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# **The Regional Prosecution Model between Kenya and the European Union: Implications on International Criminal Law?**

- *A legal examination of the Kenyan jurisdiction to try piracy suspects and the right to a fair trial for individuals suspected of piracy in Kenyan criminal proceedings.*

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# Abstract

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Modern piracy has escalated outside the coast of Somalia and in the Gulf of Aden. In order to bring suspected pirates and alleged armed robbers to justice, the European Union has entered into a regional prosecution model with Kenya.

In this study I examine if the regional prosecution model between Kenya and the European Union may have any implications on international criminal law by specifically analyzing the Kenyan jurisdiction to try piracy suspects and the right to fair trial in Kenyan criminal proceedings of piracy suspects.

By using a legal method, this study offers some clarity regarding Kenya's jurisdictional basis to prosecute piracy suspects, as well as, to what extent they respect the right to a fair trial in its criminal proceedings of alleged pirates. In addition, the legal analysis demonstrates that international criminal law may be undermined and subjected to mistrust. Furthermore, the legal analysis also offers indications on a normative development of the Security Council in relation to its role in bringing perpetrators of international crimes to justice.

**Keywords:** Piracy, Regional Prosecution Model, Kenya, Exchange of Letters, Jurisdiction, Right to a Fair Trial, International Criminal Law, Human Rights

# Acronyms

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EEZ – Exclusive Economic Zone

EU – European Union

EU NAVFOR – European Union Naval Force Operation Atlanta

HRC – Human Rights Committee

ICC – International Criminal Court

ICCPR – International Covenant on Civil and Political Rights

ICJ – International Court of Justice

IMB PRC – International Maritime Bureau’s Piracy Reporting Centre

SC – Security Council

SUA Convention – Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation

TFG – Transitional Federal Government

UK – United Kingdom

UN – United Nations

UNCLOS – United Nations Convention on the Law of the Sea

UNOCD – United Nations Office on Crime and Drugs

US – United States of America

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# 1. Introduction

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Modern piracy has been a growing threat in recent years. In the summer of 2008, an epidemic of piracy broke out in the Gulf of Aden and off the coast of Somalia. Since then, the situation in the region has motivated the international community into collective action. The Security Council has taken various resolutions<sup>1</sup> actualizing Chapter VII-based mandates relating to the suppression of piracy and armed robbery at sea. At the moment there are also a number of counter-piracy operations taking place in the Gulf of Aden: European Union Naval Force (EU NAVFOR) - Operation Atlanta; North Atlantic Treaty Organization - Operation Ocean Shield; and Combined Task Force-151.<sup>2</sup> In addition, there are a number of states that act independently and contribute to the suppression of piracy and armed robbery in the region. The states that have deployed naval ships or/and aircraft in the region are the following: Japan, China, the Russian Federation, India, Malaysia, the Republic of Korea, Saudi Arabia, the Islamic Republic of Iran and Yemen.<sup>3</sup>

According to the International Maritime Bureau's Piracy Reporting Center (IMB PRC) there was a significant drop of attempted robberies at sea and piratical acts during the year of 2013.<sup>4</sup> This indicates that the international community has, more or less, succeeded to quarantine the outbreak of piracy in the Gulf of Aden and outside the coast of Somalia. Although, there have been a widespread reluctance among European States to prosecute piracy due to variety of reasons and the apprehended pirates have routinely been set free instead of faced with trial.<sup>5</sup> In order to overcome this dilemma, the European Union, among others, sought regional arrangements for the transfer of suspected pirates to stand trial. These regional arrangements are

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<sup>1</sup> The relevant resolutions are: S/Res/1816 (June 2, 2008); S/Res/1838 (Oct. 7, 2008); S/Res/1846 (Dec. 2, 2008); S/Res/1851 (Dec. 16, 2008); S/Res/1897 (Nov. 30, 2009); S/Res/1918 (April 27, 2010); S/Res/1950 (Nov. 23, 2010); S/Res/1976 (Apr. 11, 2011); S/Res/2015 (Oct. 24, 2011); S/Res/2020 (Nov. 22, 2011)

<sup>2</sup> Report of the Secretary-General pursuant to Security Council resolution 1846 (2008), S/2009/146, para. 26. Available at: <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N09/257/27/PDF/N0925727.pdf?OpenElement>, access: 2014-04-16

<sup>3</sup> Report of the Secretary-General pursuant to Security Council resolution 1846 (2008), S/2009/146, para. 14

<sup>4</sup> *ICC IMB Piracy and Armed Robbery Against Ships – 2013 Annual Report*, p. 5: The report states that in 2013 there were 7 attacks off the coast of Somalia and 7 in the Gulf of Aden compared to the figures of year 2011, 37 in the Gulf of Aden and 160 off the coast of Somalia. It certainly indicates that the counter-piracy operations taking place in the region have been successful in its mission to suppress piracy and armed robbery at sea. Report available by request at: <http://www.icc-ccs.org/piracy-reporting-centre/request-piracy-report>, access: 2014-04-16

<sup>5</sup> A policy known as “catch and release”. Appears in: Pemberton, Beck (2011) “*Pirate Jurisdiction*”: Fact, Fiction, and Fragmentation in International Law; Kontorovich, Eugene (2010) “A Guantanamo on the Sea: The Difficulty of Prosecuting Pirates and Terrorists” in *California Law Review*, Vol. 98, Issue 1

more commonly referred to as *Regional Prosecution Model*. The regional prosecution model relative to piracy and armed robbery at sea is a newly developed phenomenon where apprehended individuals suspected of piracy or armed robbery are transferred, by the apprehending State, to third State for prosecution. Since it is a new phenomenon it gives rise to a multiple of new and interesting questions.

## 1.1 Research Problem

One of the major regional prosecution models is the one between EU and Kenya. On March 6<sup>th</sup>, 2009, the European Union (EU) entered an agreement with Kenya to transfer suspected pirates, captured by European countries involved in Operation Atlanta, into Kenyan custody while awaiting trial in the country.<sup>6</sup> Two problematic aspects arise when discussing the legal dimensions of the agreement between Kenya and the EU. Firstly, the provisions stipulated in the agreement are vague and does not specify a ground for jurisdiction in Kenya.<sup>7</sup> Piracy is generally considered to evoke the principle of universal jurisdiction and it would look like there is no need for the agreement to stipulate the jurisdictional ground for piracy. Although, Robin Geiß and Anna Petrig<sup>8</sup> note that:

With regard to the scope of the universality principle, it should be noted that universal jurisdiction is only provided over conduct, which matches the piracy definition under international law. For acts defined as piracy under municipal law, which go beyond the definition of piracy under international law, the universality principle cannot be invoked. In this sense, the scope of the universal jurisdiction over the municipal crime of piracy is limited by international law.<sup>9</sup>

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<sup>6</sup>See, Exchange of Letters between the European Union and the Government of Kenya on the conditions and modalities for the transfer of persons suspected of having committed acts of piracy and detained by the European Union-led naval force (EUNAVFOR), and seized property in the possession of EUNAVFOR, from EUNAVFOR to Kenya and for their treatment after such transfer, 6<sup>th</sup> March, 2009. [Hereinafter referred to as Exchange of Letters]

<sup>7</sup> See, Exchange of Letters

<sup>8</sup> Robin Geiß is Professor at the Faculty of Law, University of Potsdam, Germany & Anna Petrig is a researcher at the Max Plank Institute for Foreign and International Criminal Law.

<sup>9</sup> Geiß, Robin; Petrig, Anna (2011) *Piracy and Armed Robbery at Sea*, Oxford University Press, p. 144



This indicates that if there is a discrepancy between the definitions of piracy in the domestic legislation of Kenya and to that of international law, Kenya might not be able to claim the universal jurisdiction over piracy but instead rely on one of the other<sup>10</sup> established jurisdictional principles. Furthermore, some discuss whether a series of Security Council resolutions might establish a jurisdictional ground for piratical activities occurring in the Gulf of Aden and outside the coast of Somalia.<sup>11</sup> As illustrated, there is somewhat of a legal uncertainty concerning the Kenyan jurisdiction over piracy that needs to be put under scrutiny.

Secondly, it is stated in the Exchange of Letters that the parties will treat suspected pirates “[...] both prior to and following transfer, humanely and in accordance with international human rights obligations [...]”.<sup>12</sup> However, the Human Rights Committee expresses its concern regarding the “[...] continued reports of overcrowding, torture and ill-treatment in prisons and places of detentions law enforcement personnel”.<sup>13</sup> In addition, the Special Rapporteur on extrajudicial, summary and arbitrary executions, Christof Heyns, states that the police’s use of excessive force goes unaddressed by the government and that the extrajudicial killings occurring in the country remains persistent.<sup>14</sup> The Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, Rodolfo Stavenhagen, notes that “[...] there have been countless reports of arbitrary detention, police harassment, and incidents of torture and rape [...]”.<sup>15</sup> As illustrated, the human rights record of Kenya indicates that violations of human rights guarantees have been frequent. This actualizes a situation of major concern regarding the legitimacy of Kenya as a host country for piracy trials. I find it relevant to examine whether the provisions regarding the safeguarding of human rights in the agreement is respected by specifically looking at Kenya and its commitment to offer piracy suspects a fair trial in criminal proceedings. It is noteworthy to mention that the two problematic legal aspects that have been identified in relation to the agreement between Kenya and the EU are two of the main arguments for including piracy within the jurisdiction of the International Criminal Court (ICC). The ICC

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<sup>10</sup> Other principles of jurisdiction are, for example: the territoriality principle; the nationality principle; the passive personality principle; the protective principle

<sup>11</sup> See, Geiß; Petrig (2011)

<sup>12</sup> See, Exchange of Letters, Section 2(c)

<sup>13</sup> See, Human Rights Committee, Considerations of reports submitted by States parties under article 40 of the Covenant, 31 August 2012, CCPR/C/KEN/CO/3, Section 16.

<sup>14</sup> See, Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, Christof Heyns, 26 April 2011, A/HRC/17/28/Add.4, Section. 58

<sup>15</sup> See, Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, Rodolfo Stavenhagen, 26 February 2007, A/HRC/4/32/Add.3, Section 60

would be able to guarantee the suspected individuals with a right to a fair trial and, in addition, have a solid jurisdictional basis to prosecute these individuals.<sup>16</sup> This raises the question whether the regional prosecution model is a better alternative or not, and what implications the specific model between Kenya and the EU, with its potential flaws, may have on international criminal law.

## 1.2 Purpose and Research Question

The regional prosecution model is a new phenomenon and, as illustrated above, one of the major regional prosecution models are the one between Kenya and the EU. This prosecution model is actualizing serious concern regarding the risks for the suspected individuals, as well as Kenya's jurisdictional claims. The main purpose of the thesis will be formulated in relation to the research problem of this study. The main purpose with this study is to identify if the regional prosecution model between Kenya and the EU may have any implications on international criminal law. In order to realize the main purpose of this study, the research question is the following:

- *What implications does the regional prosecution model between Kenya and the EU have on international criminal law?*

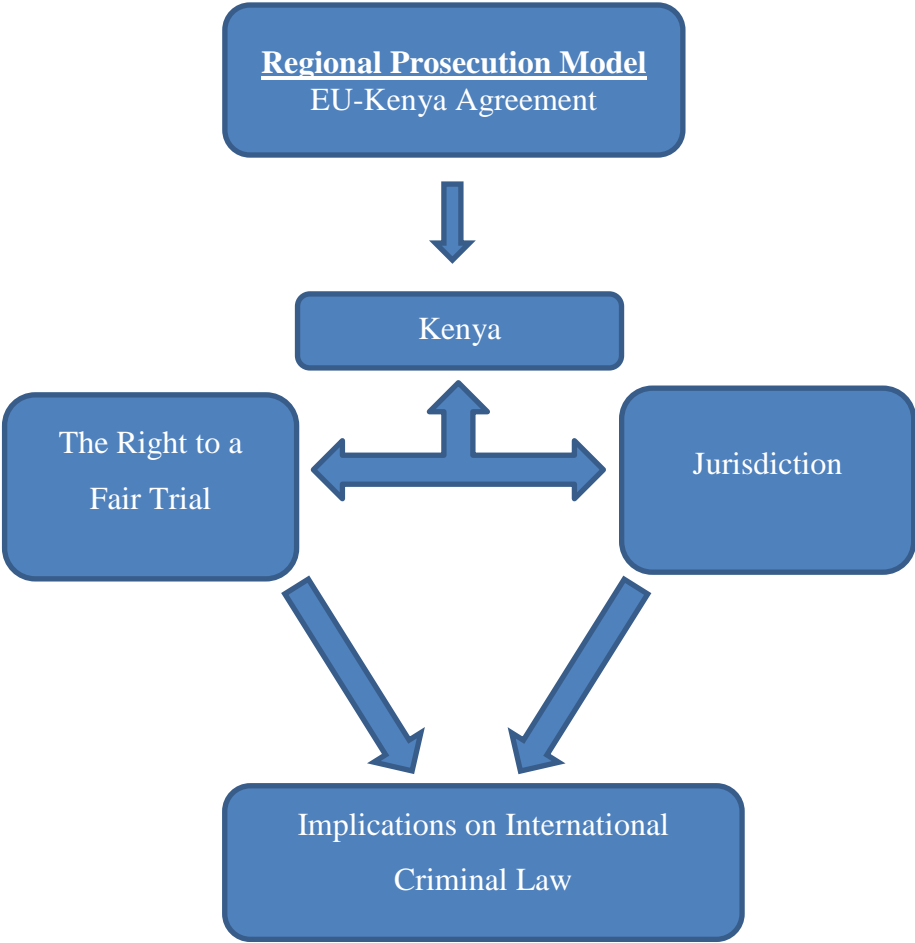
To operationalize the analysis of this study, and facilitate an answer to my research question I find it necessary to use two functional questions:

1. What jurisdictional basis does Kenya rely upon when prosecuting pirates transferred to them by European countries involved in Operation Atlanta?
2. To what extent does Kenya provide piracy suspects with a fair trial in criminal proceedings?

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<sup>16</sup> Dutton, Yvonne M. (2010) *Bringing Pirates to Justice: A case for including piracy within the jurisdiction of the international criminal court.*

The legal analysis will be divided in two sections. In the first section I intend to examine what jurisdictional basis Kenya possess when prosecuting pirates by examine their national legislation and exploring if one of the established principles of jurisdiction in international law is applicable to the situation. Furthermore, I try to ascertain whether the Security Council confers a jurisdictional basis to prosecute piracy by reviewing the resolutions which forms the base of many of the counter-piracy operations. In the second section I intend to determine whether Kenya fulfills the legal security provisions stipulated in article 14 of the International Covenant on Civil and Political Rights (1966)<sup>17</sup> and offer piracy suspects a fair trial. Through the analysis I will be able to identify if the regional prosecution model between Kenya and the EU have any legal advantages and what implications it may have on international criminal law. For further illustration see below:



<sup>17</sup> See provisions stipulated in Article 14, International Covenant on Civil and Political Rights (1966)

## 1.3 Methodology

This section will present the methodological aspects of this study.

### 1.3.1 Research Design

The research design of this study is a qualitative case study where a legal method will be used as an instrument to collect and analyze data. The subject of examination in a case study varies depending on what or which that shall be studied. It can be a specific event, group of individuals or phenomenon. However, it is fundamental that the subject of examination in a case study can be delimited and depicted within specific parameters, such as; for example, tied to a specific actor, time period or location.<sup>18</sup> The subject of examination in this study consists of the agreement between Kenya and the EU regarding the transfer of apprehended piracy suspects. Thus, the subject of examination is confined within explicit parameters such as, specific actors<sup>19</sup>, location<sup>20</sup>, and limited timeframe.<sup>21</sup> The case study should be regarded as the research design of this study and not as the applied method.

The qualitative element of this study is depicted by the fact that I, as the researcher, will locate myself in a process of constant reflection and analysis of legal data.<sup>22</sup> Furthermore, I will carefully select that legal material which is best suited for achieving the purpose and answering the research questions of this study.<sup>23</sup> The trait of a qualitative analysis is that it transforms data into findings. However, there is no exact formula for how this transformation should take place and it will remain unique relative to each researcher and his or her research design.<sup>24</sup>

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<sup>18</sup> Creswell, John W (2009) *Research Design: Qualitative, Quantitative and Mixed Methods Approaches*, p. 13

<sup>19</sup> The specific actor is Kenya.

<sup>20</sup> The locations are bound to: Gulf of Aden, Coast of Somalia, and Kenya.

<sup>21</sup> The timeframe is limited to between: 6<sup>th</sup> March 2009 (the concluding of the agreement) and up to 2014 (the writing of this thesis).

<sup>22</sup> Creswell 2009: 74

<sup>23</sup> Creswell 2009: 174

<sup>24</sup> Chambliss, Daniel F. & Russell K. Schutt (2010) *Making Sense of the Social World: Methods of Investigation*, Pine Forge Press/Sage Publications (3rd ed.), p. 250

### 1.3.2 Legal Method

In this study I will be analyzing the regional prosecution model between Kenya and the EU by specifically examine the Kenyan jurisdiction to try piracy suspects and the right to a fair trial in Kenyan criminal proceedings. Furthermore, this procedure will include the processing of legal texts and other legal sources. Therefore, a traditional legal method<sup>25</sup> will serve as a practical choice of method for analyzing and gathering data.

