Walking the Plank: The Legality of United States Transfers of Somali Pirates to Kenya for Prosecution -- Effective Remedy or Illegal Action?

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Professors John Heywood & Chris Brantley

Submitted by Laurie Green

I. Introduction

"Now and then we had a hope that if we lived and were good, God would permit us to be pirates." ~ Mark Twain

With their mysterious appeal and rebellious attitudes, pirates have always loomed large in pop culture as men with flashy swords, long beards and buried treasure. This fascination and intrigue has vastly grown over the last few years with the release of such films as *Pirates of the Caribbean* in which Johnny Depp plays the comically charming Captain Jack Sparrow, who is more of a rock star mix between Kurt Cobain and a young Mick Jagger than a swashbuckling marauder. However, in reality, piracy is far more complex than the lore of eye patches, peg legs and walking the plank. Pirates have been labeled as the original enemy of mankind, and have been around as long as those sailing the high seas. In fact, piracy is considered the original international crime.

In ancient times, piracy was combined with the more legitimate seafaring business.[1] From the 9th through the 11th centuries, Western Europe endured the onslaught of the Vikings.[2] During the 16th and 17th centuries, several monarchs endorsed the use of privately owned ships, known as privateers, to battle, raid, and harass Spaniards in the Caribbean.[3] However, throughout the 18th century and early 19th century piracy declined with the development of the steam engine and the growth of vigilant navies.[4] Yet, despite this decline, piracy never completely disappeared. Over the past few years the world has seen a surge in piracy off the coasts of Nigeria, Somalia and Indonesia, particularly in the Gulf of Aden. Like their peg-legged predecessors, these modern day pirates are plundering ships at will, and bringing home the booty of their exploits.

In response, the international community has undertaken multiple coordinated steps in an attempt to combat the extraordinary growth in modern day piracy, including action by the United Nations Security Counsel passing a number of resolutions under its Chapter VII powers to address threats to international peace and security. Despite these responses and actions, pirate attacks continue and there remains frustration among states at the lack of prosecution and the lack of available options for prosecution. As such, several states, including the United States, have entered into agreements with Kenya where captured pirates will be turned over to Kenyan courts for prosecution. In response to these agreements, many have raised the question over the legality of such agreements and transfers. This article will examine the legality of such measures in the context of U.S. action.

Part II of this article, will discuss the current state of piracy along with the legality of the United States' position and response to piracy. Part III will discuss the United States' right of referral and jurisdictional basis for turning captured pirates over to Kenya for prosecution. The Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation ("SUA"), The Convention of the High Seas 1958 and the Memorandum of Understanding ("MoU") between the United States and Kenya in regards to Somali pirates will be discussed. The relevant articles of each will be interpreted and analyzed as well as any potential conflicts between them. In addition, the concept of the universal jurisdiction will be analyzed. Part IV will discuss the legality of transferring pirates captured by the United States to Kenya for prosecution. Specifically, what are the obligations of the United States, with respect to international due process, when transferring / extraditing someone to another jurisdiction for prosecution. Also, at issue is whether or not Kenya satisfies those minimum standards. Part V will discuss the policy behind such agreements and transfers as well as the benefits and

drawbacks. This article concludes in Part IV with the assertion that, pursuant to the Convention on the High Seas, the United States does not have the right of referral to third party states for pirates captured on the high seas, but, pursuant to SUA, the U.S. does have the right of referral to SUA member states for pirates captured in territorial waters. However, this right of referral pursuant to SUA is constrained by the potential illegality of the actual transfer (i.e., the transfers violate provisions of the ICCPR and UNCAT).

II. Background/Current State of piracy

Far from being an extinct crime as once believed by many, international piracy has soared in recent years grossing those involved millions of dollars and causing more in damages. Typical ransom payments range from $500,000 to 2 million dollars.[5] In 2008, overall ransoms were estimated to have exceeded 30 million dollars.[6] Although it is hard to estimate total damages caused to the shipping industry each year by pirates, some have estimated the cost to be between 1 billion and 16 billion dollars.[7]

The main goal of Somali pirates is to seize a vessel and hold the ship and crewmembers hostage for ransom.[8] Using modern technology such as GPS navigation along with automatic weapons and rocket-propelled grenades, today's pirates are able to complete attacks in less than 20 minutes.[9] This quick assault leaves little time for vessels to respond and virtually no time for outside patrols to render assistance.[10]

From January through September 2009 there were 306 attacks by pirates, 147 occurred in Gulf of Aden and Somali coastal waters.[11] Of those 306 attacks, the International Maritime Bureau ("IMB") reports '114 vessels were boarded worldwide, 88 vessels fired upon and 34 vessels hijacked with some 661 crew taken hostage, twelve kidnapped and eight missing'.[12] The numbers for the first 9 months of 2009 exceed the numbers for the entire year in 2008. In 2008,

a total of 293 pirate attacks occurred worldwide. In that year, 49 vessels were hijacked, 931 were taken hostage or kidnapped and 21 missing.[13] From 2003 to 2008, a total of 1,845 pirate attacks occurred.[14] The IMB reported that between the year 2007 and 2008 a 200% increase occurred in the number of attacks by pirates.

The area most affected by the recent upswing of piracy is the Horn of Africa, with the Gulf of Aden and Somalia coastal waters being main target areas. Somalia's coastline extends 2,300 miles, which equates to over 2.5 million square miles of ocean in the Gulf of Aden and Indian Ocean.[15] In addition to the vast amount of ocean pirates have to roam outside of Somalia, the lack of any effective government in Somalia has made this area fertile ground for modern day pirates. Vessels navigating the narrow waters in the Gulf of Aden are prime targets for pirates. It has been estimated that approximately 16,000 - 20,000 ships and nearly 12 percent of the world's petroleum transit the Gulf of Aden each year.[16] In 2008, of the 49 vessels hijacked worldwide, Somali pirates hijacked 42.[17]

International Response to Piracy

In response to the current situation of the coast of Somalia, the international community has undertaken multiple steps in its effort to combat piracy. One such step, lead by the United States, is the assembly of a coalition to increase patrols in the region.[18] This coalition is composed of more than 20 countries including Great Britain, France, India, China and Russia.[19] The United Nations Security Council has also increased its efforts by passing multiple resolutions concerning piracy and Somalia.[20] In 2008 alone, the Security Council passed five resolutions concerning piracy in the Gulf of Aden and Somalia, which is more than any other subject that year. The resolutions were passed pursuant to the Chapter VII powers of the Security Council under the UN Charter, which allows the Security Council to authorize the use of force to protect

against threats to international peace and security. These resolutions include the authority to capture pirates within Somalia's sovereign waters[21] and land.[22]

III. Legal Frameworks for Prosecuting Pirates

The legal frameworks for capturing pirates are based on the principle of universality. Universal jurisdiction allows any state to capture and prosecute certain offenders for crimes committed outside the jurisdiction of the prosecuting state regardless of the nationality of the offender or victim.[23] In addition to universal jurisdiction, many states have entered into other treaties that specifically address piracy. However, despite the presence of these frameworks, there is a lack of clear procedures for handling pirates once they have been captured.[24] This absence of procedure has been a persistent obstacle in the effort to combat piracy.[25]

Efforts to Prosecute Pirates

Most countries patrolling the Gulf of Aden have thus far chosen either not to apprehend pirates (and instead merely foil their hijacking attempts) or to release pirates after capture without charging them.[26] These practices are attributed in large part to the anticipated expense and difficulty of actually prosecuting pirates.[27] Many countries have called for a special tribunal for prosecution of pirates,[28] while others have called upon regional domestic courts to take action as a solution to the lack of prosecution.[29] Britain has signed a Memorandum of Understanding ("MoU") with Kenya in which captured pirates will be transferred to Kenya for prosecution.[30] The United States followed Britain's lead and signed their own MoU with Kenya regarding the transfer of captured pirates to Kenyan courts for prosecution in February 2009.[31] However, while the need to prosecute captured pirates has not been questioned, the potential legality of these agreements and transfers has been.

United States' Right of Referral

The United States entered into a MoU with Kenya on January 16, 2009.[32] The agreement reportedly sets out an arrangement whereby Kenya will accept the transfer of suspected pirates captured by the U.S. for prosecution in Kenyan courts. The MoU has not been made public record in the U.S. so the exact contents of the agreement are unknown; therefore, a full assessment of the arrangement is not possible. However, it is generally accepted that MoUs do not take precedent over treaties and are not legally binding.[33]

In addition to its MoU with Kenya, the U.S. has stated that it is relying on The Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation ("SUA") as a legal basis to transfer pirates to Kenya for prosecution.[34] SUA provides for jurisdiction under article 6, which states:

> 1) Each State Party shall take such measures as may be necessary to establish its jurisdiction over the offence set forth in article 3 when the offence is committed:
>
> a. Against or on board a ship flying the flag of the State at the time the offence is committed; or
>
> b. In the territory of that State, including its territorial sea; or
>
> c. By a national of that State
>
> 2) A State Party may also establish its jurisdiction over any such offence when:
>
> a. It is committed by a stateless person whose habitual residence is in that State; or
>
> b. During its commission a national of that State is seized, threatened, injured or killed; or
>
> c. It is committed in an attempt to compel that State to do or abstain from doing any act

Under article 6, a plain reading would not grant Kenya jurisdiction to try Somali pirates

captured outside Kenyan territory by a third party state for acts not committed against a Kenyan vessel or involving Kenyan nationals. However, article 8 appears to act as a universal jurisdiction type clause; thus, granting jurisdiction to any signatory member of SUA regardless of article 6 provisions. Article 8 states:

> 1) The master of a ship of a State Party (the "flag State") may deliver to the authorities of any other State Party (the "receiving State") any person who he has reasonable grounds to believe has committed one of the offences set forth in article 3
>
> 3) The receiving State shall accept the delivery, except where it has grounds to consider the Convention is not applicable to the acts giving rise to the delivery, and shall proceed in accordance with the provisions of article 7. Any refusal to accept a delivery shall be accompanied by a statement of the reasons for refusal.

An initial reading of article 8 appears to grant jurisdiction to any signatory member. To construe and confirm the meaning of article 8, rules of treaty interpretation should be employed.

Rules of Interpretation

The Vienna Convention on the Law of Treaties ("Vienna Convention") entered into force on January 27, 1980.[35] The U.S. submitted the Vienna Convention to the Senate for approval in 1971, but the Senate has yet to ratify it; thus, the Vienna Convention and its articles are not binding on the U.S. However, upon submission of the Vienna Convention to the Senate, the U.S. Department of State indicated that the Vienna Convention reflected customary international law on treaty law and practice.[36] The Department of State continues to hold the view that the provisions of the Vienna Convention represent customary international law.[37] U.S. courts hold this view as well. In *Avero Belgium Ins. v. American Airlines, Inc*., the court stated that although the United States has never ratified the Vienna Convention, we recognize it as a source of customary international law.[38] In addition, the American Law Institute believes the Vienna Convention is the "black letter" law for principles relating to the law of treaties.[39] Accordingly,

given the fact the United States recognizes the provisions of the Vienna Convention as customary international law, the provisions relating to treaty interpretation will be employed in the present analysis not as provisions of the Vienna Convention binding upon the U.S., but as rules of customary international law binding on all States regardless of whether they are parties to the Vienna Convention.

The main task in construing or interpreting a treaty "is to give effect to the expressed intention of the parties, that is 'their intention as expressed in the words used by them in the light of the surrounding circumstances."[40] Article 31 of the Vienna Convention states:

> 1) A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given the terms of the treaty in their context and in the light of its object and purpose[41]

When interpreting a treaty one must look at the primary elements of article 31, which are 1) good faith, 2) ordinary meaning, 3) context, and 4) object and purpose.[42] One must interpret the text of a treaty in good faith attributing ordinary meaning to the words used in light of the treaty's ultimate or overall object and purpose. Although this appears to be rather straightforward, further explanation of these elements is useful when applying article 31.

