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Abstract

On January 16, 2009, Kenya and the United States signed a Memorandum of Understanding (MOU) under which Kenya agreed to try suspected pirates captured by the U.S. In addition, Kenya signed a similar MOU with the European Union on March 6, 2009. Another is planned between Kenya and China.

This paper examines Kenya’s decision to receive and prosecute these suspects, as well as an important new Merchant Shipping law, (currently awaiting Presidential assent), that confers on Kenyan Courts jurisdiction over non-nationals for hijacking and robbery committed on the high seas. This statute effectively establishes universal jurisdiction over piracy. This new law supplements the offense of piracy *jure gentium* in the Penal Code which has been used to successfully prosecute pirates at least once before.

After analyzing the jurisdiction of Kenyan courts to undertake prosecutions under both international and Kenyan law, the paper concludes that that the High Court of Kenya, rather than the subordinate courts in the country is the Court with jurisdiction to entertain prosecutions of suspected non-national pirates for offences allegedly committed in the high seas.

While Kenya’s new Merchant Shipping law gives Kenyan courts broad jurisdiction over such suspects, the broad sweep of this new law go far beyond Kenya’s obligations under both the SUA Convention and UNCLOS, which in their express terms only allow capturing states the right to prosecute. However, the inability of Somalia to arrest and prosecute such suspects suggests Kenya may exercise such jurisdiction as part of its contribution to the burden sharing in the prosecution of captured suspects. In addition, the Kenyan legislation is consistent with the common law norm that crimes defined by international law require domestic law to try or punish them.

The paper also addresses several possible challenges to the broad extra-territorial scope over non-nationals created by this law under international law. It also briefly touches on some of the international humanitarian legal issues that are posed by the increasingly militarization of the multinational anti-piracy mission off the Coast of Somalia. Ultimately, the paper argues that only limited prosecutions are feasible in Kenya particularly in light of the congestion and related challenges in the country’s criminal justice system.
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Introduction

In an undisclosed Memorandum of Understanding signed on January 16, 2009 between Kenya and the United States, Kenya agreed to try captured pirates.\(^1\) This is not the first time Kenya has agreed to such an arrangement. In a Thursday, December 11, 2008 Memorandum of Understanding, Kenya agreed to receive and prosecute suspected pirates captured in the High Seas by the United Kingdom.\(^2\) The British regarded Kenya as an alternative to trying suspects in Somalia, which the British argued had “no effective central government or legal system.”\(^3\) Further, on Friday, March 6, 2009, Kenya signed a similar agreement with the European Union, and another is planned with China.\(^4\)

This paper examines Kenya’s decision to receive and prosecute these suspects, as well as an important new Merchant Shipping law that confers on Kenyan Courts jurisdiction over non-nationals for piratical acts committed extra-territorially. As a prelude, first I discuss previous piracy prosecutions in Kenya after which I discuss the structure, territorial and extra-territorial jurisdiction of Kenyan Courts. Thereafter I discuss the offense of piracy \textit{jure gentium} in the Penal Code and the new offenses against hijacking and robbery by non-nationals in the high Seas inaugurated by the new Merchant Shipping law. I analyze the jurisdiction of Kenyan courts to undertake these prosecutions under both international and Kenyan law, and consider the comity concerns as well as the competence of Kenyan courts to handle these prosecutions.

Based on the foregoing analysis, I conclude that the best jurisdictional basis for prosecution of non-national pirates captured by third States for extra-territorial offenses is domestic law.\(^5\) In addition, I note that the offenses created by Kenya’s new Merchant Shipping law are best tried in the High Court rather than in Subordinate Courts. I also


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take note of several possible challenges to the broad extra-territorial scope over non-nationals created by this law under international law. The paper also briefly touches on some of the international humanitarian and human right issues that are posed by the increasingly militarization of the multinational anti-piracy mission off the Coast of Somalia. In conclusion, I note that only limited prosecutions are feasible in Kenya as the Kenya-U.S. Memorandum of Understanding of January 2009 suggests. In this sense, Kenya ought not become an off-shoring center for captured pirate suspects off the Coast of Somalia particularly in light of the congestion and related challenges in the country’s criminal justice system.

Previous Piracy Prosecution in Kenya

The first piracy trial in Kenya started in 2006, after the U.S. handed over to Kenyan authorities 10 Somali nationals captured “approximately 200 miles off the coast of Somalia” by the guided-missile destroyer, U.S.S. Winston Churchill. The Pirates were charged before a Senior Principal Magistrate in Mombasa for hijacking the vessel MV Safina Al Bisaraat on January 20, 2006 in the High Sea, threatening the lives of its crew and demanding a ransom.

The accused were sentenced to seven years in prison each on Wednesday October 26, 2006. In sentencing them, the Court found that there was no evidence that they were fishermen rather than pirates or that any of them was a minor, as had been alleged in their defense.

Following the sentencing, a defense lawyer for the pirates said he would appeal the sentences since in his view, Kenyan courts had no jurisdiction over crimes committed by non-nationals in the high seas. There is also an ongoing piracy trial in which eight suspected Somali pirates were charged before a Kenyan Court in December 2008, following their seizure in the high seas by the British Royal Marines and subsequent surrender to Kenya.

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Territorial Jurisdiction of Kenyan Courts

Kenya has a three-tiered judicial system. At the bottom are subordinate courts staffed by judicial officers with titles ranging from District Magistrates at the lowest rank to Chief Magistrate at the highest rank. Appeals of all criminal, civil and customary law cases heard in these subordinate courts lie to the High Court of Kenya, the second tier in Kenya’s judicial system. The High Court can also call for review of any cases heard in the subordinate courts, and it enjoys original unlimited jurisdiction over all cases in the country. Appeals on questions of law from the High Court go to the Court of Appeal, the highest court in the country. The Chief Justice sits on both the High Court and Court of Appeals.

Extraterritorial Civil and Criminal Jurisdiction of Kenyan Courts

The 2006 trial and conviction of pirates by a Senior Resident Magistrate suggests strongly that, under Kenyan law, subordinate courts can assume jurisdiction over extraterritorial crimes. Such an extension of extraterritorial jurisdiction by subordinate courts does not however rest on a very sound legal basis in Kenya’s judicial system, particularly for the crime of piracy "jure gentium" under Kenya’s Penal Code.
However, the High Court does clearly have extra-territorial jurisdiction, both as an admiralty court and I would argue as a Court defined by the Constitution of Kenya as a Court of “unlimited original jurisdiction” in criminal as well as civil cases. The High Court’s admiralty jurisdiction is however only exercisable “in conformity with international law and the comity of nations.” Therefore, civil claims may be brought in Kenya for recovery of losses arising from piratical attacks in the high seas. In fact, Kenyan courts have shown willingness, though not decided affirmatively, to extend the scope of the country’s Marine Insurance Act extraterritorially to cover a loss under an insurance policy for piracy outside Kenya’s territorial waters. In that case, a defendant insurance company argued against being held liable for piratical acts that resulted in a covered loss because 1982 United Nations Law of the Sea Convention (UNCLOS) defines piracy as a conduct “directed against a ship, aircraft, persons or property in a place outside the jurisdiction of any state.” The Court rejected this reasoning, noting in part that there was “no reason to limit piracy to acts outside territorial waters, in the

whom admiralty proceedings are pending…to appoint a magistrate not below the rank of magistrate of the first class to be deputy marshal and the deputy marshal shall have in relation to those particular proceedings, subject to the direction of the judge, the power, authority, duties and functions of the Admiralty marshal,” id. Even if this rule was read to confer on subordinate courts jurisdiction to try non-national pirates not captured by Kenya for piratical acts in the high seas, these rules are not themselves legislatively promulgated. As such, they do not in my view form a legislative basis for extra-territorial jurisdiction for subordinate courts. A more direct reference of the power of Subordinate Courts to have jurisdiction over piracy is § 4 of the Criminal Procedure Act, Chapter 75 of the Laws of Kenya which provides the High Court of ‘a subordinate court’ may try offences in the Penal Code. Under the First Schedule of the Criminal Procedure Code, piracy jure gentium is listed as triable by a “subordinate court of the first class presided over by a chief magistrate, senior principal magistrate, or a senior resident magistrate,” id. I am unsure if the inclusion of piracy in this Schedule as triable in Court’s other than the High Court conclusively settles the jurisdiction over piracy by subordinate courts. Even if it does, the offences created by the new Merchant Shipping law are not as yet similarly included in this schedule. I therefore conclude that the jurisdiction of subordinate courts over non-national pirates for piratical acts committed in the high seas does not have conclusive support under Kenyan law.

14 § 4(1) of the Judicature Act (Rev. 1988) provides: The High Court shall be a court of admiralty in matters arising in the high seas, or in territorial waters, or upon any lake or other navigable inland waters in Kenya.” Similarly, the Merchant Shipping Act defines court as the “High Court exercising its admiralty jurisdiction.” § 4(2) provides that “The admiralty jurisdiction of the High Court shall be exercisable – (a) over and in respect of the same persons, things and matters and (b) in the same manner and to the same extent, and (c) in accordance with the same procedure, as in the High Court of England, and shall be in conformity with international laws and the comity of nations.”

15 § 60(1) of the Kenyan Constitution provides that “There shall be a High Court, which shall be a superior court of record, and which shall have unlimited original jurisdiction in civil and criminal matters and such other jurisdiction and powers as may be conferred on it by the Constitution or any other law.”

