



Somali pirates have rights too

Judicial consequences and human rights concerns

I think that this court would be abdicating its jurisdiction, power and authority and its Constitutional obligations in ensuring the protection of the fundamental rights and freedoms of the [pirates] who find themselves in a perilous, insecure and unenviable situation in a strange country to which they were brought without their wish or volition.¹

INTRODUCTION

The above statement of the court, which refers to the legality of the existing piracy jurisdiction, epitomises the dangers of the international community's conduct in countering piracy in the Horn of Africa. A conventional law-enforcement problem has escalated to such a level that although military intervention is condoned, military deterrence has been limited by international laws that safeguard pirates from military actions that would otherwise be lawful were they undertaken within a combat situation. These rules stipulate that the use of force against suspected pirates be proportional to the crime and that due process be complied with when apprehending these pirates. To circumvent these constraints, new international rules have been established to accommodate the military actions, to the detriment of human rights standards.² These new rules have created a negative precedent and could become mired in the same legal quagmire that the fight against terrorism is beset with, while they also fail to address the security challenges and counter-piracy acts that inadvertently intensify piracy.

Most of the naval warships that patrol the Gulf of Aden and the Indian Ocean hope that their presence alone will deter pirates from attacking shipping vessels, but this is rarely the case.³ Instead, in practice, the warships have been capturing suspected pirates and then often releasing them, rather than taking them into custody for prosecution; this is because few countries are willing to accept the burden of prosecuting these cases. The customary refrain used for the 'catch and release'

policy is 'insufficient legal basis'.⁴ This 'insufficient legal basis' results from difficulties with determining the appropriate jurisdiction, conflict of laws, the inadequacy of domestic laws, evidentiary procedures, and the cost of the judicial consequence. For example, a vessel that is attacked by pirates could be registered in Panama, have a Filipino crew, be owned by a Turkish corporation ferrying Ukrainian cargo destined for China, and be rescued by a US warship.⁵

It is therefore hardly surprising that judicial consequences, or the lack thereof, have been identified as the weakest link in the counter-piracy war. The lack of legal preparedness before dispatching the naval forces is nothing short of dereliction by the international community and exposes the pirates to human rights violations. Despite the escalation of piracy, many countries are yet to amend their laws in ways that can adequately address the potential legal obstacles to prosecution. This undoubtedly threatens the credibility of these counter-piracy operations. A few suspects are prosecuted in the home country of the warship that has captured them, when the piratical incident is directed against that country's nationals or vessels.⁶ However, some of the naval states have resorted to rendering the captured suspected pirates to regional courts, and Kenya and the Seychelles have accepted the bulk of these suspects for prosecution, as well the responsibility for the imprisonment of convicted pirates.

To a certain extent, rendering piracy suspects to regional courts undermines the legitimacy of the ensuing prosecutions. The regional courts are hampered by inadequate resources, capacity and laws to conduct effective piracy trials and, in Kenya's case, a foundering criminal justice system. Kenya has long been accused of breaching human rights standards, and there have been accusations of extrajudicial killings, torture and partial courts. Human rights monitors also place Kenya's judiciary architecture far below the minimum international standards necessary to protect the rights of the rendered suspects. The country's new

constitution has only recently provided a roadmap that can be used to implement reform of the justice system. The realisation that human rights standards are relative for different parties and judicial systems means that it is more expedient for the West to prosecute the suspected pirates in a less rigorous regional human rights environment as opposed to one that has more stringent, Western human rights standards. For some countries the reality of saving US\$ 240 000 may seem worth sacrificing the rights of the pirates and ignoring their plight.⁷

Nevertheless, human rights are universal and that universality means that they must be enjoyed by all, without discrimination. However, a recent judgement in Kenya may offer a ray of hope for the pirates in the country.⁸ Justice Mohamed Ibrahim, in *Re Mohamud Mohamed Hashi & 8 Others*, ruled that the pirates' rights had been violated when they were prosecuted under the old piracy law; he also prohibited the lower courts from determining their case because the country had no jurisdiction. He added that, considering the 'peculiar, very unique and exceptional circumstances' in which the pirates found themselves, it was incumbent on the court to offer them protection and security and *suo moto* declared them 'vulnerable persons' and 'wards' of the court. Notwithstanding this decision, the State has appealed, and jurisdiction remains a problematic issue in the country's piracy trials.

The discussion that follows will explore the human rights issues underpinning the judicial response to maritime piracy in the Horn of Africa. The international human rights concerns limiting the naval states' judicial response will be reviewed and reference to Kenya's prosecutorial role will be discussed at length. The first part of this discussion briefly introduces the phenomenon of piracy, with some emphasis on the state of insecurity in Somalia and how this insecurity encourages piracy and results in the ensuing legal dilemma. The second part discusses the perceived and considered failure of the international legal system, and the potential human rights concerns that prompt such recourse to the regional courts. The third part examines Kenya's legal and systemic shortcomings as the main regional centre for piracy prosecutions.

In prosecuting suspected pirates, observance of due process and basic human rights standards would be a positive and necessary step towards containing conflict in the region. It is evident that the need for legal accountability for pirates is being championed at the expense of their rights, and this not only fuels more piratical attacks but also creates a greater threat to security in the region. The situation calls for the deliberation of other options that may help to resolve this security threat. These options include legal and political remedies that should underscore respect for principles of fundamental justice and universally accepted human rights, particularly for the pirates, who constitute a vulnerable group. This would lend credibility to the international counter-piracy efforts and reduce the legitimacy of the pirates' actions, which they feel are based on historical injustices against them that have been perpetrated by the international community.

Maritime piracy in the Horn of Africa

The incidents of piracy are increasing, outpacing the best countering efforts of the international community. This increase in piracy attacks in the Horn has been attributed to a number of factors,⁹ which include inadequate state law-enforcement capacity in Somalia; greater vessel vulnerability as a result of technology that reduces the crew numbers required to man vessels; ambiguous jurisdictions; the attractive geographic location that makes acts of piracy easier to perpetrate; and the potential high returns of piracy coupled with the low risk of any significant consequences. To elaborate further, Somalia is strategically situated next to busy sea routes, at the entrance to the Gulf of Aden, and has a long coastline of 3 898 km. The majority of the vessels that are attacked are bulk carriers, containers and chemical tankers. The weak judicial consequences of piratical acts seem to have emboldened the pirates, and less than 40 per cent of the captured pirates are ever brought to trial.¹⁰

In 2010 the incidence of piratical attacks remained virtually unchanged from that of 2009, with 219 attempts and 49 reported successful hijackings. In 2009 piratical incidents off the Somali coast constituted 217 of the 416 incidents reported globally. Forty-nine of the successful

Table 1 Horn of Africa piracy numbers

| | 2007 | 2008 | 2009 | 2010 | 2011 (1st Quarter) |
|-----------------------|-------------|------------|-------------|-------------|--------------------|
| Incidents | 51 | 111 | 218 | 219 | 97 |
| Hijackings | 8 | 49 | 49 | 52 | 16 |
| Hostages | 163 | 815 | 867 | 1016 | 299 |
| Ransom amounts (US\$) | 3.6 million | 75 million | 177 million | 238 million | 65 million |

Sources International Maritime Bureau (IMB), Piracy and armed robbery against ships annual reports, 2009 and 2010 and IGAD, Report on the Impact of Piracy on the IGAD region

hijackings occurred off the Somali coast, with the pirates holding 867 crew members hostage.¹¹ This represented a 50 per cent increase from 2008. But successful hijackings were down relative to the piratical incidents reported, as a result of better policing of the Gulf of Aden. Attacks decreased by 50 per cent in the Gulf of Aden but rose substantially in other seas and the Indian Ocean. 2010 also witnessed the highest number of hostages held by the Somali pirates, and 2011 may turn out to be a record year.

The first quarter of 2011 has seen the greatest number of piratical attacks ever recorded by the International Maritime Bureau (IMB) in that quarter.¹² There were 142 attacks, of which 97 were off Somali waters. By contrast, 2010 had 35 such attacks over the same period. Somali pirates hijacked sixteen of the eighteen vessels that were hijacked in the first quarter of 2011 and were responsible for holding 299 of the 344 crew members who were taken hostage during these attacks. On 31 March 2011, Somali pirates were holding captive 763 crew members on 49 ships.

Maritime piracy is becoming more lucrative as ransom payments soar. One Korean vessel, *Samho Dream*, paid an estimated US\$ 9.5 million, the highest amount reported thus far. In 2010, ransom payments (excluding insurance amounts) accounted for US\$ 238 million, up from US\$ 177 million in 2009, and piracy was estimated to cost the international economy US\$ 7–12 billion per annum.¹³ Meanwhile, each year, the shipping industry pays approximately US\$ 2.3–3 billion to reroute ships in an effort to avoid piracy.

According to the IMB, the Somali pirates' area of activities has spread from the Gulf of Aden and the Red Sea to the coast of Kenya, Tanzania, the Seychelles, Madagascar and India in the Indian Ocean and Oman in the Arabian Sea. The pirates' relocation has shifted policing to the

Indian Ocean, which means that a much larger area must now be policed. The hijacking of the South Korean *MV Golden Wave*, with 39 Kenyans on board, off Lamu Island in October 2010 and the first hijacking of a Kenyan vessel, *FV Sakoba*, in March 2010 means that piracy has now become a security priority for the country.¹⁴

The militarisation of counter-piracy efforts has resulted in desperation among the pirates who, previously humane in their treatment of hostages, have lately become more violent, probably because they are fighting men rather than fishermen, and, in particular, now that the crew are repelling more of their attacks.¹⁵ The increasing violence also puts the lives of the captured vessel's crew in greater risk. In 2011, Somali pirates have already killed at least fifteen crew members and hostages.

There are also proposals for a private navy, which could seriously undermine security in the region, especially after the killing of a pirate by private security guards.¹⁶ Exacerbating the dangers of the high seas, the use of captured crew as human shields or for further piratical attacks has also become routine practice.¹⁷ Even as the stakes are raised in the piracy struggle, understanding what drives these pirates to a possible death in pursuit of their gains may reveal why they display such tenacity, despite the risks.

Anarchic Somalia and the pirate

Somalia has been in a state of perpetual conflict since 1991 and this has resulted in an anarchic environment within the country. The Islamists have increased their attacks against the internationally recognised Transitional Federal Government (TFG) as well as launched their first foreign attack in Uganda, which provides the bulk of the African Mission in Somalia (AMISOM) troops that are mandated to protect the TFG. With cash from the ever-increasing ransoms, piracy is potentially fuelling other security challenges in the country and the region, particularly the proliferation of refugees, arms and human trafficking, and terrorism.¹⁸

The internal dynamics of the country in conflict fuels crime; violent insurgency; political instability; and the inability of the government to deliver basic services, not to mention an increase in egregious human rights abuses; the foreign exploitation of Somalia's resources; dumping of hazardous waste; the destruction of the Somali marine environment; and the harassment of fishermen and other coastal dwellers.¹⁹ Unfortunately, it is these problems, which lie at the heart of both the Somalia crisis and the escalation in piracy, that are given short shrift in counter-piracy responses. Somalis are one of the largest refugee groups in the world and the UN High Commissioner for Refugees observes that, although Somalia seems to have no real prospect of peace, 'there is [no other] group

Table 2 Total costs of maritime piracy per year

| Cost factor | Value (US\$) |
|---|---|
| Ransoms: excess costs | \$ 176 million |
| Insurance premiums | \$ 460 million to \$3.2 billion |
| Rerouting ships | \$ 2.4 to \$ 3 billion |
| Security equipment | \$ 363 million to \$ 2.5 billion |
| Naval forces | \$ 2 billion |
| Prosecutions | \$ 31 million |
| Piracy deterrent organisations | \$ 19.5 million |
| Cost to regional economies of which Egypt of which Kenya of which Seychelles | \$ 1.25 billion \$ 642 million \$ 414 million \$ 6 million |
| TOTAL ESTIMATED COST | \$ 7–12 billion per year |

Source: Anna Bowden, The economic costs of maritime piracy

of refugees as systematically undesired, stigmatised and discriminated against'.²⁰

As a result of the country's instability and its non-functioning government, Somali pirates are able to operate with impunity and foster a growth in their numbers. There is virtually no security agency that has the capability to counter the growing menace. The few existing agencies, such as the police, are under-equipped and under-trained, and some units are not even located in Somalia itself.²¹ The pirates' income is higher than the government budget allocated to tackle the problem, which makes it difficult to combat even were the government so inclined.²² The estimated annual ransoms that are paid, in the region of US\$ 238 million, makes piracy in Puntland and central Somalia a most lucrative economic sector. Somali leaders have requested that one per cent of the naval expenditure (estimated at US\$ 2 billion, in 2010) be given as resources for their coast guards, who they claim would have a greater impact in reducing piracy than the naval armada.²³

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to improve their lives

The securitisation and militarisation of piracy in the Horn of Africa has been prompted by the violent characterisation of the Somali pirate.²⁴ In addition, the approach to the problem that represents it solely as a state-security issue compounds the lot of a suspected pirate because it makes it less likely that his – so far only male suspects have been captured – individual actions and motivations will be taken into account. This approach therefore denies the suspected pirates a voice with which they could articulate their problems, while it simultaneously emphasises the protection of commercial interests in the international community's counter-piracy engagements. As a result there is little recognition that there may be the need for altruistic interventions in Somalia. Ergo, the international community is absolved from any responsibility for addressing the problems that it bears great responsibility for intensifying.²⁵

A Somali pirate

The shipping industry is in many ways responsible for the lack of empathy shown to Somali pirates because

it has run a campaign, augmented by the media, that portrays the pirates as 'bloodthirsty and merciless sea thieves', reminiscent of the pirates of the recent past. The alienation of pirates also originates in the Latin definition: *hostis humani generis* (enemies of mankind).²⁶ Nonetheless, Somali pirates are not necessarily like the pirates of old in their development, their operations or how they are given their 'just desserts'. The anarchy in Somalia means that extreme poverty, unemployment and insecurity are ever-present dangers for the average Somali, and the country is a humanitarian catastrophe that should not be ignored.