Element 1 – Good Faith. Good faith means honesty in belief or purpose.[43] The principle of interpretation in good faith 'flows directly from the rule *pacta sunt servanda'* meaning 'the agreement shall be honored.'[44] This principle is codified as article 26 of the Vienna Convention, which provides that "every international agreement in force is binding upon the Parties to it and must be performed by them in good faith."[45] This principle of good faith applies to the entire interpretation process from dissecting the text to the subsequent practice of the parties to the treaty.[46] However, a good faith interpretation should not lead to a manifestly absurd or unreasonable result.[47]

Element 2 – Ordinary Meaning. "The terms of a treaty must be interpreted according to the meaning which they possessed, or which would have been attributed to them, and in the light of current linguistic usage, at the time when the treaty was originally concluded."[48] "The true meaning of a text has to be arrived at by taking into account all the consequences which normally and reasonably flow from the text."[49]

Element 3 – Context. For the purposes of treaty interpretation, the context shall comprise, in addition to the text, including its preamble and annexes: a) any agreement made between the parties in connection with the conclusion of the treaty and b) any instrument made by one or more parties in connection with the conclusion of treaty and accepted by the other parties as an instrument related to the treaty.[50]

Element 4 – Object and Purpose. "Although the objects of a treaty may be gathered from its operative clauses taken as a whole, the preamble is the normal place in which to embody, and the natural place in which to look for, an express or explicit general statement of the treaty's objects and purposes."[51] The object and purpose of a treaty "is, as it were, a secondary or ancillary process in the application of the general rule on interpretation. The initial search is for the 'ordinary meaning' to be given to the terms of the treaty in their 'context'; it is *in light of* the object and purpose of the treaty that the initial and preliminary conclusion must be tested and either confirmed or modified."[52]

These rules of interpretation are generally consistent with the United States' understanding of treaty interpretation rules. According to United States law, a treaty is to be interpreted in good faith[53] "in accordance with the ordinary meaning to be given to its terms in their context and in the light of its object and purpose."[54] However, U.S. law differs on the weight to be given to the plain meaning of the text and the object and purpose of the treaty. U.S. law states the plain

meaning of treaty language applies,[55] unless its application would be inconsistent with the intent and expectations of the signatories.[56] Generally, a treaty should be liberally construed consistent with its intent.[57] The ultimate goal in treaty interpretation in the United States is to determine the shared intent of the parties.[58] In the Supreme Court case *Eastern Airlines, Inc. v. Floyd*[59], Justice Marshall provided the following approach for treaty interpretation:

> When interpreting a treaty, we 'begin "with the text of the treaty and the context in which the written words are used." ' Other general rules of construction may be brought to bear on difficult or ambiguous passages. Moreover, " 'treaties are construed more liberally than private agreements, and to ascertain their meaning we may look beyond the written words to the history of the treaty, the [treaty] negotiations, and the practical construction adopted by the parties.' "[60]

Despite the difference in the willingness to resort to the negotiating history of the treaty between international law and U.S. law, the resulting interpretation when applying either set of rules will generally turn out the same.[61]

In the present case, attributing the ordinary meaning to the words used in article 8 and read in the context of the entire treaty text and preamble, article 8 grants signatory members of SUA the power to prosecute pirates who are alleged to have committed acts of piracy on the high seas, regardless of the capturing state or of the flag state of the vessel against which the acts are committed. This interpretation is in accord with the object and purpose of the treaty, which is to provide jurisdiction and channels for prosecution for those accused of committing acts of maritime violence. Accordingly, based on the plain language and resulting interpretation of article 8, SUA allows the U.S. to transfer suspected pirates to Kenya for prosecution. However, the United States' reliance on SUA as a jurisdictional basis is thrown into doubt by the Convention on the High Seas 1958, which is part of the original United Nations Convention on the Law of the Sea (UNCLOS).[62] UNCLOS (and in turn the Convention on the High Seas) is a codification of customary international law, and is also thought of as the "constitution of the

oceans."[63]

Article 19[64] of the Convention on the High Seas states:

> On the high seas or in any other place outside the jurisdiction of any State, every State may seize a pirate ship or aircraft, or a ship taken by piracy and under the control of pirates, and arrest the persons and seize the property on board. *The courts of the State which carried out the seizure may decide upon the penalties to be imposed*, and may also determine the action to be taken with regard to the ships, aircraft or property, subject to the rights of third parties acting in good faith.[65]

Although article 19 does not expressly state who is to prosecute / conduct a trial, it is reasonable to conclude that the state which carried out the seizure is granted jurisdiction by way of the statement, "[t]he courts of the State which carried out the seizure may decide upon the penalties to be imposed." However, since Article 19 does not explicitly state what state is entitled to prosecute, we must turn to rules of treaty interpretation again to ascertain the intention of the drafters. As discussed above, when interpreting a treaty one must look at the primary elements of article 31, which are 1) good faith, 2) ordinary meaning, 3) context and 4) object and purpose.[66] One must interpret the text of a treaty in good faith attributing ordinary meaning to the words used in light of the treaty's ultimate or overall object and purpose.

Based on the ordinary meaning of the words used in article 19 and read in the context of the entire treaty text, the state, which is authorized to impose penalties, would be the same state with the jurisdiction to prosecute the offender. This right of prosecution does not lie with any state other than the seizing state. The word 'may' in article 19 (i.e., the State which carried out the seizure *may* decide upon the penalties to be imposed) refers to seizing state. It gives a discretionary right of prosecution to the seizing state. The seizing state has the option to prosecute. However, regardless of the seizing state's decision on prosecution, jurisdiction to prosecute does not lie or transfer to any other state. Thus, article 19 grants the exclusive

jurisdiction to prosecute to the seizing state. As such, the transfer of suspected pirates seized by the U.S. to Kenya for prosecution is prohibited by article 19.

In seeking to confirm the interpretation from the application of article 31, supplementary means may be reviewed. Article 32 of the Vienna Convention states:

> Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:
>
> a) leaves the meaning ambiguous or obscure; or
>
> b) leads to a result which is manifestly absurd or unreasonable

As stated earlier, United States' law provides that a treaty should be liberally construed consistent with its intent.[67] U.S. courts exhibit a great willingness to resort to the legislative history or the travaux preparatories[68] as U.S. courts reason that in any treaty interpretation, the ultimate goal is to determine the intentions of the parties.[69]

Accordingly, a review of the International Law Commission (ILC) commentary on article 19 is appropriate to confirm the resulting interpretation of article 19 that the state, which captured the suspected pirate, is the state with the jurisdiction to prosecute. ILC commentary on article 19 states:

> This article gives any State the right to seize pirate ships (and ships seized by pirates) and to have them adjudicated upon by *its* courts. *This right cannot be exercised at a place under the jurisdiction of another State*.[70]

The commentary for article 19 clearly reveals the drafters' intent that the state who captured the suspected pirates was to have exclusive jurisdiction to prosecute. It is clear that the right to prosecute cannot be transferred to any other state, and any attempted transfer of jurisdiction to a third state is forbidden. This review of the commentary confirms the previous interpretation of article 19 using the general interpretation rule. Accordingly, any transfer of pirates captured by

the U.S. to Kenya for prosecution is in violation of the Convention on the High Seas. However, as discussed above, SUA does allow captured pirates to be transferred to a third party state for prosecution; thus, there is a conflict between SUA and the Convention on the High Seas.

The United States is a signatory member of both SUA and the Convention on the High Seas, and both treaties are listed as being currently in force by the U.S. Department of State.[71] As such, the U.S. has conflicting obligations under these treaties. Therefore, the question becomes what treaty takes precedent and governs the U.S. right of referral. To answer this question and determine what treaty controls, rules for resolving conflicting treaties must be employed.

Resolving Conflicts Between Treaties

In order to resolve a conflict between treaties, the first step is to determine whether either treaty embodies a conflict-resolution clause. If so, the conflict should be resolved in accordance with the conflict-resolution clause present. Upon review of the treaties in the present case, neither have applicable conflict-resolution clauses. The Convention on the High Seas contains a conflict-resolution clause for agreements that were already in existence when it entered into force; however, as SUA was not in existence at that time, the clause does not apply here.

In the event neither treaty contains an applicable conflict-resolution clause, the next step is to determine if the Vienna Convention on the Law of Treaties applies. The Vienna Convention contains provisions for resolving conflicts among treaties. As noted previously, the U.S. is not a party to the Vienna Convention; thus, it is not bound by the convention's provisions. But again, as stated previously, the U.S. does consider most of "the provisions of Vienna Convention on the Law of Treaties to constitute customary international law on the law of treaties."[72] Therefore, in light of the fact that the next step of resolving treaty conflict is to review principles of customary international law, we will apply the rules of the Vienna Convention as the U.S. considers the

Vienna Convention a reflection and codification of customary international law.

A) Vienna Convention on the Law of Treaties

The rule in the Vienna Convention on the Law of Treaties applicable to conflicting treaties is article 30. Article 30 states in relevant part:

> 1) … the rights and obligations of States parties to successive treaties relating to the same subject-matter shall be determined in accordance with the following paragraphs
>
> 3) When all the parties to the earlier treaty are parties also to the later treaty but the earlier treaty is not terminated or suspended in operation …, the earlier treaty applies only to the extent that its provisions are compatible with those of the later treaty.

By its terms, article 30 is only applicable to 'successive treaties relating to the same subject-matter.' Thus, the question becomes are the Convention on the High Seas and SUA successive treaties which relate to the same subject-matter. To make this determination, the question of what is considered 'the same subject-matter' must be answered. There has been much debate over what is actually considered 'the same subject-matter' for purposes of article 30. In fact, during the conference negotiations for the Vienna Convention, a question was raised concerning the scope and meaning of the words 'relating to the same subject-matter.'[73] In response, Sir Humphrey Waldock, expert consultant, stated:

> "On the second point raised … concerning the words 'relating to the same subject-matter', [I agree] that those words should not be held to cover cases where a general treaty impinges indirectly on the content of a particular provision of an earlier treaty; in such cases, the question involve[s] such principles as *generalia specialibus non derogant*."[74]

Other scholars agree stating, "[t]he meaning of the expression 'relating to the same subject-matter' is not clear but should probably be construed strictly, so that the article would not apply when a general treaty impinges indirectly on the content of a particular provision of an earlier treaty."[75] One scholar in particular has stated, "in the absence of a clause [of precedence or

abrogation,] the prevailing treaty would normally be the more specific one, no matter whether it is earlier or later than the more general treaty …. If none of the instruments concerned is more specific than the other, the more recent treaty will prevail in the case of incompatibility of individual provisions."[76] Consequently, if an earlier treaty is considered special or more specific it receives priority over the later general treaty. Moreover, article 30 would not apply to treaties with different foci, but overlapping scopes or issues.[77] Thus, in the present situation, the question is whether the Convention on the High Seas and SUA relate to the same subject-matter or if they are treaties with different focuses, but overlapping issues. In determining if treaties were related the to same subject-matter, one scholar has stated, "[i]f an attempted simultaneous application of two rules to one set of facts or actions leads to incompatible results it can be safely assumed that the test for sameness is satisfied."[78]

Here, when applying SUA and the Convention on the High Seas to determine if a right to transfer Somali pirates captured by the United States to Kenya for prosecution exists, different, incompatible results are produced. Thus, SUA and the Convention on the High Seas can be said to relate to the same subject matter for the purposes of article 30. As such, the question now becomes if one treaty is special or more specific than the other in regards to piracy. If neither treaty is deemed to be special or more specific then article 30 applies and the later in time treaty prevails, which is SUA. If one treaty is determined to be special or more specific then article 30 is inapplicable and general rules for resolving treaty conflicts must be employed.

To assess whether one treaty is special, a review of the treaty text and the scope and aim of the treaty is necessary. The preamble of the treaty, the context in which the treaty was developed and the drafters' intent are all relevant in assessing the scope and aim of a treaty. In addition to the drafters' intent, other commentary can also be useful in determining the scope and aim of a

treaty and its particular provisions.

Scope and Aim of the Convention on the High Seas

The Convention on the High Seas defines piracy specifically in article 15 as:

> 1) Any illegal acts of violence, detention or any act of depredation, committed for private ends by the crew or the passengers of a private ship or a private aircraft, and directed:

a. On the high seas, against another ship or aircraft, or against persons or property on board such ship or aircraft;

b. Against a ship, aircraft, persons or property in a place outside the jurisdiction of any State;

> 2) Any act of voluntary participation in the operation of a ship or of an aircraft with knowledge of facts making it a pirate ship or aircraft;
>
> 3) Any act of inciting or of intentional facilitation of an act described in sub-paragraph 1 or sub-paragraph 2 of this article.[79]

The Convention on the High Seas specifically defined piracy in its provisions because one of the aims of the convention was to address issues of piracy. One of the major focuses of the convention was the repression of piracy. The convention codified customary international law[80] and sought to facilitate cooperation among states with respect to capturing and prosecuting pirates. Thus, given the specific articles addressing piracy, the aim of the convention to suppress piracy and its codification of customary international law regarding the capture and prosecution of piracy, the Convention on the High Seas can be deemed special in regards to piracy. U.N. Security Council documents and U.S. beliefs and statements support this conclusion.

In Resolution 1816 the Security Counsel stated, "*[a]ffirming* that international law, as reflected in the United Nations Convention on the Law of the Sea of 10 December 1982 ("the Convention"), sets out the legal framework applicable to combating piracy and armed robbery, as well as other ocean activities."[81] The Security Counsel continued by stating, *[r]eaffirming* the

relevant provisions of international law with respect to the repression of piracy, including the Convention, and *recalling* that they provide guiding principles for cooperation to the fullest possible extent in the repression of piracy on the high seas or in any other place outside the jurisdiction of any state…"[82] The U.S. also agrees that the Convention on the High Seas governs the law of piracy. A report by the House of Representatives Subcommittee on Coast Guard and Maritime Transportation regarding international piracy stated, "[t]he UNCLOS … sets the legal framework that governs the effort to combat piracy, armed robbery at sea, and other criminal activity in the maritime domain."[83] The U.S. Department of State has stated, "[t]he CGPCS calls on state parties to implement their obligations under relevant treaties and applicable international law, including in particular the UN Convention on the Law of the Sea with respect to suppressing piracy, establishing jurisdiction, and accepting delivery of suspected pirates…"[84] In addition to holding UNCLOS (and in turn the Convention on the High Seas) sets the legal framework for piracy, the U.S. also cites to the Convention on the High Seas and UNCLOS III to define piracy.[85] Accordingly, it is clear that UNCLOS and the Convention on the High Seas is specific / special in regards to the legal framework for acts of piracy.