The work of Bert Lehrberg<sup>26</sup>, *Praktisk Juridisk Metod*<sup>27</sup> forms the basis for the legal method of this study. Although the process described by Lehrberg is primarily directed towards Swedish domestic law, the general working procedure can be applied when dealing with international law. The working procedure suggested by Lehrberg includes six steps:

1. Identify a legal problem or question;
2. find the right applicable legal rule;
3. read and interpret the sources of law;
4. identify the necessary prerequisite in the legal rule;
5. specify the meaning of the necessary prerequisite with help of the sources of law;
6. assess independently by using balanced considerations.<sup>28</sup>

The legal problem is identified in relation to the addressed functional questions of this study. Furthermore, this study addresses two specific functional questions which, in turn, imply that two specific legal questions are identified. In order to find the solution or applicable rule on the legal question one must have knowledge about the relevant legal sources. Lehrberg describe the legal sources as law, legislative history, case law, precedent and doctrine.<sup>29</sup> However, to increase the reliability of the method in relation to international law I find it necessary to take the *Statute of*

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<sup>25</sup> For an example of a usage of a traditional legal method see, Jacobsson, Marie (2009) *Folkrätten, havet och den enskilda människan*, Liber AB; Jacobsson describe a traditional legal method as a tool for a legal analysis where the analysis of current law is based on international treaties, customary law, case law and international doctrine. Marie Jacobsson is Associate Professor of Public International Law at Lund University. She is an advisor of Public International Law to the Swedish Ministry of Foreign Affairs and a member of the United Nations International Law Commission

<sup>26</sup> Professor of Civil Law at Uppsala University

<sup>27</sup> Lehrberg, Bert (2010) *Praktisk Juridisk Metod*, Uppsala: Iustus Förlag AB (Sixth Edition); A direct translation of the title would be: Practical Legal Method.

<sup>28</sup> Lehrberg 2010: 29-36

<sup>29</sup> Lehrberg 2010: 31

*the International Court of Justice (ICJ)* into account. Article 38 of the ICJ statute stipulates that the court should apply the following hierarchy of international law in its rulings:

- a) international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
- b) international custom, as evidence of a general practice accepted as law;
- c) the general principles of law recognized by civilized nations.
- d) subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.<sup>30</sup>

Ulf Linderfalk<sup>31</sup> states that the statute of ICJ only applies to the court proceedings. However, the general opinion in the literature of international law is that the article reflects the hierarchy of the applicable sources of law in general.<sup>32</sup> Thus, the sources of law, as described by Lehrberg, are consolidated in international law. The actual practice of interpretation will be based on the above described hierarchy of sources, then to be applied on the identified legal questions of the study. Furthermore, the necessary prerequisite of the legal rule needs to be identified and specified. The prerequisite of a legal rule is those conditions or criteria's that needs to be fulfilled before that specific rule can be applied.<sup>33</sup> The sixth and final step of the working process is done automatically in the legal analysis, when the five preceding stages are fulfilled.

### **1.3.2.1 Conflict of Preemptory Norms**

To further increase the reliability of the legal method and its relation to international law this study will adopt a complimentary interpretation procedure described by Linderfalk. When engaged in the legal analysis of this study there might arise a problematic situation where rules of international law are in conflict with each other and it is unclear which rule should have priority. Linderfalk suggest the usage of four questions that are designed to solve the conflict between the

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<sup>30</sup> Article 38 § 1, *Statute of the International Court of Justice*

<sup>31</sup> Professor of International Law at Lund University

<sup>32</sup> Linderfalk, Ulf (2006) "Folkrättens källor" in *Folkrätten i ett nötskal*, Linderfalk, Ulf (ed), Lund: Studentlitteratur AB, p. 24-25

<sup>33</sup> Lehrberg 2010: 35

colliding rules.<sup>34</sup> He emphasizes the importance of the questions to be answered in the specific order in which they are presented:

1. Are there any rule *jus cogens*?
2. Are there any agreement on priority?
3. Are there any rule *lex specialis*?
4. Which rule was agreed upon last?

The first question aims to determine whether any of the colliding rules have a higher ranking than the others. According to the maxim *lex superior* the rule with the higher rank should have priority. The only rule that the maxim *lex superior* aims to differentiate is *jus cogens* rules.<sup>35</sup> According to the *Vienna Convention on the Law of Treaties*<sup>36</sup>, *jus cogen* norms are defined as:

[...] a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.<sup>37</sup>

The intention behind question two is to examine whether the colliding rules are contractual rules and if the contracting parties have agreed upon how to resolve a possible conflict of rules, then this agreement should be respected. The third question is designed to examine whether one of the colliding rules are more special than the other. According to the maxim of *lex specialis*, then the more special rule should have priority. Linderfalk notes that a treaty based law is no more special than a law that derives from international customary law, only because the former is codified in a written treaty. When determining whether a rule is more special, it is not based on the form of the rule, it is based on its content.<sup>38</sup> The fourth question aims to determine whether one of the rules

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<sup>34</sup> Linderfalk 2006: 32

<sup>35</sup> Linderfalk 2006: 33

<sup>36</sup> According to Linderfalk, Ulf (2006) "Traktaträtt" in *Folkrätten i ett Nötskal*, Linderfalk, Ulf (ed) the *Vienna Convention on the Law of Treaties* (1969) is an important international instrument. However, one must keep in mind that the convention does not apply on an *ex post facto* basis, the rules stipulated by the Vienna Convention are only applicable to treaties agreed upon after the ratification of the Vienna Convention. Thus, the Vienna Convention only applies to state parties of the convention. Although, Linderfalk state that content of the convention reflects international customary law. Therefore, the convention will be used, as a tool for colliding rules, if possible in this thesis.

<sup>37</sup> Article 53, *Vienna Convention on the Law of Treaties*, Vienne 23 May, 1969

<sup>38</sup> For example, according to the maxim of *lex specialis* the *Convention (III) relative to the Treatment of Prisoners of War*, Geneva, 12 August 1949 should be regarded as more special than the *International Convention on Civil and Political Rights*, 1966 in relation to rules regulating prisoners of war in conflict situations, presumed that the rule in question is not a *jus cogens* rule.

have been agreed upon later than the others. According to the maxim *lex posterior* the later rule should have priority.<sup>39</sup>

### 1.3.2.2 Soft Law

Soft law can be described as rules of international law that do not establish any concrete rights or obligations for the legal subjects to whom they are addressed. Such rules can be characterized as normative and even though they may be rules of law – although non-binding – their content is inherently flexible or vague.<sup>40</sup> Furthermore, soft law is a term which could be used to describe a variety of non-legally binding instruments. It includes state conference declarations such as resolutions and legal instruments from the UN General Assembly. Soft law can also be applied to non-treaty agreements between states or between states and other entities that lack capacity to conclude treaties.<sup>41</sup> In addition, soft law also takes the form, for example, as treaties concerned with human rights and environmental protection, where the legal subjects otherwise would refrain, due to a wary, from concluding legally binding norms.<sup>42</sup> Soft law can be contrasted with the term hard law, which is always legally binding.<sup>43</sup> Therefore, the use of soft law instead of hard law instruments enables states to agree to more detailed and precise provision because the legal commitment are more limited.<sup>44</sup>

Legal instruments from the UN General Assembly, such as non-binding declarations, resolutions or any other soft law instrument are invariably law *per se*. It may give indications of existing law, or evidence on the existence of *opino juris*, or state practice that contributes to generate new law.<sup>45</sup> Although, soft law should not be confused with the application of *de lege ferande*.<sup>46</sup> The legal effect of declarations, resolutions, guidelines or any other soft law instruments is not necessarily consistent. The characteristic of nearly all the sources of soft law is

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<sup>39</sup> Linderfalk 2006: 33-34

<sup>40</sup> Dixon, Martin (2013) *Textbook on International Law*, (7<sup>th</sup> ed.), Oxford University Press, p. 52

<sup>41</sup> Boyle, Alan & Chinkin, Christine (2007) *The Making of International Law*, Oxford University Press, p. 213-14

<sup>42</sup> Dixon 2013: 52

<sup>43</sup> Dixon 2013: 213

<sup>44</sup> Boyle; Chinkin 2007: 214

<sup>45</sup> Boyle; Chinkin 2007: 212

<sup>46</sup> Boyle; Chinkin 2007: 212. *De lege ferande* is latin for "future law" used in the sense of what law should be. Compare to *De lege lata* which means current law.



that they are carefully negotiated, often carefully drafted statements. Some soft law instruments have normative significance despite their non-binding, non-treaty form and some of them also serve as a mechanism for interpretation or amplifications of the terms of a treaty.<sup>47</sup>

## 1.4 Material

The material of this study will consist of both primary and secondary sources. The legal method will be used as a tool for collecting and analyzing the data of this study. The analytical framework, chapter (2), will primarily be based upon secondary sources consisting of legal literature in order to provide the reader with a basic understanding of those parts, which, will later be used as building blocks in the legal analysis, chapter (3). The legal analysis will consist of primary legal sources, such as laws, legal cases, doctrine and soft law documents.

The secondary sources which are going to be used in the analysis as doctrine will be further specified below. Chapter 3 will be divided in two sections. The first part (3.1) will examine the jurisdictional basis of Kenya to prosecute suspected pirates transferred to them by countries involved in Operation Atlanta. In order to assist in the interpretation of international customary law as well as jurisdictional bases I will use: Robin Geiß and Anna Petrig<sup>48</sup> (2011) *Piracy and Armed Robbery at Sea*;<sup>49</sup> and James Thuo Gathii<sup>50</sup> (2009) *Jurisdiction to Prosecute Non-National Pirates Captured by Third States under Kenyan and International Law*.<sup>51</sup> The second part (3.2) will examine to what extent Kenya respect the right to fair trial for piracy suspects in its criminal proceedings. In order to assist me in the interpretation of Article 14 of the ICCPR, I will use: Manfred Nowak<sup>52</sup> (1993) *U.N. covenant on civil and political rights: CCPR commentary*<sup>53</sup> and

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<sup>47</sup> Boyle; Chinkin 2007: 214-16

<sup>48</sup> For a presentation of the Authors see above footnote 8

<sup>49</sup> Geiß, Robin; Petrig, Anna (2011) *Piracy and Armed Robbery at Sea*, Oxford University Press

<sup>50</sup> James Thuo Gathii is Associate Dean for Research and Scholarship and Governor George E. Pataki Professor of International Commercial Law, Albany Law School and Advocate of the High Court of Kenya.

<sup>51</sup> Gathii, James Thuo (2009) "Jurisdiction to Prosecute Non-National Pirates Captured by Third States Under Kenyan and International Law" in *Loyola of Los Angeles International and Comparative Law Review*, Vol. 31

<sup>52</sup> Professor of International Law and Human Rights at Vienna University; Director of the Ludwig Boltzmann Institute of Human Rights in Vienna, Austria; former UN Special Rapporteur on Torture.

<sup>53</sup> Nowak, Manfred (1993) *U.N. covenant on civil and political rights: CCPR commentary*, Kiel: Engel

Sarah Joseph, Jenny Schultz and Melissa Castan<sup>54</sup> (2000) *The International Covenant on Civil and Political Rights: cases, material and commentary*.<sup>55</sup> Finally, by using a triangulation process to verify the reliability on the data, this study will maintain a high level of validity throughout the working procedure. An example of where a triangulation process could be used is on court proceedings. For example, an indictment is drafted by the prosecutor, in which he or she asserts something about the accused and should, therefore, not be considered as an objective assessment of the situation.<sup>56</sup>

## 1.5 Area of Research

This thesis aims to identify whether the regional prosecution model between Kenya and the EU have any implications on international criminal law, by specifically examining the jurisdiction for Kenyan courts to try piracy and the right to a fair trial in Kenyan criminal proceedings against piracy suspects. Thus, the topic of this study will primarily operate between two interconnected fields of international law, namely, human rights law and international criminal law. According to Françoise Tulkens<sup>57</sup> it is self-evident that there is a close relationship between human rights and criminal law. This is demonstrated by many of the instruments which are safeguarding fundamental rights and freedoms, whether in domestic or international law.<sup>58</sup> Furthermore, Claire de Than and Edwin Shorts<sup>59</sup> suggests that there is a clear and visible cross-referencing between

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<sup>54</sup> Sarah Joseph is Senior Lecturer at Monash University and Associate Director of the Castan Centre for Human Rights Law; Jenny Schultz is a Barrister and Solicitor of the Supreme Court of Victoria and the High Court of Australia, and Senior Lecturer in the Monash University Faculty of Law; and Melissa Castan is a Barrister and Solicitor of the Supreme Court of Victoria and the High Court of Australia, and Senior Lecturer in the Monash University Faculty of Law.

<sup>55</sup> Joseph, Sarah; Schultz, Jenny; Castan, Melissa (2000) *The International Covenant on Civil and Political Rights: cases, material and commentary*, Oxford University Press

<sup>56</sup> Höglund, Kristine; Öberg, Magnus (2011) *Understanding Peace Research: methods and challenges*, London: Routledge, p. 43-44

<sup>57</sup> Françoise Tulkens is a Judge and Vice-President of the European Court of Human Rights. Member of the Board of Editors for the *Journal of International Justice*.

<sup>58</sup> Tulkens, Françoise (2011) "The Paradoxical Relationship between Criminal Law and Human Rights" in *Journal of International Criminal Justice* 9, p. 578

<sup>59</sup> Claire de Than, B.A., LL.M., is a Senior Lecturer in Law, City University & Edwin Shorts, M.A., Barrister-at-Law, Senior Lecturer in Law, London Metropolitan University

international criminal law, international humanitarian law and international human rights.<sup>60</sup> To further elucidate the interdependence between the legal disciplines see the illustration below:



## 1.6 Definition of Piracy and Armed Robbery

The United Nations Convention on the Law of the Sea (UNCLOS) 1982<sup>61</sup> is a treaty which, up to this date, has been ratified by 164 countries.<sup>62</sup> Furthermore, this treaty specifically defines the crime of piracy. Article 101 of the Convention stipulates the requirements for an act to amount to the crime of piracy.<sup>63</sup>

The definition of piracy codifies three requirements for an act to qualify as piracy under UNCLOS. Firstly, there is a requirement for the act to take place in the high seas or outside the jurisdiction of any State.<sup>64</sup> The second requirement specifies that the act must be committed for

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<sup>60</sup> de Than, Claire; Shorts, Edwin (2003) *International Criminal Law and Human Rights*, London: Sweet and Maxwell, p. 12

<sup>61</sup> *United Nations Convention on the Law of the Sea*, Dec. 10, 1982

<sup>62</sup> See United Nations Division for Oceans Affairs and the Law of the Sea, [http://www.pca-cpa.org/showpage.asp?pag\\_id=1288](http://www.pca-cpa.org/showpage.asp?pag_id=1288), access: 2014-04-09

<sup>63</sup> *United Nations Convention on the Law of the Sea*, Article 101. 'Piracy consists of any of the following acts: (a) any illegal acts of violence or detention, or any act of depredation, committed for private ends by the crew or the passengers of a private ship or a private aircraft, and directed: (i) on the high seas, against another ship or aircraft, or against persons or property on board such ship or aircraft; (ii) against a ship, aircraft, persons or property in a place outside the jurisdiction of any State; (b) any act of voluntary participation in the operation of a ship or of an aircraft with knowledge of facts making it a pirate ship or aircraft; (c) any act of inciting or of intentionally facilitating an act described in subparagraph (a) or (b).'

<sup>64</sup> See, UNCLOS, Article 101 (a)(ii)

private ends.<sup>65</sup> Thirdly, there is a requirement that the act must be directed against another ship or aircraft or against persons or property on board such a ship or aircraft.<sup>66</sup> This is sometimes referred to as the two-ship requirement.<sup>67</sup> A ship or aircraft is considered as a pirate ship or aircraft when it is used by persons for the purpose of committing one of the acts which are stipulated in Article 101.<sup>68</sup> In addition, Article 105 stipulates that piracy is a crime which is subject to universal jurisdiction, provided that the State which is exercising the seizing of the pirate ship and arrest the pirates prosecute and try the suspects in their national courts.<sup>69</sup>

Many of the provisions codified in UNCLOS are to be considered as customary law. Thus, making the provisions stipulated in the treaty binding on every State, including non-parties to the Convention.<sup>70</sup> The 1988 Rome Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation<sup>71</sup> (SUA Convention) have 156 State parties.<sup>72</sup> However, this treaty does not provide a definition on piracy per se. Article 3, of the Convention, codifies an exhaustive list of offences which are prohibited pursuant to the convention. For example, it is stipulated in the article, that it is an offence if a person “*seizes or exercises control over a ship by force or threat thereof or any other form of intimidation*”<sup>73</sup> or “*performs an act of violence against a person on board a ship if that is likely to endanger the safe navigation of that ship*”.<sup>74</sup>

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<sup>65</sup> See, UNCLOS, Article 101 (a)

<sup>66</sup> See, UNCLOS, Article 101 (a)(i)

<sup>67</sup> See for example: Lawrence, Azubike (2010) “International Law Regime Against Piracy” in *Annual Survey of International & Comparative Law*, Vol. 15, Issue. 1, p. 53

<sup>68</sup> See, UNCLOS, Article 103

<sup>69</sup> UNCLOS, Article 105 ‘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 or aircraft taken by piracy and under the control of pirates, and arrest the persons and seize the property on board. The courts of the State which carried out the seizure may decide upon the penalties to be imposed, and may also determine the action to be taken with regard to the ships, aircraft or property, subject to the rights of third parties acting in good faith.’

