

117. *Id.*

piracy suspects in *Republic v. Said Abdullahi Haji & 8 Others* is inconsistent with section 72(3)(b) of the Constitution. The only basis on which the result in *Said Abdullahi Haji* could be justified is that the protections of section 72(3)(b) do not extend extraterritorially because the suspects were allegedly arrested on the high seas. The court did not however address itself to that question. By declining to seriously inquire about the delay in charging the accused persons beyond twenty-four hours, the court, in essence, legitimized the indefinite detention of the piracy suspects before they were charged in Kenya.

Although Kenyan courts have declined to answer this question, the arrests and detentions of the piracy suspects by foreign militaries on the high seas are certainly governed by international law. The International Covenant on Civil and Political Rights (ICCPR), to which Kenya is a party, requires that arrested individuals be promptly informed of the reasons for the arrest and any criminal charges against them.<sup>118</sup> Such persons must be brought before a judge or other authorized judicial officer<sup>119</sup> and given the right to challenge the lawfulness of their arrest and detention.<sup>120</sup>

Delays in charging the piracy suspects occurred in each of the ongoing cases in Mombasa. The following cases exemplify the variation in the number of days between arrest on the high seas and charges being brought against the accused persons: *Republic v. Mohammed Hassan Ali*<sup>121</sup> (eleven-day delay); *Republic v. Liban Ahmed Ali & 10 Others*<sup>122</sup> (seven-day delay); *Republic v. Said Mohamed Ahmed & 7 Others*<sup>123</sup> (fifteen-day

---

118. ICCPR, *supra* note 68, at 175.

119. *Id.*

120. *Id.* at 176.

121. (2009) Crim. Case No. 1694 (Chief Magis. Ct.) (Mombasa, Kenya). The accused were arrested on May 7, 2009 by the Spanish Navy for committing piracy in relation to the Maltese vessel *Anny Petrakis*. *Spanish Navy Detains Suspected Pirates Off Somalia*, AFP, May 7, 2009, <http://www.google.com/hostednews/afp/article/ALeqM5i91FV8h3nCW2QuW4U4Vg2UTZLLTA>. The case was first brought to court on May 18, 2009, the accused having been turned over to Kenyan authorities on May 16, 2009. This case is due to be consolidated with *Republic v. Iadid Mohamed Mohamud*, (2009) Crim. Case No. 1784 (Chief Magis. Ct.) (Mombasa, Kenya), as ordered by the Chief Magistrates Court on August 24, 2009.

122. (2009) Crim. Case No. 1374 (Chief Magis. Ct.) (Mombasa, Kenya). The accused were arrested by the French Navy on April 15, 2009 after hijacking the Liberian *Safmarine Asia*. Sharon Otterman & Mark McDonald, *French Navy Seizes 11 Accused of Pirate Attacks off Somalia*, N.Y. TIMES, Apr. 16, 2009, at A8. They were turned over to Kenyan officials on April 22, 2009 and were charged the next day. Katharine Houreld, *Pirates Are Marched Down Gangplank—to Kenya Jail*, FOXNEWS.COM, Apr. 22, 2009, <http://www.foxnews.com/wires/2009Apr22/0,4670,Piracy,00.html>.

123. (2008) Crim. Case No. 3486 (Chief Magis. Ct.) (Mombasa, Kenya). The accused were arrested on November 9, 2008 by the Royal British Marines from the *HMS Cumberland* after attacking and detaining the Yemeni *Waadi Omar 2* and the Danish *Powerful*. Asha Hamisi, *Suspected Pirates Appear in Court*, KENYA BROAD. CORP., Nov. 19, 2008, <http://www.kbc.co.ke/story.asp?ID=53954>. They were turned over to Kenyan officials on November 18, 2008 and were charged on November 24, 2009. *Said Mohamed Ahmed*, Crim. Case No. 3486.

delay); *Republic v. Jama Abdikadir Farah & 6 Others*<sup>124</sup> (ten-day delay); *Republic v. Ahmed Abdikadir Hersi & 10 Others*<sup>125</sup> (eight-day delay); *Republic v. Shafili Hirsi Ahmed & 6 Others*<sup>126</sup> (fourteen-day delay), and *Republic v. Mohamud Mohamed Hashi & 8 Others*<sup>127</sup> (seven-day delay).

In *Said Mohamed Ahmed*, the suspects were handed over to Kenya on November 18, 2009 but were not charged until November 24, 2009. This delay is inconsistent with the Kenyan High Court's holding that bringing charges more than twenty-four hours after arrest violates section 72(3)(b)

---

124. (2009) Crim. Case No. 1695 (Chief Magis. Ct.) (Mombasa, Kenya). The accused were captured on May 7, 2009 by the Spanish Navy for the attempted hijacking of the Panamanian *Nepheli*. *Spanish Navy Detains Suspected Pirates Off Somalia*, *supra* note 121. Their boat allegedly capsized due to evasive action taken by the *Nepheli*, and they were pulled out of the water by the crew of the *Marqyes de La Ensenada*, a ship that went to investigate the *Nepheli*'s distress signal. *Id.* The accused in this case were put on their defense at the close of the prosecution case on 27<sup>th</sup> of May, 2010, see Linah Benyawa, "Kenya Puts On Defense Piracy Suspects," *East African Standard*, May 27, 2010 available at <http://www.standardmedia.co.ke/InsidePage.php?id=2000010322&cid=418&story=Kenya%20puts%20on%20defence%20suspected%20pirates>

125. (2009) Crim. Case No. 1582 (Chief Magis. Ct.) (Mombasa, Kenya). The accused were seized by the French Navy on May 3, 2009 when they apparently mistook the French military vessel *FNS Nivose* for a commercial vessel and "made a run at it." *Pirates Seized After Threatening French Navy Ship*, CNN.COM, May 3, 2009, <http://edition.cnn.com/2009/WORLD/africa/05/03/kenya.pirates/>. They were then trapped by a helicopter before they could fire or flee. *Id.* The pirates were handed over to Kenya on 8<sup>th</sup> May, 2009. See Mc Parry, "French Navy Hands Suspected Pirates to Kenya," available at <http://www.armybase.us/2009/05/french-navy-hands-suspected-pirates-to-kenya/>.