The question that should be asked is: who is the typical Somali pirate? Is he a privateer, a profiteer, a terrorist, a kidnapper or just a pirate? The undernourished image of Abdiwali Abdiqadir Muse, the sole surviving pirate of those who attacked the *Maersk Alabama*, should have debunked the global preconceptions concerning the Somali pirate. He is neither a bloodthirsty individual nor a kingpin; only one of the pirates captured so far has been a financier, a trainer, or a recruiter. Unlike pirates operating in other parts of the world, Somali pirates engage in piratical acts to hold hostages and ships for ransom; they rarely kill their captives because that invariably represents lost profits.

Muse attributed his actions to the problems in Somalia.²⁷ Thus, for the pirates, the crime is a reaction to a basic survival instinct and the struggle to improve their lives; they believe that they are basically faced with a do-or-die situation. Practically all options that might improve their livelihoods carry the risk of death, that is, fleeing as refugees to live in overstretched refugee camps; migrating by sea in appalling conditions; being recruited into militias, or engaging in piratical acts.²⁸ More than a thousand Somalis have lost their lives crossing the Gulf of Aden, some of whom might have been saved by the naval patrols.²⁹ Piracy promises wealth if they succeed at their endeavour and the prospect of a better life even if they are captured and then given lengthy prison sentences.

Crimes against Somalia

In the absence of an effective government, the pirates view themselves as national defendants of their resources. Their attitude has, in fact, won them some public legitimacy and even their leaders have refused to pass a law that criminalises their actions outright.³⁰

Western companies have allegedly been illegally fishing and dumping toxic waste off the Somali coast. An estimated 700 foreign-owned vessels, most of which are armed, are engaged in illegal, unlicensed and unreported (IUU) and unsustainable fishing in Somali waters. The fishing activities of these vessels cause considerable loss to the Somali fishermen, who are poorly equipped and cannot compete.³¹ In 2006, the total annual value of

illegal fishing in the tuna and shrimp industries alone amounted to US\$ 94 million.³² The Spanish government recently offered US\$ 4 million to the TFG for the purpose of turning pirates into fishermen. This amount is incongruous, however, when taking into account both the losses that result from illegal fishing and the US\$ 2,5 million in subsidies for arms that are given to Spanish vessels that continue exploiting Somali waters.³³

The cost of the hazardous waste that is dumped in Somali waters may be harder to quantify but it is equally real.³⁴ The 2004 tsunami revealed the extent of the dumping on the beaches of Somalia. The effects of dumping cause health and environmental problems in the area, and although the Basel Convention prohibits wealthy countries from dumping hazardous waste in poorer countries, Somalia is unable to enforce this rule. The UN Resolution's failure to provide naval forces to police other maritime transgressions, such as the IUU fishing and environmental damage, raises questions regarding the effectiveness of such resolutions without Somali co-operation. This situation could change, depending on the outcome of the Secretary-General's report, which is required under UN Resolution 1976 (2011) on the protection of Somali natural resources and waters, alleged illegal fishing and the illegal dumping of toxic substances.

The piracy in the Horn of Africa has been linked to Somali Islamists (Al Shabaab and Hizb ul Islam) and terrorism, a link previously refuted by the UN Monitoring Group for Somalia.³⁵ Portraying Somali pirates as Islamist extremists is inaccurate. However, recent reports regarding this 'unholy' alliance indicate that Somali pirates have indeed agreed to split their proceeds with Islamists, and that the latter may have their own piracy operations.³⁶ The existence of piratical Islamists would swiftly result in the deterioration of the security climate both in Somalia and on the surrounding high seas. This scenario could engulf piracy in the complexities associated with the war against terrorism and hamper initiatives to counter the piracy problem. With resurgent Islamists and increasingly large ransom pay-outs, the potential for piracy to fuel the conflict and worsen the suffering of the Somali people cannot be over-emphasised. The Horn of Africa security problem is therefore becoming thornier. Consequently, managing the judicial consequences of piracy with a view to effectively countering piracy and preventing further conflict becomes even more important.

Countering piracy with international legal instruments

Since Somalia has no effective, functioning government, the international community has taken responsibility for prosecuting the captured pirate suspects. Piracy *jure*

gentium (by the law of nations) is one of the few crimes to which the doctrine of universal jurisdiction applies.³⁷ This means that any state may seize a pirate ship or aircraft on the high seas and prosecute the offenders, even if the crime, the defendant and the victims have no nexus with the state carrying out the prosecution. However, because piracy *jure gentium* under international law differs from piracy under municipal law, some states may have difficulty prosecuting acts of piracy, depending on the clauses they domesticate.³⁸

Piracy is defined as a crime against nations under Article 101 of the 1982 UN Convention on the Law of the Sea (UNCLOS). It is '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 on the high seas or in a place outside the jurisdiction of any State, against another ship or aircraft, or against persons or property on board such ship or aircraft'.³⁹ The courts of the state carrying out the seizure has the jurisdiction to impose penalties.

The four constitutive elements of piracy are: an illegal *act of violence* and depredation; committed for *private ends*; on the *high seas*; and by persons in one *private ship/aircraft* against another. This distinction is significant. If the piratical act is committed within territorial waters, the offence is armed robbery, not piracy *jure gentium*.⁴⁰ The constitutive elements also define piracy as differing from a privateer's actions. A privateer (or the vessel) possesses a letter of marque and reprisal from a state, which allows the arming of the vessel in order to commit acts that would otherwise have constituted piracy.⁴¹ The elements also distinguish a piratical act from a terrorist act at sea because such an act is done for private ends rather than political aims and must include a second ship.⁴² The 'two-ship rule' partly explains why the 1988 Suppression of Unlawful Acts against the Safety of Maritime Navigation (SUA Convention) was ratified to fill this gap in UNCLOS and to include terrorist activities.⁴³

The SUA Convention focuses on acts that endanger a ship and any persons on board. The treaty allows any signatory to board and detain a suspect vessel and obliges the contracting government to prosecute or extradite anyone who seizes or exercises control over a ship by force or threat of force. The range of unlawful activities covered is thus wider than under the Law of the Sea Convention. However, it fails to define terrorism at sea and armed robbery.

Since Somali pirates carry out attacks on the high seas and then seek refuge in Somali territorial waters, various UN resolutions were passed in 2008, pursuant to Chapter VII of the UN Charter, which authorised the use of military force and incursions into Somalia. Resolution 1816 (2008) created the right of 'hot pursuit' by authorising the international force to enter the territorial waters

of Somalia and to use all necessary means for the purpose of repressing acts of piracy. Resolution 1851 (2008) extended the use of military force to land-based operations in Somalia, though this is a power that has rarely been used.⁴⁴ Another instrument that can be applied against piratical acts is the UN Convention against Transnational Organised Crime, which applies to groups that may engage in piracy-related activities, such as obtaining information concerning the carriage and routes of vessels with the intention of attacking and/or robbing them.⁴⁵ These legal instruments notwithstanding, the detention and prosecution of alleged pirates has remained difficult.

INTERNATIONAL PROSECUTION AND HUMAN RIGHTS

The reluctance to prosecute captured pirates stems from the lack of clarity that exists concerning both the interpretation of international laws of human rights and armed conflict, and national criminal jurisdiction vis-à-vis the captured pirates. The piratical judicial consequences raise human rights concerns similar to those evidenced in the war on terror, although piracy is neither a partisan activity nor the result of any particular ideological leaning. In addition, the practical realities of fighting piracy are far less daunting.⁴⁶ There is reason for concern here, as the international community validates certain actions, such as the denial of due process, torture, and renditions, to counter piracy threats. The economic disincentives also heighten governments' aversion to prosecuting pirates, which has resulted in Somali pirates being treated capriciously and often denied due judicial process.

Financial cost, logistics and the piracy problem

On one hand, the burden associated with the capture of alleged pirates in the Indian Ocean and then the transportation of defendants, witnesses and evidence back to the naval nations, as well as translation costs and sheltering and feeding costs for the concerned parties, have been cited as the reasons why it is difficult to ensure that

pirates enjoy the normal rights of a civilian trial. These trials can also impede naval operations when essential personnel have to give evidence onshore. Moreover, there are expectations that deterrence is diminished if the trial takes place in the West, where, for the pirates, a custodial stay is preferable to remaining in their native home.⁴⁷ A review of the prosecutorial cost (Table 3) in the region vis-à-vis the West illustrates this gap.

On the other hand, piracy in the Horn of Africa may not be sufficiently alarming, otherwise governments would have marshalled the necessary legal and other solutions to counter the problem.⁴⁸ For most of the countries affected by these acts of piracy, the prosecutorial obstacles that existed in 2008 remain. It is probable that there is little financial benefit to them if they amend their laws. The probability of bias could also be creating the impression that piracy is a larger problem than it actually is, because the IMB Piracy Reporting Centre's *raison d'être* is to prompt more international resources and attention. At present, although international shipping has been adversely affected, the increased premiums and the cost of hiring security guards are manageable relative to the potential ransom payments.⁴⁹ With an estimated cost of US\$ 2 billion per annum, deploying more warships for piracy law-enforcement missions would exceed the benefits, given current levels of piracy activity.

In response to the issues mentioned above, there has been a proposal to create a private navy with mercenaries (privateers) to tackle the problem and reduce costs. Unlike the navies whose operations are mandated by, inter alia, UNCLOS, there is no legal framework that addresses how these planned private navies would be regulated. A recent UN Resolution reaffirmed that the use of mercenaries violates the UN Charter's principles.⁵⁰ Advocates for these navies claim that such a force will abide by the laws of, and be answerable to, the flag country, which grants a letter of marque. However, to date, the flag states' level of engagement in countering piracy has been negligible, and they are therefore unlikely to constitute an effective oversight body over the mercenaries' activities. If naval forces with no law-enforcement capabilities have difficulties containing the piracy scourge, how much harder would it be for the privateers?

The use of mercenaries in most security situations in Africa is controversial and their presence off the Somalia coast could prove problematic. With no law-enforcement training and the lack of adequate legal restraints, the privateers are likely to engage in acts that most navies have been constrained against committing according to international law, such as land raids and executions at sea.⁵¹ The use of armed personnel on a vessel has already proved dangerous because the pirates then shoot to kill before securing the targeted vessels

Table 3 Cost of Somalia piracy prosecutions in 2010

| Region | Prosecutions | Average cost | Total cost of prosecutions |
|------------------------------------|--------------|--------------|----------------------------|
| Regional | 483 | \$52 000 | \$25 116 000 |
| Europe | 21 | \$246 000 | \$5 166 000 |
| North America | 3 | \$335 733 | \$1 007 199 |
| Total cost of prosecutions in 2010 | | | \$31 289 199 |

Source Bowden, The economic costs of maritime piracy

for hostages. More crew members are therefore likely to be killed. In response to the increased chance of the death of crew members, counter-piracy initiatives may become more stringent and aggressive and this in turn will lead to greater human rights concerns. Whatever new anti-piracy proposals are put forward, however, they should not be sanctioned if they are likely to increase the suffering of the Somali people.

Minimising the burden of prosecuting pirates

The fact that the pirates are criminals rather than combatants poses a dilemma for the naval warships.⁵² The asymmetric confrontation means that violence should be used sparingly. Despite their expanded legal mandate, naval forces are only able to launch attacks on a suspected pirate vessel once the pirates attempt to board another vessel; their actions must therefore remain largely defensive. Neither may they pursue the pirates to shore, for fear of incurring civilian casualties.⁵³ Many members of these navies decry these human rights safeguards that impede their operations.