<sup>70</sup> See, Azubike 2010: 49; McCorquodale; Dixon 2003: 352. In the *Case Concerning Maritime Delimitation and Territorial Questions Between Qatar and Bahrain*, the United Nations Conventions on the Law of the Sea (1982) was not in force between Qatar and Bahrain because it was only Bahrain that had ratified it. Although, both States agreed that the provisions which had been applicable to their conflict did constitute customary international law. Furthermore, this understanding was adopted by the International Court of Justice. Available through: <http://www.icj-cij.org/docket/index.php?p1=3&p2=3&case=87&code=qb&p3=90>, access: 2014-04-09

<sup>71</sup> *Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation* (1988)

<sup>72</sup> See, <http://cns.miis.edu/inventory/pdfs/aptmaritime.pdf>, access: 2014-04-10

<sup>73</sup> SUA Convention, Article 3 §1(a)

<sup>74</sup> SUA Convention, Article 3 §1(b); The full content of SUA Convention, Article 3, is available through: <http://cns.miis.edu/inventory/pdfs/aptmaritime.pdf>, access: 2014-04-10. In addition, a ship is defined in article 1 ‘For the purpose of this Convention, ‘ship’ means a vessel of any type whatsoever not permanently attached to the sea-bed, including dynamically supported craft, submersibles or any other floating craft.’

Furthermore, this convention is applicable to offences occurring in the territorial waters of a State if the safety of maritime navigation is affected.<sup>75</sup> Any signatory state may prosecute violations of the prohibitions offered by the SUA Convention.<sup>76</sup>

Even though the SUA Convention has a broad application and applies to offences on ships irrespective of its location as long as it is engaged in international navigation pirates can still go unpunished because only signatory parties with a nexus to the crime are entitled to prosecute.<sup>77</sup>

Offences occurring in the internal waters or territorial sea of a coastal State are not, in the strict sense, acts of piracy. Instead these activities should be characterized as “armed robbery against ships”. In legal terms, piracy can only be committed on the high seas or the exclusive economic zone (EEZ).<sup>78</sup> Armed robbery at sea is defined in the Code of Conduct Concerning the Repression of Piracy and Armed Robbery against Ships in the Western Indian Ocean and the Gulf of Aden (Djibouti Code of Conduct):

“Armed robbery” against ships consists of any of the following acts:

(a) unlawful act of violence or detention or any act of depredation, or threat thereof, other than an act of piracy, committed for private ends and directed against a ship or against persons or property on board such a ship, within a State’s internal waters, archipelagic waters and territorial sea;

(b) any act of inciting or of intentionally facilitating an act described in subparagraph (a).<sup>79</sup>

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<sup>75</sup> SUA Convention, Article 4

<sup>76</sup> Article 6 of the SUA Convention offers jurisdiction provided that the offence was ‘(a) against or on board a ship flying the flag of the State at the time the offence is committed; (b) in the territory of that State, including its territorial sea; or (c) by a national of that State.’

<sup>77</sup> Dutton, Yvonne M (2010) “Bringing Pirates to Justice: A Case for Including Piracy within the Jurisdiction of the International Criminal Court” in *The Chicago Journal of International Law*, Vol. 11, No. 1, p 208-09

<sup>78</sup> Jacobsson 2009: 35

<sup>79</sup> *Code of Conduct Concerning the Repression of Piracy and Armed Robbery against Ships in the Western Indian Ocean and the Gulf of Aden* (Djibouti Code of Conduct), 29 January 2009, available through: <http://www.imo.org/OurWork/Security/PIU/Documents/DCoC%20English.pdf> , access: 2014-04-10. It is open for signatory only to the 21 State’s referred to as “Participants” in the Preamble of the Code. So far the Code has 20 signatories. France is the only eligible signatory State that has not signed the Code yet.

## 1.7 Delimitations

This study is delimited to one specific regional prosecution model, namely, that between the European Union and Kenya. There are other models, for example, between Kenya and the United States; and between Russia and Yemen.<sup>80</sup> However, the choice of the Kenya- EU model is solely based on it being one of the major models currently in existence due to the number of countries involved. Furthermore, this study does not purport to examine, to what extent there is a responsibility with the European countries involved in the regional prosecution model.

In order to examine what implications the regional prosecution model between Kenya and the EU may have on international criminal law, this study will examine what jurisdictional basis Kenya may rely upon when prosecuting pirates and to what extent the right to a fair trial is respected in Kenyan criminal proceedings. These two legal aspects are identified when reviewing the Exchange of Letters between Kenya and the EU.<sup>81</sup> Thus, the study delimits itself by specifically examine these two legal aspects.

In addition, when examining whether Kenya is able to provide a fair trial to piracy suspects in its criminal proceedings, this study will apply the provisions stipulated in article 14 of the ICCPR. When examining the right to fair trial, other articles in the ICCPR are also actualized.<sup>82</sup> However, article 14 is one the most central elements in relation to providing individuals with the right to a fair trial.<sup>83</sup> Therefore, due to the limited size of this thesis, this study will only examine the provision stipulated in article 14.

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<sup>80</sup> Geiß; Petrig 2011: 170-72

<sup>81</sup> See, Section 1.1 (Research Problem)

<sup>82</sup> For example, Article 9; 15; 16 of the ICCPR are also actualized when discussing the right to a fair trial.

<sup>83</sup> Nowak 1993: 238

## **1.8 Disposition**

Chapter (2), the analytical framework is structured so that it provides the reader with basic understanding of those parts which are later examined in chapter (3), the legal analysis. Chapter (2) will thus create a framework containing those building blocks on which the legal analysis rests upon. The legal analysis is divided in two sections whereas the first examines the jurisdiction for Kenyan courts to try piracy suspects, and the other the right to a fair trial in Kenyan criminal proceedings of piracy suspects. Furthermore, the legal analysis is structured into three parts. Firstly, a legal problem will be presented which is identified in relation to the research problem and the functional questions of this study. Secondly, there will be a legal discussion regarding each stipulated problem. Third, and finally, there will be a legal reflection which is based upon the legal discussion in part two.

In the final chapter (4), the conclusions of this study will be presented, as well as an end discussion regarding the implications of the regional prosecution model, between Kenya and the EU, on international criminal law. In addition, topics for further research will also be presented in this chapter.

## 2. Analytical Framework

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This Chapter provides the reader with an analytical framework which will be used as building blocks in the legal analysis.

### 2.1 Sovereignty

One of the most fundamental concepts of international law is sovereignty.<sup>84</sup> State sovereignty implies that the State is in possession of certain rights and duties. These sovereign rights and duties are established as soon as a State starts its existence.<sup>85</sup> According to the Montevideo Convention on the Rights and Duties of States (1933) a State should fulfill four criteria for it to be recognized:

The state as a person of international law should possess the following qualifications:

- a) A permanent population;
- b) a defined territory;
- c) government; and
- d) capacity to enter into relations with the other states.<sup>86</sup>

The concepts of State sovereignty can be divided into three categories, each, dealing with different kinds of rights and duties: those connected to the usage of the State territory; those connected to the treatment of the State nationals; and those connected to the exercise of political governance of the State. Generally, these rights and duties are included in territorial sovereignty, personal sovereignty, and political sovereignty.<sup>87</sup> The territorial sovereignty implies that the State owns the exclusive right to decide who is allowed access to enter its territory and who is

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<sup>84</sup> McCorquodale; Dixon 2003: 234

<sup>85</sup> Linderfalk, Ulf (2006) "Folkrätten, staten & statens suveränitet" in *Folkrätten i ett nötskal*, Linderfalk, Ulf (ed), Lund: Studentlitteratur AB, p. 15

<sup>86</sup> *Montevideo Convention on the Rights and Duties of States* (1933), Article 1

<sup>87</sup> Linderfalk 2006: 15



permitted to reside within its territorial borders.<sup>88</sup> Even though a State may be subject to certain limitations, such as guarantees of human rights and diplomatic privileges, the State still has absolute and unchallengeable authority over its territory and all nationals.<sup>89</sup> The Convention on the Territorial Sea and the Contiguous Zone (1958) stipulates that State sovereignty covers more than land based territory:

The Sovereignty of a State extends, beyond its land and its internal waters, to a belt of sea adjacent to its coast, described as the territorial sea.<sup>90</sup>

The State responsibility to control its territory also includes actors other than the State itself. A State is responsible to take precautions in order to prevent actors from using their territory in a way which might have inimical result on other countries.<sup>91</sup> According to the Montevideo Convention a State is required to have a population. The personal sovereignty refers to the State's relationship with its population.<sup>92</sup> The personal sovereignty of a State is sometimes known as its jurisdictional sovereignty which includes the exercise of administrative, judicial, executive and legislative activities.<sup>93</sup> The fact that a State has sovereignty over the territorial sea means that it has full legislative jurisdiction therein in the same way as land territory.<sup>94</sup> The political sovereignty implies that a State is represented by some form of governance. A government, for example, must be able to claim the right to freely decide how and in what manner the State will be governed. A government should have the right to freely determine which kind of politics that should be practiced in that specific State.<sup>95</sup> State sovereignty is – as noted above - a crucial aspect of international law and it serves as an integral part of the equality between States and of the territorial and political integrity as referred to in the United Nations charter:

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<sup>88</sup> Linderfalk 2006: 16

<sup>89</sup> Dixon 2013: 161

<sup>90</sup> *The Convention on the Territorial Sea and the Contiguous Zone* (1958), Article 1 §1

<sup>91</sup> Linderfalk 2006: 16. As an example, Linderfalk offers al-Qaida in Afghanistan. If it is concluded that al-Qaida is engaged in acts of international terrorism, then it is a violation of international law if Afghanistan continues to let al-Qaida operate from Afghan territory.

<sup>92</sup> Linderfalk 2006: 18

<sup>93</sup> McCorquodale; Dixon 2003: 268

<sup>94</sup> Dixon 2013: 220

<sup>95</sup> Linderfalk 2006: 18-19

The Organization is based on the principle of the sovereign equality of all its Members.<sup>96</sup>

The following section deals with one specific aspect of sovereignty, namely, State jurisdiction.

## 2.2 Jurisdiction

State jurisdiction is the power of the State to prescribe and enforce the rules of law. The ability of the State to exercise jurisdiction is closely connected to its sovereignty and constitute one of its most vital features.<sup>97</sup> It is the authority over persons, property, and events occurring within the territorial bounds of a State. The exercise of this authority encompasses action in the national sphere through its legislature, police force and courts.<sup>98</sup> The jurisdiction of a State may be modified by various principles of international law or by specific obligations freely undertaken by the state. This, in turn, might enable for the extraterritorial extension of authority generated by the jurisdictional sovereignty of a State.<sup>99</sup> There are three ways in which jurisdiction may be asserted: legislative, adjudicative and executive. Firstly, the legislative jurisdiction entails the right of a State to pass domestic legislation that has a national bearing on conduct.<sup>100</sup> It is prescriptive in its nature and as a general rule, the legislative jurisdiction is unlimited and a State may legislate for any matter irrespective of where the event occurs or the nationality of the individuals involved.<sup>101</sup> One example of prescriptive or legislative jurisdiction is that of the United Kingdom (UK) and the Broadcasting Act 1990 which makes it an offence under the national legislation of UK to broadcast from the high seas in a manner that interferes with domestic broadcasting services. This case also illustrates the extraterritorial extension of a State's legislative jurisdiction.<sup>102</sup> Secondly, the adjudicative jurisdiction<sup>103</sup> of a State is the authority of

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<sup>96</sup> *United Nations Charter* (1945), Article 2 §1

<sup>97</sup> Cryer; Robert; Friman, Håkan; Robinson, Darryl; Wilmshurst, Elizabeth (2010) *An Introduction to International Criminal Law and Procedure*, Cambridge University Press, p. 43

<sup>98</sup> McCorquodale, Robert; Dixon, Martin (2003) *Cases and Materials on International Law*, Oxford University Press, p. 268

<sup>99</sup> Dixon, Martin (2013) *Textbook on International Law*, Oxford University Press, p. 150

<sup>100</sup> Cryer; et al. 2010: 43

<sup>101</sup> McCorquodale; Dixon 2003: 268

<sup>102</sup> Dixon 2013: 149; more generally the prescriptive or legislative jurisdiction of a state is illustrated through all of its established domestic legislation.

the domestic courts to take action in order to enforce the national legislation and pass judgment on matters brought before them. A State has the exclusive right to establish courts and assign their respective jurisdiction, and to define the procedural perimeters which are to be followed.<sup>104</sup> Third and finally, the executive jurisdiction of a State is the right to effect legal process coercively, such as to arrest someone, or undertake searches or seizures. Thus, it is the capacity of the state to enforce its national legislation.<sup>105</sup> The sovereign equality of all States implies that a State may not exercise its executive jurisdiction in another State's territory irrespective of the reach of its legislative jurisdiction. Although, the extraterritorial exercise of the executive jurisdiction is possible with the consent of the host State.<sup>106</sup> States are entitled to pass jurisdiction to one another.<sup>107</sup> A State can claim jurisdiction upon a number of principles, all of which will be dealt with in the below sections.

### **2.2.1 The Territoriality Principle**

Under the territoriality principle, States have the right to exercise jurisdiction over all events on their territory. It extends over its land, national airspace, internal water and territorial sea and for limited purposes, to its contiguous zone, continental shelf and Exclusive Economic Zone. Furthermore, a State has authority over nationals, friendly aliens or enemy aliens and it also covers ships and aeroplanes that are registered in the state.<sup>108</sup> The territoriality principle is the most dominant ground of jurisdiction that exists within international law. The territorial basis for jurisdiction can be divided into two categories: the objective and subjective territorial principle. The objective territorial basis for jurisdiction means that the State has jurisdiction over offences that are completed in its territory, even if parts of the offence took place outside the State's borders. The subjective territorial basis of jurisdiction means that the State has jurisdiction over

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<sup>103</sup> Also known as judicial jurisdiction

<sup>104</sup> Cryer; et al. 2010: 44

<sup>105</sup> Cryer; et al. 2010: 44; Dixon 2013: 150

<sup>106</sup> McCorquodale; Dixon 2003: 268

<sup>107</sup> Cryer; et al. 2010: 46

<sup>108</sup> Dixon 2013: 152; Cryer; et al. 2010: 46

offences and matters arising or beginning in its territory, even if parts of the crime – or the completion of the crime – take place in another State.<sup>109</sup>

## 2.2.2 The Nationality Principle

The principle of nationality means that the exercise of State jurisdiction is based on nationality. Thus, the State owns the right to prosecute its nationals for any crimes, on the basis of nationality. Furthermore, this implies that the State can prosecute individuals suspected of crimes irrespective of their location in the world. The national jurisdiction is based on the link between the national and the State.<sup>110</sup> Where there is doubt as to whether the individual can be counted as a national or not, the *Nottebohm Case* is sometimes regarded as an indicator for nationality. The International Court of Justice believed that it, in principle, was for each State to determine the criteria for awarding nationality.<sup>111</sup>

Furthermore, the Court suggested that in cases where two or more States were alleging that an individual was their national:

A 'genuine link' with a State had to be established before that nationality could be recognized.<sup>112</sup>

States tend to exercise the nationality jurisdiction extraterritorially very rarely, and it is only when the crimes or the indictable act is particularly serious.<sup>113</sup> When jurisdiction is being asserted on the basis of nationality of the offender, the *locus delicti*<sup>114</sup> is required to accept the intervention of a foreign State so that they may exercise jurisdiction over events occurring on

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<sup>109</sup> Dixon 2013: 152

<sup>110</sup> Cryer; et al. 2010: 48; Dixon 2013: 151-152

<sup>111</sup> *Nottebohm Case (Lichtenstein v. Guatemala)*, ICJ Rep 1955 4, International Court of Justice. 'It is [...] for every sovereign State, to settle by its own legislation the rules relating to acquisition of its nationality, and to confer that nationality by naturalization granted by its own organs in accordance with that legislation. It is not necessary to determine whether international law imposes any limitations on its freedom of decision in this domain. Furthermore, nationality has its most, immediate, its most far-reaching and, for most people, its only effects within the legal system of the state conferring it. Nationality serves above all to determine that the person upon whom it is conferred enjoys the rights and is bound by the obligations which the law of the State in question grants to or imposes on its nationals. This implies in the wider concept that nationality is within the domestic jurisdiction.'

<sup>112</sup> *Nottebohm Case (Lichtenstein v. Guatemala)*, ICJ Rep 1955 4, International Court of Justice

<sup>113</sup> McCorquodale; Dixon 2003: 276

<sup>114</sup> 'Scene of the Crime', it is the place where the tort, offence or injury was committed or the place where the last event necessary to make the actor liable occurred.

their territory.<sup>115</sup> For the State to claim national jurisdiction it is required that the individual, upon whom the State jurisdiction is asserted, was a national at the time the crime was committed. Otherwise, it may constitute a breach of the principle *nullum crimen sine lege*<sup>116</sup>. Although, there are examples of States which provide jurisdiction of suspects whom later acquire their nationality.<sup>117</sup>

### 2.2.3 The Passive Personality Principle

In accordance with the passive personality principle, a State may assert jurisdiction over the crimes committed against its nationals while they are in another country.<sup>118</sup> In the *Lotus case*, some of the judges were critical of this basis of jurisdiction, arguing that the international customary law was in conflict with the principle of passive personality. Judge John Bassett Moore expressed it as follows:

It is evident that this claim is at variance not only with the principle of the exclusive jurisdiction of a State over its own territory, but also with equally well-settled principle that a person visiting a foreign country, far from radiating for his protection the jurisdiction of his own country, falls under the dominion of the local law and,

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<sup>115</sup> Cryer; et al. 2010: 48

<sup>116</sup> 'No crime without law', Also known as the Legality principle which is a moral principle in criminal law that implies that a person cannot be or should not be faced with criminal punishment except for an act that was criminalized by law before he or she performed the act.

<sup>117</sup> See the Swedish Penal Code, Chapter 2, Section 2: "Crimes committed outside the Realm shall be adjudged according to Swedish law and by a Swedish court where the crime has been committed:

1. by a Swedish citizen or an alien domiciled in Sweden,
2. by an alien not domiciled in Sweden who, after having committed the crime, has become a Swedish citizen or has acquired domicile in the Realm or who is a Danish, Finnish, Icelandic, or Norwegian citizen and is present in the Realm, or
3. by any other alien, who is present in the Realm, and the crime under Swedish Law can result in imprisonment for more than six months.