126. (2009) Crim. Case No. 2463 (Chief Magis. Ct.) (Mombasa, Kenya) (initially filed as Crim. Case No. 825). The accused were arrested by the Swedish Navy on May 26, 2009 after attempting to hijack the Greek *MV Antonis*. *Swedish Navy Hands Suspected Pirates to Kenya*, LOCAL (Sweden), June 9, 2009, <http://www.thelocal.se/19954/20090609/>. They were handed over to Kenyan officials on June 8, 2009 and were charged on June 9, 2009. *Shafili Hirsi Ahmed*, Crim. Case No. 2463. This case was initially filed at the Malindi Law Courts as Criminal Case 825 of 2009, but was subsequently moved to Mombasa. An issue arose because one of the accused is allegedly only 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, in a motion that same afternoon, the accused asserted that he was sixteen years old, and the court referred him for age assessment.

127. (2009) Crim. Case No. 840 (Chief Magis. Ct.) (Mombasa, Kenya). In early March, 2009, the accused were captured by the German Navy when they attempted to hijack the German *MV Courier*. *French Frigate Delivers Alleged Pirates to Kenya as Trial Begins*, TOPNEWS, Apr. 22, 2009, <http://www.topnews.in/french-frigate-delivers-alleged-pirates-kenya-trial-begins-2155278>. Their trial began on April 22, 2009 in Kenya. *Id.*

of the Constitution. Remarkably, in *Republic v. Mohamud Abdi Kheyre & 6 Others*<sup>128</sup> (142-day delay), the suspects were handed over to the Kenyan authorities on March 5, 2009, but they were not charged until June 3, 2009.

Even if Kenyan courts arrive at the conclusion that Kenya's constitutional requirement that suspects be charged within twenty-four hours does not apply extraterritorially, rules of international law mandate that the courts take into consideration the rights of all persons who are criminally charged before them.<sup>129</sup> In the ideal scenario contemplated by Article 105 of UNCLOS,<sup>130</sup> suspects should be charged in the countries of the navies that captured them. Unsurprisingly, in almost all the piracy cases going on in Kenya, the accused have repeatedly argued that Kenyan courts lack jurisdiction over them.<sup>131</sup> For example, in *Mohamud Mohamed Hashi*, the piracy suspects argued that they were brought into court seven days after their arrest, notwithstanding the fact that they were transported to Kenya via helicopter within hours of their interdiction on the high seas. However, no reason was given for the delay in bringing them to court within the constitutionally required twenty-four-hour time period.<sup>132</sup> In April 2009, a French court rejected similar arguments challenging the arrest and transfer of two piracy suspects into France.<sup>133</sup>

The March 6, 2009 Exchange of Letters Between the European Union and Kenya on the Conditions and Modalities for the Transfer of Persons Suspected of Having Committed Acts of Piracy<sup>134</sup> (EU-Kenya

---

128. (2009) Crim. Case No. 791 (Chief Magis. Ct.) (Mombasa, Kenya). The accused were captured by the United States Navy on February 11, 2009 after they attempted to hijack the Marshall Islands' *Polaris*. Mike Mount, *U.S. Close to Handing Pirate Suspects to Kenya*, CNN.COM, Mar. 4, 2009, <http://www.cnn.com/2009/WORLD/africa/03/04/us.kenya.pirates/index.html>. They were not charged by Kenya until July 1, 2009. *Kenya: U.S. Officer Tells of Pirate Attack*, DAILY NATION (Kenya), July 2, 2009, <http://allafrica.com/stories/200907021096.html>. Notably, the Charge Sheet in the Court file lists March 5, 2009. This is perhaps the date of handover of the suspects to Kenya, in which case the suspects were in U.S. custody between February 11, 2009 and March 5, 2009.

129. United Nations Convention on the Law of the Sea art. 230(3), Dec. 10, 1982, 1833 U.N.T.S. 397 [hereinafter UNCLOS]. See also, Douglas Guilfoyle, "Counter-Piracy Law Enforcement and Human Rights," 59 *International and Comparative Law Quarterly*, 141 (2010)

130. UNCLOS art 105.

131. For an extended analysis, see James Gathii, *Jurisdiction to Prosecute Non-National Pirates Under Kenyan and International Law*, 31 *LOY. L.A. INT'L & COMP. L. REV.* 363 (2010).

132. Crim. Case No. 840. These arguments were made by the lawyer for the accused persons on August 10, 2009. The case is pending a determination on a judicial review application filed in the High Court of Kenya challenging the constitutionality of the prosecutions in Kenya.

133. See *France Rejects Appeal by Suspected Somali Pirates*, REUTERS, Apr. 6, 2009, <http://uk.reuters.com/article/idUKTRE5354Z820090406> (noting that the suspects' arrest and transfer to France were unauthorized).

134. Exchange of Letters Between the European Union and the Government of Kenya on the Conditions and Modalities for the Transfer of Persons Suspected of Having Committed

Memorandum of Understanding) provides that transferred persons “will be brought promptly before a judge or other officer authorized by law to exercise judicial power, who will decide without delay on the lawfulness of his detention and will order his release if the detention is not lawful.”<sup>135</sup> In none of the cases, however, were such inquiries conducted for the suspects handed over by the EU-Led Naval Force (EUNAVFOR).<sup>136</sup> Unlike courts in other jurisdictions, Kenyan courts do not have an automatic duty to rule on the legality of someone’s detention. In Spain, for example, the filing of charges against two Somali piracy suspects in November, 2009 was preceded by prosecutors’ requests to the court to decide if it would allow the filing of charges.<sup>137</sup> The piracy charges in that case arose following an attack against a Spanish vessel that was allegedly being held by Somali pirates who were negotiating for a ransom and the release of their two confederates held by Spain.<sup>138</sup> In the United States, criminal defendants brought to court without a warrant are entitled to appear before the court in a pre-trial proceeding known as a *Gerstein* proceeding, which tests the validity of the suspects’ detention through a probable cause determination.<sup>139</sup> In fact, in the United States, criminal defendants are entitled to two more pre-trial hearings: the initial appearance—the only one contemplated under Kenyan law—and a preliminary examination. These safeguards against the unwarranted detention of presumptively innocent people are not present in Kenyan law.

