



PERMANENT MISSION OF THE REPUBLIC OF KENYA  
TO THE UNITED NATIONS

No. 215/14

The Permanent Mission of the Republic of Kenya to the United Nations presents its compliments to the Secretary-General of the United Nations and with reference to Note No. LA/COD/59/1 of 23 January, 2014 has the honour to forward the submissions of the Government of the Republic of Kenya on the scope and application of the principle of universal jurisdiction pursuant to paragraph 3 of resolution A/RES/68/117 which was adopted by the United Nations General Assembly on 16 December, 2013.

The Permanent Mission of the Republic of Kenya to the United Nations avails itself of this opportunity to renew to the Secretary-General of the United Nations, the assurances of its highest consideration.

**New York – April 30, 2014**

THE SCOPE AND APPLICATION OF THE PRINCIPLE OF UNIVERSAL  
JURISDICTION

**SUBMISSIONS OF THE  
REPUBLIC OF KENYA ON THE  
SCOPE AND APPLICATION OF  
THE PRINCIPLE OF  
UNIVERSAL JURISDICTION IN  
KENYA:  
CRIMINALISATION AND  
TRIAL OF PIRACY CASES**

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## THE SCOPE AND APPLICATION OF THE PRINCIPLE OF UNIVERSAL JURISDICTION

### SUBMISSIONS OF THE REPUBLIC OF KENYA ON THE SCOPE AND APPLICATION OF THE PRINCIPLE OF UNIVERSAL JURISDICTION IN KENYA: CRIMINALISATION AND TRIAL OF PIRACY CASES

#### 1. Background

On 16 December 2013 the United Nations General Assembly (UNGA) adopted resolution **A/RES/68/117** by which it invited Member States of the United Nations to submit before 30 April 2014, observations on the scope and application of the principle of universal jurisdiction.

In this regard, the Republic of Kenya wishes to submit as follows:

#### 2. Introduction

The Republic of Kenya's application of the principle of universal jurisdiction dates back to early 20<sup>th</sup> century, with the enactment of the country's Penal Code (Chapter 63 Laws of Kenya), in 1930, which criminalised, in **Section 69 (1)** as read with **Section 69 (3)**,<sup>1</sup> the act of piracy committed by any person in the territorial waters of Kenya or in the high seas. The particular provisions state as follows:

'69 (1) Any person who, in territorial waters or upon the high seas, commits any act of piracy *jure gentium* is guilty of the offence of piracy...

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

Since then, Kenya has applied the principle of universal jurisdiction, in its judicial practice, in the prosecution of piracy cases committed in the high seas with the first trial being conducted in 2006.

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<sup>1</sup> Repealed by the Merchant Shipping Act (Chapter 389 Laws of Kenya)

### 3. Kenya's Courts Invocation of the Principle of Universal Jurisdiction

The law courts of Kenya first invoked the principle of universal jurisdiction in 2006 in the first piracy case trial involving ten (10) Somali nationals captured in the high seas of the Indian Ocean by the United States of America (U.S) almost 200 miles off the coast of Somalia.<sup>2</sup>

The captured pirates were tried before a Senior Principal Magistrate Court in Mombasa for the offences of jointly attacking a U.S vessel identified as MV Safina Al Bisaraat-M.N.V-723 on the high seas, 200 miles off the coast of Somalia, on 16 January 2006; threatening the lives of the crew of the vessel and demanding ransom of U.S. \$ 500,000 from the vessel captain contrary to **Section 69 (1)**<sup>3</sup> as read with **Section 69 (3)** of the Penal Code (Chapter 63 Laws of Kenya).<sup>4</sup> At the end of the trial the Magistrate's Court, in October 2006, found the 10 accused persons guilty of the offence of piracy and sentenced them to seven (7) years imprisonment.<sup>5</sup>

The accused persons appealed to the High Court of Kenya against the judgment of the Magistrate's Court contesting, among other issues, the Magistrate's Court jurisdiction to try the case on the ground that the accused persons were non-nationals of Kenya and the criminal acts they were convicted of were committed outside Kenya, that is in the high seas of the Indian Ocean.<sup>6</sup>