The first, paragraph shall not apply if the act is not subject to criminal responsibility under the law of the place where it was committed or if it was committed within an area not belonging to any state and, under Swedish law, the punishment for the act cannot be more severe than a fine."

<sup>118</sup> Cryer; et al. 2010: 49

except so far as his government may diplomatically intervene in case of denial of justice, must look to that law for protection.<sup>119</sup>

The passive personality principle extends the principle of nationality to include and enables for it to be applied on all crimes perpetrated against all nationals of the State, regardless of where the individuals are located in the world. State practice demonstrates that it is very seldom that this jurisdictional basis is invoked as a basis for prosecution.<sup>120</sup> However, this ground for jurisdiction has been on the rise in connection with the war on terrorism. There is a problem with the passive personality jurisdiction, it can lead to individuals being subjected to regulations from different States simultaneously and would, thus, be subject to laws which they have no knowledge of.<sup>121</sup>

## **2.2.4 The Protective Principle**

The protective principle implies that the State is entitled to invoke protective jurisdiction over extraterritorial activities that threaten national security. Such activities include, for example, treason, espionage, forging or counterfeiting a currency.<sup>122</sup> The Harvard Research Group demonstrated that examples of jurisdiction, which was based on the protective principle, could be found in the national legislation of most countries.<sup>123</sup> Therefore, the principle of protection is to be considered as one of the established jurisdictional foundations of international customary law.<sup>124</sup> Jurisdiction which is based on protection was defined as the following by the Harvard Research Group:

A State has jurisdiction with respect to any crime committed outside its territory by an alien against the security, territorial integrity or political independence of that State, provided that the act or omission which constitutes the crime was not

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<sup>119</sup> Moore, John Basset (Dissenting Opinion) *SS Lotus Case (France v. Turkey)*, PCIJ Ser A (1927), No 9, Permanent Court of International Justice

<sup>120</sup> McCorquodale; Dixon 2003: 282

<sup>121</sup> Cryer; et al. 2010: 49

<sup>122</sup> Cryer; et al. 2010: 50

<sup>123</sup> A modern example is that which is presented in section 2.2 about UK and the Broadcasting Act 1990.

<sup>124</sup> Dixon 2013: 156

committed in exercise of a liberty guaranteed the alien by the law of the place where it was committed.<sup>125</sup>

The principle of protection is useful to the State because it enables for it to combat extraterritorial acts which are done by aliens and have an adverse effect on the State's welfare or security.<sup>126</sup>

### 2.2.5 The Effects Doctrine

During the last decade, some States have adopted legislation which aims to give the State jurisdiction over any actions that generates an effect on its territory. This ground for jurisdiction is known as *the effects doctrine*.<sup>127</sup> The core element of the doctrine consists of an extraterritorial application of national laws over an act that has an effect on the State and is caused by an individual without territorial or national connection to that State. It is, therefore, the exercise of jurisdiction over non-nationals on actions that take place abroad.<sup>128</sup> The effects doctrine is primarily American and was originally applied in anti-trust situations which had an impact on the US.<sup>129</sup> For example under the anti-trust legislation of the USA, a foreign company, which have partial of its operations in the USA, may become liable to penalties under US law for engaging in anti-competitive practices, even if the actual activities complained of take place outside US soil.<sup>130</sup> Many States have adopted legislation aimed at protecting the activities of persons or companies operating legally in the State they are located in, even if the actions are illegal under the State in which their actions have consequences.<sup>131</sup> The effects doctrine can be seen as an extension of either the territorial- or the protective principle. It can be perceived as an extension

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<sup>125</sup> Article 7 'Protection –Security of the State', *Harvard Research Draft Convention on Jurisdiction with respect to Crime* (1935). Found in: Grant, John P. & Barker, Craig J. (2007) *The Harvard Research in International Law: Contemporary Analysis and Appraisal*, Appendix 9, p. 488

<sup>126</sup> McCorquodale; Dixon 2003: 277-278

<sup>127</sup> Dixon 2013: 157

<sup>128</sup> McCorquodale; Dixon 2003: 286-87

<sup>129</sup> McCorquodale; Dixon 2003: 286-87

<sup>130</sup> Dixon 2013: 157; See also, *Hartford Fire Insurance Co. v. California US Supreme Court*, 113 S. Ct 2891 (1993), The case arose around an insurance crisis in the United States. The complainant alleged that London insurance companies, which acted in the United Kingdom, had cooperated in order to refuse to provide reinsurance to certain US based companies, except on terms agreed upon amongst themselves. This was said to violate the Sherman Act (an act which prohibits collusion). The defense argued that their actions were legal in the State where they took place. However, the US Supreme Court found, by a majority, that the US court did have jurisdiction.

<sup>131</sup> McCorquodale; Dixon 2003: 286

of the territorial principle where the part of an activity might take place on a State's territory, even if the only effect is the economic harm which is indirectly caused by that particular activity. It can also be perceived as an extension of the protective principle where the scope of the protective jurisdiction is extended to apply on situations other than national security to, for example, where issues considered of importance to a State are affected.<sup>132</sup>

## 2.2.6 The Universal Jurisdiction

The principle of universal jurisdiction implies that a State may invoke universal jurisdiction over serious crimes committed by individuals irrespective of where they are located. There is no need for the State to demonstrate any territorial or national link to the crime or the individual for it to claim jurisdiction based on the universality principle.<sup>133</sup> The purpose of universal jurisdiction is linked to the idea that international crimes affect the international community as a whole.<sup>134</sup> The crimes that give rise to an exercise of the universal jurisdiction are: war crimes, crimes against humanity, genocide, torture, slavery and piracy. Piracy is generally regarded as a crime which is synonymous with a State exercise of universal jurisdiction, because it is a crime which takes place on international waters.<sup>135</sup> The International Criminal Court constitutes an important tool in the prosecution of international crimes.<sup>136</sup> The Statute of the International Criminal Court stipulates that the Court has jurisdiction over four specific crimes.<sup>137</sup>

Not all offences which give rise to the principle of universal jurisdiction is uniformly acknowledged, as for example, drug trafficking.<sup>138</sup> One of the most cited cases in which a State

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<sup>132</sup> McCorquodale; Dixon 2003: 286

<sup>133</sup> Dixon 2013: 154; Cryer; et al. 2010: 50

<sup>134</sup> Cryer; et al. 2010: 51

<sup>135</sup> McCorquodale; Dixon 2003: 289; Linderfalk 2006: 33; There are those who denies the existence of universal jurisdiction, see for example: Rubin, Alfred (2001) "Actio Popularis, Jus Cogens and Offences Erga Omnes" in *New England Law Review*, 265. Also, some question whether piracy is an appropriate analogy for modern assertions of universal jurisdiction, see Kontorovich, Eugene (2004) "The piracy analogy: Modern Universal Jurisdiction's Hollow Foundation" in *Harvard International Law Journal*, 183

<sup>136</sup> Dixon 2013: 154

<sup>137</sup> Article 5, Crimes within the jurisdiction of the Court, *Rome Statute*, International Criminal Court. 'The jurisdiction of the Court shall be limited to the most serious crimes of concern to the international community as whole. The Court has jurisdiction in accordance with this Statute with respect to the following crimes: a) The crime of genocide; b) Crimes against humanity; c) War crimes; d) The crime of aggression.'

<sup>138</sup> McCorquodale; Dixon 2003: 289



exercised universal jurisdiction is the *Eichmann Case*.<sup>139</sup> Israeli authorities arrested Adolf Eichmann in Argentina in 1960 and brought him back to Israel to stand trial.<sup>140</sup> The District Court of Jerusalem stated the following:

The abhorrent crimes defined in this law are crimes not under Israel law alone. These crimes which afflicted the whole of mankind and nations itself (“*delicta juris gentium*”). Therefore, so far from international law negating or limiting the jurisdiction of countries with respect to such crimes, in the absence of an International Court the international law is in need of the judicial and legislative authorities of every country, to give effect to its penal injunctions and to bring criminals to trial. The authority and jurisdiction to try crimes under international law are *universal*.<sup>141</sup>

Israel sought not only to assert jurisdiction on the basis of the universality principle, but also on the passive personality and protective principle. However, the jurisdictional claims on these grounds were criticized. The passive personality principle sought jurisdiction on the basis of Eichmann’s Jewish victims. However, the victims were not Israeli nationals at the time of the offences. The Israeli assertion of the protective jurisdiction was also criticized on the fact that Israel was not an established State at the time of the offences.<sup>142</sup>

Since the International Court of Justice’s decision in the *Yerodia Case*, universal jurisdiction has been divided into two sub-categories.<sup>143</sup> Firstly, pure universal jurisdiction arises when a State tries to invoke jurisdiction over international crimes even if the accused person is not present on its territory.<sup>144</sup> Secondly, conditional universal jurisdiction is jurisdiction which is

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<sup>139</sup> See,

<sup>140</sup> Cryer; et al. 2010: 53-54

<sup>141</sup> *The Attorney-General of the Government of Israel v. Eichmann*. Criminal Case No. 40/61, District Court of Jerusalem, Judgement of Dec. 11 1961, Para. 12

<sup>142</sup> Cryer; et al. 2010: 50

<sup>143</sup> See, *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)*, Judgment, I.C.J Reports 2002, p.3: Belgium had issued a warrant for the arrest of the Congolese Foreign Minister for grave violations of human rights and based the exercise of jurisdiction on the universality principle. The decision on the merits turned on whether the Foreign Minister could claim immunity. The judgment of the Court stipulated he could. Furthermore, it was also established that universal jurisdiction was established as a principle of customary law.

<sup>144</sup> Also known as *universal jurisdiction in absentia*

exercised over international crimes while the suspected individual is located within the territorial borders of the State.<sup>145</sup>

## 2.3 Security Council

The Security Council is the enforcing organ of the United Nations. The Security Council consists of fifteen members. Five of them<sup>146</sup>, China, France, the Russian Federation, the United Kingdom, and the United States hold their seats by the authority of the Charter. The other ten are elected by the General Assembly to two-year terms.<sup>147</sup> The Council is tasked with preserving the peace and security in the world, thus trying to achieve a more stable world order by preventing or stopping armed conflicts.<sup>148</sup> It is summarized in the purposes of the UN, article 1 of the UN Charter.<sup>149</sup>

The SC has the authority to put any conflict or dispute that may generate international implications under scrutiny and to identify aggressive action by states. Furthermore, it may decide upon an application of appropriate measures, be it economic sanctions or military actions, as a response to hostile situations. In addition, the SC has the power to establish peacekeeping missions, create tribunals in order to try individuals for war crimes, and to decide on matters that may have effects on the fate of a government.<sup>150</sup> Basically, its powers can be divided in two specific categories, the peaceful settlement of disputes and the adoption of enforcement measures.<sup>151</sup> Chapter VI of the charter contains measures of a more peaceful nature whilst chapter VII provides the SC with enforcing measures.<sup>152</sup> The International Court of Justice notes that there is no established procedure for determining whether actions, taken in the name of the UN,

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<sup>145</sup> Cryer; et al. 2010: 51-52; Dixon 2013: 154-155 Conditional universal jurisdiction is also known as *universal jurisdiction with presence*

<sup>146</sup> Referred to as "the Permanent Five" or "P5"

<sup>147</sup> Fasulo, Linda (2009) *An Insider's Guide to the UN* (2ed), Yale University Press, p. 40-41

<sup>148</sup> Fasulo 2009: 38. Also see articles 23, 24, 25 and 28 of the UN charter which stipulates the function and powers of the SC

<sup>149</sup> Article 1(1), United Nations Charter. 'To maintain international peace and security, and to that end: to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace, and to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace.'

<sup>150</sup> Fasulo 2009: 38

<sup>151</sup> Shaw, Malcolm N. (2008) *International Law*, (6th Ed), Cambridge University Press, p. 1208

<sup>152</sup> See, Chapter VI & VII of the United Nations Charter

are legitimate. It is for each UN organ to interpret their role and to determine their competence under the UN charter (or in line with the charter if it is complemented with *praxis*).<sup>153</sup> Article 2(7) of the UN charter stipulates that:

Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any State [...].<sup>154</sup>

The prohibition listed in this article loses its status in cases where chapter VII measures are invoked by the Security Council, also the State sovereignty is put aside as a legal obstacle.<sup>155</sup> Furthermore, The Security Council has had an increased tendency to use regional organizations in the context of peacekeeping and peace enforcement.<sup>156</sup> Chapter VIII of the UN Charter regulates regional arrangements.<sup>157</sup>

### **2.3.1 Resolutions**

The Security Council has the power to adopt decisions which are binding on all UN member states by virtue of Article 25 in the UN Charter:

The Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter.<sup>158</sup>

A general rule is that actions which fall outside the parameters of Chapter VII in the UN Charter are recommendatory.<sup>159</sup> Thus, decisions which actualize Chapter VII of the Charter in order to preserve the international peace and security are the most important category of binding

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<sup>153</sup> Because there is no procedure for determining the lawfulness/validity of UN measures the Court has pointed out that “*each organ must, in the first place, determine its own jurisdiction*” in *Certain expenses of the United Nations* (Advisory Opinion), ICJ Reports 1962, p. 168. Opinion available at: <http://www.icj-cij.org/docket/files/49/5259.pdf>, access: 2014-04-22. Bring, Ove (2002) also makes this interpretation, p. 246

<sup>154</sup> Article 2(7), United Nations Charter

<sup>155</sup> Bring 2002: 306

<sup>156</sup> Shaw 2008: 1273

<sup>157</sup> See Chapter VIII of the UN Charter. Article 52 provides that nothing in the Charter should preclude the existence of regional arrangements for dealing with matters that relate to the preserving of international peace and security, as long as these arrangements are consistent with the purposes and principles of the UN.

<sup>158</sup> Article 25, UN Charter

<sup>159</sup> Bring 2002: 306

resolutions.<sup>160</sup> Even so, not all provisions stipulated in SC resolutions are legally binding; those resolutions which merely recommend, call upon or urge States to do or refrain from something, are not legally binding.<sup>161</sup> The importance of the language in resolutions taken by the SC is noted by the International Court of Justice:

The language of a resolution of the Security Council should be carefully analysed before a conclusion can be made as to its binding effect.<sup>162</sup>

The Security Council has introduced a spacious interpretation of the concept “international peace security”, as provided in article 39 of the Charter. While each new practice must develop in accordance with the Charter as a base of international law, the individual provision of the Charter does not, necessarily, have to be seen as a barrier for new and different solutions.<sup>163</sup> Furthermore, article 103 of the Charter stipulates that:

In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail.<sup>164</sup>

The International Court of Justice provided that a valid and binding resolution prevails over inconsistent international agreements when interpreting article 103 in the *Lockerbie case*.<sup>165</sup> In the *Lockerbie case* the Court refused an application by Libya for provisional measures on the ground that resolution 748 which required Libya to surrender suspected terrorists for trial was binding and thus, it prevailed over the provisions of the 1972 Montreal Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation.<sup>166</sup>

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<sup>160</sup> Boyle; Chinkin 2007:230

<sup>161</sup> Boyle; Chinkin 2007:229

<sup>162</sup> *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion, I.C.J. Reports 1971, p. 53.

<sup>163</sup> Bring 2002: 306

<sup>164</sup> Article 103, United Nations Charter

<sup>165</sup> *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United Kingdom)*, Preliminary Objections, Judgment, I. C.J. Reports 1998. Available at: <http://www.icj-cij.org/docket/files/88/7129.pdf> , Access: 2014:04-22.

<sup>166</sup> Boyle; Chinkin 2007:232

## 2.4 Due Process in International Law

Rules that are administered through courts in accordance with established legal principles and procedures can be described with term ‘due process’. It functions as a safeguard for the protection of individual rights. The concept of due process is broad and may include rules that are applicable in cases of: deprivation of liberty; rules that relate to property; and rules that are related to administrative procedures of justice.<sup>167</sup> Thus, due process includes a legal requirement that a state must respect all legal rights that are owed to a person.

Procedural law regulates what happens before and during a trial. A fair trial is not only a way of making sure that an individual is sentenced or freed; it is also a way of controlling the State’s human rights obligations. There are different procedural forms depending on the type of case. If one is to take the perspective of human rights, then the focus will be directed towards criminal law. It is a procedural form which regulates the procedure regarding whether an individual charged with a crime is guilty or not.<sup>168</sup> Proper administration of justice has two central aspects, the institutional and the procedural. The institutional aspects involve, for example, the independence and impartiality of courts and agencies in order to deal correctly with prosecution. The fairness of the hearing and the respect for the rights of parties are two examples on the procedural aspects in administration of justice.<sup>169</sup> The right to a fair trial is a central element to control the maintenance of human rights, due to the fact that it provides a protection against arbitrary and unlawful interference with other rights as, for example, the right to life.<sup>170</sup> The right to a fair trial is, as mentioned before, a human right, as evidenced by its occurrence and reflectance in for example: the European Convention for the Protection of Human Rights and Fundamental Freedoms (1950), article 6; and the International Convention on Civil and Political Rights (1966), article 14.<sup>171</sup>

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<sup>167</sup> Icelandic Human Rights Centre, available at: <http://www.humanrights.is/the-human-rights-project/humanrightscasesandmaterials/comparativeanalysis/therighttodueprocess/process/>, access: 2014-04-24. In this thesis the understanding is limited to ‘due process’ as administrative procedures of justice.

<sup>168</sup> Nowak, Karol (2011) ”Rättegången som en mänsklig rättighet” in *Frihet och personlig säkerhet*, Karlbrink, Lena (ed), Liber AB, p. 143

<sup>169</sup> Icelandic Human Rights Centre, available at: <http://www.humanrights.is/the-human-rights-project/humanrightscasesandmaterials/comparativeanalysis/therighttodueprocess/process/>, access: 2014-04-24.