Navies frustrated by legal
impotence may already
be covertly shooting and
dumping the pirates at sea

The enforcement process is further complicated because particular procedural rules (such as those surrounding apprehension procedures or evidence collection) must be adhered to. This enforcement role is a very atypical one for naval officers who are not used to the exigencies of law enforcement. They are hampered by difficulties such as how to ascertain what constitutes evidence of a piratical act or an attempt of the act; the boarding of a vessel; the owning of a fishing vessel; or the possession of an AK-47. Most pirates throw their weapons overboard if they encounter naval ships, thus removing the overriding evidence of their intent to commit a piratical attack.

Inaction due to legal constraints has encouraged sentiments for a return to the old days. Taking piracy-related equipment as proof of piratical intent has been proposed in an attempt to reduce the burden of proving a piratical act and as a means of lowering costs and reducing the human rights concerns that plague such trials.⁵⁴ Equipment articles widen the scope of criminal liability

by creating *prima facie* evidence that a vessel is a pirate ship, which is the approach used against drug traffickers. This would allow a finding that a crew is guilty of piracy if they are aware of the presence of certain specified equipment on board their ship (for example, weapons, ladders, and grappling hooks) within a certain defined area of the high seas such as the Gulf of Aden.⁵⁵

Naval forces with no law-enforcement capabilities could abuse such a process. The sinking of an alleged pirate vessel by the Indian Navy vessel *Tabar*, which resulted in the death of fourteen people, emphasises this danger. Claiming self-defence, *Tabar* officials said the ship was a 'pirate mothership' in 'description and intent', and yet the dead 'pirates' were actually crew members that had been taken hostage when their Thai fishing boat, the *Ekawat Nava 5*, was hijacked.⁵⁶ The piracy equipment proposal would validate the actions of the Russian navy, in which pirates, allegedly released to the sea, died under strange circumstances.⁵⁷ Russia, as a state party to the European Convention on the Protection of Human Rights and Fundamental Freedoms by the European Court of Human Rights (ECHR), has an obligation to safeguard the lives of pirates in its custody and accord them due judicial process before sanctioning. Fishermen in Yemen already complain of increasing aggressive harassment by the naval armada, including illegal searches and seizures. The fishermen consider the naval forces to be as dangerous as the pirates themselves.⁵⁸

Such incidents also raise concerns about whether the international humanitarian laws are being adhered to. Navies frustrated by legal impotence may already be covertly shooting and dumping the pirates at sea. The proliferation of information on piracy attacks masks the fact that there is a patent lack of information on the actual number of suspected pirate casualties. The UN Secretary-General has reiterated that piracy suspects should be brought to justice and not simply either be let go or left to die.⁵⁹ Considering the cost and difficulty of prosecuting the Somali pirates, a country can put pressure on the prosecution to encourage the suspects to plead guilty so as to avoid a trial which they would likely lose if due process were followed or, once on trial, for the court to deliver a guilty verdict so as to avoid or postpone determining repatriation issues.⁶⁰ The governments are therefore only selectively offering human rights guarantees as opposed to protecting the inherent rights of the Somali pirates.

Pirates' human rights claims for asylum and detention

The prosecution challenges that face the capturing naval states begin when a simple act of capture immediately invokes a jurisdictional predicament and rights violations. For European nations, the ECHR stipulates that

captured pirates come under the protection guaranteed by the Convention as soon as they are under the effective control of a state naval vessel. Hence the states are obliged to secure for everyone within their jurisdiction the rights and freedoms defined under the Convention. The captured pirates, whether the act occurred in Somali waters or on the high seas, can thus assert human rights protection/violations under Articles 2 (right to life); 3 (prohibition of torture and other forms of inhumane and degrading treatment); 5 (right to liberty and security – relating to detention); 6 (right to a fair trial); and 7 (due judicial process before punishment).

The simple act of capture (of suspected pirates) immediately invokes ... rights violations

A suspected pirate is considered within the ‘effective control’ of an ECHR-contracting party if he is detained by a European navy. In *Medvedyev and Others v France*, the ECHR clarified that the ‘holding’ of pirates by the navies is in contravention of Article 5 as it deprives them of their liberty.⁶¹ However, it is uncertain if ECHR jurisdiction applies if the pirates are on board a skiff that is under a naval vessel’s control, with some states like Russia assuming that ECHR jurisdiction therefore does not apply. They question how such can apply if ‘control’ was never intended for the purpose of arrest but for eventual freedom.⁶² Also, the length of time it takes to bring the suspects to trial is an impediment considering the time it takes to bring them to trial due to the distance travelled. The court found that the naval forces’ failure to accord the detainees the option of contacting lawyers and relatives was a breach of human rights.⁶³ The navy had also failed to inform judicial authorities of their actions, thereby violating the French laws.

Capturing European nations are also unwilling to capture and prosecute for fear of asylum claims, either on board a state vessel or upon acquittal or release of the suspected pirates.⁶⁴ ECHR Article 3 imposes an absolute duty to both refrain from subjecting a person to inhumane treatment and protecting a person from inhumane treatment. Somali pirates could allow their deliberate capture so as to take advantage of European asylum laws.⁶⁵ Bearing in mind the legal and logistical burden that the prosecution of pirates entails, there is a higher likelihood of a prosecution failing in the Western states. Also, as a result of a state’s non-refoulement obligations, the appalling human rights record in Somalia makes it

difficult for any state to repatriate the convicts once they have served their term. The non-refoulement principle prohibits the expulsion, extradition, deportation, return or otherwise removal of any person in any manner whatsoever to a country or territory where the person would face a real risk of persecution or serious harm.⁶⁶

Meanwhile, the US treatment of alien criminals is epitomised by the treatment of the terrorist suspects in Guantanamo Bay and the extraordinary renditions.⁶⁷ The US Constitution’s Eighth Amendment prohibits cruel and degrading treatment, and this therefore necessitates the off-shoring of any rights-violating activities by state agencies. Although the Supreme Court has decided that aliens detained in Guantanamo Bay are entitled to the right of *habeas corpus* notwithstanding their designation as enemy combatants and their location on foreign soil, this right is not always honoured.⁶⁸ It is evident that the geographic scope of *habeas* rights is decided by practical and functional considerations, and the executive branch is expected to exploit this discretion by scouring the globe for locations that facilitate more extraterritorial detentions and acts of rendition where constitutional rights will prove to be more ‘impractical’.⁶⁹

Finally, under ECHR jurisprudence, the pirates could also claim that they have been subjected to unfair trials and other violations of rights in receiving countries like Kenya, Yemen or Puntland. Prohibition of torture and inhumane treatment is an absolute right that overrides concerns of public policy and national security even in cases involving suspects accused of terrorist acts.⁷⁰ Piracy suspects in Kenya have complained of both ill treatment by prison authorities and the other prisoners, and the lack of food and medical attention.⁷¹ Also, countries at the forefront of advocating for an international legal response to piracy are not prosecuting pirates themselves, despite the universality of the piracy crime. Rather, these nations are eager to use universal jurisdiction to prosecute other crimes that offer more prosecutorial challenges than piracy and are more politicised. Pirates convicted in regional courts could appeal based on the national laws of the original capturing state and thereby invoke human rights violations as a basis to set aside their conviction. The credibility of the nations patrolling the waters off Somalia lies in their ability to both respect the rights of the pirates and ensure that they prosecute the suspects captured.

Piracy tribunal – regional or international?

The aforementioned human rights and costs concerns are behind the call for an alternative judicial forum in the region. Several initiatives have been set in motion. In the face of such inadequate piracy prosecution, the Security Council adopted Resolution 1976 (2011) to urgently consider the establishment of specialised Somali courts

that can try suspected pirates in both Somalia and the region, and this would include an extraterritorial Somali specialised counter-piracy court.⁷² The Secretary-General is to report on the modalities of such prosecution mechanisms in July 2011.⁷³

The option of an international tribunal has been sponsored by Russia.⁷⁴ The advantage of such a court would be that it could prove appropriate for prosecuting piracy leaders who have so far evaded capture, though the process of setting up the tribunal would take time to come to fruition. It could also prove costly and judicially cumbersome.⁷⁵ The perennial question remains, however: where would these convicted pirates serve their term? According to the UN, one option would be to repatriate the convicted pirates to serve jail terms in Somalia. Puntland expressed its willingness to receive the convicted pirates but Somaliland is adamant that, even after its prisons have been improved to bring them up to the standards acceptable for repatriating countries, it will only take in foreign-convicted Somalilanders.⁷⁶

The Djibouti Code of Conduct to Combat Acts of Piracy was intended to facilitate the conclusion of a treaty that would prevent and suppress piracy and armed robbery in the western Indian Ocean and the Gulf of Aden.⁷⁷ The states are to undertake a review of their legislation with a view to ensuring that they have national laws that criminalise piratical acts. The states are also to conduct shared operations by nominating shipriders for patrols on the counter-piracy naval vessels. Few regional states have conducted piracy trials and they are slow to commit in this regard. Besides, the Code has not been adopted by either the major shipping nations or the major crew-providing nations such as the Philippines.⁷⁸

Regional human rights standards are deemed ... subject to less scrutiny

Meanwhile, the pressure for regional prosecution is increasing. One of the AU initiatives to fight maritime piracy, the Durban Resolution, contains provisions for member states to enact national legislation relating to maritime security.⁷⁹ Another initiative, the Eastern and Southern Africa – Indian Ocean's (ESA-IO) Regional Strategy and Regional Plan of Action for Maritime Security, encourages regional nations to undertake the prosecution of pirates arrested in the region.⁸⁰ Mauritius, South Africa, Tanzania, the Comoros and Maldives, and Mozambique have been requested to undertake such

prosecutions but they remain reluctant to do so. This lack of commitment is partly informed by the Kenyan experience, in which promised resources were not delivered.

As the naval patrols continue their counter-piracy efforts with little impact, the lack of co-operation among the navies and the nations is further evidenced by the existence of several agreements to prosecute the pirates having been made with a single country such as the Kenya piracy agreements rather than a single agreement for all the forces.

Bilateral agreements and diplomatic assurances

The abovementioned concerns make the regional trials an attractive option. There is a belief that if trials are conducted in the region it will give them greater legitimacy and hence act as a greater deterrent than they would if conducted far from Somalia. The pressure for regional trials inevitably leads to the conclusion that regional human rights standards are deemed both less rigorous and subject to less scrutiny. Such a belief is upheld with the Kenya–UK memorandum, which was formulated because the pirates do not ‘relish’ the prospect of a Kenyan jail sentence, preferring instead a British prison.⁸¹

In 2006, the US was the first nation to render a group of pirates to Kenya and in May 2009, after the Exchange of Letters, the EU followed suit.⁸² However, despite this memorandum, the EU countries are under no duty to render suspects to Kenya, which creates room for forum shopping and legal uncertainty. Other regional states like Yemen and Djibouti are either considered unstable or reluctant to prosecute.⁸³ Honouring the principle of non-refoulement, most countries do not send the captured pirates to Somalia because of the lack of a functioning central government and the probability that they will be inhumanely treated there.

The Kenya–EU Piracy Memorandum provides for the condition and modalities necessary for the transfer of piracy suspects and the rights of transferees detained or seized by the EU-led Naval Force (EUNAVFOR). In addition to outlining the rights of the suspects, the memorandum is explicit in that nothing in it is intended to derogate from any rights that a transferred person may have under applicable domestic or international law. A similar agreement and conditionality was procured by the UK.⁸⁴ However, although the Kenyan government gave the necessary assurances for the agreements to be concluded, the actual practice within the country is a far cry from the assurances delivered. France, relying on similar assurances that the pirates will not suffer inhumane treatment and torture, sends suspected pirates to Puntland.

ECHR jurisprudence is explicit that, to satisfy a state's positive obligation of non-refoulement, it is not sufficient for states simply to obtain diplomatic assurances that an applicant will not be subjected to any treatment contrary to the Convention.⁸⁵ Furthermore, for pirates rendered by the US, the executive branch does not have the sole authority to determine the sufficiency and reliability of the receiving government's assurances that the suspected pirates will not face torture before rendering. Instead, such assurances and the reasons for finding them sufficient are subject to examination in an administrative proceeding and, ultimately, a judicial review.⁸⁶ The EU has also announced that it has no objection to suspected pirate prisoners who are serving their jail term in Kenya being sent back to Somalia, though it does acknowledge that the quality of the judicial system and detention centres in Somalia have to be considerably improved if the transfer mechanism is to be effective. The memorandum also creates a dilemma in that Kenya guarantees that no life sentence will be imposed on convicted pirates, which implies possible interference with the judicial process.⁸⁷

These judicial rulings provide grounds and remedy for suspected pirates who can claim that their rights have been violated by executive decisions. That there is a high risk that the suspected pirates' rights will be violated is the reality in some of the regional courts, however.⁸⁸ For example, the trial and imprisonment conditions in Kenya are appalling and in some cases even fatal, which begs the question of which takes precedence and is most non-derogable: the right to a fair trial or the right to life? To circumvent any questionable legality of detaining and prosecuting pirates, the EU states have decided that it is simply easier to pay Kenya and transfer the pirates into Kenyan custody for prosecution; in doing so they have chosen to ignore human rights standards when it is convenient for them to do so.

