UNIVERSITY OF NAIROBI

INSTITUTE OF DIPLOMACY AND INTERNATIONAL STUDIES

PIRACY, INTERNATIONAL LAW AND DIPLOMACY: A CASE STUDY OF KENYAN AGREEMENTS ON PROSECUTING PIRACY

BY

PAUL NDEMO MAINA

R50/63355/10

This thesis is submitted in partial fulfillment of the requirements of the award of the Master of Arts in International Studies at the Institute of Diplomacy and International Studies (IDIS), University of Nairobi.

MAY 2011

Bd-35957
AF6
JX
4444
.A134

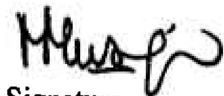
DECLARATION

I declare that this research is my original work and that it has not been presented to any other institution of higher learning for the award of an academic certificate.

Signature Date

Paul Ndemo Maina

This research project has been submitted with my approval as University supervisor



Signature

Prof. M. Mwagiru Date

Research Supervisor

ACKNOWLEDGEMENT

First of all, I wish to thank the State Law Office, in particular the Solicitor General, Mr. Wanjuki Muchemi, for facilitating my attendance of the course at the National Defence College. I also wish to appreciate the encouragement and support of the Chief Public Prosecutor, Mr. Keriako Tobiko

Secondly, I wish to thank the Commandant of the National Defence College, Lt. Gen. Joseph Kasaon and the Senior Directing Staff, more particularly Maj. Gen. Antony Rob, in whose charge I was, for their concern and support in my thesis progress.

I also wish to acknowledge my research supervisor, Prof. Makumi Mwagiru, who provided useful direction and assistance in my thesis research. His keen eye for detail ensured that key issues in the thesis were captured.

Some special friends whose material and moral support has kept me through the year need a special mention. These are Njeri, Wamuyu and Wambui.

Last, and by no means the least, I wish to acknowledge my dear wife Ruth and children, Sifa, Imani and Jabali, whose support and encouragement has been nothing but phenomenal, not to mention their sacrifice of my "absence" for the entire year. Their constant words of affirmation and prayers in the midst of the tight program helped me endure the difficult moments.

ABSTRACT

This study looks at piracy off the coast of Somalia that has riveted the world's attention since 2008 when a sudden increase in its incidences was reported. It traces piracy from the ancient times through the Middle Ages up to piracy as it manifests itself in modern day, before focusing on the Somalia piracy phenomenon. The study looks at the main Conventions dealing with piracy under the international regime, notably, the United Nations Convention on the Law of the Sea (UNCLOS), and the 1988 Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation (SUA Convention)

The study focuses on the subject of universal jurisdiction as key legal doctrine in providing a legal basis for states to deal with certain offences. The study traces the history of the offence of piracy as the very first in the history of man that came under the ambit of universal jurisdiction and shows how the same concept obtains today in dealing with piracy cases. The historical basis for the application of this doctrine was that a pirate, being *hostis humani generis*, that is, an enemy of all mankind, was considered as having renounced his benefits and rights to an orderly society and to the protection of the state, and since he had declared "war" on all mankind, all mankind was similarly entitled to wage war against him and punish him wherever he may be found.

The study also discusses the various diplomatic and international responses to the piracy problem off the coast of Somalia. The efforts discussed include responses by individual states, regional initiatives, joint efforts at the international level and specific United Nations resolutions adopted

The study also looks at Kenya's role in the fight against piracy It mainly focuses on six prosecution agreements that Kenya signed with the, United Kingdom, United States, Denmark,

China, European Union and Canada on the transfer and prosecution of suspected pirates arrested in the Gulf of Aden or the west Indian Ocean. The study seeks to establish whether these agreements were in Kenya's interest, and further whether Kenya's withdrawing from the agreements had affected its diplomatic relations with the states it signed the agreements with.

DEDICATION

I dedicate this thesis to Ruth, Sifa, Imani and Jabali, my family, and to the realization of a solution to the unprecedented piracy menace off the coast of Somalia and the region.

TABLE OF CONTENTS

DECLARATION i

ACKNOWLEDGEMENT ii

ABSTRACT iii

ABBREVIATIONS ix

CHAPTER 1 1

INTRODUCTION TO THE STUDY 1

1.0 Introduction 1

1.1 Statement of the Research Problem 3

1.2 Objectives of the Study 4

1.3 Literature Review 4

1.3.1 Piracy and International Law 4

1.3.2 Piracy and Diplomatic Relations 10

1.4 Justification of the Study 14

1.5 Theoretical Framework 15

1.6 Hypotheses 17

1.7 Research Methodology 17

1.8 Chapter Outline 19

CHAPTER 2 21

PIRACY AND INTERNATIONAL LAW 21

2.0 Introduction 21

2.1 Piracy in the Ancient World 22

2.2 Piracy during the Middle Ages 22

2.3 Piracy in the Modern Day 26
2.4 Universal Jurisdiction 35
CHAPTER 3 43
INTERNATIONAL LAW, DIPLOMACY AND PIRACY 43
3.0 Introduction 43
3.1 Diplomacy 43
3.1.1 History of Diplomacy 44
3.1.2 Establishment of Diplomatic Relations 45
3.1.3 Diplomatic Relations and National Interests 45
3.2 International law 48
3.3 International law and diplomacy 50
CHAPTER 4 53
RESPONSES TO PIRACY OFF THE SOMALIA COAST 53
4.0 Introduction 53
4.1 Djibouti Code of Conduct 55
4.2 Contact Group on Piracy off the Coast of Somalia (CGPCS) 57
4.3 ESA-10 58
4.4 African Union 59
4.5 European Union 60
4.6 Combined Maritime Force (CMF) 60
4.7 North Atlantic Treaty Organization (NATO) 61
4.8 United Nations Efforts 61
4.8.1 UNODC Counter-Piracy Programme 61
4.8.2 United Nations General Assembly Resolution 61

4.8.3 Secretary General's Report on Piracy off Somalia 62
4.8.4 United Nations Security Council Resolutions 62
4.9 Other Efforts 69
4.9.1 INTERPOL 69
4.9.2 Shared Awareness and De-conflicting (SHADE) 70
4.9.3 Indian Ocean Naval Symposium (IONS) 70
4.9.4 World Maritime Day 70
CHAPTER 5 71
ANALYSIS OF PIRACY PROSECUTION AGREEMENTS 71
5.0 Introduction 71
5.1 US Agreement 71
5.2 Canada Agreement 75
5.3 Denmark Agreement 80
5.4 UK Agreement 82
5.5 European Union Agreement 83
5.6 China Agreement 84
5.7 Analysis of Interview Findings 87
CHAPTER 6 92
CONCLUSION 92
BIBLIOGRAPHY 96

ABBREVIATIONS

AMISOM	African Union Mission to Somalia
AU	African union
CGPCS	Contact Group on Piracy off the Coast of Somalia
CMF	Combined Maritime Forces
COMESA	Common Market for East and Southern Africa
EAC	East African Community
EU	European Union
IGAD	Inter Governmental Authority on Development
INTERPOL	International Police
IOC	Indian Ocean Countries
IONS	Indian ocean Naval Symposium
NATO	North Atlantic Treaty Organization
NCB	National Central Bureau
RPA	Regional Plan of Action
RS	Regional Strategy
SADC	Southern Africa Development Cooperation
SHADE	Shared Awareness and De-conflicting
SUA	Convention for the Suppression of Unlawful Acts against Maritime Safety and Navigation
TFG	Transitional Federal Government
UK	United Kingdom
UN	United Nations

UNCLOS	United Nations Convention on the Law of the Sea
UNODC	United Nations Office on Drugs and Crime
UNSCR	United Nations Security Council Resolution
US	United States of America

CHAPTER 1

INTRODUCTION TO THE STUDY

1.0 Introduction

Piracy is an age old problem. Indeed as early as the sixteenth century it had already acquired the label of a universal crime. [1] Throughout the seventeenth century ships, particularly slow moving ones, plying international trade routes were targets of pirate attacks.[2] Piracy is one of those crimes that had been considered as having significantly diminished from the modern day radar.[3]Today, piracy has re-emerged as a major crime and one of great concern particularly when viewed against the backdrop of its possible link with terrorism. [4]It is a vice that has galvanized states together in a bid to address it.