<sup>170</sup> Nowak 2011: 143

<sup>171</sup> Nowak 2011: 147

## 2.4.1 International Covenant on Civil and Political Rights

The Convention on civil and political rights was opened for signature on 19<sup>th</sup> December 1966 and entered into force in 23<sup>rd</sup> March 1976.<sup>172</sup> Together with the *International Convention on Economic, Social and Cultural Rights* (1966) it offers a legally binding protection of human rights, as they were established in the *Universal Declaration on Human Rights* (1948). Furthermore, the rights in article 1-21 of the declaration are reflected by the content of ICCPR.<sup>173</sup> The convention has a well-established monitoring system. Article 28 creates a specific committee of experts whose tasks are to review State implementation of the Convention's content on a national level. This committee is called, the Human Rights Committee (HRC).<sup>174</sup> Furthermore, the convention provides two monitoring mechanisms which are designed to help HRC examine the implementation process on the national level. Firstly, according to article 40 in the ICCPR, State parties are required to submit reports within a year of entry thereafter when requested by the HRC. The HRC has requested reports to be presented every five years.<sup>175</sup> The HRC comments on the submitted country report are known as "concluding observations".<sup>176</sup> Article 41 provides State parties with a possibility to offer a complaint against another State party to the convention on the grounds that the latter is not fulfilling its obligations in accordance with the treaty.<sup>177</sup> If a State has ratified *The First Optional Protocol* to ICCPR, which is a separate treaty, individuals may submit complaints to HRC about alleged State violations of their ICCPR rights.<sup>178</sup>

Civil and political rights have historically been perceived as freedom from arbitrary government interference. Therefore, the rights in the ICCPR generally been characterized as "negative rights".<sup>179</sup> Although, the stipulated rights in ICCPR creates obligations of both positive and negative nature. A State is capable to provide a negative right without any active

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<sup>172</sup> See status of treaty at: [https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=IV-4&chapter=4&lang=en](https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&lang=en), access: 2014-04-24

<sup>173</sup> Karlbrink, Lena (2010) "Den internationella konventionen om de medborgerliga och politiska rättigheterna" in *Mänskliga rättigheter – juridiska perspektiv*, Lundberg, Anna (ed), Liber AB, p. 81; Nowak, Manfred (1993) *U.N. Covenant on Civil and Political Rights: CCPR Commentary*, Engel Publisher, p. XVII

<sup>174</sup> Jospeh, Sarah; Schultz, Jenny; & Castan, Melissa (2000) *The International Covenant on Civil and Political Rights: Cases, Materials, and Commentary*, Oxford University Press, p. 10; See also Article 28, International Covenant on Civil and Political Rights (1966)

<sup>175</sup> Jospeh; Schultz; Castan 2000: 11

<sup>176</sup> Karlbrink 2010: 88

<sup>177</sup> Karlbrink 2010: 88; See also, article 41, International Covenant on Civil and Political Rights (1966)

<sup>178</sup> Jospeh; Schultz; Castan 2000: 13; Karlbrink 2010: 88

<sup>179</sup> Jospeh; Schultz; Castan 2000: 21

involvement from the State. For example, there is no need for the State to enact legislation in order to protect and respect a negative right.<sup>180</sup> Basically, the State only has to refrain from interfering.<sup>181</sup> On the contrary, in order to protect a positive right, the State needs to ensure that the domestic legislation and exercise of authority is handled in a manner that enables for the individual's full enjoyment of his or her rights.<sup>182</sup> In general, civil rights cover rights in order to protect physical integrity, procedural due process rights<sup>183</sup>, and non-discriminatory rights. Political rights enable one to participate meaningfully in the political life of one's society, and include rights such as freedom of expression, assembly, and association, and the right to vote.<sup>184</sup>

Article 14 of the ICCPR provides the accused individual with some minimum guarantees in criminal trials.<sup>185</sup> Therefore, article 14 serves as a protection of the fair trial aspect in procedural due process.

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<sup>180</sup> Karlbrink 2010: 82

<sup>181</sup> Jospeh; Schultz; Castan 2000: 21

<sup>182</sup> Karlbrink 2010: 82

<sup>183</sup> This thesis will specifically examine fair trial in accordance with article 14 of ICCPR as an aspect of procedural due process rights.

<sup>184</sup> Jospeh; Schultz; Castan 2000: 5

<sup>185</sup> Nowak 1993: 235

## 3. Legal Analysis

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The legal analysis consists of three components: a legal problem; a legal discussion; and a legal reflection. Furthermore, the analysis is divided in two sections: the first one examines what jurisdictional base Kenya may rely upon when prosecuting pirates transferred to them by European countries involved in Operation Atlanta; the second section examines to what extent Kenya fulfill the provisions stipulated in article 14 of the ICCPR and respect piracy suspect's right to a fair trial in criminal proceedings.

### 3.1 Jurisdictional Base for Kenyan Courts to try Piracy Suspects

#### 3.1.1 Legal Problem

At the moment, transfers of piracy suspects to Kenya are possible on a case by case basis.<sup>186</sup> As illustrated in section 1.1 (Research Problem) of this study there is a problematic aspect regarding Kenya's jurisdiction over piracy suspects, transferred to them by European countries. The current agreement between Kenya and the EU does not stipulate a jurisdictional ground upon which Kenya may rely when prosecuting transferred piracy suspects. In order to bring some clarity to the issue at hand, this section will examine what jurisdictional ground Kenya may rely upon when prosecuting pirates transferred to them by third States involved in Operation Atlanta.

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<sup>186</sup> Factsheet: The EU fight against piracy in the Horn of Africa (23<sup>rd</sup> December 2013), p. 3



## 3.1.2 Legal Discussion

### 3.1.2.1 Kenya and Universal Jurisdiction for Piracy

The crime of piracy is generally considered to evoke the principle of universal jurisdiction, thus, allowing any nation to try piracy even if there is no clear nexus between the State which is claiming the jurisdiction and the piratical act itself. According to some commentators, article 105 of UNCLOS grants universal jurisdiction for piracy.<sup>187</sup> Therefore, Kenya, as a party to the Convention, would appear to be granted universal jurisdiction for piracy in accordance with article 105.<sup>188</sup> Article 105 of UNCLOS reads as follows:

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 or aircraft taken by piracy and under the control of pirates, and arrest the persons and seize the property on board. The courts of the State which carried out the seizure may decide upon the penalties to be imposed, and may also determine the action to be taken with regard to the ships, aircraft or property, subject to the rights of third parties acting in good faith.<sup>189</sup>

A closer reading of the content in article 105 implies that it only offers an executive version of universal jurisdiction, as follows by “*every State may seize a pirate ship or aircraft*”.<sup>190</sup> However, no adjudicative universal jurisdiction is granted in the provision, instead adjudicative jurisdiction is granted the State which performs the seizing of the pirate vessel.<sup>191</sup> Thus, the provision only offers a limited form of universal jurisdiction for piracy. All piracy suspects who are being prosecuted in Kenya are brought there by the third-party States who, in addition, performed the

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<sup>187</sup> For example, see: de Bont, Saoirse (2010) *Prosecuting Pirates and Upholding Human Rights Law: Taking Perspective*, p. 7; Kontorovich, Eugene (2010) “A Guantanamo on the Sea: The Difficulty of Prosecuting Pirates and Terrorists” in *California Law Review*, Vol. 98, Issue 1, p. 252; and Azubuike, Lawrence (2010) “International Law Regime Against Piracy” in *Annual Survey of International & Comparative Law*, Vol. 15, Issue. 1, p. 54

<sup>188</sup> Kenya ratified the convention 2<sup>nd</sup> March 1989. See ratification document of UNCLOS, available at: [http://www.un.org/depts/los/reference\\_files/status2010.pdf](http://www.un.org/depts/los/reference_files/status2010.pdf), access: 2014-05-06

<sup>189</sup> Article 105, UNCLOS

<sup>190</sup> Article 105, UNCLOS; The first sentence in the provision stipulates the right for all States to seize pirate vessels and to apprehend piracy suspects.

<sup>191</sup> Article 105, UNCLOS; Only ‘The courts of the State which carried out the seizure may decide upon the penalties to be imposed’,

apprehension of the pirate.<sup>192</sup> Therefore, in relation to universal jurisdiction as offered in article 105 of UNCLOS, Kenya do not have universal jurisdiction to try pirates in its national courts.

However, in Security Council Resolution 1851, the SC created an opportunity for Kenya to address its inadequate adjudicative universal jurisdiction in accordance with article 105 of UNCLOS. Under Chapter VII of the UN Charter, the SC stipulated the following:

*Invites all States and regional organizations fighting piracy off the coast of Somalia to conclude special agreements or arrangements with countries willing to take custody of pirates in order to embark law enforcement officials (“shipriders”) from the latter countries, in particular countries in the region [...].*<sup>193</sup>

This invitation, for countries to conclude “shiprider” agreements, was later reaffirmed in Security Council Resolution 1897, in which the SC used the exact same phrasing.<sup>194</sup> Even though the Exchange of Letters between Kenya and the EU does not stipulate anything relating to the use of “shipriders”, it does not prevent the establishing of such a co-operational dimension.<sup>195</sup> Thus, Kenyan law enforcement officers have the opportunity to embark on warships belonging to countries who are involved in Operation Atlanta. This would, in turn, make Kenya as a *prima facie* seizing State and as a result, enable Kenya to use adjudicative universal jurisdiction in accordance with article 105 of UNCLOS.

Despite the jurisdictional dilemma that arises with regards to article 105 of UNCLOS, universal jurisdiction is well established as a principle of international customary law.<sup>196</sup> In the *Case of S.S Lotus* (1927), Judge Moore noted that piracy is a crime which is subject to universal jurisdiction:

[...] In the case of what is known as piracy by law of nations, there has been conceded a universal jurisdiction, under which the person charged with the offence may be tried and punished by any nation into whose jurisdiction he may come.<sup>197</sup>

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<sup>192</sup> Gathii, James Thuo (2009) “Jurisdiction to Prosecute Non-National Pirates Captured by Third States Under Kenyan and International Law” in *Loyola of Los Angeles International and Comparative Law Review*, Vol. 31, p. 364

<sup>193</sup> See, Security Council Resolution 1851, Para. 3, p. 2, S/Res/1851/2008

<sup>194</sup> See, Security Council Resolution 1897, Para. 6, p. 3, S/Res/1897/2009

<sup>195</sup> See, Exchange of Letters; One should note that the Djibouti Code of Conduct also recommend the establishment of shiprider agreements.

<sup>196</sup> However, the universal jurisdiction over piracy as a principal norm of international customary law is not without critics. For example, Kontorovich, Eugene & Art, Steven (2010) Notes that there is no widespread state practice regarding the application of universal jurisdiction for piracy in “An Empirical Examination of Universal Jurisdiction for Piracy” in *The American Journal of International Law*, Vol. 104, No. 3

Furthermore, in a more recent case between Congo and Belgium in the International Court of Justice, *Case Concerning Arrest Warrant* (2000), President Guillaume made the following remark:

Traditionally, customary international law did, however, recognize one case of universal jurisdiction, that of piracy.<sup>198</sup>

It seems quite clear, that universal jurisdiction over piracy is well founded as customary international law which would make Kenya eligible to evoke universal jurisdiction over pirates transferred to them by third-party State's involved in Operation Atlanta. However, Article 9 in the Draft Convention on Jurisdiction with Respect to Crime stipulates:

A State has jurisdiction with respect to any crime committed outside its territory by an alien which constitutes piracy by international law.<sup>199</sup>

Geiß and Petrig claim, in an attempt to interpret the provision of this article, that the scope of the universality principle should only apply to acts which are synonymous with the definition of piracy in international law. Therefore, they note, that if an act of piracy in accordance with the domestic legislation of a State goes beyond the definition of piracy, as provided for in international law, the universality principle cannot be invoked.<sup>200</sup> Article 101 of the United Convention on the Law of the Sea (1982) provides a definition of piracy in international law.<sup>201</sup> In year of 2009, Kenya enacted a new national law called *The Merchant Shipping Act of 2009* which provide Kenyan court's with jurisdiction over non-nationals who commit piratical acts

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<sup>197</sup> *The Case of the S.S Lotus* (1927) Dissenting Opinion, Judge Moore, Permanent Court of International Justice p. 70. Available at: [http://www.icj-cij.org/pcij/serie\\_A/A\\_10/35\\_Lotus\\_Opinion\\_Moore.pdf](http://www.icj-cij.org/pcij/serie_A/A_10/35_Lotus_Opinion_Moore.pdf), access: 2014-05-06

<sup>198</sup> *Case Concerning the Arrest Warrant*, 11 April 2000 (Democratic Republic of the Congo v. Belgium), Separate Opinion of President Guillaume, I.C.J. Reports 2002, p. 37. Available at: <http://www.icj-cij.org/docket/files/121/8128.pdf>, access: 2014-05-06

<sup>199</sup> Article 9 Universality- Piracy, Draft Convention on Jurisdiction with Respect to Crime, Appendix 9: Jurisdiction with Respect to Crime in *The Harvard Research in International Law: Contemporary Analysis and Appraisal*, Grant (2007) John P; Barker, Craig J. (ed), p. 488. Available at: <http://bib.convdocs.org/v23585/?download=1>, access: 2014-05-06. The Harvard Draft Conventions were originally a project, between 1927-1939 by a Harvard advisory committee consisting of distinguished experts, to interpret and codify international law.

<sup>200</sup> Geiß; Petrig 2011: 144. Their interpretation is partly based upon the explanatory commentary of the Harvard Research Program on International Law.

<sup>201</sup> Article 101, UNCLOS; For the full content of this article, see section 1.5.1 (Definition of Piracy and Armed Robbery)

extraterritorially.<sup>202</sup> Section 369(1) of the Merchant Shipping Act contains the definition of piracy. However, this provision does not confine its *ratione loci* to the high sea; it also stipulates that crimes can occur in places which are under Kenyan jurisdiction.<sup>203</sup> This suggests that the Kenyan definition of piracy differs from that of the international definition of piracy, whereas the Kenyan State defines piracy more broadly.<sup>204</sup> Therefore, for acts which falls within the scope of the international definition of piracy Kenya may rely upon the customary universality principle when prosecuting pirates. However, Kenya should not be eligible to invoke the customary universality principle for acts which go beyond the international definition of piracy, but instead rely upon another jurisdictional basis for its criminal proceedings of piracy suspects.

### 3.1.2.2 Kenya and Alternate Jurisdictional Bases

As stated above, for an act to be defined as piracy it must take place on the high sea or in any other place outside the jurisdiction of a State. Although, many of the violent acts that takes place off the Coast of Somalia and in the Gulf of Aden, are happening within the territorial waters of another State, primarily that of Somalia.<sup>205</sup> Alexander Muasya Muteti<sup>206</sup> states that piracy is not something that is confined to the high seas.<sup>207</sup> This view is also shared by Zou Keyuan<sup>208</sup> who claims that “*the criterion on ‘high seas’ is blurred by the fact that most of the piratical acts take place within the waters of national jurisdiction in the contemporary world.*”<sup>209</sup> An act that does not fall within definition of piracy should instead be defined as ‘armed robbery at sea’.<sup>210</sup>

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<sup>202</sup> Kenyan Merchant Shipping Act of 2009, available at: <http://www.kenyalaw.org:8181/exist/kenyalex/actview.xql?actid=CAP.%20389>, access: 2014-05-06; See also Gathii, James Thuo (2009) “Jurisdiction to Prosecute Non-National Pirates Captured by Third States Under Kenyan and International Law” in *Loyola of Los Angeles International and Comparative Law Review*, Vol. 31, p. 364

<sup>203</sup> Section 369(1), Merchant Shipping Act of 2009; See also Geiß; Petrig 2011: 144

<sup>204</sup> Article 101(a)(i) in UNCLOS stipulates that an act of piracy must occur ‘on the high seas’

<sup>205</sup> See for example, Security Council Resolution 1816, Preamble, S/Res/1816/2008

<sup>206</sup> Alexander Muasya Muteti is currently the Deputy Head of the Anti-Piracy Unity of the Office of the Director of Public Prosecutions. Graduated in 1999 with a Bachelor of Law Degree. Thereafter joined the Kenya School of Law for a Postgraduate Diploma in Law. Then admitted to the Bar in 2001 and joined the State Law Office Department of Public Prosecutions, the predecessor of the Office of The Director of Public Prosecutions.