Scope and Aim of the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation

The aim of the SUA convention is to address issues of maritime terrorism.[86] In fact, the hijacking of the Italian cruise ship, *Achille Lauro*, was the catalyst for the development of SUA. In 1985, the *Achille Lauro* was hijacked and the crew and passengers held hostage by four Palestinians who demanded the release of fifty Palestinian prisoners in Israel.[87] One passenger was killed during the hijacking.[88] As a result of the issues raised by the hijacking, the deficiencies in international law with respect to maritime terrorism were exposed. Based on the

nature of the hijacking, it could not be classified as an act of piracy, and thus, the legal frameworks for piracy were inapplicable.[89] As such, there was a call in the international community to develop a framework to address maritime terrorism. In response to the outcry from the international community, a convention was drafted (SUA) with the aim of minimizing risks of terrorist acts directed at ships.[90] This aim and sentiment is further repeated in the preamble of SUA, which states in part, "[d]eeply concerned about the world-wide escalation of acts of terrorism…"[91] Due to this anti-terrorism aim, the acts outlawed in SUA were drafted to cover terrorists' acts.[92] This intention is expressed by the UN General Assembly in its request of states "to take appropriate measures to ensure the effective implementation of the instruments in question, in particular through the adoption of legislation, where appropriate, aimed at ensuring that there is a proper framework for responses to incidents terrorist acts at sea."[93] Acts covered by SUA are listed in article 3, which states:

> 1) Any person commits an offense if that person unlawfully and intentionally:

a. Seizes or exercises control over a ship by force or threat thereof or any other form of intimidation; or

b. Performs an act of violence against a person on board a ship if that act is likely to endanger the safe navigation of that ship; or

c. Destroys a ship or causes damage to a ship or to its cargo which is likely to endanger the safe navigation of that ship; or

d. Places or causes to be placed on a ship, by any means whatsoever, a device or substance which is likely to destroy that ship, or cause damage to that ship or its cargo which endangers or is likely to endanger the safe navigation of that ship; or

e. Destroys or seriously damages maritime navigational facilities or seriously interferes with their operation, if any such act is likely to endanger the safe navigation of a ship; or

f. Communicates information which he knows to be false, thereby endangering the safe navigation of a ship; or

g. Injures or kills any person, in connection with the commission or the attempted commission of any of the offences set forth in subparagraphs (a) to (f).

2) Any person also commits an offence if that person:

a. Attempts to commit any of the offences set forth in paragraph 1; or

b. Abets the commission of any of the offences set forth in paragraph 1 perpetrated by any person or is otherwise an accomplice of a person who commits such an offence; or

c. Threatens, with or without a condition, as is provided for under national law, aimed at compelling a physical or juridical person to do or refrain from doing any act, to commit any of the offences set forth in paragraph 1, subparagraphs (b), (c) and (e), if that threat is likely to endanger the safe navigation of the ship in question.

As stated above, the acts listed are meant to cover terrorists' acts, and although acts of piracy and terrorism are similar, there is a distinct difference between the two. Pirates seek financial or private gain from their acts, whereas terrorists seek political gain or to make a political statement. Acts committed for political purposes do not qualify as piracy.[94] Pirates act covertly, while terrorists seek publicity. While pirates usually do not seek to physically harm anyone, terrorists often injure and kill people or attempt to cause physical harm to people. "Although pirates brandish weapons and have fired upon ships, it is contrary to their interest to intentionally harm the hostages…"[95] The Restatement (Third) of Foreign Relations Law states:

> Not every act of violence committed on the high seas is piracy under international law. Only the following acts are considered piratical: (i) Any illegal acts of violence, detention, or depredation committed for private ends by the crew or the passengers of a private ship or a private aircraft, and directed against another ship or aircraft on the high seas, or against persons or property on board such other ship or aircraft; or against a ship, aircraft, persons, or property in a place outside the jurisdiction of any state; (ii) any act of voluntary participation in the operation of a ship or of an aircraft with knowledge of facts making it a pirate ship or aircraft; (iii) any act of inciting or of intentionally facilitating an act described in subparagraph (1) or (2).[96]

The Restatement continued by stating, "[a]cts indicated in Comment c are piracy only if they are by private ships and for private ends. Seizure of a ship for political purposes is not

considered piracy." The essence of piracy consists in the pursuit of private ends as contrasted with public ends.[97] "Primarily the pirate is a man who satisfies his personal greed or his personal vengeance by robbery or murder in places beyond the jurisdiction of a state. The man who acts with public object may do like acts to a certain extent, but his moral attitude is different…"[98] The comment to the Harvard Draft Convention on Piracy, which was relied upon heavily by the International Law Commission in preparing the articles on piracy in the Convention on the High Seas states:

> It may be thought advisable to exclude from the common jurisdiction certain doubtful phases of traditional piracy which can now be left satisfactorily to the ordinary jurisdiction of a state, or of two or three states, stimulated to action on occasion by diplomatic pressure …. Therefore the draft convention excludes from its definition of piracy all cases of wrongful attacks on persons or property for political ends, whether they are made on behalf of states, or of recognized belligerent organizations, or of unrecognized revolutionary bands.[99]

In testimony before the Subcommittee on Coast Guard and Maritime Transportation on international piracy, Rear Admiral William D. Baumgartner confirmed a link between piracy and terrorism has yet to be established. Rear Admiral Baumgartner stated, [t]he United States Government and Navy and naval intelligence has looked for a nexus between piracy and terrorism, and so far we have not found that nexus. In some respects, it would be an easier problem to tackle if we could establish that definitively, but we have not been able to."[100] Rear Admiral Baumgartner also stated, "al-Shabab [an Islamist faction working to gain political control in Somalia] is opposed to piracy, demonstrably opposed to piracy. And, in fact, when they and their fellows were in charge, piracy decreased markedly in the areas where they were in control."[101] Therefore, given the anti – maritime terrorism aim of SUA and the marked differences in pirates and terrorists, it does not appear SUA was originally intended to cover piracy much less specifically address it. This conclusion is reflected in the drafters' intent.

In submitting their draft convention, the drafters' of SUA felt it necessary "to make a clear distinction between the cases covered by the proposed new convention and piracy, since the latter was governed by a different regime, which is intentionally codified and customary law of the sea … The new convention should therefore be without prejudice to the legal rules regarding international piracy …"[102] This intention was further expressed in a study released by the International Maritime Organization ("IMO"), which stated, "[t]he Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation, 1988 … (SUA Convention and Protocol) deal with unlawful acts that fall outside the crime of piracy as defined in article 101 of UNCLOS."[103] Moreover, when discussing the interface of IMO agreements with the Law of the Sea treaty, Rudiger Wolfrum, Vice President of the International Tribunal for the Law of the Sea, lists the SUA convention in the category of agreements "intended for encouraging and facilitating maritime trade."[104]

Accordingly, given the aim of SUA, the differences in pirates and terrorists, the lack of an established nexus between piracy and terrorism, and the drafters' intention on the acts to be covered by SUA, the conclusion can be made that SUA is not special or specific in regards to acts of piracy. On the other hand, the Convention on the High Seas does deal with pirates specifically. There are nine articles in the Convention on the High Seas that specifically address piracy, including articles on the definition and the seizure and adjudication of suspected pirates. SUA generally covers unlawful acts against maritime navigation, while the Convention on the High Seas focuses specifically on piracy. U.S. officials agree that SUA is not specific to piracy, but applies more broadly to acts of violence against ships.[105] As such, SUA would be considered a general treaty that should not impinge on the particular provisions in the Convention on the High Seas that address piracy. According to rules of interpretation the later in time SUA would

not take precedent over the Convention on the High Seas with respect to piracy because the Convention on the High Seas is special or more specific. Therefore, article 30 of Vienna Convention would be inapplicable in the present treaty conflict, and general principles of treaty conflict should be applied to determine which treaty governs the U.S. right of referral.

General Principles of Treaty Interpretation and Conflict Resolution

i) Lex Posterior

The general interpretative principle of *lex posterior* means that the more recent or later in time treaty prevails over an inconsistent earlier treaty. This principle is also known as *lex posteriori* or *prior derogat*. This principle has been codified in article 30 of the Vienna Convention. Again, this principle means the later in time treaty prevails over the earlier treaty, but only to the extent the earlier in time treaty's provisions are incompatible with the later treaty. The SUA convention came into force 1 March 1992 as compared with the Convention on the High Seas, which came into force 30 September 1962; thus in applying the principle of *lex posterior* to the present situation, SUA is later in time and would prevail over the Convention on the High Seas, as they are inconsistent with regards to the prosecution of pirates.

ii) Lex Specialis

The general interpretative principle of *lex specialis* means that the specific treaty supersedes the general treaty.[106] This principle is also known as *generalibus specialia derogant* or *generalia specialibus non derogant*. It "focuses on the scope and precision of the treaties, giving effect to the more narrowly gauged treaty."[107] This principle applies even if the general treaty or provision is later in time. As the Convention on the High Seas is focused on piracy in certain provisions, the Convention on the High Seas is more specific than SUA, which does not address piracy specifically as discussed above.

In assessing what general principles of treaty conflict supersede other principles, Chris Borgen argues, "[i]f the states are party to both treaties, under *lex posterior* the later treaty applies. However, if one treaty is more specialized, *lex specialis* applies."[108] Accordingly, the Convention on the High Seas would take precedent over SUA regardless of when SUA came into force because the Convention on the High Seas is more specialized with respect to piracy. Therefore, applying general rules of treaty interpretation, the Convention on the High Seas governs the U.S. obligations for transferring suspected pirates to third party states for prosecution.

Universal Jurisdiction

As stated above, most agreements and treaty provisions addressing jurisdiction to capture and adjudicate pirates are based on the principle of universality. For hundred of years, states have been using universal jurisdiction as the basis to capture and prosecute pirates. This practice has been recently codified in UNCLOS.[109] Accordingly, as piracy is subject to universal jurisdiction, it is possible for the U.S. to base their right of referral solely on universal jurisdiction. However, there are two issues that may prevent the United States from using universal jurisdiction as its basis for transferring captured pirates to Kenya for prosecution: 1) the location of where the acts of piracy are committed (i.e., high seas or territorial waters) and 2) whether the pirates will be afforded international due process rights / minimum standards by Kenya.

The first issue that may prevent the United States from using universal jurisdiction as its basis for transferring suspected pirates to Kenya for prosecution is where the act of piracy was committed. For an act of piracy to be subject to universal jurisdiction, the *locus delicti* must be the high seas or a place outside the jurisdiction of any state.[110] An act of piracy committed inside territorial waters (not on the high seas) is subject to the territorial jurisdiction and sovereignty of

the coastal state. Territorial waters are defined as the waters extending up to twelve nautical miles from a coastal state's baseline.[111] Piratical acts committed inside territorial waters are, in fact, technically defined as acts of armed robbery at sea, not piracy.

According to the IMO, 100 attacks occurred in the Gulf of Aden, 15 occurred in the Red Sea, 1 occurred off the coast of Kenya, and 47 occurred off the coast of Somalia from January to September 2009. The IMO does not report on whether an attack occurred on the high seas or in territorial waters, they only report by the area of attack. Thus, using the IMO report as a reference, the precise number of attacks in territorial seas versus the high seas is not exactly known.

Based on the principle of universality, only the attacks that occurred on the high seas are subject to universal jurisdiction. Of those attacks subject to universal jurisdiction, the transfer of those captured would be governed by customary international law principles of universal jurisdiction as codified in UNCLOS. As discussed previously, UNCLOS does not allow the transfer of suspected pirates to third party states for prosecution; only the seizing state has jurisdiction to prosecute the suspected pirate. Accordingly, U.S. transfers of suspected pirates captured on the high seas to Kenya for prosecution is prohibited. However, as stated earlier the attacks that occurred in the territorial waters of Somalia are not subject to universal jurisdiction, but subject only to the jurisdiction of Somalia. Under normal circumstances only Somalia would have authority and jurisdiction to capture those suspected of committing piratical acts in Somali territorial waters; however, given the surge of piracy off the coast of Somalia, the UN Security Council has, at the request and with the consent of the acting Somali government, authorized third party states to enter Somalia's territorial waters to capture suspected pirates.[112] This unprecedented authorization changes the jurisdictional and legal landscape for the potential

prosecution of captured pirates. Again, under normal circumstances, those captured for committing piratical acts in Somali territorial water would be subject to Somali domestic legislation regarding piracy; but, as just stated Security Council resolution 1846 changes this. S.C. resolution 1846 urges states to use SUA as basis of jurisdiction to prosecute suspected pirates. As discussed earlier, SUA allows states to transfer suspected pirates to third party signatory member states for prosecution. Given that piratical acts committed in territorial waters are defined as acts of armed robbery, not piracy, the laws governing piracy, which would pre-empt SUA and not allow transfer to third party states for prosecution, are not technically applicable. Therefore, it appears that suspected pirates captured by the U.S. pursuant to S.C. resolution 1846 authorization could be transferred to Kenya for prosecution under SUA.

An argument can be made that the classification between piracy and armed robbery at sea is a technical nuance that should not prohibit the laws governing piracy from being applied to suspected pirates captured in Somali territorial water. This is especially true given the fact that Somalia's sovereignty has been overridden. If those in territorial waters are going to be subjected to international forces, then international laws should still apply i.e., UNCLOS as the codification of customary international law. Another argument is that the technical /definitional nuance between piracy and armed robbery at sea is not enough to bring piratical acts within the realm of SUA. SUA was developed as a response to terrorism and was meant to cover terrorist acts. The drafters never intended SUA to cover piratical acts, and, as discussed earlier, felt it necessary to state SUA was meant to cover all acts outside of piracy. Therefore, SUA is inappropriate to use for acts that are in effect piracy, and, in the absence of applicable treaties, customary international law should apply.

While these arguments are novel and may cause one to stop and think, it is likely they will

fail. One such reason is that when excluding piracy from SUA's scope, the drafters stated, "[SUA] should be without prejudice to international piracy." The mention of international piracy shows the drafters' intent to only exclude acts of piracy committed on the high seas (i.e., international piracy). Another reason the above arguments are likely to fail are because despite the 'technical / definitional nuance' between piracy and armed robbery at sea, it is nonetheless a difference. Customary international law (i.e., UNCLOS) defines piracy as acts committed on the high seas, not in territorial waters; thus, despite however minute or technical the difference may be, it is still a difference the international community has felt necessary to make and keep. Therefore, because piratical acts committed in territorial waters are considered acts of armed robbery at sea and not piracy, states capturing suspected pirates in Somali territorial waters are free to use SUA as a basis to transfer them to third party states for prosecution as acts of armed robbery at sea covered by article 3 of SUA.