KENYA PIRACY TRIALS AND HUMAN RIGHTS VIOLATIONS

Somali pirates are being rendered to a jurisdiction that, as it faces a crisis of confidence, offers no better protection to its citizens. The accused pirates have repeatedly voiced their lack of confidence in the Kenyan judicial process and believe that they are being unfairly persecuted.⁸⁹ The country lacks a judicial infrastructure that is able to sustain the prosecution of pirates on an internationally acceptable standard.⁹⁰ The independence, professionalism and credibility of the judiciary, the police and the office of the Attorney-General (AG) have been called into serious question following their perceived complicity in repression and other acts of human rights violations, as concluded by a UN Special Rapporteur.⁹¹

His findings corroborated those of the government's own Waki Commission, which found state agencies culpable for extrajudicial killings.⁹²

The International Criminal Court's decision to prosecute the perpetrators of the 2007 post-election violence (PEV) is a clear indication of the failure of the judicial system and the absence of political will to provide justice. The same can be evidenced from the manner in which the key perpetrators of mega-scandals have been exonerated.⁹³ Corruption is rife in these political and judicial institutions, and this casts further doubt upon the efficiency of their functioning.⁹⁴ The proposed judicial reforms, which are intended to strengthen the independence of the judiciary and security of tenure, as well as a new system of appointing judges in the new Constitution of Kenya, vindicate these reports.⁹⁵ Impunity is undermining respect for the rule of law and is eroding the fundamental freedoms. Human rights remain illusory for many citizens. With the issue of the credibility of the judicial and criminal justice system in question, is it possible to give the piracy suspects a fair trial?

National piracy legal framework

The competency of the Kenyan trials has been and should be challenged on grounds of illegality and human rights violations. The protection of fundamental rights and freedoms and the circumstances for derogations are stipulated in Chapter Four of the Constitution of Kenya and the country is a signatory to all the major human rights conventions. However, it is a fact that this does not 'presuppose [...] a common basis of respect for fundamental rights', irrespective of the guarantees in the Kenya-EU Piracy memorandum.⁹⁶ Thus claims of rights violations formed grounds for one pirate to sue the German government for inhumane treatment following his rendering to Kenyan authorities.⁹⁷ The Kenya-EU piracy memorandum had not addressed inherent weaknesses within the Kenyan system, such as the lack of appropriate piracy law and capacity and/or knowledge of maritime law.

In early 2010, the Kenyan government temporarily reneged on its commitment to prosecute suspected pirates, citing a burdened system created by the failure of the international community to live up to its end of the agreement.⁹⁸ Kenya's attitude negated its claim that it could, through fulfilling its obligations, genuinely remedy an international problem.⁹⁹

At present, the Kenyan government is no longer receiving suspected pirates for prosecution from naval forces, and, with the expiration of the piracy memorandum in September 2010, this could well expose the country to serious security challenges.¹⁰⁰ This situation

does not, however, halt the trials of any suspects already rendered. The piracy memoranda were never discussed at cabinet level which, though not a specific requirement, would have been useful as the security implications necessitated wider consultations. Only now has there been the realisation that the country has no law for prosecuting pirates and the legal loopholes have only been discovered with the operationalisation of the laws. That Kenya has not acquitted itself adequately with respect to the prosecutions is evident from the conflicting decisions taken by courts of concurrent jurisdiction, which has further emphasised the impediments to Kenya playing an effective role.

Inadequate domestic law

The piracy defence lawyers have argued that Kenya has no legal jurisdiction to prosecute the cases because the key maritime conventions (SUA and UNCLOS) have not been domesticated in the country, even though the country was a signatory.¹⁰¹ The substantive maritime law, the Merchant Shipping Act (1967), did not define or refer to piracy. But the Penal Code did define piracy *jure gentium* under Section 69 (now repealed).¹⁰² Kenya, having been promised financial assistance in return for the trials, in conducting the trials with deficient laws was taking a political rather than a legal stand. As a consequence, there has been a contest between balancing international human rights and international criminal justice demands in Kenya that has resulted in various illegalities during the piracy trials.¹⁰³ This made the outcomes of the piracy trials a foregone conclusion. Until October 2010, all the court rulings favoured the government.

Suspected pirates rendered before September 2009 were prosecuted under a Penal Code which prescribed a life penalty for the crime of piracy *jure gentium*. UNCLOS provisions were used to frame charges and conduct the trials, and this proved to be a difficult and inconsistent task.¹⁰⁴ This legal lacuna has led to inadequate evidence having been presented in the concluded piracy trials, which resulted in inconsistencies and the violation of the pirates' rights.

In the Seychelles, as a result of the lack of clear laws the first pirates to be tried were charged according to the terrorism laws. The judge, in finding against this count, determined that the pirates' actions were committed for private ends rather than with the objective of influencing the Seychellois government, an essential ingredient for a terrorist act.¹⁰⁵ Meanwhile, in the US, even as it renders suspects to Kenya, the inadequacy of piracy law has resulted in conflicting interpretations of what constitutes piracy. This has therefore set the stage for a protracted legal battle.¹⁰⁶ Tanzania, rather than have a miscarriage of justice resulting from insufficient legal grounds, released thirteen pirates who had been arrested in Tanzanian

waters.¹⁰⁷ For these countries, like Kenya, there is little or no judicial precedent to expedite the decisions.

The Merchant Shipping Act 2009, which domesticates the UNCLOS and SUA provisions, was enacted to resolve the issue of an appropriate legal framework while expanding the country's extraterritorial jurisdiction over piratical crime.¹⁰⁸ Because a person cannot be charged for crimes retroactively, the Act only applies to pirates charged after September 2009, although at that time eleven piracy trials had already commenced before the courts. Moreover, the court noted that the repeal of Section 69 by the Merchant Act did not safeguard ongoing trials with express or transitional provisions but created a new law – piracy by statute rather than piracy *jure gentium*.¹⁰⁹ The Convention allows any signatory state with personal jurisdiction over a defendant to either prosecute them or transfer them to another Convention state for prosecution. Hence the enactment of the new piracy law has failed to settle the piracy jurisdiction dispute. The application of the deficient piracy law has resulted in appeals on the grounds that, under the Penal Code, Kenya has no jurisdiction to prosecute piratical acts committed on the high seas and that under the Merchant Shipping Act 2009, piracy trials can only be conducted in the High Court rather than the magistrates' court.

Jurisdictional questions: extraterritoriality and admiralty matters

In Hassan M. Ahmed & 9 Others, the accused sought to set aside their conviction on grounds that the courts lacked jurisdiction; erred in the choice of law applied; and erred in the evaluation of evidence.¹¹⁰ Justice Azangalala concluded that 'piracy is a tryable and punishable offence in Kenya and there are no [jurisdictional] limitations under Section 69 of the Penal Code'.¹¹¹ Playing to the gallery, the judge noted that Kenya's failure to domesticate UNCLOS provisions did not negate its application because Kenya, as a member of the civilised world, was still bound to 'apply international norms and instruments' and was not expected to act in contradiction to the expectations of member states of the UN.¹¹² With the legislation of the Merchant Shipping Act 2009 addressing this defect, the Act had gone beyond any necessary requirements and had covered its bases as far as piracy prosecutions were concerned. The Act had granted the country extraterritorial jurisdiction to prosecute against acts of piracy, thereby surpassing Kenya's obligation under UNCLOS and the SUA Convention.

However, operating in a different political climate, Justice Ibrahim ruled in *Re Mohamud Muhamed Hashi & 8 Others* that the law granted admiralty jurisdiction only to the High Court rather than the magistrates' court.¹¹³ The defence lawyer had applied for a stay of proceedings in the lower courts because he claimed that under Section 5 of the Penal Code the courts were acting

without jurisdiction, demonstrated in evidence and fact, based on the fact that there was no law conferring to the courts any jurisdiction over the high seas. Thus the court ordered the unconditional release of nine suspected pirates accused of attacking *MV Courier* for lack of jurisdiction, under Section 69 of the Penal Code.¹¹⁴

This ruling has been appealed on grounds that the new Constitution, under Sections 2 and 50, gives retrospective effect to the flawed piracy provisions, thereby granting the courts jurisdiction to adjudicate in piracy offences.¹¹⁵ Further, that the judge erred in law in issuing orders that were never sought for or which he had no power to grant.¹¹⁶ The defence will use the same Constitution under Section 25 (right to a fair trial), alongside Section 50, to insist that the retroactive interpretation of the constitutional provisions would violate the fundamental rights of the accused pirates, and that these rights are sacrosanct.

Presumption of the pirates' guilt has been the norm

The Court of Appeal has subsequently issued a stay of execution of Judge Ibrahim's orders, pending the determination of the appeal.¹¹⁷ The trials in the lower courts have ground to a halt, pending the appellate outcome, to be heard in July 2011, which will determine the fate of more than 80 suspects either on trial or already convicted. Although the judge in *Re Mohamud Muhamed Hashi & 8 Others* might have been selective about which constitutional provisions were fundamental, the principle of his decision cannot be gainsaid. The Kenyan courts may be ready to champion the rights of persons even when they stand to gain very little in political capital. The decision suggests that Kenya may at last be willing to respect the pirates' fundamental rights and redress any legal breaches, if any have occurred. This development, alongside the fact that the pirates themselves will participate in the review process, may increase the pirates' confidence in the system.

Meanwhile, no distinction is made between admiralty matters and criminal matters when the piracy cases are on trial.¹¹⁸ Maritime matters are handled by the High Court, which has original jurisdiction with respect to admiralty matters.¹¹⁹ The practice is to refer to English law for guidance because Kenya has no judicial experience upon which to draw. This dispute was not clarified in the ruling when it arose in the *R. Hassan M. Ahmed & 9 Others v. Republic*.¹²⁰ The court concluded that a first-class magistrates' court had jurisdiction, without

providing legal clarity on this conclusion. The matter of whether jurisdiction over piracy issues is vested in the High Court or the magistrates' court under the Merchant Shipping Act 2009 was raised again and the application has been referred to the High Court. The ruling will be delivered in May 2011.¹²¹ Nonetheless, the issue of whether piracy matters should be strictly an admiralty issue, thus only adjudged at the High Court, might ease the claims of rights violations on grounds of the competency of the courts. But the other trial challenges will likely remain the same for the pirates.

Denial of due process

Justice must not only be done but it must be seen to be done. The piracy trials have been conducted in very challenging circumstances that have proved to be to the detriment of the pirates. The suspected pirates, who come into a country with no legal aid system, discover upon their arrest and arraignment that there is no system to facilitate their defence, that is, no legal representation, witness logistics and lawful evidence presentation.¹²² There is also the obvious delay between being arrested and being charged in court; from the moment of capture, it takes approximately six to thirty days to be arraigned in court. There is a high probability that pirates do not receive any legal advice during this period and are not allowed any communication with their families.¹²³ In light of this process, the courts have been guilty of disregarding fundamental rights by expediting the trials once they are underway. Presumption of the pirates' guilt has been the norm, and this has meant that proving their innocence has been especially difficult for the accused, who are detained under such constrained circumstances. Universality of human rights means that they are to be enjoyed by all, without discrimination.

However, piracy suspects are nevertheless fortunate when compared with accused Kenyans, because they at least enjoy some legal representation, no matter that it is often incompetent. Because the country has no legal aid scheme, the Attorney-General has insisted that Kenya may only try suspects if they have legal representation.¹²⁴ However, some of the suspects have been denied advocates of their choice even with the dearth of maritime legal expertise in the country.¹²⁵ Most of the experienced criminal lawyers in Kenya are not on the roster of UN-approved lawyers that are considered suitable defence for suspected pirates, and many are based in Nairobi even though the trials are being conducted in Mombasa.¹²⁶ The pirates have expressed their frustration and feelings of helplessness at being encumbered with advocates they have not willingly selected and maintain that they have little faith in their advocates' competence.¹²⁷ In one case, the alleged pirates fired their advocate; he had finally appeared only after six previous no-shows and the

alleged pirates had met with him a mere five times over a 20-month period.¹²⁸ This decision meant that proceedings had to be protracted as they waited for the UN to assign another lawyer to them. Their own choices of an advocate had been repeatedly rejected.