<sup>207</sup> Muteti, Alexander Muasya (2012) “Prosecution of piracy cases – the Kenya experience” in *Commonwealth Law Bulletin*, 39:1, p.76

<sup>208</sup> Zou Keyuan is Harris Professor of International Law at the University of Central Lancashire

<sup>209</sup> Keyuan, Zou (2009) “New Developments in the International Law of Piracy” in *Chinese Journal of International Law*, Vol.8, No. 2, p. 329

<sup>210</sup> See Section 1.6 (Definition of Piracy and Armed Robbery)

Generally these acts would be subjected to the national penal code of the affected State. However, Somalia does not have enough State capacity for apprehension or prosecution.<sup>211</sup> Thus, it falls upon foreign nations, among them, the countries involved in Operation Atlanta, to apprehend the individuals who commit these acts. When Kenya is faced with individuals who have committed a piratical act that falls within the scope of armed robbery at sea, then the State must rely on other jurisdictional grounds for prosecution. The *Convention for the suppression of unlawful acts against maritime navigation* (1988) regulates many acts which do not fall within the scope of piracy as well as the establishing of jurisdiction for such crimes.<sup>212</sup> Kenya, as a state party to the SUA convention, has enacted domestic legislation that reflects the crimes in the SUA Convention.<sup>213</sup> However, given the fact that Somalia has not acceded to the SUA Convention<sup>214</sup> the provisions regarding jurisdiction are of little importance, since most of the suspects being transferred to Kenya for prosecution are Somali nationals.<sup>215</sup>

Since the Transitional Federal Government (TFG) of Somalia has given its consent for other States to use enforcement powers in Somali territorial waters, the sovereign equality remains intact because States are entitled to pass jurisdiction to one another.<sup>216</sup> Still, Kenya would have to have some sort of connection to the criminal act in order to prosecute the perpetrator since it is only the crime of piracy that gives rise to the principle of universal jurisdiction. The passive personality principle would allow Kenya to assert jurisdiction over a criminal act, for example armed robbery at sea, if Kenyan nationals were victims of that specific act.<sup>217</sup> In addition, the flag State principle would allow Kenya to exercise its jurisdiction over a criminal act which is committed against a ship sailing under its flag.<sup>218</sup> The European Committee for Crime Problems confirms that the State jurisdiction is connected to a ship; through its flag and that the right to

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<sup>211</sup> The Transitional Federal Government of Somalia has asked for the assistance of the UN to address piracy and furthermore, given its consent for foreign nations to operate within their territorial waters. See, Security Council Resolution 1816, Preamble, S/Res/1816/2008

<sup>212</sup> Convention for the suppression of unlawful acts against maritime navigation (1988); See specifically the definition of acts that falls within the scope of applicability of the SUA Convention in Article 3. Article 6 regulates jurisdiction over such acts.

<sup>213</sup> See, Section 370 & 371 of the Merchant Shipping Act of 2009

<sup>214</sup> See, the excel chart on the Status of Ratification regarding the SUA convention provided by IMO at: <http://www.imo.org/About/Conventions/StatusOfConventions/Pages/Default.aspx> , access: 2014-05-07

<sup>215</sup> Geiß; Petrig 2011: 157

<sup>216</sup> For Somali consent see above footnote (24); See, Section 2.3 (Jurisdiction) for States ability to pass jurisdiction.

<sup>217</sup> See, Section 2.3.3 (The passive personality principle); See also, Gathii 2009: 389

<sup>218</sup> The duties of a flag State are outlined in Article 94 of UNCLOS

punish extends to acts taking place on that ship.<sup>219</sup> Furthermore, Kenya may be able to assert jurisdiction in relation to the effects doctrine. Thus, basing its jurisdiction upon the effects piratical acts - that falls within the scope of armed robbery at sea - might have on Kenya. Kenya may argue that the country have been suffering economically as result of piracy and armed robbery taking place outside the coast of Somalia and in the Gulf of Aden.<sup>220</sup> The effects doctrine can be seen as an extension of both the territorial- and the protective jurisdiction principle. However, it would be hard for Kenya to claim jurisdiction based solely on either one of these two jurisdictional principles. For a State to assert jurisdiction through the protective principle, the Harvard Research Group has noted that the act needs to directed, “*against the security, territorial integrity or political independence of that State.*”<sup>221</sup> However, individuals who are engaged in piracy or armed robbery at sea are often only motivated by personal financial gain.<sup>222</sup> In addition, for Kenya to evoke jurisdiction through the territoriality principle, the crime would have to take place on its territory.<sup>223</sup>

### 3.1.2.3 Security Council as a Jurisdictional Venue for Prosecution

The escalating increase of piratical acts outside the coast of Somalia in 2008, forced the SC to react and Resolution 1816 was adopted.<sup>224</sup> While reaffirming the Somali sovereignty, the SC decided that States cooperating with the TFG in the fight against piracy and armed robbery at sea may:

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<sup>219</sup> Council of Europe, European Committee for Crime Problems (1992) “Extraterritorial Criminal Jurisdiction” in *Common Law Forum*, Vol. 3, No. 3, available at: <http://link.springer.com/article/10.1007/BF01096364> , access: 2014-05-07

<sup>220</sup> See, Otto, Lisa (2012) *Kenya and the pest of piracy*, Situation Report, Institute for Security Studies ‘Overall, however, the country has been suffering economically as a direct result of maritime piracy. Figures calculated by Inchcape Shipping Services, based in East Africa, estimate that the costs to the shipping industry in Kenya alone are between US\$ 300 million and US\$ 400 million a year.’

<sup>221</sup> Article 7 ‘Protection –Security of the State’, *Harvard Research Draft Convention on Jurisdiction with respect to Crime* (1935). Found in: Grant, John P. & Barker, Craig J. (2007) *The Harvard Research in International Law: Contemporary Analysis and Appraisal*, Appendix 9, p. 488

<sup>222</sup> Pemberton 2011: 20

<sup>223</sup> See, Section 2.2.3.1 (The Territoriality Principle)

<sup>224</sup> Security Council Resolution 1816, S/Res/1816/2008

(a) Enter the territorial waters of Somalia for the purpose of repressing acts of piracy and armed robbery at sea, in a manner consistent with such action permitted on the high seas with respect to piracy under relevant international law; and

(b) Use, within the territorial waters of Somalia, in a manner consistent with action permitted on the high seas with respect to piracy under relevant international law, all necessary means to repress acts of piracy and armed robbery.<sup>225</sup>

The granted mandate in Resolution 1816 had two specific parameters; a time period limited to six months; and it was limited to the situation in Somalia. However, the limited period of time has been renewed by subsequent resolutions.<sup>226</sup> The latest, Resolution 2125 was adopted the 18<sup>th</sup> November 2013 and prolonged the authorization with 12 months.<sup>227</sup> Furthermore, in Resolution 1851 the Security Council extended the previous authorization granted in Resolution 1846 to also be applicable on Somali territory:

[...] States and regional organizations cooperating in the fight against piracy and armed robbery at sea off the coast of Somalia for which advance notification has been provided by the TFG to the Secretary-General may undertake all necessary measures that are appropriate in Somalia, for the purpose of suppressing acts of piracy and armed robbery at sea, pursuant to the request of the TFG, provided, however, that any measures undertaken pursuant to the authority of this paragraph shall be undertaken consistent with applicable international humanitarian and human rights law.<sup>228</sup>

There are two interpretations that can be made regarding whether the Security Council, through its adopted Resolutions, may function as an alternative jurisdictional venue for prosecution of pirates and armed robbers at sea in Kenya. Firstly, one can interpret the granted authorization extensively and argue that States are entitled to claim both executive, as well as adjudicative jurisdiction when the SC encourages States to use all necessary means and measures in order to

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<sup>225</sup> Security Council Resolution 1816, para. 7, S/Res/1816/2008

<sup>226</sup> One should note that the Security Council Resolution 1846, para. 10, S/Res/1846/2008, stipulated the exact same authorization as in S/Res/1816/2008, but increased the *ratione temporis* with twelve months.

<sup>227</sup> Security Council Resolution 2125, para. 12, S/Res/2125/2013, This Resolution does not refer to S/Res/1816/2008, but instead reaffirms the same sentenced authorization granted in S/Res/1846/2008.

<sup>228</sup> Security Council Resolution 1851, para. 6, S/Res/1851/2008, the extension granted in this Resolution was also prolonged in S/Res/2125/2013.

repress piracy and armed robbery at sea.<sup>229</sup> Thus, the SC would create two separate jurisdictional regimes for Kenya to prosecute and apprehend suspected pirates and alleged armed robbers.<sup>230</sup> It is noteworthy that Kenya would, in fact, have the possibility to act as both the enforcer and apprehend suspects and later bring these individuals to its country for trial through a use of the, above described, “shiprider” agreements.<sup>231</sup>

Secondly, one may interpret the authorization in more restrictive sense and argue that States are only granted the opportunity to claim executive jurisdiction and thus, only apprehend suspected pirates and alleged armed robbers. The authorization granted States by the SC in Resolution 1848 to use “*all necessary means to repress acts of piracy and armed robbery*”<sup>232</sup> should be read in relation to “*enter the territorial waters of Somalia for the purpose of repressing acts of piracy and armed robbery at sea.*”<sup>233</sup> Geiß and Petrig suggests that this only points towards an authorization for States to take immediate action once they enter Somali territorial waters and thus, only grants States with the possibility to arrest individuals suspected of piracy or armed robbery, rather than granting States adjudicative jurisdiction to prosecute them.<sup>234</sup> Furthermore, they suggest, that the authorization granted by the SC in Resolution 1851 for States to “*undertake all necessary measures that are appropriate in Somalia*”<sup>235</sup>, have a geographical scope and limits measures to the Somali mainland and does, therefore, not include prosecution in third States.<sup>236</sup> Thus, this interpretation implies that Kenya is not granted an authorization to claim adjudicative jurisdiction to prosecute suspected pirates or alleged armed robbers, merely the opportunity to arrest such individuals.

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<sup>229</sup> See: S/Res/1816/2008, para. 7; S/Res/1848/2008, para. 10; S/Res/1851/2008, para. 6

<sup>230</sup> One regime would grant them jurisdiction to prosecute pirates and armed robbers apprehended in the territorial waters of Somalia and the other jurisdiction to prosecute pirates and armed robbers apprehended on Somali territory.

<sup>231</sup> See, Section 3.1.2.1 (Kenya and Universal Jurisdiction for Piracy)

<sup>232</sup> See, S/Res/1848/2008, para. 10(b)

<sup>233</sup> See, S/Res/1848/2008, para. 10(a)

<sup>234</sup> See, Geiß; Petrig 2011: 165

<sup>235</sup> See, S/Res/1851/2008, para. 6

<sup>236</sup> Geiß; Petrig 2011: 166



### 3.1.3 Legal Reflection

It stands clear that Kenya is able to claim jurisdiction over suspected pirates based on the universality principle. Therefore, Kenya is able to prosecute these individuals in their national courts on the basis of universal jurisdiction, which originates both from international customary law and treaty law.<sup>237</sup> However, their national legislation provides a broader definition of piracy and for acts that go beyond the international definition of piracy, they may not rely upon universal jurisdiction.<sup>238</sup> Piratical acts that occur within the territorial boundaries of State are normally defined as armed robbery at sea and should be subjected to the national penal code of that country. However, it is beyond reach for Somalia to handle such issues, due to a lack of capacity. Kenya must have a nexus to the perpetrated crime, if they are to prosecute acts that fall outside the scope of the international definition on piracy. The jurisdictional provisions granted through the SUA Convention are not applicable because Somalia is not a ratifying party of that specific treaty. Nevertheless, there seems to be an opportunity for Kenya to rely upon other jurisdictional principles in specific cases. The passive personality principle and the flag state principle would allow Kenya to claim adjudicative jurisdiction to prosecute armed robbers in situations where the victims are Kenyan nationals or where the attacked vessel is sailing under Kenyan flag. Furthermore, Kenya could argue that piratical acts, which do not give rise to universal jurisdiction, are inflicting tremendous damage to, for example, their shipping industry, even though this may be a more controversial approach.<sup>239</sup> In addition, the possibility for Kenya to use the authorization granted by the Security Council as a venue for prosecution, depends on whether one chooses to interpret the content restrictively or extensively. Either they grant both adjudicative and executive jurisdiction for third countries, which would enable them to prosecute and apprehend individuals suspected of piracy or armed robbery at sea, or as Geiß and Petrig argue, only grant the executive version of jurisdiction. However, one should keep in mind that the Security Council does not explicitly state, that adjudicative jurisdiction is not available. Thus,

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<sup>237</sup> By treaty law I refer to discussion in Section 3.1.2.1, regarding article 105 of UNCLOS.

<sup>238</sup> See discussion regarding Merchant Shipping Act of 2009, Section 369

<sup>239</sup> See discussion in Section 3.1.2.2 (Kenya and Alternate Jurisdictional Bases)

Kenya would be eligible to claim an *ad hoc* jurisdictional basis through the Security Council Resolutions, to prosecute piracy and armed robbery.<sup>240</sup>

## 3.2 Piracy Suspect's Right to a Fair Trial in Kenyan Courts

### 3.2.1 Legal Problem

As illustrated in section 1.1 (Research Problem) in this study, criminal proceedings of pirates in Kenya are problematic from human rights perspective.<sup>241</sup> Even though the agreement between Kenya and the EU obliges Kenya to treat transferred individuals in accordance with human rights law<sup>242</sup> and the Kenyan domestic law offer the accused a number of fair trial rights,<sup>243</sup> there is great uncertainty whether Kenya is capable to uphold its obligations in accordance with article 14 of the ICCPR and to provide individual's suspected of piracy with a fair trial. This section will analyze if Kenya fulfill its commitments in accordance with article 14 of ICCPR in order to determine whether Kenya ensures the requirement of a fair trial for piracy suspects in Kenyan courts.

### 3.2.2 Legal Discussion

The discussion in 3.2.2 will be structured so that I systematically examine each provision stipulated in article 14 of the ICCPR in relation to Kenya's piracy trials.

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<sup>240</sup> See discussion in, Section 3.1.2.3

<sup>241</sup> See Section 1.2 of this study

<sup>242</sup> Exchange of Letters, Section 2(c)

<sup>243</sup> See for example, Constitution of Kenya, available at: <http://www.kenyalaw.org:8181/exist/kenyalex/actview.xql?actid=Const2010&term=Right%20to%20Bail> , access: 2014-04-28.

### 3.2.2.1 Article 14(1) Right to a Fair and Public Hearing

Kenya ratified the International Covenant on Civil and Political Rights 1<sup>st</sup> May 1972.<sup>244</sup> Since then Kenya has been obligated to implement its content on the national level. Specifically, Kenya has a duty to safeguard the provisions stipulated in article 14 about the right to equality before courts and tribunals and to a fair trial. Article 14 aims at ensuring the proper administration of justice.<sup>245</sup> Its content is applicable in both civil and criminal proceedings. Article 14(1) outlines the general guarantee, whereas article 14(2)-(7) sets out specific guarantees in relation to criminal trials and criminal appeals. The guarantees outlined in article 14(1) apply to all stages of the proceedings in all courts.<sup>246</sup> Article 14(1) provides: “*All persons shall be equal before the courts and tribunals*”.<sup>247</sup> This implies that the Kenyan national legislation should be applied without discrimination by the State judiciary.<sup>248</sup> Included in this is the principle of equality of arms. This principle is violated if the accused is excluded from an appellate hearing when the prosecutor is present.<sup>249</sup> The United States Department of State, in its report on the Human Rights situation in Kenya, claims that there is widespread discrimination in the Kenya society.<sup>250</sup> Furthermore, Kenyan domestic legislation criminalizes homosexual activity.<sup>251</sup> Even though there is no obvious connection between these forms of discrimination and the prerequisite of ‘equality before courts’ it certainly gives an indication of the current climate regarding discriminatory practices in Kenya. Article 14(1) also stipulates that “[...] *everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. [...]*”.<sup>252</sup> This provision is, partly, fulfilled by Kenya who provides a fair and public hearing of piracy

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<sup>244</sup> See Kenya’s date of ratification, available at: [https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=IV-4&chapter=4&lang=en](https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&lang=en), access 2014-04-28

<sup>245</sup> Human Rights Committee, 23<sup>rd</sup> August 2007, General Comment No. 32, Article 14: Right to equality before courts and tribunals and to a fair trial, CCPR/C/GC/32, para 2. [Hereinafter General Comment No.32]

<sup>246</sup> Jospeh; Schultz; Castan 2000: 279

<sup>247</sup> Article 14(1), International Covenant on Civil and Political Rights (1966)

<sup>248</sup> Nowak 1993: 238. Nowak mentions that the first sentence of article 14(1) is a result of the general doctrine of equality in article 26 of ICCPR.