16 § 4(2) (c) of the Judicature Act (Rev. 1988) id.

17 Chapter 67 of the Laws of Kenya.

18 In Omar Shariff Abdalla v. Corporate Insurance Co. Ltd., (High Court of Kenya at Mombasa, Civil Suit 320 of 1998 (Judgment of Khaminwa J. Dated 29th July 2005) eKLR. Notably, in this case the parties agreed that the “vessel was operating within geographical limits set out in the policy,” id. at 2. However, the pirate attacks that resulted in the claim in this case occurred “in Somali waters near Kismayu,” id. The court’s jurisdiction to prescribe in this case was not in issue even though the piracy was extra-territorial and the ship was registered in Tanzania in light of the fact that the defendant Corporate Insurance Co. Ltd – a private international company – had offices in Nairobi.

19 Id. at 6 (emphasis added).
context of an insurance policy if a vessel was in the ordinary meaning of the phrase ‘at
sea’ or if the attack upon her could be termed a maritime offense.”20

The Court therefore construed the term ‘at sea’ and ‘maritime offense’ as capable of
giving rise to the High Court’s jurisdiction extraterritorially.21 Of course the
extraterritorial application of a civil statute does not preclude non-Kenyan citizens
brought before Kenyan courts to stand trial for alleged piratical acts outside Kenya’s
territorial jurisdiction to argue that Kenyan courts do not have personal jurisdiction over
them because of the extraterritorial location of their acts. The attorney representing the 10
convicted pirates in 2006 suggested such a challenge, as we saw above.

Jurisdiction Over Extra-Territorial Piracy: The High Court’s Unlimited Original Clause

The Constitution of Kenya grants the High Court expansive jurisdiction. This grant of
jurisdiction is the root of the Court’s jurisdiction under Kenyan law. The Constitution is
the supreme law of the country and any law inconsistent with the Constitution is
considered void.22 The Constitution’s grant of jurisdiction to the High Court is extremely
broad. Section 60 terms this jurisdiction “unlimited original jurisdiction in civil and
criminal matters.” While this provision does not explicitly suggest that the High Court’s
jurisdiction is extra-territorial, the Constitution does not limit it to civil or criminal cases
on Kenya’s territory. In my view, to the extent that the Constitution’s establishes the
jurisdiction of the High Court, with no reference to whether the civil or criminal acts that
may form the subject matter of the suit occurred in the territory of the Republic of Kenya,
strongly suggests the Constitution confers upon the High Court a wide swath of power.
Such jurisdiction, in my view, includes extraterritorial jurisdiction as long as it conforms
to international law as required by the Judicature Act. This must be so when one reads the
conferment of jurisdiction on subordinate courts in the Magistrate’s Court Act. Section
3(2) of that Act confers jurisdiction on Magistrate’s Court “throughout Kenya.” This
strongly suggests that Magistrate’s or subordinate courts in Kenya merely or only have
territorial jurisdiction.23 That is a major reason that prosecuting non-national pirates for
acts outside Kenya in subordinate courts poses potential difficulties for the prosecution
should a conviction procured in a subordinate court be appealed on this ground.

There is another reason that heavily leans against prosecution of piratical acts by non-
Kenyan nationals outside Kenya’s territorial jurisdiction in subordinate courts. The
conferment of jurisdiction in the High Court by the Constitution does not stop at the
broad grant of “unlimited original jurisdiction,” rather the Constitution further provides

20 Id. Citing with approval Andreas Lemos [1982] Lloyds Rep. 50
21 Arguably, the Kenyan High Court in this context does not therefore have to inquire if Parliament
intended to make a specific statute to have extraterritorial effect. After all, the Judicature Act as well as the
Merchant Shipping Act recognize the High Court’s admiralty jurisdiction. In the U.S., a clear statement by
Congress of such extraterritorial intent is often required in the absence of an express stipulation by
Congress that a statute should have extraterritorial effect, see Spector v. Norwegian Cruise Line, Ltd., 545
22 § 3 of the Constitution of Kenya.
23 See John Maraka Wekesa v. Patrick Wafula Otunga In the High Court of Kenya at Bungoma, Civil
Appeal No. 50 of 2001 (2005) eKLR.
the High Court shall have “such other jurisdiction and powers as may be conferred on it by this Constitution or any other law.”

The clause “any other law” certainly includes the law of nations. This means that the High Court’s jurisdiction over piratical acts outside Kenya by non-Kenyan nationals may arise from the law of nations. Kenya’s highest court, the Court of Appeals has held that “Kenya as a member of the international community subscribes to international customary laws and has ratified various international covenants and treaties.”

The upshot of my argument is therefore that the High Court of Kenya has jurisdiction both under the Constitution, as well as under the law of nations to try persons for offenses against the law of nations. This is the most defensible legal basis for prosecuting non-national pirates for extraterritorial piratical conduct in Kenya. This position is further fortified by the fact that piracy jure gentium and other crimes of an international law character that are triable in domestic courts cannot be directly created by customary or international law without a domestic statute conferring such jurisdiction. In short, it is not that customary international law that has created the offense of piracy directly as a triable offense in a Kenyan court, or that the Constitution has effectively assimilated the customary international law crime into Kenyan law. Rather, my argument here is that the Constitution of Kenya establishes a legal basis for the High Court’s extraterritorial jurisdiction over non-nationals. Further, the power to prosecute such piracy is explicitly recognized in the Kenyan Penal Code.

**The Kenyan Penal Code Confers Jurisdiction Over Piracy Jure Gentium**

Although Kenya has no universal jurisdiction statute, its Penal Code criminalizes piracy, both in Kenya’s territorial waters as well as in the High Seas. The Kenyan Penal Code’s

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25 This is the case even though the Judicature Act which defines sources of Kenyan law does not enumerate international law as part of Kenyan law. I have in fact argued that International law, including the law of nations is part of the law of Kenya. James Gathii, International Law as A Source of Kenyan Law (on file with the author).
27 For purposes of Kenyan law therefore, non-Kenyan national piracy committed in the high seas falls within the criminal jurisdiction of the High Court in addition to murder and robbery with violence.
28 To argue that the law of nations directly establishes the crime of piracy for Kenya would be inconsistent with a binding British precedent, R. v. Keyn (1876) 2 Ex. D. 63, 203 (Cockburn, C.J. holding that “Nor, in my opinion, would the clearest unanimous assent on the part of other nations be sufficient to authorize the tribunals of this country to apply, without an Act of Parliament, what would practically amount to a new law. In so doing, we should be unjustifiably usurping the province of the legislature. The assent of nations is doubtless sufficient to give the power of parliamentary legislation in a matter otherwise within the sphere of international law; but it would be powerless to confer without such legislation a jurisdiction over foreigners in foreign ships on a portion of the high seas.”). This holding was affirmed in R. v. Bow Street Metro. Stipendiary Magistrate, Ex Parte Pinochet Ugarte (No.3) (2000) 1 AC 147 (holding that it was only after the coming into force of Section 134 of Criminal Justice Act of 1998 that English criminal courts acquired jurisdiction over extra territorial torture).
29 Kenya Penal Code, (1967) Chapter 63 § 69 of the Laws of Kenya provides: “(1) Any person who, in territorial waters or upon the high seas, commits any act of piracy jure gentium is guilty of the offence of
definition of piracy as a crime within Kenya’s territorial waters may be surprising given that piracy under international law is often understood as a crime committed in the high seas rather than in territorial waters or ports. The statute in the relevant part provides that “[a]ny person who, in territorial waters or upon the high seas, commits any act of piracy *jure gentium* is guilty of the offence of piracy.” This is universal jurisdiction given that a pirate’s contacts with Kenya are totally irrelevant to the question of whether or not a Kenyan court has jurisdiction to prosecute the pirate. This view is also consistent with the outcome in the 1934 House of Lords decision, *In re Piracy Jure Gentium*, where the court held that “with regard to crimes as defined by international law, that law has no means of trying or punishing them. The recognition of them as constituting crimes, and the trial and punishment of criminals are left to the municipal courts of each country.”

Prosecution of piracy *jure gentium* would therefore be permissible since Kenya is a dualist country – rules of international law are binding as a matter of domestic law only when Parliament has passed legislation to implement international norms. While the

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(2) Any person who, being the master, an officer or a member of the crew of any ship and a citizen of Kenya -

(a) unlawfully runs away with the ship; or

(b) unlawfully yields it voluntarily to any other person; or

(c) hinders the master, an officer or any member of the crew indefending the ship or its complement, passengers or cargo; or

(d) incites a mutiny or disobedience with a view to depriving the master of his command,

is guilty of the offence of piracy.

(3) Any person who is guilty of the offence of piracy is liable to imprisonment for life.

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30 While UNCLOS II adopts the view that piracy is committed in the high seas, there are differing opinions and views on what both the traditional content of the international law of piracy is as well as the variety of approaches adopted in national laws on piracy, see BARRY HART DUBNER, *THE LAW OF INTERNATIONAL SEA PIRACY*, 38-39 (1990).

31 *Kenya Penal Code* at § 69(1).

32 *In re Piracy Jure Gentium* (1934) AC 586. See also *U.S. v. Hudson and Goodwin*, 11 U.S. (7 Cranch) 32, 34, (1812) (to the effect that a person cannot be tried for an international crime in the United States unless Congress adopts a statute).