In May 2009, the High Court, in dismissing the appeal and upholding the judgment of the Magistrate's Court, found that the provisions of **Section 69(1)** of the Penal Code, which until repealed by the Merchant Shipping Act provided that any person on the high seas could be found guilty of the offence of piracy, were broad enough to cover the prosecution of non-

<sup>2</sup> *R v. Hassan M. Ahmed and 9 Others, Criminal Case No. 434 of 2006*. See also, J T Gathii, *Jurisdiction to Prosecute Non-National Pirates Captured by Third States under Kenyan and International Law*, (2009) 31, 365, <http://digitalcommons.lmu.edu/cgi/viewcontent.cgi?article=1652&context=ilr> accessed 27 April 2014.

<sup>3</sup> Repealed in May 2009 by the enactment of the Merchant Shipping Act (Chapter 389 Laws of Kenya).

<sup>4</sup> *Hassan M. Ahmed v. R* (2009) eKLR, <http://kenyalaw.org/caselaw/cases/view/55714/> accessed 27 April 2014.

<sup>5</sup> *Ibid.*

<sup>6</sup> *Ibid*; *Supra* note 2, 376.

national suspects captured in the high seas of the Indian Ocean, off the coast of Somalia.<sup>7</sup>

The prosecution of piracy cases committed in the high seas has been the only occasion where the Kenyan Courts have successfully invoked the principle of universal jurisdiction.<sup>8</sup> Since 2006 when the first piracy case was instituted in the Kenyan courts, the Magistrate's Courts in Mombasa have so far adjudicated over a total of 17 piracy cases involving 143 suspects.<sup>9</sup>

#### **4. Applicable international treaties for the Exercise of Universal Jurisdiction over Piracy by Kenya Courts**

Kenya is party to the following maritime treaties that criminalise piracy.

##### **a) United Nations Convention on the Law of the Sea**

The United Nations Convention on the Law of the Sea (UNCLOS) definition of piracy, at **Article 101**, includes acts of violence committed against persons

<sup>7</sup> Supra note 2, 376.

<sup>8</sup> In 2011, the High of Kenya in Nairobi invoked the principle of universal jurisdiction in the case of *The Kenya Section of International Commission for Jurists (ICJ - Kenya) v. Attorney General and Minister for Internal Security and Provincial Administration, Misc. Criminal Application No. 685 of 2010*, where the applicant had approached the court for issuance of a provisional warrant of arrest. The High of Kenya ordered the issuance of a provisional warrant of arrest of H.E. Omar H. A. Al-Bashir, the president of the Republic of Sudan, in an attempt to give effect to the decisions of the International Criminal Court (ICC) Pre-Trial Chambers of March 2009 and July 2010 that ordered the arrest of H.E. Omar H. A. Al-Bashir for crimes against humanity, war crimes and genocide. The learned judge of the High Court observed that though the Republic of Sudan is not party to the Rome Statute of the ICC, nevertheless, the crimes for which H.E. Omar H. A. Al-Bashir is accused of are not only crimes under the Rome Statute but also under customary international law. As such the learned judge found that the nature of the crimes for which H.E. Omar H. A. Al-Bashir was accused of by the ICC, that is international crimes, were those that could be adjudicated over by any nation in the world under the principle of universal jurisdiction. On this basis, the learned judge based the High Court of Kenya's jurisdiction to order the issuance of provisional warrant of arrest for H.E. Omar H. A. Al-Bashir on the principle of universal jurisdiction.

The Republic of Kenya, which was a party to the matter before the High Court, appealed against this decision in 2012 on, among other grounds, the ground that the High Court erred in invoking the principle of universal jurisdiction in finding that the High Court of Kenya had sufficient capacity to adjudicate over the case for the issuance of a provisional warrant of arrest against a non-party to an international treaty, that is the Rome Statute. The appeal case is still ongoing before the Court of Appeal of Kenya.