The second issue that may prevent the United States from using universal jurisdiction as its basis for transferring suspected pirates to Kenya for prosecution is whether the alleged pirates will afforded international due process / minimum standards in the Kenya judicial system. When using the universality principle as the basis for jurisdiction certain guidelines or principles still must be followed. These guidelines / principles are outlined in the Princeton Principles on Universal Jurisdiction. While the Princeton Principles are not officially recognized as customary international law, many recognize them as a codification of such.

Principle 10 (Grounds for Refusal of Extradition) states in part:

> A state …. shall refuse to [extradite a person] based on universal jurisdiction if the person …. is likely to face a death penalty sentence or be subjected to torture or any other cruel, degrading, or inhuman punishment or treatment, or if it is likely that the person …. will be subjected to sham proceedings in which international due process norms will be violated and no satisfactory assurances to the contrary are provided.[113]

There are have been numerous allegations of torture and human rights abuses of suspected pirates being held in Kenyan jails. In addition to the torture allegations, questions have also been raised about whether Kenya extends international due process rights to suspected pirates. Moreover, allegations of the non-independence and impartiality of the Kenyan judiciary have many asking about the legitimacy of the proceedings (i.e., whether the proceedings are sham proceedings). As section IV discusses international due process / minimum standards and whether Kenya meets the standards, the allegations just raised and the determination of whether the U.S. can base their right of referral of suspected pirates to Kenya for prosecution based on universal jurisdiction will be discussed in the following section.

IV. Legality of Referral -- Is Current Procedure for Prosecuting Pirates Legal

"*It is essential, if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by the Rule of Law.*"
~Universal Declaration of Human Rights, 1948

In addition to having the right to refer captured pirates to Kenya for prosecution, the United States must also ensure the transfer is legal. Part of ensuring the legality of the transfer is ensuring due process / international minimum standards will be afforded to the suspected Somali pirates when transferred to Kenya.

A. Due Process / International Minimum Standards

i. What are US obligations when referring /extraditing persons to another jurisdiction for prosecution?

As stated above, when extraditing / transferring suspected pirates to Kenya for prosecution the U.S. must adhere and ensure international due process rights / minimum standards will be afforded to suspected Somali pirates. The international due process rights / minimum standards that are to be afforded to the suspected pirates are codified in the *International Covenant on*

Civil and Political Rights ("ICCPR") and the *United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* ("UNCAT"). In assessing whether suspected Somali pirates are afforded international due process rights / minimum standards when transferred by the U.S. to Kenya for prosecution both the ICCPR and UNCAT will be discussed and applied to the circumstances surrounding the capture and transfer of the Somali pirates.

a) International Covenant on Civil and Political Rights

The ICCPR was written and adopted by states with the intention of codifying the civil and political rights expressed in the *Universal Declaration of Human Rights* into international law.[114] The rights enshrined in the ICCPR "represent the basic minimum set of civil and political rights recognized by the world community."[115] The United States ratified the ICCPR in September 1992.[116] During the ratification process, the Senate determined the treaty was non-self-executing and did not implement the treaty into domestic law; thus, it is not binding on American courts.[117] The effect of this decision is that a claim brought in an American court cannot be based upon the ICCPR.[118] However, the ICCPR is still a legally binding treaty and the United States, by ratifying the treaty, is obligated to abide by the provisions set forth.[119] By ratifying the ICCPR the United States signaled its agreement and recognized that the rights pronounced within were basic due process rights that all humankind should be entitled.

In order to monitor state compliance with the rights enumerated within the ICCPR, the Human Rights Committee ("Committee") was established. The Committee monitors compliance through country visits, review of country reports submitted by the state parties themselves and adjudication of individual complaints. Although the decisions of the Committee are not binding authority on state parties, they are highly persuasive authority.[120]

In addition to the United States ratifying the ICCPR, the ICCPR represents customary international law.[121] Therefore, even if the United States did not ratify the ICCPR, it would still be bound to uphold the rights listed in the ICCPR as they represent customary international law.

Articles 9 and 14 of the ICCPR codify international due process standards. Article 9 states:

1. Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.

2. Anyone who is arrested shall be informed, at the time of arrest, of the reasons for his arrest and shall be promptly informed of any charges against him.

3. Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release. It shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial, at any other stage of the judicial proceedings, and, should occasion arise, for execution of the judgement [sic].

4. Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.

5. Anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation.[122]

Article 14(1) provides that any person charged with a criminal offense is "entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law."[123] A fair trial is defined in Art. 14(3) as a trial that guarantees everyone shall be entitled:

a) To be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him;

b) To have adequate time and facilities for the preparation of his defense and to communicate with counsel of his own choosing;

c) To be tried without undue delay;

> d) To be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it;
>
> e) To examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;
>
> f) To have the free assistance of an interpreter if he cannot understand or speak the language used in court;
>
> g) Not to be compelled to testify against himself or to confess guilt[124]

In determining whether suspected pirates captured by the United States and transferred to Kenya for prosecution are afforded due process of law, each of the above provisions will be discussed in relation to the Kenyan judicial and prison system. These provisions provide for international minimum standards of treatment; thus, Kenya's compliance with them is vital in determining the legality of U.S. transfers to Kenya.

In his article analyzing the compliance of the Iraqi High Tribunal with international due process Kevin Jon Heller lays out a useful framework for discussing and analyzing international due process.[125] The framework breaks down international due process rights into four chronological categories: pre-trial; trial; judgment and sentence; and appeals. Under each category specific rights / norms are discussed and analyzed. This framework provides a logical model for discussing international due process; thus, I will use Heller's framework when discussing and analyzing the international due process rights of Somali pirates in the Kenyan judicial system.[126]

A) Pre-trial

International due process rights afforded to an accused during pre-trial procedures include:

the right to counsel; the right to silence; the right to review the accused's detention; the right to prepare a defense; and the right of juveniles to be detained separate from adults. Each will be discussed and analyzed in turn.

1. Right to Counsel

The right to counsel is a touchstone of international due process. Article 14(1) provides for an accused to have the right to counsel regardless of his ability to pay.[127] It is worth noting that during negotiations for the ICCPR, the United States was the country to propose the accused should be informed of his right to legal assistance and to have counsel appointed, if he could not afford counsel.[128] It is also critical to note, the right to counsel includes the right to counsel during pre-trial procedures.[129] Christoph Safferling has stated:

> [T]he safeguarding of human rights during the pre-trial stage is important because the whole inquiry is intended to determine the legal and factual basis for trial by obtaining evidence and preparing court procedure. The foundations for potential conviction are being laid here. It is a crucial stage for the suspect … Therefore … the suspect must be assisted by legal counsel.[130]

The Kenyan Criminal Procedure Code provides "[a] person accused of an offence before a criminal court, or against whom proceedings are instituted under this Code in a criminal court, may of right be defended by an advocate."[131] The Kenyan Constitution states in section 83:

> (2) Where a person is detained by virtue of a law referred to in subsection (1) the following provisions shall apply-
>
> (e) at the hearing of his case by the tribunal appointed for the review of his case he shall be permitted to appear in person or by a legal representative of his own choice.

The constitution also provides in section 77(2)(d) that every person charged with a criminal offence "shall be permitted to defend himself before the court in person or by a legal representative of his own choice."[132] However, section 77(14) states "[n]othing contained in subsection (2)(d) shall be construed as entitling a person to legal representation at public expense."[133]

There are two potential inconsistencies in the Kenyan Constitution and criminal procedure code with the fundamental right to counsel: 1) the right to have counsel appointed for indigents and 2) the right to counsel during pre-trial procedures.

a. Right to Counsel For Indigents

As stated previously, one of the most fundamental due process rights is the right to counsel, and to have counsel appointed if an accused does not have the financial means to secure counsel. In Kenya, indigent defendants do not have the right to government appointed counsel except in capital cases. Piracy is not classified as a capital offense; therefore, those accused of piracy that cannot afford counsel are left without representation. In its 2008 Human Rights Report for Kenya ("U.S. Country Report on Human Rights"), the U.S. State Department Bureau of Democracy, Human Rights, and Labor stated, "[t]he lack of a formal legal aid system [in Kenya] seriously hampered the ability of many poor defendants to mount an adequate defense."[134] This denial of the right to counsel for indigent defendants is in violation of article 14(1) of the ICCPR as well as customary international law.

b. Right to Counsel During Pre-Trial Procedures

International due process requires that upon arrest or detention suspects should be appointed or allowed access to counsel.[135] Important to note here are that both the Kenyan constitution and criminal procedure code distinguish between the right to counsel during pre-trial procedures and during times when the accused is brought before the court. Both afford the accused a right to counsel during times when the accused is before the court. However, neither mentions the accused's right to counsel during pre-trial procedures. As such, it appears an accused does not have a right to counsel during pre-trial procedures such as police interrogations. However, the U.S. Country Report on Human Rights states that Kenya law does provide pre-trial detainees the

right to access attorneys.[136] But, a review of the Kenyan Constitution and criminal procedure code does not provide for this right. Moreover, even if the law does provide a right to access counsel, it is not clear this includes the right to have counsel present during pre-trial procedures such as police interrogations. Additionally, an accused that cannot afford counsel is still denied their right to counsel during pre-trial procedures, as they are not provided legal counsel as discussed above. Thus, at a minimum, indigent pre-trial detainees are denied the right of counsel during pre-trial procedures.

As Safferling explained, the foundations for trial and conviction are being laid during pre-trial procedures; thus, it is critical for an accused to have counsel during this time.[137] The right to counsel during pre-trial procedures is especially critical for suspected pirates being detained in Kenya due to the allegations of torture inflicted upon detainees in the Kenyan prison system. Denying suspects the right of counsel during interrogations and other pre-trial procedures calls into question the legitimacy of confessions and evidence obtained and is a deprivation of international due process. Moreover, the denial of counsel during pre-trial procedures is in violation of the ICCPR and customary law international law.

2. Right to Silence

Although the right to silence is not explicitly stated, article 14(3) of the ICCPR states that everyone is entitled "not to be compelled to testify against himself or confess guilt."[138] In short, this means an accused has a right to silence. This is particularly so in order to not incriminate oneself. The Committee has stated, "that the wording of Article 14(3)(g), i.e., that no one shall 'be compelled to testify against himself or to confess guilt,' must be understood in terms of the absence of any direct or indirect physical or psychological pressure from the investigating authorities on the accused with a view to obtaining a confession of guilt."[139] Confessions must

be completely voluntarily and without physical and / or psychological coercion.[140] The Committee found in *Conteris v. Uruguay*, a confession obtained after the accused was subjected to ill treatment was in violation of article 14(3)(g).[141] The Committee has also applied the right to silence to pre-trial procedure.[142]

Section 77(7) of the Kenyan constitution states "[n]o person who is tried for a criminal offence shall be compelled to give evidence at the trial." This section only provides for the right to silence during trial, which is not in compliance with the requirements of the ICCPR according to the Human Rights Committee as stated above.[143] The denial of the right to silence during pre-trial procedure is likely to be deemed a violation of international due process.

In addition to the denial of the right to silence, another point that potentially raises concerns is the circumstances surrounding any confessions made by accused pirates. The reported mistreatment and torture inflicted upon detainees in the Kenyan system could call into question the voluntariness, and in fact, the actual legitimacy of any confessions made by suspected pirates. If the suspected pirates were subjected to mistreatment and torture during police questioning or by police or prison guards with the goal of obtaining a confession then the confession could be in violation of article 14(3)(g).

3. Notice of Charges

Article 14(3)(a) provides that everyone charged with a criminal offence shall be entitled "[t]o be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him."[144] Notice must be given in a timely manner in order to allow the accused time to prepare a defense.[145] The Committee has stated, "[n]otice must be provided in time to allow the accused sufficient opportunity to examine or have examined the witnesses against him/her, and to secure the attendance and examination of witnesses against him/her."[146]

The Kenyan constitution provides "[a] person who is arrested or detained shall be informed as soon as reasonably practicable, in a language that he understands, of the reasons for his arrest or detention."[147] Section 83(2) of the Kenyan constitution further provides:

> Where a person is detained by virtue of a law referred to in subsection (1) the following provisions shall apply-
>
> (a) he shall, as soon as reasonably practicable and in any case not more than five days after the commencement of his detention, be furnished with a statement in writing in a language that he understands specifying in detail the grounds upon which he is detained:
>
> (b) not more than fourteen days after the commencement of his detention, a notification shall be published in the Kenya Gazette stating that he has been detained and giving particulars of the provision of law under which his detention is authorized;
>
> (c) not more than one month after the commencement of his detention and thereafter during his detention at intervals of not more than six months, his case shall be reviewed by an independent and impartial tribunal established by law and presided over by a person appointed by the President from among persons qualified to be appointed as a judge of the High Court;

According to section 134 of the Kenyan criminal procedure code "[e]very charge or information shall contain, and shall be sufficient if it contains, a statement of the specific offence or offences with which the accused person is charged, together with such particulars as may be necessary for giving reasonable information as to the nature of the offence charged."

The Kenyan constitution provides in both sections 77(2) and 83(2) that a detainee shall be informed promptly of the reason of his arrest and detention. Section 134 of the criminal procedure also provides for informing the detainee of the charges being brought against him. These notice requirements provided for in Kenya satisfy the requirements of article 14(3)(a); thus, there would be no violation of the ICCPR or customary international law based on notice.

4. Review of Detention

In addition to the right to be informed of the charges, the accused is entitled to have the legality of their detention promptly reviewed by a court. Article 9(4) of the ICCPR, states anyone, deprived of their liberty "shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention…"[148]

Section 83(2) of the Kenyan constitution provides:

> Where a person is detained by virtue of a law referred to in subsection (1) the following provisions shall apply-
>
> (c) not more than one month after the commencement of his detention and thereafter during his detention at intervals of not more than six months, his case shall be reviewed by an independent and impartial tribunal established by law and presided over by a person appointed by the President from among persons qualified to be appointed as a judge of the High Court;

Normally, persons in Kenya arrested for minor offences are to be brought before a judge within 24 hours, and persons arrested for capital offences are to be brought before a judge within in 14 days.[149] Piracy is not considered a capital offence; thus, in theory suspected pirates should be brought before a judge within 24 hours. It should be noted that suspected pirates captured at sea may not be brought before a judge as quickly as someone arrested in Kenya due to the time required to transfer suspected pirates from sea to Kenyan territory. However, the required travel time cannot act as an excuse to deprive suspected pirates of their right to have their detention reviewed promptly. Giving due consideration to the circumstances surrounding the capture and the location of the capture, suspected pirates should be transferred to Kenyan territory and brought before a judge in a timely manner without undue delay.