As piracy continued in the nineteenth century, so did the international law regime. This regime developed as customary international law and made piracy the very first crime to be considered as having universal jurisdiction, whereby any country could prosecute a suspected pirate.[5] Today, the key international legislation on piracy is encapsulated in the 1958 Geneva Convention on the High Seas, the 1982 United Nations Convention on the Law of the Sea (UNCLOS), and the 1988 Convention for the Suppression of Unlawful Acts Against the Safety

---

[1] Bruce D. Landrum, *The Globalization of Justice: The Rome Statute of the International Criminal Court*, ARMY LAW, (Sept. 2002) pp 2-25

[2] Donald R. Rothwell, *Maritime Piracy and International Law*, CRIMES OF WAR PROJECT (2009)

[3] Eugene Kontorovich, *International Legal responses to Piracy Off the Coast of Somalia*, American Society of International Law Vol. 13:2 (2009)

[4] Gal Luft, Anne Korin, *Terrorism Goes To Sea*, Institute for the Analysis of Global security, http://www.iags.org/fa2004.html last visited on 29th August, 2010

[5] Ibid

of Maritime Navigation (SUA Convention) that was championed by the International Maritime Organization (IMO).[6]

International relations on the other hand have existed from time immemorial. After the Second World War, international relations were considered as a means to establishing an international system that would replace the one destroyed by the wars.[7] It has since grown and plays a pivotal role in the relationship of states.

As mentioned above, piracy is now a universal concern that needs a global approach. Although the incidences of piracy are increasing around the world, the waters off the coast of Somalia have become particularly notorious.[8] Geographical factors have also exacerbated this problem; ships plying the Gulf of Aden route must pass through the Suez Canal through the narrow strait between the horn of Africa and the Arabian Peninsula, thus making them more vulnerable.[9]

In a bid to combat the menace, Kenya, as a member of the international community, and in keeping with the principle of universal jurisdiction, offered itself to assist in the prosecution of suspected pirates arrested by the naval forces patrolling the vast Indian Ocean off the Somalia coast in 2008. This was followed by Kenya signing agreements with the UK, USA, European

---

[6] Malvina Halberstam, *Terrorism on the High Seas: The Achilles Lauro, Piracy and the IMO Convention on Maritime Safety*, The American Journal of International Law, Vol. 82 No. 2 (Apr., 1988)pp 269-310

[7] Norman d. Palmer, Howard C. Perkins, *International Relations* (Delhi: AITBS Publishers, 2007) xiv

[8] James Kraska, Brian Wilson, *Maritime Piracy in East Africa*, JOURNAL OF INTERNATIONAL AFFAIRS VOL 2:2 (2009) p55

[9] Eugene Kontorovich, op. ct.

Union, Denmark, Canada and China respectively to receive and prosecute suspected pirates arrested by the respective states' naval forces on the high seas.[10]

1.1 Statement of the Research Problem

Piracy has occupied a central part in the discussions of crime prevention particularly in the region. The agreements that the Government entered into formed a basis upon which cooperation as far as prosecution of such cases was concerned would proceed. However, it is apparent that the consultations relating to the agreements were not inclusive considering that Hon. Amos Wako, the Kenyan Attorney General categorically stated that he was not involved in the signing of the agreements. Needless to say, this put the credibility of the agreements and their effective implementation into question.

In addition when prosecutions began in earnest in 2008, legislators began raising concerns of the country's capacity to do it. Other concerns raised were over the security implications, as well as technical challenges such as what to do with the pirates who serve and complete their terms. The issue now is whether Kenya will continue with the prosecution of piracy cases, and if so, under what terms.

Kenya is likely to lose out if it fails to continue prosecution of piracy cases. First of all, the international community will withdraw logistical support that Kenya has been enjoying because of its role in the prosecution of suspected pirates. Secondly, Kenya's position as a regional power may also diminish. Third, Kenya being very proximate to Somalia has already and is likely to continue being severely affected by piracy. It cannot therefore fail to act. Lastly

[10] http://wwww.nytimes.com/2009/04/24/world/africa/24kenya.html?_r=1 last visited on 29th August, 2010

and most importantly, Kenya could lose its capacity to project itself as a dependable international partner thereby straining its relations with key partners.

1.2 Objectives of the Study

- To identify the contentious issues in the agreements on prosecuting piracy signed by Kenya.

- To explore the outcomes of the agreements on Kenya's diplomatic relations with the States it signed the agreements with.

- To find out problems of prosecuting piracy cases.

1.3 Literature Review

This section will review the writings of various scholars in the field of piracy and international law and diplomacy.

1.3.1 Piracy and International Law

Donald Snow argues that national security and by extension international security is no longer limited to the traditional conceptualizations of military action.[11] The national menu has broadened to include problems that are either semi-military or non military at all, as in the case of piracy. The evolving security landscape now presents the increasing challenges. Problems such as piracy present serious concerns as to the kind of threats they pose and the solutions to be

---

[11] Donald M. Snow, *National Security For A New Era: Globalization and Geopolitics* (New York: Pearson, 2004) p 269

applied. It is not as though piracy is a new crime; it has see-sawed over the ages and hidden itself for the past century patiently waiting its turn to re-emerge with a new sense of vigour.[12]

Piratical attacks have increased significantly since 2008 off the coast of Somalia. In 2008 alone, Somali Pirates attacked more than one hundred vessels in the Gulf of Aden and the adjoining Indian Ocean. [13] Michael Bahar while admitting that the attacks have indeed increased further states that the attacks have been brutal.[14] In a recent incident, four American hostages aboard a yatch were killed by pirates.[15] This is by far the most brazen attack on hostages captured off the Somalia coast, and raises serious questions regarding the direction the piracy menace is going. This is because, the emphasis and motivation of these piratical attacks has been the ransom to be derived from their activities. Outrightly killing hostages that had not been held for even a week therefore is a matter of grave concern.[16]

Until recently, there had been no record of any pirates killing or meting violence against crew members of ships they had hijacked.[17] That is of course not to say that the attacks were a pleasant affair, considering that they are usually staged using high powered firearms. The clarity on the nature of the attacks is critical as it would inevitably have informed some provisions in the Agreements between Kenya and the international community.

---

[12] ICC International Maritime Bureau, *Piracy and Armed Robbery against Ships* , (2006)

[13] James Kraska, Brian Wilson op cit

[14] Michael Bahar, *Attaining Optimal Deterrence at Sea: A Legal and Strategic Theory for Naval Anti-Piracy Operations*, 40 VAND. J. TRANSNATIONAL LAW 1 (2007)

[15] http://news.yahoo.com/s/ap/piracy checked on 22nd February, 2011

[16] Ibid

[17] Ibid

A number of factors have influenced the manner in which international naval vessel handle piracy cases off the coast of Somalia. According to Kontorovich, these "nations patrolling the Gulf of Aden have chosen not to prosecute pirates because of the anticipated difficulty and expense. What to do with apprehended pirates has become the central legal question of the current anti-piracy campaign. The dominant approach has been to avoid capturing pirates in the first place, or, if captured, releasing the pirates without charging them with a crime".[18] He goes further to say "Yet while nations have been willing to shoulder serious enforcement costs, they have shied away from accepting judicial burdens. It is unlikely that piracy can be stopped if pirates are not prosecuted and punished."[19] The result is that Kenya has not only become the focal point, but has also borne the burden of the prosecution of all suspected pirates in the region.