### III. PROCEDURAL ISSUES

This section presents an in-depth look at many of the procedural deficiencies in the current piracy prosecutions. First, Kenyan law does not allow for assessors who act as jurors in criminal trials except for offenses

---

Acts of Piracy and Detained by the European Union-Led Naval Force (EUNAVFOR), and Seized Property in the Possession of EUNAVFOR, from EUNAVFOR to Kenya and for Their Treatment After Such Transfer, Annex, 2009 O.J. (L 79) 52 [hereinafter Annex to Exchange of Letters].

135. *Id.* at 56.

136. Assuming that such an inquiry would be conducted in a Kenyan court runs up against Article 8 (a) of the Memorandum, which only empowers “competent” Kenyan and EU authorities to resolve any issues relating to the interpretation and application of the Memorandum. *Id.* at 53. Further, Article 8(b) specifies that disputes concerning interpretation or application of the provisions of the Memorandum shall be “settled exclusively by diplomatic means,” essentially denying the Memorandum any foundation as a legal basis for judicial enforcement. *Id.*

137. Daniel Woolls, *Spain Moves to End Piracy Hostage Crisis, Seeking Quick Trial of 2 Somali Suspects*, BLOG TAGARANA, Nov.16, 2009, <http://blog.taragana.com/law/2009/11/16/spain-moves-to-end-piracy-hostage-crisis-seeking-quick-trial-of-2-somali-suspects-16901/>.

138. *Id.*

139. See *Gerstein v. Pugh*, 420 U.S. 103, 126 (1975) (holding that the Fourth Amendment to the U.S. Constitution requires a timely judicial determination of probable cause as a prerequisite to detention).

for which the death penalty is available.<sup>140</sup> Additionally, Miranda rights, which must be administered to criminal defendants upon arrest in the United States,<sup>141</sup> have no equivalent in Kenya. Another difference is the role of representation. In the United States, defendants have the right to adequate legal representation (i.e., the lawyer must do a reasonably good job defending the accused person).<sup>142</sup> While the Kenyan Criminal Code and Constitution guarantee a defendant's right to have a lawyer, unlike in the United States, there is no guarantee of *adequate* legal representation.<sup>143</sup> Therefore, piracy suspects who do not receive adequate assistance of counsel in Kenya cannot impugn their trial. In addition, in both the United States and in the European Union, unlike in Kenya, suspects are guaranteed access to a lawyer not merely in court, but also in the initial stages of a police interrogation. As such, Article 6 of the European Convention on Human Rights guarantees the right to a fair trial and provides penalties where an accused person is denied access to a lawyer in the first forty-eight hours of detention.<sup>144</sup> The procedural differences make successful prosecutions much more likely in Kenya, even if other countries have an equal—if not superior—claim of jurisdiction.

#### A. *Witness Attendance Problems*

In all the ongoing piracy cases in Mombasa, the attendance of both foreign and local witnesses has continually delayed the proceedings. For example, on 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*<sup>145</sup> that was scheduled to

---

140. Kenyan law allows assessors of fact in cases involving the death penalty. These include robbery with violence, murder, and treason. The judge, however, is not bound by the finding of the assessors. See Criminal Procedure Code, (2009) Cap. 75 § 322(2) (Kenya) (“If the accused person is convicted, the judge shall pass sentence on him according to law.”). Piracy is not one of the offenses for which assessors participate in a nonbinding assessment of the facts.

141. See *Miranda v. Arizona*, 384 U.S. 436, 492 (1996) (holding that statements are inadmissible when a suspect is not apprised of his right to consult with an attorney or the right to have one present during interrogation).

142. See *McMann v. Richardson*, 397 U.S. 759, 771 (1970) (holding that criminal defendants have a right to effective assistance of counsel).

143. See Criminal Procedure Code, (2009) Cap. 75 § 193 (Kenya) (“A person accused of an offence before a criminal court, or against whom proceedings are instituted under this Code in a criminal court, may of right be defended by an advocate.”).

144. *Murray v. United Kingdom*, App. No. 18731/91, 22 Eur. H.R. Rep. 29, 37-40, 48 (1996). For more see Basil Ugochukwu, “Comparative Fair Trial: Between the African and European Human Rights Systems,” see [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1579844](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1579844)

145. (2009) Crim. Case No. 1694 (Chief Magis. Ct.) (Mombasa, Kenya).

begin September 23, 2009.<sup>146</sup> 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. Defense lawyers again objected to having not been provided with witness statements and for an adjournment of trial. On both occasions, they were overruled. Further delay in this case is expected pending an assignment of a new magistrate because the original magistrate assigned to hear the case has been transferred.

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. The nonappearance of accused persons in court, and sometimes even of their defense counsel, as well as congestion in the court calendar,<sup>147</sup> have resulted in continuing delays and sporadic hearings. In early January, 2010, the prosecution in *Liban Ahmed Ali* continued arguing that their international witnesses were still abroad, and it was not until February, 2010 that they eventually testified. The hearing was still scheduled to continue at the end of March 2010. Charges in this case had originally been brought on March, 23 2009.

The delays occasioned by the lack of witness attendance have certainly affected the piracy suspects' rights to a speedy trial as guaranteed by section 77(1) of the Kenyan Constitution.<sup>148</sup> The High Court held in *Republic v. William Maina Wamondo*<sup>149</sup> that such a delay not only contravenes the Constitution but also Article 10 of the Universal Declaration of Human Rights. The 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. Citing section 306(1) of the Criminal Procedure Code, the High Court then proceeded to acquit the accused person in the case because there was insufficient evidence to carry the government's burden.<sup>150</sup> Similarly, in *Republic v.*

---

146. Criminal Case No. 1694 and Criminal Case No. 1784 were consolidated on September 2, 2009 because they involved the same alleged piracy incident.

