

PIRACY PROSECUTIONS IN KENYAN COURTS

Christopher E. Bailey*

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I. THE REGIONAL LEGAL FIGHT AGAINST PIRACY

Even though the incidence of piracy attacks has dropped during the period from 2011-2016, contemporary maritime piracy, a *jus cogens* crime against international law, has been a major problem off the Somali coast since 2000.¹ While the causes of the piracy problem no doubt arise from instability ashore, including problems with the rule of law and a lack of effective governance, the international community has undertaken a range of actions to combat the problem to include

* Dr. Christopher E. Bailey is an Associate Professor at the National Intelligence University in Bethesda, Maryland, specializing in national security law, international law, and professional ethics. He is licensed to practice law in California and the District of Columbia and is a member of the American Society of International Law. He has an LLM degree in National Security & U.S. Foreign Relations Law, as well as an SJD degree in International and Comparative Law, from the George Washington University School of Law. All statements of fact, analysis, or opinion are the author's and do not reflect the official policy or position of the National Intelligence University, the Department of Defense or any of its components, or the U.S. government.

¹ The U.N. Secretary General reports that the problem of Somali piracy has been "radically reduced from the peak of 237 pirate attacks in 2011." U.N. Secretary General, *Report of the Secretary-General on the situation with respect to piracy and armed robbery at sea off the coast of Somalia*, ¶ 3, U.N. Doc. S/2016/843, (Oct. 7, 2016). The Secretary General recently reported "a slight increase in pirate activities between March and June 2017 [that] pointed to the root causes as not being fully addressed." U.N. Secretary General, *Report of the Secretary-General on the situation with respect to piracy and armed robbery at sea off the coast of Somalia*, ¶ 3, U.N. Doc. S/2017/859 (Oct. 12, 2017). Thus, while the situation off the Somali coast is better than it was in 2011, the piracy threat is still very real.

criminal prosecutions in regional courts.² In fact, Kenya,³ Mauritius,⁴ and now the Seychelles⁵ have made important progress in prosecuting piracy cases under municipal law,⁶ often with financial support from the international community, and technical assistance from the United Nations Office on Drugs and Crime (UNODC) Counter-Piracy Programme⁷ and the Public International Law and Policy Group.⁸ Indeed, Kenya's first piracy prosecutions predated those in either the Seychelles or Mauritius, providing both countries with a corpus of procedural and substantive law to draw from. All three countries have exercised universal jurisdiction as permitted by international human rights law, which allows any nation to prosecute a captured pirate, even if that country lacks a connection to the crime.⁹ Thus, all three countries have made an important contribution to fighting the scourge of piracy, resulting in

² S.C. Reg. 2442 (Nov. 6, 2018) (commending Kenya, Mauritius, and the Seychelles for their efforts to prosecute suspected pirates in their national courts, and noting support from the international community).

³ *Kenya Opens Fast-Track Piracy Court in Mombasa*, BBC (June 24, 2010), <http://www.bbc.com/news/10401413>. Kenya was the first regional state to accept piracy suspects for prosecution in its municipal courts. The UNODC supported the construction of a new high security courtroom (the Shanzu Court) adjacent to the Shimo la Tewa remand prison in Mombasa; the UNODC-trained judge has been able to use the courtroom to conduct piracy and other high-risk trials, e.g., terrorism, while also easing the congestion in the main Mombasa courtroom. UNODC, *Counter Piracy Programme: Support to the Trial and Related Treatment of Piracy Suspects*, Issue 11 at 4, (Mar. 2013), http://www.unodc.org/documents/easternafrika/piracy/UNODC_Brochure_Issue_11_vv.pdf

(last accessed Mar. 18, 2018). The UNODC Counter Piracy Programme has also refurbished five Kenyan prisons. *Id.* at 3.

⁴ Matteo Crippa, *Mauritius Strengthens Its Anti-Piracy Capacity*, COMMUNIS HOSTIS OMNIUM (July 25, 2012), <https://piracy-law.com/2012/07/25/mauritius-strengthens-its-anti-piracy-capacity/>.

⁵ Rassin Vannier, *First Trial Starts Before the Seychelles Dedicated Court for Piracy and Maritime Crime Cases*, SEYCHELLES NEWS AGENCY (June 2, 2015), <http://www.seychellesnewsagency.com/articles/3066/First+trial+starts+before+the+Seychelles+dicated+court+for+piracy+and+maritime+crime+cases>.

⁶ U.N. Secretary General, *Report of the Secretary-General Pursuant to Security Council Resolution 2020*, ¶ 44, U.N. Doc S/2012/783 (Oct. 22, 2012) (citing 1,186 global prosecutions for piracy from 2006 to 2012, with Kenya accounting for 137 cases, Seychelles 105, and Somalia 290). As of August 2014, the Seychellois courts have prosecuted 133 suspected of piracy with 129 convictions and 4 acquittals. Anthony Francisco Tissa Fernando, *An Insight into piracy prosecutions in the Republic of Seychelles*, 41 COMMONWEALTH LAW BULLETIN 173, 175 (2015).

⁷ UNODC, *Counter Piracy Programme*, *supra* note 3.

⁸ Michael Scharf & Mistale Taylor, *A Contemporary Approach to the Oldest International Crime* 33(84) UTRECHT J. OF INT'L AND EUROPEAN LAW 77-89 (2017) (examining how the PILPG formed a high-level piracy working group that provided a broad range of legal and policy advice to domestic, regional and international counter-piracy officials, preparing "nearly fifty research memoranda on cutting-edge issues raised by modern piracy prosecutions" for officials in Kenya, the Seychelles, and Mauritius).

⁹ Stephen Macedo, UNIVERSAL JURISDICTION: NATIONAL COURTS AND THE PROSECUTION OF SERIOUS CRIMES UNDER INTERNATIONAL LAW. 47-49 (Stephen Macedo Ed., 2004).

the increased capacity of local courts to prosecute contentious cases involving important international law issues.

Kenya has vital national security interests implicated by acts of maritime piracy and armed robbery. Indeed, Kenya has strong reasons for asserting criminal jurisdiction in such cases, even where the attacks take place outside its territorial waters and neither Kenyan nationals nor property interests are involved. First, as has been repeatedly emphasized by the U.N. Security Council, attacks against vessels pose a direct threat to “the prompt, safe and effective delivery of humanitarian aid to Somalia,” exacerbating the situation in that country and undermining regional peace and security.¹⁰ In fact, the Security Council has noted the possible role that “piracy may play in financing [arms] embargo violations by armed groups”¹¹ Second, piracy and armed robbery at sea pose a direct threat to Kenyan commercial shipping, fishing, and tourism, undermining the country’s economic security and prosperity.¹² Third, the payment of ransoms raises issues of the possible facilitation of terrorism and other criminal activity in Kenya, including arms trafficking, government corruption, and money laundering.¹³ According to the U.N. Secretary General, pirate leaders launder ransom money through the world’s financial system, and that laundering has “caused steep price increases in goods in the Horn of Africa and surrounding areas. Some of the proceeds are reportedly being reinvested into criminal activities, such as drug trafficking, weapons and alcohol smuggling, and human trafficking.”¹⁴

Kenya has taken an important lead in the fight against Somali piracy, including investigating and prosecuting cases under its penal law and amending that law where appropriate to provide for expanded reach consistent with international

¹⁰ S.C. Res. 1816 (June 2, 2008) (condemning acts of piracy and armed robbery against vessels in territorial waters and the high seas off the coast of Somalia).

¹¹ See, e.g., S.C. Res. 1844 (Nov. 20, 2008) (determining that the situation in Somalia constitutes a continuing threat to international peace and security in the region); S.C. Res. 1846 (Dec. 2, 2008) (noting continuing concern by the threat that piracy and armed robbery pose to vessels at sea), S/RES/1846 (2008); S.C. Res. 1851 (Dec. 16, 2008) (noting the dramatic increase in the incidents of piracy and armed robbery at sea off the coast of Somalia). See also Chairman of the Security Council Committee, *Report of the Monitoring Group on Somalia of 20 November 2008*, ¶¶ 264-66, U.N. Doc. S/2008/769 (Nov. 20, 2008).

¹² Lucas Bento, *Toward an International Law of Piracy Sui Generis: How the Dual Nature of Maritime Piracy Law Enables Piracy to Flourish*, 29 BERKELEY J. INT’L L. 101, 108-111 (2011); see also Teo Kermeliotis, *Somali pirates cost global economy \$18 billion a year*, CNN (Apr. 12, 2013), <https://www.cnn.com/2013/04/12/business/piracy-economy-world-bank/index.html>.

¹³ Willis Oketch, *U.N. Report: How Kenya invited and hosted Somali Pirates*, THE STANDARD (Nairobi) (May 24, 2015), <https://www.standardmedia.co.ke/article/2000163324/un-report-how-kenya-invited-and-hosted-somali-pirates>; see also U.N. CONVENTION AGAINST TRANSNATIONAL ORGANIZED CRIME (Sept. 29, 2009), <https://www.unodc.org/unodc/en/treaties/CTOC/signatures.html> (Kenya acceded to the convention on June 16, 2004).

¹⁴ U.N. Secretary General, *Report of the Secretary-General Pursuant to Security Council Resolution 2020* (2011), ¶ 6, U.N. Doc. S/2012/783 (Oct. 22, 2012).

law. Kenya successfully prosecuted its first-ever piracy case in 2006,¹⁵ followed by 76 more cases by August 2009.¹⁶ But in March 2010, Foreign Minister Moses Wetangula announced that Kenya would no longer accept international piracy cases for trial in its courts—although it has continued to do so on an ad hoc basis.¹⁷ In fact, many Muslim leaders questioned the propriety of the piracy trials,¹⁸ and Members of Parliament voiced concerns that the trials placed the country's national security at risk and argued that the international community was not providing sufficient financial support for the costs of prosecution.¹⁹ Moreover, there was some evidence of a growing estrangement between Kenya and the international community over sensitive issues, including human rights abuses, corruption, and the International Criminal Court investigation into Kenya's 2007 presidential election.²⁰

In any case, the evidence suggests that the Kenyan courts have conducted fair trials involving piracy suspects that have generally complied with international human rights law and have made reasonable sentencing decisions. The Kenyan experience is notable for several reasons: its application of international law in its municipal courts, its use of universal jurisdiction, and the problems associated with burden-sharing for this quintessential international problem. In addition, if the threat posed by Somali piracy is, in fact, now resurgent after a five-year hiatus,²¹ Kenyan case law offers some lessons for regional partners, such as the Seychelles and Mauritius, in the prosecution and punishment of such cases consistent with applicable international human rights law. Nonetheless, Kenya should consider amending its statutory law to broaden its definition of piracy (maritime violence), adopt sentencing guidelines, and provide the High Court with discretionary authority to order the Attorney General to provide legal representation to a defendant at state expense, which could help facilitate the prosecution of future cases.