As early as the sixteenth century, piracy was considered as a crime that came under universal jurisdiction.[20] Although there are still debates on the issue, most modern scholars accept the broad panorama of universal jurisdiction provided under UNCLOS.[21]

Under international law, a pirate may be prosecuted by any state under its domestic anti-piracy legislation under the principle of universal jurisdiction.[22] This is where the pirate fits the definition of such under international law. A major challenge has been the issue of how to deal

---

[18] Eugene Kontorovich op. ct

[19] Ibid

[20] Bruce D. Landrum, op.cit.

[21] Michael H. Passman, *Protections Afforded to Captured Pirates Under the Law of War and International Law*, TULANE MARITIME LAW JOURNAL VOL. 33 (2008) p 14

[22] Lori Fisler Damrosch, et al, *International Law: Cases and Materials and Basic Documents Supplement*, 4th Ed (St. Paul, Minnesota: West Publishing Company: 2001)p 402

with pirates who do not strictly fall within this international definition. Under the UNCLOS definition of piracy, the offence only occurs if it is perpetrated on the high seas, that is, areas beyond the 12 nautical miles recognized as belonging to a State.

Interestingly, before the current regime on international law on piracy developed, most of the world's oceans were considered high seas. [23]The import of that is that it was easier to net pirates since the coverage area was wider. Today, large portions of the world oceans have been taken over by states hence forming part of their territories. Rothwell argues that as a result, modern law on piracy has been severely constrained. Rothwell argues that as a result of the developments in the law of the sea, there is very little high sea piracy.[24] Whereas that may be true of other areas, the same cannot be said of the Somalia cases. Indeed, Somalia pirates have continually become more emboldened, and attack ships far into the high seas.

Some scholars like Bart Simpson have argued that universal jurisdiction does not fill any jurisdictional gaps.[25] He argues that vessels even on the high seas have always been considered as being within the territories of their flag states, and that therefore the states maintain jurisdiction over any pirates that may attack the vessel. The real issue though is enforcement and the practicability thereof, as Ruth Wedgwood argues. She states that relying on the issue of nationality was problematic because nationality was not always clear.[26] Slaughter summarizes the issue well by stating that universal jurisdiction is the handmaiden of international law in as

[23] Donald R. Rothwell, op. cit.

[24] Ibid

[25] Eugene Kontorovich, *Implementing Sosa v. Alvarez-Machain: What Piracy Teaches about the Limits of the Alien Tort Statute*, 80 NOTRE DAME L. REV. 111, 151 (2004)

[26] Ruth Wedgewood, *The Revolutionary Martyrdom of Jonathan Robbins*, 100 YALE L.J. 229, 239 n.26 (1990)

far as prosecuting offences that are recognized as illegal in domestic systems around the world is concerned.[27]

Goodwin is very critical of piracy being considered as a crime under universal jurisdiction. He states that the various bases used for justifying such an exertion of jurisdiction are misplaced, myopic, and do not comport with modern times.[28] On the issue of statelessness of the vessel or pirate for instance, he states that the assumption is that by cruising piratically, the ship and its crew are stripped of their nationality, something he disagrees with, and finds support in UNCLOS.[29] He further argues that even if the ship were stateless, there is nothing to suggest that the pirate himself loses his national character.

He also questions the basis of applying the principle of *hostis humani generis* to exercise universal jurisdiction since the understanding of this phrase has been different historically; although used in reference to the "enemy of all mankind", he argues that some refer to it in the context of piracy because of the heinousness of piracy, while others view piracy from the point of individuals attacking indiscriminately against the laws of all nations, or in other instances it is considered as being *hostis humani generis* by virtue of the fact that the major naval forces have traditionally exercised jurisdiction over pirates.[30]

---

[27] Anne-Marie Slaughter, *Defining the Limits: Universal Jurisdiction, National Courts And The Prosecution Of Serious Crimes Under International Law* 168-69 (2004). p 56

[28] Joshua Michael Goodwin, *Universal Jurisdiction and the Pirate: Time for an Old Couple to Part.* Pg 23

[29] Ibid p 9

[30] Ibid p 13

Due to the difficulties experienced arising from the fact that most piratical attacks were occurring within territorial waters, the International Maritime Bureau sought to merge the understanding of piracy as defined under UNCLOS and the issue of armed robbery against ships.[31]

One of the most significant challenges of the SUA Convention is that it only applies to states parties that have signed onto it. This is unlike the UNCLOS that applies to all states by virtue of it being customary international law.[32] Somalia is notably, not a signatory to the Convention.

On the subject of international cooperation, it is difficult to miss the underlying and overarching individual state interests. This is very aptly captured in the US' foreign policy on maritime security that states in part:

> "Maritime Domain Awareness is the effective understanding of anything associated with the global Maritime Domain that could impact the security, safety, economy, or environment of the United States. It is critical that the United States develop an enhanced capability to identify threats to the Maritime Domain as early and as distant from our shores as possible..."[33]

---

[31] Robert C. Beckman, *Combating Piracy and Armed Robbery Against Ships in Southeast Asia: The Way Forward*, 33 OCEAN DEV. & INT'L L. 317, 319 (2002).

[32] Rosalyn Higgins, *Problems and Process: International Law and How We Use it* 64 (Clarendon Press:1994)

[33] US National Security Presidential Directive NSPD-41, December 21, 2004

1.3.2 Piracy and Diplomatic Relations

Economic factors and trade play a significant role in determining the relations of states. Another significant consideration, according to Snow is the realization that developing countries are the hub of violence that plagues the world. [34] It is no wonder therefore that acts of piracy and other criminal activities seem to thrive in such countries. According to Prof. Mwagiru, these countries do not form part of the globalizing world.[35] It is most likely to find what are termed failed states in this category of states. A failed state, as Somalia is considered to be, refers to a state that is totally incapable of being part of the international community.[36] The instability of such states amounts to a threat to the peace as defined by Article 39 of the UN Charter.[37]

Peace is an important precondition for the survival of any state. One of the key ways through which this may be achieved is diplomacy. According to Morgenthau, diplomacy can assist in the development of a new international consensus.[38] This consensus is then useful towards ensuring that peace is arrived at.

Classical realists argue that the central feature of the contemporary international system is "structural anarchy" or the distinguishable lack of a centralized unit that settles disputes.[39]

---

[34] Donald M. Snow, *National Security For A New Era: Globalization and Geopolitics* (New York: Pearson, 2004) p 305

[35] Makumi Mwagiru, *Foreign Policy, Economic Diplomacy And Multilateral Relations: Framing The Issues In Kenya' Emerging Asia-Pacific Policy,* Vol. 4, no.1(Nairobi: Ruaraka Printing Press,2006) 45-58

[36] Helman, Gerald B., Steven R. Ratner, *Saving Failed States: Foreign policy 89* (1992-1993)

[37] Johan Kaufmann, *The Diplomacy of International Relations* (Hague: Kluwer Law International, 1998) p 158

[38] James E. Dougherty, Robert L. Pfaltzgraff, Jr, *Contending Theories of International Relations* (Philadelphia: J.B.Lippincott Co., 1971) p 79

[39] Ole R. Holsti, *Theories of International Relations and Foreign Policy: Realism and Its Challengers*, in Charles W. Kegley, Jr. *Controversies in International relations Theory* (New York: St. martin's Press, 1995) p 37

According to Schuman, an international system that lacks a common government necessarily requires that each unit rely on its own power.[40] The state cannot trust other units for its own protection and its interests. It must be proactive, and move those units to achieve its own ends.