33 In *R.M. (suing thro’ Next friend) J.K. Cradle (The Child Fund) Millie v A.G.* Civil Case No. 2002 (Nairobi) [2006] eKLR, the High Court went even further noting even where a treaty been ratified but not domesticated with an implementing legislation, the Court could nevertheless take it into account in interpreting an ambiguous provision of a statute.
Kenyan Penal Code applies to crimes within Kenya, it also applies to crimes committed partly within and partly outside of Kenya. While the Penal Code does not explicitly confer jurisdiction for crimes entirely outside of Kenya, the fact that it criminalizes piracy committed on the high seas that is also a crime recognized under the law of nations confers jurisdiction on the Kenyan High Court as I argue more fully below. Such an interpretation is supported by English precedents such as In re Piracy Jure Gentium which Kenyan courts on a question of first impression would consider persuasive authority.

The downside with prosecution of piracy jure gentium under the Penal Code is that it provides prosecutorial authorities with little domestic law guidance on what the elements of the crime of piracy jure gentium are. Suffice it to say, the crime of piracy jure gentium in the Kenyan Penal Code is a reflection of a similar prohibition in Article 101 of the United Nations Law of the Sea Convention, which Kenya ratified on 23rd of March 1989.

The lack of guidance on the elements of the crime of piracy in the Penal Code will, however, not be an issue any longer. This is because the Kenyan Parliament recently passed the Merchant Shipping Bill, which incorporates the offence of piracy jure gentium as well as new offences of robbery and hijacking of ships on the high seas and in Kenya’s territorial waters consistently with Kenya’s obligation under the Convention on Suppression of Unlawful Acts on the Sea (SUA), which I discuss in the next section. Notably though, suspects already captured for piratical acts prior to the President signing this new law are only prosecutable for the crime of piracy jure gentium under the Penal Code as we have seen above. The reason is straightforward – like in many countries, ex post facto crimes are prohibited in Kenya. Therefore, prosecutions under the new Merchant Shipping law will have to have been committed after it comes into effect.

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34 See Kenya Penal Code, supra note 27, at § 5 (providing “The jurisdiction of the courts of Kenya for the purposes of this Code extends to every place within Kenya, including territorial waters.”).

35 See id. at § 6 (“When an act which, if wholly done within the jurisdiction of the court, would be an offence against this Code, is done partly within and partly beyond the jurisdiction, every person who within the jurisdiction does or makes any part of such act may be tried and punished under this Code in the same manner as if such act had been done wholly within the jurisdiction.”).


37 Section 101 of UNCLOS defines piracy as any of the following acts: (a) any illegal acts of violence or detention, or any act of depredation, committed for private ends by the crew or passengers of a private ship or a private aircraft, and directed: (i) on the high seas, against another ship or aircraft, or against persons or property on board such ship or aircraft; (ii) against a ship, aircraft, persons or property in a place outside the jurisdiction of any State; (b) any act of voluntary participation in the operation of a ship or of an aircraft with knowledge of facts making it a pirate ship or aircraft (c) any act of inciting or of intentionally facilitating an act described in subparagraph (a) or (b). For the date of Kenya’s ratification, see United Nations, Oceans and Law of the Sea, available at http://www.un.org/Depts/los/reference_files/chronological_lists_of_ratifications.htm#The%20United%20Nations%20Convention%20on%20the%20Law%20of%20the%20Sea.

38 CONSTITUTION, § 77(4) (1998) (Kenya) provides: “No person shall be held to be guilty of a criminal offence on account of an act or omission that did not, at the time it took place, constitute such an offence,
Prosecution Under Kenya’s New Merchant Shipping Law

On Thursday, February 12, 2009, the Kenyan Parliament enacted a new Shipping law. When it receives Presidential assent, this new law will replace the 1967 Merchant Shipping Act and bring Kenya into compliance with its international maritime obligations including those contained in UNCLOS as well as the 1988 Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation (SUA). Thus, under both domestic and international law, Kenya has undoubtedly expressed its concern about threats to the safety and security of passengers, crews and their ships in the high seas.

Section 368 of Kenya’s new Merchant Shipping adopts the definition of piracy contained in Article 101 of UNCLOS (1982). Section 369 of the new law adopts the offences contained in Article 3 of the SUA Convention of hijacking and destroying ships with some minor modifications. To address non-Kenyan pirate suspects operating outside Kenya’s territorial and maritime jurisdiction, Section 369 (4)(a) provides that these offenses shall apply “whether the ship...is in Kenya or elsewhere,” or whether the offences were “committed in Kenya or elsewhere” or whatever the nationality of the

39 Kenya has also ratified the SUA Protocol. See International Maritime Organization, Status of Conventions By Country, available at http://www.imo.org/home.asp?topic_id=910. Among the other treaties the new law seeks to domesticate include the International Convention for the Safety of Life at Sea (SOLAS), 1974 and its Protocols of 1978 and 1988. This new Kenyan law is part of a major overhaul of the Maritime Sector in Kenya. (The Authority had initially been established in subsidiary in 2004, see Kenya Maritime Authority Order Legal Notice No. 70 of 2004). In 2006, the Kenyan Parliament passed the Kenya Maritime Authority Act and established the Kenya Maritime Authority and a Director General to run it as well as registrar of Ships, a Registrar of Seafarers, a Principal Receiver of Wreck and a Principal Surveyor of Ships. In my view, these reforms while long overdue represented very successful lobbying by interest groups in the maritime industry. The passage of the Merchant Shipping Act was given impetus by the need for a framework for prosecution of pirates off the coast of Somalia. In addition to lobbying in Kenya by groups such as the Seafarers Assistance Program, the International Maritime Organization encouraged Kenya to pass the new law so that it could “qualify for the ‘White List’ of countries deemed to be properly fulfilling their obligations under the 1978 International Convention on Standards for Training, Certification, and Watchkeeping for Seafarers (STCW),” Efthimios E. Mitropoulos, Sec’y Gen. Int’l Mar. Org., Remarks at the Meeting with H.E. Mwai Kibaki, President of the Republic of Kenya in Nairobi May 4, 2006, available at http://www.imo.org/About/mainframe.asp?topic_id=1322&doc_id=6315.

40 Article 5 of SUA provides that “[e]ach State Party shall make the offences set forth in article 3 punishable by appropriate penalties which take into account the grave nature of these offences.” Section 369 (1) of the Merchant Shipping Act of 2009. Chapter _ of the Laws of Kenya (still awaiting Presidential assent) provides that “[s]ubject to the provision of subsection (5), a person who unlawfully, by use of force or by threats of any kind seizes a ship or exercises control of it commits the offence of hijacking a ship (2) Subject to subsection (5), a person commits an offence if he unlawfully and intentionally (a) destroys a ship (b) damages a ship or its cargo as to endanger, or to be likely to endanger, the safe navigation of a ship; (c) commits, on board a ship, an act of violence which is likely to endanger the safe navigation of the ship; or (d) places or causes to be placed on a ship any device or substance which is likely to destroy the ship or is likely so to damage it or its cargo as to endanger is safe navigation. (3) Nothing in subsection (2)(d) is to be construed as limiting the circumstances in which the commission of any act may constitute (a) an offence under subsection (2)(a)(b) or (c); or attempting or conspiring to commit, or aiding, abetting, counselling, procuring or inciting, or being of and part in, the commission of such an offence.”

person committing the act." In this sense, Kenya’s new Merchant Shipping law confers on Kenyan courts jurisdiction wider than that in the SUA Convention.

Article 6 of the SUA Convention, provides that State parties establish jurisdiction over offences with respect to which they have a nexus. This includes offences committed on their flag ships; in their territory; by their nationals; if committed by stateless persons whose habitual residence is in that State; a national of the state is injured, threatened or killed in the course of the commission of the offence; the offence is “committed in an attempt to compel that State to do or abstain from doing something.” Article 6(4) of SUA further confirms that territoriality or a strong nexus to a State is the predicate necessary to establishing jurisdiction in the SUA Convention. In fact, this is the manner in which other SUA Convention State parties have crafted their implementing legislation. For example, in the United States, the implementing legislation closely follows the SUA Convention jurisdictional provisions and unlike Kenya’s Merchant Shipping Act provides no extra-territorial jurisdiction.

Under Kenya’s new Merchant Shipping law, the penalty for the offenses of hijacking or destroying a ship is imprisonment for life. Section 370 criminalizes endangering the safe navigation of any ship and makes the offence punishable whether it is “committed in Kenya or elsewhere and whatever the nationality of the person committing the act.”

