THE LEGAL CHALLENGES AND PROSPECTS OF PROSECUTING PIRACY: AN ANALYSIS OF INTERNATIONAL LAW AND KENYA'S LEGISLATION

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DECLARATION

I, **ASHLEY SIMIYU TOYWA,** do declare that this is my original work and it has not been submitted and is not currently being submitted for a degree in any other University.

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DEDICATION

I dedicate this work to my wife Samantha and my son Ethan. You are a source of great inspiration.

ACRONYMS

MOU	Memorandum of Understanding
UNSC	United Nations Security Council
MSA	Merchant Shipping Act, 2009
UNCLOS	United Nations Convention on the Law of the Sea
SUA	Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation at Sea
IMO	International Maritime Organization
UN	United Nations
HSC	United Nations High Seas Convention (Geneva Convention on the High Seas)
PCIJ	Permanent Court of International Justice
ILC	International Law Commission
IMB	International Maritime Bureau
EEZ	Exclusive Economic Zone
UNGA	United Nations General Assembly
EUNAVFOR	European Union Naval Force
RECAPP	Regional Cooperation Agreement on Combating Piracy and Armed Robbery against Ships in Asia
RAPPICC	Regional Anti-Piracy Prosecutions Intelligence Co-ordination Centre
ICTY	International Criminal Tribunal for the Former Yugoslavia
ITLOS	International Tribunal for the Law of the Sea
SOLAS	International Convention for the Safety of Life at Sea
ISPS	International Ship and Port Security Code

LIST OF STATUTES

1. Constitution of Kenya, 2010
2. Judicature Act, Cap. 8, Laws of Kenya, came into force 1st August 1967
3. Merchant Shipping Act, No. 4 of 2009, Laws of Kenya, came into force 1st September, 2009.
4. Penal Code, Cap. 63, Laws of Kenya, came into force 1st August, 1930

LIST OF INTERNATIONAL LEGAL INSTRUMENTS

1. Convention for the Suppression of Unlawful acts against the Safety of Maritime Navigation, 1988; 1678 UNTS 221
2. Convention on the High Seas, 1958; 450 UNTS 11
3. Charter of the United Nations, 1945; UNTS
4. United Nations Convention on the Law of the Sea, 1982; 1833 UNTS 3.

LIST OF CITED CASES

1. *Attorney-General of the Government of Israel v. Eichmann (Israel Sup. Ct. 1962), Int'l L. Rep.*
2. *Joyce v Director of Public Prosecutions [1946] 1 All ER 186*
3. *S.S. Lotus (France v. Turkey), 1927 P.C.I.J.*
4. *R v Mohamed Ahmed Dahir and others (The Topaz) (unreported) SCA 51 of 2009*
5. *R v Osman and Others (The Draco) (2011) SLR 344*
6. *Republic v Chief Magistrate's Court, Mombasa Ex-Parte Mohamud Mohamed Hashi & 8 Others [2010] eKLR*
7. *Attorney General v Mohamud Mohammed Hashi & 8 Others (2012) eKLR*
8. *Republic vs. Abdirahman Isse Mohamed and Three (3) others(2010)*
9. *Hassan M. Ahmed v Republic (2009) eKLR*

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ABSTRACT

Piracy is an international problem that disrupts the global maritime trade and endangers the safety and security of crews, ship owners, and cargo owners. Alleged acts of Piracy have escalated off the coast of Somalia and in the Gulf of Aden.

The gravity of the threat against maritime security and in order to bring suspected pirates to justice has led the international community to come together and developed international legislation and instruments on piracy. This study seeks to critically examine the development of international law on piracy and its enforcement by states with a specific focus on Kenya.

CHAPTER ONE

INTRODUCTION

1.1 Background to the Study

Kenya has distinguished itself in the global war against piracy by undertaking prosecutions in its national courts of suspected pirates arrested on the high seas and handed over by navies of leading maritime nations under bilateral agreements and memoranda of understanding (MOUs) entered into between Kenya and these leading maritime nations. For example, in the MOUs signed on 16th January, 2009 between Kenya and the United States of America, Kenya agreed to prosecute captured pirates.[1] By a Memorandum of Understanding signed on 11th December, 2008, Kenya agreed to receive and prosecute suspected pirates captured on the high seas by the United Kingdom. Further, on 6th March, 2009, Kenya signed a similar agreement with the European Union.[2]

Until the 1980s, piracy was generally considered history and restricted to medieval times, but the 1990s has seen resurgence in maritime piracy, with persistent surge in 2000s in the Western Indian Ocean and Gulf of Aden. Today, this group of international criminals threatens to bring much of international shipping to a standstill. According to the International Maritime Organization (IMO), between September 2009 and January 2011 there were 172 acts of piracy attacks and attempted attacks on ships off the coast of Somalia.[3]

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[1] David Morgan, Kenya Agrees to Prosecute U.S.-Held Pirates: Pentagon, REUTERS, Jan. 29, 2009, available at http://www.reuters.com/article/newsMaps/idUSTRE50S4ZZ20090129 (accessed on 18th October, 2018).

[2] Press Release, European Security and Defence Policy, Agreement with Kenya Signed on 6th March, 2009), available at http://www.consilium.europa.eu/uedocs/cms-data/docs/pressdata/en/esdp/106547.pdf. (accessed on 18th October, 2018).

[3] International Maritime Organization, IMO. Reports on Acts of Piracy and Armed Robbery against Ships: Annual report 2010, Maritime Safety Committee (MSC).4/Circ.169, Annex 5, Apr. 01, 2011.

International law against maritime piracy is codified in various international conventions. The 1982 United Nations Convention on the Law of the Sea (herein after referred to as UNCLOS)[4] which has been largely ratified contains the definition of piracy.[5] Article 101 of the Convention states that 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 intentionally inciting or facilitating an act described in subparagraph (a) or (b).

Article 105 of the UNCLOS Convention further grants every state jurisdiction to arrest and prosecute persons suspected of committing acts of piracy. It provides 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.

The maritime acts of depredation often fall outside the definition provided in article 101 of UNCLOS Convention due to several reasons. First, whereas the definition covers acts committed on the high seas, armed groups have captured and held for ransom crews of ships engaged in the exercise of the right of innocent passage in territorial waters as provided for under article 45 of

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[4] United Nations Convention on the Law of the Sea (adopted 10th December 1982, entered into force on 16th November 1994);1833 UNTS 397.

[5] On 16th June 2016, Azerbaijan was the 168th country to ratify UNCLOS, http://www.un.org/Depts/los/reference_files/chronological_lists_of_ratifications.htm,(accessed on 7th November, 2018).

UNCLOS.[6] Similarly, some of these acts of violence are committed partially on the high seas and partially in territorial waters or wholly in territorial waters and, thus, not covered within this definition. Second, this definition of piracy only includes acts committed by one ship against another ship; acts not involving two ships do not fall within this definition. Third, the definition only includes criminal acts committed for private ends. The plain language of this definition provides that the motive for piracy must be pecuniary; hence, any acts committed for political ends are excluded from this definition.

The United Nations Security Council Resolution 1846 called upon states to establish an effective legal jurisdiction to bring alleged offenders to justice, protect seafarers and passengers.[7] Kenya responded with the prosecution of suspected pirates. Other countries, however, responded through the deployment of naval vessels to protect the lives of the seafarers and passengers and escort vessels.

To achieve this, Kenya had to effect far reaching changes in the law. In the initial stages, suspected pirates were charged under Kenya's Penal Code.[8] The prosecutions were subjected to legal challenges necessitating the enactment of the Merchant Shipping Act in September 2009 (herein after referred to as the MSA, 2009).[9] The Merchant Shipping Act, 2009 was enacted to

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[6] The regime of innocent passage, in accordance with Part II, section 3, shall apply in straits used for international navigation: (a) excluded from the application of the regime of transit passage under article 38, paragraph 1; or (b) between a part of the high seas or an exclusive economic zone and the territorial sea of a foreign State. 2. There shall be no suspension of innocent passage through such straits.

[7]United Nations Security Council Resolution, UN Doc. S/RES/1846 (2008), December 2, 2008; www.un.org/Docs/sc/unsc_resolutions08.htm. (Accessed on 18th October, 2018).

[8] Cap. 63, Laws of Kenya (Revised edition, 1967).

[9] Merchant Shipping Act of 2009, Laws of Kenya, Act No. 4 of 2009.

address the shortcomings in the Penal Code in terms of defining the offence of piracy and prescribing the jurisdiction of Kenyan courts to prosecute suspected pirates.

The prosecution of piracy in Kenya is currently undertaken under the Merchant Shipping Act of 2009. Prior to the enactment of the Merchant Shipping Act, 2009 the offence of piracy was provided for under section 69(1) of the Penal Code as follows:

> 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.

Section 369 of the Merchant Shipping Act, 2009 defines piracy as follows:

(a) any act 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. against another ship or aircraft, or against persons or property on board such ship or aircraft; or
    ii. against a ship, aircraft, persons or property in a place outside the jurisdiction of any State;
(b) any voluntary act of participation in the operation of a ship or of an aircraft with knowledge of facts making it a pirate ship or aircraft; or
(c) any act of inciting or of intentionally facilitating an act described in paragraph (a) or (b).

The Merchant Shipping Act, 2009 has not only extended the jurisdiction of the Kenyan courts to try piracy committed by non-nationals in the high seas, but it also defines more extensively and comprehensively the offence of piracy than was previously defined under the repealed section 69 of the Penal Code. Section 369 of the Merchant Shipping Act, 2009 adopts the definition of piracy that is found in the United Nations Convention on the Law of the Sea.[10]

[10] Article 101 of the United Nations Convention on the Law of the Sea (adopted 10 December 1982, entered into force on 16 November 1994); 1833 UNTS 397.

From the foregoing, there is a lack of effectiveness in dealing with attacks on ships because the definition contains several limitations.[11] The most significant limitation is that the UNCLOS Convention provisions are only concerned with piracy on the high seas and they do not address piracy in territorial, coastal or inland waters. The majority of piracy incidents in the world take place in territorial or coastal waters but they are legally speaking not acts of piracy at all. The consequence is that special jurisdictional rules on piracy are not applicable because the attacks take place in the wrong geographic area.[12]

1.2 Problem Statement

In the first-ever piracy trial in Kenya, *Republic v. Hassan Mohamud Ahmed*,[13] decided in 2006, ten Somali suspects originally captured by the U.S. Navy were convicted of the crime of piracy.[14] The Kenyan High Court subsequently rejected their appeal.[15] That appellate decision produced a binding precedent, finding that Kenyan magistrates' courts have jurisdiction to proceed with piracy prosecutions against non-nationals captured outside the country.

In another Kenyan case, *In Re Mohamud Mohamed Dashi & 8 Others*,[16] the Chief Magistrate's Court at Mombasa charged the suspected pirates with the offence of piracy as per the repealed

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[11] R. Herbert Burns, S. Bateman and P. Lehr, 'Lloyd's MIU Handbook of Maritime Security', CRC Press, 2008, p. 18□189.

[12] D. Anderson, R. de Wijk, S. Haines and J. Stevenson, 'Somalia and the Pirates', Working Paper No. 33, European Security Forum, December 2009, p. 10.

[13] *Criminal Appeal 198 to 207 of 2006 Hassan M. Ahmed vs Republic, unreported.*

[14] *Republic v. Hassan Mohamud Ahmed, Crim. No. 434 of 2006 (Chief Magistrate Court November 1, 2006) (Jaden, Acting Senior Principal Magistrate).*

[15] *Hassan M.Ahmed vs. Republic, Crim.App.Nos.198, 199, 201, 203, 204, 205, 206, &207of2008 (High Court, May 12, 2009) (Azangalala, J.).*

[16] *In Re Mohamud Mohamed Dashi & 8 Others (2010) eKLR.*

section 69 of the Kenyan Penal Code.[17] The question of jurisdiction was canvassed before the High Court. Judge Ibrahim concluded that because the piratical incident did not occur within Kenya, or the territorial waters of the State, they did not have jurisdiction to adjudicate the matter. However, the Court of Appeal subsequently reversed Judge Ibrahim's decision in the High Court in 2012.[18] Maraga JA's judgment in the Appeal Court dealt with the concept of piracy *jure gentium*. Judge Maraga said this regarding piracy *jure gentium*:

> It is clear that piracy *jure gentium* is an assault on vessels sailing upon the high seas whether or not such an assault is accompanied by robbery or attempted robbery.

The Somali suspects committed the alleged crimes within Somalia territorial waters off the coast of Somalia and not in the high seas. They were, however, charged with the offence of piracy which occurs in the high seas. The Somali suspects were charged with a wrong offence since the alleged crime was not piracy. At the beginning, the criminal acts committed by Somali nationals off the coast of Somalia, were not the form of piracy on the high seas as stated in UNLCOS definition, but rather a form of theft carried out along the Somali coast by armed or non-armed groups who boarded a ship and stole money or other valuable objects.[19] Beside this form, there was another type of activity born in response to the problem of foreign illegal fishing in Somali waters including the exclusive economic zone.

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[17] Penal Code (1967) Chapter 63 of the Laws of Kenya, Section 69; Section 69(1) of the Penal Code, which provides that 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.

[18] Attorney General v Mohamud Mohammed Hashi & 8 Others [2012] eKLR.

[19] BAHADUR J., The pirates of Somalia: Inside their Hidden World, (New York, Pantheon Books, 2011), pp. 32-47.