One of the key issues for instance that inform US foreign policy towards Africa is its desire to secure its interests in Africa from the perceived threat that is posed by the spread and rise of Islamic fundamentalism.[41] According to Wolfers, power is "the ability to move others or to get them to do what one wants them to do and not to do what one does not want them to do".[42] The state must act to ensure its own survival.

Another important issue is that of morality. According to Dougherty and Pfaltzgraff, Jr, realists assume that moral principles are not applicable to political actions. He states that "Because the statesman acts in an international environment – distinguishable from a national environment by the absence of authoritative political institutions, legal systems, and commonly accepted standards of conduct-his moral standards differ from those governing behavior within a national unit."[43]

On the other hand they argue that utopianism or idealism differs from realism to the extent that it places emphasis on the development of norms of international behavior based on

---

[40] Frederick L. Schuman, *International Politics: The Western State System in Mid-Century*, 5th ed. (New York: McGraw-Hill Book Co.,1953) p 249-250

[41] Peter Schraeder, *United States Foreign Policy Toward Africa: Incrementalism, Crisis and Change* (Cambridge: Cambridge University Press, 1996) p 253

[42] Arnold Wolfers, *Discord and Collaboration* (Baltimore: John Hopkins Press, 1962) p 103

[43] James E. Dougherty, Robert L. Pfaltzgraff, Jr, op. ct. p 66

law and organization.[44] They further argue that idealists make an assumption that states have a harmony of interests.

According to Kegley Jr, the idealist world view is based on the belief that "The fundamental human concern for the welfare of others makes progress possible.[45] He further states that "International society must reorganize itself institutionally to eliminate the anarchy that makes problems...likely."[46] The emphasis of the idealist school of thought is therefore clearly an institutional one. It sees solutions to world problems as emanating from institutions created by states. Holsti states that idealists view institution building as one of the means through which states may eliminate or at least minimize the harshest features that are emphasized by realists.[47] Institution building accordingly helps to reduce uncertainty and creates a sense of transparency in dealings between states.

The situation above therefore makes a clear case for the partnering with and provision of assistance to developing countries. This is crucial if the piracy menace, that has global implications, is going to be effectively dealt with.

Developed countries clearly acknowledge that even with their superior military might, they need to have partnerships with allies so as to effectively combat piracy. Whereas, the state

---

[44] Ibid, p 65

[45] Charles W. Kegley, Jr, *The Neoliberal Challenge to Realist Theories of World Politics: An Introduction* in Charles W. Kegley, Jr. *Controversies in International relations Theory* (New York: St. martin's Press, 1995) p 5

[46] Ibid

[47] Ole R. Holsti op cit p 43

may apprehend suspected pirates, it would need a willing partner state to quickly accept to prosecute the suspects if due process is not going to be compromised.[48]

Furthermore, according to Bahar a state such as the US may be reluctant to take on Somali pirates single-handedly. This is because of the fear of spiraling anti-American sentiments and thereby granting terrorist elements fodder for their diabolical agenda. [49]

It is therefore in the best interest of such states to act as part of a group of states, to give the impression of a united international force. US has a very clear policy on maritime security issues that is unequivocal about its cooperation with other actors which states that "Ensuring the security of the Maritime Domain must be a global effort, in which the [US] Government efforts are developed and furthered with the support of other governments and international organizations resulting in lasting international cooperation."[50]

Michael Bahar makes a strong case that the only viable way forward for the US in dealing with the piracy is the route of multilateralism. Whilst acknowledging the unparalleled naval power of the US, he recognizes that this is the only means to having successful maritime security.[51]

In order to establish multilateral relationships, including the duties and responsibilities each party will have, states will enter into agreements. Prof Mwagiru states that "the landscape of modern diplomatic, international and regional relations is dotted with the various agreements

[48] Michael Bahar, op. cit.

[49] Ibid 28

[50] US National Security Presidential Directive NSPD-41, December 21, 2004, p6

[51] Michael Bahar, op. cit.

that states have concluded with each other".[52] These agreements are a clear testimony to the fact that states are not islands and do indeed need other states in order to pursue their interests.

According to Kraska and Wilson the collaborative efforts towards the confrontation of the piracy problem in the horn of Africa has begun to strengthen relationships among not only the states in East Africa, but also between these states and the maritime powers and shipping nations.[53]

This study will be useful in providing an understanding and the outcome of agreements entered into by Kenya on prosecution of piracy cases. Notably, there currently exists no literature on the subject.

1.4 Justification of the Study

Kenya has been a key player globally in the fight against the piracy, particularly since 2008. Therefore, anything that appears to make Kenya reluctant in the fight should be a cause for serious concern not only to the region but to the international community as well.

This study seeks to understand the challenges, more particularly arising from the agreements on prosecution signed by Kenya in order to provide direction that may assist Kenya fully contribute towards the fight against piracy, particularly in the arena of prosecution.

---

[52] Makumi Mwagiru, *DIPLOMACY: Documents, Methods and Practice* (Nairobi: Institute of Diplomacy and International Studies, 2004) p84

[53] James Kraska, Brian Wilson, *Maritime Piracy in East Africa*, Journal of International Affairs 62.2 (2009), *p 1-12: 2*

1.5 Theoretical Framework

Realism as a theory emphasizes the lack of a central authority in the international system, and places a high premium on state action to assure its own survival, since the international system is "anarchic".[54] It considers that human beings are innately evil and cannot be trusted, and by extension the state. Each state must therefore look out for its own interests. States need to employ their own initiatives and explore means to buttress their national interests. On the other hand, pluralism lays emphasis on the interdependence of states due to factors of the economy, science and technology.[55] According to the theory, the interdependence of states results in a situation where the traditional nation-state's role significantly reduces since other sub and supranational actors are given prominence; indeed, states give up some of their sovereignty and independence in such an arrangement.[56]

The essence of the pluralist approach is that in order for both intergovernmental organizations and international nongovernmental organizations to take root, people need to be aware that they not only have shared certain interests and objectives that transverse national boundaries, but that the best way of solving their problems and addressing their challenges is through pooling their resources and ensuring transnational cooperation.[57] Individual effort alone will be neither adequate nor sustainable. Unlike realism therefore, it is non-state centric and provides a forum where all states, whether large or small, benefit from the cooperation of states through the institutions and regimes created. The theory emphasizes the processes of trans-

[54] Michael Sheehan, *International Security: An Analytical Survey* (Lynne Rienner Publishers :Colorado, 2005) p8

[55] Jurg Martin Gabriel, Worldviews and Theories of International Relations (London: MacMillan Press, 1994) p 8

[56] Ibid

[57] Akira Iriye, *Global Community: The Role of International Organizations in the Making of the Contemporary World* (Berkeley, CA: University of California Press, 2002) p 9

nationalism, integration and interdependence within the international system.[58] It further down plays the exalted emphasis on military-security issues as propounded by realism.[59] In an ever globalizing world one must recognize the construction of "transnational networks that are based upon a global consciousness, the idea that there is a wider world over and above separate states and national societies, and that individuals and groups, no matter where they are, share certain interests and concerns in that wider world."[60]