147. For instance, on December 16, 2009, the court ruled that a scheduled hearing could not proceed because of the lateness of the hour.

148. For a discussion of the constitutional rights of criminal defendants in Kenya, see *supra* Part II.A.

149. (2003) Crim. Case No. 133 (H.C.K.) (Nyeri, Kenya).

150. *Id.*; see also Criminal Procedure Code, (2009) Cap. 75 § 306(1) (Kenya) (providing for the acquittal of the defendant if, after the close of the prosecution's case, the evidence adduced does not establish guilt).

*Martin Nyongesa Wefwafwa*,<sup>151</sup> the High Court held:

[An] accused person 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.<sup>152</sup>

*B. Who Are the Complainants in the Piracy Cases: The Flag State, Kenya, or the Capturing States?*

Under Kenyan criminal law, the complainant in a criminal case must, through the prosecution, present his or her evidence to enable the court to determine if an accused person is properly charged and if the accused person should be put on his defense.<sup>153</sup> Kenyan courts are empowered to issue arrest warrants for persons so charged.<sup>154</sup> However such arrest warrants are intended to be executed only within Kenya.<sup>155</sup> This does not preclude the possibility that individuals may be charged without a warrant since making a complaint or bringing the person before a magistrate is also sufficient to institute criminal proceedings.<sup>156</sup> In fact, a court in Kenya can issue an arrest warrant for a person located outside of the country, and such a warrant may be executed outside the country.<sup>157</sup> However, this process laid down under Kenyan law is not followed in piracy cases.

Kenyan law requires that a complaint be signed by the complainant in addition to the magistrate.<sup>158</sup> Nonappearance by a complainant at the hearing of the case, when the accused person appears, can result in acquittal.<sup>159</sup> Defense attorneys have argued that the nonappearance of the crews of attacked ships at hearings serves as the basis for dismissing the case on the premise that the crews and passengers of those vessels were the

---

151. (2004) Crim. Case No. 72 (H.C.K.) (Bungoma, Kenya).

152. *Id.*

153. See Criminal Procedure Code, (2009) Cap. 75 § 89(1) (Kenya) (providing that “[p]roceedings may be instituted either by the making of a complaint or by the bringing before a magistrate of a person who has been arrested without warrant”).

154. *Id.* § 90(1).

155. *Id.* § 109.

156. *Id.* § 89(1).

157. See *id.* § 110(1) (“When a warrant of arrest is to be executed outside the local limits of the jurisdiction of the court issuing it, the court may, instead of directing the warrant to a police officer, forward it by post or otherwise to a magistrate within the local limits of whose jurisdiction it is to be executed.”). Such a warrant needs the endorsement of a magistrate “within the local limits of whose jurisdiction it is to be executed.” *Id.* § 111(1). However, if delay would be occasioned in obtaining such endorsement, the police officer to whom it is directed may be assisted by local police officers in executing the warrant. *Id.* § 111(3).

158. *Id.* § 89(3).

159. See *id.* § 202 (specifying further that the court retains the discretion not to acquit the accused person in these circumstances if there is a proper reason to adjourn the case to another date).

proper complainants under sections 89(3) and 202 of the Criminal Procedure Code.

In *Mohamed Hassan Ali*, for example, the defense applied for acquittal on the ground that the witnesses the prosecution produced for the hearing that day were not the captain, crew, or other persons aboard the vessel allegedly subjected to piratical attack. The defense argued that without the complainants, the accused persons could not receive a fair trial. The prosecution argued that the Kenyan state, rather than the crew of the vessel, was the complainant in the case and was properly represented by the prosecution. According to the prosecution, the piracy cases were “special ones” in which the complainant’s were the flag states on whose behalf the government of Kenya was acting. The court overruled the defense’s application to have the accused acquitted and agreed with the prosecution that piracy cases are “special” because they involve offenses that traverse national and international boundaries—which according to the court made the state the complainant.

The theory that the proper complainants in piracy cases are the flag states of the vessels raises more questions than it answers. First, this argument does not comport with the fact that the suspects are often captured by navies of countries other than the flag states who then handover the suspects to Kenya under agreements to which the flag vessels are often not parties. This suggests that the governments of the navies that captured the suspected pirates are the proper complainants as contemplated under Article 105 of UNCLOS.<sup>160</sup>

Second, the fact that Kenya has agreed to prosecute the suspected pirates does not make Kenya the appropriate complainant. The offenses are committed against the vessel, its crew, and the goods it carried, not Kenya itself. This raises many complexities given that crew members are often comprised of different nationalities than the flag state and the owners of the goods carried on the vessel. Further, given that piracy is conceptualized as a crime against all of human-kind, anyone could be a complainant. Clarity regarding the proper complainants in the piracy cases becomes crucial. The Kenyan government argues that it is the proper complainant and that the parties directly affected by the alleged offenses and those that took part in arresting the suspects assume no direct responsibility to appear in court. Kenya’s criminal procedure law is designed for criminal cases that occur within the territorial jurisdiction of the particular magistrate’s court where

---

160. See UNCLOS, *supra* note 130, at 397 (“On the high seas, or in any other place outside the jurisdiction of any State, every State may seize a pirate ship . . . or a ship . . . taken by piracy and under the control of pirates, and arrest the persons . . . . The courts of the State which carried out the seizure may decide upon the penalties to be imposed . . . .”).

the attendance of the complainant and witnesses is possible.<sup>161</sup> Grafting the piracy prosecutions onto this system and justifying them as “special” obscures their character and simply does not work.<sup>162</sup> Potential modifications to make the piracy prosecutions fit the circumstances of Kenyan courts raise important questions about due process, such as whether the burden of proving that the suspects committed the offenses beyond a reasonable doubt can be met by introducing witnesses other than the ones allegedly subjected to piratical attacks.

The European Union has funded the efforts of the Nairobi-based UNODC to assist in accommodating the logistical issues presented by the prosecution of pirates. The funding focuses on the attendance of witnesses and other matters to ensure that trials are conducted efficaciously. UNODC’s role is crucial in successfully prosecuting piracy cases because it bridges the gap between the commission of the alleged offenses on the high seas and the fact that Kenya’s criminal justice system is designed for offenses committed within Kenya.