¹⁵ James Thuo Gathii, *Kenya's Piracy Prosecutions*, 104 AM. J. INT'L L. 20, 21 (2010).

¹⁶ *Id.*

¹⁷ *Kenya Ends Trials of Somali Pirates in its Courts*, BBC NEWS, (Apr. 1, 2010), <http://news.bbc.co.uk/2/hi/africa/8599347.stm>; see also U.N. Secretary General, *Report of the Secretary-General on the Modalities for the Establishment of Specialized Somali Anti-Piracy Courts*, ¶¶ 3-4, Annex V, U.N. Doc. S/2011/360 (Oct. 22, 2012).

¹⁸ *Leaders Question Trial of Piracy Suspects in Kenyan Courts*, REUTERS (June 13, 2009), <https://www.nation.co.ke/News/-/1056/610466/-/uk9mt7index.html>.

¹⁹ Jeff Davis, *Kenya Cancels Piracy Trial Deals*, THE DAILY NATION (Nairobi) (June 13, 2009), <https://www.nation.co.ke/news/Kenya-cancels-piracy-trial-deals/1056-1021740-qkua99/index.html+&cd=5&hl=en&ct=clnk&gl=us>.

²⁰ Milena Sterio, *Piracy off the Coast of Somalia*, 4 AMSTERDAM L. F. 104, at 113-14 (2012).

²¹ Tom Vanden Brook, *Pirate attacks rising off East Africa, Pentagon and shipping records show*, USA TODAY (Apr. 23, 2017), <https://www.usatoday.com/story/news/politics/2017/04/23/pirate-attacks-rising-off-east-africa-shipping-records-show/100812972/>.

II. INTERNATIONAL LAW ON PIRACY

International law provides Kenya, as well as its regional partners, with ample authority for the capture, detention, and prosecution of suspected maritime pirates. The general international legal framework for combating piracy and armed robbery at sea is reflected in the 1982 U.N. Convention on the Law of Sea (UNCLOS)²² and 1988 Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation (SUA Convention)²³ both of which have been ratified by Kenya.²⁴ Additionally, through multiple Chapter VII resolutions, and with the consent of the Somali government, the U.N. Security Council has provided expanded legal authority to the States, and regional and international organizations that have been taking part in this effort. Next, the Djibouti Code of Conduct, funded and administered by the International Maritime Organization (IMO), provides a framework for capacity building in the Gulf of Aden and the Western Indian Ocean; it has been a useful non-binding step towards a uniform, regional approach to combating piracy.²⁵ Finally, international human rights law requires that a pirate receive a fair trial and, after the sentence has been carried out, be returned to his country of origin—absent a valid claim for asylum, perhaps based on the non-refoulement obligations of the international refugee law.²⁶

First, the UNCLOS recognizes that “[a]ll States shall cooperate to the fullest possible extent in the repression of piracy on the high seas or in any other place outside the jurisdiction of any State.”²⁷ In fact, the UNCLOS is widely

²² UNITED NATIONS CONVENTION ON THE LAW OF THE SEA, Dec. 10, 1982, 1833 U.N.T.S. 397 [hereinafter UNCLOS] (Entered into force Nov. 1, 1994. Kenya’s ratification was effective on Nov. 16, 1994).

²³ CONVENTION FOR THE SUPPRESSION OF UNLAWFUL ACTS AGAINST THE SAFETY OF MARITIME NAVIGATION, Mar. 10, 1988, 1678 U.N.T.S. 221, entered into force Mar. 1, 1992 [hereinafter SUA Convention] http://oceansbeyondpiracy.org/sites/default/files/SUA_Convention_and_Protocol.pdf.

According to the IMO, Kenya has also ratified the 1988 Protocol that relates to the safety of fixed platforms on the continental shelf, see *Status of Conventions*, International Maritime Organization, [http://www.imo.org/en/About/Conventions/StatusOf](http://www.imo.org/en/About/Conventions/StatusOfConventions/Pages/Default.aspx)

[Conventions/Pages/Default.aspx](http://www.imo.org/en/About/Conventions/StatusOfConventions/Pages/Default.aspx) (last accessed Mar. 15, 2018).

²⁴ Kenya has a dualist legal system; its 2010 Constitution provides that the “general rules of international law shall form part of the law of Kenya.” CONSTITUTION art. 2(5) (2010) (Kenya). However, the Constitution also provides that that the “State shall enact and implement legislation to fulfil its international obligations in respect of human rights and fundamental freedoms.” CONSTITUTION art. 21(4) (2010) (Kenya).

²⁵ *Id.*; see also Int’l Mar. Org. (IMO) Mar. Safety Div., *Djibouti Code of Conduct*, Edition 4 (Nov. 2014-Aug. 2015). The IMO, through its Maritime Safety Division, has been assisting the signatories in the implementation of the Djibouti Code.

²⁶ Convention relating to the Status of Refugees, 1954 U.N.T.S. 189 (entered into force Apr. 22, 1954), <https://treaties.un.org/Pages/ViewDetailsII.aspx?src=TREATY&mtdsgno=V-2&chapter=5&Temp=mtdsg2&lang=en> (last accessed Mar. 17, 2018). Kenya acceded to this convention on May 16, 1966.

²⁷ UNCLOS, *supra* note 22, at art. 100.

recognized as customary international law, binding upon all States.²⁸ Article 101 defines piracy to include a two-ship rule, i.e., actions on one ship directed against a second ship, committed for private ends, i.e., excluding acts of state and terrorism, and on the high seas, i.e., outside the territorial waters of any State. The Treaty also provides for universal jurisdiction over acts of piracy—but not for “armed robbery”—on the high seas and within the territorial waters of states.²⁹

The UNCLOS also has several important shortcomings that undermine its utility in the fight against contemporary piracy. The Treaty has a two-ship requirement that precludes its application when its own crew or passengers seize a single ship in international waters, e.g., the 1985 hijacking of the Italian cruise ship *Achille Lauro* by Palestinian militants posing as passengers. The definitional issue involving acts committed for private ends leaves open its application in mixed motive cases; namely, whether it could apply to pirates linked to a political or religious cause, e.g., al Shabaab, while also reaping private gain.³⁰ Additionally, the UNCLOS does not allow for the “hot pursuit” of suspects who reenter territorial waters from the high seas. It does not address inchoate acts such as attempts, aiding and abetting, or conspiracy, or even spell out the constituent elements of certain

²⁸ Samuel Shnider, *Universal Jurisdiction over Operation of a Pirate Ship: The Legality of the Evolving Piracy Definition in Regional Prosecutions*, 38 N.C. J. INT’L L. & COM. REG. 473, 496 (2012).

²⁹ UNCLOS, *supra* note 22, at art. 105, provides that “[o]n the high seas, or in any other place outside the jurisdiction of any State, every State may seize a pirate ship or aircraft, or a ship or aircraft taken by piracy and under the control of pirates, and arrest the persons and seize the property on board. The courts of the State which carried out the seizure may decide upon the penalties to be imposed and may also determine the action to be taken with regard to the ships, aircraft or property, subject to the rights of third parties acting in good faith.” Arguably, the conditional language in art. 105, combined with art. 100, permits the transfer of a captured pirate to a second State for prosecution and incarceration consistent with international human rights law.

³⁰ Sterio, *supra* note 20, at 109 n.35 (citing scholarship that questions whether the UNCLOS disqualifies acts committed for political, religious, ideological, or ethnic reasons from the piracy definition).

offenses.³¹ In fact, capturing forces have released many suspects based upon a lack of evidence that the person was engaged in an “act” of piracy.³²

Still, many persons captured at sea may be nothing more than the “foot soldiers” for local chiefs and warlords ashore who organize, equip, and direct the clan-based criminal groups, and who then launder the money using couriers and through *hawala* networks (informal money remittances), so that the illicit revenue can be used in arms trafficking or for other illicit purposes.³³ Nonetheless, the successful eradication of piracy may require the prosecution of cases involving inchoate acts, as well as the financiers, warlords, and pirate leaders who organize and support the work of the foot soldiers. Finally, the Treaty does not address the legality of ransom payments made by private parties to secure the release of hostages.³⁴

Second, the SUA Convention recognizes the “urgent need to develop cooperation between States in devising and adopting effective and practical measures for the prevention of all unlawful acts against the safety of maritime navigation, and the prosecution and punishment of their perpetrators.”³⁵ The Convention criminalizes various acts of maritime violence, such as the seizure of ships by force or threat of force, acts of violence against a person on board a ship,

³¹ Some writers have suggested that states adopt municipal “equipment laws,” dealing with the tools typically used by pirates, such as ladders, rocket-propelled grenades, and grappling hooks, that are inconsistent with offshore fishing activities. Thus, states could use equipment laws—that are similar to the ones that had been used to eradicate the slave trade during the 19th century—to define “intent to commit piracy,” avoiding the unnecessary release of suspects based upon a lack of evidence. Eugene Kontorovich, *Equipment Articles for the Prosecution of Maritime Piracy*, Discussion Paper prepared for the One Earth Future Foundation, 1-2 (May 2010). This also means that the possession of such equipment could establish a presumption that the suspects were operating a “pirate ship,” as defined in UNCLOS art. 103 (providing that a “ship or aircraft is considered a pirate ship or aircraft if it is intended by the persons in dominant control to be used for the purpose of committing one of the acts referred to in article 101”), and that the crew is guilty of piracy. Shnider, *supra* note 28, at 474-482 (examining equipment laws but concluding that the use of universal jurisdiction to prosecute such a case would violate the *nullum crimen* principle because it would constitute a “new” crime under international law).

³² See, e.g., U.N. Secretary General, *Report of the Secretary-General on possible options to further the aim of prosecuting and imprisoning persons responsible for acts of piracy and armed robbery at sea off the coast of Somalia*, ¶ 20 U.B. Doc. S/2010/394 (July 26, 2010) (explaining that over 700 suspects had been released by naval forces during the first six months of 2010; the reasons for release included insufficient evidence to support a prosecution, a lack of transfer arrangements with a regional State, or an inability to find a State—either in the region or elsewhere—willing to accept the transfer).

³³ Chairman of the Security Council Committee, *Report of the Monitoring Group on Somalia*, ¶ 136, U.N. Doc. S/2008/769 (Dec. 10, 2008) (describing piracy operations with financiers—including political and business leaders—who provide funds and material support, to include teams who monitor ship movements in major ports in neighboring countries).