This study will enter at the level of the pluralist debate. The reason for this proposition is that states in seeking to deal with the piracy menace, while driven by their own self interest, cannot possibly do so without cooperation with one another and without deferring to international institutions such as the United Nations. Indeed, the actions taken by the foreign naval vessels off the coast of Somalia were informed to a certain degree by numerous UN resolutions. Whilst one recognizes the challenge posed by international organizations in terms of confronting sovereignty, they nonetheless provide the stage on which states project their power, gain international prestige, status, and domestic legitimacy, and of course provide the means for solving problems in the globalized world.[61]

The US President's National Strategy for Maritime security states that national effort is not sufficient, and must be transformed to international cooperation by strengthening ties with

---

[58] Richard Little, *International Relations and the Triumph of Capitalism*, in Ken Booth, Steve Smith (eds), *International Relations Theory Today* (Pennsylvania: Pennsylvania State University Press, 1995) p 65

[59] Paul R. Viotti, Mark V. Kauppi, *International Relations Theory: Realism, Pluralism, Globalism, and Beyond* 3rd ed (Boston: Allyn and Bacon, 1999) p 8

[60] Akira Iriye op ct, p8

[61] Ann Kent, "China's International Socialization: The Role of International Organizations," *Global Governance* 8.3 (2002)

allies and friends.[62] This approach very much defines the thinking of many States in confronting the problem of piracy.

1.6 Hypotheses

i) The agreements on the prosecution of suspected pirates were not in the interest of Kenya

ii) The agreements on the prosecution of suspected pirates have resulted in the straining of diplomatic relations between Kenya and its signing partners.

1.7 Research Methodology

In this research, the researcher will be undertaking a case study using the qualitative method. The researcher has adopted a case study approach in order to conduct an intensive study of the units of investigations in order to deepen the understanding of the prosecution of piracy cases in Kenya.

This study will adopt both a descriptive and diagnostic research design in its conduct. It will be an in-depth study of agreements signed by Kenya on the prosecution of suspected pirates arrested off the coast of Somalia. Although Kenya prosecuted other pirates in 2006, it was not under any particular agreement. The incidents of piracy have astronomically increased since then, a fact the international community has taken note of, hence the need to adopt a comprehensive strategy towards prosecution of suspected pirates.

The agreements being considered in this study relate to incidences after the 2006 case. It is notable that the agreements were concluded upon the realization that piracy off the Somali coast was spiraling out of control, and a geostrategic State such as Kenya with adequate

---

[62] US National Security Presidential Directive NSPD-41, December 21, 2004

capabilities was required to assist in the prosecution of such cases under the principle of universal jurisdiction. The researcher chose to focus on these particular agreements as case studies since they clearly herald the dispensation of increased prosecution of piracy cases by Kenya. The agreements are six in number, notably signed between Kenya and UK, US, Canada, Denmark, European Union and China respectively.

This method will enhance the study by helping the researcher better understand the behavior of the various units involved in the study, including the history of the units and the relationship they have with other forces within the environment. This method is also advantageous as it allows for triangulation. One may for instance utilize interviews, questionnaires, and the study of reports to obtain relevant data. It may also be useful in conducting a historical analysis.

The researcher will employ triangulation by utilizing both primary and secondary data collection methods. The primary data will be obtained from the sources indicated below, whereas the secondary data will be obtained from published data available in the libraries and on the internet, as well as relevant unpublished research works. Secondary data will be the main source of data. It will greatly add value to the study because it is more readily available due to increased scholarship and technology. In addition it will help the researcher analyze Kenya's relationship with international partners over a period that primary data alone would not be able to provide. It will also be extremely useful in view of the low resource input required.

In conducting the research the researcher will apply the non-probability sampling design since the researcher is already aware of what is being sought. There is therefore no need for having a representative sample. The sample to be selected is capable of providing the required

in-depth information. Considering that the target population is small, the researcher will focus on purposive sampling. The area under study being a specialized one has a limited category from which a sample can be chosen.

The sample units will consist of officers from Government ministries and departments, more particularly, the Ministry of Foreign Affairs, the State Law Office and the Kenya Navy. The rationale for choosing these units is that they form the core government Ministries and Departments that were involved in the negotiation or implementation, or both, of the agreements on prosecution of suspected pirates.

The research instrument to be utilized will be interviews. The researcher is aware that questionnaires may not be suitable for the respondents sought, and therefore telephone or personal interviews will be used.

Upon collection of the primary data, the researcher will edit the responses obtained therefrom, that is from the interviews. The editing will ensure that the responses are not only accurate but also complete and uniform. Finally, the information will be interpreted in accordance with the objectives of the study and the hypotheses advanced.

1.8 Chapter Outline

The study is divided into 6 chapters as indicated herebelow:

Chapter One will cover the introduction, statement of the research problem, objectives, literature review, justification, theoretical framework, and hypothesis and research methodology.

Chapter Two will discuss the evolution of piracy from the early ages through the middle ages right up to the modern times. The chapter will also discuss the law of the sea, the status of piracy under international law, and the various international instruments where it is encapsulated.

Chapter Three will discuss the nexus between international law and diplomacy and link these with counter piracy efforts.

Chapter Four will look at the responses that have been mounted against piracy off the coast of Somalia. It will discuss the various diplomatic and institutional initiatives that have been employed in preventing and combating piracy

Chapter Five will undertake an analysis of the piracy prosecution agreements entered into between Kenya and the US, UK, Denmark, Canada, European union and China respectively. The chapter will also highlight the findings from the interviews conducted

Chapter Six will be the last chapter and will give a conclusion to the study.

CHAPTER 2

PIRACY AND INTERNATIONAL LAW

2.0 Introduction

The practice of piracy can be traced long in history from the very earliest times. It flourished in the middle ages, notably the seventeenth and eighteenth century, but took a dip thereafter and subsequently considered to have largely vanished. The re-emergence of piracy in the last decade was therefore not only a surprise to scholars but a headache and paradox to policy makers. Indeed, some scholars had posited that since governments and shipping companies had become so well endowed in terms of sophisticated tracking equipment and other communication equipment, and there existed an unprecedented international cooperation on law enforcement matters, coupled with heavy budgetary allocation towards defence matters, piracy was well on its way to elimination.[1] This position of course never anticipated the dare devil approach and modus operandi of modern day pirates, particularly those operating off the coast of Somalia that have modern speed boats at their disposal as well as sophisticated equipment and high caliber firearms.

Piracy was the first offence to be considered as coming under universal jurisdiction. For centuries, pirates have been deemed as *hostis humani generis* (enemies of all mankind).[2] International law on piracy has significantly developed. The main conventions dealing with piracy are the 1958 Geneva Convention on the High Seas, the 1982 United Nations Convention

[1] Stuart Mcmillan, *Piracy: An Old Menace Re-merges Stuart McMillan Comments on a Maritime Problem That Has Grown Steadily Worse in the Last Decade*, New Zealand International Review 27.2 (2002)

[2] Yvonne M. Dutton, *Piracy and Customary Law: Bringing Pirates to Justice: a Case for Including Piracy within the Jurisdiction of the International Criminal Court* , CJIL (Summer 2010)

on the Law of the Sea (UNCLOS), and the 1988 Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation (SUA Convention) that was championed by the International Maritime Organization (IMO).[3]

2.1 Piracy in the Ancient World

Piracy is an age old problem that can be traced to thousands of years. There is evidence under both the Greek and Roman times that piracy existed but also extended to acts of banditry on land. Modern day piracy is limited to acts of robbery on the sea. The understanding of ancient piracy and modern day piracy is therefore very different.[4]