<sup>9</sup> A M Muteti, *Prosecution of Piracy Cases – The Kenya Experience*, (2013) 39, No. 1, Commonwealth Law Bulletin, 73.

or property on board a ship in the high seas. In particular **Article 101** defines piracy as follows:

- '(a) any illegal acts of violence or detention, or any act of depredation, committed for private ends by the crew of the passengers of a private ship or a private aircraft, and directed:
  - (i) on the high seas, 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 private ship or aircraft;
- (c) any act of inciting or of intentionally facilitating an act described in paragraphs (a) or (b).'

**b) Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation**

The Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation, 1988 (SUA), at **Article 3**, sets out acts that constitute crimes under the treaty. In particular, **Article 3** provides as follows:

- '1. Any person commits an offence if that person unlawfully and intentionally:
  - 1. seizes or exercises control over a ship by force or threat thereof or any other form of intimidation; or
  - 2. performs an act of violence against a person on board a ship if that act is likely to endanger the safe navigation of that ship; or
  - 3. destroys a ship or causes damage to a ship or to its cargo which is likely to endanger the safe navigation of that ship; or
  - 4. places or causes to be placed on a ship, by any means whatsoever, a device or substance which is likely to destroy that ship, or

cause damage to that ship or its cargo which endangers or is likely to endanger the safe navigation of that ship; or

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

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

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

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

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

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

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

## 5. Kenya's Legislation on the Exercise of Universal Jurisdiction over Piracy Cases

The legal basis for the exercise of universal jurisdiction by Kenya courts over the crime of piracy is provided for in **Section 370** of the Merchant Shipping Act (Chapter 289 Laws of Kenya) which was enacted in 2009. This Act repealed the Penal Code's **Section 69** which legislated on piracy as discussed above.

**Section 370** of the Merchant Shipping Act provides as follows:

(1) Subject to subsection (5), a person who unlawfully, by the use of force or by threats of any kind, seizes a ship or exercises control of it commits the offence of hijacking a ship.

(2) Subject to subsection (5), a person commits an offence if he unlawfully and intentionally -

- (a) destroys a ship;
- (b) damages a ship or its cargo so as to endanger, or to be likely to endanger, the safe navigation of the ship;
- (c) commits, on board a ship, an act of violence which is likely to endanger the safe navigation of the ship; or
- (d) places or causes to be placed on a ship any device or substance which is likely to destroy the ship or is likely so to damage it or its cargo as to endanger its safe navigation.

(3) Nothing in subsection (2) (d) is to be construed as limiting the circumstances in which the commission of any act may constitute -

- (a) an offence under subsection (2) (a), (b) or (c); or
- (b) attempting or conspiring to commit, or aiding, abetting, counselling, procuring or inciting, or being of and part in, the commission of such an offence.

(4) Subject to subsection (5), subsections (1) and (2) shall apply -

- (a) whether the ship referred to in those subsections is in Kenya or elsewhere;
- (b) whether any such act as is mentioned in those subsections is committed in Kenya or elsewhere; and
- (c) whatever the nationality of the person committing the act.

(5) Subsections (1) and (2) shall not apply in relation to any warship or any other ship used as a naval auxiliary or in customs or police service, or any act committed in relation to such a warship or such other ship unless the -

- (a) persons seizing or exercising control of the ship under subsection 91), or committing the act under subsection (2), as the case may be, is a Kenyan citizen;
- (b) act is committed in Kenya; or
- (c) ship is used in the customs service of Kenya or in the service of the police force in Kenya.



(6) A person who commits an offence under this section shall be liable, upon conviction, to imprisonment for life.

(7) In this section -

**"act of violence"** means any act done -

- (a) in Kenya which constitutes the offence of murder, attempted murder, manslaughter, or assault; or
- (b) outside Kenya which, if done in Kenya would constitute such an offence as is mentioned in paragraph (a); and

**"unlawfully"** -

- (a) in relation to the commission of an act in Kenya, means so as (apart from this Part) to constitute an offence under the law of Kenya; and
- (b) in relation to the commission of an act outside Kenya, means that the commission of the act would (apart from this Part) have been an offence under the law of Kenya if it had been committed in Kenya.