³⁴ See generally Bento, *supra* note 12, at 423.

³⁵ The SUA Convention, *supra* note 23, pmbl.

and the placing of a device or substance that is likely to destroy or damage it.³⁶ Thus, the Convention proscribes acts that can: involve only one vessel, be considered acts of terrorism, and be committed for private gain.

State parties are obligated to criminalize the enumerated maritime offenses and to take measures to establish jurisdiction to prosecute cases occurring in its respective territorial waters or involving their respective nationals, and to all ships flying their respective flag. The Convention also sets out the principle of *aut dedere aut judicare*; namely, that a state party to the treaty must either prosecute a person present in its territory or send that person to another state that requests his or her extradition for prosecution of that crime.³⁷ Article 12 further obligates state parties to “afford one another the greatest measure of assistance in connection with criminal proceedings brought in respect of the offences set forth in article 3, including assistance in obtaining evidence at their disposal necessary for the proceedings.”³⁸ Thus, the SUA Convention is an important counter-piracy tool, perhaps a more effective tool than the UNCLOS, in the hands of states engaged in a regional fight against a common enemy.

Third, the U.N. Security Council has supplemented this treaty law through successive Chapter VII resolutions. The resolutions impose binding legal obligations on U.N. Member States, providing legal authority for pursuing ships and aircraft to enter Somali territorial waters and capture and detain pirates.³⁹ Initially, in June 2008, United Nations Security Council Resolution (UNSCR) 1816 (2008) emphasized the serious nature of the problem, noting the Council’s concerns “by the threat that acts of piracy and armed robbery against vessels pose to the prompt, safe and effective delivery of humanitarian aid to Somalia, the safety of commercial maritime routes and to international navigation. . . .”⁴⁰ This Resolution, noting consent from the Somali government, authorizes States cooperating with Somalia to enter its territorial waters and use “all necessary means” to repress acts of piracy and armed robbery at sea.⁴¹ This Resolution then calls upon states “to cooperate in determining jurisdiction, and in the investigation and prosecution of persons responsible for acts of piracy and armed robbery off the coast of Somalia, consistent with international law including international human rights law. . . .”⁴² Thus, this Resolution closed the gap in the UNCLOS with respect to the “hot pursuit” of suspects who reenter Somali territorial waters from the high seas by permitting a limited use of force consistent with international human rights law.

³⁶ *Id.* at art. 3(1).

³⁷ *Id.* at art. 6(4), 10.

³⁸ *Id.* at art. 12(1).

³⁹ *See, e.g.*, S.C. Res. 1816, *supra* note 10, ¶ 7.

⁴⁰ *Id.* at pmb1.

⁴¹ *Id.* ¶ 7.

⁴² *Id.* ¶ 11. This authorization was valid for a six-month period and had been extended by successive one-year periods under S.C. Res. 1846 (Dec. 2, 2008) and S.C. Res. 1897 (Nov. 30, 2009) (addressing the crisis off the coast of Somalia).

The U.N. Security Council has reinforced this initial, groundbreaking resolution with successive resolutions.⁴³ UNSCR 1844 (2008) directed member states to impose restrictions on designated individuals and entities “to take measures against those who seek to prevent or block a peaceful political process, or those who threaten the [Somali government or the African Union mission], or take action that undermines stability in Somalia or the region.”⁴⁴ This broad resolution provides a useful tool against the “business” networks involving pirate leaders, corrupt government officials, and the Somali diaspora who plan and finance pirate operations.⁴⁵ UNSCR 1851 (2008) invited member states and regional organizations to take several important counter-piracy measures.⁴⁶ This resolution invited states to embark law enforcement officials, i.e., ship-riders, on vessels to “facilitate the investigation and prosecution of persons detained,”⁴⁷ during counter-piracy operations; to establish an international cooperation mechanism to serve as a point of contact among states and regional and international organizations;⁴⁸ to create an information center on regional piracy matters;⁴⁹ and to continue to support the Somali government.⁵⁰ UNSCR 1897 (2009) commended the Kenyan efforts to prosecute criminal suspects and the support provided by the UNODC, and it renewed the initial authorizations as set out in Resolutions 1816 and 1851 for an additional twelve months.⁵¹ Finally, UNSCR 1918 (2010)—not adopted under Chapter VII—noted the “problems caused by the limited capacity of the judicial system of Somalia and other States in the region to effectively prosecute suspected pirates,”⁵² and commended Kenyan efforts to prosecute suspected pirates in its national courts and imprison convicted persons.⁵³

Fourth, the 2009 Djibouti Code of Conduct urges States to investigate all acts of piracy and armed robbery at sea, and to report information on all piracy and robbery investigations and prosecutions.⁵⁴ Somalia, Kenya, Mauritius, the

⁴³ See, e.g., S.C. Res. 2442, *supra* note 2 (the most recent in this series of resolutions addressing the situation off the coast of Somalia).

⁴⁴ S.C. Res. 1844, *supra* note 11, pmb.

⁴⁵ See generally World Bank Group [WBG], *Pirate Trails: Tracking the Illicit Financial Flows from Pirate Activities off the Horn of Africa* (2013) (assessing various “business models” for Somali piracy based upon different methods of financing and revenue sharing).

⁴⁶ S.C. Res. 1851, *supra* note 11, ¶ 3.

⁴⁷ *Id.*

⁴⁸ *Id.* ¶ 4.

⁴⁹ *Id.* ¶ 5.

⁵⁰ *Id.* ¶ 6.

⁵¹ S.C. Res. 1897, ¶ 7 (June 2, 2008).

⁵² S.C. Res. 1918 (Apr. 27, 2010) (expressing grave concerns by the threat that piracy and armed robbery at sea pose to vessels off the coast of Somalia).

⁵³ *Id.* ¶ 8.

⁵⁴ International Maritime Organization, *Status of the Implementation of the Djibouti Code of Conduct*, <http://www.imo.org/en/OurWork/Security/PIU/Pages/Content-and-Evolution-of-the-Djibouti-Code-of-Conduct.aspx> (last accessed July 12, 2019); see also S.C. Res. 1897 ¶ 12 (Nov. 30, 2009) (the U.N. Security Council welcomed this development, “recognizing the efforts of signatory States to develop the appropriate

Seychelles, and 16 other countries are parties to this agreement.⁵⁵ The signatories agreed to support the investigation, arrest and prosecution of suspected pirates, the interdiction and seizure of suspect ships and property on board such ships, the rescue of ships, persons, and property subject to piracy and armed robbery, and the conduct of shared operations including embarking law enforcement officials on patrol ships or aircraft of another signatory. The IMO has supported regional training on maritime safety and law enforcement through its Djibouti Regional Training Centre, and at its regional information-sharing centers.⁵⁶ The IMO has also worked closely with the UNODC and development partners to assess and update municipal piracy legislation to support criminal investigations and prosecutions.⁵⁷

Lastly, international human rights law provides important fair trial and due process guarantees to all persons—including suspected pirates. Indeed, while the 1948 Universal Declaration on Human Rights enshrines the right to a fair trial,⁵⁸ the 1966 International Covenant on Civil and Political Rights expands on this with a right to life,⁵⁹ freedom from arbitrary arrest or detention,⁶⁰ and equality before courts and tribunals with specified rights such as a presumption of innocence, minimum guarantees in criminal proceedings, the right to have a higher court review the conviction or sentence, and a prohibition on double jeopardy.⁶¹ Kenya is also party to the 1954 Refugee Convention⁶² and the 1984 Convention against Torture,⁶³ both of which impose non-refoulement obligations upon State Parties. In other words, after a convicted person has completed his sentence, Kenya might be

regulatory and legislative frameworks to combat piracy, enhance their capacity to patrol the waters of the region, interdict suspect vessels, and prosecute suspected pirates....)(emphasis in original).

⁵⁵ *Status of the Implementation of the Djibouti Code of Conduct*, *supra* note 54.

⁵⁶ *Djibouti Code of Conduct*, *supra* note 25, at 4-5.

⁵⁷ *Id.* at 6.

⁵⁸ G.A. Res 217 (III) A, Universal Declaration of Human Rights (Dec. 10, 1948).

⁵⁹ The International Covenant on Civil and Political Rights (ICCPR), art. 6, Dec. 19, 1966, 999 U.N.T.S. 14668.

⁶⁰ *Id.* at art. 9; *see also* Human Rights Committee, *General Comment No. 35: Article 9 (Liberty and Security of Person)*, CCPR/C/GC/35, Dec. 16, 2014, at <https://undocs.org/CCPR/C/GC/35>.

⁶¹ ICCPR, *supra* note 59, at art 14; *see also* Human Rights Committee, *General Comment No. 32: Article 14 (Right to Equality before Courts and Tribunals and to a Fair Trial)*, CCPR/C/GC/32 (Aug. 23, 2007), at <https://undocs.org>

/CCPR/C/GC/35; *see generally* UNODC, UNITED NATIONS PRINCIPLES AND GUIDELINES ON ACCESS TO LEGAL AID IN CRIMINAL JUSTICE SYSTEMS, June 2013 (adopted by U.N. General Assembly, A/67458, Dec. 20, 2012) (recognizing the importance of legal aid in a fair criminal justice system, to include the right to assigned legal counsel and without payment by the defendant if he cannot afford to do so himself).

⁶² CONVENTION RELATING TO THE STATUS OF REFUGEES, *supra* note 26.

⁶³ Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, art. 3, Dec. 10, 1984, 1465 U.N.T.S 85 (entered into force June 26, 1987) (providing that “No State Party shall expel, return (“refouler”) or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.”).

constrained in its ability to repatriate a convicted pirate to his country of origin if that person—by claiming asylum—could demonstrate grounds for believing that his life or freedom would be threatened on discriminatory grounds or that he would be in danger of being subjected to torture.⁶⁴ Finally, Kenya is party to the 1989 Convention on the Rights of the Child, which constrains its ability to prosecute the not-uncommon underage pirates.⁶⁵

III. KENYAN LAW ON PIRACY

Kenya has a strong constitutional structure that incorporates its international human rights obligations in an overall domestic legal framework that supports the rule of law and respect for civil liberties—even if its daily law enforcement practices may fall short.⁶⁶ However, like many other countries without prior experience in prosecuting piracy cases (Kenya did not prosecute its first case until 2006), Kenya found that its relevant statutory law needed an update to prosecute cases in cooperation with its international legal partners. In any case, recent appellate decisions and parliamentary actions have eliminated many problems, such as the applicability of universal jurisdiction under Kenyan law. Still, other problems remain, including its definition of piracy, whether the High Court should have discretionary authority to order the Attorney General to appoint qualified counsel for indigent non-resident defendants,⁶⁷ and the minimum age for

⁶⁴ Yvonne M. Dutton, *The Potential for Asylum-Seeking by Convicted Pirates*, in PROSECUTING MARITIME PIRACY: DOMESTIC SOLUTIONS TO INTERNATIONAL CRIMES, 320, 329-35 (Michael P. Scharf et al. ed., 2015) (concluding that international human rights law sets a high evidentiary bar that creates a significant obstacle to asylum-seeking persons who have been convicted of piracy offenses).