Justice Ibrahim rightly concluded that certain rights of the accused had been violated

The law requires all competent witnesses to be present during the trial because only primary evidence is admissible.¹²⁹ But the court has little power to compel the attendance of foreign-based witnesses. Therefore, valuable evidence necessary for conducting a fair trial is often unavailable; several trials have been delayed and one dismissed.¹³⁰ Foreign-based captains and crew, and some naval officers, refuse to attend court to give testimonies, citing security and safety concerns. On the other hand, in their efforts to prove their innocence, the alleged pirates have been unable, or are in no position to summon witnesses to plead their cases; generally, no assistance has been proffered from any quarter.¹³¹

Evidence collection has been haphazard and, in some cases, the naval officials have thrown the pirates' weapons overboard after their capture; this means that key evidence is often missing.¹³² The Attorney-General has developed standard operating procedures that must be adhered to by the naval warships in an attempt to streamline evidence collection, an area where procedure was sorely lacking. In November 2010, a court ordered the release of seventeen piracy suspects that had been detained at sea by the US Navy because the Navy had failed to provide the necessary evidence required to convict the suspects.¹³³

The issue of *locus quo* also presents a problem. The piracy defence teams have repeatedly made applications to visit the scene of the crime, with the purpose of enabling the court to ascertain certain facts relating to the offence, but this has been deemed impossible because the shiprider agreements to facilitate their access to the warships have never been concluded.¹³⁴ Considering that few officers of the court have the requisite maritime knowledge and law, without such agreements having been concluded the court is unable to contextualise the facts that are in dispute before it.

The records of the trials are inadequate and far below the UN's Standard Minimum Rules for the Treatment of Prisoners.¹³⁵ There has been a common assumption

that all the captured pirates are Somalis but this is an assumption that has been neither refuted nor confirmed. Invariably, the courts have not conclusively ascertained the accused person's particulars: their names, nationality, age or occupation, even in instances where the suspects claim that they are Yemeni fishermen, Somali migrants or human traffickers.¹³⁶ In the Muse trial, the accused was charged, as an adult, with piracy despite the varying ages that his family claimed he was (fifteen to nineteen years old) and the fact that there was no record available that could confirm his age.¹³⁷ It was simply more convenient for the court to treat him as an adult, although the absence of accurate records makes the trial incomplete because such records assist the court in determining an appropriate sentence. This documentation issue has already proved problematic in the event of acquittals or dismissals as there is often no record that can be used to decide where the convict should be repatriated.

Most of the alleged pirates do not speak, read or write the English language, which proves an obstacle for the trial process. Multiple translations for witnesses' and the accused's testimonies are common, for example Swedish, German, English and Somali, and this multilingualism slows down the trial and means that the recording of statements is susceptible to mistakes. For the suspects themselves, this communication problem is serious because they are unable to communicate in their own language or understand the evidence that is being brought against them.

Despite all these challenges, the piracy trials have been concluded with amazing speed in comparison to other Kenyan criminal cases. The manner in which these piracy trials have been conducted has highlighted the legal inequality that exists within the country, where laws are meant to apply equally to all, irrespective of nationality.¹³⁸ The trials conducted under the circumstances described above are evidently lacking legitimacy and the observance of basic standards required for a trial to be adjudged fair and impartial. In a number of the cases, due judicial process has been discarded in favour of political expediency, engendering the notion that human rights are relative: there are different standards for different parties. Justice Ibrahim rightly concluded that under the new Constitution, certain rights of the accused had been violated and the accused were therefore in need of protection. The weakness of the due process in the piracy trials is aggravated by the systemic challenges of the judicial and security sectors.

A dysfunctional criminal justice system

The Western nations have increased pressure for constitutional, judicial and security sector reforms in Kenya even as they return the pirates to Kenya to be prosecuted;

the AG describes this as an ‘inherent contradiction’.¹³⁹ The *Saadi v. Italy* ruling provides a basis on which to re-examine the agreement between Kenya and the European countries. The ratification of numerous international instruments for the protection of fundamental rights and freedoms; the existence of human rights domestic laws; and the signing of bilateral agreements such as the piracy agreements are not, in reality, sufficient to ensure alleged pirates adequate protection against the risk of ill-treatment (Article 3). Reliable sources have reported practices that have either been resorted to or tolerated by the authorities that are manifestly contrary to the principles of the Convention.¹⁴⁰ Legitimacy of the trials is also dependent on the confidence of the litigants in the justice system.

Lack of safeguards against inhumane treatment and torture

Although Kenya may have given assurances to its international partners that the rendered prisoners’ rights will be respected, the reality belies that fact. The first Somali piracy suspects landed in a prison system already under strain. The dire conditions of detention in Kenyan prisons, particularly the overcrowding, lack of adequate health services and high levels of violence, create a very harsh environment. There is a backlog of cases waiting to be tried, which results in the prolonged confinement of the accused. The country’s 90 prisons, designed to hold 16 000 prisoners, hold approximately 53 000 prisoners.¹⁴¹ The risk of HIV infection is high and an estimated 46 prisoners die every month as a result of overcrowding, unhygienic conditions, and poor health care.¹⁴² Most minors are incarcerated together with adults; rape of inmates by fellow inmates and prison officials is common; and meals are not only inadequate but half-rations are sometimes given as punishment.¹⁴³

Several human rights monitors have highlighted the fact that Kenyan security agencies, including the prison services and the police, condone torture and the ill treatment of suspects.¹⁴⁴ Prisoners and suspects reportedly die while in police custody during interrogations or as a result of punishment or torture, and fear of this is repeatedly expressed by piracy suspects who are awaiting trial.¹⁴⁵ The ECHR’s extensive reliance on such human rights reports can be used to rebut the rendering nations’ claims (that Kenya respects human rights) in the event that piracy suspects’ rights are violated in Kenya. Acts of inhumane treatment and torture are rarely investigated, partly because Kenya has not domesticated the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. With no definition of what constitutes torture, prosecuting the crime is almost impossible.¹⁴⁶ The burden of proof lies

on the persons alleging torture, making it easier for the perpetrators to escape blame.

However, the situation appears to have improved recently. Piracy suspects who were interviewed admitted that accommodation and food had improved since their arrival in 2009. The presence of piracy suspects and the international attention attached to them has resulted, therefore, in some positive changes in prison conditions, but only at Shimo La Tewa prison, where they are remanded.¹⁴⁷ The Kenya–EU piracy memorandum requires that Kenya notify the European Naval Force Somalia (EU-NAVFOR) of any deterioration in a suspect’s physical condition and of any allegations of improper treatment. Despite this memorandum, however, it is highly unlikely that the Kenyan government will admit to any such failings on its part.

Fair trial before a competent and impartial tribunal

Kenya has no effective measures in place to ensure that any person who is detained is afforded fundamental legal safeguards during incarceration, including the right to a lawyer. Though the Constitution provides that one is innocent until proven guilty, the police often arbitrarily arrest and imprison people. Relatives or lawyers do not always have access to prisoners, which is contrary to the obligation to avoid ‘incommunicado detention’.¹⁴⁸ Suspected pirates have failed in their attempts to have the State provide them with communication facilities to contact their relatives and arrange visitations. The concessions granted so far have been based on religious reasons.¹⁴⁹ Contrary to the Constitution, the fundamental rights mentioned above have been denied on grounds of ‘security’.¹⁵⁰

Piracy trials are conducted in the magistrates’ courts. Because the police are responsible for prosecuting crimes in the magistrates’ court, the suspects’ plight is exacerbated by the fact that their investigators are also their prosecutors.¹⁵¹ Added to this, the judicial case backlog means that remand imprisonment is longer than necessary, which is a life-threatening issue for Kenya’s prisoners.¹⁵² The creation of a special court in Shimo La Tewa prison in an attempt to facilitate the conclusion of piracy trials has not been well received, though this is mainly because the court has been set up in a restricted zone even though the country has constitutional guarantees that a trial must be public. Reconciling the two is proving difficult. The court is also considered to have been created to protect Western witnesses from perceived security dangers prevalent in the Kenyan judiciary on Mombasa Island. In addition, the executive control over the judiciary is pervasive and is often abused to serve executive ends.¹⁵³ The lack of confidence in the judiciary as a competent and independent body was demonstrated by the refusal of the opposition to challenge in the courts the 2007 presidential election results.

Renditions and forced disappearances

Even once piracy suspects have been acquitted, or been convicted and served their term, the challenge as to what should then be done with them remains. This has been brought into sharp focus recently. In the first test case in the country, after the courts dismissed a case against seventeen suspected pirates, the accused were left in legal limbo. No country wanted to take responsibility for them: neither the US (whose navy had originally captured them) nor the EU, which is strident on human rights protection rhetoric.¹⁵⁴ Nonetheless, given a choice between Kenya and Somalia, most of those who have been imprisoned preferred the latter.¹⁵⁵ However, it has been demonstrated that, in practice, the government can disregard this obligation because the domestic protection laws are weak. They fail to guarantee the absolute principle of non-refoulement, thus exposing persons to the risk of torture in other countries. The Refugee Act (2006) grants an exception on the grounds of national security and public order, while the Immigration Act makes no reference to the principle; neither does the Constitution.¹⁵⁶

With cash from the ever-increasing ransoms, piracy is potentially fuelling other security challenges in the region

Despite the principle of non-refoulement, Kenya has a long record of renditioning suspected criminals, with several cases of renditions and forced disappearances associated with extrajudicial killings. Illegal renditions have been institutionalised in the country, as has been evidenced in the wake of renditioning of Kenyan terror suspects to Uganda after the Kampala bombings.¹⁵⁷ Kenyans and foreigners have been unlawfully transferred to Somalia, Uganda, Ethiopia and Guantanamo Bay without the benefit of due process or any other competent review process.¹⁵⁸ Hence, in certain circumstances, diplomatic assurances have been considered valid only when they have been determined to be so judicially.¹⁵⁹ Thus the rendering states are not absolved from their positive obligation to protect the alleged pirates' lives from inhumane risks and treatment. The Kenyan courts have only recently reiterated the country's constitutional guarantee that a person cannot be deprived of freedom arbitrarily or without just cause; there can be no detention without trial; and a person has the right to freedom from ill treatment or punishment that is cruel, inhumane or degrading.¹⁶⁰

Security implications

Finally, Kenya's dubious political and security involvement in Somalia's affairs calls into question the continuation of the piracy trials. There are too many strings attached that preclude an independent judicial determination of the suspected Somali pirates. This has brought to the fore the debate on the security implications of the piracy trials. Kenya already bears the burden of Somali refugees; the prosecutions are an unwelcome addition to the challenges it faces in terms of having Somalia as a neighbour. Kenya's Parliament requested the revocation of the piracy memoranda due to security implications and Muslim leaders there have insisted that Kenya not be utilised as a pirate dumping ground.¹⁶¹ Even as the Kenyan public does not fully understand why the captured pirates have to be tried in Kenya as opposed to the arresting states, the government's role in rescuing the Kenyan hostages has been less than stellar.¹⁶² The continuation of piracy trials could exacerbate ethnic and religious tensions, due to the perception that Somali security problems are being imported into the country, as was witnessed by the events in March 2010.¹⁶³

The UN has also sharply criticised the Kenyan government's role in Somalia. Kenyan nationals account for half of all foreign fighters in Al-Shabaab.¹⁶⁴ The country is also emerging as a major source of support for Somali armed opposition groups who are Al Shabaab ideologues, activists and fundraisers and who function openly among Somali diaspora communities, where their influence has reached a disturbing magnitude. Kenya is also violating the UN arms embargo to Somalia by providing military support to the Transitional Federal Government (TFG) with the training of security personnel. Kenya has also tried to take advantage of its neighbour's fragility with attempts to siphon off its wealth.¹⁶⁵ Further, numerous economic factors are involved – piracy ransom money is allegedly being laundered in Kenya; international organisations, foreign embassies and non-governmental organisations (NGOs) within Somali operate from Kenya; and many naval warships that refuel along the Kenyan coast provide another revenue stream to the country.¹⁶⁶

WAY FORWARD

[There is] a dual threat which terrorism poses for human rights: a direct threat posed by acts of terrorism and an indirect threat because anti-terror measures themselves risk violating human rights [...] There is nothing more counterproductive than to fight fire with fire, to give terrorists the perfect pretext for martyrdom and for accusing democracies of using double standards.¹⁶⁷

From the preceding discussion it is evident that defining the counter-piracy initiatives with the use of rhetoric that is similar to that which is used in the war on terrorism has shaped the responses to acts of piracy, and contributed to the adoption of measures that violate the pirates' human rights. This lack of respect for the rule of law could portend further incursions into fundamental human rights and the inevitable systematic abuse of those rights.¹⁶⁸ The fight against terrorism should rather be perceived as a cautionary tale, in that the danger of minor derogations is that they soon become the new norm. The potential for abuse and the deprivation of rights far outweighs the advantages of curbing piratical acts, despite any desire that may exist to avoid limiting piracy to discussions of human rights paradigms.