*C. The Role of the UNODC, the Anti-Piracy Unit, and UN-Funded Interpreters*

The UNODC has funded the training of judges, magistrates, and prosecutors involved in piracy prosecutions; helped in getting witnesses from abroad to come to trial; funded a revamped Shimo La Tewa prison in Mombasa where the piracy suspects have been held; provided legal resources, office equipment, transportation assistance, and fuel for prosecutors; and supplied the Kenyan police with training in investigation procedures, investigative equipment, and the safe transport of weapons for ballistic examination in Nairobi.<sup>163</sup> UNODC has also funded the refitting of an exhibit room to secure and stow firearms.<sup>164</sup>

The assistance provided by the UNODC illustrates the general logistical challenges attendant in the prosecution of cases in Kenya, not to mention the complexities added when prosecuting extra-territorial offenses. UNODC is essentially retrofitting the Kenyan criminal justice system, which is already heavily backlogged and bedeviled by basic problems such

---

161. See generally GATHII, *supra* note 59 (providing a lengthy discussion of the territorial jurisdiction of magistrate courts to try piracy suspects, and noting that the language of the Magistrate’s Courts Act strongly suggests that these courts only have territorial jurisdiction).

162. See Bahar, *supra* note **Error! Bookmark not defined.**, at 82–85 (discussing the limits of Kenya’s legal system in the piracy prosecutions).

163. UNITED NATIONS OFFICE ON DRUGS AND CRIME, COUNTER PIRACY PROGRAMME 3–4 (2009), available at [http://www.unodc.org/documents/easternafrika//piracy/UNODC\\_Counter\\_Piracy\\_Programme.pdf](http://www.unodc.org/documents/easternafrika//piracy/UNODC_Counter_Piracy_Programme.pdf).

164. *Id.* at 3.

as inadequate prison space, inadequate investigatory resources for the police, and courts with inadequate office equipment and methods of record-keeping.<sup>165</sup> Kenya has an especially rudimentary criminal justice system in which suspects are held for long periods of time in prison while awaiting trial without adequate basic needs such as clean water and medical care and where corruption in the judiciary is legendary.<sup>166</sup> The European Union has appropriated 1.75 million Euros to support UNODC's work for the judicial and penal reforms in return for Kenya agreeing to prosecute the piracy suspects.<sup>167</sup> The prison warden at the Shimo La Tewa Prison, which has received several upgrades including mattresses for the prisoners and a new kitchen and sewerage system, has argued that the piracy suspects have turned out to be "a blessing in disguise."<sup>168</sup>

Although the UNODC has argued that it is extending assistance to defense lawyers in two of the piracy cases, the overwhelming assistance rendered so far has been to the police, the prosecution, the Shimo La Tewa prison, and the courts in Mombasa. Even the training that has been conducted by the UNODC has not included defense attorneys.<sup>169</sup> In addition, severe limitations placed on piracy suspects' ability to

---

165. See generally GATHII, *supra* note 59, at 25 (discussing concerns about the general competence of the Kenyan courts to conduct the piracy prosecutions).

166. See, e.g., UNITED NATIONS HIGH COMM'R FOR HUMAN RIGHTS, UN SPECIAL RAPPORTEUR ON EXTRAJUDICIAL, ARBITRARY OR SUMMARY EXECUTIONS MISSION TO KENYA 16–25 (FEBRUARY 2009) (Feb. 25, 2009), <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=8673&LangID=E> (noting that the majority of Kenyans with whom the author spoke viewed the Kenyan judiciary as corrupt despite contrary views by judges within the system); see also KENYA NAT'L COMM'N ON HUMAN RIGHTS, REPORT ON EXTRA-JUDICIAL KILLINGS AND DISAPPEARANCES—OVERVIEW OF THE REPORT AND SAMPLE CASES 2–18 (2007) (detailing the most basic failures of the Kenyan criminal justice system, including instances where Kenyan police extrajudicially executed a suspect).

167. See Letter from the Minister for Eur. to the European Scrutiny Comm. of the U.K. Parliament (Sept. 7, 2009), reprinted in HOUSE OF COMMONS EUROPEAN SCRUTINY COMMITTEE, DOCUMENTS CONSIDERED BY THE COMMITTEE ON OCTOBER 14, 2009, 2008–9, H.C. 19–xxvii, at 153–54, available at <http://www.publications.parliament.uk/pa/cm200809/cmselect/cmeuleg/19xxvii/1932.htm> (providing the committee with a detailed update on piracy-related activity).

168. McConnell, *supra* note 119; see also *Nicholas Cage Visits Kenyan Prison*, AFRICA NEWS, Nov. 17, 2009, available at LEXIS, News Library, Most Recent Two Years File (noting that the prison was one of the warmest of the world after visiting it.). But 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.

169. McConnell, *supra* note 119 (citing defense lawyer Oruko Nyarwinda, who is critical of the "lopsided" nature of the assistance given to the prosecution and the courts by the UNODC); see also, Jeffrey Gettleman, *Rounding Up Suspects, the West Turns to Kenya as Piracy Criminal Court*, N.Y. TIMES, Apr. 23, 2009, at A8 (noting that defense attorney Francis Kadima has represented a total of thirty-two pirates and has not been paid anything for any of the cases).

communicate with their relatives in Somalia which hinders their ability to raise money to ensure effective defense work. The UNODC's assistance with the piracy prosecutions has at times constituted unwarranted overreaching. For example, in *Mohamed Hassan Ali*, the UNODC paid for the appearance of a Spanish interpreter. The defense objected to a UNODC-paid interpreter on the basis that the UNODC was a third party to the proceedings and that the interpreter would likely engage in a "stage managed translation." The defense sought an independent court approved translator to ensure fairness in the trial. In a rare victory for the defense in piracy cases, the court agreed that allowing a UNODC-paid translator would undermine the integrity of the proceedings against the accused and ordered that an approved translator be provided. Notably, in *Said Abdallah Haji*, the prosecution applied to have an Italian naval officer who worked on the ship that arrested the accused person to serve as an interpreter for the other officers aboard the vessel. Oddly, the defense lawyers did not object to having a person who was a witness himself to serve as an interpreter for the prosecution, even though the same arguments could have been made about not having a court-appointed interpreter as in *Mohamed Hassan Ali*. The difference in how interpreters in the two cases were treated, albeit in a very analogous factual circumstance, suggests that defense attorneys in the various piracy cases are unevenly trained and share no overarching strategy.<sup>170</sup>