⁶⁵ CONVENTION ON THE RIGHTS OF THE CHILD, art. 1, 1577 U.N.T.S. 44 (opened for signature on Nov. 20, 1989) (entered into force on Sep. 2, 1990) (Kenya ratified the CRC on July 30, 1990, *see* https://treaties.un.org/Pages/showDetails.aspx?objid=08000002800007fe&clang=_en (last accessed Sep. 21, 2018)).

⁶⁶ U.S. Dep't of State, Bureau of Democracy, H.R. and Lab., *2018 Country Reports on Human Rights Practices: Kenya* (Mar. 13, 2019), <https://www.state.gov/reports/2018-country-reports-on-human-rights-practices/kenya/> (citing human rights abuses involving the Kenyan police and the judiciary, with impunity at all levels of government as a continuing problem).

⁶⁷ CONSTITUTION art. 50(2)(h) (2010) (Kenya) (providing that every accused person has the right to a fair trial, which includes the right “to have an advocate assigned to the accused person by the State and at State expense, if substantial injustice would otherwise result, and to be informed of this right promptly ...”); *but see* Legal Aid Act, No. 6 (2016), KENYA GAZETTE SUPPLEMENT No. 56 § 36 (excluding non-resident indigent persons from receiving legal aid in criminal cases); *see also* Osino George Osanda, *Examining the Right to Legal Representation at Public Expense: A Case for Kenya*, LLM dissertation, University of Nairobi (Dec. 2017) (examining issues under the 2016 LEGAL AID ACT involving foreign nationals).

criminal responsibility.⁶⁸ This experience offers lessons for other regional partners, such as the Seychelles or Mauritius, who also need international assistance in this fight.⁶⁹

In August 2010, after multiple attempts at constitutional reform, the Kenyan people approved a new constitution with improved structures, processes, and authorities necessary for the administration of justice in Kenya.⁷⁰ The 2010 Constitution guarantees “every person”⁷¹ certain individual liberties in a Bill of Rights (Articles 19-59), to include a right to life,⁷² equality, freedom from discrimination,⁷³ and protection from slavery, servitude and forced labor.⁷⁴ With respect to due process rights, Article 49 provides for the rights of arrested persons,⁷⁵ Article 50 provides for a non-derogable right to a fair trial, and Article 51 provides for the rights of persons detained, held in custody, or imprisoned.⁷⁶ The 2010 Constitution strengthens the role and authority of the judiciary with respect to human rights issues. In all cases, Article 23(1) provides that the “High Court has jurisdiction, in accordance with Article 165, to hear and determine applications for redress of a denial, violation or infringement of, or threat to, a right or fundamental freedom in the Bill of Rights,” and can grant judicial relief by declaration, injunction, and/or judicial order.⁷⁷ In other words, the 2010 Constitution contains enforceable human rights guarantees that are applicable in cases involving foreign nationals taken captive overseas and prosecuted in Kenyan courts for piracy offenses under a theory of universal jurisdiction.

While Kenya has successfully prosecuted many piracy cases, including its first-ever prosecution in 2006 in a Magistrate’s Court with an appeal to the Kenyan

⁶⁸ Penal Code (2014), Cap. 63 § 14 (Kenya) (providing for age 12 as the age of criminal responsibility).

⁶⁹ S.C. Res. 2442, *supra* note 2.

⁷⁰ Melizsa Mugenyi, *The Judiciary: Emerging Vanguard of Kenya’s New Constitution*, in CONSTITUTION BUILDING IN AFRICA, Jaap de Visser, Nico Steytler, Dereck Powell and Ebenezer Durojaye, 166 (2015).

⁷¹ CONSTITUTION arts. 12-18 (2010) (Kenya) (outlines the detailed rights of Kenyan citizens).

⁷² *Id.* at art. 26.

⁷³ *Id.* at art. 27 (this is an important issue in piracy trials, especially since many defendants have been non-citizens and may not speak the languages used in Kenyan courts. In other words, non-citizens should have the same “equality of arms,” in terms of the assistance of counsel, as a similarly-situated Kenyan citizen).

⁷⁴ *Id.* at art. 30.

⁷⁵ *Id.* at art. 49 (providing for the right to be informed of the charges, the right to remain silent, the right to communicate with an advocate, the right against self-incrimination, and the right to be brought before a magistrate within 24 hours after arrest (or on the next court day, if the 24 hour period ends outside ordinary court hours) and that after that first court appearance, the person has the right to release on bail absent compelling reasons for pre-trial detention).

⁷⁶ CONSTITUTION arts. 50-51 (2010) (Kenya).

⁷⁷ *Id.* at art. 23(1).

High Court,⁷⁸ Kenya has done so with the benefit of considerable international assistance in investigating and prosecuting the cases.⁷⁹ Thus, some foreign partners, such as the United Kingdom and the United States, have transferred captured pirates to Kenya for prosecution under bilateral transfer Memoranda of Understanding (MOU).⁸⁰ Indeed, Kenya demanded substantial financial support in exchange for its governmental and prosecutorial cooperation. Initially, some criticized this effort, claiming that Kenya could not provide a fair trial to piracy suspects.⁸¹ However, the UNODC has provided an extensive range of technical assistance, including building a high-security courtroom in Mombasa,⁸² to overcome these concerns. First, this technical assistance has included training for police officers, prosecutors, judges, and prison staff on international law issues.⁸³ Second, it has included improved trial support, providing for courtroom computers, witness travel, transcription services, facilities to permit the introduction of witness testimony by video link, and defense counsel for indigent defendants.⁸⁴ Third, it has provided funds to refurbish five prisons, to include providing mattresses and blankets, improved water and sewage capacity, new kitchens, and improved medical support.⁸⁵ Piracy suspects have had access to qualified defense counsel, funded by UNODC, on request through a Kenyan non-governmental organization.⁸⁶

⁷⁸ Hassan M. Ahmed v. Republic, Crim. App. 198, 199, 201, 203, 204, 205, 206 & 207 of 2008 (H.C.K. May 12, 2009) (finding that the magistrates' courts have jurisdiction to hear piracy prosecutions against non-nationals captured outside Kenyan territory); *see also* Republic v. Aid Mohamed Ahmed (2010) eKLR (Kenya) (holding that Kenyan law sufficed to establish criminal jurisdiction over non-nationals for offenses committed outside Kenya).

⁷⁹ Robin M. Warner, *Abu Dhabi: The Emirates Ctr. for Strategic Studies and Research*, THE PROSECUTION OF PIRATES IN NATIONAL COURTS, Emirates Lecture Series 109, (2013).

⁸⁰ Frederick Lorenz & Laura Eshbach, *Transfer of Suspected and Convicted Pirates*, in Scharf, PROSECUTING MARITIME PIRACY, *supra* note 64, at 163-165.

⁸¹ *Id.* at 164.

⁸² U.N. Secretary General, *Report of the Secretary-General on the modalities for the establishment of specialized Somali anti-piracy courts*, ¶ 71, U.N. Doc. S/2011/360 (June 15, 2011) (explaining that “[p]iracy prosecutions in a third State in the region would entail security considerations given the support for piracy suspects among some Somali communities.”). In fact, Kenya has a large ethnic Somali population, concentrated largely in the northeastern and coastal counties, many of whom already bear some animosity toward Kenya (especially the Kenyan Police and judiciary), and could be expected to support ethnic/religious kin involved in pirate activities. Thus, the government must consider the security risks to police, witnesses, prosecutors, and court officials involved in piracy trials as a priority concern.

⁸³ U.N. Office on Drugs and Crime, *Counter Piracy Programme*, at 3-4 (Nov. 2009), www.unodc.org/documents/easternafrika/piracy/UNODC_Counter_Piracy_Programme.pdf.

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ U.N. Secretary General, *Report of the Secretary-General on specialized anti-piracy courts in Somalia and other States in the region*, ¶ 67, U.N. Doc. S/2012/50 (Jan. 20, 2012).

The Director of Public Prosecutions (DPP) can prosecute offenses committed before September 1, 2009, either in Kenyan territorial waters or on the high seas, under the 1963 Kenyan Penal Code.⁸⁷ The now repealed article, section 69(1), had provided that: “any person who, in the territorial waters or upon the high seas, commits any act of piracy *jure gentium* [according to the law of nations] is guilty of the offence of piracy.”⁸⁸ Section 69(3) then provided that any person guilty of the offense of piracy was subject to life imprisonment. In fact, Kenya has been prosecuting many piracy cases—involving offenses committed before September 2009—in its magistrates’ courts.⁸⁹ Moreover, Kenya has been prosecuting cases before its Chief Magistrate’s Court in Mombasa but uses qualified state counsel rather than police prosecutors.⁹⁰

The DPP can prosecute recently committed offenses against the safety of ships under the 2009 Merchant Shipping Act, which Parliament amended to domesticate the UNCLOS and the SUA Convention.⁹¹ In fact, Parliament passed the 2009 Act based upon some issues that had been identified in Kenya’s initial piracy prosecutions; the 2009 Act embraces a more comprehensive definition for piracy while also extending the jurisdiction of Kenyan courts to non-nationals.⁹² The 2009 Act defines “armed robbery against ships” as “any unlawful act of violence or detention or any act of depredation, or threat thereof, other than an act of piracy, directed against persons or property on board such a ship, within territorial waters or waters under Kenya’s jurisdiction . . .”⁹³ The statute then defines piracy using verbatim language from UNCLOS article 101, thus incorporating both the private ends and two-ship requirements from that treaty.⁹⁴

⁸⁷ *Hassan M. Ahmed v. Republic* K.L.R. (2009).

⁸⁸ THE PENAL CODE art. 69(1) (repealed 2009) (Kenya).

⁸⁹ CONSTITUTION art. 169 (2010) (Kenya) (showing that the Magistrates’ Courts are Kenya’s criminal courts of first instance, with appeals to the High Court and then to the Court of Appeals); see also James Thuo Gathii, *Jurisdiction to Prosecute Non-National Pirates Captured by Third States under Kenyan and International Law*, 31 LOY. L.A. INT’L & COMP. L. REV. 363, 367-69 (2009) (arguing that the extension of extraterritorial jurisdiction to the magistrate courts lacks a sound basis in Kenyan law).