Unlike the crime of piracy jure gentium which still remains in the Penal Code, the new shipping law elaborates on the specific elements constituting the crimes of hijacking or destroying a ship thereby giving prosecutorial authorities invaluable guidance. The

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42 Id. at § 369(4)(c)
43 SUA Convention, art. 6(a).
44 Id. at art. 6(b).
45 Id. at art. 6(c).
46 Id. at art. 6(a).
47 Id. at art. 6(b).
48 Id. at art. 6(c).
50 But see United States v. Lei Shi, 525 F.3d 709, 723 (9th Cir. 2008) (noting in part that the U.S.’s implementing legislation “expressly provides foreign offenders with notice that their conduct will be prosecuted by any state signatory.”). As I note below, U.S. courts are likely to exercise broad extra-territorial jurisdiction on other grounds including where extraterritorial conduct is “purposefully aimed at the United States,” see U.S. v. Aikens, 946 F.2d 608, 613-14 (9th Cir. 1990).
51 Merchant Shipping Act, supra note 39, at § 369(6).
52 Id. at § 370(7). The penalty for this offense is a fine “not exceeding five hundred and fifty thousand (Kenya) shillings,” id. at § 426.
53 For example, the law defines “act of violence” as any done in or outside Kenya if “it constitutes the offence of murder, attempted murder, manslaughter, or assault,” id. at § 369(7) “acts of violence” (a) and(b). Similarly, it defines “unlawfully” whether committed in or outside Kenya as meaning “an offense under the law of Kenya,” id. at § 369(7) “unlawfully” (a) and (b). This guidance, in my view, is crucial given the different definitions of piracy contained in different Conventions. In addition to the definition of piracy in UNCLOS, which applies to piracy in the high seas and in exclusive economic zones, there is the definition of piracy in Article 15 of the 1958 Convention on the High Seas as well as that contained in Article 2 of the International Maritime Committee’s Model National Law. Notably, the International Maritime Bureau defines piracy to includes attacks against ships ‘in the territorial sea or archipelagic waters of a state’ while the International Maritime Organization’s defines the crime of ‘armed robbery
statute also provides that a master of a ship has an obligation to deliver to Kenyan authorities or to any SUA Convention country, a person such a master reasonably believes to have committed any of the foregoing offences.\footnote{54}{Merchant Shipping Act at § 371.}

The new Merchant Shipping law provides that prosecutions for offenses defined in it may, “without prejudice to the provisions of any other law relating to prosecutions, be conducted by any officer appointed under” the new law and “specially authorized in writing in that behalf by the Attorney General.”\footnote{55}{Id. at § 425.} This provision does not however appear to remove from the regular Kenyan judicial system the prosecution of piracy or robbery of ships.\footnote{56}{Notably, § 427(3) provides that this jurisdiction shall not be “in addition to, and not in derogation of, any jurisdiction or power of the court under any other law.” In addition, the new law establishes jurisdiction over Kenyans and non-Kenyans who commit offenses on board a Kenyan ship whether on the high seas, any foreign port, or on board any foreign ship here he does not belong. \textit{id.} at § 429. This law further provides that offences or complaints made under it shall be ‘deemed to have been committed in any place in Kenya’ where the offender and person complaining ‘may be for the time being’ for the purpose of establishing jurisdiction over them. In the Kenyan judicial system, the Admiralty Judge is any judge of the High Court of Kenya sitting in Mombasa.} Rather, this provision seems to relate to the myriad other maritime related civil offences created under this new law.\footnote{57}{For example, § 417 of the new law establishes an offence for failure to comply with an improvement notice issued by an inspector to a ship owner, master of member of a ship crew who is in violation of any provision of the statute. This law further provides that offences or complaints made under it shall be ‘deemed to have been committed in any place in Kenya’ where the offender and person complaining ‘may be for the time being’ for the purpose of establishing jurisdiction over them. \textit{id.} at § 427.}

\textit{The New Law’s Extraterritorial Jurisdiction and UNCLOS}

Article 105 of UNCLOS provides that “[t]he courts of the State which carried out the seizure [of pirates] 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 persons acting in good faith.”\footnote{58}{UNCLOS, \textit{supra} note 34.} It has been suggested that this provision gives jurisdiction to prosecute pirates solely to capturing States as a matter of customary international law.\footnote{59}{Eugene Kontorovich, \textit{International Legal Responses to Piracy off the Coast of Somalia}, 13(2) \textit{AM. SOC’Y OF INT’L L. (ASIL): INSIGHT}, February 6, 2009, \textit{available at} http://www.asil.org/insights090206.cfm.} Here, it is important to remember the authoritative study of the law of piracy undertaken by Alfred P. Rubin. Rubin noted Article 105 of UNCLOS was lifted from Article 18 of the International Law Commission’s Law of the Sea Codification of 1958. According to Rubin, Article 105 of UNCLOS illustrated “the way the Commission resolved the conflict between ‘naturalist jurists who view ‘piracy’ as a crime against international law seeking only a tribunal with jurisdiction to apply that law and punish the criminal, and ‘positivist’ jurists who view ‘piracy’ as solely a municipal law crime, the
only question of international law being the extent of a state’s jurisdiction to apply its criminal law to an accused foreigner acting outside the territorial jurisdiction of the prescribing state.”

Article 18 of the International Law Commission’s Law of the Sea Codification of 1958 was adopted in Article 105 of UNCLOS as a compromise. It defined piracy as an international crime, thereby adopting a positive rule, while leaving its enforcement to domestic law as naturalists would have had it. In so doing, UNCLOS, like the text of the Harvard Research Draft Convention on Piracy, was de lege ferenda (or an instance of progressive codification), rather than established customary international law. While recent reference to Article 105 of UNCLOS has sought to establish where jurisdiction for prosecution of suspected pirates seized in the high seas lies, what has often gone unnoticed is the expansive “enforcement jurisdiction” to seize not only such pirates but also “any pirate ship or aircraft” and “any property on board” – a view consistent with the view that naval powers have “a special authority to safeguard international commerce based on the special interest, military strength and moral assertiveness.” Given the inconsistency in the practice of states to norms defining jurisdiction over piracy, it is unclear how much weight a domestic tribunal prosecuting pirates ought to place on say the definition of piracy in Article 101 of UNCLOS, especially if there is no mirror domestic law.

I want to return to the question of jurisdiction over suspected pirates captured in the high seas. The few contemporary cases of prosecution of pirates that I have come across strongly suggest the accuracy of Alfred Rubin’s argument about the mixed legacy of natural and positive law in the law of piracy. These contemporary examples show that while piracy continues to be universally condemned consistent with the views of naturalists, jurisdiction over their prosecution continues to be defined by national legislation as positivists preferred. Examples in line with Article 105 of UNCLOS, include reports that the government of Somaliland has on more than one occasion

60 Alfred P. Rubin, the Law of Piracy 360 (2d ed. 1998).
61 Id.
62 Id. at 341 (concluding that “[t]hus the Harvard draft must be evaluated on its own merits as a legislative proposal, and cannot be supported as a reflection of a scholarly analysis of precedent and theory,” id and stating too that “the Harvard researchers thus did not necessarily diminish the value of their proposals as an exercise de lege ferenda,” id. at 340).
63 Id. at 318. According to Rubin, “‘piracy’ with regard to foreign officials remained as it existed in the nearly nineteenth century…a perjorative applied to non-European and unrecognized rebel military forces which the statesmen wished to attach a sense of illegality under international law….The failures in practice to encourage non-European societies to conform their behavior to the needs of European commerce by calling their military arms, or even their governments, ‘piratical’, appears not to have been noticed by statesmen, who persisted in using the word ‘piracy’ and its derivatives to refer generally to illegality either to withdraw from that usage, withhold the legal results that they had argued should flow from it, or to apply the law of war to conflicts that ensued.” Id. at 314.
64 Somaliland became independent from British colonial rule in June 1960 but joined the Italian administered UN Trusteeship of Southern Somaliland that eventually became the Somali Republic. However, after civil war broke out in Somalia in 1991, Somaliland declared it had seceded from the Somali Republic. Somaliland maintains more effective control over its territory than Somalia which is governed by the Transitional Federal Government. Somaliland is currently seeking membership in the African Union as
arrested and prosecuted pirates.\textsuperscript{65} There is also the example Somali pirates, captured in the high seas by the French Navy in April 2008 for holding a French yacht hostage, and facing possible prosecution but still being held by French authorities.\textsuperscript{66} 

Then there are contrary examples where the capturing State handed over suspected pirates to another State. For example there is the 2006 case of involving Somali pirates handed over to Kenya for prosecution by the United Kingdom referred to above. There is also the case of Danish authorities who have now surrendered to the Netherlands five Somali pirates captured by the Danish navy in early January 2009 in the Gulf of Aden.\textsuperscript{67} There is also the March 5th, 2009 handover of seven suspected pirates to Kenya by the United States who had been captured in February 2009.\textsuperscript{68} These suspects may be among the first to be tried under the January 2009 U.S./Kenya MOU for piracy.\textsuperscript{69} In addition, as noted above, there is another case underway in Kenya before a Mombasa Chief Magistrate in which eight suspected Somali pirates are charged following their seizure in the high seas by the British Royal Marines and subsequently surrendered to Kenya.\textsuperscript{70}

While these examples are certainly not intended to be exhaustive, they strongly suggest the continuing relevance of the applicability of traditional rules of jurisdiction to prescribe including those based on the nationality of the victims or the ship or aircraft or a State separate from Somalia, see International Crisis Group, Somaliland: Time for African Union Leadership, Africa Report No. 110 (23rd May, 2006). The government of Somaliland has offered its ports for international anti-piracy operations, see Andrew Cawthorne and David Clarke, “Somaliland Offers Ports for Anti-Pirate Operations,” 4th December 2008 (Reuters) Availabale at \url{http://www.alertnet.org/thenews/newsdesk/L4451910.htm}


\textsuperscript{66} \textit{Un navire de guerre français déjoue une attaque de pirates somaliens (A French Military Ship Evades a Somali Pirate Attack)}, LEMONDE, Feb. 1, 2009.