While the support the UNODC has provided the Kenyan criminal justice system in return for prosecution of the piracy suspects has been invaluable, the example of a UNODC-funded interpreter, who the court agreed might not be impartial, illustrates the danger of UNODC over-involvement, which may tilt the balance too heavily in favor of the prosecution without regard to the rights of the accused. The failure to provide an interpreter to an accused person in a criminal case contravenes section 77(2)(f) of the Kenyan Constitution<sup>171</sup> and is grounds for an acquittal because it violates an accused person's right to an interpretation of the evidence in a language he understands.<sup>172</sup>

---

170. See Sarah Childress, *Legal Limbo Awaits Somali Pirates*, WALL ST. J., May 6, 2010, [http://online.wsj.com/article/SB10001424052748703961104575225810196963690.html?mod=WSJ\\_latestheadlines](http://online.wsj.com/article/SB10001424052748703961104575225810196963690.html?mod=WSJ_latestheadlines) (describing the challenges in conducting the piracy trials in Kenya and the burden they are placing on and noting that one of the defense lawyers in the trials has filed numerous objections to evidence, bail hearings, and other issues and has lost on all but one).

171. CONSTITUTION, Art. 77(2)(f) (2008) (Kenya) (providing that "[e]very person who is charged with a criminal offence . . . shall be permitted to have without payment the assistance of an interpreter if he cannot understand the language used at the trial of the charge").

172. See *Joseph Kamau Gitau v. Republic*, (2002) Crim. App. 1002 (H.C.K.) (Nairobi, Kenya) (granting an acquittal on appeal partly because the appellant was not provided with an interpreter in violation of Article 77(2)(f) of the Constitution).

*D. Production of Video Evidence*

One of the most significant issues that has arisen concerns the production of DVD evidence containing the voice recordings of the distress calls and footage from vessels allegedly subjected to piratical attacks. In *Mohamed Hassan Ali*, the defense objected to the production of recordings by an officer of the Spanish warship that arrested the piracy suspects because Kenyan law requires the person who made the recording to be the one to produce it in court. The defendants argued that having the officer produce the DVD evidence would deny them the opportunity to cross-examine its makers and that the evidence could just as easily be adduced orally. The court rejected the objections and held that it amounted to preventing the prosecution from adducing evidence even before the witnesses who had made the DVD recording could be put it on the stand.

While the court did not outright foreclose the possibility of entertaining the objection in the future, the defense's objection and the inability to file an appeal to the High Court illustrates the limits facing the defense in these cases. With insufficient resources to file appeals, the odds seem to be stacked in favor of the prosecution. Similar objections to the production of DVD evidence were made by the defense in *Mohamud Abdi Kheyre*. The defense argued that it had not been supplied with the DVD to review prior to trial and that it therefore could not consult with the accused persons nor conduct cross-examination effectively. In addition, the defense raised doubts regarding the DVD's authenticity because the recording occurred outside of the country. The court overruled the objections but gave the defense an opportunity to review the video evidence before it was eventually produced.

The Kenyan Court of Appeal has held that a video-tape recording is admissible as evidence "provided that a proper foundation for its reception has been laid."<sup>173</sup> The Court of Appeal further noted that, like the admissibility of voice-tape recordings, the admissibility of video-taped evidence can be relied upon where "the voices recorded can be properly identified," keeping in mind that "[s]uch evidence should always be regarded with some caution and assessed in light of all the circumstances of each case."<sup>174</sup> In light of the foregoing statements by the Court of Appeal, defendants' objections to the production of DVD evidence are founded on established precedents.

---

173. See *Jane Betty Mwiseje & 2 Others v. Republic*, (1991) Crim. App. 17 (C.A.K.) (Kenya) (analogizing the use of video-tape recording to the use of tape-recordings). See generally *id.* (holding that a video-tape recording is admissible as evidence, yet noting that the officer performing the video-tape recording must notify the accused and ask the accused's consent before proceeding).

174. *Id.* (citing *Republic v. Masqud Ali*, [1965] EWCA (Crim) 2, 1965 All E.R. 464, 464 (Eng.)).

In a report on its efforts to support the prosecutions in Kenya, the UNODC has noted that “Kenyan authorities have reported that the current Evidence Act is generally outdated and too formal[]” and that “[s]ome modern forms of evidence may not be admissible [while] others may only be admitted through onerous procedures.”<sup>175</sup> The report recommends “urgent legislative review”, some of which could be done expeditiously through an administrative process of “gazetting” to “ensure efficient and fair prosecutions.”<sup>176</sup> As discussed above, the UNODC’s role in this context constitutes a very objectionable form of over-reaching into the legislative process in Kenya—it encroaches the sovereignty of the country by making laws for its internal governance with direction from international organizations. This kind of reform, even while debatably desirable outside the context of piracy prosecutions, would, if designed to propel the piracy prosecutions further, amplify the intrusiveness of the EU into Kenya’s internal affairs.<sup>177</sup>

*E. Defense Requests to Visit the Scene of the Crime and Judicial Notice in Place of Proof*

Kenyan law allows the defense to request a visit to the scene of a crime by a criminal defendant. In *Said Abdallah Haji*, for example, the defense applied to visit the scene of the crime and the vessel allegedly involved to resolve questions regarding a lack of video evidence. The defense lawyers argued that such a visit would have provided them with the information necessary to properly defend their clients.