⁹⁰ Gathii, *supra* note 15, at 36 (noting that the piracy cases have been prosecuted by qualified lawyers deputized from the Office of the Deputy Public Prosecutor in the Attorney General’s chambers). In any case, police prosecutors—who typically have limited legal training—would not be qualified to handle cases involving important issues of international law with complex problems involving evidence and foreign witnesses.

⁹¹ MERCHANT SHIPPING ACT, art. 432 (2009) (Kenya) (repealing the older piracy provisions under the 1963 Kenyan Penal Code, although the DPP may prosecute for various criminal acts under the Penal Code such as conspiracy, kidnapping, murder, and robbery); see also Paul Musili Wambau, *Prosecution of Maritime Piracy Cases in Kenya: Testing the SUA Convention Model on Piracy Prosecution*, S. AFR. J. OF CRIMINOLOGY, Special Ed. No. 1 (2014) (examining the piracy provisions in Kenya’s 2009 Merchant Shipping Act and some of the challenges it faces in Kenya courts; Wambau argues, in part, that Kenya’s exercise of universal jurisdiction against piracy on the high seas is broader than what is permitted by the SUA Convention and is not, therefore, premised on “sound legal principles.”).

⁹² MERCHANT SHIPPING ACT, art. 432 (2009) (Kenya).

⁹³ *Id.* at art. 369.

⁹⁴ *Id.*

This statute also proscribes various inchoate acts, such as attempts, conspiracy, aiding and abetting, counselling, or procuring or inciting an act of piracy.⁹⁵ Section 370(4) clearly provides for universal jurisdiction over non-Kenyan pirates. It explains that “subsections (1) and (2) [involving the hijacking and destruction of ships] shall apply—(a) whether the ship referred to in those subsections is in Kenya or elsewhere; (b) whether any such act as is mentioned in those subsections is committed in Kenya or elsewhere; and (c) whatever the nationality of the person committing the act.”⁹⁶ Still, jurisdiction in cases involving “armed robbery against ships” is limited to Kenyan territorial waters.⁹⁷ Section 371 provides for life imprisonment for piracy offenses or for any acts of armed robbery against ships in Kenyan waters.⁹⁸

Kenya has an important concern involving the incarceration of persons after sentencing, given the large number of persons that it has prosecuted to date.⁹⁹ Indeed, as noted by the U.N. Secretary General, “it is apparent from the experience over the last year [2009-2010] that the long-term burden is not the prosecution itself, but the consequent imprisonment.”¹⁰⁰ Initially, it would be preferable to transfer such persons to Somali prisons so that the convicts could serve out their sentences closer to home, for cultural and humanitarian reasons, while also minimizing the burden on Kenya.¹⁰¹ But the lack of effective governance in Somalia since the 1991 overthrow of the Siad Barre government, with the presence of armed groups like al Shabaab and the shortcomings in Somali state infrastructure, raises questions about prison security.¹⁰² Thus, Kenyan officials could reasonably ask whether a sentenced

⁹⁵ *Id.* at art. 370(3).

⁹⁶ *Id.* at art. 370(4).

⁹⁷ MERCHANT SHIPPING ACT, *supra* note 92, at art. 369(1).

⁹⁸ *Id.* at art. 371 (2009) (Kenya); *see also* Eugene Kontorovich, *The Problems of Pirate Punishment*, in PROSECUTING MARITIME PIRACY, 299-319 (Scharf et. al eds., 2015) (finding that the average pirate’s prison sentence is 14 years worldwide; he bases this conclusion upon an examination of 407 prosecutions in 15 countries over an eight-year period from 2006 to 2014. In fact, since Kenya imposes a maximum sentence of life imprisonment, the decision by a capturing nation to transfer a suspect to Kenya has significant consequences).

⁹⁹ *See, e.g.*, U.N. Secretary General, *Report of the Secretary-General on the situation with respect to piracy and armed robbery at sea off the coast of Somalia*, ¶ 36, U.N. Doc. S/2015/7776, (Oct. 15, 2015) (noting that Kenya had prosecuted 164 cases as of Oct. 2015).

¹⁰⁰ U.N. Secretary General, *Report of the Secretary-General on possible options to further the aim of prosecuting and imprisoning persons responsible for acts of piracy and armed robbery at sea off the coast of Somalia*, ¶ 29, U.N. Doc. S/2010/394 (July 26, 2010) (also noting that the average prison sentences imposed by Kenyan courts have ranged from 8-20 years).

¹⁰¹ *Id.* ¶¶ 35-43 (UNODC has supported efforts to increase prison capacity—consistent with international standards—in Somalia, as well as the return of convicted pirates to Somalia where they can serve out the remainder of their terms)

¹⁰² M. Ahmed, *Somalia: Mogadishu Attack an 'Act of Desperation' for Al-Shabaab*, ALLAFRICA (Apr. 15, 2013), <http://allafrica.com/stories/201304>

person, transferred to Somali custody, would likely serve out that entire sentence (i.e., barring escape from a sub-standard facility or early release by order of a corrupt Somali official). In any case, there is apparently no program for the transfer of convicted persons from Kenya to Somalia.¹⁰³ In fact, Kenyan officials have repeatedly refused “to release the convicts to finish their sentences in Somalia due to suspicion that the weak [Somali government] lacks the will and capacity to put them in jail once they leave Shimo la Tewa.”¹⁰⁴

Kenyan law has several procedural and evidentiary provisions that promote fair and timely piracy trials.¹⁰⁵ First, under the 2012 Criminal Procedure Code, an arresting officer “may take from the person arrested any offensive weapons which he has about his person, and shall deliver all weapons so taken to the court or officer before which or whom the officer or person making the arrest is required by law to produce the person arrested.”¹⁰⁶ While this article helps ensure that the police have detained suspects for valid reasons, it can create an evidentiary problem with pirates who throw weapons overboard when capture appears imminent. In other words, if one State arrested a suspected pirate, who had managed to throw his weapons overboard at last minute and in full view of witnesses, a Kenyan judge could refuse the case. Second, the code permits the trial judge take and receive victim impact statements, which it can consider in imposing a sentence.¹⁰⁷ This can be important for both victims and their families; many hostages have been held for several years and have endured dire conditions (i.e., a lack of food, water, and medical care, as well as some form of physical and psychological abuse)¹⁰⁸ while their families have likely been left impoverished by the absence of the breadwinner.¹⁰⁹

160105.html (Al Shabaab has made repeated attacks on Somali police stations, courts, and prisons. In one attack, on Apr. 14, 2013, a ten-man commando unit stormed Mogadishu’s main court complex leaving 29 persons dead. In a second attack, on Nov. 8, 2013, al Shabaab attacked the Bosaso prison in Puntland, where 49 convicted pirates were being held subsequent to their transfer from the Seychelles); Jillian Keenan, *Puntland is for Pirates*, FOREIGN POLICY (Mar. 2, 2014), <http://foreignpolicy.com/2014/03/20/puntland-is-for-pirates/>.

¹⁰³ U.N. Secretary General, *Report of the Secretary-General on the situation with respect to piracy and armed robbery at sea off the coast of Somalia*, ¶ 37, U.N. Doc. S/2016/843, (Oct. 7, 2016) (Kenya has supported the post-sentence repatriation of Somali pirates back to Somalia).

¹⁰⁴ Philip Mwakio, *Somalia wants to take pirates back home from Kenya’s Shimo la Tewa Prison*, THE STANDARD (Nairobi) (Sep. 29, 2015), <https://www.standardmedia.co.ke/article/2000177903/somalia-wants-to-take-pirates-back-home-from-kenya-s-shimo-la-tewa-prison>.

¹⁰⁵ See generally The Criminal Procedure Code Act (2012) Cap. 75 (Kenya); see also The Evidence Act (2014) Cap. 80 (Kenya).

¹⁰⁶ The Criminal Procedure Code Act (2012) Cap. 75 § 28(Kenya).

¹⁰⁷ *Id.* § 329.

¹⁰⁸ Peter Apps, *For Somali Pirate Victims, Abuse and Long Captivity*, REUTERS (June 6, 2011), <https://www.reuters.com/article/us-somalia-piracy-idUSTRE75536E20110606>.

¹⁰⁹ The Criminal Procedure Code Act (2012) Cap. 75 § 329A-F.

Third, the 2014 Evidence Act, Article 25(A), makes confessions generally inadmissible, unless made before a judge or a senior police official.¹¹⁰ However, under Article 32(1), in a trial involving several persons tried jointly for the same offense, “a confession made by one of such persons affecting himself and some other of such persons is proved, the court may take the confession into consideration as against such other person as well as against the person who made the confession.”¹¹¹ Fourth, the Evidence Act, Article 63 (A), permits the introduction of oral evidence by teleconferencing and video conferencing; this provision should help alleviate concerns with court security and reduce the problems associated with costly and time-consuming witness travel from places around the globe.¹¹²

Kenya should consider revising its minimum age of criminal responsibility, probably raising the minimum age of 12 to 15 years.¹¹³ The 1963 Penal Code (revised 2014) provides that:

- (1) A person under the age of eight years is not criminally responsible for any act or omission.
- (2) A person under the age of twelve years is not criminally responsible for an act or omission, unless it is proved that at the time of doing the act or making the omission he had capacity to know that he ought not to do the act or make the omission.¹¹⁴

This is, however, inconsistent with emerging international norms and other aspects of Kenyan law for several reasons. First, the Convention on the Rights of the Child defines a child as a “human being below the age of 18 years unless, under the law applicable the child, majority is obtained earlier.”¹¹⁵ In fact, the 2010 Kenyan Constitution does not permit the marriage of persons under age 18.¹¹⁶ Second, Kenyan employment law defines a child as any person who has not attained the age of 18 and it prohibits the employment of a child who has not attained the age of 13 years in any form of labor.¹¹⁷ Nonetheless, the Kenyan courts have generally tried adult and child pirates in the same proceeding, represented by the same attorney, with the trial judge applying juvenile rights and standards to some

¹¹⁰ The Evidence Act (2014) Cap. 80 § 25A (Kenya).

¹¹¹ *Id.* § 32(1).

¹¹² *Id.* § 63A.

¹¹³ The Penal Code Act (2014) Cap. 63 § 14 (Kenya).

¹¹⁴ *Id.*

¹¹⁵ Convention on the Rights of the Child, art. 1, 1577 U.N.T.S 3 (opened for signature Nov. 20, 1989, entered into force Sept. 2, 1990).