Piracy has also been traced from the earliest times in both the Red Sea and the Gulf where it was often manifested through tribal raiders extending their activities to the sea.[5] Their activities were not welcome and leaders attempted to deal with the piracy issue from as early as the seventh century BC where the likes of the Assyrian King Sennacherib sent out an expedition against pirates in the Gulf; the Roman emperor Trajan also led a naval expedition to the Gulf for the same purpose.[6]

2.2 Piracy during the Middle Ages

During the middle ages, piracy was considered as one way to escape the harsh realities of the eighteenth century world.[7] The people who were involved in piracy were therefore by and large those that were discontent with the society's structures and needed an elevation from what

[3] Malvina Halberstam, *Terrorism on the High Seas: The Achilles Lauro, Piracy and the IMO Convention on Maritime Safety*, The American Journal of International Law, Vol. 82 No. 2 (Apr., 1988)pp 269-310

[4] Joshua Michael Goodwin, *Universal Jurisdiction and the Pirate: Time for an Old Couple to Part*. Pg 3

[5] Michael Pearson, *The Indian Ocean* (New York: Routledge, 2003) p 56

[6] Ibid

[7] Sara Schubert, *Piracy, Riches, and Social Equality: the Wreck of the Whydah off Cape Cod*, Historical Journal of Massachusetts 34.1 (2006)

they considered a morass of misery and confinement to poverty. Although the classical appreciation of piracy was unlawful acts done on the sea, it must be noted that there was no universal understanding of what constituted piracy. Indeed, the definition was not only the subject of social construction, but also of administrators' own convenient categorization of offences; piracy was therefore sometimes defined to include depredations in land territory.[8]

One of the most notable individuals during the Middle Ages that engaged in piracy is Sir Francis Drake. However, according to Sir Drake and his own country England, he was not a pirate. Indeed, England not only never punished him, but went further and approved his actions.[9] During much of the sixteenth century, England did not do much to discourage piracy; pirates were rather seen as national heroes, some of whom deserved to be knighted for their contribution towards the county's economy through their piratical activities.[10] Pirates on the other hand viewed themselves as doing what was morally justifiable, and sometimes sought to vindicate themselves through "abolitionist" actions such as freeing slaves from slave ships they had attacked.[11]

The crackdown on piracy only came later in the early eighteenth century, when pirates begun to be viewed as a plague rather than as heroes. Piracy had to be confronted as it was a threat not only to imperial commercial links but also to law and order in particular colonies.[12]

---

[8] Joseph N.F.M. A Campo, *Discourse without Discussion: Representations of Piracy in Colonial Indonesia 1816-25*, Journal of Southeast Asian Studies 34.2 (2003)

[9] Goodwin op cit p 5

[10] Ibid

[11] Sara Schubert op cit

[12] Jeremy Black , *Britain as a Military Power, 1688-1815* (London: UCL Press, 1999) p42

Their activities were no longer considered heroic, but rather a disruption to sea trade and economic activity, not to mention the heinous nature of their operations.[13]

England begun to seriously crack down on piracy from the 1700s to the 1720s due to the "consolidation of state sovereignty, the rise of mercantilist economic theories, developments in international laws and diplomacy, and the growing influence of the mercantile class".[14] Economic considerations were however by far the foremost reasons. Pirates, seen as a threat to economic progress, were therefore treated mercilessly in courts. At some point, piracy was seen as a form of treason[15], and the punishment meted out was severe, at times involving hanging the convicted pirates.

The sustenance and growth of trade was therefore an important rationale for the harsh punishment of pirates. It is not as though Europe did not consider piracy a heinous offence, because if that were so, it would have sooner developed legislation and dealt with it. To the contrary, it encouraged piracy for a very long time before it took any action; when their economies came under threat.

It is interesting however, that though piracy was being discouraged, privateering on the other hand was openly encouraged. Privateering got the unofficial status of a national pass time

[13] Goodwin op cit p 6

[14] Ibid

[15] Ibid p 11

during the Revolutionary war.[16] Privateering may be defined as piracy against enemy vessels that is sanctioned by state authorities.[17]

In a judgment delivered in respect of an action that arose from the demand for extradition of persons charged with piracy during the American civil war, Ritchie J., stated,

"The object of privateering in general is not... fame or chivalric warfare, but plunder and profit; but at the present day the rights of private armed vessels and private belligerents cannot be doubted. Unless restrained by treaty stipulations the right to commission private armed vessels is, by the laws of nations, esteemed a legitimate means of destroying the commerce of an enemy, and captures made by private armed vessels of one belligerent, even without a commission, though not in self-defense, are not regarded as piratical either by their own government or by the other belligerent state. It does not, indeed, vest the enemy's property thus seized in the captors, but the seizure would be declared a prize of war to the government of the captors; and it is equally true that neutrals taking commission as privateers and acting on them are likewise free from the imputation of piracy."[18]

Privateers were driven by the expectation of getting enormous booty while purporting to be motivated by patriotism. In essence this was not different from piracy, only that it had the

[16] Eugene Kontorovich, *The "define and Punish" Clause and the Limits of Universal Jurisdiction[Dagger]* Northwestern University Law Review, Vol. 103, 2009

[17] Goodwin op ct

[18] Norman MacKenzie, Lionel H. Laing (eds),*Canada and the Law of Nations: A Selection of Cases in International Law, Affecting Canada or Canadians, Decided by Canadian Courts, by Certain of the Higher Courts in the United States and Great Britain and by International Tribunals*, ed. (Toronto: The Ryerson Press, 1938) p529

authority of the crown and its target was enemy ships.[19] It may have been seen as an instrument of war that was regulated by the government, but it was soon overtaken by the development of a professional navy.[20] The navy not only made proportionately more captures than the privateers, but it was more efficient in chasing enemy merchant ships, hence accounting for the declining returns of the privateers. [21] This made privateering economically unviable and hence unsustainable.

The eighteenth century was also a period in the history of America when piracy was having a significant effect on the nation's ability to conduct international trade throughout the Mediterranean Sea.[22] Momentum was therefore building not only in America but in other parts of the world to find ways of dealing with the menace.

2.3 Piracy in the Modern Day

The ocean is a tremendously significant resource to the world. It not only connects all the nations of the world, even those that are landlocked, but very significantly accounts for 90 percent of world trade today.[23] Any activity such as piracy that therefore threatens this complex global system is a matter of serious concern.

Piracy is not only alive and well today but its negative effects are reverberating around

---

[19] Goodwin op cit p 6

[20] Valerie Burton, *British Privateering Enterprise in the Eighteenth Century*, Business History Review 65.4 (1991)

[21] Ibid

[22] James Kraska, and Brian Wilson, *Maritime Piracy in East Africa*, Journal of International Affairs 62.2 (2009) pg 1

[23] James T. Conway, Gary Roughead, and Thad W. Allen, *A Cooperative Strategy for 21st Century Seapower*," Naval War College Review 61.1 (2008)

the globe.[24] From South East Asia to South America, the Caribbean to West Africa, to the east coast of Africa, piracy thrives. It is particularly prominent where there are no major naval powers such as in the Indian Ocean. The Indian Ocean differs from the Pacific and Atlantic oceans in that the latter two oceans have several major powers that have interests and borders.[25]