The challenge must therefore be to strike a balance between human rights protection and issues of security. The protection of human rights is fundamental to the issues that undermine security and peace in the region. Even for Somali pirates who have emerged from a conflict environment, international laws provide for minimum standards of protection. Thus it is paramount that the prosecution and treatment of the pirates reflect the same. Considering their background and condition, this 'vulnerable group' requires greater protection and yet they have received the least. Denial of pirates' rights, in terms of livelihood options and questionable counter-piracy judicial consequences, is counterproductive to any peace efforts and the following should therefore be considered:

- ***The focus of Kenyan piracy prosecution should shift to those who sponsor piracy in Kenya.*** The abdication of any responsibility concerning the pirates' human rights has been evident from the choices that Kenya has made as regards which piracy suspects are either protected or prosecuted – the leaders on shore or the pirates at sea. According to the recent UN Resolution 1766 (2011), it is time Kenya took responsibility for the former (those on shore) who reportedly conduct their operations from within the country.¹⁶⁹ This would prove far more effective in terms of interrupting the flow of money that facilitates the piracy operations and ransom negotiations, as well as help to stem the laundering of ransom money in the country.¹⁷⁰ Since the individuals involved in this money laundering are domiciled in Kenya, jurisdiction will not be contested and other laws such as the Proceeds of Crime and Anti-Money Laundering Act (2010) and the Prevention of Organised Crime Act (2010) would apply.¹⁷¹ The US has already begun to focus more on pirate leaders, with its 'more energetic and comprehensive' approach to piracy.¹⁷² In addition, to address regional maritime security challenges, Kenya and other regional countries should prioritise enhancing their maritime security

management capacity in tandem with their judicial capacity. Having the capacity to capture the pirates themselves would eliminate legal obstacles of jurisdiction or procedural deficiencies.

- ***The international naval force should stop rendering piracy suspects to Kenya and the region generally.*** Regional countries have lower human rights standards. Thus, by prosecuting without the stronger protections of the ECHR or the US constitution, both the pirates themselves and the counter-piracy efforts have been short-changed. The insufficient legal basis, systemic weaknesses and judicial deference evident in the piracy trials in Kenya confirm the lack of impartiality on the part of the judiciary (although changes are expected), which obviously diminishes its capacity to address the violations of rights. The convictions attained thus far have not been procedurally fair and their legality is still being contested in the courts. Regional tribunals should be discontinued as they sustain an illusion that the piracy scourge is being addressed. These 'closer-to-home-therefore-more-deterrent' determinations have done little to stem the escalation of piracy off the Horn of Africa. If they are to have any international credibility and justify their expensive endeavours abroad, the naval forces should match their zeal for capturing pirates with effective prosecutions at home. In light of the fact that the ad hoc bilateral piracy arrangements have proven so inadequate, Russia's demand for an international tribunal or a UN-mandated regional tribunal has great merit. The UN's proposal for the establishment of a regional or international tribunal to prosecute pirates should address the clear weaknesses of the present agreements, most particularly the issue of repatriation from the regional courts.
- ***The suspected or convicted pirates could assert their rights through international legal instruments at their disposal.*** The African Charter on Human and Peoples' Rights (ACHPR) – the Banjul Charter – prohibits all forms of exploitation and degradation of man, particularly torture, cruel, inhumane or degrading punishment and treatment.¹⁷³ It confirms that every individual shall be equal before the law and is entitled to equal protection of the law and that every individual shall have the right to have his or her cause heard. Rights violations could be referred to the African Court of Human and Peoples' Rights either individually or communally.¹⁷⁴ As the ECHR's jurisprudence is binding on the European naval forces, this provides the pirates with another avenue for redress.
- ***Strengthen Somalia's judicial and security institutions.*** To avoid claims of human rights violations, prosecutorial costs, asylum seeking and other forms of security threats, a Somali trial in Somali courts is the optimal solution. The current legal infrastructure in

the country is such that it provides the pirates with a safe refuge on shore, for example, if they are involved in piracy enterprises from within the country and are not actually on the high seas. Without an effective government and domestic rule of law, piracy, which should rightly be dealt with domestically, has become an international crisis. Regional leaders have called for the millions that are being spent by naval forces to be redirected towards helping the country become a functioning state, through the strengthening of internal institutions and through greater support for AMISOM.¹⁷⁵ This should include the strengthening of the country's investigative and legislative capabilities for criminalising and prosecuting piracy offences and ensuring that prison facilities meet international standards for humane and secure imprisonment. This is an ongoing initiative in Somaliland and Puntland. Effective piracy management strategies should therefore form part and parcel of the larger Somalia security governance and support systems.

- ***Finally, for any sustainable success against piracy in the region, there is an urgent need to address the other underlying factors that have given rise to the escalation of the crime.*** The states and organisations that combat piracy are urged to adapt their response to, or support for, the fight against piracy according to local realities, local requests and local demands. It is clear that piracy is simply one facet of the larger conflict consequences of the Somali situation.¹⁷⁶ This means that the inland Somali piracy response should address the urgent humanitarian crisis there, as well as the security, political and development challenges that the country faces if there is to be any hope of stemming the piracy tide. Economic and social opportunities should be provided for the masses of desperate young men in an effort to deter them from joining the piracy force. The ESA-IO's Regional Strategy has a specific Plan of Action for Inland Somalia that is to be implemented by the Intergovernmental Authority on Development (IGAD). This plan involves: (1) inter-Somali dialogue; (2) the reconstruction of key Somali institutions; and (3) dialogue with international communities and partners as well as the mobilization of resources with the aim of fostering home-grown solutions and thereby addressing the root causes of piracy.¹⁷⁷

Promoting the observance of human rights for all, including the pirates, might prove to be the only effective remedy for a people for whom the cost of non-justice is increasing daily.

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NOTES

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- 50 Resolution A/HRC/15/L.31.
- 51 Blackwater Worldwide, a security company, proposed to change the rules of engagement by not taking any pirates into custody but to rather 'use lethal force against pirates if necessary'. Mark Mazzetti, Blackwater aimed to hunt pirates.
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- 67 See generally Arthur Chaskalson, The widening gyre: counter-terrorism, human rights and the rule of law, *Cambridge Law Journal* 67(1) (March 2008), 69–91, <http://journals.cambridge.org> (accessed 13 May 2010).
- 68 *Boumediene v. Bush*, 128, S.Ct 2229 (12 June 2008). See also Supreme Court affirms habeas corpus for Guantánamo detainees, *The American Journal of International Law* 102 (4) (October 2008), 863–866. This decision received a setback recently when an appellate court all but nullified it. See A right

- without a remedy, *New York Times*, 28 February 2011, <http://www.nytimes.com/> (accessed 29 February 2011).
- 69 Raustiala, Off-shoring the war on terror, p. 221.
 - 70 In the Grand Chamber of the ECHR. *Saadi v. Italy*, Application no. 37201/06, judgment of the Grand Chamber, 28 February 2008. In this seminal human rights case, Italy and the UK (as a third-party intervener) claimed that, under Article 3 of the ECHR, the climate of international terrorism called into question the appropriateness of the ECHR's existing jurisprudence on a state's non-refoulement obligation.
 - 71 James Thuo Gathii, Kenya's piracy prosecutions, *The American Journal of International Law* 104 (July 2010), 416–436.
 - 72 Such a court has been proposed for Arusha, Tanzania while others are to be established in Somaliland and Puntland.
 - 73 This action was taken pursuant to UNSC Res. 1918 (2010) and UNSC Res. 2010/394, which required the Secretary-General to report on options to prosecute and imprison pirates. The options included enhancing the capacity of regional States to prosecute, as well as the establishment of a Somali court sitting in a third State in the region; a special chamber within the national jurisdiction of a regional state(s) with or without UN participation; a regional tribunal with UN participation; an international tribunal on the basis of an agreement between a regional state and the UN; and an international tribunal by Security Council Resolution under Chapter VII of the UN Charter.
 - 74 See Bueger, An international piracy tribunal? He posits that Russia's initiative needs to be judged either as a failure of the work of the International Contact Group on Piracy (ICG) or as an attempt to reduce the influence of non-Security Council countries (notably African countries).
 - 75 For instance, the Tribunal for the former Yugoslavia cost US\$ 276 million for 2006–7 alone, while the Rwanda Tribunal was US\$ 269 million for 2006–7. These costs constitute a seventh of the regular UN budget for 2006–7 of US\$ 1,755 billion. See David Wippman, The costs of international justice, *The American Journal of International Law* 100(4) (October 2006), 861–881.
 - 76 Martina Fuchs, Somali enclave to set up piracy courts, prisons, *Reuters*, 18 April 2011. While Puntland has stated that it would accept convicts jailed in foreign courts, Somaliland insisted that only Somalilanders convicted in foreign courts are welcomed in its jails.
 - 77 It is an IMO-sponsored regional treaty to address piracy off the coast of Somalia. It involved thirteen regional states and observer nations and international and multilateral organisations.
 - 78 ICC IMB 2011. The most affected flagged ships are from Panama (82), Liberia (57), Singapore (40), Marshall Islands (36), Antigua and Barbuda (24) and Malta (19). The most affected victim ships controlled or managed are from Germany (69), Singapore (54), Greece (46), Japan (23), UAE (17), the UK and Hong Kong (16 each), India and Malaysia (14 each) and South Korea (12).
 - 79 The Durban Resolution on Maritime Safety, Maritime Security and Protection of the Marine Environment in Africa also contains provisions to ratify and implement international instruments such as the International Ship and Ports Security (ISPS) Code.
 - 80 Joint Communiqué from the ESA-IO Ministers and EU High Representative at the 2nd Regional Ministerial Meeting on Piracy and Maritime Security in the ESA-IO Region (7 October 2010, Grand Bay, Mauritius).
 - 81 The UK is cognisant of the fact that the prison conditions in Kenya are deplorable compared with the conditions in the UK. House of Lords, Combating Somali Piracy.
 - 82 25.3.2009 Official Journal of the European Union – L 79/49 (EU-Kenya Piracy MoU). Canada, China, the UK, the US and Denmark have been widely reported in the media to have piracy agreements with Kenya. See Derek Kilner, Kenya, US Agree to Deal on Piracy, *VOA News*, 27 January 2009, <http://www.voanews.com/english/news/a-13-2009-01-27-voa16-68710907.html> (accessed 20 February 2010).
 - 83 In May 2009, Spain refused to hand over suspects to Kenya. While most of the naval forces have signed a deal with Kenya, Russia and India have not. See Westcott, Pirates in the dock.
 - 84 EU-Kenya Piracy MoU (Annex Clause 3); and House of Lords, Combating Somali piracy.
 - 85 This was affirmed in *Saadi v. Italy*; that is, that diplomatic assurances do not absolve states from these obligations. The consequence of this ruling is that the protection afforded by Article 3 is broader than that provided for in Articles 32 and 33 of the 1951 UN Convention relating to the Status of Refugees. See Fiona de Londras, *Saadi v. Italy*: Eur.Ct.H.R. reasserts absolute prohibition of refoulement, *ASIL Insights* 12(9) (2008).
 - 86 Third circuit requires review in diplomatic assurances cases. *The American Journal of International Law* 103 (2) (April 2009), 353–355. Case: *Khouzam v. Att'y Gen.*, slip op. at 23 (3d Cir. Dec. 5, 2008), <http://www.ca3.uscourts.gov/opinarch/072926p.pdf> (accessed 13 August 2010).
 - 87 EU-Kenya Piracy MoU Annex clause 4. Apparently it also provides representatives of EU-NAVFOR an audit power and control over the fate of the prisoner that few military leaders normally have in a traditional court system. If the State in question has the death penalty or corporal punishment in its legislation, EU-NAVFOR will, before any transfer is made, seek for assurances that these will not be applied to the suspected pirates.
 - 88 For example, Kenya, Puntland and Yemen. Using Kenya for piracy prosecutions suggests that the US and European states 'will trade some prisoner security for convenience and expedience'. See Kontorovich, 'A Guantánamo on the sea'. In contrast, the rendition of terror suspects to Yemen, Egypt and other countries is the subject of litigation against US officials.
 - 89 Francis Kadima, *The legal challenges of prosecuting suspected pirates in the region*. A paper presented during the ISS-EAPCCO 'Regional Meeting of Judges on Environmental Security in Eastern Africa', December 2009, Victoria, Seychelles.
 - 90 Mark Ellis, Executive Director of the International Bar Association, questioned Kenya's prosecutorial ability, concluding that: 'dumping the alleged perpetrators in Kenya without ensuring the international standards of fair trials is inappropriate and possibly illegal'. See Odhiambo Joseph, Pirates in the dock; Kenya's role, *BBC News*, 21 May 2009, <http://news.bbc.co.uk/2/hi/africa/8059345.stm>. (accessed 3 February 2010).
 - 91 UNGA, Report of the special rapporteur on extrajudicial, summary or arbitrary executions, Philip Alston on his mission to Kenya (16–25 February 2009), A.HRC/11/2/Add.6, <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G09/137/05/PDF/>