¹¹⁶ CONSTITUTION art. 45(2), 260 (2010) (Kenya) (compare article 45(2), every adult has the right to marry, with article 260, the term “child” is defined as “an individual who has not attained the age of eighteen years.”).

¹¹⁷ Committee on the Rights of the Child, *Consideration of Reports Submitted by States Parties under article 44 of the Convention* (combined third, fourth and fifth periodic reports of States parties due in 2012) ¶ 99, CRC/C/KEN/3-5 (Apr. 1, 2015).

defendants but not others.¹¹⁸ In any case, when imposing a sentence against a convicted Somali pirate under the age of 18, a Kenyan judge should take into consideration the long-standing lack of educational and work opportunities for Somali youth; in other words, the “best interests” of the child pirate undoubtedly require rehabilitation and reintegration into a functioning society.¹¹⁹

Kenya has prosecuted many important piracy cases, with both reported and unreported decisions, beginning with the 2006 decision in *Hassan M. Ahmed*.¹²⁰ In *Ahmed*, the Chief Magistrate’s Court in Mombasa convicted ten defendants of piracy under Penal Code section 69(1) and the judge sentenced each defendant to serve a seven-year prison term.¹²¹ On appeal to the High Court in Mombasa, the defendants challenged the personal jurisdiction of the court because they were not Kenyan nationals and the offense had been committed outside Kenyan territorial waters, i.e., involving an Indian-registered dhow about 275-280 miles offshore.¹²²

The High Court made several important points. First, the Court noted that the defendants claimed that they were fishermen, but found that claim inconsistent with the AK-47 rifles and revolvers that had been produced at trial before the Chief Magistrate.¹²³ Second, the Court held that it did have personal jurisdiction based upon the Penal Code; the Court noted that section 69(1) was broadly written, providing for jurisdiction over “[a]ny person who, in territorial waters or upon the high seas, commits any act of piracy. . . .”¹²⁴ Third, the Court then went further, finding that it would have had jurisdiction—even if the code had been silent on the issue—based upon the UNCLOS that had been ratified and domesticated by Kenya.¹²⁵ In fact, the Court said that this would have been true even if Kenya had not ratified and domesticated that treaty: “the Learned Principal Magistrate was bound to apply international norms and Instruments since Kenya is a member of the civilized world and is not expected to act in contradiction to expectations of member states of the United Nations.”¹²⁶ This decision clearly affirmed Kenya’s assertion of universal jurisdiction over the crime of piracy on the high seas.

¹¹⁸ Jon Bellish, *The Issue of Juvenile Piracy* in PROSECUTING MARITIME PIRACY, (Scharf, ed., 2015) *supra* note 64, at 292.

¹¹⁹ See generally Mark A. Drumbl, *Child Pirates: Rehabilitation, Reintegration, and Accountability*, 46 CASE W. RES. J. INT’L L. 235 (2013).

¹²⁰ *Hassan M. Ahmed v. Republic* (2009) K.L.R. (Kenya).

¹²¹ *Id.*

¹²² *Id.*

¹²³ *Id.* at 2 (In fact, the defendants had been in possession of “piracy equipment” that was inconsistent with their claim that they were fishermen with a broken down boat and had approached the Indian vessel for assistance. The defendants had been in possession of AK-47 rifles, a rocket-propelled grenade launcher, a maritime guidebook, and a map of shipping routes).

¹²⁴ *Id.* at 5.

¹²⁵ *Hassan M. Ahmed v. Republic* (2009) K.L.R.; but see WAMBAU, *supra* note 91, at 85 (pointing out that the finding of the appeals court judge in the *Hassan* case that the “UNCLOS had been domesticated in Kenya was erroneous.” Wambua recommends a statutory amendment to clarify the vesting of jurisdiction to try piracy cases in the magistrates’ courts).

¹²⁶ *Hassan M. Ahmed v. Republic* (2009) K.L.R. (Kenya).

In *Aid Mohamed Ahmed*,¹²⁷ the defendants, who were armed with assault rifles and rocket-propelled grenades, were captured by a British warship on the high seas on November 11, 2008, while attempting to hijack a ship.¹²⁸ The defendants claimed that they were involved in human trafficking (smuggling illegal immigrants into Yemen) and had been armed only for self-defense against pirates.¹²⁹ The Chief Magistrate held that section 69(1) grants Kenya courts universal jurisdiction over piracy offenses *jure gentium* (against the law of nations) and that such offenses were justiciable in a Magistrate’s Court.¹³⁰ The court found sufficient evidence that the defendants had attempted piracy with “offensive weapons” and, while noting that all were foreign nationals convicted for a first offense, imposed 20-year “deterrent” sentences—undoubtedly one of the longer sentences for piracy imposed by a Kenyan court.

In *Republic v. Chief Magistrate’s Court, Mombasa (Ex-parte Mohamed Hashi)*¹³¹ the defendants were charged under the then-operative section 69(1) for a March 2009 piracy attack on the *MV Courier*. The defendants had been captured on March 3 by a German ship, transferred on March 10 to Kenyan custody, and then arraigned the next day in a Mombasa court.¹³² The defendants requested the appointment of foreign counsel, contesting the jurisdiction of the Chief Magistrate’s Court in cases involving acts occurring on the high seas and not involving Kenyan nationals, i.e., the exercise of universal jurisdiction, by seeking an order of prohibition from the High Court. While the High Court acknowledged that section 69(1) had authorized universal jurisdiction, it found a problem because section 5 limited the jurisdiction of courts “to every place within Kenya, including its territorial waters,”¹³³ and found that other provisions of law could not save the case. The High Court held, therefore, that the Magistrate’s Court lacked jurisdiction to try the charges based upon universal jurisdiction.¹³⁴

However, the Court of Appeals overturned the High Court’s decision in *Republic v. Chief Magistrate’s Court, Mombasa* in its own 2012 decision.¹³⁵ In fact, the defendants abandoned the choice of counsel issue on appeal; arguably, since the key issues involved an interpretation of Kenyan statutory law, foreign counsel was not needed.¹³⁶ The Court of Appeals found no inconsistency between sections 5 and 69; the court held that section 69 had extended jurisdiction in piracy

¹²⁷ *Republic v. Aid Mohamed Ahmed*, Crim. No. 3486 of 2008 (Chief Magis. Ct. Mombasa, Mar. 10, 2010) (Kenya).

¹²⁸ *Id.* at 102.

¹²⁹ *Id.* at 3,14.

¹³⁰ *Id.* at 17.

¹³¹ *Republic v. Chief Magistrate’s Court, Mombasa Ex-parte Mohamud Mohamed Hashi & 8 others* (2010) K.L.R. (Kenya).

¹³² *Id.*

¹³³ *Id.*

¹³⁴ *Id.*

¹³⁵ *Attorney General v. Mohamud Mohammed Hashi & 8 others* (2012) eKLR (Kenya).

¹³⁶ *Id.*

cases *jure gentium*.¹³⁷ The Court also explained that the case could have been resolved by considering the UNCLOS, which is “part of our laws,”¹³⁸ as well as customary international law, for piracy offenses.

In *Republic v. Hassan Jama Haleys*, after the defense counsel withdrew from the case, the magistrate judge directed the Attorney General to provide legal representation for the accused.¹³⁹ The High Court overturned this order, holding that Kenyan law permitted a person self-representation or to retain a counsel of his choice, and explaining that murder suspects were the only class of suspects entitled to representation at state expense.¹⁴⁰ The Court acknowledged that while “it would be desirable to have a Legal Aid scheme in place in this country to cater for suspects who may be unable to engage legal counsel for themselves,” such a system does not presently exist.¹⁴¹ The Court noted that piracy trials present unique legal challenges, especially for foreign nationals who do not speak the language and do not understand the legal system; the Court said that—in its view—the government and international partners should provide such representation in order to guarantee a defendant’s right to a fair trial. Indeed, this case raises a question whether certain defendants—more likely in complex cases or cases involving novel issues—might not receive a fair trial stemming from the lack of “equality of arms,” thus violating the International Covenant on Civil and Political Rights (ICCPR) and undermining the legitimacy of the trial.¹⁴²

In *Abdirahman Mohamed Roble*,¹⁴³ the defendants appealed the imposition of a 20-year prison sentence for a piracy conviction under section 69(1).¹⁴⁴ The High Court noted a similar case in which it had reduced a 20-year sentence to 10 years’ imprisonment.¹⁴⁵ Here, because the defendants had been in remand for three years before their conviction, the Court reduced the overall sentence to an additional

¹³⁷ *Id.*

¹³⁸ *Id.*

¹³⁹ *Republic v. Hassan Jama Haleys alias Hassan Jamal & 5 Others* (2010) K.L.R. (Kenya).

¹⁴⁰ *Id.*

¹⁴¹ *Id.*

¹⁴² HRC, “General Comment No. 32,” *supra* note 61, ¶ 38, explains that ICCPR “article 14, paragraph 3 (d), guarantees the right to have legal assistance assigned to accused persons whenever the interests of justice so require, and without payment by them in any such case if they do not have sufficient means to pay for it. The gravity of the offence is important in deciding whether counsel should be assigned ‘in the interest of justice’ as is the existence of some objective chance of success at the appeals stage.” See also Deborah Osiro, *Somali pirates have rights too: Judicial consequences and human rights concerns*, INSTITUTE FOR SECURITY STUDIES (ISS) 12-13 (July 19, 2011) (citing a denial of due process resulting from a lack of competent legal representation, the delays between a person being arrested and arraigned in court, problems compelling the attendance of defense witnesses, the inadequacy of trial records, and problems ascertaining the age of suspects claiming to be minors).

¹⁴³ *Abdirahman Mohamed Roble & 10 others v. Republic* (2013) K.L.R. (Kenya).

¹⁴⁴ *Id.*

¹⁴⁵ *Id.*

five years of post-conviction imprisonment.¹⁴⁶ Thus, this case demonstrates some effort by the judiciary at maintaining a level of consistency and fairness among similarly situated defendants.