Since the early 1990s, piracy not only resurged but also increased in some areas. In South East Asia for instance, the region accounted for 65 percent of total global incidents in the year 2000 alone.[26] The region has however undertaken major cooperation efforts in order to ensure that it stems the piracy menace. One of the most significant developments is the Regional Cooperation Agreement on Combating Piracy and Armed Robbery against Ships in Southeast Asia, which is a cooperative framework of 16 Asian countries.[27] The areas of cooperation include extradition matters, and mutual legal assistance. During the past five years, this cooperation has been credited with the reduction of piracy incidences in the straits of Malacca and Singapore and throughout Southeast Asia. [28] It must however be noted that although the indigenous capacity in this area is not adequate to effectively deal with piracy, naval patrols by outside maritime powers are perceived as a challenge to national sovereignty.[29] This is one of the

---

[24] Yvonne M. Dutton, *Bringing Pirates to Justice: a Case for Including Piracy within the Jurisdiction of the International Criminal Court,* Chicago Journal of International Law 11.1 (2010)

[25] Michael Pearson, *The Indian Ocean* (New York: Routledge, 2003) p 284

[26] Zou Keyuan, *Seeking Effectiveness for the Crackdown of Piracy at Sea,* Journal of International Affairs 59.1 (2005)

[27] Ibid

[28] James Kraska, *Fresh Thinking for an Old Problem: Report of the Naval War College Workshop on Countering Maritime Piracy,* Naval War College Review 62.4 (2009)

[29] Adam J. Young, Mark J. Valencia, *Conflation of Piracy and Terrorism in Southeast Asia: Rectitude and Utility,* Contemporary Southeast Asia 25.2 (2003)

factors that has contributed to the reluctance of the nations in the region, that is, Southeast Asia, to ratify the SUA Convention.[30]

Piracy finds thriving ground in areas where there is weak or total lack of law enforcement on the seas or where there are high levels of poverty as exemplified in the state of Somalia.[31] The East Coast of Africa where the Somalia state, under a Transitional Federal Government is fledgling along, therefore makes one of the most volatile and dangerous seas in the world. According to the International Maritime Bureau, Somali pirates have continued to aggressively attack vessels in this region. The attacks are reported to have become expansive and spread "up to the sea area off Kenya, off Tanzania, off Seychelles, off Madagascar and in the Indian Ocean ... and Arabian Sea / off Oman and off west coast India and off western Maldives."[32]

Pirates have increasingly become emboldened in their operations and are not only conducting their attacks in the coastal waters of or within territorial waters of Tanzania, Kenya, Somalia, Yemen and Oman , but are also launching and attacking vessels as deep into the high seas as far as one thousand nautical miles off the coast of Somalia.[33]

Although piracy has been on the rise internationally, the incidences off the coast of Somalia, particularly from 2008, have brought the region to sharp world focus. In 2008 alone,

---

[30] Ibid

[31] Anna Hopper, *Squashing the Skull and Bones: Reforming the International Anti-Piracy Regime*, Harvard International Review 29.4 (2008)

[32] http://www.icc-ccs.org/index.php?option=com_content&view=article&id=70&Itemid=58 last visited on 16th November, 2010

[33] Ibid

more than one hundred vessels in the Gulf of Aden and western Indian Ocean were attacked, with the numbers continuing to rise, hence making the attacks unprecedented in modem times.[34]

The seizure of the very large crude carrier "Sirius Star" in November 2008, marked a new dimension in maritime piracy as it motivated a number of important international initiatives to counter the piracy menace.[35] The vessel was carrying two million barrels of oil worth $100 million cargo, and was only released with its 25 member crew after a hefty ransom of $3 million was paid.[36]

In 2010 alone, Somali pirates have been responsible for 44 percent of the 289 piracy incidents on the world's seas in the first nine months of the year.[37] The first reported case of pirates killing their hostages in this region was brought to light on 22nd February, 2011.[38] This clearly brings home the magnitude and seriousness of the piracy problem off the East African coast.

The United Nations Convention on the Law of the Sea (UNCLOS) is the foundation of ocean law and policy, and provides guidance on the various issues relating to piracy such as its

---

[34] James Kraska, Brian Wilson, *Maritime Piracy in East Africa*, Journal of International Affairs 62.2 (2009), *p 1*

[35] James Kraska, *Fresh Thinking for an Old Problem: Report of the Naval War College Workshop on Countering Maritime Piracy*, Naval War College Review 62.4 (2009)

[36] Ibid

[37] http://www.icc-ccs.org/ last visited on 16th November, 2010

[38] http://news.yahoo.com/s/ap/piracy checked on 22nd February, 2011

definition, and jurisdictional matters.[39] It is a very firm convention considering that it has one hundred and sixty (160) signatories.[40]

The UNCLOS and the Geneva Convention on the High Seas, defines piracy as consisting of "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 on the high seas, against another ship or aircraft, or against persons or property on board such ship or aircraft; against a ship, aircraft, persons or property in a place outside the jurisdiction of any State; or 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; or any act of inciting or of intentionally facilitating an act"[41] described above.

Under international law, the sea comprises various segments. It is important to understand these segments since they form the basis of jurisdictional considerations. The categorizations are the inland waters, the territorial waters, the contiguous zone, the exclusive economic zone, the continental shelf and the high seas.

Inland waters relate to waters that are to be found entirely within the jurisdiction of a state. These are waters considered from the shoreline to the baseline. It is important to note that the focus of international law is largely the sea and not the inland or internal waters.[42]

---

[39] James Kraska, Brian Wilson op ct, *p 2*

[40] Yvonne M. Dutton op cit

[41] Article 101 and 15 of UNCLOS and the Geneva Convention on the High Seas respectively

[42] Richard K. Gardiner, *International Law* (Essex: Pearson Longman Education, 2003) p 406

Territorial waters refer to that portion of the sea where the state is considered as having similar rights and jurisdiction as those over its land surface.[43] This area is considered as being part and parcel of the state in all respects, and does not exceed 12 nautical miles.[44]Piratical acts perpetrated in this area are therefore considered as falling under the jurisdiction of the coastal state. This area under the jurisdiction of the state was not always 12 miles. Customary international law, at least since the end of the seventeenth century, had maintained that territorial waters extended to a distance of 3 nautical miles from shore and that everything beyond this belt was part of the high seas, subject to no one state's exclusive jurisdiction.[45]

A coastal state may claim a portion of the sea from the baseline of the territorial sea. It may not, however, extend beyond 24 nautical miles from the baselines from which the breadth of the territorial sea is measured.[46] This is the portion referred to as the contiguous zone, and is an area where a state may exercise limited jurisdiction in order to prevent or employ sanctions related to its immigration, fiscal or sanitary laws and regulations.[47] This jurisdiction may also extend to the punishment for the infringement of those laws and regulations.