\textsuperscript{67} Expactica, \textit{Dutch Urge Closer EU Cooperation to Combat Piracy}, Jan. 16, 2009 (Prague) at \url{http://www.expatica.com/nl/news/european_news/Dutch-urge-closer-EU-cooperation-to-combat-piracy_48731.html}. It is reported the pirates would be tried under article 381 of the Dutch Criminal Code which outlaws piracy. It would be the first time for such a prosecution and the pirates may if convicted be sentenced up to 12 years in prison. In the incident in which the Danish navy captured the suspected pirates, flares were fired at the vessel in which the suspects were using causing them to jump into the water when it caught fire. \textit{See also KR News, Pirates Handed over to Dutch Authorities}, THE COPENHAGEN POST, Feb 10, 2009, available at \url{http://www.cphpost.dk/news/international/89-international/44705-pirates-handed-over-to-dutch-authorities.html}.

\textsuperscript{68} David Morgan, \textit{U.S. Delivers Seven Somali Pirate Suspects to Kenya}, REUTERS, March 5, 2009. In addition, the German Navy on March 10, 2009 handed over to Kenyan authorities, nine Somalis for trial in Kenya, see AFP “German Navy Hands Somali Pirates to Kenya-Police,” March 10, 2009 available at \url{http://forexdaily.org.ru/Dow_Jones/page.htm?id=486777}.


\textsuperscript{70} Eight Somali Piracy Suspects Charged in Kenya, supra note 8. The suspects were charged on November 19, 2008. They had been captured on November 11 in an attempt to capture a Danish vessel the MV Powerful. \textit{See also Ship Hit By Pirates Twice, Says Captain}, supra note 8 (reporting on the proceedings in the trial). For an earlier case, \textit{see also Indonesian Pirates Sentenced for Sea Robbery in Malaysian Waters}, supra note 8.
the originating or destination country(ies) of the cargo in the vessel subjected to piratical attack.\textsuperscript{71}

Kenya’s new maritime law does not avoid these questions of jurisdiction and standing over non-national piratical acts and robbery on the high seas. As we saw above, it does so by explicitly defining the crimes of robbery and attacks on vessels on the high seas as crimes under Kenyan law notwithstanding the nationality or location of the crimes in the high seas. Kenya’s new maritime law follows SUA’s model of criminalizing acts of violence against vessels in the high seas and in particular under Article 9. Article 9 provides that the Convention does not in any way affect “the rules of international law pertaining to the competence of States to exercise investigative or enforcement jurisdiction on board ships not flying their flag.”\textsuperscript{72} A very elastic interpretation of this clause could be argued as acknowledging the existence of the traditional bases of the jurisdiction to prescribe in circumstances other than those relating to States that capture suspected pirates.

For example, a state may exercise jurisdiction to prosecute suspected pirates who injured or killed a person of their nationality or who destroyed or robbed that person’s property under the passive personality principle even if such conduct occurred in the high seas.\textsuperscript{73} While in the past, the U.S. was reluctant to assert extraterritorial criminal jurisdiction over non-U.S. nationals, the U.S. Congress has expanded since the extra-territorial reach of its statutes over non-nationals to protect U.S. nationals.\textsuperscript{74} Indeed, under rules of jurisdiction, to prescribe some connection or relationship between the prescribing state

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\textsuperscript{71} See also Rubin, \textit{The Law of Piracy}, supra note 58 (noting that the approach in the ILC’s Draft articles “avoids all considerations of ‘standing’, the legal link between the incident or the accused or his victim, on the one side, and the state seeking to extend jurisdiction on the other.”).

\textsuperscript{72} UN General Assembly, \textit{Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation} (SUA), 10 March 1988. No. 29004, available at http://www.unhcr.org/refworld/docid/3ae6b3664.html. Indeed, the last two paragraphs of the SUA Convention provide that: “...matters not regulated by this Convention continue to be governed by rules and principles of general international law” and the last paragraph, “...the need for all States, in combating unlawful acts against the safety of maritime navigation, strictly to comply with rules and principles of general international law.”

\textsuperscript{73} For example, in United States v. Fawaz Yunis, 924 F.2d 1086 (1991), the United States Court of Appeals, District of Columbia argued that “a state may punish non-nationals for crimes committed against its nationals outside its territory, at least where the state has a particularly strong interest in the crime.” See also United States v. Yousef, 927 F. Supp. 673 (S.D.N.Y. 1996) (upholding extraterritorial jurisdiction over a non-national for conspiring to bomb an aircraft extraterritorially – in the Philippines); United States v. Bin Laden, 92 F. Supp. 2d 189, 221 (S.D.N.Y. 2000) (relying on passive personality principle as “increasingly accepted as applied to terrorist and other organized attacks on a state’s nationals by reason of their nationality” (citing Restatement (Third) of the Foreign Relations Law of the United States § 401, comment g.). See also United States v. Pizdrint Jr., 983 F. Supp. 1110 (M.D. Fl. 1997) (finding that the court had jurisdiction based on the principle of the effects doctrine in a case involving the assault and battery of an American by a non-U.S. citizen aboard a Liberian vessel on the high seas based on the reasoning that the vessel engaged in substantial in the U.S. and regularly operated in U.S. territory).

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and the nationality of the perpetrator or victim of an extraterritorial crime or the effects of such a crime is often required.\textsuperscript{75}

Like the U.S.’s experience in extending jurisdiction through the passive personality principle, as we saw above, Kenya’s new Merchant Shipping law appears to expand the country’s extraterritorial jurisdiction over crimes relating to shipping in the high seas even beyond those involving non-Kenyan nationals or interests. Recall, that the new law applies the offences of hijacking and robbery of ships irrespective of whether the ship is in Kenya or elsewhere, and irrespective of the nationality of the person committing the act. For this reason, the prosecution of these crimes may be contested on too broad an expansion of Kenya’s extraterritorial jurisdiction to prescribe where the offences alleged have a remote connection to Kenya.\textsuperscript{76}

The best case Kenya could make to defend its new broad extra-territorial reach over non-nationals for piratical attacks on the high seas captured by third countries is the practice of English Courts. Kenya’s Judicature Act explicitly authorizes the High Court in exercise of its admiralty jurisdiction to adopt the same jurisdiction as the ‘High Court in England.’\textsuperscript{77} While the British Merchant Shipping Act of 1995 confers only territorial jurisdiction on British courts for offences such as pollution,\textsuperscript{78} piracy committed in the high seas does not limit the admiralty jurisdiction of British courts in a similar manner.\textsuperscript{79}

\textsuperscript{75} President Guillame’s Separate Opinion in the Arrest Warrant Case noted that under the “law classically formulated, a State normally has jurisdiction over an offense committed abroad only if the offender, or at very least the victim, has the nationality of that State or if the crime threatens its internal or external security,” Arrest Warrant of 11 April, 2000 (Dem. Rep. Congo v. Belg.), 2002 I.C.J. 121 (Feb. 14) ¶¶ 15-17 and 41-42 (separate opinion of Judge Guillame).

\textsuperscript{76} Kenya could of course argue that it has a broad interest in the safety of shipping routes on the Indian Ocean coast to counter such an argument in cases with a remote connection to Kenya. In the Sexual Offences Act of 2006, the Kenyan Parliament provided for extra-territorial jurisdiction over Kenyan citizens, permanent residents of Kenya if an act that “would constitute a sexual offence had it been committed in Kenya” is committed outside Kenya. This example is much more limited than that embodied in the new Merchant Shipping law.

\textsuperscript{77} Judicature Act § 4(2)(c), supra note 14. The High Court of Kenya has confirmed this position in a number of cases including in East African Power Management Limited v Owners of the Vessel ‘Victoria Eight’ [2005] eKLR, Admiralty Jurisdiction Claim 13 of 2005 (Mwera J. Ruling of 25th November 2005) (holding that the Kenyan High Court entertains admiralty matters in the same manner as the High Court of England under the U.K’s Supreme Court Act of 1981)

\textsuperscript{78} See 43(2) Halsbury’s Laws of England, 4\textsuperscript{th} ed. (Reissue) (1997) Para 1189 (restriction over offences outside United Kingdom limits). See also the U.K. Merchant Shipping and Maritime Security Act (1997) at § 26(2) defining the high seas as including all waters beyond the territorial sea of the United Kingdom

\textsuperscript{79} See 11 (1) Halsbury’s Laws of England, 4\textsuperscript{th} ed. (1990) Para 634 (Jurisdiction in respect of crimes committed out of England) and Para 625 (Admiralty Jurisdiction) (providing in part that “Acts done on, or by means of, a foreign ship on the high seas, but outside the territorial waters of the United Kingdom, are not within the Admiralty jurisdiction if done by a foreigner, except in the case of piracy jure gentium”). See also 18 Halsbury’s Laws of England, 4\textsuperscript{th} ed. (1977) Para 1539 (to the effect that “English courts have jurisdiction to try all cases of piracy jure gentium in whatever part of the high seas and upon whosoever’s property it may be committed, and whether the accused are British subjects or the subjects of any foreign state with whom Her Majesty is at amity,” id)
It is therefore not accidental that a recent change in the High Court of Kenya website alludes to piracy on the high seas as falling within the Court’s admiralty jurisdiction.\(^{80}\)