In *Barre Ali Farah*,¹⁴⁷ seven defendants appealed a 20-year sentence under section 369(1) of the 2009 Merchant Shipping Act.¹⁴⁸ In this case, the defendants had approached a fishing trawler at high speed and ignored warning flares, putting “in fear the lives of the crew of the said vessel.”¹⁴⁹ The defendants challenged the definition of piracy under the act, contending that they were fishermen and that were no allegations that they had committed any act of violence against a “private ship.”¹⁵⁰ The Court first explained that section 369(1) provides for prosecutions based upon threats and that this definition could include acts that “caused the crew to apprehend danger and fear for their lives and hence [make this] an act of violence.”¹⁵¹ In addition, the Court did not accept the defense claim that they were indeed fishermen; the Court explained that ammunition, knives, and grappling hooks (i.e., “piracy equipment”) were recovered from their skiffs and they lacked fishing gear, fish, or fish storage facilities.¹⁵² Finally, the Court noted that the Mombasa courts had already tried several piracy cases with sentences in the five to ten-year range.¹⁵³ The Court, therefore, reduced the overall sentences from 20 years’ imprisonment to a total of 10 years.¹⁵⁴ Thus, while Kenyan courts have demonstrated some level of consistency in sentencing similarly situated defendants, the Kenyan parliament could adopt sentencing guidelines—namely, laying out the key aggravating and mitigating factors to be considered by a trial judge in making his decision—that could facilitate greater transparency and a sense of fairness.

In *Abiaziz Ali Abdulah*,¹⁵⁵ the defendants, who had been armed with AK-47 assault rifles and rocket-propelled grenades, had attacked a ship on the high seas; the defendants were convicted under section 369(1)(b) of the 2009 Merchant Shipping Act in that they “voluntarily participated in the operation of a ship *FV Ariya* with knowledge of facts making the same to be a pirate ship.”¹⁵⁶ The

¹⁴⁶ *Id.*

¹⁴⁷ *Barre Ali Farah & 6 others v. Republic* (2013) K.L.R. (Kenya).

¹⁴⁸ *Id.*

¹⁴⁹ *Id.*

¹⁵⁰ *Id.*

¹⁵¹ *Id.*

¹⁵² *Barre Ali Farah & 6 others v. Republic* (2013) K.L.R. (Kenya).

¹⁵³ *See also Abdikadir Isey Ali & 8 others v. Republic* (2015) K.L.R. (Kenya). (affirming a sentence of an additional seven years for defendants who had already been in custody for three years).

¹⁵⁴ *Barre Ali Farah & 6 others v. Republic*, K.L.R. at 4.

¹⁵⁵ *Abiaziz Ali Abdulah & 23 others v. Republic* (2014) K.L.R. (Kenya).

¹⁵⁶ *Id.* at 2. Section 369(1)(b) provides that piracy includes “any voluntary act of participation in the operation of a ship or of an aircraft with knowledge of facts making it a pirate ship or aircraft” The code then defines term “pirate ship” to mean “a ship or aircraft under the dominant control of persons who—(a) intend to use such ship or aircraft for piracy;

defendants contended that their convictions could not be sustained because the crew of the hijacked ship had returned to Iran and was not available to testify by video link.¹⁵⁷ The Court first noted that the defendants had become disruptive at trial, causing an adjournment of the proceedings, and then the video equipment went missing.¹⁵⁸ The Court then noted that there was overwhelming evidence, produced during trial, that the defendants had been found on a “pirate ship;” the evidence from the *FV Ariya* included “piracy equipment,” including two skiffs, a private ladder, ten rocket-propelled grenades, magazines of ammunition, jackets, flashlights, global positioning systems, and cloth masks.¹⁵⁹ Moreover, evidence was adduced at trial that there had been an exchange of fire between the capturing (Danish) ship and the *FV Ariya*, after the *FV Ariya* had been ordered but failed to stop, that resulted in the death of four suspects.¹⁶⁰ Thus, the High Court found sufficient evidence to support the convictions and the seven-year prison sentences.¹⁶¹

In sum, Kenya has a robust body of constitutional, statutory, and decisional law applicable to Somali piracy cases—albeit with some gaps. The 2009 Merchant Shipping Act has been a positive change, clearing up issues in prior statutory law to include any questions about whether Kenya may have violated the principle of legality with its initial prosecutions under Penal Code section 69(1),¹⁶² in that the 2009 Act explicitly allows for universal jurisdiction while also providing a broader definition of piracy. In any case, the Kenyan courts have made ample use of the universal jurisdiction provisions in statutory law with many non-nationals prosecuted for offenses occurring on the high seas and then imprisoned for appropriate terms.¹⁶³ The case law generally supports the inference that the Kenyan courts have afforded piracy defendants with important fair trial rights and that judges have exercised appropriate discretion in imposing sentences.

or (b) have used such ship or aircraft for piracy, so long as it remains under the control of those persons” Merchant Shipping Act (2009) Cap. 369 § 1 (Kenya).

¹⁵⁷ *Adbiaziz Ali Abdulah & 23 others*, K.L.R.

¹⁵⁸ *Id.* at 3.

¹⁵⁹ *Id.* at 5.

¹⁶⁰ *Id.*

¹⁶¹ *Id.* at 6.

¹⁶² Arguably, Kenyan statutory law had not properly domesticated the *jus cogens* crime of piracy—to its fullest, extraterritorial reach—prior to the enactment of the 2009 Merchant Shipping Act. Unlike Kenya’s 1963 Constitution which was silent on treaty ratification and domestication, the 2010 Constitution provides for the direct incorporation of ratified international treaties into municipal law. THE CONSTITUTION OF KENYA, 2010, art. 2(6) (“Any treaty or convention ratified by Kenya shall form part of the law of Kenya under this Constitution.”). This means that the piracy prosecutions under the 1963 Penal Code may have been in violation of the principle of legality (*nulla poena sine lege*). International Covenant of Civil and Political Rights, art. 15(1), Dec. 16, 1966, 999 U.N.T.S. 171.

¹⁶³ Eugene Kontorovich, *The Penalties for Piracy: An Empirical Study of National Prosecution of International Crime* 8-14 (Faculty Working Paper No. 211, 2012).

IV. CONCLUSION: THE FUTURE FOR REGIONAL PIRACY PROSECUTIONS

The regional partners, Kenya, Seychelles, and Mauritius, have developed a substantial body of statutory and decisional law that has responded—albeit with gaps—to the threat posed by Somali pirates in a constructive manner that is generally consistent with international human rights law.¹⁶⁴ Kenya took the lead with its 2006 trial in the *Hassan M. Ahmed* case, and even while the case may have had an otherwise fair outcome, the conviction may have also violated the principle of legality.¹⁶⁵ Nonetheless, Kenya's experience offers many lessons for the other regional partners. The threat posed by Somali pirates is a quintessential international problem, threatening the security and economic interests of every regional State, and it calls for international burden-sharing and cooperation in the capture and transfer of suspects, the investigation and prosecution of cases, and the incarceration and post-trial extradition of convicted persons consistent with international norms.¹⁶⁶

Kenya has prosecuted a large number of piracy cases, with sentences ranging from 5-20 years,¹⁶⁷ although there have been some cases involving difficult fair trial issues such as the lack of qualified legal counsel for indigent non-residents and the minimum age of criminal responsibility for child pirates. Indeed, there are many advantages, both for the international community and for Kenya, with prosecution in Kenyan courts. First, Kenya has vital national security interests that are perhaps stronger than many of its regional partners, implicated by its geographic proximity to Somalia and Somali piracy.¹⁶⁸ In fact, the international community recognized Kenya's need for support; it has provided significant support to Kenya in terms of updating its domestic laws¹⁶⁹ and improving the capacity of its judicial and penal systems.¹⁷⁰ Kenya has appropriately exercised universal jurisdiction over this international crime, on a protective basis, in the interests of the international community. Kenya also has many useful provisions of statutory law, including its domestication of treaty law, permitting witness testimony by video link and allowing for both victim impact statements, and a range of sentencing options. Finally, the Mombasa courts are conveniently located for offshore capture and transfer to Kenyan custody, as well as the possible repatriation of convicted pirates to Somali custody.¹⁷¹ Kenya's experience offers lessons for the Seychelles and Mauritius as both nations continue their efforts to fight piracy.

¹⁶⁴ Warner, *supra* note 79.

¹⁶⁵ *Hassan M. Ahmed v. Republic* (2009) eKLR. (Kenya).

¹⁶⁶ S.C.Reg. 2442, *supra* note 2.

¹⁶⁷ Warner, *supra* note 79, at 12-15.

¹⁶⁸ Paul Musili Wambua, *Kenya's Role in Counter-Piracy and the Contact Group* (May 2015, (Lessons Learned Project of the Contact Group on Piracy off the Coast of Somalia, 2015).

¹⁶⁹ Scharf & Taylor, *supra* note 8, at 78.

¹⁷⁰ Counter Piracy Programme, *supra* note 3.

¹⁷¹ Calvin Onarigo, *62 convicted Somali pirates repatriated*, June 25, 2015, The Star (June 25, 2015, 6:00 AM) <https://www.the-star.co.ke/counties/coast/2015-06-25-62->

Kenya should consider amending several points of law to help facilitate the prosecution of future cases. First, Kenya should amend its 2009 Merchant Shipping Act to define piracy (maritime violence) based upon the SUA Convention. This would allow for the prosecution of a broader range of cases (i.e., without the two-ship or private ends requirements), allowing for the prosecution of terrorism offenses or other criminal acts that might be committed during a piracy. Second, Kenya should enact “equipment” laws that would permit a judicial finding that the possession of such equipment could be prima facie evidence of an intent to commit piracy or that the defendants were operating a “pirate ship” as defined in article 369(1) under the 2009 Merchant Shipping Act.¹⁷² This could facilitate the prosecution of persons captured on the high seas who are preparing for an attack, but had not yet committed an otherwise unlawful act.

Third, Kenya should adopt a statute that would grant the High Court discretionary authority to order the Attorney General to provide legal representation, including experienced foreign counsel, to an indigent non-resident defendant at state expense. Arguably, the typical piracy trial involves a non-resident foreign citizen, who is illiterate in his own language, unfamiliar with an adversarial system, and facing a significant prison sentence for a serious offense under international law.¹⁷³ Minimally, the lack of legal representation in such cases raises issues under the 2010 Constitution with respect to the appearance of discrimination against unpopular foreign nationals.¹⁷⁴ In other cases, the High Court could be faced with an even greater risk of “substantial injustice,”¹⁷⁵ especially if the case involved complex legal and factual issues, such as a joint liability case involving foot soldiers, financiers, and other shore-based pirate leaders. Thus, a change in law that would allow for the appointment of defense

convicted-somali-pirates-repatriated/; but see Philip Mwakio, *Somalia wants to take pirates back home from Kenya's Shimo la Tewa Prison*, Sep. 29, 2015, THE STANDARD, <https://www.standardmedia.co.ke/article/2000177903/>

somalia-wants-to-take-pirates-back-home-from-kenya-s-shimo-la-tewa-prison (citing Kenya's reluctance to allow the transfer of convicted pirates to Somalia to serve out a prison sentence based upon suspicions about the will and capacity of the Somali government to jail the prisoners).