The definition of piracy is rather narrow, as it includes only action on the high seas and only action undertaken by one ship against another ship and for private ends. Forms of violence conducted in the territorial sea as well as without the involvement of two ships, such as, for instance, the violent taking of control of a ship by members of its crew or passengers, even when the follow-up consists of holding to ransom the ship and its crew and passengers, are not included. Violent activities against ships off the Somali coast sometimes took place in whole or in part in the territorial seas, thus often remaining outside the scope of the definition. Rarely did they involve the presence of one or more other ships; very fast skiffs were used, coming from bases on the mainland. It may be underlined that acts preparatory to piracy and other acts of violence not directly linked to piracy are not included in the definition.[20]

Prior to June 2008, the inapplicability of the international law of piracy in the territorial sea afforded Somali criminals a safe haven. Removing that limitation was a major objective of the members of the United Nations Security Council in adopting Resolution 1816 on 2nd June, 2008.[21] Before the limitation was removed by adoption of Resolution 1816,[22]

This study explores the international legal regime on piracy with particular emphasis on the prosecution of piracy cases occurring off the coast of Somali and their prosecution in Kenya, since, Kenya prosecuted and convicted Somali suspects on the basis of a wrong offence and a

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[20] T. Treves, "Piracy, Law of the Sea, and use of Force: Developments off the Coast of Somalia," (2009) 20 European Journal of International Law, 402.

[21] Jane G. Dalton, J. Ashley Roach, & John Daley, Introductory Note to United Nations Security Council: Piracy and Armed Robbery at Sea—Resolutions 1816, 1846 & 1851, 48 ILM 129 (2009), reprinted in ASIL NEWSLETTER, Jan./Mar. 2009, at 8. See UN Doc. S/PV.5902, (assessed on 17th November, 2019).

[22] UNSC resolution number 1816 of 2nd June 2008, paragraph. 7(a), retrieved at http://www.un.org/en/sc/documents/resolutions/ (accessed on 10th November, 2018).

defective charge of piracy. The illegal acts committed did not occur in the high seas, but rather in Somali's territorial waters, off the coast of Somali and, therefore, could not be considered to constitute piracy.

1.3 Theoretical Framework

When a crime is committed, a state must be able to exercise some kind of jurisdiction in order to be able to take judicial action. States do so regularly on the principles of territoriality or nationality, and sometimes on passive personality (the victim's nationality) or the protective principle (where national interests are affected). Occasionally, however, courts have prosecuted defendants without any of the traditional jurisdictional links being present. They have done so by using the universality principle. The principle of universality recognizes that certain crimes are of such an atrocious and dangerous nature that all states have a responsibility or a legitimate interest to take action. This is the principle of universality and the root of universal jurisdiction.
It is therefore critical to understand how international law is enforced in national jurisdictions and similarly the relationship between international law and national laws. This is captured by several divergent theories, namely, monism, dualism and sociological.

Proponents of the monism contend that international law and the national laws of each national form an integrated legal system. As such international law is part and parcel of each country's legal system.[23] In monist states international law does not need to be domesticated into national law. As such, ratification of international treaties by states automatically incorporates them into national law.

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[23] W. Slomanson, Fundamental Perspectives on International Law 6th ed. (Wadsworth, Boston 2011) 17.

Monists assert that international law takes priority over national law in cases of conflict. Proponents of monism are normally interested in authority and in laws that are higher than those that are associated with the state.[24] Hans Kelsen opines that international law is superior to national law and that states are subordinate to international law in the same manner that individuals are subordinate to national law.[25]

According to Saoirse De Bont, piracy occupies a unique position in international law.[26] Described as *hostis humani generis*, "enemies of all mankind," pirates commit the original crime under universal jurisdiction. The principle of universal jurisdiction holds that certain crimes are of such a serious nature that any state is entitled, or even required, to apprehend and prosecute alleged offenders regardless of the nationality of the offenders or victims, or the location where the offence took place. It differs from other forms of international jurisdiction because it is not premised on notions of sovereignty or state consent.

Saoirse De Bont opines that far back as the sixteenth century universal jurisdiction over piracy had been an established principle of customary international law. Today, customary law and international agreements govern jurisdiction over piracy. Notably, customary international law is binding on all states, unlike international agreements, which only govern the actions of the states

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[24] J.J. Paust, 'Basic Forms of International Law and Monist, Dualist, and Realist Perspectives ' (www.ssrn.com 2013), http://ssrn.com/abstract=2293188, (accessed 18th October, 2018).

[25] H. Kelsen, Principles of International Law, 3rd ed. (Law Exchange Ltd, Clark, New Jersey 1952), pp. 104 – 105.

[26]Saoirse De Bont, "Prosecuting Pirates and Upholding Human Rights Law: Taking Perspective," *Journal of International Law and International Relations:* Vol. 7. Available at http://oneearthfuture.org/sites/oneearthfuture.org/files//documents/publications/Human-Rights-Law-Saoirse-de-Bont.pdf. (accessed on 22nd November, 2018).

that are party to them. The relevant international instrument that apply to piracy is the United Nations Convention on the Law of the Sea.

On the other hand we have the dualist theory which presupposes that international law and national law are two separate legal and distinct systems operating independently from each other. According to Rosalyn Higgins, international law and municipal law comprise two essentially different legal systems, existing side by side within different spheres of action, the international sphere and the domestic sphere.[27] Dualists assert that international law addresses itself to states and not individuals. States are therefore free to regulate their internal affairs in whichever manner they may desire with international law having little or no control over national laws.[28] Proponents of the dualistic theory assert that international law must be translated into municipal law before it can be applied by domestic courts. Domestic courts may also apply international law when it is not in conflict with municipal law.[29] The dualist theory has however received criticism since in modern times subjects of international law are not only states but also international organizations, individuals and other non-state entities.

Alfred P. Rubin opines that universal jurisdiction over pirates was more a matter of theory than of practice; very few criminal prosecutions for piracy can be found that depended on the

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[27] R. Higgins, Problems and Process: International Law and How We Use It, (Clarendon Press, Oxford, 1994) p. 205.

[28] Edwin Borchard, 'Relation Between International Law and Municipal Law ' (http://www.law.yale.edu/ 1940), http://digitalcommons.law.yale.edu/fss_papers/3498, (accessed 10th October, 2018).

[29] J.A.C. Cartner, International Law of the Shipmaster (Routledge, London 2009) 62.

universal principle.[30] Moreover, some nations, such as the United States, did not allow their courts to exercise universal jurisdiction over piracy. Universal jurisdiction was an option, not a duty. Despite their endorsement of universal jurisdiction over pirates, the major maritime nations openly tolerated even large-scale piracy when it was directed at their enemies. Still, commentators have always supported the existence of universal jurisdiction, and for the past several centuries the right of any nation to prosecute any pirate has, as a theoretical proposition, gone unchallenged.

The sociological legal theory looks into social development of legal institutions, the social construction of legal issues and the relation of law to social change for the betterment of the society in general.[31] The sociological jurist pursues a comparative study of legal systems, legal doctrines, and legal institutions as social phenomena, and criticizes them with respect to their relation to social conditions and social progress.[32] They hold law as a social institution which may be improved by human effort, and make it their duty to discover the best means by furthering and directing such human effort.

In piracy, certain common ideas have passed on from generation unto generation with pirates being viewed as enemies of the mankind and for which no state should tolerate. Thus sanctions were created and the notion of universal jurisdiction being applied for piracy such that any state that arrests a pirate can punish irrespective of the nationality of such an individual.

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[30] Rubin, Alfred P. (1990) "Revising the Law of Piracy," *California Western International Law Journal*: Vol. 21: Available at: https://scholarlycommons.law.cwsl.edu/cwilj/vol21/iss1/7 (accessed on 7th September, 2018).

[31] James Harris, Legal Philosophies, 2nd ed. (Butterworth, London 1997) 36.

[32] Roscoe Pound "The Scope and Purpose of Sociological Jurisprudence" (1912) 25 Harvard Law Review 516.

This study inquires into the development of legal frameworks and institutions and the sufficiency of the same in light of a changing society and emergence of crimes such as piracy. The sociological legal theory is key in pursuing the question whether the legal and institutional framework has kept the pace in view of the rapid increase of piracy cases.

The crime of piracy is a social evil that must be addressed through a social institution. Whereas the international legal framework on piracy has been generally accepted as such, it does not seem to address its purpose in society. This can be attributed to the fact that at the time of its formulation, the crime of piracy was not considered a major threat to society. This study seeks to answer the question of what is the law as regards the crime of piracy in modern days. Piracy being a crime of universal jurisdiction, then the study also explores how jurisdiction in prosecuting piracy has been utilized.

1.4 Literature Review

A lot of literature exists on the doctrine of universal jurisdiction. The literature review for this study will be based on the following key themes, that is, the applicability of universal jurisdiction and the legislative framework, philosophical foundations and historical development of the doctrine of universal jurisdiction, and comparative study in other jurisdictions.

Anna Petrig and Robin Geiß describe the enforcement powers that States may rely upon in their quest to repress piracy in the larger Gulf of Aden region.[33] The piracy rules of the United Nations

[33] Anna Petrig and Robin Geiß, "Piracy and Armed Robbery at Sea: The Legal Framework for Counter-Piracy Operations in Somalia and the Gulf of Aden." (2011), Oxford University Press.

Convention on the Law of the Sea and the legal safeguards applicable to maritime interception operations are scrutinized before the analysis turns to the criminal prosecution of pirates. The discussion includes so-called ship rider agreements, the transfers of alleged offenders to regional states, the jurisdictional bases for prosecuting pirates, and the feasibility of an internationalized venue for their trial.

Scharf Michael, Newton Michael and Sterio Milena discuss the lack of consensus about the extent to which universal jurisdiction can be validly applied or should be applied as a matter of policy.[34] They cover jurisdictional issues involved in national and international efforts to address the menace of maritime piracy and piracy in relation to customary international law. The authors proceed to do a comparative study of how some of the piracy-prosecuting nations, including the Netherlands, South Korea, Tanzania, India, and Kenya, incorporate international law into domestic law. Kenya is a prosecuting nation that has concluded transfer agreements with different patrolling and apprehending nations, and as such, it has been at the forefront of Somali piracy prosecutions. Finally, South Korea and India are nations that have been involved in combating piracy in a different geographic region (Asia); it is thus interesting to examine how they have handled the challenges of domestic piracy prosecutions.

Valeria Eboli and Jean Paul Pierini discuss in depth the case involving acts of piracy between Italian and Indian nationals.[35] Two Italian service members were taken into custody by Indian

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[34] Scharf Michael P. ; Newton Michael ; Sterio Milena, "Prosecuting Maritime Piracy : Domestic Solutions to International Crimes," (2015) Cambridge : Cambridge University Press.

[35] Valeria Eboli, Jean Paul Pierini, "The Enrica Lexie Case and the limits of the extraterritorial jurisdiction of India," Centro di documentazione europea -Università di Catania -Online Working Paper 2012/n. 39 Marzo, 2012.

authorities on suspicion of piracy triggering a complex legal controversy between Italy and India. The authors highlight some of the legal implications of the controversy and focuses on issues like the State's jurisdiction and the relationship between domestic and international law, the relevance of the effects of an offence in order to establish the *locus commissi delicti*[36] under international law and Indian domestic law, flag State jurisdiction in respect of collisions and other incidents of navigation under customary international law.

Robin M. Warner examines the international law framework for investigation and prosecution of piracy offences and its implementation in national criminal justice systems, the principal elements of this framework including the definition of piracy and associated obligations in the 1982 United Nations Convention on the Law of the Sea.[37] He reviews progress towards criminalization of piracy offences in national legislative systems and distinctive trends in piracy legislation around the world. He also examines key features of the jurisprudence emerging from the regional and extra-regional prosecutions of Somali pirates as well as sentencing outcomes. The author further discusses the negotiation of the Djibouti Code of Conduct.[38] The principal thrust of these efforts has been to strengthen the capacity of countries in the Horn of Africa region to effectively investigate, prosecute and punish the offenders and to augment the overall efficacy of their criminal justice systems. An argument is made for forging stronger criminal justice cooperation networks in the Horn of Africa region and beyond to assist in gathering the necessary evidence and arresting piracy suspects for investigation and prosecution. The obstacles

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[36]Law of the place where the delict [tort] was committed.

[37] Warner, R. M., "The Prosecution of Pirates in National Courts", presented at the University of Wollongong, Australia: The Emirates Centre for Strategic Studies and Research, Series 109 (2013).

[38]International Maritime Organisation, 'Djibouti Code of Conduct' (www.imo.org 2014) <http://www.imo.org/OurWork/Security/PIU/Pages/DCoC.aspx> (accessed on 7th September, 2018).

to tracking and freezing the proceeds of Somali piracy are also examined. The author concludes that although the prosecution of Somali pirates is only one component in the solution to eradicating the complex problem of Somali piracy, it is an indispensable element in ongoing efforts to deter this harmful criminal activity and in reducing its costs to the international community.

Beck Pemberton acknowledges that most western naval powers are reluctant to prosecute captured pirates in their own Courts, having apprehensions about costs, logistics, asylum claims, and related human rights and due process issues.[39] He indicates that most of them have recently concluded a series of bilateral prisoner transfer agreements with Kenya and the Seychelles, whereby the domestic courts of those states agree to prosecute pirates in exchange for international funding and capacity-building. The author examines the jurisdictional issues pertaining to the transfer agreements, ultimately concluding that the exercise of universal jurisdiction over pirates is contrary to customary and conventional international law. As a practical consequence, transferee states would require a different basis for perfecting criminal jurisdiction.

A report by the Public International Law and Policy Group and Case Western Reserve University School of Law indicate that there are potential procedural problems with applying international standards in domestic Kenyan courts.[40] The report explores Kenya's assumed responsibility for

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[39] Michael Beck Pemberton, "A Beacon in Uncharted Waters: The International Tribunal for the Law of the Sea as a High Court of Piracy" (One Earth Future Foundation, Working Paper, 2010).