- G0913705.pdf?OpenElement (accessed 29 June 2009). Alston was investigating extrajudicial killings by security agencies.
- 92 Report of the Commission of Inquiry into Post-Election Violence (CIPEV) (Waki Report), October 2008.
 - 93 In 2009 alone, three documented scandals involving public officials in the maize, education and oil departments cost the country US\$ 403 million. A report from the Anti-Corruption Commission exonerated all of the alleged perpetrators of the fraud.
 - 94 See Kenya National Commission on Human Rights (KNCHR) and Akiba Uhaki, Crime and human rights work in Kenya: towards a strategy, Briefing Paper, August 2009, <http://www.knchr.org/images/stories/crime-and-human-rights.pdf>, (accessed 1 March 2010); and International Legal Assistance Consortium and International Bar Association Human Rights Institute, Restoring integrity: an assessment of the needs of the justice system in the Republic of Kenya, 2010, http://www.ibanet.org/Human_Rights_Institute/Work_by_regions/Africa/Kenya.aspx (accessed 1 March 2010).
 - 95 Available from http://www.kenyalaw.org/kenyalaw/klr_app/frames.php.
 - 96 The piracy MoU seeks to allay fears that any prison transfer to Kenya will amount to the violation of relevant international human rights laws. EU Joint Action Decision 12(2) (Nov 2008). But the ECtHR reserves the right to review whether on evidence available the applicant will be exposed to real risk of violation of these rights in the event of deportation. *Saadi v. Italy* (Paragraph 111 & 153), (*Chahal v. UK* 1996 23 EHRR 413).
 - 97 Gebauer, Seeking a fair trial.
 - 98 The promised financial aid and other commitments, such as training for the court officials, had failed to materialise, especially from the EU and US. EU-Kenya Piracy MoU; and Fred Mukinda and Alphonse Shiundu, Kenya laments pirates' burden, *Daily Nation*, 30 March 2010.
 - 99 Some view universal jurisdiction over piracy as means by which a state can prosecute any pirate found in its territory, regardless of they got there. See Douglas Guilfoyle's posting on *EJIL: Talk!* – ECHR Rights at Sea: *Medvedyev and others v. France*, <http://www.ejiltalk.org/echr-rights-at-sea-medvedyev-and-others-v-france/#more-2040> (accessed 20 May 2010).
 - 100 Jeff Davis, Kenya cancels piracy trial deals, *Daily Nation*, 30 September 2010.
 - 101 Before 27 August 2010, when the new Constitution was promulgated, Kenya was a dualist state requiring domestication of international instruments through legislation. The new Constitution under Section 2(6) provides that all international treaties ratified by the country shall form part of the laws of Kenya.
 - 102 However, the Penal Code, Section 5, only extends the Act's jurisdiction to Kenyan waters. Section 6 would only apply to the 'high seas' if the ship or acts of piracy should prove to have been a continuing transaction that began in Kenya and continued into the high seas or vice versa. Otherwise Section 69 would conflict with Section 5.
 - 103 In *Rono v. Rono* the Court held that, in the absence of implementing legislation, the application of international law was acceptable where there is no conflicting domestic law (Civil appeal 66 of 2002, (2005) AHRLR 107 (KeCA 2005) para 21). See Magnus Killander, The role of international law in human rights litigation in Africa, <http://ssrn.com/abstract=1438556> (accessed 16 March 2010). Killander discusses the relationship between national and international law. 'Policy choices are frequently shaped more by the framing of outcomes than by the substance of the issues at stake.' See also Gross, *Security vs. liberty*.
 - 104 Under Penal Code Section 69 (now repealed). See *Republic v. Mohamed Abdi Kheyre & 6 Others*, Crim. Case 791 of 2009; and *Republic v. Farah Mohamed Abdul Abbas & 6 Others*, Crim. Case 2127 of 2009. The particulars of the offences could not be provided and terms such as 'high seas' and 'pirate ship' were not defined.
 - 105 *Republic v. Mohamed Ahmed Dahir & Ten Others*, Crim. Side No.51 of 2009. The accused were charged with several counts of commission of terrorism, contrary to the Prevention of Terrorism Act 2004, for attacking the *Topaz*, a Seychellois Coast Guard patrol vessel, in the country's exclusive economic zone (EEZ). Fortunately, the judge dismissed all these counts on account of lack of proof, but found the accused guilty of all piracy charges.
 - 106 One court freed a group of Somali pirates stating that no American piracy law had been violated and that the definition of piracy in the international community was unclear. Another court had more clarity and allowed a case against another group to proceed. See Tim McGlone, Federal judges in Norfolk wrestle over definition of piracy, *The Virginian-Pilot*, 8 November 2010, <http://hamptonroads.com/node/575591#rfq> (accessed 10 November 2010). See also John Schwartz, Somalis no longer face federal piracy charges, *New York Times*, 17 August 2010, <http://www.nytimes.com/2010/08/18/us/18pirates.htm> (accessed 10 November 2010).
 - 107 UK lauds Tanzania for enacting anti-piracy law, *The Citizen*, 11 May 2010, <http://www.thecitizen.co.tz/news/4-national-news/1861-uk-lauds-tanzania-for-enacting-anti-piracy-law.html> (accessed 15 May 2010). The Tanzania MSA 2006 merely defines piracy but does not criminalise (create the offence of) piracy.
 - 108 The new statute creates and defines the crimes of piracy and armed robbery at sea as found in UNCLOS (Part XVI, titled 'Maritime Security') and in SUA Against Safety of Ships (Section 370), which includes the hijacking and destroying of ships within territorial waters or waters under Kenya's jurisdiction (Section 369); this Act also allows any vessel belonging to a 'Convention country' to be able to hand over seized pirates to the Kenyan authorities for prosecution.
 - 109 This would necessitate new charges and offences rather than a mere amendment of the charge sheet, which would be unconstitutional (contrary to Section 50 of the Constitution). See *in re Mohamud Hashi*. A problem with the new Act is that Somalia has not ratified the SUA Convention and this will likely result in another potential legal minefield. See Kontorovich, International legal response to piracy.
 - 110 *Hassan M. Ahmed & 9 Others v. Republic*. The ten suspected pirates were charged with piracy, and accused of assaulting and putting fear into the lives of the crew of the *Safina Al Bisarat MNV*.
 - 111 *Hassan M. Ahmed & 9 Others v. Republic*. The court noted that the defence had also failed to counter the prosecution's claim that UNCLOS was not domesticated.
 - 112 *Hassan M. Ahmed & 9 Others v. Republic*. Issues of legal right and liability should be resolved by the application of the law

- and not the exercise of discretion. See Lord Bingham, *The rule of law*, *Cambridge Law Journal* 66(1) (March 2007), 67–85.
- 113 In September 2010, the Kenya piracy MoUs had lapsed. The judge determined that Section 4 of the Judicature Act and Section 4 of the Criminal Procedure Code (CPC), when read with the schedule and the provisions of Section 60 of the repealed Constitution, vested piracy matters in the High Court. In *re Mohamud Hashi*.
- 114 The *Re Hassan M. Ahmed* case relied on Section 69 without reference to Sections 5 and 6 of the Penal Code. See also: in *re Mohamud Hashi*.
- 115 Section 2(5) and (6) of the Constitution provides that the general rules of internal law and any treaty ratified by Kenya shall form part of the law of Kenya. This, read together with the 5th Schedule that obliges the courts to interpret existing laws in line with the new Constitution, Section 50(2)(n), states that an accused person has the right to a fair trial, which includes the right not to be convicted for an act or omission that at the time that the crime was committed or omitted was not an offence in Kenya or a crime under international law.
- 116 The judge erred in issuing prohibitory orders when he should have been quashing the proceedings, which were either finalised or ongoing. He also erred in acquitting the suspects, thus usurping the power of the lower court.
- 117 Eunice Machuji, AG files appeal against ruling on piracy cases, *Daily Nation*, 12 April 2011.
- 118 *Republic v. Mohamed Kheyre & 6 Others*. Guided by Justice Azangalala's decision, the court ruled that the Penal Code provision specifically gave the magistrates' court jurisdiction despite a Judicature Act granting admiralty to the High Court.
- 119 James Thuo Gathii, *Jurisdiction to prosecute non-national pirates captured by third states under Kenyan and international law*, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1360981 (accessed 11 October 2009). See also in *re Mohamud Hashi*. The interpretation of the Constitution, the Judicature Act and the relevant piracy law indicates the intention to vest jurisdiction in the High Court when conducting piracy trials.
- 120 *Hassan M. Ahmed & 9 Others v. Republic*.
- 121 The defence counsel challenged the charging of the accused, Noor Ali Mohammed & 3 Others, (for attacking *Sherry Dhow*) in the magistrates' court under MSA 2009, which in their view recommends that piracy-related matters be determined in the High Court. See Maureen Mudi, Piracy case goes to high court, *The Star*, 8 March 2011.
- 122 There is no guaranteed access to free legal aid. Only capital offence suspects are entitled to such. *Republic v. Hassan Jamal Haleys (alias Hassan Jamal) & 5 Others*, Crim. Misc. Appl. 105 of 2010.
- 123 The pirates interviewed had been allowed no contact with their families since they had landed in Kenya in May and June 2009. This fact emerged during interviews of two groups of suspected pirates, those of Ahmed Abdikadir Hersi and Farah Mohamed Abdul Abbas, on 27 January 2011. The cases were *Republic v. Ahmed Abdikadir Hersi & 11 Others*, Crim. No. 1582 (CMC) (filed 11 May 2009). The accused were arrested by the French navy on 3 May 2009 when they attacked the French *FNS Nivo'se*; and *Republic v. Shafili Hirsi Ahmed & 6 Others*, Crim. No. 2463 (CMC, Crim. No. 825, 9 May 2009). The Swedish navy arrested the accused on 26 May 2009 off the Gulf of Aden.
- 124 According to Section 50(2)(h) of the Constitution, every accused person has the right to a fair trial, which includes the right to have an advocate assigned by the State and at State expense, if substantial injustice would otherwise result. The international community, through the UNODC Counter-piracy Programme, is funding the defence lawyers. The Programme also supports the piracy prosecutions through training and administrative support, ensuring that the trial and detention of suspected pirates is humane and efficient, and has developed Shimo la Tewa Courtroom.
- 125 In *re Mohamud Hashi*, the defence asserted as grounds for relief that the Applicants had been denied their rights to have counsel of their choice and that proceeding with the trial would condone such a denial. See also Gathi, Kenya's piracy prosecution, where he notes that in one case the defence lawyer notified the court that he would file an application under the Vienna Convention on Consular Relations for the TFG to provide legal representation for one of the accused.
- 126 Most of the UN-approved lawyers are based in Nairobi, which means that conducting a trial in Mombasa is a logistical nightmare. This situation is exacerbated as a result of limited resources as well as a lack of familiarity with maritime issues. The State Law Office admits that preparation of their UN-sponsored defence has been wanting, and that this has led to numerous adjournments. Meanwhile, funds provided for the legal representation of suspected Somali pirates were diverted to other uses, according to a defence lawyer. See Philip Muyanga, EU funds diverted, piracy trial told, *Daily Nation*, 21 July 2010.
- 127 Pirates' interviews of 27 January 2011 were for cases *Republic v. Ahmed Abdikadir Hersi & 11 Others* and *Republic v. Shafili Hirsi Ahmed & 6 Others*.
- 128 *Republic v. Ahmed Abdikadir Hersi & 11 Others*. It was never clarified why UNODC was unwilling to accept the counsel of their choice.
- 129 Evidence Act (Cap 80) Sections 62 & 63. Though all competent witnesses are compellable, summoning foreign ones is a challenge. The magistrates' courts currently do not admit testimony via video-conferencing. Nevertheless, since the Court of Appeal began holding sessions via video-link, there is a high likelihood that the same will be permitted in the lower courts soon.
- 130 Jeff Davis, Missing witnesses stall piracy cases, *Daily Nation*, 13 October 2010; and Willis Oketch, Release Somali pirates, Kenya High Court orders, *The Standard*, 9 November 2010.
- 131 Pirates' interviews of 27 January 2011 for cases *Republic v. Ahmed Abdikadir Hersi & 11 Others* and *Republic v. Shafili Hirsi Ahmed & 6 Others*. The pirates unanimously expressed their desire for a retrial and/or a fresh trial in Puntland or France or Sweden rather than Kenya, due to these types of challenges.
- 132 Additionally, guns and other paraphernalia were handed over to Kenyan authorities who had no knowledge of where they had been sourced. The naval officials also handed over photographic evidence taken on board their vessels, as opposed to the pirate vessels. The Director of Public Prosecution (DPP) provided guidelines on evidence collection for naval ships to minimise cost and inconvenience to them. See Kenya – AG's