<sup>249</sup> Nowak 1993: 246

<sup>250</sup> United States Department of State, Bureau of Democracy, Human Rights and Labour, Country Reports on Human Rights Practices for 2013, Kenya Human Rights Report, p. 2. Available at: <http://www.state.gov/j/drl/rls/hrrpt/humanrightsreport/index.htm#wrapper>, access 2014-04-26 [Hereinafter Kenya Human Rights Report 2013]

<sup>251</sup> The Kenyan Penal Code of 1930, Section 162, 163 and 165. Available at: <http://www.kenyalaw.org/8181/exist/kenyalex/actview.xql?actid=CAP.%2063>, access: 2014-04-28

<sup>252</sup> Article 14(1), International Covenant on Civil and Political Rights (1996)

suspects.<sup>253</sup> However, the Kenyan judicial system suffers from widespread corruption which is affecting all levels of the legal system. The widespread existence of corruption undermines the rule of law in the country and endangers the impartiality and independency of the Kenyan judiciary.<sup>254</sup> Corruption within the State judiciary certainly has the possibility to affect future trials of piracy suspected individuals in Kenya. The United Nations Office on Crimes and Drugs (UNODC) has gone vast lengths in order to ensure that the Kenyan courts that are in charge of the criminal proceedings are competent to conduct the piracy trials:

In order to try and ensure these are ‘fair and efficient’ trials the CPP has undertaken capacity building programmes across the criminal justice spectrum. This has included various training courses for the police, prosecutors, the judiciary and prisons officers with respect to handling piracy cases and prisoners.<sup>255</sup>

The European Union have also undertaken efforts to strengthen the State judiciary due to the fact that Kenya was not fully prepared to handle such complexities and increased workload.<sup>256</sup> The extensive efforts undertaken by both the EU and UNODC have had positive results according to a Report of the Secretary General; even though work remains to ensure that the piracy trials are in full compliance with human rights standards.<sup>257</sup> It is possible to identify a paradoxical aspect in relation to this. The fact that the EU still transfers pirates to Kenya suggests that they are of the opinion that the Kenyan judiciary possesses the competence to try pirates. However, their extensive efforts, aimed at the training of judiciary officials indicate the opposite. The requirement of a competent, impartial and independent tribunal or court is an absolute right which should not be subject to any exception.<sup>258</sup> Furthermore, article 14(1) provides that:

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<sup>253</sup> See: Civil-Military Fusion Centre, Anti-Piracy, January 2012, *Regional Courts and Prisons: Developing Local Capacity To Prosecute Somali Pirates*, p. 6 [Hereinafter Civil-Military Fusion Centre 2012]; United Nations Office on Drugs and Crime, In-depth violation of the Counter Piracy Program, *Combating maritime piracy in the Horn of Africa and the Indian Ocean Increasing regional capacities to deter, detain and prosecute pirates* (June 2013), p. 20. This in-depth evaluation report was prepared by Peter Allan, Director, Allan Consultancy Ltd. and Dr Douglas Guilfoyle, Reader in Law, University College London (acting in a personal capacity) and Ms. Alexandra Capello, Evaluation Officer, from the Independent Evaluation Unit (IEU) of the United Nations Office on Drugs and Crime (UNODC). [Hereinafter In-depth violation of the Counter Piracy Program 2013]

<sup>254</sup> The Kenya Anti-Corruption Commission (2010), *Corruption in the Kenyan Judiciary*, James Sitienei; Kenya Human Rights Report 2013: 2

<sup>255</sup> In-depth violation of the Counter Piracy Program 2013: 20

<sup>256</sup> Factsheet: The EU fight against piracy in the Horn of Africa (23<sup>rd</sup> December 2013), p. 3

<sup>257</sup> Report of the Secretary-General on the situation with respect to piracy and armed robbery at sea off the coast of Somalia, 21 October 2013, S/2013/623, p. 11

<sup>258</sup> General Comment No. 32, Section. 15

The press and the public may be excluded from all or part of a trial for reasons of morals, public order (*ordre public*) or national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.<sup>259</sup>

The Human Rights Committee notes that apart from such exceptional circumstances, a hearing needs to be opened to the public and to members of the media. Even in cases where the public is excluded from the criminal proceedings the essential findings, evidence and legal reasoning must be made public.<sup>260</sup> The court proceedings for piracy have been made accessible to the public.<sup>261</sup>

### 3.2.2.2 Article 14(2) Presumption of Innocence

Article 14(2) stipulates that “*Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law.*”<sup>262</sup> The HRC has identified the content of article 14(2) as a duty for all authorities who act on behalf of the State to refrain from prejudging the final outcome of a trial. For example, authorities should refrain from making public statements which affirms the guilt of the accused.<sup>263</sup> In order to support pirates being held in Kenya, German lawyers have filed a civil suit in Germany in which they claimed that a fair trial is impossible to conduct in Kenya because there is no presumption of innocence.<sup>264</sup> Although, Nowak notes that a violation of the right to be presumed innocent is extremely difficult to prove in practice.<sup>265</sup> Thus, if a violation of the right to be presumed innocent have been done or is about to be done, by the Kenyan authorities in relation to the piracy criminal proceedings, it is

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<sup>259</sup> Article 14(1), International Covenant on Civil and Political Rights (1966)

<sup>260</sup> General Comment No. 32 Section. 29.

<sup>261</sup> Kenyan case law concerning piracy is accessible through: [http://kenyalaw.org/caselaw/cases/advanced\\_search/](http://kenyalaw.org/caselaw/cases/advanced_search/), access 2014-04-28; Also the United Nations Interregional Crime and Justice Research Institute (UNICRI) in partnership with the International Maritime Organization (IMO) have established a database on court decision related to piracy off the coast of Somalia available at: <http://unicri.it/topics/piracy/database/>, access: 2014-04-28

<sup>262</sup> Article 14(2), International Covenant on Civil and Political Rights (1966)

<sup>263</sup> General Comment No. 32, Section. 30

<sup>264</sup> Etzioni, Amitai (2011) “Somali Pirates: An Expansive Interpretation of Human Rights” in *Canadian Naval Review*, Vol. 6, No. 4, p. 14; Also see, White, Jeffrey, “German Lawyers Launch Pirate Defense Team”, *Christian Science Monitor*, 15 April 2009, available at: [www.csmonitor.com/2009/0416/p06s01-wogn.html](http://www.csmonitor.com/2009/0416/p06s01-wogn.html), access: 2014-04-28

<sup>265</sup> Nowak 1993: 255

very hard to prove. Nevertheless, Deborah Osiris<sup>266</sup> states that the presumption of pirate's guilt has been the norm during piracy trials. This has resulted in a very problematic situation for the accused that are faced with the very difficult task of proving their innocence.<sup>267</sup> In the case *Republic of Kenya v. Mohamud Mohamed Hashi & Eight Others* the alleged pirates were refused to be released on bail pending trial.<sup>268</sup> The Constitution of Kenya stipulates that an arrested person have the right to be released on bail, unless there are compelling reasons not be released.<sup>269</sup> Even if a denial of bail might indicate that the presumption of innocence is endangered, the HRC concludes that a denial of bail does not affect the presumption of innocence.<sup>270</sup>

### 3.2.2.3 Article 14(3) Minimum Guarantees of the Accused in Criminal Court

Article 14(3)(a) provides the accused “*To be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him*”.<sup>271</sup> The right to be informed “promptly” requires that the information is given as soon as the concerned piracy suspect is formally charged with a criminal offence under the Kenyan domestic law, or the individual is publicly named as such.<sup>272</sup> The national legislation of Kenya provides a right for the defendant to be informed promptly and in detail of the charges against him or her.<sup>273</sup> According to the State Department of the United States this is a right which is generally respected by the Kenyan judiciary.<sup>274</sup> Article 14(3)(b) offers the accused “*To have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing*”.<sup>275</sup> HRC

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<sup>266</sup> Deborah Osiris is a legal and security consultant in Nairobi. Previously she worked for ISS Environmental Security Programme. She has published several articles on governance, justice, security and economic issues in the region.

<sup>267</sup> Osiris, Deborah (2011) *Somali pirates have rights too*, ISS Paper 224

<sup>268</sup> Republic of Kenya v. Mohamud Mohamed Hashi & Eight Others, Misc. Application No. 43 of 2009

<sup>269</sup> Article 49(1)(h), Constitution of Kenya, available at: <http://www.kenyalaw.org:8181/exist/kenyalex/actview.xql?actid=Const2010&term=Right%20to%20Bail> , access: 2014-04-28.

<sup>270</sup> General Comment No. 32, Section. 30

<sup>271</sup> Article 14(3)(a), International Covenant on Civil and Political Rights (1966)

<sup>272</sup> General Comment, No. 32, Section. 31

<sup>273</sup> See, Constitution of Kenya. Article 49(1)(a)

<sup>274</sup> Kenya Human Rights Report 2013: 18

<sup>275</sup> Article 14(3)(b), International Covenant on Civil and Political Rights; This right overlaps substantially with the rights contained in article 14(3)(d) and will be further considered below.

recognizes this provision as an important element of the guarantee of a fair trial and the principle of equality of arms.<sup>276</sup> The right of a defendant to consult with an advocate in a timely manner has generally been accepted by the Kenyan authorities.<sup>277</sup> Piracy suspects own choice of advocates have been repeatedly been rejected.<sup>278</sup> In addition, in the Case *Republic v. Ahmed Abdikadir Hersi & 11 Others* the alleged piracy suspects fired their advocate. The advocate finally appeared only after six previous no-shows and the accused had only met with him five times over a 20-month period.<sup>279</sup> According to HRC, a State party is not to be held responsible for the conduct of a defence lawyer.<sup>280</sup> Thus, Kenya cannot be held liable to the behavioral misconduct of a piracy suspect's advocate. The wording "facilities" in the provision, refers to right for the accused, and his or her defence council to be granted access to those documents or records necessary for the preparation of the defence.<sup>281</sup> There is a frequent occurrence of situations where the defence lawyers do not have access to evidence held by the government before trials.<sup>282</sup> However, there is no clear indication relative to the piracy trials that information is being withheld from the alleged individual.

Article 14(3)(c) stipulates the right "*To be tried without undue delay*".<sup>283</sup> This provision regulates the actual time between the arrest and trial of the suspect.<sup>284</sup> The time limit in this provision starts when the suspect is informed that the authorities are taking specific steps to prosecute him. It ends on the date of the final decision or dismissal of the proceedings.<sup>285</sup> Kenya is suffering from a huge backlog of criminal cases and as of 1<sup>st</sup> July 2013, Kenya had received 157 piracy cases.<sup>286</sup> The transfer of piracy suspects strains an already strained judicial apparatus which suggest that the Kenyan judiciary is unable to try suspect without undue delay. However, Osiris claim that despite many challenges, the piracy trials have been concluded with amazing

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<sup>276</sup> General Comment No.32, Section. 32

<sup>277</sup> Kenya Human Rights Report 2013: 18

<sup>278</sup> Osiris 2011: 12-13

<sup>279</sup> Osiris 2011: 13

<sup>280</sup> General Comment No. 32, Section. 32

<sup>281</sup> Nowak 1993: 256; Josph; Schultz; Castan 2000: 310

<sup>282</sup> Kenya Human Rights Report 2013: 18

<sup>283</sup> Article 14(3)(c), International Covenant on Civil and Political Rights. The content of this article substantially overlaps with article 9(3) in the same treaty which guarantees pre-trial detainees a right to be tries 'within a reasonable time'.

<sup>284</sup> Josph; Schultz; Castan 2000: 313

<sup>285</sup> Nowak 1993: 257

<sup>286</sup> Contact Group On Piracy off the Coast of Somalia, *CGPCS Newsletter*, March 2014, p. 2. The Contact Group on Piracy off the Coast of Somalia (CGPSC) was created on January 14, 2009 pursuant to UN Security Council Resolution 1851. [Hereinafter CGPCS Newsletter 2014]

speed in comparison to other Kenyan criminal cases.<sup>287</sup> Furthermore, the piracy cases are often described as having an efficient trial process which implies that the accused are tried without undue delay.<sup>288</sup> What is a reasonable time has to be assessed in relation to each specific case and its surrounding circumstances, according to the HRC. Although, they note, that in cases where the accused are denied bail by the court, they must be tried as expeditiously as possible.<sup>289</sup> Article 14(3)(d) stipulates the piracy suspect's right to defence:

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.<sup>290</sup>

Nowak divides this provision into five individual rights: to defend oneself in person; to choose one's own counsel; to be informed of the right to counsel; to receive free legal assistance; and to be tried in one's presence.<sup>291</sup> German lawyers argued in a suit against the German government that it was responsible for ensuring that pirates, transferred to Kenya, received proper legal representation because many of the defendants in Kenya were unable to afford defence counsel and there is no right to government counsel, except in capital cases. The lack of a formal legal aid system seriously hampered the ability of many poor defendants to mount an adequate defense.<sup>292</sup> The Counter-Piracy Programme provided by UNODC ensures that individuals suspected of piracy have access to defense counsel through provision of funding to government legal aid lawyers or non-governmental organizations.<sup>293</sup> Piracy suspects are fortunate when compared with accused nationals, based on the fact that they at least enjoy some legal representation.<sup>294</sup> Thus,

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<sup>287</sup> Osiris 2011: 13

<sup>288</sup> Cole, Alan C. (2013) *Large Scale Prosecution of Somali Piracy Suspects: What Have We Learned?*, 3<sup>rd</sup> UAE Counter Piracy Conference, Briefing Paper, p. 6. Cole is Regional Coordinator, Counter-Piracy Program, United Nations Office on Drugs and Crime (UNODC); In-depth violation of the Counter Piracy Program 2013:VI [Hereinafter Cole, Briefing Paper 2013]

<sup>289</sup> General Comment No. 32, Section 35

<sup>290</sup> Article 14(3)(d), International Covenant on Civil and Political Rights (1966)

<sup>291</sup> Nowak 1993: 258

<sup>292</sup> Amitai 2011: 14; Ryu, Alisha "Paris-based group says accused somali pirates denied rights", Voice of America, 27 August 2009. Available at: <http://www.voanews.com/content/a-13-2009-08-27-voa36-68754822/410352.html> , access: 2014-04-29; Kenya Human Rights Report 2013: 18

<sup>293</sup> Report of the Secretary-General on the situation with respect to piracy and armed robbery at sea off the coast of Somalia, 21 October 2013, S/2013/623, p. 11

<sup>294</sup> Osiris 2011: 12



the Kenyan judiciary seems to respect the piracy suspect's right to legal defence counsel. Article 14(3)(e) provides that:

To examine, or have examined, the witness against him and to obtain the attendance and examination of witness on his behalf under the same conditions as witness against him.<sup>295</sup>

The right for the accused to obtain attendance of and examine witnesses under the same conditions as the prosecuting party is a central element in the principle of "equality of arms". However, the right of the accused to obtain the examination on his or her behalf is not an absolute right.<sup>296</sup> On the 23<sup>rd</sup> January 2014, 24 piracy suspects were convicted in Kenya for voluntary participation in the operation of a pirate ship. Each individual was sentenced to serve a seven year penalty in Kenyan prison. In course of this trial, UNODC funded video link facilities for remote witness testimony.<sup>297</sup> According to Kenya's Evidence Act<sup>298</sup> all evidence needs to be obtained by direct oral testimony. Geiß and Petrig states' that video link or other techniques to hear witnesses are not permitted.<sup>299</sup> This view is supported by Osiris who states' that the courts requires all witnesses to be present during trial because only primary evidence is admissible.<sup>300</sup> This would imply that all witnesses, including naval officers or crew members of attacked vessels, need to attend court proceedings in Kenya to offer testimony. The HRC, however, claims that it is up to the State parties to determine the admissibility of evidence and how their courts assess it.<sup>301</sup> As of March 2013, UNODC reported that a witness had testified via a video link from Poland.<sup>302</sup> In addition UNODC has also funded direct trial support in form of witness travel to trial.<sup>303</sup> Since there are reports of evidence gathered via video links it suggests that Kenyan courts relative to

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<sup>295</sup> Article 14(3)(e), International Covenant on Civil and Political Rights (1966)

<sup>296</sup> Nowak 1993: 261

<sup>297</sup> CGPCS Newsletter 2014: 1

<sup>298</sup> Evidence Act of Kenya (1963), latest amendment of the act was in 2012. Section 62 provides that "All facts, except the contents of documents may be proved by oral evidence". Available at: <http://www.kenyalaw.org:8181/exist/kenyalex/actview.xql?actid=CAP.%2080>, access: 2014-04-29

<sup>299</sup> See Geiß & Petrig 2011: 178

<sup>300</sup> Osiris 2011: 13; Davis, Jeff "Missing witnesses stall piracy cases", Daily Nation, 12<sup>th</sup> October, 2010. Available at: <http://www.nation.co.ke/News/Missing%20witnesses%20stall%20piracy%20cases/-/1056/1031650/-/fmwxb8z/-/>, access: 2014-04-29.

<sup>301</sup> General Comment No. 32, Section. 39

<sup>302</sup> United Office on Drugs and Crime, Counter Piracy Programme, *Support for the Trial and Related Treatment of Piracy Suspects*, Issue 11, March 2013. Available at: [http://www.unodc.org/documents/easternafrika/piracy/UNODC\\_Brochure\\_Issue\\_11\\_wv.pdf](http://www.unodc.org/documents/easternafrika/piracy/UNODC_Brochure_Issue_11_wv.pdf), access: 2014-04-29

<sup>303</sup> Cole, Briefing Paper 2013: 2

the piracy criminal proceedings have accepted this form of witness testimony. Article 14(3)(f) provides a right for the accused “*To have the free assistance of an interpreter if he cannot understand or speak the language in court*”.<sup>304</sup> According to HRC this is a right which should be respected at all stages of the oral proceedings and applied to aliens as well as to nationals.<sup>305</sup> UNODC have funded free interpretation for the Kenyan piracy trials.<sup>306</sup> The majorities of the accused piracy suspects do not speak, read or write the English language which is a major obstacle for the trial process. Although, multiple translations for the testimonies are available to witnesses and the accused individuals, for example, Swedish, German, English, and Somali are provided throughout the criminal proceedings if necessary.<sup>307</sup> Nowak notes that the right to free assistance of an interpreter is absolute.<sup>308</sup> However, if the accused piracy suspects know the official language used in court enough to sufficiently defend themselves effectively, they are not entitled to the free assistance of interpretation, even though their mother tongue may differ from the language used in court.<sup>309</sup> With the support provided from UNODC it certainly seems like Kenya respect the right to free assistance of interpretation, if so is required. Article 14(3)(g) stipulates that the accused is “*Not to be compelled to testify against himself or to confess guilt*”.<sup>310</sup> In relation to this provision the HRC states the following:

This safeguard must be understood in terms of the absence of any direct or indirect physical or undue psychological pressure from the investigating authorities on the accused, with a view to obtaining a confession of guilt.<sup>311</sup>

However, the provision in the article, alone, does not expressly prohibit forced confession by the alleged from being admissible as evidence in criminal trials.<sup>312</sup> This lack of positive State obligations has been brought up by the HRC who urges States to legislate against the admission

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<sup>304</sup> Article 14(3)(f), International Covenant on Civil and Political Rights (1966)

<sup>305</sup> General Comment No. 32, Section. 40

<sup>306</sup> CGPCS Newsletter 2014: 1

<sup>307</sup> Osiris 2011: 13

<sup>308</sup> Nowak 1993: 263

<sup>309</sup> General Comment No. 32, Section. 40

<sup>310</sup> Article 14(3)(f), International Covenant on Civil and Political Rights (1966); When considering this safeguard one should bear the provisions stipulated in article 7 and 10(1) of the same treaty in mind.