[40] Kimberly M. Brown, J.D. Candidate, 2012, "Memorandum for the Mombasa Law Court of Kenya: Piracy Trials on the potential procedural problems with applying international standards in domestic Kenyan courts," Public International Law & Policy Group and Case Western Reserve University School of Law.

prosecuting apprehended Somali piracy suspects from capturing nation states through bilateral agreements and the conflicts that might arise when incorporating international legal norms. The report also includes a discussion on the evolution of piracy in international law, Kenya's domestication of international maritime law, and the procedural issues that may arise from trying piracy and applying international legal norms in Kenyan domestic courts. In an attempt to explore other possible issues that may arise for the Kenyan courts during the piracy trials, the report provides brief case studies of other domestic courts, which have in the past or are currently adhering to international criminal law standards. Lastly, the report examines ways in which the Kenyan courts can address the obstacles presented.

Rahmonov Alexandr states that national courts are far from dealing with the crime of piracy and the solution could be found only on regional or international level.[41] The author believes that despite the criticism, there is a room for the establishment of an ad hoc international and/or regional tribunal such as the International Criminal Court (ICC) and the tribunals for the former Yugoslavia (ICTY) and Rwanda (ICTR), which could provide the fair, impartial and effective prosecution. The analysis shows that none of the domestic courts can effectively deal with the crime of piracy, when international institutions demonstrate the ability to deliver justice in compliance with the fundamental principles of fair trial and in the most effective way. He further states that some opponents might argue that national courts will not benefit if pirates are tried by the international and/or regional tribunal. However, there is another argument in favour

[41] Rahmonov, Alexandr. 2011. "Piracy off the Coast of Somalia: In Search of the Solution." Cornell Law School Inter University Graduate Student Conference Papers (5-30-2011).Cornell University. https://scholarship.law.cornell.edu/lps_clacp/54 (accessed on 8th September, 2018).

of those supporting the idea, namely, the legacy or highly developed body of law that will serve for years helping national courts to prosecute pirates in the most productive way. Finally, the author augments the need for co-operation which seems to be the most important part for achieving the effective result. Only working in close collaboration, the states will be able not only to eliminate the global phenomenon of piracy, but also strengthen their economic and military co-operation. Both developed and developing countries would benefit from the joint efforts, as the former will secure the maritime routes, when the latter will receive significant financial and logistic support necessary for the capacity building and strengthening their judicial and penitentiary systems capacity.

Sebastian Stjärneblad takes 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 where he avers that international criminal law may be undermined and subjected to mistrust.[42] 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.

J. Ashley Roach seeks to illuminate related issues with a view to improving counter piracy action.[43] The author deals with specific issues in the international law of piracy and related international criminal law instruments as they affect the counter piracy efforts off the coast of

[42] Sebastian Stjärneblad, "The Regional Prosecution Model between Kenya and the European Union: Implications on International Criminal Law" (2014).

[43] Roach, J. (2010). Countering Piracy off Somalia: International Law and International Institutions. *American Journal of International Law,* Vol. 104, No. 3 (July 2010), pp. 397-416.

Somalia. The author then discusses the role international institutions have played and concludes with a discussion on the role of national legislation in suppressing piracy.

Danielle Ireland-Piper explains the distinction between prescriptive, enforcement and adjudicative jurisdiction, sets out some of the historical developments of extraterritorial jurisdiction, and introduces the principles of extraterritorial jurisdiction.[44] The author then identifies some of the ways in which the rights of individuals can be undermined by assertions of extraterritorial criminal jurisdiction. Finally, he considers whether the abuse of rights doctrine might usefully regulate the relationship between a state's right to assert extraterritorial jurisdiction and the rights of individuals.

James Thuo Gathii examines Kenya's decision to receive and prosecute piracy suspects, as well as the important new Merchant Shipping Act of 2009, which confers on Kenyan court jurisdiction over non-nationals for piratical acts committed extraterritorially.[45] The author discusses previous piracy prosecutions in Kenya, followed by the structure and jurisdiction of Kenyan courts. He then discusses the offense of piracy *jure gentium* in the Kenyan Penal Code and the jurisdiction of Kenyan courts to undertake these prosecutions under both international and Kenyan law is analyzed. He then concludes that the lack of a nexus between non-national pirates captured by third States in the high seas provides significant challenges to justifying

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[44] Ireland-Piper, Danielle, Prosecutions of Extraterritorial Criminal Conduct and the Abuse of Rights Doctrine (September 26, 2013). Utrecht Law Review, Vol. 9, No. 4, p. 68-89, September 2013. Available at SSRN: https://ssrn.com/abstract=2334638 (accessed on 11th September, 2018).

[45] James Thuo Gathii, "Jurisdiction to Prosecute Non-National Pirates Captured by Third States under Kenyan and International Law", 31 Loy. L.A. Int'l & Comp. L. Rev. 363 (2009).

universal jurisdiction over pirates in Kenya. All the piracy suspects being tried in Kenya were captured by third States that then handed them over to Kenya for prosecution.

Paul Musili Wambua discusses Kenya's new maritime legislation and argues that while the legislation faces challenges, it should be replicated by all member states of International Maritime Organization.[46] The author opines that the Kenyan maritime legislation not only grants extra territorial jurisdiction to national courts, but also domesticates comprehensively the relevant key provisions in the fight against piracy found in the United Nations Convention on the Law of the Sea,[47] the International Convention for the Safety of Life at Sea 1974 (the SOLAS Convention 1974),[48] Code of Conduct Concerning the Repression of Piracy and Armed Robbery against Ships in the Western Indian Ocean and the Gulf of Aden (The Djibouti Code of Conduct),[49] and the International Ship and Port Security Code (the ISPS Code).[50]

Jonathan Bellish discusses the jurisprudence of several international criminal tribunals to identify characteristics that could be used to differentiate low-level pirates from pirate leadership, a

[46] P.M.Wambua, 'The jurisdictional challenges to the prosecution of piracy cases in Kenya: mixed fortunes for a perfect model in the global war against piracy' [2012] WMU J Marit Affairs 95.

[47] United Nations Convention on the Law of the Sea (adopted 10 December 1982, force entered into force on 16 November 1994); 1833 UNTS 397.

[48] International Maritime Organization (IMO), International Convention for the Safety of Life At Sea, 1 November 1974; 1184 UNTS 3; available at: http://www.refworld.org/docid/46920bf32.html (accessed 11th September 2018).

[49]International Maritime Organisation, 'Djibouti Code of Conduct' (www.imo.org 2014) <http://www.imo.org/OurWork/Security/PIU/Pages/DCoC.aspx (accessed 11th September 2018).

[50]International Maritime Organisation, 'ISPS Code' (www.imo.org 2014) <http://www.imo.org/ourwork/security/instruments/pages/ispscode.aspx (accessed 11th September 2018).

necessary first step to any shift in strategy.[51] From there, the author describes the options available to those actors interested in pursuing such a strategic shift, noting that piracy's status as the paradigmatic crime of universal jurisdiction under international law provides policy makers with an exceptional breadth of available options. Based on international law's permissiveness in this regard, the author concludes that whatever the structure decided upon by the relevant stakeholders, it should be developed in the service of sustained multilevel cooperation, the lack of which is the true stumbling block to the targeted investigation and prosecution of pirate leadership.

Douglas Guilfoyle provides a synopsis of current international efforts to prosecute suspected Somali pirates and provides options for further judicial/prosecutorial avenues that may be invoked to combat this menace.[52]

As evidenced from the review above, quite a lot has been written on the crime of piracy. Most of the research above was triggered by the incidences of piracy off the coast of Somalia. The concept of universal jurisdiction has been broadly discussed with piracy being the oldest crime for which universal jurisdiction was applied. The UNCLOS Convention has defined the crime of piracy in Article 101, however, states like Kenya have prosecuted and convicted alleged criminals for the crime of piracy without addressing the existence of the elements necessary for

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[51] Jonathan Bellish., "The Systematic Prosecution of Somali Pirate Leadership and the Primacy of Multi-Level Cooperation" http://www.law.du.edu/documents/ved-nanda-center/SystematicProsecutionPaperDU.pdf.

[52] See written evidence from Dr. Douglas Guilfoyle: International cooperation in the prosecution of Somali pirates, Testimony before the UK House of Commons (accessed on 11th September, 2018), http://www.publications.parliament.uk/pa/cm201012/cmselect/cmfaff/writev/1318/ m09.htm.

piracy to occur as provided for in Article 101 of UNCLOS hence a gap in the existing literature which this study seeks to address.

1.5 Research Questions

This study seeks to answer the following questions:

a) Were the criminal activities off the coast of Somalia piracy or acts of robbery against ship?

b) Did the prosecution and conviction of alleged Somalia criminal offenders for the crime of piracy in Kenya courts conform to the definition of piracy in international legal instruments?

1.6 Objective of the Study

The objective of the study is to examine the legal and institutional frameworks relating to the crime of piracy, with particular emphasis on acts of alleged piracy off the coast of Somalia and the prosecution of the perpetrators thereof.

1.7 Justification of the Study

Kenya became a famous destination for the prosecution of pirates arrested in the high seas by third party states. This practice followed the adoption of UN Security Council Resolution 1851 (2008), which urged states to enter into an agreement with regional states for facilitating the process of prosecution.[53] Pirates were prosecuted under the repealed provision of the Penal Code.

[53] UN Security Council, Security Council Resolution 1851 (2008), on fight against piracy and armed robbery at sea off the coast of Somalia, 16 December 2008, S/RES/1851 (2008), http://undocs.org/S/RES/1851(2008) (accessed 11th September, 2018).

Subsequently, Kenya enacted the Merchant Shipping Act, 2009 to be able to comprehensively cover and prosecute crimes of piracy.

The Merchant Shipping Act, 2009, domesticated all key international conventions aimed at curbing piracy and other forms of insecurity at sea. The UNCLOS has provisions which require states to exercise universal jurisdiction in instances where they have actual custody of the pirates, and confers jurisdiction to the state that carried out the seizure.

This research is necessary since it analyses in detail the international legal and institutional frameworks to fight piracy. Inherent weaknesses within the legal instruments are highlighted and recommendations made on the basis of those findings. The research also addresses the necessary institutional reforms needed to effectively combat this crime. The study, in interrogating the efficacy of the international law regime on piracy, seeks to identify weaknesses and suggest necessary reforms needed in the fight against piracy.

1.8 Research Hypothesis

The study tests the hypothesis that the suspected Somali criminals off the coast of Somalia were prosecuted and convicted on a wrong charge of piracy instead of robbery against ships, since the elements necessary to uphold the charge of piracy as provided for in UNCLOS were not present.

1.9 Scope and Limitation

This study will limit itself to the applicability of international legal and institutional frameworks to fight piracy off the coast of Somalia.

1.10 Research Methodology

The research methodology applied in this study will involve secondary data. Data will be collected from case law and judicial decisions on the topic under study. Case law will be picked randomly from national jurisdictions and international tribunals. The secondary data collection technique will entail going through the relevant books, articles, journals, conference papers and information from the internet on interpretation of the topic under study.

1.11 Chapter Breakdown

This study shall consist of five key chapters.

Chapter One: Introduction

The first chapter introduces the topic under study. It sets out the agenda of the study, the research questions, problem statement, objectives, the methodology to be employed, hypothesis, justification, background, scope and limitations.

Chapter Two: Historical Development of the Law on Piracy

This chapter will discuss the law of piracy by tracing its origins and historical development. The chapter will provide a clear insight of the origins of universal jurisdiction from medieval times to its current development in the 21st century.

Chapter Three: Analysis of International Legal Instruments on Piracy

The Third chapter will analyse the international conventions on piracy in the fight against Somali criminal activities and the legal challenges that emerge in prosecuting pirates off the coast of Somalia.

Chapter Four: Kenya's Legislative Framework on Piracy and in Particular Exercise of Jurisdiction

This chapter will examine Kenya's legislative framework on piracy in relation to its jurisdiction to facilitate the prosecution of piracy suspects for crimes committed off the coast of Somalia. It will also interrogate the extent to which Kenya's legislative framework has incorporated international standards on the crime.

Chapter Five: Summary of the Findings, Conclusion and Recommendations

The fifth chapter will discuss the conclusion of the study and provide recommendations which will include inquiring into other available options that may be invoked. It will analyse the summary of the findings.

CHAPTER TWO
HISTORICAL DEVELOPMENT OF THE LAW ON PIRACY

2.1 Introduction

Jurisdiction was once primarily understood by reference to geographical borders. However, assertions of jurisdiction over universal and extraterritorial conduct have become increasingly frequent in the twenty-first century. Jurisdiction sits at the crossroads of domestic and international law, and can be controversial. This is in part because states may enjoy competing claims to jurisdiction, but also because the rights of individuals can be compromised. This chapter will set out and trace the historical development of the law on piracy to its current state with a view to establish the applicability of jurisdiction to piracy.

2.2 Historical Development of the Law on Piracy

The word pirate itself, deriving from the Greek word *peirato* and the Latin word *pirata* was in classical times often used to describe brigands and other marauders on land, or essentially any group that did not formally declare war before attacking. Further, one might even argue that given the Roman principle of *mare nostrum,*[1] the Roman response is tantamount to a mere territorial claim of jurisdiction. Judges and jurists frequently refer to pirates as *hostis humani generis*, a phrase purportedly coined by ancient Roman Marcus Tullius Ciceroin condemnation of piracy.[2]

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[1] *Mare nostrum* is Latin for our sea and illustrates Rome's attitude in respect to the Mediterranean, http://www.mediterranean-yachting.com/Hist-7.htm (accessed on 12th September, 2018)

[2] Cicero famously declared pirates to be *hostis humani generi*, meaning "enemy of all mankind". In so declaring, Cicero and the Romans introduced the element of universal jurisdiction into the law of piracy.