- office Guidance for the Transfer of Suspected Pirates, Armed Robberies and Seized Property to Kenya Assistant DPP Letter (dated 25 June 2009).
- 133 The navy failed to provide video and photographic proof that they claimed they had for an alleged attack on *MV Amira* in May 2009. See Oketch, Release Somali pirates, Kenya High Court orders.
- 134 The defence lawyers' requests have been rejected despite their claim that the video evidence is insufficient because it is both inaudible and unclear. The UN Resolution 1851(2008) authorises the use of Shiprider Agreements, which would allow law-enforcement shipriders from regional states to board warships, begin criminal investigations at sea, arrest suspected pirates, and then send them for trial in their country. The Djibouti Code also has equivalent provisions.
- 135 Clauses 7 on registering and 8 on separation of categories. Standard Minimum Rules for the Treatment of Prisoners, adopted by the First UN Congress on the Prevention of Crime and the Treatment of Offenders (Geneva in 1955).
- 136 Pirate defence that claims they are fishermen has never been refuted by the prosecution. The suspects have requested the courts to have Somali officials brought to court to confirm their identities. See Kadima, The legal challenges of prosecuting suspected pirates in the region; and *Hassan M. Ahmed & 9 Others v. Republic*.
- 137 Alleged Somali pirate will be charged as an adult after admitting to being 18, *The Guardian*, 21 April 2009, <http://www.guardian.co.uk/world/2009/apr/21/somali-pirate--charged-adult> (accessed 24 April 2010). See also Mombasa court denies bail to Somali pirates, *Daily Nation*, 1 October 2010. In her ruling, the magistrate said she could not release the accused because it was unclear whether they had identification documents.
- 138 The court has noted that prosecuting pirates was 'pretty straightforward' and often simpler than other cases. See Jeff Davis, Missing witnesses stall piracy cases.
- 139 To the extent that the US banned the AG Amos Wako from travel into the country, citing his obstruction against the fight against corruption. Kenya is considered suitable for piracy trials although 'they keep on rubbishing our judicial system', according to the AG. See Fred Mukinda and Alphonse Shiundu, Kenya laments pirates' burden.
- 140 *Saadi v. Italy*, paragraph 147. The decision is regarded a 'significant rebuff to the UK's practice of acquiring diplomatic assurances from receiving states and, pursuant to these assurances, returning non-citizens who are deemed to pose a significant terrorist threat to countries with a demonstrated record of carrying out or tolerating torture or ill-treatment'. See Londras. *Saadi v. Italy*: Eur.Ct.H.R. reasserts absolute prohibition of refoulement.
- 141 EAPCCO-HSF-ISS, Summary of 'Strategies to combat piracy' workshop.
- 142 In 2007, the Legal Resource Foundation released a report in which, of 948 prisoners from 19 prisons interviewed, 83 per cent claimed they were beaten, and 59 per cent witnessed wardens mistreating other prisoners. United States Department of State, 2010, Country Reports on Human Rights Practices – Kenya, 8 April 2011, <http://www.unhcr.org/refworld/docid/4da56db68c.html> (accessed 20 April 2011).
- 143 Kenya Human Rights Commission (KHRC) and Kenya Human Rights Network (K-HURINET): NGOs' Shadow Report On The Second Periodic Report Of The Republic Of Kenya To The Human Rights Committee On The International Covenant On Civil And Political Rights (CCPR). New York, February 2005. See also Gathii, Kenya's piracy prosecutions.
- 144 Independent Medico-Legal Unit (IMLU), Preliminary report of medico-legal investigation of torture by the military at Mount Elgon, 'Operation Okoa Maisha' (April 2008), www.imlu.org (accessed 15 June 2010); HRW 'Bring the gun or you'll die, 29 June 2009, www.hrw.org/en/reports/2009/06/28/bring-gun-or-you-ll-die (accessed 15 June 2010). See also KNCHR, The mountain of terror: A report on the investigations of torture by the military at Mt Elgon, (May 2008), www.knchr.org/dmdocuments/Mt%20Elgon%20.PDF (accessed 15 June 2010).
- 145 See Gathii, Kenya's piracy prosecutions. IMLU received 772 cases alleging torture by security officers in 2008.
- 146 Torture is prohibited by Section 25(a) of the Constitution, but there is no law defining it. IMLU is before the East African Court of Justice claiming that Kenya violated provisions of this East African Community Treaty (Article 6(d)) through its failure to ensure access to justice and uphold human rights by failing to investigate alleged Mt Elgon extrajudicial killings and torture. The government has also failed to investigate enforced disappearances in connection with various security operations around the country since 2006. See: IRIN, In the dock over torture, murder claims, *IRIN News*, 1 April 2011 <http://m.irinnews.org/92341.htm> (, Xinhua. 20110ne 2010). org arbitrary executions, ily Nation, The Standrads, East Africanaccessed 20 April 2011).
- 147 The pirates interviewed seemed to suffer no physically identifiable ill treatment or ill health. They seemed in high spirits (partly in expectation that Justice Ibrahim's decision would provide a passage home sooner). The piracy interviews with Hirsi and Farah Abbas on 27 January 2011 were for cases *Republic v. Ahmed Abdikadir Hersi & 11 Others* and *Republic v. Shafili Hirsi Ahmed & 6 Others*. The pirates unanimously expressed their desire for a retrial and fresh case, preferably a trial in Puntland or France or Sweden rather than Kenya, due to these types of challenges.
- 148 'Incommunicado detention' arises when a detainee is denied access to lawyers, family members and physicians. The UNHCHR passed a resolution in 2003 holding that 'prolonged incommunicado detention may facilitate the perpetration of torture and can in itself constitute a form of cruel, inhumane and degrading treatment or even torture' (147/1983, Selected Decisions of the Human Rights Committee under the Optional Protocol, UN Doc. CCPR/C/OP/2 1990, p.176).
- 149 If a Muslim man is incommunicado from his wife for six consecutive months, she is entitled to a talak (divorce). See Kadima, The legal challenges of prosecuting suspected pirates in the region. However, according to the Shimo la Tewa prison warders, a local NGO (MUHURI) had facilitated access for some pirates to meet their families but this was obviously not true for any of those that were interviewed on 27 January 2011.
- 150 Section 50. Although piracy is a bailable offence in Kenya, suspects have consistently been denied bail. The last bail request was conditioned on a pre-bail report by the court that would necessitate a visit to the pirates' home (assuming it is Somalia) to verify details. See Xinhua, Somali pirates denied

- bail over surety hitch, *People's Daily Online*, 16 June 2010, <http://english.peopledaily.com.cn/90001/90777/90855/7027117.html> (accessed 20 June 2010).
- 151 There are approximately 100 civilian prosecutors to 350 police prosecutors. Civilian prosecutors handle cases at the High Court.
- 152 On average, many suspects accused of capital offences spend three years in prison before their trials are completed.
- 153 See also *Republic v. Hassan M. Ahmed & 9 Others* and contrast with *in re Mohamud Hashi*. In 2008, Andrew Mwangura, of the Seafarers Organisation, was charged for issuing a statement that the military cargo on the hijacked *MV Faina* was bound for South Sudan and not Kenya, as the government claimed.
- 154 The judge could not order their repatriation to Somalia (as it would have been contrary to the principle of non-refoulement) but left it to the government to regulate their presence in the country. Also, the Kenya-EU piracy memorandum states that the country should not render and transfer a person to any other state for the purposes of investigation or prosecution. (EU-Kenya Piracy MoU Annex Clause 3(g)(h)). The pirates accused of attacking *MV Amira* wanted to go to Puntland. See Oketch, Release Somali pirates, Kenya High Court orders. However, in *re Mohamud Hashi*, the judge ordered the state to organise safe passage of and delivery of the accused to their countries or for the UNHCR to take custody of the applicants and consider them as displaced persons.
- 155 The piracy interviews with Hirsi and Farah Abbas on 27 January 2011 were for cases *Republic v. Ahmed Abdikadir Hersi & 11 Others* and *Republic v. Shafili Hirsi Ahmed & 6 Others*, Crim. No. 2463. Also, the suspects accused of attacking the *MV Amira* opted to go back to Somalia when given the choice. See Oketch, Release Somali pirates, Kenya High Court orders.
- 156 Section 21(1) (see also Paragraph 17, Committee). Kenya has refoiled thousands of Somali asylum seekers in the border area. See Amnesty International, Kenya: from life without peace to peace without life: the treatment of Somali refugees and asylum-seekers in Kenya, 8 December 2010, www.amnesty.org/en/library/info/AFR32/015/2010/en (accessed 20 April 2011).
- 157 Illegal rendition? We've been doing it for years – EA Police, *East African*, 11–17 October 2010.
- 158 At least 140 people (nationals of seventeen different countries) were arrested and renditioned by the Kenyan authorities between December 2006 and February 2007. See: Human Rights Watch, 'Why am I still here?': the 2007 Horn of Africa renditions and the fate of those still missing, 30 September 2008, www.hrw.org (accessed 15 June 2010)
- 159 *Saadi v. Italy*, paragraph 147 and *Khouzam v. AG*.
- 160 Under Section 29. In *Mohamed Aktar Kana v. Attorney General*, High Court App. No. 544 of 2010, the executive was ordered to ensure due process was followed before extraditing a Kampala bombing terror suspect who was set to be extraordinarily renditioned to Uganda. See also in *re Mohamud Hashi*.
- 161 Celestine Achieng, Kenya imprisons seven Somalis for piracy; Alphonse Shiundu, AG queried over Kenya's role on piracy cases, *Daily Nation*, 30 March 2010. The EU stated that Kenya was not a dumping ground but that it has a direct economic and security interest in countering piracy. See also Eric Van Der Linden, Kenya should not relent in the war against piracy, *The Standard*, 9 April 2010.
- 162 Mwangura, Communications of 12 June 2010 and 28 January 2011.
- 163 Specifically, complaints that Kenya was opening itself to attacks of sympathisers of the suspects in Somalia as a result of the fact that Kenya hosts the largest number of Somali refugees. There are 338 151 registered refugees in the country and many more that are unregistered. Al Shabaab incursions into the country have also increased in the past year. See Mukinda and Shiundu, Kenya laments pirates' burden; Mohamed Olad Hassan, Somali judge who jailed pirate insurgents killed, *aryaTV*, 12 November 2009, www.waryatv.com/read/article/2259 (accessed 23 April 2010); and Cyrus Ombati, Al Shabaab launch fresh bomb attack in Mandera, *The Standard*, 15 March 2011.
- 164 Without the approval of the UNSC Committee established pursuant to Resolution 751 (1992). UN Somalia Monitoring Group Report.
- 165 Kenya drew up an agreement with the TFG with assistance from the Norwegian government for off-shore drilling off the coast of Somalia for the benefit of Kenya and Norway, but it was rejected by the TFG parliament, making the MoU non-actionable, http://www.un.org/Depts/los/clcs_new/commission_preliminary.htm#%282%29 and <http://www.innerecitypress.com/los3somalia.pdf> (accessed 23 May 2010).
- 166 Goldsmith, Forget piracy, Somalia's whole 'global' economy is booming – to Kenya's benefit. Also see IGAD ICPAT, *Report on the impact of piracy on the IGAD region*.
- 167 The concurring opinion of Judge Mjer, joined by Judge Zagrebelsky, quoting the former French Minister of Justice, Robert Badinter, in *Saadi v. Italy*.
- 168 Lord Bingham, The rule of law.
- 169 UN Resolution 1976 (2011) underlines the need to investigate and prosecute those who illicitly finance, plan, organise, or unlawfully profit from piracy in the Horn.
- 170 A 'complicated syndicate involving lawyers, state agencies like the Central Bank of Kenya, the police, the judiciary, foreign government departments, KRA officials, and international fraudsters' are deeply involved in money laundering activities. Dann Okoth, Confession: lawyer tells how he helps pirates, *The Standard*, 4 March 2011.
- 171 Businesses such as Forex bureaus and money transfer agencies have been used to launder piracy ransoms before channeling the money back into the economy. Okoth, Confession: lawyer tells how he helps pirates.
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ABOUT THIS PAPER

The international community's counter-piracy operation off the coast of Somalia has had limited success, despite a proliferation of initiatives and resources. Although the large military presence has increased the number of piracy suspects that are being brought to trial, it has not reduced the number of pirates taking to the high seas. Rather, the increased militarisation and the strategies designed to bypass human rights obligations vis-à-vis the Somali pirates has undermined the credibility of the counter-piracy initiatives. The regional piracy prosecutions in Kenya, in particular, have raised various human rights issues, such as the failure to observe due process and the lack of appropriate jurisdiction. This paper highlights the fact that the strategy of enforcing legal accountability for pirates at sea but not for those on shore breeds a disregard for the human rights of a very vulnerable group of people, and results in an increase in piratical activities.

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Deborah Osiro is a legal and security consultant in Nairobi. Previously she worked for the ISS Environmental Security Programme. She has published several articles on governance, justice, security and economic issues in the region.

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