To determine compliance with article 9(4) each capture and transfer of suspected pirates would have to be reviewed on a case-by-case basis. Accordingly, a determination of compliance is not possible for this paper. However, reports on Kenyan's general compliance with article 9(4)

are important for the U.S. to consider in assessing whether suspected pirates will be afforded their right to a prompt review of their detention.

According to the U.S. Country Report on Human Rights, "the right to prompt judicial determination of the legality of detention frequently was not respected in practice."[150] The Human Rights Committee stated, "the Committee remains concerned about reports of serious dysfunctions in the administration of justice, owing primarily to the lack of human and material resources as well as the slow pace of proceedings."[151] Based on these reports, it does not appear detainees in Kenya are afforded their right to a prompt review of their detention pursuant to article 9(4). As such, it is questionable whether suspected pirates would be afforded such prompt review.

5. Right to Prepare a Defense

The right to have adequate time and facilities to prepare a defense and to communicate with counsel is stated in article 14(3)(b). This right is mirrored in the Kenyan Constitution in sections 77(2)(c) and 83(2)(d). Section 77(2)(c) provides that every person charged with a criminal offence "shall be given adequate time and facilities for the preparation of his defence."[152] Section 82(2)(d) provides:

> (2) Where a person is detained by virtue of a law referred to in subsection (1) the following provisions shall apply-
>
> (d) he shall be afforded reasonable facilities to consult a legal representative of his own choice who shall be permitted to make representations to the tribunal appointed for the review of the case of the detained person; and

The Kenyan government stated in its 2004 report to the UN Human Rights Committee that their "criminal process affords reasonable facilities to arrested persons to build their defences, engage legal counsel of their choice."[153] In the General Comment to article 14, the Human Rights Committee stated, "what constitutes 'adequate time' depends on the circumstances of

each case. 'Adequate facilities' must include access to documents and other evidence which the accused requires to prepare his case, along with the opportunity to engage and communicate with counsel."[154]

The right to prepare a defense can be separated into three sub-sections: 1) pre-trial disclosure; 2) extent of disclosure and 3) exculpatory evidence.

a. Pre-Trial Disclosure

According to section 134 of the Kenyan criminal procedure code "[e]very charge or information shall contain, and shall be sufficient if it contains, a statement of the specific offence or offences with which the accused person is charged, together with such particulars as may be necessary for giving reasonable information as to the nature of the offence charged." Although, section 134 of the Kenyan criminal procedure code provides for the accused being informed of the nature of the charge, it does not provide a right for the accused to have access to the evidence being presented against him before his trial begins. For offences being tried by the magistrates' courts, the accused does not know of the evidence being brought against him until his trial begins.[155] The U.S. Country Report on Human Rights states this lack of access to evidence is a handicap to defense lawyers.[156] Not only is the lack of access to evidence a handicap to defense lawyers, but is also a violation of the right to prepare a defense in article 14(3)(b).

b. Extent of Disclosure

As discussed above, the prosecution is only required to inform the accused the nature of the charge. However, even this disclosure of the nature of the charge is limited by the Kenyan criminal procedure code. Section 137 states:

> The following provisions shall apply to all charges and informations, and, notwithstanding any rule of law or practice, a charge or information shall, subject to this Code, not be open to objection in respect of its form or contents if it is framed in accordance with this Code –
>
> (a) (i) a count of a charge or information shall commence with a statement of the offence charged, called the statement of offence;
>
> (ii) the statement of offence shall describe the offence shortly in ordinary language, avoiding as far as possible the use of technical terms, and *without necessarily stating all the essential elements of the offence*, and if the offence charged is one created by enactment shall contain a reference to the section of the enactment creating the offence;
>
> (iii) after the statement of the offence, particulars of the offence shall be set out in ordinary language, in which the use of technical terms shall not be necessary:
>
> Provided that where any rule of law or any Act limits the particulars of an offence which are required to be given in a charge or information, nothing in this paragraph shall require more particulars to be given than those so required;[157]

Section 137 only requires the accused be informed of a general description of the offence to be charged. This general description does not require all of the elements of the charged offence to be stated, and in fact, could be interpreted to restrict the listing of all essential elements of the charged offence. This limitation and possible restriction is in contradiction to the 'adequate facilities' requirement in article 14(3)(b). Not being informed of all the elements of the offence to the charges cannot be said to be providing the accused with 'adequate facilities' (i.e., access to information required to prepare a defense). The Human Rights Committee has "emphasized that [the notice of charges requirement] requires that the notice include details of the charges."[158] Limiting and possibly restricting the disclosure of all the elements of the offense to be charged

does not meet the requirement of detailed notice. Thus, the lack of detailed notice disclosure and the lack of 'adequate facilities' provided to the accused is a violation of the right to prepare a defense in article 14(3)(b).

c. Exculpatory Evidence

A State is not allowed to withhold evidence that is exculpatory to the accused.[159] If the accused is not informed of exculpatory evidence, he cannot "present his case in conditions that do not place him at a disadvantage vis-à-vis his opponent" in violation of his right to a fair trial.[160] In Kenya, the prosecutor is required to present all evidence in its possession to the court.[161] This requirement is absolute regardless of whether the evidence is unfavorable to its case or exculpatory to the accused.[162] The absolute disclosure of all evidence by the prosecution is required because, as stated above, the accused does not know of the evidence being brought against him until his trial begins.[163] However, this requirement is only for offences being tried by the magistrates' courts, not offences being tried by the High Court as the accused in cases before the High Court has a right to pre-trial disclosure of evidence.[164] As such, an accused being tried before the High Court is not provided with any of the evidence being used against him until his trial begins. This is a clear violation of the right to prepare a defense. Accordingly, based on lack of pre-trial disclosure for non-capital offences, the lack of detailed notice and the denial of the right of the accused to receive exculpatory evidence in cases before the High Court, Kenya is in violation of obligations under article 14(3)(b).

6. Juvenile Detention

Article 10(2)(b) of the ICCPR provides that "[a]ccused juvenile persons shall be separated from adults and brought as speedily as possible for adjudication." Article 10(3) also provides that "…[j]uvenile offenders shall be segregated from adults and be accorded treatment

appropriate to their age and legal status."

The U.S. Country Report on Human Rights noted there were no separate facilities for minors in pretrial detention in the Kenyan prison system.[165] The U.S. Country Report on Human Rights further noted that civil activists have observed juveniles of both sexes sharing cells with adult men and women.[166] The exact age of many suspected pirates is unknown and uncertain; however, the age of most pirates is below 25 with many believed to be in their teens. The suspected pirates that are under the age of eighteen should be detained in separate juvenile facilities and not mixed with adult detainees. To date, there have been no specific allegations that juvenile suspected pirates have been detained in facilities with adults. However, as stated above, the U.S. Country Report on Human Rights noted there were no separate facilities for detained juveniles in the Kenyan prison system. Therefore, the conclusion can be drawn that juvenile suspected pirates are housed in the same facilities as adult detainees. This lack of separate detention facilities and the mixture of juvenile detainees with adult detainees violates article 10(2)(b) and 10(3).

B) Trial

a. Right to Prompt Trial

In addition to the right listed in article 14(3)(c) to be tried without undue delay, article 9(3) of the ICCPR provides:

> Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release…[167]

General Comment 13 to the ICCPR states, "that the right to trial without undue delay relates not only to the time by which a trial should commence, but also to the time by which it should end and judgement [sic] rendered; all stages must take place 'without undue delay.'"[168]

Economic and administrative restraints are not valid reasons for delaying trials.[169] The Committee has stated that while it is "not unsympathetic to the State party's claims that budgetary constraints may cause impediments to the proper administration of justice," these constraints are not justification for causing delay in bringing an accused to trial.[170]

The U.S. Country Report on Human Rights stated that lengthy pretrial detention continued to be a serious problem in the Kenyan judicial system.[171] There is a judicial backlog of approximately one million criminal cases.[172] This backlog of cases results in detainees being held for years before being brought before a judge.[173] The U.S. Country Report on Human Rights states that a majority of detainees spend more than 3 years in prison before their trial is completed.[174] This inexplicably long delay in bringing an accused to trial is a clear violation of article 14(3)(c) and Kenya's budgetary issues are no excuse for non-compliance.

Somali pirates transferred to Kenya will undoubtedly be affected by the delay. Suspected pirates will be placed in the backlogged Kenyan judicial system where they will take their place in line and wait up to 3 years potentially before having a trial. This delay will result in a denial of suspected pirates' due process rights.

b. Presence of Accused at Trial

Article 14(3)(d) of the ICCPR states that "[i]n the determination of any criminal charge against him, everyone shall be entitled … [t]o be tried in his presence." The Kenyan criminal procedure code provides "[e]xcept as otherwise expressly provided, all evidence taken in a trial under this Code shall be taken in the presence of the accused, or, when his personal attendance has been dispensed with, in the presence of his advocate (if any)."[175] The U.S. Country Report on Human Rights reports that in practice the accused is afforded the right to attend their trial. There have also been no allegations that suspected pirates have not been allowed to attend their

trial. Thus, there appears to be no violation of article 14(3)(d).

c. Cross-Examination of Witnesses

Article 14(3)(e) states an accused shall be entitled "[t]o examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him." The General Comment to article 14 provided, "that this provision was designed to guarantee the accused the same legal powers to compel the attendance of witness and to examine or cross-examine any witnesses available to the prosecution."[176] Section 302 of the Kenyan Criminal Procedure Code states, "[t]he witnesses called for the prosecution shall be subject to cross-examination by the accused person or his advocate, …"

In practice, defendants are allowed to confront witness and cross-examine them at trial. Defendants are also allowed to present witnesses in their defense. There have been no allegations that suspected pirates have not been able to confront or cross-examine witnesses presented by the prosecution. Accordingly, Kenyan law is not in violation of article 14(3)(e).

C) Judgment and Sentence

a. Burden of Proof

Article 14(2) states "[e]veryone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law." Although this article does not explicitly state the burden of proof required for conviction, the Human Rights Committee has stated in its commentary to article 14(2) that "[n]o guilt can be presumed until the charge has been proved beyond a reasonable doubt."[177] The Committee further noted "that the presumption of innocence implies a right to be treated as innocent, and imposes a duty on all public authorities to refrain from prejudging the outcome of a trial."[178]

Kenyan law provides that an accused is entitled to a presumption of innocence;[179] however, there is no mention of the burden of proof required for conviction. Section 215 of the Kenyan criminal procedure code states "[t]he court having heard both the complainant and the accused person and their witnesses and evidence shall either convict the accused and pass sentence upon or make an order against him according to law, or shall acquit him." Section 322 of the criminal procedure code further provides:

> (1) When the case on both sides is closed, the judge shall then give judgement [sic].
>
> (2) If the accused person is convicted, the judge shall pass sentence on him according to law.

There is no mention in either the Kenyan constitution or criminal procedure code about the burden of proof required for a criminal conviction. In its report to the Human Rights Committee about is compliance with the ICCPR, Kenya reported that "an accused person is presumed to be innocent until proven guilty."[180] The report does not state the burden of proof required for conviction. Depending on how the Kenyan judiciary interprets and applies the right to be presumed innocent until proven guilty, an argument could be made Kenyan law violates article 14(2) by not requiring the burden of proof for conviction to be beyond a reasonable doubt. Again, this argument's validity depends on the Kenyan judiciary's interpretation and consistent application of the right to be innocent until proven guilty.

D) Appeals

Article 14(5) of the ICCPR provides that "[e]veryone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law."[181] The right to appeal includes the right to prompt review by a higher court.[182] The Committee has held "Article 14(3)(c) must be read together with Article 14(5), so that the to right to review of

conviction and sentence must be made available without undue delay at all instances."[183] Section 347 of the Kenyan Criminal Procedure Code states "a person convicted on a trial held by a subordinate court of the first or second class may appeal to the High Court; and … [a]n appeal to the High Court may be on a matter of fact as well as on a matter of law."

In practice defendants are granted the right of appeal. While there are have been no cases of suspected pirates transferred by the U.S. to Kenya under the current MoU that have reached the appeals stage, it does not appear based on previous practice that the right of appeal would be denied. Thus, given section 347 of the Kenyan criminal procedure code grants a right of appeal and this right of appeal is granted in practice, Kenya satisfies the minimum due process standards under article 14(5).

Article 6 of the ICCPR states "[a]nyone sentenced to death shall have the right to seek pardon or commutation of the sentence. Amnesty, pardon or commutation of the sentence of death may be granted in all cases." Kenya does not prohibit the death penalty for certain crimes. However, the maximum sentence for the offense of piracy is a life sentence.[184] Thus, as long as the maximum penalty for piracy does not change, Kenya meets due process standards under article 6 of the ICCPR.