Before leaving the question of jurisdiction to prescribe, it may be apposite to note that the recent U.S./Kenya and EU/Kenya memoranda of understanding, under which Kenya would prosecute captured pirates in the high seas, could be argued to establish jurisdiction by agreement. This kind of jurisdiction is often used to establish jurisdiction over non-national forces on foreign territory.\(^{81}\) In some jurisdictions, treaties with ‘extradite or prosecute’ provisions have been interpreted as establishing jurisdictional agreements among the contracting parties to extradite or prosecute offenders.\(^{82}\) Such an agreement to prosecute an offender captured on the high seas by a SUA contracting party has recently been suggested to defend jurisdiction over a non-national in the high seas in the case of a one-ship piracy\(^{83}\) even when such a defendant is brought within a court’s jurisdiction involuntarily.\(^{84}\)

If this is so, could it be for purposes of international law that jurisdiction to prescribe for crimes of international law has been reconfigured from norms providing “‘which state can exercise authority over whom, and in what circumstances’ to norms that establish under what conditions the international community…may prescripte international rules of conduct”?\(^{85}\) In short, is universal jurisdiction over widely condemned conduct such as piracy and slavery the norm today? While this argument has support in customary international law, without a domestic statute establishing jurisdiction over extraterritorial conduct with little nexus to a country poses jurisdictional difficulties to prosecute.\(^{86}\) While Kenya may certainly be able to show its interests in the safety of commercial shipping and of the delivery of humanitarian assistance through the Gulf of Aden and in the Indian Ocean, its interests may not be any more superior to those of other nations where the commerce is not destined to or through Kenya. In any event, Kenya’s new

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\(^{80}\) See Admiralty Jurisdiction (High Court of Kenya) available at http://www.judiciary.go.ke/about/structure_content.php?content=1


\(^{82}\) Yousef, 327 F.3d at 95 n. 29.

\(^{83}\) Lei Shi, 525 F.3d at 723.

\(^{84}\) Id. at 725 (finding by analogy to other statutes that physical location in the U.S. did not have to have been voluntary and that SUA does not “contain such voluntary entry requirement,” id. at n. 25.). 18 U.S.C.A. § 2280(b)(1)(C) confers jurisdiction on U.S. Court where the “offender is later found in the United States after such activity is committed.” There is no similar provision in the SUA Convention, just as there is no provision in the SUA Convention authorizing jurisdiction over non-nationals for extraterritorial crimes as the Kenyan legislation does. See also United States v. Robert Morris 589 F.2d 862 (5th Cir. 1979) (holding that there is ample authority that “a mere violation of a law not embodied in a treaty binding the United States” does not oust the jurisdiction of a U.S. Court at 873. Further, that “a defendant may not ordinarily assert the illegality of his obtention to defeat the court’s jurisdiction over him.”).

\(^{85}\) Leila Sadat, Redefining Universal Jurisdiction, 35 New Eng. L. Rev. 241, 246 n.28 (2001) (citing ROSALYN HIGGINS, PROBLEMS AND PROCESS: INTERNATIONAL LAW AND HOW WE USE IT 56 (1994)).

\(^{86}\) This requirement of nexus or effects in Kenya is strongly suggested by the High Court of Kenya decision in Musisi v. Republic (21st February, 1969, Mwendwa C.J. and Trevelyan J.) 48 INT’L L. REP. 90 (1969) (holding an offence committed outside Kenya by a Kenyan fell within the jurisdiction of the High Court because ‘the appellant’s fraud (though committed abroad) was to get the Kenya government to act upon it in Kenya, id. at 91).
Merchant Shipping law’s extraterritorial jurisdiction over non-nationals exceeds the bases for jurisdiction in the SUA Convention. As such, the strongest base for Kenya’s jurisdiction over non-national piratical acts in the high seas is its own laws and the choices it will make to prosecute such cases. So far, it is reported that the U.S./Kenya memorandum of understanding is not a wholesale acceptance to prosecute all suspects captured in the High Seas. Rather, Kenya has agreed to selectively prosecute only a limited number of such pirates. As Kenya’s Minister of Foreign Affairs Moses Wetangula noted, the MOU was not “an open door for dumping pirates onto Kenya [sic] soil because it will not be acceptable.”

Comity Concerns of the New Law’s Extraterritorial Reach and Recent SC Resolutions

The extraterritorial extension of one country’s criminal laws and sanctions, as opposed to civil laws, extraterritorially under international law raises ‘special concerns.’ International law limits the extraterritorial extension of a State’s criminal laws. In this sense, Kenya is adopting very broad constructions of its jurisdiction to prescribe very much like the United States has done by its often aggressive enforcement of both the criminal and civil penalties of its antitrust laws. While Somalia arguably has a ‘clearly greater’ interest in deterring its citizens from engaging in piracy off its Coast, its inability to curb such piratical attacks gives other States like Kenya room to argue in

87 Childress, Pact With Kenya, supra note 69 (noting that under the MOU Kenya “has agreed to take only a limited number of cases” and that “the [Kenyan] government would decide which cases to try in part based on where the alleged crimes too place. [And further that] Kenya has provided the [US] navy with a checklist of evidence required to prosecute.”).
89 RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 403 n.8.
90 See Rio Tinto Zinc Corp. v Westinghouse Electric Corp. (1978) A.C. 547 (holding that the ‘exercise by the United States courts of extraterritorial jurisdiction in penal matters in the view of Her Majesty’s Government is prejudicial to the sovereignty of the United Kingdom). See also RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES SECTION § 403(1) (providing that “a state may not exercise jurisdiction to prescribe with respect to a person or activity having connections with another state when the exercise of such jurisdiction is unreasonable.”).
91 For example, in United States v. Nippon Paper Industries Co., Ltd, 109 F.3d 1 (1997), cert. denied 523 U.S. 1044 (1998), the U.S.’s First Circuit Federal Court held that “we see no tenable reason why principles of comity should shield NPI [a Japanese entity] from prosecution. [And noting further] We live in an age of international commerce, where decisions reached in one corner of world can reverberate around the globe in less time than it takes to tell the tale. Thus a ruling in NPI’s favor would create perverse incentives for those who would use nefarious means to influence markets in the United States, rewarding them for erecting as many territorial firewalls as possible between cause and effect,” id. at 26. But see the concurring opinion of Judge Lynch noting that “[i]n this criminal case, it is our responsibility to ensure the executive’s interpretation of the Sherman Act does not conflict with legal principles, including principles of international law,” id. at 31.
92 See RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 403(3).
favor of exercising jurisdiction to prescribe over such conduct. This appears to be what Kenya has done with the passage of its new Merchant Shipping law.

Kenyan courts have held that Kenyan law ought not to be interpreted to violate international law. Kenya’s new extraterritorial piracy law has to be examined to see if it is prejudicial to Somalia, a State with no effective control over its territory or its maritime jurisdiction. This is a primary reason accounting for the use of Somalia as a launching pad for piratical attacks. The Security Council has encouraged all States and “in particular flag, port and coastal States, States of the nationality of victims and perpetrators of piracy and armed robbery, and other States with relevant jurisdiction under international law and national legislation,” to cooperate in both the investigation and prosecution of those responsible for piratical acts and robbery on the high seas. Seen in this light, Kenya’s new Merchant Shipping law could very well illustrate the authority States have now been granted by the Security Council’s legislative mandate in prescribing rules of conduct and engagement in dealing with piracy.

However, Somalia’s juridical statehood is not in question. It is represented in international bodies like the United Nations and recently contributed a judge to the International Court of Justice. Because of its lack of effective control, a variety of private actors emerged to command the lucrative gateways to foreign markets from the port cities of Kismayo and Mogadishu. The emergence of piratical attacks from these Somalia cities is further evidence of the loss of their commercial significance and the threat posed to global commerce in one of the major lanes of maritime transport in the

93 William Reno, Shadow States and the Political Economy of Civil Wars, in GREED AND GRIEVANCE: ECONOMIC AGENDAS IN CIVIL WARS 16 (Mats Berdal & David M. Malone ed., 2000) calls States like Somalia the “product of personal rule, usually constructed behind the façade of de jure state sovereignty.”