Beck Pemberton[3] in his writing states that Hugo Grotius did refer to pirates as the common enemy of mankind the reverence with which jurists refer to Grotius for justification of universal jurisdiction over piracy. Similarly, his quintessential work, *Mare Liberum,*[4] which argued that the seas were insusceptible to sovereign claims or territorial delimitation, has clearly been usurped by the advents of the Geneva Convention on the High Seas (HSC)[5] and UNCLOS,[6] which delimit the territorial seas, contiguous zones and exclusive economic zones that coastal states may claim off their shores.

Eugene Kontorovich,[7] citing Emerich de Vattel, further argues that Grotius use of *hostis humani generis* has been long misunderstood. He suggests that Grotius was referring to military rules of engagement, and not to the criminal jurisdiction of any court.[8] Aside from jurisdictional

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[3] See Article by Beck Pemberton., "Pirate Jurisdiction: Fact, Fiction, and Fragmentation in International Law" (2011) Tulane University Law School

[4]Earlier in the 17th century, Hugo Grotius published his seminal work, "Mare Liberum." Under this view, the sea should be open to all states for exploration and trade, irrespective of naval capabilities. Mare Liberum revolved around two key principles: first, that "the High Seas were laissez-faire domains to be used by all nations," and second, that no state could claim these as their own. Although published earlier than Mare Clausum, Mare Liberum did not gain traction until much later when the rest of Europe began to engage in trade. Due in part to an increase in international commerce, Mare Liberum continues to govern the high seas. Despite the popularity of Mare Liberum, sovereignty over territorial waters nevertheless remained an important concern. States continued to recognize coastal states' right to protect waters extending from their coasts, despite widespread acceptance of the freedom of the high seas. Traditionally, this protection extended only three miles from the shore, since this was the maximum distance that could be reached by a cannon. The current laws governing the sea evolved from the struggle between those espousing the freedom of the seas and those championing sovereign dominion over them. See https://opinion.inquirer.net/96462/unclos-mare-liberum-or-mare-clausum#ixzz5QtReo1sE (accessed on 12th September, 2018)

[5] United Nations Convention on the High Seas (Geneva, 29 April 1958, entered into force 30 September 1962) 13 UST 2312; 450 UNTS 11 (HSC).

[6] United Nations Convention on the Law of the Sea (adopted 10 December 1982, entered into force entered into force on 16 November 1994); 1833 UNTS 397.

[7]Eugene Kontorovich, "The Piracy Analogy: Modern Universal Jurisdiction's Hollow Foundation", 45 HARV.INT'L L.J. 183, 184 (2004).

[8]*Hostis* means enemy in the military sense. Its application to pirates stemmed from the theory that a nation's vessels could attack pirates as if they were military enemies, even absent a declaration of war or any formal hostilities. The

overreaching, the label of *hostis humani generis* has also had the effect of dehumanizing pirates as the common enemy of mankind. This would connote some sort of bestial nemesis perpetrating the gravest of crimes against all humanity. Historically, however, piracy was not among the crimes most vilified.[9] Even in Grotius' day, the difference between pirate and privateer[10] was essentially a technicality, and made more indistinct by the frequent transitions men would make between those professions. In the modern context, as we are yet plagued by far graver crimes than piracy, the continued reference to pirates as *hostis humani generis* misplaces the crime along any moral spectrum that we as a civilized people might share.

However, piracy's status as an international criminal offence (*jure gentium*) has never been clearly established. The divergent positivist and naturalist approaches of Gentili and Grotius, respectively, to law and, consequently, to piracy *jure gentium*, has a huge bearing on the application of the principle of universal jurisdiction deriving from it.

2.2.1 Roman Empire Circa 60-70 BCE

Piracy, despite not always having been termed as such, has existed for as long as trade ships have navigated the oceans. Some trace piracy as far back as 1190 B.C. when ship battles in the Mediterranean Sea were common.[11] The term *peirates* (pirates) was likely only first coined by the

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term's provenance has long been forgotten by all but a few scholars of piracy and the law of war, but it was certainly understood by Vattel, a close reader of Grotius.

[9]As per Rubin piracy was regarded as belonging to a lesser, ordinary class of evils, more like murder than war crimes. Piracy was regarded as heinous, in a weak sense, along with many other offenses. It is hard to see how this could provide for singling out piracy as the sole universal offence.

[10]An armed ship that is privately owned and manned, commissioned by a government to fight or harass enemy ships

[11] Philip de Souza, Piracy in the Graeco-Roman World (Cambridge University Press, 1999) 15.

Greeks much later, around 500-300 B.C. To the Romans, pirates were not just ship-robbers but also undesirable groups on land who essentially practiced banditry.

In terms of how the law was used to respond to piracy, since Roman times and the work of Cicero pirates have essentially been known as *hostes humani generis.*[12] On the basis of Cicero's work, Grotius (1583-1645) used the classification of *hostes humani generis* to advance the notion of universal jurisdiction.[13]The status of *hostes humani generis* meant pirates were stripped of any national affiliation and were thus beyond the protection of any state. This granted states universal jurisdiction over pirates. Pirates captured on the high seas could be tried and punished by any state, regardless of whether they were a national of that state or had attacked a flag ship of that state. The creation of universal jurisdiction was revolutionary and marks piracy's most significant contribution to international law.[14]

There is widespread agreement that the term *hostis humani generis*, which is often cited as the basis for piracy *jure gentium*, was used by Cicero to describe pirates as the Roman Empire knew them and translates roughly to mean 'enemies of all mankind'.[15] However, the context and legal

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[12] M. Tullius Cicero, *De Officiis* (Walter Miller trans, Heinemann, 1913 ed) Book III, [107] at 385.

[13] Hugo Grotius, *The Rights of War and Peace, Including the Law of Nature and of Nations* (A.C. Campbell trans, Boethroyd, 1814 ed) [

[14] M. Cherif Bassiouni, „The History of Universal Jurisdiction and Its Place in International Law" in Stephen Macedo (ed), *Universal Jurisdiction: National Courts and the Prosecution of Serious Crimes Under International Law* (University of Pennsylvania Press, 2004) 39, 47.

[15] Milena Sterio, 'Fighting Piracy in Somalia and elsewhere: Why more is needed' (2009) 33 *Fordham International Law Journal* 372, 376; Donald P. Paradiso, 'Come All Ye Faithful: How the International Community has Addressed the Effects of Somali Piracy but Fails to Remedy its Cause' (2010) 29 *Penn State International Law Review* 187, 194; Douglas R. Burgess, '*Hostis Humani Generi*: Piracy, Terrorism and a New International Law' (2005) 13 *University of Miami International & Comparative Law Review* 293, 302; Lucas Bento, 'Toward an International Law of Piracy Sui Generis: How the Dual Nature of Maritime Piracy Law Enables Piracy to Flourish' (2011) 29 *Berkeley Journal of*

implications of this assertion has been a matter for debate. There has been difficulties of differentiating between the political and legal definitions of this phrase and its implications.[16] The varied debate were espoused by two schools of thought.

There are those who assert that the Roman Empire claimed dominion in a municipal criminal sense over pirates. They often do so without considering the historical context of the phrase *hostis humani generis*; they assume that the understanding of the phrase came into being during the 16th and 17th centuries.[17] Often this line of argument is linked to the inference that piracy and the jurisdiction afforded to it are based on the heinousness of the crime.

By contrast, there are those who hold the stance that pirates under Roman law were communities existing in a state of constant legal war with the world make this assertion on the basis of a detailed examination of the circumstances of counter-piracy actions undertaken by the Roman military. The most notable historical action was the campaign against the Cilician raiding communities by Pompey, circa 67 BCE. During this campaign the Roman armies engaged the pirates not as criminals to be punished but as a sovereign enemy to be conquered for the good of the Empire. The argument that these pirate communities were viewed as sovereign nations to whom the laws

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International Law 399, 401; Joshua Michael Goodwin, 'Universal Jurisdiction and the Pirate: Time for an old couple to part' (2006) 39 *Vanderbilt University Journal of Transnational Law* 973, 978 979.

[16] Ömer F. Direk, Martin D. A. Hamilton, Karen S. Openshaw and Patrick C. R. Terry, 'Somalia and the Problem of Piracy in International Law' (2010) 6(24) *Review of International Law and Politics* 115, 123; Niclas Dahlvang, 'Thieves, Robbers & Terrorists: Piracy in the 21st Century' (2006) 4 *Regent Journal of International Law* 17,19.

[17] R. Burgess, '*Hostis Humani Generi*: Piracy, Terrorism and a New International Law' (2005) 13 *University of Miami International & Comparative Law Review* 293, 302

of war applied is supported by the historical evidence that the campaign was ended not by prosecutions but a negotiated surrender and peace agreement.[18]

Rubin argues that the reason a state of permanent war existed within communities that were referred to as pirates was because they pursued an economic course of raiding and other warlike activity without any formal declaration of war, something that in the Empire required a formal, multi stage religious and political ceremony.[19] It was in this context that Cicero defined them as *hostis humani generis* and it was their failure to formally declare war before engaging in warlike action which meant that the Empire was under no obligation to do so either. In this context, it is understood that those who had been captured in marauding actions by piratical communities became legal slaves, making it difficult to read *hostis humani generis* as referring to a municipal criminal jurisdiction. The argument in support of reading Cicero's assertions as referring to a state of legal war is that Rome tended to attached the term 'pirate' to any state or community which opposed the empire. This makes it difficult to argue that they were asserting a municipal criminal jurisdiction over the world at large on the basis of a group's opposition to Roman rule.[20]

The meaning of the definition *hostis humani generis* in relation to pirates has by no means remained static throughout history however; it is clear that in the context of its origin in the Roman Empire, via Cicero, it referred to a state of legal war rather than criminals who were subject to a

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[18] James Kraska, *Contemporary Maritime Piracy International Law, Strategy, and Diplomacy at Sea* (Praeger Publishing, 2011) 6–7

[19] Alfred P Rubin, *The Law of Piracy* (US Naval War College Press, 1988) 83-84

[20] James Kraska, *Contemporary Maritime Piracy International Law, Strategy, and Diplomacy at Sea* (Praeger Publishing, 2011) 6–7

universal jurisdiction of municipal law.[21] This understanding would change as the phrase was revitalized in the late 16th century, as will be explored below.

2.2.2 16th and 17th Century

The experience of England in the 16th and 17th centuries significantly shaped how piracy is viewed today. During this period the use of letters of marque and reprisal were commonplace, allowing holders to recapture goods taken by foreign nationals unlawfully on behalf of the Crown. At the same time, the Barbary States engaged in marauding and slave taking with the blessing of the Ottoman Empire, a practice that branded them, in political rhetoric, as pirates.[22] During this period the term 'pirate' ceased to hold its historical legal meaning (a state or community in a state of perpetual war by virtue of its conduct) and first became synonymous with privateering, then later to mean privateering without, or in excess of, a commission. Rubin argues that this flexible use of the term 'pirate' in political rhetoric and everyday vernacular caused the erosion of its classical legal meaning.

In 1569 piracy moved beyond the realm of rhetoric and began its re-entry into the legal sphere when Queen Elizabeth I proclaimed that all who practiced piracy (in the context of actions in excess of a valid commission or without a commission) were beyond her protection and were to be lawfully taken and punished by whosoever should encounter them.[23] This proclamation was

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[21] Tamsin Paige, 'Piracy and Universal Jurisdiction' 12 Macquarie Law Journal 131 (2013)

[22] Lucas Bento, 'Toward an International Law of Piracy Sui Generis: How the Dual Nature of Maritime Piracy Law Enables Piracy to Flourish' (2011) 29 *Berkeley Journal of International Law* 399, 401

[23] Queen Elizabeth I, 'A Proclamation Against the Maintenance of Pirates' (1569) Renascence Editions, https://scholarsbank.uoregon.edu/xmlui/bitstream/handle/1794/709/proclamation.pdf?sequence=1 (accessed on 26th October, 2018).

followed in 1577 with the Warrant to the Warden of Cinque Ports which set out that English common law was to be followed by the Admiralty when goods changed hands as a result of said counter-piracy operations. Under the Warrant, pirates covered not only those who engaged in plunder on the seas without a commission but also to British subjects who took a foreign commission and smugglers.[24] From these developments it became a legal requirement to have a crown licence to hunt pirates, with most merchant vessels holding a licence in case they should be set upon, as such action was considered legal enforcement and to do so without crown authorization would be unjust.[25] As an extension of the rise in counter-piracy action at the end of the 16th century, it was declared in 1589 that all goods seized from pirates must be submitted to *in rem* proceedings in an Admiralty prize court to determine the lawful title; failure to do so resulted in the buyer receiving no title and the seizer having their commission revoked.[26]

Gentili, resurrected the *hostis humani generis* concept when considering pirates.[27] In this context he was not referring to communities or states who engaged in the economic practice of raiding and thus in a state of constant lawful war, but to individuals who were subject to summary execution for unlawful acts of plundering. Gentili's reasoning for this position was that only a prince (or

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[24] Lawrence Azubuike, 'International Law Regime Against Piracy' (2009) 15 *Annual Survey of International & Comparative Law* 43, 45

[25] Michael Bahar, 'Attaining Optimal Deterrence at Sea: A Legal and Strategic Theory for Naval Anti-Piracy Operations' (2007) 40(1) *Vanderbilt Journal of Transnational Law* 1, 12.