E) Other

a. Judicial Independence

Article 14(1) of ICCPR provides "everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law." Further, article 2(b) of ICCPR provides "…any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial

remedy." The Human Rights Committee defined independent and impartial in *Bahamonde v. Equatorial Guinea:*

> [A] situation where the functions and competences of the judiciary and executive are not clearly distinguishable or where the latter is able to control or direct the former is incompatible with the notion of an independent and impartial tribunal within the meaning of article 14, paragraph 1, of the Covenant.[185]

Section 77(1) of the Kenyan Constitution requires an accused is entitled to "…a fair hearing within a reasonable time by an independent and impartial court…" However, despite the constitution requiring an accused be judged by an independent and impartial court, there are concerns with the actual independence and impartiality of the Kenyan judicial system.

i. Executive influence on Judicial Branch

The U.S. Country Report on Human Rights stated that although the Kenyan Constitution and law provided for judicial independence, the executive branch influenced the judicial branch at times.[186] The report also quoted the African Peer Review Mechanism[187] as reporting a "visible lack of independence of the judiciary" in Kenya.[188] In its 2005 report *Concluding observations of the Human Rights Committee* ("UN Human Rights Committee Report") based on a report submitted by the Kenyan government pursuant to article 40 of the ICCPR, the Committee stated:

> …While the Committee appreciates recent Government measures such as the adoption of the Anti-Corruption and Economic Crimes Bill and its implementation, and the establishment of the Kenya Anti-Corruption Commission, which led to the resignation or the suspension of many High Court and Court of Appeal judges, it notes that allegations of judicial corruption persist, a situation that seriously undermines the independent and impartiality of the judiciary...[189]

These reports raise serious doubts and concerns over the actual independence and impartiality of the judicial system, which in turn calls into question the fairness of the trial received by an accused. As such, based on the above reports, it appears likely that suspected pirates might not

receive a fair trial by an independent and impartial judiciary, which would be a violation of article 14(1).

b. Treatment of Detainees

In addition to the due process rights provided in articles 9 and 14, articles 7 and 10 also provide minimum standards for treatment of detainees.[190] Article 7 of the ICCPR provides that "[n]o one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment."[191] Article 10(1) further provides, "[a]ll persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person."[192] It should be noted that the U.S. entered a reservation to article 7 of the ICCPR about the meaning of "cruel, inhuman and degrading treatment or punishment."[193] While there is dispute about what constitutes "cruel, inhuman and degrading treatment or punishment," it is unlikely the reported behavior and actions below represent the source of the debate. It should also be noted that Kenya did not enter any reservations to the ICCPR, and therefore, is obliged to comply fully with its provisions.

The U.S. Country Report on Human Rights stated, "…police frequently used violence and torture during interrogations and as punishment of pretrial detainees and convicted prisoners. According to IMLU's 2005-06 annual report, common methods of torture included whipping, burning with cigarettes, and beating with gun butts and wooden clubs."[194] The U.S. Country Report on Human Rights also stated that IMLU received 772 allegations of torture in Kenyan prisons, although the real number of torture cases was likely higher.[195] The UN Human Rights Committee Report stated:

> The Committee is concerned at reports that police custody is frequently resorted to abusively, and that torture is frequently practised [sic] in such custody. It is especially concerned at the information about the extremely high number of deaths in custody …. [I]t remains disturbed by the reports that law enforcement

> officials responsible for acts of torture are seldom prosecuted, and that forms for the filing of complaints … can only be obtained from the police themselves.[196]

In addition to the reports and concerns over torture and cruel and inhuman treatment in the Kenyan prison system, the actual living conditions of detainees have also raised questions. The U.S. Country Report on Human Rights stated:

> Prison and detention center conditions continued to be harsh and life threatening. Most prisons, particularly men's prisons, continued to be severely overcrowded in part due to a backlog of cases in the judicial system. In May the director of health services for prison services stated that the country's 90 prisons held 48,000 prisoners while they were designed to hold only 12,000 persons. According to an OFFLACK study released in 2007, Meru Prison held three times more inmates than its intended capacity and had only nine toilets for 1,045 prisoners, forcing many to use as toilets the same buckets they also used for bathing. In Kamiti Maximum Security Prison, approximately 700 inmates shared a cell block designed for 300. During the April security operation in Mount Elgon, IMLU noted that Bungoma Prison held over 900 prisoners in a facility with a 480-person capacity.[197]

The U.S. Country Report on Human Rights stated the meal portions for prisoners were inadequate and water shortages were a persistent problem.[198] The report also stated that hundreds of prisoners die annually from infectious diseases caused and spread by overcrowding, unhygienic conditions and inadequate medical treatment.[199] The report cited a July 2008 Ministry of Home Affairs report that concluded 46 inmates died monthly due to congestion, unhygienic conditions and poor health care.[200] The UN Human Rights Committee Report stated, "…the Committee continues to be concerned at the situation in prisons, particularly in the areas of sanitation and access to health care and adequate food. It is concerned at the extreme overcrowding of prisons, which was acknowledged by the delegation and which, combined with sanitation and health-care deficiencies, may result in life-threatening conditions of detention."[201]

It is clear from these reports that detainees in the Kenyan prison system are subjected to torture, cruel, inhuman, and degrading treatment, and are not treated with humanity and respect

for the inherent dignity of a human person. Whipping, burning with cigarettes and beating with gun butts and wooden clubs is very likely to qualify as cruel and inhuman treatment. Having nine toilets for over 1,000 prisoners, being forced to use the same bucket for bathing as is used as a toilet, housing 48,000 prisoners in a space designed for 12,000, being exposed to infectious diseases, and receiving inadequate meal portions is also highly likely to qualify as inhuman and degrading treatment. It is also very likely that suspected pirates will be subjected to the same treatment and conditions given these types of conditions are prevalent throughout the entire Kenyan prison system, and not specific to one or a select few prisons. The treatment and conditions Kenyan detainees are subjected to are without question in violation of article 7 and 10(1) of the ICCPR. Given the inevitable certainty that suspected pirates transferred to the Kenyan prison system will be subjected to cruel and inhuman treatment and degrading conditions, any U.S. transfer of suspected pirates to Kenya would result in a failure to ensure the minimum standards afforded to suspected pirates in violation of international law.

b) UN Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment

UNCAT entered into force on June 26, 1987, and the United States ratified the convention on October 21, 1994.[202] UNCAT provides two protections to accused pirates: 1) the right to not be subject to torture or ill-treatment and 2) capturing / extraditing states cannot deliver accused pirates to states where there are grounds to believe the pirates will be tortured.[203] Article 2 provides:

> 1.)Each State Party shall take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction.
>
> 2) No exceptional circumstances whatsoever, whether a state of war or a threat or war, internal political instability or any other public emergency, may be invoked as a justification of torture.

More importantly in terms of U.S. obligations when transferring suspected pirates to Kenya for prosecution is article 3. Article 3 provides:

> 1) No State Party shall expel, return ("refouler") or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.

U.S. courts advance this proposition as well. A New York district court has stated that extradition should be refused if extradition is likely to result in "anticipated torture, cruel conditions of incarceration or lack of due process at trial" in the receiving country.[204] In determining if "substantial grounds" exists for believing one will be subjected to torture article 3(2) provides:

> 2) For the purpose of determining whether there are such grounds, the competent authorities shall take into account all relevant considerations including, where applicable, the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights.

Article 3(2), thus, provides that an extraditing or transferring state should look to patterns of gross, flagrant or mass human right violations by the receiving state in determining whether the detainee being transferred is likely to be subjected to torture. Commentary on article 3(2) explains:

> The existence of such a serious human rights situation in a country should serve as a warning to other States which might consider the possibility of expelling, returning or extraditing a person to that country. However, paragraph 2 does not exclude the possibility of handing over a person to that country, if the State taking the decision is satisfied that in that specific case no risk of torture exists. Nor does paragraph 2 mean that a person may always be handed over to a State where there is no consistent pattern of human rights violations. It may be that, nevertheless, in the specific case a risk of torture exists, for instance because the person concerned belongs to a specific group, or has committed a specific act, which might give rise to special risks for him in the country concerned. Insofar as paragraph 2 refers to the existence in a State of a consistent pattern of gross, flagrant or mass violations of human rights, the provision is neither absolute nor exhaustive. Expulsion, return or extradition may sometimes be permitted even if such a general situation exists, and on the other hand, expulsion, return or extradition may sometimes be prohibited under the general rules of article 3 even if there is no such consistent pattern of human rights violations. The general rule is the one indicated in the first part of paragraph 2, namely that the existence of substantial

> grounds for believing in a risk of torture shall be assessed in the light of all relevant circumstances.[205]

Accordingly, the U.S. is prohibited from transferring suspected pirates to Kenya for prosecution if the U.S. believes the suspected pirates will be subjected to torture in Kenya. In assessing the probability of the suspected pirates being subjected to torture, the U.S. should consider any pattern of gross, flagrant and mass human rights violations in addition to the likelihood of suspected pirates being tortured based on their status as a pirate.

As stated previously, the U.S. Country Report on Human Rights stated, "…police frequently used violence and torture … as punishment of pretrial detainees."[206] The U.S. Country Report on Human Rights also stated that over 750 allegations of torture in the Kenyan prison system were reported in 2008.[207] The 2007 U.S. Country Report on Human Rights cited a Legal Resource Foundation report, which stated that torture was common in the Kenyan prison system and inflicted openly.[208] The Legal Resource report went on to state that "[o]f 948 prisoners from 29 prisons interviewed, 83 percent claimed they were beaten, and 59 percent witnessed wardens mistreating other prisoners."[209] Also as stated previously, the UN Human Rights Committee Report stated that police frequently resort to abuse and torture of detainees in custody, and that police were rarely held accountable for such abuse and torture.[210] The United Nations (UN) Special Rapporteur on torture has stated that the use of torture by law enforcement officials in Kenya was widespread and systematic.[211] He recommended that, "[t]he government should ensure that all allegations of torture and similar treatment are promptly, independently and thoroughly investigated by a body capable of prosecuting perpetrators."[212]

Thus far, two piracy cases have been brought before Kenyan courts and in both cases the defendants alleged they were tortured and denied religious privileges.[213] These previous allegations combined with the numerous reports of abuse and torture by Kenyan police and prison officials

raise serious concerns about the transfer of suspected pirates to Kenya for prosecution. Although a consistent pattern of gross, flagrant and mass human rights violations does not need to be shown or proven for UNCAT's refouler ban to apply, Kenya clearly exhibits such a pattern. This pattern in addition to the previous allegations is arguably substantial grounds for believing transferred pirates will be subjected to torture in Kenya. Therefore, any transfer of suspected pirates to Kenya may be in violation of UNCAT's refouler ban. While Kenya may give assurances that suspected pirates will not be tortured and that they are reforming their prison system, it is questionable whether these assurances will be enough to overcome and discount their previous blemished human rights record. This is especially true for the U.S. given the State Department has issued numerous Country Reports on Human Rights noting the torture, abuse and inhumane treatment of detainees in the Kenyan prison system. Accordingly, any transfer by the U.S. of suspected pirates to Kenya may reasonably be challenged as a violation of UNCAT's refouler ban.

II. **Is the current transfer arrangement an effective remedy or bad policy?**

Beyond the questions of legality, the simple question of whether the transfers are an effective remedy to the prosecution issues of piracy or whether they are bad policy for the United States remains. Many, including the United States government and the UN Security Counsel, applaud the transfer agreement and encourage other states to pursue similar arrangements. However, others question the U.S. motivation behind the agreement and speculate the harm to the U.S. may outweigh the benefits of the arrangement. These questions of motivation lead to, and magnify, the question of legitimacy of U.S. action and exacerbate the potential harm to both the U.S. reputation generally and, in particular, to the validity of U.S. leadership in the international sphere.

The executive director of the Washington-based think tank Africa Action, Gerald Lemelle , has stated, "[a]t the heart of Western intervention in Somalia, which has been a geo-political football, is the battle for its oil."[214] Prof. Abdi Ismail Samitar, a Somali advocate at the University of Minnesota, stated that the MoU granting Kenya rights to drill for oil off the Somali continental shelf, extending up to 200 miles, caused an uproar in Kenya, and that the 245-member Somali Parliament voted unanimously against it.[215] "[The TFG] is not a real government, so they lack the authority to implement or enter into agreements," the professor insisted.[216] Prof. Samitar said that the TFG was beholding to Kenya and its Western backers because of a lack of financial resources; and therefore, the interim government lacks the ability to protect the interests of the Somali people.[217]

Sadia Aden, a Virginia-based human rights advocate and Prof. Samitar argue the United Nations has engaged in leading Western nations in an attempt to control Somali resources.[218] Ms. Aden also argues the foreign navies that patrol Somali seas against pirates are really there to exploit the resources of Somalia, mainly its oil reserves and natural gas; and have been given permission to do so by the UN Security Council.[219] "Somalis know that these navies did not come to hunt and prosecute pirates but to divide the Somali seas, and to protect their interests as they hope to divide up our resources—not just in the ocean, but also on land," Ms. Aden continued.[220] The U.S. and other Western countries intervene in and around Somalia both to control the Gulf of Aden and the Indian Ocean as well as to claim concessions for oil exploration and exploitation.[221]

Despite the fact that arguments alleging that states, including the U.S., exchange "blood" for oil may become shrill and overstated, as legitimate state interests in these resources are a proper motivation for action, concerns of motivation still potentially lead to questions of the legitimacy

of U.S. actions. Choosing to overlook Kenya's blemished record and continuous pattern of human rights abuses and sacrificing basic human right protections afforded to detainees, calls into question U.S. legitimacy and gives the appearance of flagrant disregard for U.S. obligations under international customary law, the ICCPR, UNCAT, and as its position as world leader. The credibility of the United States will be impaired in the international arena if we seek to hold others to certain human rights standards, but fail or are unwilling to subject ourselves to the same standard. Additionally, selectively applying human rights policy will generate charges of hypocrisy that will further damage U.S. legitimacy.