<sup>311</sup> General Comment No. 32, Section. 41

<sup>312</sup> Nowak 1993: 263

of evidence gathered through a violation of article 7 in ICCPR.<sup>313</sup> Kenya has, through its Evidence Act, domestic legislation that stipulates the non-admissibility of evidence or confessions gathered through the use of threat or inducement.<sup>314</sup> Even though there have been allegations of torture in Kenya, as noted by the UN Special Rapporteur, Christof Heyns in his report extrajudicial, summary or arbitrary executions,<sup>315</sup> there is no clear indications on its occurrence in relation to the piracy trials.<sup>316</sup> With this in mind, it therefore appears like Kenya respect the provisions in article 14(3)(g).

#### 3.2.2.4 Article 14(4) Juvenile Rights

Article 14(4) stipulates that “*In the case of juvenile persons, the procedure shall be such as will take account of their age and the desirability of promoting their rehabilitation*”.<sup>317</sup> Juveniles should, as a minimum, enjoy the same protection and guarantees as are provided to adults under article 14. Furthermore, juveniles are in need of special protection.<sup>318</sup> Nowak notes that States should ensure that criminal trials against juveniles should be conducted differently than those against adults.<sup>319</sup> In relation to Kenya and the piracy trials, lawyers handle cases with entire groups of pirates, and minors are not specifically represented. In addition, if a minor commits a crime with an adult, which mostly is the case with child pirates, then that minor goes to trial in a

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<sup>313</sup> General Comment No. 32, Section 41; ‘[...] Domestic law must ensure that statements or confessions obtained in violation of article 7 of the Covenant are excluded from the evidence, except if such material is used as evidence that torture or other treatment prohibited by this provision occurred. [...]’

<sup>314</sup> See, Kenya’s Evidence Act, Article 26; ‘A confession or any admission of a fact tending to the proof of guilt made by an accused person is not admissible in a criminal proceeding if the making of the confession or admission appears to the court to have been caused by any inducement, threat or promise having reference to the charge against the accused person, proceeding from a person in authority and sufficient, in the opinion of the court, to give the accused person grounds which would appear to him reasonable for supposing that by making it he would gain any advantage or avoid any evil of a temporal nature in reference to the proceedings against him.’

<sup>315</sup> See, Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, Christof Heyns, 26 April 2011, A/HRC/17/28/Add.4, Section. 11 & 34. Available at: <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G11/130/06/PDF/G1113006.pdf?OpenElement>; the United States department of State also reports of torture in Kenya, Kenya Human Rights Report 2013: 2; Also

<sup>316</sup> James Cockayne states’ that in November 2011, a court in Cologne ruled that Germany had violated the prohibition on torture, inhuman and degrading treatment (Articles 3 ECHR and 7 ICCPR) by transferring Somali pirates to Kenya in *The UN Security Council and Organized Criminal Activity: Experiments in International Law Enforcement*, United Nations University Working Paper Series, No. 3, March 2014, p. 9. Cockayne is Head, Office at the United Nations, United Nations University.

<sup>317</sup> Article 14(4), International Covenant on Civil and Political Rights (1966)

<sup>318</sup> General Comment No. 32, Section. 42

<sup>319</sup> Nowak 1993: 265

regular adult court even though there are separate justice systems for adults and juveniles.<sup>320</sup> According to the HRC, there lies an obligation with the State to take appropriate measures to establish a juvenile criminal system, in order to ensure that the minors are treated in accordance with their age.<sup>321</sup> The UNODC have funded and facilitated situations where juveniles have been identified. They have later received support which enabled them to reunite with their families.<sup>322</sup> Thus, aiding Kenya with the task of safeguarding juveniles rights according to the provision stipulated in article 14(4).

### 3.2.2.5 Article 14(5) Right to an Appeal

Article 14(5) provides the accused with a right to appeal “*Everyone convicted of crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law*”.<sup>323</sup> The proceedings must take place before “*a higher tribunal.*”<sup>324</sup> Thus, the piracy suspect, if convicted, should have the opportunity to appeal and be tried by a higher Kenyan judiciary instance. The right stipulated in article 14(5) is only available to persons convicted by a crime.<sup>325</sup> Furthermore, the right should not be limited to the most serious offences.<sup>326</sup> Defendants in Kenya may appeal a verdict to the High Court, and in due course to the Court of Appeals, and for some specific matters, to the Supreme Court.<sup>327</sup> Though, it should be noted that under article 14(5) the defendant only has the right to one appeal. However, if the State legislation provides the defendant with the opportunity for more appeals, then the defendant must be given a reasonable chance to pursue those appeals.<sup>328</sup> In 2009, The Court of Appeals issued a stay of execution of

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<sup>320</sup> Fritz, Danielle (2012) “Child pirates from Somalia: A call for the international community to support the further developments of juvenile justice systems in Puntland and Somaliland” in *Case Western Reserve Journal of International Law*, Vol. 44:891, p. 899-900

<sup>321</sup> General Comment No. 32, Section. 43

<sup>322</sup> In-depth violation of the Counter Piracy Program 2013: 20

<sup>323</sup> Article 14(5), International Covenant on Civil and Political Rights (1966)

<sup>324</sup> Nowak 1993:266

<sup>325</sup> Nowak 1993:267

<sup>326</sup> General Comment No. 32, Section. 45; The HRC gives a reference to the different language version (crime, infraction, delito) and notes that this indicate that the right to appeal is applicable to all crimes, not only the most serious ones.

<sup>327</sup> Kenya Human Rights Report 2013: 18

<sup>328</sup> Josph; Schultz; Castan 2000: 334; See also General Comment No. 32, Section 45: ‘Article 14, paragraph 5 does not require States parties to provide for several instances of appeal. However, the reference to domestic law in this

Judge Ibrahim's<sup>329</sup> orders, pending the determination of the appeal. The trials in the lower Kenyan Courts grounded to a halt while waiting on the appellate outcome which was about to be heard in July 2011.<sup>330</sup> There are indications on Kenya's willingness to redress any legal breaches and to respect the right to appeal for individual's convicted of piracy.

### **3.2.2.6 Article 14(6) Right to Compensation for Miscarriage of Justice**

Article 14(6) provides the accused with a right to compensation if he or she has been subject to a miscarriage of justice:

When a person has by a final decision been convicted of a criminal offence and when subsequently his conviction has been reversed or he has been pardoned on the ground that a new or newly discovered fact shows conclusively that there has been a miscarriage of justice, the person who has suffered punishment as a result of such conviction shall be compensated according to law, unless it is proved that the non-disclosure of the unknown fact in time is wholly or partly attributable to him.<sup>331</sup>

HRC states' that it is necessary for a State to adopt legislation which ensures that compensation, as the provision stipulates, can be provided and that such compensation is made within a reasonable period of time.<sup>332</sup> Kenyan law stipulates that a defendant should be compensated if a Judge in the High Court or magistrate acquits or discharges the accused of an offence.<sup>333</sup> However, there are no identified indications on the existence of individual's convicted of piracy being subjected to a miscarriage of justice. Although, Kenya's enacted legislation suggest that if this would be the case, then the pirate should be entitled to compensation.

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provision is to be interpreted to mean that if domestic law provides for further instances of appeal, the convicted person must have effective access to each of them.'

<sup>329</sup> Justice Mohammed K. Ibrahim was at the time of the appeal a High Court Judge since his appointment on May 22, 2003.

<sup>330</sup> Osiris 2011: 12; See also, for example, H. C. Miscellaneous Application No. 434 of 2009, Judgement Maraga, Ja. Available at: <http://piracylaw.files.wordpress.com/2012/10/kenya-hashhi-appeal-opinion.pdf> , access: 2014-05-02

<sup>331</sup> Article 14(6), International Covenant on Civil and Political Rights (1966)

<sup>332</sup> General Comment No. 32, Section. 52

<sup>333</sup> Criminal Procedure Act of Kenya (1930), Section 171-175

### 3.2.2.7 Article 14(7) The principle of “*Ne bis in idem*”

Article 14(7) provides that “*No one shall be liable to be tried or punished again for an offence for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of each country*”.<sup>334</sup> This provision establishes a prohibition against bringing an individual, whom once have been convicted for a certain offence, to stand trial again for that same offence.<sup>335</sup> As of January 2013, ten convicted pirates had served their sentence and were repatriated to Somalia. Furthermore, Somali individuals who are convicted of piracy and have finished their sentences are to be repatriated to Somalia.<sup>336</sup> The fact that convicted pirates who served their sentence are being repatriated to their country of origin indicates that Kenya respect the provision established in article 14(7). However, once they reach their country of origin, Kenya is not responsible of upholding the guarantees stipulated in the article. In theory, the once convicted pirate can be subjected to a trial for the same offence in their country of origin which is not a breach of the provision. According to the HRC, the provision in article 14(7) “*does not guarantee ne bis in idem with respect to the national jurisdictions of two or more States. This understanding should not, however, undermine efforts by States to prevent retrial for the same criminal offence through international conventions*”.<sup>337</sup> Nowak claims that this interpretation is both too general and too absolute.<sup>338</sup> This certainly gives room for arbitrary State behavior. However, as far as Kenya is concerned, it seems like the State is respecting the provision established in article 14(7).

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<sup>334</sup> Article 14(7), International Covenant on Civil and Political Rights (1966)

<sup>335</sup> General Comment No. 32, Section. 54

<sup>336</sup> In-depth violation of the Counter Piracy Program 2013: VI; See also, Peppah K.O. “24 Somali Pirates Convicted in Kenya” in *Zegabi: East Africa News*, 27<sup>th</sup> January 2014, available at: <http://www.zegabi.com/articles/?p=7126>, access: 2014-05-02

<sup>337</sup> General Comment No. 32, Section. 57; See also the Case of *A.P. v. Italy* where the defendant was convicted in Switzerland for the crime of conspiring to exchange currency. He was sentenced to two years imprisonment, which he duly served. In addition, he was also convicted in absentia in Italy for the same offence. The HRC found that the article 14(7) did not apply because the provision prohibits double jeopardy only with regard to an offence adjudicated in a given State.

<sup>338</sup> Nowak 1993: 273; this view is also shared by Jospheh; Schultz; Castan 2000: 337-38. ‘From a humanitarian point of view, The A.P. principles are to be regretted. If a state has imposed an adequate penalty on a person for an offence, it should not be permissible for that person to be tried for the same offence in another jurisdiction.’

### 3.2.3 Legal Reflection

After examining the content of article 14 in relation to the piracy trials in Kenya, it is clear that Kenya do not fully respect the stipulated provisions. Even though the individuals suspected of piracy are guaranteed legal protection in the agreement between EU and Kenya<sup>339</sup>, as well as an extensive legal safety net according to Kenyan national law<sup>340</sup>, there are indications on violations of the piracy suspect's legal rights. Below I will present those reflections where I have identified a potential threat relating to the respect of the stipulated provisions, as well as indications on Kenyan violations of the rights offered in article 14.

Kenya's obligation in accordance with article 14(1) to provide a competent and impartial for court for the criminal proceedings are seriously under threat because of the corruption that is apparent throughout the country, specifically in the Kenyan judiciary system. Furthermore, Kenya appears to violate the presumed innocence of suspected pirates, as it is stipulated in article 14(2), even though a violation of the provision is hard to prove. There seem to be indications on the occasional misbehavior of piracy suspects defence counsel. Although, according to HRC in the General Comment on article 14, Kenya should not be held liable such misconduct.

The Kenyan judiciary is strained by a huge backlog of criminal cases and an increase of the burden – more transfers of piracy suspects - strongly suggests that the right for the piracy suspects to be tried with undue delay in accordance with article 14(3)(c) is endangered. However, there are indications on the opposite, claiming that the trials are efficient and proceeds in a brisk pace. In cases where juvenile piracy suspects are apprehended and faced with trial, Kenya are obligated to offer them same rights as adult piracy suspects. As such, there does not seem to be any obligation under article 14(4) to offer them special treatment, even though they are in need of it. The treatment of juvenile piracy suspects in Kenya has both positive and negative aspects. The negative aspect is that they do not offer them separate legal counsel, as they are grouped with adult piracy suspects. Furthermore, if the juvenile piracy suspect commits an act of piracy with an adult, the juvenile are tried in the same court as the adult. The positive aspect is that with the

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<sup>339</sup> See agreed upon terms of protection in Exchange of Letters

<sup>340</sup> See for example, the Constitution of Kenya

funding and facilitating support of UNODC, Kenya is able to reunite juvenile pirates with their families in their country of origin.

It is possible to identify a problematic situation in relation the principle of *ne bis idem*, as provided for in article 14(7). As far as Kenya is concerned, this provision is respected. However, there seem to be no legal obstacle for a convicted pirate to be tried again for the same crime in another country. Thus, once a pirate is repatriated to his or her country of origin, they may be subjected to trial for the same crime even though they have been convicted for it once in Kenya.

Finally, the EU and the UNODC have, and are still supporting Kenya in order to strengthen its State judiciary. This is a process which has to continue until the Kenyan judiciary is considered stable enough to provide the piracy trials, fully, in accordance with article 14. In addition, the fact that EU still transfers suspected pirates - even though there are indications on the lack of respect for human rights - to Kenya suggests that many of the European countries are willing to trade away some legal rights of the suspected pirates for convenience.



# 4. Conclusion

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## 4.1 End Discussion

### 4.1.1 Summary Conclusion of the Legal Analysis

In sum, this study has brought some clarity regarding which jurisdictional basis Kenya may rely upon when prosecuting suspects. In addition, this study has identified a problematic jurisdictional aspect with regards to Kenya and its piracy trials. There is currently a solid jurisdictional framework for Kenya to prosecute pirates transferred to them by European States involved in Operation Atlanta. However, Kenya do not have the jurisdiction – other than the potential jurisdictional basis granted by the Security Council – to prosecute individuals who are apprehended within Somali borders as they are, per definition, armed robbers. For Kenya to prosecute alleged armed robbers there must be a connection between Kenya and the criminal act *per se*. A clear line will have to be drawn so that only piracy suspects are transferred and prosecuted in Kenya.

Furthermore, this study has generated some insight in how the right of a fair trial is respected by Kenya in its criminal proceedings of suspected pirates. The right to a fair trial, in accordance with article 14 of the ICCPR, is, with regard to specific provision in the article, being violated by the Kenyan State.<sup>341</sup> Furthermore, there also certain provision that are gravely endangered by the current situation in Kenya.<sup>342</sup>

Human rights and international criminal law are two pillars in the international legal system. For Kenya to be able to participate legally in the effort of suppressing piracy both these pillars need to be fully upheld.

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<sup>341</sup> See, Section 3.2.3 (Legal Reflections)

<sup>342</sup> For example, widespread corruption may have a negative effect on the impartiality and independence of Kenyan courts.

## 4.1.2 Implications on International Criminal Law

There have been an increased will to combat international crimes, as proven by the fact that countries from different parts of the world are cooperating in order to fight off piracy outside the coast of Somalia and in the Gulf of Aden. The regional prosecution model between Kenya and the EU can be perceived as a national court with international dimensions. However, the creation of courts with national and international elements is not a new phenomenon in itself. The world has seen such hybrid models before, for example in, Sierra Leone, Kosovo, East Timor, Cambodia and Bosnia and Herzegovina. Even though, the crimes under investigation in these courts or tribunals did not include piracy.<sup>343</sup> Therefore, the regional prosecution model between Kenya and the EU should be seen as a new phenomenon. Nevertheless, it still shares many characteristics with similar precedent courts or tribunals.

A common problem for many of the internationalized courts is that almost all of them have a shortage of financial or other resources. The resources, such as money, equipment and personnel are often contributed voluntarily by States or other actors. Funding difficulties may have impacts on the effectiveness and efficiency of the concerned court or tribunal, as well as, on the rights of the accused.<sup>344</sup> This is, as identified in the analysis, present in the context of Kenya. Despite the fact that the Kenyan State apparatus is highly corrupt, the EU and the UNODC continues to offer financial aid in order to strengthen its State judiciary. However, the combination of corruption and financial aid may not be the most suitable with regards to the concept of justice in international criminal law. Much of the economical contributions may be subjected to embezzlement, therefore not fulfilling its purpose to strengthen the rule of law in Kenyan courts. As a result, the potential outcome may be that the situation does not improve and, the right to a fair trial for piracy suspects and alleged armed robbers may continuously be subjected to violations by the Kenyan State.

As mentioned in the analysis, the regional prosecution model between Kenya and the EU certainly suggests that that many of the European countries are willing to trade away some legal rights of the suspected pirates or alleged armed robbers for convenience. Although, as much as

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<sup>343</sup> Cryer; et al. 2010: 181

<sup>344</sup> Cryer; et al. 2010: 191

there is a desire to capture these perpetrators and bring them to justice, there must also be a will to offer suspects the legal protection which forms the basis of international criminal procedure. Otherwise there is a possibility that the legal system of international criminal law will be subjected to degradation and mistrust. Furthermore, the potential ad hoc jurisdiction granted by the Security Council may offer us indications on a normative development in international criminal law. A development where the Security Council is given an additional attribute, other than the ability to establish international tribunals, to combat international crimes and bring perpetrators of such crimes to justice.

## **4.2 Future Research**

The increased militarization taking place outside the coast of Somalia and in the Gulf of Aden actualize interesting questions as to what extent the humanitarian law is applicable and respected by involved parties. Furthermore, a potential topic of future study is State responsibility relative to regional prosecution models. Specifically, do the European States have any obligations and how are these respected with regards to the transfer of apprehended piracy suspects?

In addition, a potential topic of study could be the role of security companies, hired to protect vessels travelling through the troubled waters in the region. For example, does a private security contractor have the legal right to apprehend a suspected pirate and what implications do such practices have on international law?

In sum, the regional prosecution models, established to counter and suppress modern piracy, raises a number of interesting topics which are relevant to study in order to comprehend those complex legal issues that is generated in the fight against modern day piracy.

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