[26] Michael Bahar, 'Attaining Optimal Deterrence at Sea: A Legal and Strategic Theory for Naval Anti-Piracy Operations' (2007) 40(1) *Vanderbilt Journal of Transnational Law* 1, 12. Gerry J Simpson, *Law, War & Crime: War Crimes Trials and the Re-invention of International Law* (Polity Press, 2007) 168; Eugene Kontorovich, '"A Guantánamo on the Sea": The Difficulty of Prosecuting Pirates and Terrorists' (2010) 98 *California Law Review* 243, 257

[27] Alberico Gentili, *Three Books on the Law of War* (John C Rolfe trans, Clarendon Press, 1931) 423

theoretically a sovereign by a different title) had the legal authority to go to war. Therefore, it was impossible for a pirate to be in a state of lawful war, making their actions criminal and synonymous with brigandage and robbery. This also had the effect of ending the concept of the 'pirate state' in a legal sense. This is supported by the fact that goods captured by Barbary corsairs were considered to have transferred title legally in the same manner as a wartime capture, although such a state remained in political rhetoric for some time.[28]

Grotius on the other hand, paved the way for universal jurisdiction over piracy much more profoundly than Gentili. He argued that the term 'piratical' could not apply to states unless the state existed for the primary purpose of engaging in wrongdoing. Given that states existed for many legitimate purposes, and the pirate like activity was but a part of the activity, they could not be considered to be pirates in the legal sense.[29] In this vein Grotius supported the notion that goods captured by states engaging in such activity amounted to a legal capture and legitimate transfer of title. By inference from his arguments regarding states being legally considered pirates, Grotius consigned piracy to a crime committed by individuals in breach of natural law. In this work, Grotius argued that sovereignty on the high seas was gained in the same manner as it was on land, through the use of military force and the exercise of effective control. As an extension of this premise, navies could justifiably capture pirates and enforce their municipal law, acquiring jurisdiction through the sovereignty gained with an exercise of effective control through use of force.

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[28] Edward Coke, *The Third Part of the Institutes of the Laws of England*, (Garland Publishing Company, 1832 Ed, 1979) 113.

[29] Hugo Grotius, *De Jure Belli Ac Pacis Libri Tres* (Francis W. Kelsey et al. trans., 1925) 631.

The result of these arguments was that foreign individuals captured in counter-piracy actions who could not show a valid commission (entitling them to be treated as enemy combatants) became subject to the municipal law of England.[30] In most cases this exercise of jurisdiction usually resulted in the captured pirates being summarily executed.[31] Kontorovich argues that the branding of pirates as *hostis humani generis* through this period in history was used to apply the legal disabilities of both combatants and civilian criminals to pirates while avoiding granting them the legal protections of either category.[32]

This legal debate about piracy was revisited in the later part of the 17th century by Molloy, although by this stage the phrase *hostis humani generis* had become firmly embedded in the above noted concepts of English municipal law. Molloy, as a general rule, argued that traditional concepts of jurisdiction must apply to piracy for it to fall within English jurisdiction. However, he qualified this position by arguing that, where acts of piracy occur beyond state jurisdiction, anyone who captures the perpetrators is legally justified in subjecting the pirates to summary execution by hanging on the basis that piracy was a breach of natural law.[33] The implication of Molloy's work is that the jurisdiction afforded to piracy is grounded in the notion of the heinousness of the crime.

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[30] Joshua Michael Goodwin, 'Universal Jurisdiction and the Pirate: Time for an old couple to part' (2006) 39 *Vanderbilt University Journal of Transnational Law* 973, 978–979.

[31] Gerry J Simpson, *Law, War & Crime: War Crimes Trials and the Re-invention of International Law* (Polity Press, 2007) 168

[32] Eugene Kontorovich, '"A Guantánamo on the Sea": The Difficulty of Prosecuting Pirates and Terrorists' (2010) 98 *California Law Review* 243, 257

[33] Charles Molloy, *De jure maritimo et navali, or, A Treatise of Affairs Maritime, and of Commerce* (T Whieldon and T Waller, 1778).

Jenkins adopted a different approach to Molloy, one that is very similar to the modern day law of piracy and consistent with the legal practice of the time.[34] He argued that pirates were *hostis humani generis* and as such all peoples were commissioned to legally capture and punish pirates, an approach that was the norm at the time.[35] Where his views became progressive was that he argued first that the Admiralty had jurisdiction over all of the high seas, and that this jurisdiction was concurrent with other nations. He then proceeded to argue that pirates by virtue of their actions have removed themselves from the protection of their sovereign, making them essentially stateless. By contrast, privateers engaging in the same activity, but with a sovereign commission, are acting as an arm of the state, thus the state and not the individual is responsible. When these two arguments by Jenkins are considered together we end up with a theory of concurrent municipal jurisdiction for each nation to enforce its municipal piracy laws based upon positivist notions of sovereignty and jurisdiction, rather than on the vaguer notions of natural law and heinousness which Molloy argued in favour of contemporaneously. It was the arguments of Jenkins that led to pirates occupying a unique position in international law as individuals who derived their legal personality in relation to their personal actions rather than as an extension of their state.[36]

2.2.3 19th Century

The 19th century brought about an end of privateering as well as the cessation of piracy as a menace on the high seas. It was also a period where the rhetoric of pirates was more prevalent than any

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[34] Brian Jenkins, International Terrorism: *A New Mode of Conflict,* in International Terrorism and World Security 21 *(David Carlton &Carlo Schaerf eds., 1975).7*

[35] William Wynne, *The Life of Sir Leoline Jenkins: Judge of the High-Court of Admiralty* (Gale Ecco, Print Editions, 2010) vol. 1 xxxvi.

[36] Donald P. Paradiso, 'Come All Ye Faithful: How the International Community has Addressed the Effects of Somali Piracy but Fails to Remedy its Cause' (2010) 29 *Penn State International Law Review* 187, 194

legal definitions, such definitions often becoming lost or languishing in obscurity. This period saw the United States at war with the Barbary States, the 1856 Paris Declaration banning the use of privateers and a naval dominance by the British Empire that was so overwhelming that it was used to justify British Imperial Law as International Law in regards to piracy.[37]

Wooddeson expanded the definition of the law of nations to mean not only those laws that are common between all states (the classic natural law definition) but to also include the law between states inter se, which at the time was predominantly custom but also incorporated a degree of treaty law.[38] He then proceeded to define piracy as falling into this broad category, strengthening the conception of piracy being a crime *jure gentium* rather than simply a crime municipally with concurrent jurisdictions.

2.2.4 20th Century

In 1927, the Permanent Court of International Justice (PCIJ) delivered judgment in the *Lotus* case[39]. This decision was a turning point in jurisdictional jurisprudence. The PCIJ considered whether Turkey, in instituting criminal proceedings against a French national over a collision on the high seas between a Turkish ship and a French ship resulting in the death of Turkish nationals, acted in conflict with international law. The French Government submitted that the Turkish courts, in order to have jurisdiction, must be able to identify a specific title to jurisdiction given to Turkey in international law. Conversely, the Turkish Government took the view that it inherently had

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[37] Alfred P Rubin, *The Law of Piracy* (US Naval War College Press, 1988).

[38] Richard Wooddeson, 'Of Captures by Sea', *Lectures on the Law of England*, vol 1, 434, 434.

[39] S.S. Lotus (Fr. v. Turk.), (1927) P.C.I.J. Ser. A No. 10 (Sept. 7)

jurisdiction, provided such jurisdiction did not come into conflict with a principle of international law. The PCIJ stated:

> 'International law governs relations between independent States. The rules of law binding upon States therefore emanate from their own free will as expressed in conventions or by usages generally accepted as expressing principles of law and established in order to regulate the relations between these co-existing independent communities or with a view to the achievement of common aims.'

And, while observing that jurisdiction is certainly territorial, the PCIJ found:

> 'It does not, however, follow that international law prohibits a State from exercising jurisdiction in its own territory, in respect of any case which relates to acts which have taken place abroad, and in which it cannot rely on some permissive rule of international law.

Finally, the Court concluded as follows:

> "Far from laying down a general prohibition to the effect that states may not extend the application of their laws and the jurisdiction of their courts to persons, property and acts outside their territory, it leaves them in this respect as regards other cases, every State remains free to adopt the principles which it regards as best and most suitable".

In this way, the PCIJ established a presumption in favour of a nation's extraterritorial jurisdiction, in the absence of a prohibitive rule. Following the decision in *Lotus*, domestic courts began to grapple with the consequences of assertions of extraterritorial jurisdiction. As economies became increasingly interconnected there was an increased interest in regulating cross-border activities, such as transnational crime and the activities of multinational corporations. In some cases, the interest in extraterritoriality became associated with attempts to enforce human and indigenous rights.

The prosecution of war crimes after World War II was also pivotal in the development of extraterritorial jurisdiction. The adjudication of Nazi war crimes in the Nuremberg tribunal transformed our understanding of jurisdiction. The trials are often described as an exercise of extraterritorial jurisdiction that sought to bring accused war criminals to account on behalf of the entire world community of civilized nations. Although it has been argued that the allied forces were in fact exercising territorial jurisdiction as sovereigns over occupied territory, it is widely accepted that the Nuremberg trials were an exercise of extraterritorial jurisdiction based on the universality principle.[40] Following Nuremberg, Israel's prosecution of Eichmann as a member of the Gestapo for his involvement in the holocaust in *Attorney General of the Government of Israel v Eichmann*[41], is also widely cited as an example of extraterritorial jurisdiction. Nonetheless, as late as 1990, the scholar Frederick Mann observed:[42]

> 'Normally no State is allowed to apply its legislation to foreigners in respect of acts done by them outside the dominions of the sovereign power enacting. That is a rule based on international law, by which one sovereign power is bound to respect the subjects and the rights of all over sovereign powers outside its own territory.'

Although piracy has existed for a very long time, there is no clear cut definition of what constitutes piracy. This definitional complexity partly stems from the fact that some scholars, such as Phillip De Souza[43] and Alfred Rubin,[44] do not regard piracy as an international crime. Alfred Rubin views

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[40] Ireland-Piper, Danielle, Prosecutions of Extraterritorial Criminal Conduct and the Abuse of Rights Doctrine (September 26, 2013). Utrecht Law Review, Vol. 9, No. 4, September 2013.

[41] Attorney-General of the Government of Israel v. Eichmann (Israel Sup. Ct. 1962), Int'l L. Rep., vol. 36,p. 277, 1968

[42] F. A. Mann (1990). Further Studies in International Law, (Oxford: Clarendon Press. 1990. xxiv 400 pp. 40). *International and Comparative Law Quarterly, 39*(4), 956-956.

[43] Philip De Souza, *Piracy in the Graeco - Roman World*, (1st, Cambridge University Press, 2002) 150 - 152

[44] A.P. Rubin, *The Law of Piracy* (2nd, Transnational Publishers, Inc, New York 1998) 294

piracy as solely a municipal law crime, the only question of international law being the extent of a state's jurisdiction to apply its criminal law to an accused foreigner acting outside the territorial jurisdiction of the prescribing state. The League of Nations Committee of Experts for the Progressive Codification of International Law examined the question in 1926. Ambassador Matsuda prepared a brief set of draft articles for discussion, which provoked numerous government responses and a brief debate in and report from the Committee of Experts itself, before the topic was dropped as not being of sufficient practical interest. The report nonetheless had an influence on the Harvard Research in International Law draft convention on piracy in 1932.[45]

In 1932, Harvard University legal researchers concluded that piracy was not an international crime, but was merely a basis for extraterritorial jurisdiction in every state to prosecute suspected pirates. How far that extraordinary jurisdiction was used would depend on the municipal law of the state and not the law of nations. The Harvard Research Group based their conclusion partly on the prevailing orthodox view at the time that international law existed between states only. According to this view, private persons were not regarded as legal persons under international law; that international law only defined duties privileges and powers between states.[46]

The views of the Harvard Research Group influenced the work of the International Law Commission (ILC) in drafting the 1958 Convention on the High Seas. The work of the Harvard Research Group formed an essential theoretical foundation on which the ILC heavily relied on in

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[45]Douglas Guilfoyle, '*The Laws of War and the Fight Against Somali Piracy: Combatants or Criminals?*' (2010) 11 Melbourne Journal of International Law 141, 149

[46]Wambua, Paul Musili. "Prosecution of maritime piracy cases in Kenya: testing the SUA Convention model on piracy prosecution." Acta Criminologica: African perspectives on combatting Maritime Piracy: Special Issue 1 (2014): 76-91.

the preparation of the draft articles of the 1958 Convention on the High Seas. The ILC, however, modified the proposals of the Harvard Research Group for practical and political purposes. The most notable modification was the definition of the conditions under which a state would be conferred with jurisdiction over piracy. In providing that piracy could only occur in the high seas or any place outside the jurisdiction of any country, the ILC effectively made piracy an international crime.

2.3 The Current State of the law on Piracy

The current law of piracy is found in UNCLOS articles 100 to 107,[47] which were directly inserted, verbatim, from the Geneva High Seas Convention of 1958 (GHSC).[48] It is acknowledged that by the time the GHSC was drafted, piracy was considered a historical throwback and sections governing it were included as a matter of historical propriety rather than out of any genuine need.[49] Before the GHSC was drafted there were a number of unsuccessful attempts to codify customary law on piracy *jure gentium.* However, these attempts were considered to be *de lege ferenda*[50] rather than merely a codification of the existing state of the law.

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[47] *United Nations Convention on the Law of the Sea*, opened for signature 10th December 1982; 1833 UNTS 3; (entered into force 16th November 1994) arts 100–107.

[48] *Geneva Convention on the High Seas,* opened for signature 29th April 1958; 450 UNTS 11; (entered into force 30th September 1962) art 14–22.

[49] Robin Geiss & Anna Petrig, *Piracy and Armed Robbery at Sea: the Legal Framework for Counter-Piracy Operations in Somalia and the Gulf of Aden* (2011) 51–52

[50] Lex ferenda is a Latin expression that means "future law" used in the sense of "what the law should be" (as opposed to lex lata - "the current law"). The derivative expression de lege ferenda means "with a view to the future law". The expressions are generally used in the context of proposals for legislative improvements, especially in the academic literature.