97 PAUL COLLIER, THE BOTTOM BILLION: WHY THE POOREST COUNTRIES ARE FAILING AND WHAT CAN BE DONE ABOUT IT 4-5 (2007). William Reno notes, “[n]early all governments recognize shadow states as interlocutors in global society and conform to the practice of extending sovereignty by right to former colonies. This principles applies I cases where formal state capacity is practically nil. For example, Somalia holds a seat in the United Nations, exists as an entry in World Bank tables, and presumably has access to foreign aid, provided an organization there can convince outsiders that is the rightful heir to Somalia’s existing sovereignty…Jackson observed that this leads to external support for de jure sovereignty of states with very weak internal administrations, relieving rulers of the need to strengthen institutions to protect productive groups in society, from which regimes could extract income.” William Reno, Shadow States, supra note 89, at 45.


world.\textsuperscript{100} Markets of violence,\textsuperscript{101} such as for piratical attacks in the high seas, evidence the uphill challenges that confront the Transitional Federal Government of Somalia to consolidate itself into an effective government. If the people of Somalia and their interests in building effective structures of governance, and in addressing the problems that drive some of them to engage in piracy, is the concern of the international community as it should be, then clearly a comity concern arises.\textsuperscript{102} Indeed, the representative from the Transitional Government of Somalia noted that supporting Somalia’s engage in a comprehensive peace process should not be sidelined by efforts to address piracy in the Security Council.\textsuperscript{103}

That is why more effective regional and international efforts should be redoubled including the Djibouti Peace Process under the auspices of the Inter-governmental Association on Development (IGAD) as well as the African Union Mission in Somalia (ANISOM)\textsuperscript{104} so that efforts to end piracy are not undertaken in isolation of the larger crisis in Somalia. Kenya has been at the forefront in supporting the Transitional Federal Government of Somalia as well as in combating piracy off its coast.\textsuperscript{105} While Kenya has

\textsuperscript{100} The Suez Canal which links the Red Sea to the Indian Ocean off the Gulf of Aden is one of the most important shipping lanes in the world. It reduced sea journeys off through the Cape of Good Hope off the Southern Coast of Africa with its reopening in 1975. Somalia’s nationalist ambitions in the horn of Africa from the 1970s threatened the importance of this corridor of commerce. See Abdi Sheik-Abdi, Somali Nationalism: Its Origins and Future, 15 J. MOD. AFR. STUD. 657-65 (1977).

\textsuperscript{101} William Reno, Shadow States, supra note 89, at 44.


\textsuperscript{104} See Communiqué of the 31st Extra-Ordinary Session of the Inter-Governmental Authority on Development (IGAD) Council of Ministers, Addis Ababa, Ethiopia (Dec. 22, 2008) (noting and reiterating IGAD’s position that “the escalation of acts of piracy along Somali waters is a symptom of the overall economic, political, security and social problem afflicting Somalia in the last 18 years, and that sustainable solution can only be achieved through addressing the root causes, in particular through the establishment of institutions of governance and protection of the people of Somalia,” id. at ¶ 14). See also S.C. Res. 1853, supra note 92 (noting the importance of this mission). This resolution also lists several other initiatives established to conduct a variety of activities relating to the restoration of peace and stability in Somalia. There is also an International Contact Group on Somalia that includes Somalia’s development partners in the EU and elsewhere. The UN Secretary General has also appointed a UN Special Representative of the Secretary General for Somalia.

\textsuperscript{105} In November 2005, Kenya pledged to increase naval patrols to combat piracy off the Indian Ocean coast. In September that year, the country had acquired a new high-speed boat for that purpose. For Kenya’s efforts see Nancy Karigithu, (Director General Kenya Maritime Authority), Role Played by Kenya in the Fight Against Piracy and Armed Robbery Against Ships in Waters off the Coast of Somalia, Abstract of Presentation to be Made at the Ninth Meeting of the Consultative Process on Oceans and the Law of the Sea: “Overview of Threats to Maritime Security, their Impacts and Responses Thereto with a Focus on Piracy and Armed Robbery Against Ships” (undated), available at
security concerns arising from its shared border with Somalia and has even returned Somalia refugees across the border.\textsuperscript{106} It would be implausible to make the case that the Kenyan government does not believe any comity concerns may arise from the manner in which it conducts its relations to Somalia.\textsuperscript{107} Kenya has to implement its new extraterritorial authority over non-nationals carefully in light of the unlikely reciprocal comity consequence that Somalia would hale Kenyans with little contact to Somalia for conduct arising entirely in the high seas.\textsuperscript{108} Such care is not unwarranted given recent UN Security Council resolutions allowing third states to pursue pirates within Somalia’s territorial waters\textsuperscript{109} and another effectively permitting such States to engage in a land pursuit.\textsuperscript{110} What is more, there are suggestions of establishing an internationally


\textsuperscript{106} See, e.g., USAID (Kenya), Kenya-Somalia Border Conflict Analysis (Aug. 31, 2005) (report prepared by Dr. Ken Menkhaus). Kenya has had a troubled history with Somalia from the Somalia/Kenya war of 1964 that was settled in the Arusha Accords of 1967 (\textit{See} OAU Declaration on Kenya-Somali Relations AHG/ST.1(IV) adopted by the Fourth Ordinary Session of the Assembly of Heads of State and Government Held in Kinshasa, Congo, from 11-14 September, 1967) (In the 1964 war a Somali irendentist movement claimed part of Kenyan territory for Somalia). The rise of radical Islamist movements in the 1990s and the large flows of Somalia refugees to Kenya as well as flows of arms and cross border raids including cattle rustling resulting in rising insecurity in Northern Kenya and continuing border tensions.

\textsuperscript{107} According to Kenya’s Foreign Policy Statement, the country is committed to: “The desire to promote economic development will influence Kenya’s approach to foreign policy while maintaining its traditional core principles and norms of non-alignment, non-interference in internal affairs of other states, good neighbourliness, peaceful settlement of disputes and adherence to the charters of the UN and African Union,” MINISTRY OF FOREIGN AFFAIRS OF KENYA, FOREIGN POLICY, available at http://www.mfa.go.ke/mfacms/index.php?option=com_content&task=view&id=13&Itemid=31&limit=1&limitstart=2.

\textsuperscript{108} A very aggressive implementation of this new extraterritorial law would constitute a kind of ‘legal imperialism’ that would fail short of balancing Kenya’s legitimate interests in safe passage of maritime commerce, on the one hand, and the fact that the conduct involves an extension of Kenya’s jurisdiction extraterritorially. For an analogous case of such skepticism in relation to Texas’ extension of personal jurisdiction over conduct occurring entirely within Mexico, see Transportadora Ego ba v. Jose Antonio, 217 S.W.3d 603 (6th Cir. 2006), \textit{cert. denied} 128 S. Ct. 810 (2007) (noting “For more than a century, the United States has rejected Mexican attempts to assert extraterritorial judicial jurisdiction over Americans who have allegedly wronged Mexican citizens in the United States...If the United States expects this deference from Mexican courts, then United States courts should exercise reciprocal restraint. The attempt to exercise jurisdiction over a foreign defendant in this case, based solely on foreign conduct, is precisely the type of ‘legal imperialism’ that this court has recently cautioned courts to avoid and that runs afool of comity and other international law norms, provoking undesired consequences for American interests,” \textit{id}. at *28.).

\textsuperscript{109} S.C. Res. 1816, \textit{supra} note 91, adopted with the consent of Somalia, permitted for a six month period States cooperating with Somalia’s Transitional Federal Government to enter into Somalia’s territorial waters and “use all necessary means” to repress acts of piracy and armed robbery at sea. \textit{See id}. at ¶ 7(a). This authority was renewed for a twelve month period by S.C. Res. 1846, U.N. Doc. S/RES/1846 (Dec. 16, 2008).

administered coast guard for Somalia, that may for all intents and purposes end up being regarded as an occupying force and produce the kind of reaction to U.S. forces in Somalia of the early 1990s. The last time the Security Council authorized the “use of all necessary means” with respect to Somalia, it turned out to be a major turning point in committing UN forces to peace making in Somalia in particular and Africa in general. The failure of United Nations Operation In Somalia (UNISOM I and II) of the 1990s can be accounted for in part because where “people are dying in large numbers because of civilian conflict, the illusion should be discarded of a type of intervention that does not immediately interfere with the domestic politics of a country and does not include a nation-building component.” Thus, dealing with piracy to protect the interests of safe maritime commerce backed up with the most intrusive authorizations of the use of force on Somali territory and territorial waters, without a concomitant commitment to rebuilding the Somali state is to repeat the mistakes of the 1990’s and may ultimately not end piracy.

Concerns of International Humanitarian Law

The Security Council has called upon States engaged in the capture, investigations, prosecutions and all aspects of addressing piracy to ensure their conduct was “consistent with application international law including international human rights law.” In addition, in Resolution 1851 of December 16th, 2008, the Security Council urged these anti-piracy efforts to be “undertaken consistent with applicable international humanitarian and human rights law.”

(authorizing States and International Organizations to use all necessary means within Somalia’s territorial waters efforts to combat piracy and robbery in the high seas; and noting that such authorization was procured with the consent of the Transitional Federal Government of Somalia). The authorizations here run for a period of 12 months from December 16th, 2008.


112 See Mark Cushman Jr., Five GI’s Are Killed as Somalis Down 2 U.S. Helicopters, N.Y. TIMES, Oct. 4, 1993 (at the time there was a 27,000 UN peacekeeping force in Somalia including 4,400 American troops). The goal of the American forces was to capture General Mohammed Farah Aideed. The failure to capture Aideed and the October 3, 1993downing of two U.S. helicopters resulted in criticisms of the Clinton Administration in congress. President Clinton thereafter announced a pull out of American troops, which in turn resulted in major pullbacks of UNISOM troop contributions from other countries. See Paul F. Horvitz, Fending Off Congress Clinton Links Pullout to Safety for Somalia, INT’L HERALD TRIB., Oct. 7, 1993.


116 S.C. Res.1816, supra note 91, ¶ 11.

These Security Council decisions for the observance of international law in the conduct of anti-piracy efforts are crucial particularly given the council has authorized the use of “all necessary means” including on Somali territory and territorial waters as we saw above. There is an increasing and really unprecedented presence of naval power and presence off the Indian Ocean Coast. The countries involved are Russia, France, Norway, Great Britain, Turkey, Germany, India, China, South Korea, Iran, Canada, Malaysia, the United States and Kenya, among others. In November 2008 the EU announced its first ever naval mission – combating piracy off the Coast of Somalia. The British Navy leads this EU force. On its part, the United States created a new Maritime Security Patrol Area in the Gulf of Aden in August 2008 and established Combined Task Force 151 to counter piracy, deter drug smuggling and weapons trafficking. India has argued in favor of a U.N.-authorized force in place of this patchwork of US-allied and EU forces.