In opposing the application, the prosecution argued that the court should take judicial notice of the existence of rampant piratical attacks in the Gulf of Aden. Further, the prosecution argued that the pirated vessels were no longer present at the scene of the crime. The court dismissed the defense’s application, yet took judicial notice of the physical aspects of the case, perhaps alluding to where the offense occurred and that the defense was at liberty to call any witnesses to establish any facts to the contrary. In effect, the court seemed to place the burden on the defense to prove that the offense did not occur and suggested that the inherent logistical difficulties and security situation in the Gulf of Aden prevented the court from

---

175. UNITED NATIONS OFFICE ON DRUGS AND CRIME & EUROPEAN COMM’N, EU SUPPORT TO THE TRIAL AND RELATED TREATMENT OF PIRACY SUSPECTS 6 (2009).

176. *Id.*

177. This would be inconsistent with the principle of nonintervention in domestic affairs safeguarded by Article 2(7) of the Charter of the United Nations. See U.N. Charter art. 2, para. 7 (“Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter . . .”).

2010]

THE USE OF FORCE

135

proceeding to the scene of the crime. The defense filed an appeal of this ruling to the High Court. As of March 1, 2010, the application is still pending.

A defendant's request to visit the scene of an alleged piratical attack is reasonable because the prosecutions in Kenya are often justified by the country's proximity to the location of the offenses. Because the prosecutions are heavily supported by the UNODC, it would seem only fair for Kenyan courts to seriously consider applications to visit the scene of the offenses to verify that the locations are indeed on the high seas. The alternative, as happened in *Said Abdallah Haji*, is that the court may simply decide to take judicial notice of the location of the offenses. Judicial notice of facts is generally taken only when the facts are so irrefutable that there is no need to tender evidence to prove them. To take judicial notice regarding the location of the alleged piracy offenses is to lift the burden from the prosecution to prove that the offenses occurred on the high seas, where the offenses constitute piracy under Kenyan and international law.<sup>178</sup> Notably, none of the charge sheets in the piracy cases allege with specificity the location off the coast of the alleged offenses. As such, the defense may request a visit to the scene of the offense. Notably, the U.S. Supreme Court has on occasion reversed indictments that improperly identified the venue of the offense.<sup>179</sup>

Magistrate courts have invoked judicial notice in other contexts as well, for example, in response to allegations by accused persons that they have been subjected to beatings by prison wardens or other prisoners; that they have not received sufficient health care attention; and that Kenyan prisons are generally congested. Such a finding was made in *Republic v. Mohamed Abdi Kheyre & 6 Others*,<sup>180</sup> where the accused person alleged that they were beaten and denied food and that the prison was over-crowded. The court issued an order cautioning the prison authorities to treat the accused persons "according to laid down procedures."

Prison conditions at Shimo La Tewa remain harsh and congested despite significant reforms. The assistance of the UNODC and the warden's decision to open up the prison to local human rights organizations like Kituo Cha Sheria in Mombasa to scrutinize the prison and conduct rights education are important strides in correcting the problem. The UNODC has argued, however, that it has to provide assistance to the piracy suspects in a manner that does not privilege them above other prisoners or the prison

---

178. See generally GATHII, *supra* note 59 (discussing the relevance of the crime's location to jurisdictional concerns).

179. See, e.g., *Travis v. United States*, 364 U.S. 631, 636-37 (1961) (holding that venue was improperly laid in Colorado and should have been in the District of Columbia).

180. (2009) Crim. Case No. 791 (Chief Magis. Ct.) (Mombasa, Kenya).

wardens themselves.

*F. Allegations of Torture, Mistreatment, and Denial of Bail*

In its agreement with the EU, Kenya agreed to ensure that piracy suspects were humanely treated and provided with “adequate accommodation and nourishment, [and] access to medical treatment” in addition to all the guarantees of a fair trial.<sup>181</sup> The agreement provides that the suspects will be treated “in accordance with international human rights obligations, including the prohibitions 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.”<sup>182</sup> The agreement further specifies, in more detail than Kenyan law, that the piracy suspects have not only a right to a prompt trial, but a right to be released if it is determined that their detention is unlawful.<sup>183</sup> The EU also agreed to provide assistance to secure the attendance of witnesses.<sup>184</sup> The agreement also provides national and humanitarian agencies,<sup>185</sup> as well as representatives of the EU and EUNAVFOR, with access to persons detained pursuant to the agreement.<sup>186</sup>

An EU delegation visited Kenya between March 29, 2009 and April 1, 2009 to assess how much funding the country would need to continue to detain and try piracy suspects; an amount of 1.74 million Euros was proposed.<sup>187</sup> This money is being used to support piracy prosecutions by an EU-UNODC Counter-Piracy Program through supporting the work of police investigators, prosecutors, courts, and prisons. It was hoped that this money would reduce the incidence of beatings, lack of health care, and prison overcrowding, as mentioned above. Even with these interventions, the conditions of confinement for the piracy suspects are crowded. There

---

181. Annex to Exchange of Letters, *supra* note 134, at 51.

182. *Id.* at 56.

183. *Id.* at 56–57.

184. *Id.* at 58 (setting forth articles 6(a) & (b)(3) of the Provisions on the Conditions of Transfer of Suspected Pirates and Seized Property From the EU-Led Naval Force to the Republic of Kenya).

185. *Id.* at 57–58 (setting forth article 5(f) of the Provisions on the Conditions of Transfer of Suspected Pirates and Seized Property From the EU-Led Naval Force to the Republic of Kenya).

186. *Id.* at 57 (setting forth article 5(e) of the Provisions on the Conditions of Transfer of Suspected Pirates and Seized Property From the EU-Led Naval Force to the Republic of Kenya).