The GHSC drew heavily on these prior attempts to codify custom, and also by virtue of the language adopted, cemented the prohibition on privateering from the 1856 Paris Declaration.[51] Articles 100 to 107 of UNCLOS are widely regarded as both the relevant authority defining the crime of piracy *jure gentium* and as a codification of custom on this issue.[52] Before the substantive definition of piracy law is explored it is worth noting that Article 100 of UNCLOS only requires states to cooperate with piracy suppression, with all other counter piracy action being voluntary.[53]

2.4 Principles of Jurisdiction under International Law

Jurisdiction as has been understood, pertains to exercise of authority by a state in various, Judicial, regulatory and legal matters. Further, extra-territorial jurisdiction refers to exercising this jurisdiction over occurrences and actors that are situated outside and beyond the territorial limits of a particular state.[54] A state, thus, can exercise extraterritorial jurisdiction in three ways[55]:

a) Legislative - This is also called the prescriptive jurisdiction, which deals with the ability of a state to prescribe laws for actors and conducts abroad;

b) Enforcement - It concerns with the ability of a state to ensure compliance of its laws; and

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[51] James Kraska, *Contemporary Maritime Piracy International Law, Strategy, and Diplomacy at Sea* (Praeger Publishing, 2011) 6–7.

[52] Diana Chang, 'Piracy Laws and the Effective Prosecution of Pirates' (2010) 33 *Boston College International and Comparative Law Review* 273, 274.

[53] Matthew C Houghton, 'Walking the Plank: How United Nations Security Council Resolution 1816, While Progressive, Fails to Provide a Comprehensive Solution to Somali Piracy' (2008) 16 *Tulsa Journal of Comparative & International Law* 253, 270.

[54] Danielle Ireland-Piper, Prosecutions for Extraterritorial Criminal Conduct and the Abuse of Rights Doctrine, 9(4) UTRECHT L. REV. 74, 68 (Sept. 2013).

[55] J.A. Zerk, Extraterritorial Jurisdiction: Lessons for the Business and Human Rights Sphere from Six Regulatory Areas, Corporate Social Responsibility Initiative Working Paper No. 59, at p. 13 (Harvard University 2010).

c) Judicial - Also known as the adjudicative jurisdiction, it empowers the courts of a state to adjudicate and resolve private disputes with a foreign element.

Under customary international law, states exercise jurisdiction on three main bases: nationality, territoriality, and universality. The nationality principle can provide a state with grounds for jurisdiction where a national is either a victim (passive nationality) or a perpetrator (active nationality). The territoriality principle may be invoked where conduct either takes place within a nation's borders (subjective territoriality), or the effects of the conduct are felt within the borders (objective territoriality). The universality principle is reserved for conduct constituting an international crime. International law also recognizes a protective principle, wherein a state can assert jurisdiction over foreign conduct that threatens national security. There is also some support for an effects principle, which gives jurisdiction over extraterritorial conduct, the effects of which are felt by a state.[56]

Extra-territorial jurisdiction can be exercised by a state on the basis of different principles that exist under International Law. The different principles that can be exercised under the Customary International Law are based on Territoriality, Nationality and Universality.

2.5 Piracy as a crime under International Law

Universal jurisdiction is generally reserved for crimes of an exceptionally serious and heinous nature and the placing of piracy in this category illustrates the extent to which piratical activities were seen as a widespread scourge.

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[56] Danielle Ireland-Piper, Prosecutions for Extraterritorial Criminal Conduct and the Abuse of Rights Doctrine, 9(4) UTRECHT L. REV. 74, 68 (Sept. 2013).

A customary international law regime developed to respond to the threat of piracy in the 19th century. In the 20th century this was codified in the 1958 Convention on the High Seas (HSC)[57] and the 1982 United Nations Convention on the Law of the Sea (UNCLOS)[58], both of which contain provisions recognizing the universal jurisdiction of States to repress piracy and investigate and prosecute its perpetrators. The UNCLOS provisions are considered to be reflective of customary international law on piracy.

Article 100 of the UNCLOS commits States Parties to cooperate in the suppression of piracy on the high seas. Piracy is defined in Article 101 of the UNCLOS as:

(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).

Important elements in the definition are the requirement for two ships or aircraft, the criminal intent, the use of force, the taking over of a vessel against the wishes of its master, and the robbery of cargo, the possessions of those on board, or even the vessel itself, as the ultimate objective. Piracy can only be committed for private ends, so any acts committed for political motives are excluded from the definition. Somali style piracy differs from the traditional concept of piracy

[57] United Nations Convention on the High Seas (Geneva, 29 April 1958, entered into force 30 September 1962); 13 UST 2312; 450 UNTS 11 (HSC).

[58] United Nations Convention on the Law of the Sea (adopted 10 December 1982, entered into force entered into force on 16 November 1994); 1833 UNTS 397.

reflected in the UNCLOS provisions since robbery does not appear to be the major objective of some contemporary Somali pirates, because vessel, crew, and cargo are released after the payment of ransom. However, the taking over of the vessel by force with the intent of obtaining financial gains can be regarded as falling within the definition of piracy. Piracy also extends to the operation of a ship or boat used to commit piratical acts. In the Somali context, this ancillary provision may cover the operations of mother and brother ships.[59]

A point to note is that the term piracy as defined under international law is often applied to piratical type activities which do not strictly fit that definition of piracy. Piracy within the meaning of Articles 100-101 of the UNCLOS, only applies to acts taking place within the exclusive economic zone or on the high seas, not analogous acts within the territorial sea which are subject to the criminal jurisdiction of the relevant coast State rather than the universal jurisdiction of all States. The vast majority of attacks on shipping around the world, including many off the Horn of Africa, tend to take place relatively close to shore, and thus within the territorial seas or archipelagic waters of coastal states. Technically, therefore, the vast majority of piracy-style attacks are not deemed piracy under the UNCLOS definition. The International Maritime Organization (IMO) instead uses the term "armed robbery against ships" to cover piracy-style attacks taking place within the territorial sea. In contrast, the International Maritime Bureau (IMB) has adopted a more all-encompassing definition of piracy as an act of boarding any vessel with the intent to commit theft

[59] See Article by Warner, R. M., "The Prosecution of Pirates in National Courts", presented at the University of Wollongong, Australia: The Emirates Centre for Strategic Studies and Research, Series 109 (2013); HSC, Art. 17, UNCLOS, Art. 103.

or any other crime and with the intent or capability to use force in the furtherance thereof whether within the territorial sea, EEZ or on the high seas.[60]

2.6 Criminalization of Piracy in National Laws

The ability of a State to apply and enforce its own laws against piracy will depend on the existence of applicable provisions criminalizing the relevant piratical acts in the domestic law of the State and its political will to take jurisdiction. Some domestic laws on piracy only provide jurisdiction to the State concerned where the pirate ship or the pirates have the nationality of that State or are in the territory of that State. Samuel Shnider notes that prior to the recent upsurge in Somali piracy there were very few prosecutions in which the court asserted universal jurisdiction over piracy where the prosecuting state had no connection to the offence either as the flag state of the victim vessel or the nationality of the perpetrators or the victims. [61]

In 2010, the UN General Assembly (UNGA) called on member states to take appropriate steps under their national law to facilitate the apprehension and prosecution of those who are alleged to have committed acts of piracy including by adopting the UNCLOS definition in their national criminal code definitions of piracy. The more recent UN Security Council resolutions on Somali piracy have called on member States to criminalize piracy,[62] and the Djibouti Code of Conduct[63] requires regional States to review their national legislation with a view towards ensuring that there

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[60] Robert C. Beckmann, "Combating Piracy and Armed Robbery against Ships in Southeast Asia: The Way Forward," Ocean Development and International Lawvol. 33, no.3 (2002): 319.

[61]Samuel Shnider, *Universal Jurisdiction over Operation of a Pirate Ship: The Legality of the Evolving Piracy Definition in Regional Prosecutions*, 38 N.C. J. Int'l L. & Com. Reg. 473 (2012).

[62]Resolution 2184 (2014) under Chapter VII of the United Nations Charter, UNTS, http://www.un.org/en/ga/search/view_doc.asp?symbol=S/RES/2184%20(2014) (accessed on 15th September, 2018).
[63] International Maritime Organisation, 'Djibouti Code of Conduct' (www.imo.org 2014).

are national laws in place to criminalize piracy. Kenya has reviewed its laws in line with the resolution and enacted the Merchant Shipping Act, 2009 which under Section 360 thereof criminalized piracy.

2.7 Conclusion

From the above discussion, jurisdiction under international law has been one of the most contested and controversial concepts and subjects. Universal jurisdiction by different states has been a regular feature of international law and thus, there are now different principles in place that facilitate such assertion of universal jurisdiction.

Universal jurisdiction in the present day proves to be an effective way in exercising jurisdiction over perpetrators of piracy activities, wherein, the victims are of various nationalities in as much as they are contested and debated principles of jurisdiction. Universal exercise of jurisdiction can prove to be useful in seeking to regulate transnational crimes, such as piracy since piracy is not limited to the territorial limits of any state, thus the relevant legal frameworks should also not be limited to the territorial limits of the state as these crimes are of universal nature and have to be prevented.

It is therefore, clear that the codification of the law on maritime piracy took many years and would not have been realized without the efforts of numerous actors as discussed in this chapter. This was in spite of divergent interests and opinions of the concerned actors. It is these various international conventions that provide the legal backbone for maritime legislation in Kenya in general and piracy in particular.

CHAPTER THREE

ANALYSIS OF INTERNATIONAL LEGAL INSTRUMENTS ON PIRACY OFF THE COAST OF SOMALIA

3.1 Introduction

In efforts to combat piracy, states have adopted conventions and resolutions that address piracy and above all, enacted national laws aimed at bringing suspected pirates to justice. Other than the 1982 UNCLOS[1] that covers the crime of piracy, there is a host of international resolutions dealing with similar offences off the coast of Somalia.[2]

The absence of law enforcement off the Somali coast, together with the damaging effect of the attacks on the shipping industry, has spurred the United Nations and the international community as a whole into action. Since 2008, the United Nations Security Council has adopted twelve resolutions addressing Somali piracy. Consequently, this chapter will be devoted to an analysis of some aspects of these resolutions which aimed both at defining and, in a sense, extending the legal framework for counter-piracy operations and, in particular, for piracy prosecution, and at enhancing cooperation among States.

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[1]United Nations Convention on the Law of the Sea (adopted 10 December 1982, entered into force entered into force on 16 November 1994); 1833 UNTS 397.

[2]UNSC Resolution 1816(2008) of 2 June 2008, para. 7. UNTS

3.2 United Nations Convention on the Law of the Sea (UNCLOS)

Article 101 of UNCLOS defines piracy as follows:

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 intentionally inciting or facilitating an act described in subparagraph (a) or (b).

The definition outlines four elements necessary to identify piracy. The elements are discussed hereunder.

Firstly, piracy consists of unlawful act of violence, which may consist in detention or depredation; the range of acts may encompass assaults, thefts of cash or ships, kidnappings with the purpose to obtain a ransom, or even murder.[3] Secondly, piracy must be committed for private ends, which means that neither ships nor aircrafts on military or government service nor insurgents can commit a piratical act.[4] Besides, this requirement is useful in order to distinguish piracy from maritime terrorism, which is a politically and ideologically motivated act that will be discussed at a later stage. Thirdly, piratical acts must be committed on the high seas or in a place outside the

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[3]Murphy M. N., Small boats, weak states, dirty money: the challenge of piracy, New York, Columbia University Press, 2009, p. 135. See also, KONTOROVICH E., "A Guantanamo on the Sea": the difficulty of prosecuting pirates and terrorists, in KONTOROVICH E, ART S., An empirical examination of universal jurisdiction for piracy, Faculty Working Papers, Chicago, USA, Northwestern University School of Law, 2010, p. 252, retrieved at http://www.californialawreview.org/assets/pdfs/98-1/Kontorovich.pdf on 12 October 2013. (assessed on 19th November, 2018).

[4]Tanaka Y., The international law of the sea, Cambridge, Cambridge University Press, 2012, p. 355.

jurisdiction of any state. Fourthly, piratical acts must be committed from one ship against another ship, this is the two ship requirement.

When dealing with the elements needed to identify piracy under article 101 of UNCLOS, we note that acts of piracy must occur on the high seas. What distinguishes piracy and other forms of maritime terrorism is the location in which acts take place. Acts of piracy can occur only on the high seas while an act of armed robbery at sea for instance can only occur in maritime spaces that are under a state's sovereignty. It is a State's responsibility to suppress acts of armed robbery at sea by enacting proper legislations.

It is important to distinguish the offence of armed robbery at sea and piracy. The International Maritime Organization (IMO), in its Code of Practice for the Investigation of the Crimes of Piracy and Armed Robbery against Ships adopted on 2nd December 2009, defines armed robbery against ships as:[5]

a) any 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 above.

The terminology armed robbery at sea has been used in various UN Security Council resolutions as well as in the text of the Regional Cooperation Agreement on Combatting Piracy and Armed

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[5]International Maritime Organization, Code of Practice for the Investigation of the Crimes of Piracy and Armed Robbery against Ships, IMO Doc. A 22/Res.922 (Jan. 22, 2009), retrieved at http://www.imo.org/Pages/home.aspx, (accessed on 20th November, 2018).

Robbery against ships in Asia (ReCAAP),[6] in the text of the Djibouti Code of Conduct, with exactly the same wording, and it is recognized by the International Maritime Bureau.[7] This common use of the terminology suggests that it is widely accepted as a form of crime at sea.[8]

The majority of piracy like incidents off the coast of Somali take place in territorial or coastal waters. They are legally speaking not acts of piracy at all. The International Maritime Organization commonly classify these attacks as armed robbery at sea. The consequence is that the special jurisdictional rules on piracy are not applicable because the attacks take place in the wrong geographic area. Another element is that no second ship is usually involved. The internal seizure within a ship is not regarded as an act of piracy.