The United States has legitimacy as an international actor inasmuch as it obeys international law. By choosing to ignore or disobey international law and engage in actions that are contrary to international standards and norms, the United States calls its legitimacy into question. As the United States has acted to extend and facilitate the formation of international law, the U.S.'s loss of legitimacy as an international actor damages both the reputation of the U.S., that is to say, its ability to carry out its broader policy goals in the international arena as well as the growth, continued development and credibility of the international system. That is to say, if the U.S. can break from the most basic strictures of humanitarian protection when its national interests are at stake, then all national stakeholders will rightly perceive that the system is one of convenience and not of deepest right and conviction.

III. Conclusion

The right of U.S. referral of suspected pirates to Kenya for prosecution turns on the location of capture. If the suspected pirates are captured on the high seas, the Convention on the High Seas is the governing legal framework for prosecution and adjudication based on its specificity and specialness in regards to international piracy. The Convention on the High Seas

does not allow seizing states to transfer captured pirates to third party states for prosecution. Thus, the U.S. is prohibited from transferring suspected pirates captured on the high seas to Kenya for prosecution. If, however, suspected pirates are captured in territorial waters, SUA is the governing legal framework for prosecution and adjudication because SUA, not the Convention on the High Seas, covers acts of maritime violence committed in territorial waters. Thus, the U.S. is allowed to transfer suspected captured in territorial waters to Kenya for prosecution. This right of referral for pirates captured in territorial waters is, however, constrained by the legality of the actual transfer. Pursuant to the ICCPR and UNCAT, the United States is required to ensure that detainees it seeks to extradite or transfer to a third party state for prosecution will be afforded international due process rights and the third party receiving state will uphold minimum standards. If persons will not be afforded due process or if receiving countries will not uphold minimum standards, the United States must refuse to extradite. Kenya's failure to provide certain due process rights such as the right to counsel, the right to silence during pre-trial proceedings and the right to prompt trial violates the ICCPR. Additionally, the torture, abuse and extremely unsanitary conditions that detainees of Kenyan prisons are subjected to are violations of the ICCPR and UNCAT. Accordingly, based on Kenya's failure to provide detainees due process rights and their failure to uphold minimum standards, the United States should refuse to transfer / extradite suspected pirates. Moreover, even if due process rights were provided and minimum standards upheld, the United States should take into serious consideration the implications and potential harm the transfer agreement could do to the U.S. reputation as well as U.S. legitimacy. The need to prosecute pirates goes with saying; however, the prosecution of pirates is not worth the potential damage to U.S. reputation and legitimacy as a world power incurred as a result.

[1] *True Caribbean Pirates: History of Pirates*, http://www.history.com/content/pirates/history-of-the-caribbean-pirates.
[2] *Id*.
[3] *Id.*
[4] *Id*.
[5] National Security Council, *Countering Piracy Off the Horn of Africa; Partnership & Action Plan* 6 (2008) [hereinafter "*Partnership & Action Plan*"].
[6] *Id.*
[7] *International Piracy on the High Seas: Hearing Before the H. Subcomm. On Coast Guard & Maritime Transportation*, 111th Cong. (May 19, 2009) (statement of Peter Falk) [hereinafter "*International Piracy on the High Seas*"]; see also Gal Luft & Anne Korin, *Terrorism Goes to Sea*, Foreign Aff., Nov./Dec. 2004, at 61, 62.
[8] *International Piracy on the High Seas: Hearing Before the H. Subcomm. On Coast Guard & Maritime Transportation*, 111th Cong. (Feb. 4, 2009) (statement of Peter Falk) (Summary of Subject Matter Report) [hereinafter "*International Piracy on the High Seas: Summary Report*"].
[9] *Id.*
[10] *Id.*
[11] ICC International Maritime Bureau Piracy Reporting Centre and Armed Robbery Against Ships Quarterly Report, January 1 – September 30, 2009 [hereinafter "*2009 Quarterly Report*"].
[12] ICC International Maritime Bureau Piracy Reporting Centre and Armed Robbery Against Ships Annual Report, January 1 – December 31, 2008 [hereinafter "*2008 Annual Report*"].
[13] *Id*.
[14] *Id.*
[15] *Partnership & Action Plan*, supra note 5, at 5.
[16] *Id.* at 4.
[17] *2008 Annual Report on Piracy,* supra note 12, at .
[18] Eugene Kontorovich, *'A Guantanamo on the Sea': The Difficulties of Prosecuting Pirates and Terrorists,* 98 Cal. L. Rev. (forthcoming February 2010).
[19] *Id.*
[20] S.C. Res. 1816, U.N. Doc. S/RES/1816 (June 2, 2008), S.C. Res. 1838 U.N. Doc. S/RES/1838 (Oct. 7, 2008), S.C. Res. 1844 U.N. Doc. S/RES/1844 (Nov. 20, 2008), S.C. Res. 1846 U.N. Doc. S/RES/1846 (Dec. 2, 2008), and S.C. Res. 1851 U.N. Doc. S/RES/1851 (Dec. 16, 2008).
[21] S.C. Res. 1816
[22] S.C. Res. 1851 authorized nations to attack pirates on land within Somalia and to 'take all necessary measures that are appropriate in Somalia' to suppress 'acts of piracy and armed robbery at sea'. This is also contrary to customary international law and unprecedented action by the Security Council.
[23] 1 John P. Grant & J. Craig Barker, Harv. Research in International Law: Contemporary Analysis and Appraisal 275, 276 (2007) *Jurisdiction with Respect to Crime: Universal Jurisdiction and the Harvard Research;* Scharf, Michael P.
[24] *See International Piracy on the High Seas: Summary Report,* supra note 8.
[25] *Id.*
[26] Kontorovich, *supra* note 18.
[27] *Id.*
[28] *Id.*
[29] *Id.*
[30] Barney Jopson, *Kenya Signs Deal to Prosecute Somali Pirates,* Financial Times (Dec. 12, 2008), *available at* http://www.ft.com/cms/s/9b63b8e6-c7c4-11dd-b611-000077b07658.html?nclick_check=1.

[31] Jacquelyn S. Porth, *Legal Experts Take Action to Prosecute Pirates: Careful evidence collection is key to successful legal cases*, American.gov (Feb. 27, 2009), *available at* http://www.america.gov/st/peacesec-english/2009/February/20090227144346s-jhtrop0.3818781.html.

[32] *Id.*
[33] *See* Anthony Aust, *Modern Treaty Law and Practice* 174 (2000).
[34] *Partnership & Action Plan*, supra note 5, at 13; 27 I.L.M. 668 (1988).
[35] 1155 U.N.T.S. 331.
[36] Restatement (Third), Foreign Relations Law of the United States, Introduction to Part III.
[37] Vienna Convention on the Law of Treaties, United States Department of State, http://www.state.gov/s/l/treaty/faqs/70139.htm.
[38] 423 F.3d 73, 79 n.8 (2d Cir. 2005); see also *Chubb & Son, Inc. v. Asiana Airlines*, 214 F.3d 301, 308 (2d Cir. 2000).
[39] M. Frankowska, *The Vienna Convention on the Law of Treaties Before United States Court*, 28 Va. J. Int'l L. 281, 286 (1988).
[40] I.M. Sinclair, *The Vienna Convention on the Law of Treaties*, 115 (1984).
[41] Vienna Convention, *supra* note 35.
[42] Sinclair, supra note 40. P. 115.
[43] *Black's Law Dictionary* (8th ed. 2004).
[44] International Law Commission, *Articles Concerning the Law of the Sea with Commentaries*, 1956 (II), Yearbook of the International Law Commission, 221 [hereinafter "Yearbook"].
[45] Vienna Convention, *supra* note 35, art. 26.
[46] Sinclair, supra note 40, at 120
[47] *Id.*
[48] Sinclair, supra note 40, at 124 (citing Fitzmaurice, 'Treaty Interpretation and other Treaty Points', 33 *B.Y.I.L.* (1957) at 212).
[49] Sinclair, supra note 40, at 121.
[50] Vienna Convention, *supra* note 35, art. 31(2).
[51] Sinclair, *supra* note 40, at 128 (citing Fitzmaurice, 'Treaty Interpretation and other Treaty Points', 33 *B.Y.I.L.* (1957) at 228).
[52] Sinclair, *supra* note 40, at 130.
[53] 2 Litigation of International Disputes in U.S. Courts § 10:5 (citing *Square D Co. and Subsidiaries v. C.I.R.*, 438 F.3d 739, 2006-1 U.S. Tax Cas. (CCH) P 50162, 97 A.F.T.R.2d 2006-1058 (7th Cir. 2006)) [hereinafter "International Disputes"].
[54] *Id.* (citing *Restatement Third, Foreign Relations Law of the United States* § 325(1)).
[55] *Id.* (citing *Reino de Espana v. American Bureau of Shipping, Inc.*, 528 F. Supp. 2d 455, 459-60, 2008 A.M.C. 83 (S.D.N.Y. 2008)).
[56] *Id.* (citing *U.S. v. Stuart*, 489 U.S. 353, 365, 109 S.Ct. 1183, 89-1 (1989)).
[57] *Id.* (citing *U.S. v. Stuart*, 489 U.S. 353, 365, 109 S.Ct. 1183, 89-1 (1989)).
[58] *Id.*
[59] 499 U.S. 530, 111 S.Ct. 1489 (1991).
[60] *Id.* at 534-35 (citing *Volkswagenwerk Aktiengesellschaft v. Schlunk*, 486 U.S. 694, 699, 108 S.Ct. 2104, 2108 (1988)).
[61] International Disputes, *supra* note 53.
[62] The Law of the Sea Convention started in 1956, but the four UNCLOS I treaties (Convention on the Territorial Sea and the Contiguous Zone; Convention on the High Seas; Convention on Fishing and Conservation of the Living Resources of the High Seas; and Convention on the Continental Shelf.)

were not concluded until 1958. They started with a draft treaty put together by the International Law Commission, but were later broken into four separate treaties.
[63] Eugene Kontorovich, *International Legal Responses to Piracy off the Coast of Somalia*, 13 American Society of International Law 2 (Feb. 6, 2009), *available at* http://www.asil.org/insights090206.cfm.
[64] Article 43 of the draft (unified) UNCLOS treaty ended up as Article 19 of the High Seas convention, and the wording is also repeated in Article 105 of UNCLOS III.
[65] 1958 Geneva Convention on the High Seas, Apr. 29, 1958, 13 U.S.T. 2312, 450 U.N.T.S. 82.
[66] *See* Sinclair, supra note 40.
[67] International Disputes, supra note 53, (citing *U.S. v. Stuart*, 489 U.S. 353, 365, 109 S.Ct. 1183, 89-1 (1989)).
[68] International Disputes, *supra* note 53, at 2 (citing *Restatement Third, Foreign Relations Law of the United States § 325,* comment e, note 1, and note 4).
[69] *Id.*
[70] Yearbook, *supra* note 44, art. 43 at 283 (emphasis added).
[71] U.S. Dept. Of State, *Treaties in Force: A List of Treaties and Other International Agreements of the United States in Force on January 1*, [2009] (1929-).
[72] United States Department of State, Vienna Convention on the Law of Treaties, *available at* http://www.state.gov/s/l/treaty/faqs/70139.htm.
[73] Seyed A. Sadat-Akhavi, *Methods of Resolving Conflict between Treaties*, Brill Academic Publishers, 2003, p. 59 (citing United Nations, *United Nations Conference on the Law of Treaties, Second Session, Vienna, 9 April – 22 May 1969, Official Records*, p. 253, para. 41.). In posing the question, a scenario was put forth as an example that goes as follows: "[i]f a convention on such a specific topic as third party liability in the field of nuclear energy contained provisions on the recognition in other States parties of judgments rendered by the courts of on State party, it could not be regarded as relating to the same subject-matter as a later general treaty on recognition and enforcement of judgments."
[74] *Id.* at 60.
[75] Aust, *supra* note 33, at 183.
[76] Christopher J. Borgen, *Resolving Treaty Conflicts*, 37 Geo. Wash. Int'l L. Rev. 573, 604 (2005) (quoting Andrea Schulz, The Relationship Between the Judgments Project and Other International Instruments 14, 6 (Hague Conference on Private International Law, Prel. Doc. No. 24, 2003), http://hcch.e-vision.nl/upload/wop/genaff_pd19e.pdf).
[77] Id. at 603
[78] *Id*. at 615 (citing E.M. Vierdag, *The Time of Conclusion of a Multilateral Treaty*, 59 Brit. Y.B. Int'l L. 75, 100 (1988)).
[79] United Nations Convention on the Law of the Sea, Dec. 10, 1982, 1833 U.N.T.S. 3, Art. 101; see also Convention on the High Seas, *supra* note 65; see also President's June 14, 2007 Policy for the Repression of Piracy and other Criminal Acts of Violence at Sea
[80] Joshua Michael Goodwin, *Universal Jurisdiction and the Pirate: Time for an Old Couple to Part*, 39 Vand. J. Transnat'l L. 937, 975 (2006).
[81] S.C. Resolution 1816, 2 June 2008.
[82] *Id.*
[83] *International Piracy on the High Seas: Summary Report*, *supra* note 7, at 9.; the report was referring to UNCLOS III, but given the fact UNCLOS III is an update of first UNCLOS series, which the Convention on the High Seas was a part and given the provisions related to piracy in UNCLOS III are identical to the provisions in the Convention on the High Seas, the statement can be taken to encompass the Convention on the High Seas.
[84] Policy Statement: Contact Group on Piracy Off the Coast of Somalia, Office of the Spokesman, U.S. Department of State, January 14, 2009.
[85] *Id.* at 1-2; *Partnership & Action Plan*, *supra* note 5, at 16.