In early December 2008, France reported having already arrested 12 pirates but to date they are yet to be formally charged in court. Indeed, there are reports of many other arrests of suspected pirates, but much fewer accounts of their release or of charges being preferred against them. Thus this huge militarization of combating piracy is likely to create large numbers of suspected pirates held in undisclosed locations inconsistently with their rights to process under international law. Some reports suggest that the mission of the Combined Maritime Forces off the Coast of Somalia to “disrupt and deter” rather

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122 By March 5, 2009, the U.S. military reported that the combined naval forces off the Coast of Somalia had ‘encountered and disarmed approximately 250 pirates’ and that 130 of them had been released, 110 turned over for prosecution, and 7 were ‘pending final disposition,’ See Page 13 Statement of Vice Admiral William E. Gortney, U.S. Navy Commander, U.S. Naval Forces Central Command Before the House Armed Services Committee on Counter-Piracy Operations in the U.S. Central Command Area of Operations, 5 March 2009 Page 12. For a press account of a release of captured pirates in early March 2009 by the U.S. navy involved 16 suspected pirates after no evidence against them was uncovered. They were handed over the authorities of the Puntland Coast Guard, see CNN, Navy Releases 9 Suspected Pirates, Citing Lack of Evidence, March 9, 2009, available at http://www.cnn.com/2009/US/03/02/somalia.pirates/index.html.
than to capture and hold these suspects accountable.\textsuperscript{123} Even if this is the mandate of the forces off the Coast of Somalia, the importance of having regard to international humanitarian law in the disruption and deterrence of piratical acts remains crucial. For example, the capture of the suspects now on trial in the Netherlands by the Danish navy was procured by firing flares at their vessel, which caught fire and the suspects were then rescued before they drowned.\textsuperscript{124} While this incident had a happy ending, it does point to the importance of bearing in mind the importance of international humanitarian law.

\textit{Concerns of Prosecuting Piracy in the Kenyan Judiciary}

There are legitimate concerns about the independence, congestion and corruption\textsuperscript{125} of the Kenyan judiciary. These concerns go back a long way.\textsuperscript{126} Although the Attorney General is constitutionally empowered to require the Commissioner of Police to investigate any matter which relates to any alleged or suspected offence,\textsuperscript{127} long time Attorney General Amos Wako has often argued that the Commissioner of Police failed to comply with his directives to investigate certain offences.\textsuperscript{128} The Attorney General and the Commissioner of Police are currently under pressure to resign following a scathing report of their inability to order the investigation and prosecution of extrajudicial killings by security force by the United Nations Special Rapporteur on Extra Judicial, Arbitrary or Summary Executions, Philip Alston.\textsuperscript{129}

Thus, there is a sense in which Kenya’s agreement to prosecute pirates sits uncomfortably with the challenges facing its investigatory and prosecutorial system at home. These challenges are compounded by “inadequate resources, inadequate remuneration of prosecutors, staff attrition, and placement of the police and the prosecutors under two

\textsuperscript{125} \textit{See 1 Report of the Integrity and Anti-Corruption Committee of the Judiciary of Kenya (Ringera Report) (Sept. 2003). See also Report of the Commission of Inquiry Into Post Election Violence, (Waki Commission) (2008), “[t]he elements of systemic and institutional deficiencies, corruption, and entrenched negative socio-political culture, have in our view, caused and promoted impunity in this country,” id. at 444.
\textsuperscript{127} \textit{Constitution} § 26(4) (Kenya) (1998).
\textsuperscript{129} Press Statement by Prof. Philip Alston, UN Special Rapporteur on Extra-Judicial, Arbitrary or Summary Executions, Mission to Kenya 16-25 February 2009. See also, Kenya National Commission on Human Rights, Report on Extra-Judicial Killings and Disappearances – Overview of the Reported and Sample Cases,
separate authorities, preventing even the most basic institutional cooperation” in the criminal justice system.\textsuperscript{130} How then can a judicial system facing these challenges as well as congestion and backlog in the prison system\textsuperscript{131} take on the task of prosecuting non-national pirates for extraterritorial conduct? Perhaps that is why Kenya has declared it will not be a dumping ground for these suspects. Indeed, Kenya must be careful not be become the new offshore center of suspects captured overseas who then languish in the Kenyan legal and prison system for years on end.\textsuperscript{132} Perhaps, for this reason, the U.S. has assigned two Naval Criminal Investigative Service and Coast Guard Personnel to help in the assembling and deposition of witnesses as well as in pre-trial preparatory work to help Kenyan authorities build cases against the pirates.\textsuperscript{133}

That said, the Kenyan judiciary has experience prosecuting nonnationals. For example, in 2005 the High Court in Mombasa issued a habeas corpus ordering that sixty-three Bangladesh nationals arrested and held in custody with no charges for a period of nine days be released on bond.\textsuperscript{134} In another case, the Court of Appeals quashed the conviction of a citizen of Guinea who had been convicted of a drug related offense inconsistently with his right to the assistance of an interpreter ‘through whom the proceedings’ could be interpreted so that he could follow the proceedings ‘in a language he understands.’\textsuperscript{135} In short, while Kenya’s judicial and prosecutorial systems have significant failures, the Constitution and the Courts, when they function well, have inbuilt protections for criminal defendants.\textsuperscript{136} Even if Kenyan courts worked effectively and efficiently in the prosecution of pirates captured by other States, they would still have to contend with difficult evidentiary questions regarding their captors. For example, the first such trial in 2006, the suspects alleged that they had been tortured by the U.S. Navy.\textsuperscript{137} Such

\textsuperscript{131} The pirates surrendered to Kenya will most likely to be held together with others already in custody in the crowded colonial era Shimo La Tewa Maximum Prison where 3,500 prisoners sleep on the floor in humid and sweltering heat and in the most unhygienic conditions, see Mutonya Njuguna, “Shimo La Tewa: Life is a Scene from a Horror Film,” Daily Nation, June 14, 1995 (Page IV, Wednesday Magazine). On Prison conditions in Kenya, see Amnesty International, Kenya – Prisons: Death Due to Torture And Cruel, Inhuman and Degrading Conditions, AFR 32/010/2000, 07/12/2000. Kenya is running a major donor funded prison reform effort under the Governance, Justice, Law and Order Sector (GJLOS) Reform Programme. Among the agencies involved are the Kenya Prisons Service, the Probation and Aftercare Services and the Office of the Vice President and Ministry of Home Affairs.
\textsuperscript{132} For such experiences of Somalia prisoners in Kenya, see Human Rights Watch, Why Am I Still Here? The 2007 Renditions and the Fate of Those Still Missing (East Africa), Sept.30, 2008.
\textsuperscript{134} Ex Parte Abaidul Haque & 62 Others, Misc Criminal Application No. 43 of 2005 Before Justice Mwera (ruling issued 25th May, 2005). Suspects arrested in Kenya are required to be charged within 24 hours, see Section 73(3)(b) of the Constitution of Kenya. However, if the charges to be preferred include an offence punishable by death, (murder and robbery with violence), such suspects must be brought before a court within fourteen days of the arrest or from the commencement of the detention.
\textsuperscript{136} In fact, as I argue elsewhere, it is often the rich that work these protections to their advantage when they fall afoul the law, see James Gathii, Defining the Relationship Between Corruption and Human Rights, A Study Sponsored by the Ford Foundation (2009), at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1342649.
allegations will certainly taint the outcomes of such trials especially because of the difficulty of establishing the truthfulness of such allegations in light of the lack of independently verifiable evidence – except perhaps medical evidence if the suspects are handed over to Kenyan authorities without inordinate delays after their capture.

Conclusions

In my view, only limited prosecutions of suspected pirates who are non-nationals that charged with extraterritorial piratical conduct ought to be brought for prosecution to Kenya. While Kenya’s new Merchant Shipping law gives Kenyan courts broad jurisdiction over such suspects, the broad sweep of this new law go far beyond Kenya’s obligations under both the SUA Convention and UNCLOS, which in their express terms only allow capturing states the right to prosecute. However, the inability of Somalia to arrest and prosecute such suspects suggests Kenya may exercise such jurisdiction as part of its contribution to the burden sharing in the prosecution of captured suspects. In addition, the Kenyan legislation is consistent with the common law norm that crimes defined by international law require domestic law to try or punish them. Kenya’s new Maritime Shipping law’s expansive extraterritorial scope over non-national pirates captured by third states raises important questions about the jurisdiction of subordinate courts as a matter of Kenyan law. In addition, the exercise of this new mandate, if exercised by the Kenyan High Court as argued here, suggests that Kenya has a truly universal jurisdiction statute over piracy.

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138 The countries neighboring the Malacca and Singapore Straits have cooperated in enhancing the safety, security and environmental protection of the straits pursuant to Article 42 of UNCLOS. By analogy, such cooperation among the multinational forces off the Gulf of Aden such as in the shared prosecution of suspects may avoid indefinite detentions without trial in violation of international law.