The Security Council endeavored to cope with the growing alarm caused by pirate like criminal activities off the coast of Somalia. It took measures within the framework of international law aimed at remedying the limitations of the abovementioned rules of UNCLOS. The United Nations Resolution 1816 of 2nd June, 2008 and the others which followed it were designed to address the issue of piracy like activities off the Coast of Somalia.

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[6]Article 1(2), ReCAAP, 11th November 2004, retrieved at http://www.recaap.org/, (accessed on 20th November, 2018).

[7]The IMB is a non-profit making organization established in 1981 as a specialized division of the International Chamber of Commerce, www.icc-iccs.org/icc/imb. (accessed on 20th November, 2018).

[8]This was a Sub-regional meeting on maritime security, piracy and armed robbery against ships for Western Indian Ocean, Gulf of Aden and Red Sea States that was held in Djibouti from 26 to 29 January 2009. The Code of Conduct concerning the Repression of Piracy and Armed Robbery against Ships in the Western Indian Ocean and the Gulf of Aden was adopted and signed on 29 January 2009 by the representatives of nine countries -Djibouti, Ethiopia, Kenya, Madagascar, Maldives, Seychelles, Somalia, the United Republic of Tanzania and Yemen. It remains open for signature at the IMO headquarters and has since been signed by a total of 20 out of the 21 countries that are eligible to sign. The meeting also adopted other resolutions on Technical Cooperation and assistance, enhancing training in the region and on expressions of appreciation. Available at, www.imo.org/OurWork/Security/PIU/Pages/DCoC English.pdf, (accessed on 20th November, 2018).

3.3 United Nations Security Council Resolutions

The UN Security Council adopted its first resolution concerning Somali piracy on 2nd June, 2008 and since than it has adopted eleven additional resolutions. There are two overall reasons for this continuous commitment. Firstly, the situation on Somalia's territory concerning the level of disorder and the inability of the then Transitional Federal Government (TFG) to enforce power and create functioning institutions. This situation enabled the creation of any form of organized crime and impeded the assertion of control over Somalia's waters; hence, the upsurge of armed robbery at sea and piracy. Being unable to enforce power, Somalia was equally incapable to combat piracy. Secondly, the increased number of attacks made piracy a major threat to the safety and security of international navigation and maritime trade.

3.3.1 Resolutions 1816, 1836 and 1846

Resolution 1816 was the first resolution adopted on 2nd June, 2008.[9] The resolution, *inter alia*, provides that:

> Affirming that international law, as reflected in the United Nations Convention on the Law of the Sea of 10 December 1982 ("the Convention"), sets out the legal framework applicable to combating piracy and armed robbery, as well as other ocean activities.

With this sentence the Security Council refers in particular to articles 100, 101, and 105 UNCLOS requiring States to cooperate in the repression of piracy, to board, search, and seize suspected pirate vessels, and to arrest suspected pirates with the aim to prosecute them.[10]

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[9]UNSC Resolution No. 1816 of 2nd June 2008, retrieved at http://www.un.org/en/sc/documents/resolutions/, (accessed on 20th November, 2018).

[10]This is explicitly affirmed in other UNSC Resolution No. 1976 of 11th April 2011, and 2015 of 24th October 2011, retrieved at, http://www.un.org/en/sc/documents/resolutions/, (accessed on 20th November, 2018).

The framework of Resolution 1816 is applicable also against armed robbery. As stated earlier, armed robberies are unlawful acts of violence that occur in a State's territorial waters. The Security Council through Resolution 1816, extended the geographical area of intervention for international navies that are authorized to conduct their counter-piracy operations in the territorial waters off the coast of Somalia, in a manner consistent with such action permitted on the high seas with respect to piracy under relevant international law.

The key element in the Resolution is set out in paragraph 7 of Resolution 1816.[11] It copes with the limitation of the definition of piracy to acts perpetrated on the high seas which, makes it inadequate to deal with acts which sometimes take place wholly in the territorial sea, and very often include an attack on the high seas followed by the pirated ship being brought by the pirates into the territorial sea and held for ransom in a port or near the coast, or by the attacking skiffs retreat into the territorial and internal waters of Somalia. Paragraph 7 provides that:

> Decides that for a period of six months from the date of this resolution, States cooperating with the TFG 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:
>
> 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.

The basic effect of these provisions is to make the rules of international law concerning piracy on the high seas applicable also to territorial waters, *inter alia*, permitting pursuit from the high seas

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[11]UNSC Resolution No. 1816 of 2nd June 2008, paragraph 7(a) and (b) retrieved at http://www.un.org/en/sc/documents/resolutions/, (accessed on 20th November, 2018).

into these waters, and clarifying that states acting under these rules within the territorial waters of Somalia may use all necessary means. Ultimately, the Security Council invites all States to cooperate in the determination of jurisdiction, as well as in the investigation and prosecution of those responsible for carrying out acts of piracy and armed robbery off the Somali coast.

Resolutions 1836 and 1846 have not brought about significant changes in terms of relevant authorization for international navies. Resolution 1836, adopted on 7th October 2008, reiterates to a great extent the concerns and requests of Resolution 1816, with two additional matters.[12] Firstly, it highlights that piracy was becoming increasingly violent and organized and the use of mother ships was becoming a common practice for Somali pirates. Secondly, this resolution underlines the conditions essential to create an environment unsuitable for piracy to flourish; that is, Somalia's need of economic and social development, of functioning institutions and rule of law, and respect for human rights.

Resolution 1846 was adopted on 2nd December 2008, and its main objective was extending the authorizations of paragraph 7 of resolution 1816 for twelve additional months.[13]

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[12]UNSC Resolution No. 1836 of 7th October 2008, retrieved at http://www.un.org/en/sc/documents/resolutions/, (accessed on 20th November, 2018).

[13]UNSC Resolution No. 1846 of 2nd December 2008, par. 10, retrieved at http://www.un.org/en/sc/documents/resolutions/, (accessed on 20th November, 2018).

3.3.2 Resolution 1851

Resolution 1851, adopted on 16th December 2008, contains a further extension of the geographical area in which States and international organizations area allowed to act in order to combat piracy and armed robbery at sea.[14] In fact, States and international organizations may undertake all necessary measures that are appropriate in Somalia, pursuant to the request of the Transitional Federal Government. This geographical extension to Somali territory is most linked to a growing problem highlighted in this resolution: the need for investigation and prosecution of those who facilitate and organize on Somalia's territory acts of piracy and armed robbery.[15] On this matter, the Security Council invites all the States involved in counter-piracy operations to support the Transitional Federal Government.

3.3.3 Resolutions 1897, 1918 and 1950

Resolution 1897, adopted on 30 November 2009, extended the authority set out in paragraph 7 of resolution 1816 (or paragraph 10 of resolution 1846) and of paragraph 6 of resolution 1851 for one year.[16] The Security Council appreciated the efforts of the Republic of Kenya to prosecute suspected pirates. Kenya has played one of the most active roles in the prosecution of pirates.

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[14]UNSC Resolution No. 1851 of 16th December 2008, par. 6, retrieved at http://www.un.org/en/sc/documents/resolutions/, (accessed on 20th November, 2018).

[15]UNSC Resolution No. 1851 of 16th December 2008, par. 7, retrieved at http://www.un.org/en/sc/documents/resolutions/, (accessed on 20th November, 2018).

[16] UNSC Resolution No.1897 of 30th November 2008, retrieved at http://www.un.org/en/sc/documents/resolutions/, (accessed on 20th November, 2018).

Resolution 1918, adopted on 27th April 2010, deals almost exclusively with problems related to prosecution; first of all, within the limits of Somali, as well as of other regional, judicial systems.[17] Resolution 1950, adopted on 23rd November 2010, extends for twelve months the authorizations renewed in resolution 1897.[18]

3.3.4 Resolutions 1976 and 2020

Resolution 1976, adopted on 11 April 2011, reiterates again the need for further endeavor in the prosecution of pirates and in the adoption of laws which criminalize piracy since piracy is a crime subject to universal jurisdiction.[19] In addition, between the various options proposed by the Secretary General as possible solutions for pirate prosecution, the Security Council considers the establishment of specialized Somali anti-piracy courts, inside or outside Somalia, as most advisable.

Resolution 2020, adopted on 22nd November 2011, extends resolution 1950 for another year, always upon TFG request and consent.[20] The Security Council strongly condemned the practice of kidnappings and hostage-takings which results not only in the brutal treatment of the hostages, but

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[17]UNSC Resolution No.1918 of 27th April 2010, retrieved at http://www.un.org/en/sc/documents/resolutions/, (accessed on 20th November, 2018).

[18]UNSC Resolution No.1950 of 23rd November 2010, retrieved at http://www.un.org/en/sc/documents/resolutions/, (accessed on 20th November, 2018).

[19]UNSC Resolution No.1976 of 11th April 2011, retrieved at http://www.un.org/en/sc/documents/resolutions/, (accessed on 20th November, 2018).

[20]UNSC Resolution No. 2020 of 22nd November 2011, retrieved at http://www.un.org/en/sc/documents/resolutions/, (accessed on 20th November, 2018).

also in the generation of further funding to buy weapons, ammunitions, and any other equipment thanks to ransom money.

3.3.5 Resolutions 2077, 2125 and 2184

Resolution 2077 was adopted on 21st November 2012, and extended the previous resolution for another year until the adoption of resolution 2125 on 18th November 2013, which contains a further one-year extension.[21] Notwithstanding the fact that the period of transition in Somalia ended on 20th August 2012, the Security Council stresses on the persistent need to strengthen Somali institutions and law enforcement capabilities.

Resolution 2077 also deals extensively with the hurdles posed by investigation and prosecution of suspected pirates and of piracy facilitators, which was one of the gravest concern for the Security Council.

Resolution 2184 of 2014 extends for a period of twelve months the entry into Somali territorial waters for purposes of repressing acts of piracy and armed robbery at sea. Further, it calls upon states with relevant jurisdiction such as flag and coastal states to cooperate in determining jurisdiction, investigation and prosecution of persons responsible for acts of piracy and armed robbery off the coast of Somalia. This mandate has equally been extended over the years by various resolutions.

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[21]UNSC Resolution No. 2077 of 21st November 2012, and Resolution No. 2125 of 18th November, 2013 retrieved at http://www.un.org/en/sc/documents/resolutions/, (accessed on 20th November, 2018).

3.4 Conclusion

The Security Council resolutions are couched in a manner that recognizes UNCLOS as the major international legal framework to combat piracy. Whilst the UNCLOS remains the international legal instrument governing piracy, the same has limited the scope of piracy to certain characteristics which have to be present for piracy to occur. The characteristics are the two – ship requirement, the incident has to occur in the high seas and the act has to fulfil a private end. The Somali type criminal activities that occurred off the coast of Somalia did not have the characteristics as provided for in the UNCLOS. This necessitated the United Nations Security Council to adopt the resolutions highlighted above, for purposes of preventing and prosecuting suspected Somalia pirates. Kenya played a key role in prosecuting the Somali pirates before and after the adoption of the resolutions. The question, however, is whether Kenya in prosecuting the suspected pirates acted within the law as provided for in UNCLOS, the UNSC Resolutions and the Merchant Shipping Act, 2009. This question will be answered in detail in the next chapter.

CHAPTER FOUR

KENYA'S LEGISLATIVE FRAMEWORK ON PIRACY

4.1 Introduction

The Security Council resolutions require that states continue to cooperate with Somalia authorities in the fight against piracy, states are equally called upon to criminalize piracy under their domestic laws and to favorably consider the prosecution and imprisonment of pirates apprehended off the coast of Somalia. The chapter focuses on Kenya as a case study by examining its legislative framework on piracy and a number of key decisions that involved Somali pirates. The question of jurisdiction is also highlighted.

4.2 Penal Code, Cap 63 Laws of Kenya

The history of Kenyan piracy laws dates back to the British East African Order in Council (1897) that extended to Kenya the application of certain Indian Acts (including the Indian Penal Code), common law of England, doctrines of equity, and statutes of general application in force in England on the 12th day of August 1897.[1] Some of these statutes of general application that were then applied to Kenya were the Admiralty Offenses (Colonial) Acts of 1849 and 1860 and the Courts (Colonial) Jurisdiction Act of 1874 which granted courts in the British colonies jurisdiction over admiralty offenses, including piracy.[2] After Kenya attained her independence, the Kenya

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[1]Article by Paul Musili Wambua, The jurisdictional challenges to the prosecution of piracy cases in Kenya: mixed fortunes for a perfect model in the global war against piracy. Published online by the World Maritime University, 2012. WMU J Marit Affairs (2012) 11:95–113DOI 10.1007/s13437-012-0021-6.

[2]Saad Saeed Bin Li Mahri vs Reginam (criminal appeal no. 142 of 1954) Court of Appeal for Eastern Africa EALR (1954) 222, where the court affirmed that the Eastern Africa courts had powers to try a case of piracy committed in the high seas by virtue of Admiralty Offences (Colonial) Act of 1849 and the Courts (Colonial) Jurisdiction Act of 1874.

Penal Code was amended to provide for the offence of piracy in section 69.[3] The repealed section 69 defined the offence of piracy as:

> 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.

The repealed section 69 of the Penal Code did not define extensively the offence of piracy as provided for in the UNCLOS. In order to define the offence of piracy as provided for in article 101 of UNCLOS, Kenya had to enact the Merchant Shipping Act, 2009. The new legislation comprehensively defined the offence of piracy and adopted UNCLOS in its provision vide section 369 thereof.