187. 492 PARL. DEB., H.C. (6th ser.) (2009) 465W, available at <http://www.publications.parliament.uk/pa/cm200809/cmhansrd/cm090508/text/90508w0007.htm>. In response to a question, the British Secretary of State for Foreign Affairs told the House of Commons on May, 14 2009 that the German Ambassador to Kenya had visited pirates transferred to Kenya by German forces on March 10, 2009 and April 8, 2009. 492 PARL. DEB., H.C. (6th ser.) (2009) 921W, available at <http://www.publications.parliament.uk/pa/cm200809/cmhansrd/cm090514/text/90514w0010.htm#09051458000122>.

are 48,000 other criminal suspects and convicts held in Kenya's 90 prisons.<sup>188</sup> This is estimated to amount to an overcrowding rate of 344 percent.<sup>189</sup> This contrasts with the standards of the custodial facilities in the United States and in the European Union. Unsurprisingly, the piracy suspects have continually requested to be tried in the countries of the navies that arrested them.<sup>190</sup>

All the piracy suspects have applied for but have been denied bail without exception.<sup>191</sup> In arguing against applications for bail, prosecutors have emphasized that the offenses with which the suspects are charged are serious, their identities and places of abode are not known, and the right to bail is not absolute.<sup>192</sup> However, the Kenyan High Court has categorically rejected such outright denials of bail in terse terms, holding that:

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 (the law here being Section 72(5) of the Constitution), and the courts (subordinate or the High Court) have no discretion in the matter. The only discretion given to the court under the said provision of the Constitution is as to whether the accused should be released unconditionally or conditionally.<sup>193</sup>

The prosecution in piracy cases arguably operate outside the jurisprudence developed by Kenyan courts, and the bail context is just one of many instances in which piracy suspects are subjected to double standards in accessing their procedural rights. However, in other contexts, piracy suspects are receiving a lot of attention from the heavily-funded

---

188. U.S. DEPARTMENT OF STATE, 2009 HUMAN RIGHTS REPORT: KENYA 3 (2010), <http://www.state.gov/g/drl/rls/hrrpt/2009/af/135959.htm>.

189. See Martin Schonteich, *Pre-Trial Detention in Africa*, Civil Society Prison Reform Initiative (CSPRI) Newsletter, Jan. 2006, at 2, available at <http://www.communitylawcentre.org.za/clc-projects/civil-society-prison-reform-initiative/newsletters/newsletter/newsletter%2015.pdf/>.

<sup>190</sup> For example, in *Republic v. Mohamud Abdi Kheyre & 6 Others*, supra note 128, Abdullahi Ahmed Hussein, accused person number four, told the court on 29<sup>th</sup> July, 2009 that he had no faith in Kenyan courts and that he wanted to be taken to the country of the people who had arrested him for trial. See also in *R v Juma Abdikadir Farah*, supra note \_\_, where on July 22<sup>nd</sup> 2009 all the accused persons told the courts that they had no faith in Kenyan courts and requested they either be repatriated to Somalia or for trial in the country that had effected their arrest.

<sup>191</sup> For example, in *R v Said Abdullah Haji*, supra note \_\_, Senior Superintendent of Police Gibson Wanderi for the prosecution argued against a bail application on 26<sup>th</sup> of June 2009 because the offense with which the accused was charged was very serious, their identities and places of abode were unknown and if released would likely abscond and that the right to bail was not absolute. The court agreed with the prosecution in rejecting the bail application. Bail was denied in all other piracy cases discussed in this article on the same grounds.

192. See, e.g., *Republic v. Said Abdallah Haji & 8 Others*, (2009) Crim. Case No. 2127 (Chief Magis. Ct.) (Mombasa, Kenya).

193. *Musyoki v. Republic*, (2004) Crim. Applic. No. 646 (H.C.K.) (Nairobi, Kenya) (quoting *Very Odeougu v. Republic*, (1998) Crim. Applic. Nos. 427 & 428) (Kenya)).

UNODC program as it tries to ensure their expeditious prosecution.

#### CONCLUSION

Piracy is regarded as an offense that states have universal jurisdiction to prosecute. This exercise of universal jurisdiction is meant to protect commercial shipping on the high seas. Although there is no obligation to prosecute pirates once captured, Kenya has volunteered to prosecute piracy suspects captured off the coast of Somalia. Hence, while a few centuries ago countries negotiated with pirates to ensure safe passage on the high seas, today, the United States, the European Union, and other naval powers use their armed forces to interdict pirates on the high seas and funnel them to Kenya—and perhaps in the future, to the Seychelles—for prosecution.

This Article illustrates the many problems that have beset these prosecutions. These problems reflect the lack of internationally agreed upon standards for conducting piracy prosecutions and highlight the inadequacy of Kenya's criminal justice system. In the absence of international standards for piracy prosecutions, each country assuming the responsibility for the prosecutions uses its own domestic legal system. The UNODC has tried propping up the entire system, including the courts, the prosecution, the police, and the prison system, with a view to having prosecutions that withstand international scrutiny. The problems addressed in this Article include: poor witness attendance compromising the right to speedy trials; questions regarding the proper complainants in piracy prosecutions; and the overreaching of the UNODC in Kenya's criminal justice system, including the attempt to circumvent the regular process of legislative enactment and amendment. These issues, among others, undermine the efficacy of piracy trials.<sup>194</sup> Turkey, a member of the United Nations Contact Group on Piracy off the Coast of Somalia, has written to the Secretary General of the United Nations requesting the establishment of an international mechanism to try piracy suspects.<sup>195</sup> As this Article shows, piracy trials in Kenya were not well-planned in advance. The trials were hurriedly convened to prevent further embarrassment to European Union governments, who are unwilling to engage in prosecutions at home, but saddled with piracy suspects aboard their naval ships off the coast of Somalia. The Kenyan legal system was not designed to prosecute non-nationals for crimes committed outside its territorial jurisdiction, but this is

---

194. See generally Bakano, *supra* note 80 (providing a summary of some of the broader obstacles faced by piracy trials in Kenya).

195. David Osler, *UN Asked to Oversee Piracy Trials*, LLOYD'S LIST, Jan. 7, 2010, <http://www.lloydslist.com/ll/news/un-asked-to-oversee-piracy-trials/20017735221.htm;jsessionid=751604F0D3B9DADEDCD47C8DA137D3AF.065acf6a61c52eed94766d1ba7da5d95d4ecd58a>.

2010]

## THE USE OF FORCE

139

exactly what it has been asked to do. As a result, piracy prosecutions in Kenya are but a grand experiment in international justice being conducted in an ill-prepared and overcrowded criminal justice system. For a crime that spans centuries, the trials in Kenya demonstrate that this experiment in international justice is still in its infancy and far from operating efficiently.