¹⁷² Art. 369(1) defines a “pirate ship” as a ship under the dominant control under the dominant control “of persons who—(a) intend to use such ship or aircraft for piracy; or (b) have used such ship or aircraft for piracy, so long as it remains under the control of those persons” Merchant Shipping Act (2009) Cap. 369 § 1 (Kenya).

¹⁷³ Osanda, *supra* note 67 (examining the issue involving “substantial injustice” under the 2010 Constitution and recommending that the LEGAL AID ACT OF 2016 be amended to include consideration of the complexity of the case, potential sentence upon conviction, and seriousness of the crime). *Id.* at 34-37.

¹⁷⁴ *Compare* CONSTITUTION art. 27(4) (2010) (Kenya) (“The State shall not discriminate directly or indirectly against any person on any ground, including race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth.”), with LEGAL AID ACT (2016), Cap. art. 36(1) (Kenya) (excluding non-resident indigent persons from receiving legal aid in criminal cases).

¹⁷⁵ CONSTITUTION art. 50(2)(h)(2010)(Kenya).

counsel for indigent foreign nationals would help ensure Kenyan compliance with its human rights obligations under the ICCPR.¹⁷⁶ Fourth, Kenya should revise the 2012 Criminal Procedure Code to permit the introduction of witness testimony to prove allegations involving the use of firearms and “piracy” equipment; this would be useful in cases in which the pirates throw their weapons and equipment overboard when capture at sea is imminent.¹⁷⁷

Next, Kenya should revise its minimum age of criminal responsibility to 18 with separate trials for child pirates, and favor rehabilitation programs and early repatriation for Somali youth. This would help ensure that Kenya is compliant with its human rights obligations under the 1990 Convention on the Rights of the Child.¹⁷⁸ Finally, even though Kenya has relatively “lenient” sentencing practices,¹⁷⁹ it should adopt sentencing guidelines for piracy offenses where the “foot soldiers” and persons guilty of inchoate/material support offenses should receive lesser sentences (e.g., in the five to ten-year range), and the financiers, warlords and pirate leaders should receive longer sentences (e.g., in the ten-year to life range). Such guidelines would help ensure greater consistency and fairness in all sentencing decisions, with increased severity reserved for the more culpable persons.¹⁸⁰ These guidelines, based on extensive trial experience over the past ten years, could also be helpful to the Seychellois and Mauritian courts as they work their way through a comparable range of cases.¹⁸¹

The Seychelles and Mauritius have recently taken up important roles in the regional fight against Somali pirates and have already benefitted from Kenya’s experience.¹⁸² Both governments have followed the Kenyan model, including updating their penal law based largely upon the UNCLOS to permit the exercise of universal jurisdiction¹⁸³ and adopting transfer agreements (MOUs) with major

¹⁷⁶ ICCPR, *supra* note 59, art. 14(3); *see also* Osanda, *supra* note 67 (examining the issue involving “substantial injustice” under the 2010 Constitution and recommending that the LEGAL AID ACT OF 2016 be amended to include consideration of the complexity of the case, potential sentence upon conviction, and seriousness of the crime). *Id.* at 34-37.

¹⁷⁷ Dr. Douglas Guilfoyle, Written evidence to the House of Commons Foreign Affairs Committee, *Legal Issues Relating to Counter-Piracy Operations off the Coast of Somalia* (Jan. 5, 2012), <https://publications.parliament.uk/pa/cm201012/cmselect/cmaff/1318/1318we09.htm> (last visited Nov. 28, 2018).

¹⁷⁸ Convention on the Rights of the Child, art. 1, *opened for signature* Nov. 20, 1989, 1577 U.N.T.S 3 (entered into force Sept. 2, 1990).

¹⁷⁹ Kontorovich, *supra* note 98, at 304-07.

¹⁸⁰ Kontorovich, *supra* note 163; *see also* Warner, *supra* note 79 (examining the range of sentencing decisions in regional and extra regional prosecutions).

¹⁸¹ *Id.* at 11 (noting that the Seychellois courts impose sentences average 50 percent longer than the Kenyan courts).

¹⁸² Sterio, *supra* note 20, at 115-19.

¹⁸³ The 2011 Mauritian law expressly incorporates a broad definition of piracy and provides that “jurisdiction shall apply—(a) whether the ship referred to in those subsections is in Mauritius or elsewhere; (b) whether any act referred to in those subsections is committed in Mauritius or elsewhere; and (c) irrespective of the nationality of the person doing the act.” THE PIRACY AND MARITIME VIOLENCE ACT 2011 (No. 39 of 2011), art. 4(3). Mauritian law also provides for a maximum penalty of 60 years’ imprisonment. *Id.* art. 4(5). In a like

maritime governments.¹⁸⁴ Both governments have also received financial assistance from the European Union implemented through the UNODC.¹⁸⁵ The Seychelles prosecuted its first piracy case in 2010, involving 11 Somali nationals who had been captured on the high seas with a mother ship and two skiffs equipped with a range of weapons and other “piracy equipment.”¹⁸⁶ The Supreme Court found that the defendants lacked the intent to commit terrorism, but held that they were guilty on the piracy charges.¹⁸⁷ The Seychellois courts have since successfully prosecuted numerous cases; the court has applied the theory of “equipment laws” by judicial decision¹⁸⁸ and has imposed appropriate prison sentences, even if slightly more severe than Kenyan sentencing decisions,¹⁸⁹ following fair trials that have included defense legal counsel funded by UNODC.¹⁹⁰ In fact, the Seychellois courts have established a strong body of piracy jurisprudence and have become “a center of gravity for regional piracy trials.”¹⁹¹

Mauritius subsequently prosecuted its first piracy case in 2013; the case involved a capture at sea by American and European warships, the subsequent transfer of 12 suspects to Mauritian custody, and a fair trial followed by appellate challenges.¹⁹² In its lead piracy case, the Supreme Court of Mauritius examined

manner, the Seychellois Penal Code was amended in 2012 to permit the exercise universal jurisdiction: “(1) Any person who commits any act of piracy within Seychelles or elsewhere is guilty of an offence and liable to imprisonment for 30 years and a fine of R1 million. (2) Notwithstanding the provisions of section 6 and any other written law, the courts of Seychelles shall have jurisdiction to try an offence of piracy or an offence referred to under subsection (3) whether the offence is committed within the territory of Seychelles or outside the territory of Seychelles.” THE PENAL CODE, art. 65 (Seychelles) (as amended with effect from Aug. 6, 2012).

¹⁸⁴ Aruna Narain, *Preparing for Piracy Trials in Mauritius*, 39 COMMONWEALTH L. BULL. 53, 55-58 (2013); Fernando, *supra* note 6, at 174.

¹⁸⁵ UNSCR 2442, *supra* note 2, pmb.

¹⁸⁶ Republic v. Dahir and Others (51 of 2009) [2010] SCSC 81 (July 25, 2010) (citing the 2006 Kenyan case *Hassan M. Ahmed*, *supra* note 78, and noting that Penal Section 65 had been recently amended to clarify jurisdiction and to provide a more detailed definition of the offence of piracy consistent with the UNCLOS).

¹⁸⁷ *Id.* ¶ 71. The defendants received 10-year sentences. Republic v. Dahir and Others (51 of 2009) [2010] SCSC 86 (July 25, 2010).

¹⁸⁸ Lorenz & Paradis, *supra* note 80, at 224-228.

¹⁸⁹ See Sharon Uranie, *Seychelles Court Sentences Five Somalis to 12 Years, Concludes Last Piracy Case*, SEYCHELLES NEWS AGENCY (June 10, 2016), <http://www.seychellesnewsagency.com/articles/5355/Seychelles+court+sentences+five+Somalis+to++years%2C+concludes+last+piracy+case> (last visited Sept. 22, 2018).

¹⁹⁰ Fernando, *supra* note 6, at 211.

¹⁹¹ Warner, *supra* note 79, at 9.

¹⁹² See generally *Somali piracy comes ashore in Mauritius as pirates are detained and trialed in island courts*, LEMAURICIEN (Jan. 26, 2014), <https://www.lemauricien.com/article/somali-piracy-comes-ashore-mauritius-pirates-are-detained-and-trialed-island-courts/> (last visited Nov. 28, 2018). See *Director of Public Prosecutions v. Ali Abeoukader Mohamed & Ors*, 2015 SCJ 452 (Dec. 18, 2015) (decision of the Supreme Court of Mauritius examining municipal jurisdiction over piracy offenses committed on the high seas), on file with author. See also Jamil Ddamulira Mujuzi, *The*

several important issues, including Mauritian jurisdiction on the high seas, the significance of “piracy equipment,” and whether the 19-day detention at sea on a French warship had resulted in an undue delay in arraigning the accused before a Mauritian judge.¹⁹³ On the undue delay issue, the government argued that the Mauritian Constitution did not apply until judicial control commenced by Mauritian authorities.¹⁹⁴ However, the Supreme Court concluded it had “not been established that any serious irregularity or constitutional contravention took place at [pretrial] stage and in relation to the detention of respondents which had affected the fairness of their trial.”¹⁹⁵ This is, therefore, a useful decision for both Kenyan and Seychellois courts that might be considering similar issues involving the inevitable delays in bringing a pirate captured on the high seas before a trial judge.

Overall, the national prosecutions in the two countries have been a very positive development, both as a means of sharing the regional burden and as a means of reducing any concerns about Kenya’s willingness to continue as a heavy-lifter in piracy prosecutions. Still, Mauritius and the Seychelles should consider raising the age of criminal responsibility, while favoring separate trials and rehabilitation for underage pirates.¹⁹⁶

Mauritian Piracy Act: A Comment on the Director of Public Prosecutions v. Ali Abeoukader Mohamed Decision, 48 OCEAN DEVELOPMENT AND INT’L L. 69-78 (2017) (assessing the decision of the Supreme Court and how the 2011 Mauritian Piracy and Maritime Violence Act could be strengthened).

¹⁹³ *Director of Public Prosecutions v. Ali Abeoukader Mohamed & Ors*, 2015 SCJ 452 (Dec. 18, 2015).

¹⁹⁴ *Id.*

¹⁹⁵ *Id.* at 21.

¹⁹⁶ Milena Sterio, PROSECUTING JUVENILE PIRACY SUSPECTS: THE INTERNATIONAL LEGAL FRAMEWORK (2018), at 139-42. See, for example, *R v. Osman & Ors* (CO 19/2011) [2011] SCSC 74 (Oct. 12, 2011) (adults and minors tried jointly for piracy offenses in the Seychellois Supreme Court, but with probation officers present during the recording of statements made by the minors).