4.3 The Kenya Merchant Shipping Act of 2009

The prosecution of piracy in Kenya is currently undertaken under the Merchant Shipping Act, 2009. [4] Prior to the enactment of the MSA 2009, the offence of piracy was provided for under the repealed section 69 of the Penal Code.[5] The MSA 2009 has defined more extensively and comprehensively the offence of piracy than was previously defined under the repealed section 69 of the Penal Code. The key Convention adopted under the provisions of the MSA, 2009 is the United Nations Convention on the Law of the Sea (UNCLOS).[6] Section 369 of the MSA, 2009

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[3]Amended via Act No. 24 of 1967.

[4]Merchant Shipping Act 2009, Act No. 4 of 2009; available online at http://www.kenyalaw.org/kenyalaw/klr_app/frames.php (accessed on 18th September 2018). The Act came into force on 1st September 2009.

[5]Cited as the Penal Code, Cap. 63 Laws of Kenya, available at http://www.kenyalaw.org/kenyalaw/klr_app/frames.php (accessed 18th September 2018).

[6]United Nations Convention on the Law of the Sea (adopted 10 December 1982, entered into force entered into force on 16 November 1994); 1833 UNTS 397.

adopts the definition of piracy in Article 101 of UNCLOS. Section 369 of the Merchant Shipping Act, 2009, defines piracy as follows:

> (a) any act 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) against another ship or aircraft, or against persons or property on board such ship or aircraft; or
> (ii) against a ship, aircraft, persons or property in a place outside the jurisdiction of any State;
> (b) any voluntary act of participation in the operation of a ship or of an aircraft with knowledge of facts making it a pirate ship or aircraft; or (c) any act of inciting or of intentionally facilitating an act described in paragraph (a) or (b).

Section 369 of the MSA, 2009 incorporated the elements that are essential for piracy to be seen to have occurred. As already discussed, the elements are, firstly, piracy consists an unlawful act of violence, which may consist detention or depredation; the range of acts may encompass assaults, thefts of cash or ships, kidnappings with the purpose to obtain a ransom, or even murder. Secondly, piracy must be committed for private ends, which means that neither ships nor aircrafts on military or government service nor insurgents can commit a piratical act. Thirdly, piratical acts must be committed on the high seas or in a place outside the jurisdiction of any state. Fourthly, piratical acts must be committed from one ship against another ship, this is the so-called two ship requirement. Accordingly, internal hijacking of a ship on the high seas is not regarded as an act of piracy.

4.4 Prosecution of Suspected Somali Pirates in Kenya

The first piracy trial in Kenya started in 2006 after the capture of ten Somali nationals approximately 200 miles off the coast of Somalia by the guided-missile destroyer, U.S.S Winston

Churchill.[7] The suspected Somali pirates were charged before the Chief Magistrate's Court in Mombasa with the offence of piracy in *Republic versus Hassan M. Ahmed and 9 others*.[8] They were accused of attacking and detaining a machine sailing vessel-MV Safina Al Bisarat, assaulting the crew and making demands for the payment of a ransom. The appellants had been charged under the now repealed section 69(1) as read with section 69(3) of the Penal Code.[9] The ten suspects were subsequently sentenced to seven years imprisonment after the trial court found that it had jurisdiction to hear the case. It is worth emphasizing that the incident took place about 200 miles away from the Coast of Somalia, the ship was attacked by speed boats and not another ship as is required by Article 101 of UNCLOS.

On appeal to the High Court, the appellants challenged the finding by the magistrate that Kenyan courts had jurisdiction over non-nationals and for offences that occurred miles away from the Kenyan coast.[10] The learned Judge, while relying on Article 101 of the 1982 UNCLOS, found that Kenyan courts had jurisdiction over piracy cases, and held that:

> Even if the Penal Code had been silent on the offence of piracy, I am of the view that the learned Principal Magistrate would have been guided by the United Nations Convention on the Law of the Sea.

In the case in *Re Mohamud Mohamed Dashi & 8 others*, the Chief Magistrate's Court at Mombasa charged the suspected pirates with the offence of piracy as per section 69 of the Kenya Penal

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[7]James Thuo Gathii "Jurisdiction to Prosecute Non-National Pirates captured by Third States under Kenyan and International Law" (2009) 31Loyola of Los Angeles International and Comparative Law Review.

[8] *Republic v Hassan M Ahmed and 9 others Mombasa Chief Magistrates Court Criminal Case No. 434 of 2006 (unreported).*

[9] Penal Code Cap 63 Laws of Kenya Section 69(1) provided; any person who, in territorial waters or upon the high seas, commits any act of piracy *jure gentium* is guilty of an offence of piracy. Section 69(3) provided; any person who is guilty of the offence of piracy is liable to imprisonment for life.

[10] *Hassan M. Ahmed v Republic criminal appeals Nos. 198-207 of 2008 [2009] eKLR.*

Code.[11] Judge Ibrahim concluded that because the piratical incident did not occur within Kenya, or the territorial waters of the State, Kenya did not have jurisdiction to adjudicate the matter. However, the court of appeal subsequently reversed Judge Ibrahim's decision in the high court in 2012.[12] Maraga JA's judgment in the Appeal Court dealt with the concepts of *piracy jure gentium* and universal jurisdiction.

As a result, the Court of Appeal held that Ibrahim J had incorrectly interpreted that Kenya did not have jurisdiction over piratical matters that occurred outside the territorial realm of the State. Furthermore, the Court of Appeal held that there was no foundation for the High Court to find that section 5 of the Kenya Penal Code should override section 69.[13]

Jurisdiction of magistrate's courts in Kenya to try piracy cases under the Merchant Shipping Act, 2009 was also considered in the case of *Republic versus Abdirahman Isse Mohamud and 3 others*.[14] The accused, Abdirahman Isse Mohamud, Mohamed Osman Farah, Feisal Abdi Muse and Noor Ali Mohamed, had been charged before the Magistrate's Court in Mombasa for the offence of piracy under sections 369 as read with 371 of the Merchant Shipping Act. They had been accused of attacking a fishing dhow, namely, the Sherry Fishing Dhow, while armed with offensive weapons. The accused had challenged the jurisdiction of the Magistrate's Court over piracy, arguing that such jurisdiction vested in the high court. In the instant case, the issue was not whether

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[11] *In Re Mohamud Mohamed Dashi & 8 Others [2009] eKLR.*
[12] *Attorney General v Mohamud Mohammed Hashi & 8 Others [2012] eKLR.*
[13] Maraga JA: Where he (Ibrahim J) erred, in my view, is in subordinating Section 69 of the Penal Code to Section 5 thereof; in his interpretation of Sections 369 and 371 of the Merchant Shipping Act of 2009; on Kenyan courts' jurisdiction to try piratical offences committed on the high seas; and most importantly, in his failure to appreciate the applicability of the doctrine of universal jurisdiction in reference to the case at hand.
[14] *Republic v Abdirahman Isse Mohamud and 3 others [2011] eKLR.*

Kenya had jurisdiction or not, but which court in Kenya, between the High Court and the Magistrate's Court, had jurisdiction.

The consideration of jurisdiction in *Republic versus Abdirahman Isse Mohamud and 3 others* was quite different from the findings in the *Hashi case*. The accused had been charged under the Merchant Shipping Act, unlike in the *Hashi case* where charges had been brought under the repealed section 69 of the Penal Code. The court further seemed to suggest that the emerging picture was that Kenyan courts had jurisdiction over the offence of piracy irrespective of the mode of arrest. Thus, a person would be tried for piracy if they were now standing before the trial courts or the court with actual custody of the accused person.

The prosecution, defense and the court in all cases highlighted above, concentrated on the issue of jurisdiction without considering the elements that ought to be present for piracy to occur. The criminal activities in the cases prosecuted in Kenya occurred off the coast of Somalia approximately 200 miles off the coast of Somalia or in the Gulf of Aden. The attacks did not include two ships since the attackers used skiffs, dhows or small boats.[15] Article 103 of UNCLOS does not define a ship to include skiffs, dhows and small boats; it however, provides for the use of a pirate ship in a dominant position.[16] The repealed section 69 of the Penal Code only provided for piracy *jure gentium*; it did not define what constitutes a ship.

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[15] A ship is a large watercraft that travels the world's oceans and other sufficiently deep waterways, carrying passengers or goods, or in support of specialized missions, such as defense, research and fishing. Historically, a "ship" was a sailing vessel with at least three square-rigged masts and a full bowsprit. Ships are generally distinguished from boats, based on size, shape, load capacity, and tradition. https://en.wikipedia.org/wiki/Ship, (accessed on 22nd November, 2018).

[16] Article 103 of UNCLOS provides that: A ship or aircraft is considered a pirate ship or aircraft if it is intended by the persons in dominant control to be used for the purpose of committing one of the acts referred to in article 101.

In the case of *Re Mohamud Mohamed Dashi & 8 others*, it was submitted that the criminal acts took place in the Gulf of Aden. This was on the basis of the evidence of the prosecution after closing its case. The defense did not challenge the statement in the charge sheet that the incident did not take place in the high seas, but rather in the Gulf of Aden nor did the defense adduce evidence that the Gulf of Aden is not high seas.[17]

4.5 Conclusion

The critical elements necessary to prove piracy were never canvassed during the trials. The parties concentrated more on the issue of jurisdiction without delving into whether or not the crimes constitute piracy as provided for in Article 101 of UNCLOS. The suspects were charged, prosecuted and convicted on the strength of acts of piracy without proving that, indeed, the acts were committed in the high seas and not off the coast of Somalia and that two ships were present during the criminal activities.

The same applies if the ship or aircraft has been used to commit any such act, so long as it remains under the control of the persons guilty of that act.

[17] The Gulf of Aden, also known as the Gulf of Berbera, is a gulf amidst Yemen to the north, the Arabian Sea and Guardafui Channel to the east, Somalia to the south, and Djibouti to the west. In the northwest, it connects with the Red Sea through the Bab-el-Mandeb strait, and in the southeast, it connects with the Indian Ocean through the Guardafui Channel. It shares its name with the port city of Aden in Yemen, which forms the northern shore of the gulf. Historically, the Gulf of Aden was known as "The Gulf of Berbera", named after the ancient Somali port city of Berbera on the south side of the gulf. However, as the city of Aden grew during the colonial era, the name of "Gulf of Aden" was popularized. The waterway is part of the important Suez Canal shipping route between the Mediterranean Sea and the Arabian Sea in the Indian Ocean, with 21,000 ships crossing the gulf annually. https://en.wikipedia.org/wiki/Gulf_of_Aden, (accessed on 22nd November, 2018).

CHAPTER FIVE

FINDINGS, CONCLUSION AND RECOMMENDATION

5.1 Introduction

The study explored the legal challenges in the prosecution of suspected pirates off the coast of Somalia, it analysed the international conventions on piracy and Kenyan maritime legislation.

5.2 Findings

The study was an exploration of the international legal regime on piracy with particular emphasis on the prosecution of alleged piracy cases occurring off the coast of Somalia. The study began by discussing the historical development of the law on piracy. The study established that jurisdiction under International law was one of the most contested and controversial concepts and subjects. It is therefore, clear that the codification of the law on maritime piracy took many years and would not have been realized without the efforts of numerous actors as discussed in chapter two.

The objective of the study was addressed in chapters three and four. Chapter three discussed the international legal instruments on piracy with particular emphasis on piracy off the coast of Somalia. Criminal activities of the coast of Somalia did not conform to the definition and elements necessary to constitute piracy as illustrated in chapter three. They cannot be referred to as piracy. The criminal activities are armed robbery against ships and not piracy. The United Nations Security Council endeavored to cope with the growing alarm caused by pirate like criminal activities off the coast of Somalia. It took measures within the framework of international law aimed at remedying the limitations of the abovementioned rules of UNCLOS. The United Nations

Security Council Resolution 1816 of 2nd June, 2008 and the others which followed it were designed to address the issue of piracy like activities off the Coast of Somalia.

Chapter Four discussed Kenya's legislative framework on piracy and the subsequent prosecution of Somali criminals suspected of alleged piracy activities. This chapter found that Kenya enacted a robust maritime legislation in 2009 which adopted the definition of piracy as provided for in UNCLOS. It emerged from the study that Kenya prosecuted suspected criminal with the wrong offence of piracy instead of armed robbery against ship since the criminal activities occurred in Somalia's territorial waters off the coast of Somalia and in the Gulf of Aden which is not in the high seas. The requirement of the two ships was not present in the alleged criminal activities, since the perpetrators used skiffs, dhows and small boats which cannot be defined as ships.

5.3 Conclusion

States had been urged to corporate in the fight against criminal activities off the coast of Somalia and legislate domestic law to effectively combat the criminal activities. Kenya responded with the prosecution of Somali suspects and, subsequent enactment of the Merchant Shipping Act, 2009. Prior to the enactment of the Merchant Shipping Act, 2009, the prosecution of alleged Somali suspects was undertaken pursuant to the repealed section 69 of the Penal Code which provided for piracy *jure gentium*. The enactment of the Merchant Shipping Act, 2009, adopted the definition of piracy as provided for in UNCLOS. The prosecution of suspected criminals off the coast of Somalia was initiated and sustained by a charge of piracy instead of armed robbery against ship. This proves the hypotheses that the prosecution and conviction of the suspected Somali criminals was on a wrong charge of piracy instead of robbery against ships, since the elements necessary to uphold the charge of piracy as provided for in UNCLOS were not fulfilled.

5.4 Recommendation

Having come to the above conclusions, this study recommends the prosecution of Somali criminal for the crime of acts of robbery as opposed to piracy under national courts. Prosecution for the crime of armed robbery against ships is the most viable option since the offences committed by Somali nationals occur off the coast of Somalis in Somali's territorial waters and not in the high seas. The two ship requirement is also not a requirement for the crime of armed robbery against ships. The study thus recommends Kenya's continued support in the prosecution of such crimes.

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