[86] Myron Nordquist and John Moore, Legal Challenges in Maritime Security, 49 (Martinus Nijhoff Publishers 2007) Combating Terrorism at Sea: The Suppression of Unlawful Acts Against the Safety of Maritime Navigation; Helmut Tuerk,
[87] Malvina Halberstam, *Terrorism on the High Seas: The Achille Lauro, Piracy and the IMO Convention on Maritime Safety*, 82 Am. J. Int'l L. 269, 269 (1988).
[88] *Id.*
[89] Lieutenant Mike Madden, *Trading the Shield of Sovereignty for the Scales of Justice: A Proposal for Reform of International Sea Piracy Laws*, 21 U.S.F. Mar. L.J. 139, 149 (2009).
[90] Halberstam, *supra* note 87, at 270
[91] SUA, *supra* note 34, pmbl.
[92] "Although it was decided to retain the term "unlawful acts," it was nevertheless understood that the object and purpose of these treaties was to deal with acts of terrorism and to provide a legal framework for the apprehension and prosecution of alleged terrorists." Tuerk*, supra* note 86*,* 64-5.
[93] G.A. Res. 59/24, U.N. Doc. A/59/PV.56 (17 Nov. 2004).
[94] Jarna Petman & Jan Klabbers, Nordic Cosmopolitanism: Essays in International Law for Martti Koskenniemi, 401 (2003) Maritime Security: an Individual or a Collective Responsibility?; Marie Jacobsson.
[95] *Partnership & Action Plan*, supra note 5, at 6.
[96] Restatement (Third), Foreign Relations Law, supra note 36, § 522 cmt. c (1987).
[97] Halberstam, *supra* note 87, at 275 (citing 3 F. Wharton, International Law Digest 471-72 (2d ed. 1887) (quoting W. Hall, International Law 233-34 (1st ed. 1884))).
[98] *Id.*
[99] Halberstam, *supra* note 87, p. 278 (Harvard Research in International Law, Comment to the Draft Convention on Piracy, 26 AJIL Supp. 749, 786 (1932)).
[100] International Piracy on the High Seas: Summary Report, *supra* note 8, at 12-3.
[101] *Id.* at 13.
[102] Tuerk, *supra* note 86, at 50.
[103] IMO Doc. LEG/MISC.6, 10 September 2008, p. 44; Article 101 of UNCLOS III and article 15 of the Convention on the High Seas 1958 are identical.
[104] Myron Nordquist and John Moore, *Current Maritime Issues and the International Maritime Organization*, 225 (Martinus Nijhoff Publishers 2007) *IMO Interface with the Law of the Sea Convention*; Rudiger Wolfrum.
[105] International Piracy on the High Seas: Hearing Before the H. Subcomm. on Coast Guard & Maritime Transportation, 111th Cong. (Feb. 4, 2009) (statement of Rear Admiral Baumgartner) [hereinafter "Baumgartner statement"].
[106] Borgen, *supra* note 76, at 589.
[107] *Id.*
[108] *Id.* at 614.
[109] *See* Convention on the High Seas, *supra* note 65.
[110] Luc Reydams, *Universal Jurisdiction: International and Municipal Legal Perspectives*, 58 (Oxford University Press 2003).
[111] Convention on the Territorial Sea and Continguous Zone, Apr. 29, 1958, 516 U.N.T.S. 205.
[112] S.C. Res. 1851, *supra* note 20.
[113] Princeton University Program in Law and Public Affairs, *The Princeton Principles on Universal Jurisdiction* 28 (2001).
[114] Joanna Harrington, *The Absent Dialogue: Extradition and the International Covenant on Civil and Political Rights*, 32 Queen's L.J. 82, 87 (2006).
[115] *Id.* at 88 (citing Dominic McGoldrick, *The Human Rights Committee: Its Role in the Development of the International Covenant on Civil and Political Rights* (Oxford: Clarendon, 1994)).

[116] S. Comm. on Foreign Relations*, Rep. on the International Covenant on Civil and Political Rights,* S. Exec. Rep. 102, sec. IV (1992), reprinted in 31 I.L.M. 645, 649 (1992) [hereinafter Senate Report] (recognizing and affirming the rights guaranteed within the ICCPR are "cornerstones of a democratic society").
[117] *Id.* at 652 (declaring the ICCPR to be non-self-executing).
[118] "Under subparagraph (b) [of article 2(3) of the ICCPR], a State Party must ensure that any person seeking the remedy referred to in subparagraph (a) 'shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State….' Accordingly, there must be at least one public authority, belonging to some branch of government, capable of being seized of the claim: if the courts refuse to take cognizance of certain cases … the State is still under an international obligation to provide an alternative mechanism (legislative, administrative, or otherwise) for the determination of the claim." Hurst Hannum and Dana D. Fischer, *U.S. Ratification of the International Covenants on Human Rights*, 61 (Transnational Publishers, Inc. 1993).
[119] See U.S. Const. art. VI, § 2 ("All treaties made … under the authority of the United States, shall be the supreme law of the land; and the Judges, in every State, shall be bound thereby"); see also Vienna Convention, supra note , art. 26 (affirming the principal of *pacta sunt servanda* that "[e]very treaty in force is binding upon the parties to it and must be performed by them in good faith").
[120] Bridget Kessler, *In Jail, No Notice, No Hearing ... No Problem? A Closer Look at Immigration Detention and the Due Process Standards of the International Covenant on Civil and Political Rights*, 24 Am. U. Int'l L. Rev. 571, 578 (2009).
[121] *See* Harrington, *supra* note 114.
[122] International Covenant on Civil and Political Rights, 16 December 1966, 999 U.N.T.S. 171, 6 I.L.M. 368 (entered into force Mar. 23, 1976).
[123] *Id.* art. 14(1).
[124] ICCPR, *supra* note 122, art. 14(3).
[125] See Kevin Jon Heller, *A Poisoned Chalice: The Substantive and Procedural Defects of the Iraqi High Tribunal*, 39 Case W. Res. J. Int'l L. 261 (2006-2007).
[126] The purpose of the analysis is not to raise and discuss only the alleged deprivations of due process rights, but to discuss and analyze a comprehensive list of due process rights due to the Somali pirates.
[127] ICCPR, *supra* note 122, art. 14(3)d.
[128] David Weissbrodt, *The Right to a Fair Trial: Articles 8, 10 and 11 of the Universal Declaration of Human Rights*, 150 (Martinus Nijhoff Publishers 2001).
[129] Heller, *supra* note 125, at 269 (citing Christoph J.M. Safferling, *Towards an International Criminal Procedure* 106 (2001).
[130] *Id.*
[131] Kenyan Criminal Procedure Code § 193.
[132] Kenya constitution § 77(2)(d).
[133] *Id.* at § 77(14).
[134] United States Department of State, *2008 Human Rights Reports: Kenya* (2009) [hereinafter "U.S. Country Report on Human Rights"], *available at* http://www.state.gov/g/drl/rls/hrrpt/2008/af/119007.htm
[135] Heller, *supra* note 125, at 270.
[136] U.S. Country Report on Human Rights, *supra* note 134. http://www.state.gov/g/drl/rls/hrrpt/2008/af/119007.htm
[137] Heller, *supra* note 125, p. 270 (citing Safferling, *supra* note 129).
[138] ICCPR, *supra* note 122, art. 14(3)(g).
[139] Weissbrodt, *supra* note 128, at 135 (citing *Berry v. Jamaica,* Communication No. 330/1988, U.N.

Doc. CCPR/C/50/D/330/1988 (1994)).
[140] *Id.*
[141] Weissbrodt, *supra* note 128, p. 135 (citing *Conteris v. Uruguay*, Communication No. 139/1983, U.N. Doc. A/40/40 at 196 (1985)).
[142] David Weissbrodt and Rudiger Wolfrum, *The Right to a Fair Trial*, 712 (Springer 1996).
[143] *Id.*
[144] ICCPR, *supra* note 122, art. 14(3)(a).
[145] Weissbrodt, *supra* note 128, at 113.
[146] Weissbrodt, *supra* note 128, at 113 (citing *Mbenge v. Zaire*, Communication No. 16/1977, U.N. Doc. A/38/40 at 134 (1983)).
[147] Kenya Constitution § 77(2).
[148] ICCPR, *supra* note 122, art. 9(4).
[149] U.S. Country Report on Human Report, *supra* note 134.
[150]U.S. Country Report on Human Rights, *supra* note 134.
[151] UN Human Rights Committee Report, *Consideration of Reports Submitted by States' Parties Under Article 40 of the Covenant: Kenya*, U.N. Doc. CCPR/C/KEN/2004/2, ¶ 20 (Sept. 27, 2004).
[152] Kenya Constitution § 77(2)(c).
[153] UN Human Rights Committee Report, supra note 151, at ¶ 129.
[154] Weissbrodt, *supra* note 128, at 121-22.
[155] Momanyi Bwonwong'a, *Procedures in Criminal Law in Kenya*, 182 (East African Educational Publishers 1994).
[156] U.S. Country Report on Human Rights, *supra* note 134.
[157] Kenyan Criminal Procedure Code § 137 (*emphasis added*).
[158] Weissbrodt, *supra* note 128, at 114.
[159] *Id.* at 137.
[160] Heller, *supra* note 125, at 280 (quoting *Foucher v. France*, 22209/93 [1997], ECHR 234, para. 34).
[161] Bwonwong'a, *supra* note 155, at 182.
[162] *Id.*
[163] *Id.*
[164] *Id.*
[165] U.S. Country Report on Human Rights, supra note 134.
[166] *Id.*
[167] ICCPR, *supra* note 122, art. 9(3).
[168] Weissbrodt, *supra* note 128, at 125.
[169] *Id.* at 129.
[170] *Id.* at 129 (citing *Fillastre, Bizouarn v. Bolivia*, Communication No. 336/1998, U.N. Doc. CCPR/C/43/D/336/1988 (1991)).
[171] U.S. Country Report on Human Rights, *supra* note 134.
[172] *Id.*
[173] *Id.*
[174] *Id.*
[175] Kenyan Criminal Procedure Code § 194.
[176] Weissbrodt, *supra* note 128, at 136 (citing Human Rights Committee, General Comment 13, Article 14 (Twenty-first session, 1984), paragraph 12, Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. HRI\GEN\1\Rev.1 at 14 (1994)).
[177] Heller, *supra* note 125, at 269 (citing Human Rights Committee, ¶ 7, General Comment No. 13, U.N. Doc. CCPR/C/21/Rev.1/Add.6 (Nov. 11, 1994).
[178] Weissbrodt, *supra* note 128, at 114.

[179] U.S. Country Report on Human Rights, *supra* note 134.
[180] UN Human Rights Committee Report, *supra* note 151, at ¶ 129.
[181] ICCPR, *supra* note 122, art. 14(5).
[182] Weissbrodt, *supra* note 128, at 128.
[183] *Id.*
[184] *See* Kenyan Penal Code.
[185] Heller, *supra* note 125, at 295-6 (citing *Bahamonde v. Equatorial Guinea*, Communication No. 468/1991, 10 Nov. 1993, CCPR/C/49/D/468/1991, ¶ 9.4).
[186] *Id.* at 9.
[187] The African Peer Review is an African Union (AU) initiative which evaluates AU member states for conformance with commonly agreed political and economic standards
[188] U.S. Country Report on Human Rights, *supra* note 134.
[189] UN Human Rights Committee Report, *supra* note 151, at ¶ 20.
[190] U.S. made reservation to art. 7, but they are still obliged to uphold provision as customary international law.
[191] ICCPR, *supra* note 122, art. 7.
[192] *Id.* at art. 10(1).
[193] Senate Report, *supra* note 116, at 651.
[194] U.S. Country Report on Human Rights, *supra* note 134.
[195] *Id.*
[196] UN Human Rights Committee Report, *supra* note 151, at 4.
[197] U.S. Country Report on Human Rights, *supra* note 134.
[198] *Id.*
[199] *Id.* at 6.
[200] *Id.*
[201] UN Human Rights Committee Report, *supra* note 151, at ¶ 19.
[202] United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, S. Treaty Doc. No. 100-20, 1465 U.N.T.S. 85.
[203] *Id. See also*, Michael H. Passman, *Protections Afforded to Captured Pirates Under the Law of War and International Law*, 33 Tul. Mar. L.J. 1, 34 (2008).
[204] *Ahmad v. Wigen*, 726 F. Supp. 389, 414 (E.D. N.Y. 1989), decision aff'd, 910 F.2d 1063 (2d Cir. 1990).
[205] Herman J. Burgers and Hans Danelius, *The United Nations Convention against Torture: A Handbook on the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 128 (Martinus Nijhoff Publishers 1988).
[206] U.S. Country Report on Human Rights, *supra* note 134.
[207] *Id.*
[208] United States Department of State, *2007 Human Rights Reports: Kenya* (2008) [hereinafter "U.S. Country Report on Human Rights 2007"] http://www.state.gov/g/drl/rls/hrrpt/2007/100487.htm.
[209] *Id.*
[210] UN Human Rights Committee Report, *supra* note 151, at 4.
[211] Amnesty International Report on Kenya, Prisons: Death due to torture and cruel, inhuman and other degrading conditions, AFR 32/010/2000 (citing Report of the Special Rapporteur, Sir Nigel Rodley, submitted pursuant to Commission on Human Rights resolution 1999/32. Addendum Visit of the Special Rapporteur to Kenya in September 1999.1 March 2000).
[212] *Id.*
[213] *See* Michael Bahar, *Attainting Optimal Deterrence at Sea: A Legal and Strategic Theory for Naval Anti-Piracy Operations*, 40 Vand. J. Transnat'l L.J. 1, 41 (2007).
[214] Saeed Shabazz, UN Role in Somalia Comes Under Fire, The Final Call (Sept. 7, 2009),

http://www.finalcall.com/artman/publish/World_News_3/article_6392.shtml.
[215] *Id.*
[216] *Id.*
[217] *Id.*
[218] *Id.*
[219] *Id.*
[220] *Id.*
[221] Abayomi Azikiwe, Somalia: U.S.-backed War Sharpens Humanitarian Crisis, Worker's World (Sept. 23, 2009), http://www.workers.org/2009/world/somalia_1001/.