The exclusive economic zone refers to the area beyond the territorial waters of the state in which the state may exercise sovereign rights over economic activity.[48] UNCLOS[49] more specifically delineates these activities as comprising:

[43] Gardiner ibid, p 411

[44] Article 3, UNCLOS

[45] Ernst B. Haas, Allen S. Whiting, Dynamics Of International Law (New York,Mcgraw-Hill, 1956) P 409

[46] Article 33, United Nations Convention on the Law of the Sea

[47] Rebecca M.M. Wallace, *International Law* 4th ed (London: Sweet & Maxwell, 2002) p 149

[48] Gardiner op cit, p 414

(a) sovereign rights for the purpose of exploring and exploiting, conserving and managing the natural resources, whether living or non-living, of the waters superjacent to the seabed and of the seabed and its subsoil, and with regard to other activities for the economic exploitation and exploration of the zone, such as the production of energy from the water, currents and winds;

(b) Jurisdiction as provided for in the relevant provisions of the Convention with regard to:

(i) the establishment and use of artificial islands, installations and structures;

(ii) marine scientific research;

(iii) the protection and preservation of the marine environment;

It is imperative that a coastal state exercising its rights under the umbrella of the exclusive economic zone takes due regard to the rights and duties of other states.[50]

The continental shelf refers to the seabed and subsoil of the submarine areas that extend beyond a coastal state's territorial sea, proceeding "throughout the natural prolongation of its land territory to the outer edge of the continental margin, or to a distance of 200 nautical miles from the baselines from which the breadth of the territorial sea is measured where the outer edge of the continental margin does not extend up to that distance".[51] A coastal state exercises sovereign exclusive rights over the continental shelf for purposes of exploring it and exploiting its natural resources. This is a functional formulation that gives the "...legal basis for coastal state authority in regard to development of the shelf's resources while [avoiding] the undesirable

---

[49] Article 56, United Nations Convention on the Law of the Sea

[50] Ibid

[51] Article 76, United Nations Convention on the Law of the Sea

complications for navigation, overflight, and free-swimming fisheries which might occur should sovereignty over the continental shelf be recognized."[52]

It is important to note that even where a state does not exercise its rights over its continental shelf, another state wishing to do so must first seek and obtain the express consent of the coastal state.[53] This is because the "rights of the coastal State over the continental shelf do not depend on occupation, effective or notional, or on any express proclamation".[54]

UNCLOS provides that the high seas are open to all states, and that states may exercise certain freedoms over the high sea. More specifically , these include freedom of navigation, freedom of overflight, freedom to lay submarine cables and pipelines, freedom to construct artificial islands and other installations that are permitted under international law, freedom of fishing, subject to certain conditions, and limited freedom of scientific research.[55]

Since the mid twentieth century, modern maritime jurisdiction of states over the high seas has expanded through state practice and international agreement. This has been as result of the increase in fishing and seabed mining technology and the sheer increase of new states into the international system. [56]

On the issue of sovereignty, UNCLOS is categorical that no state may claim sovereignty over any part of the high seas.[57] No state has any greater rights or jurisdiction over it than

---

[52] Lawrence Juda, *International Law and Ocean Use Management.* (New York: Routledge, 1996) P 102

[53] Article 77, United Nations Convention on the Law of the Sea

[54] Ibid

[55] Article 87, United Nations Convention on the Law of the Sea

[56] James L. Zackrison, and James E. Meason, *Chile, Mar Presencial and the Law of the Sea*, Naval War College Review 50.3 (1997)

[57] Article 89, United Nations Convention on the Law of the Sea

another.[58] It belongs to everyone and any state, irrespective of whether it is a coastal or land-locked state, has equal rights over it and may sail ships flying its flag on such portions of the sea.[59] Indeed "the ocean generally is incapable of permanent appropriation as property, or domain, by any one nation; and, being common alike to all mankind, no one nation can (without treaty, at least) acquire any greater rights or jurisdiction over it than another. All have 'a common right and a common jurisdiction'; each over its own vessels, and of crimes injurious to itself; none an exclusive right or jurisdiction, or over the vessels of the other." [60] This is the affirmation of the concept of the freedom of the seas whereby the high seas may be used freely by ships of all nations.[61]

In dealing with piracy, States are obliged under UNCLOS to fully cooperate.[62] This is in relation to incidents of piracy that occur on the high seas and beyond the jurisdiction of any particular state. Cooperation is indeed a major issue in the fight against piracy since even the strongest of naval powers do not possess the capacity to single handedly patrol the vast oceans and bring suspected pirates to justice.

Under Article 102, acts of piracy that are committed by a warship or a government ship whose crew members have mutinied and taken charge of the ship are considered as acts committed by a private ship. A ship or aircraft is only considered a pirate ship in two scenarios.

---

[58] Norman MacKenzie, Lionel H. Laing op cit p 81

[59] Article 90, United Nations Convention on the Law of the Sea

[60] Norman MacKenzie, Lionel H. Laing, ed ,*Canada and the Law of Nations: A Selection of Cases in International Law, Affecting Canada or Canadians, Decided by Canadian Courts, by Certain of the Higher Courts in the United States and Great Britain and by International Tribunals*, ed. (Toronto: The Ryerson Press, 1938)p 81

[61] Peter Malanczuk , *Akehurst's Modern Introduction to International Law*, (London: Routledge, 1997) p 184

[62] Article 100, United Nations Convention on the Law of the Sea

Firstly, where the purpose of the persons in charge of the vessel is to commit an act of piracy as described under the UNCLOS in article 101. Secondly, where the vessel has already been used to commit such piratical acts so long as it is in the control of the persons guilty of the said piratical act.[63]

2.4 Universal Jurisdiction

As early as 1696, an English jury in the case of Rex v Dawson was given the following instruction:

> "The King of England hath not only an empire and sovereignty over the British seas, but also an undoubted jurisdiction and power... for the punishment of all piracies and robberies at seas, in the most remote part of the world; so that if any person whatsoever, native or foreign ... with whose country we have no war ... and are in amity shall be robbed or spoiled [on the high seas], it is piracy within the limits of your enquiry, and the cognizance of this court."[64]

A pirate, being a hostis humani generis was considered as having renounced all the benefits of orderly society and state protection, and since he had declared war on all mankind, mankind was similarly entitled to declare war on him and inflict him with punishment wherever he was found.[65]

The subject of jurisdiction in criminal proceedings is an important one. A court must be seized of jurisdiction of a particular matter in order for it to properly exercise its judicial function

[63] Article 103, United Nations Convention on the Law of the Sea

[64] Goodwin op ct p 11

[65] Ibid p 12

over the same. Where that jurisdiction is non- existent therefore, any matter brought before that court or tribunal will result in it being considered a nullity *ab initio.*

The more common type of jurisdiction relates to that possessed by municipal courts over the subjects of a state or over a matter that affects that state in some way or other. This would for instance be a case where a national has committed a criminal offence within the state or even outside the state. It may also involve a situation where a foreigner has committed an offence within the state or against the interests of the state, wherever those interests may be. A good example of the latter is the trial in the US of some of the people alleged to have bombed the US embassies in Nairobi and Dar-es-Salaam; although the alleged perpetrators were not US nationals, it was US interests that were affected and therefore the US could rightfully exercise jurisdiction over them and try them. This is the traditionally conceptualization of jurisdiction, that is, where a state only prescribes law limited to the governance of conduct and persons within its own territory.[66]

In matters of the sea, jurisdiction may be based on a variety of factors. One such consideration is jurisdiction based on what is referred to as the "flag state". Here, a ship flying the flag of a particular state is considered as being subject to the state whose flag it is flying.[67] The ship is seen as a "floating" portion of the territory whose flag it possesses. The vessels upon the high seas are "... recognized as parts or elongations of the territory of the nation under whose flag they sail...because the ocean generally is incapable of permanent appropriation as property,

[66] K. Lee Boyd, *Universal Jurisdiction and Structural Reasonableness*, Texas International Law Journal 40.1 (2004),

[67] Eugene Kontorovich, *Implementing Sosa v. Alvarez-Machain: What Piracy Teaches about the Limits of the Alien Tort Statute*, 80 NOTRE DAME L. REV. 111, 151 (2004)

or domain, by any one nation; and, being common alike to all mankind, no one nation can (without treaty, at least) acquire any greater rights or jurisdiction over it than another. All have 'a common right and a common jurisdiction'; each over its own vessels, and of crimes injurious to itself; none an exclusive right or jurisdiction, or over the vessels of the other."[68] The state is therefore considered as having jurisdiction over its ship.

Under UNCLOS, a ship or aircraft may retain its nationality even where the vessel has subsequently become a pirate ship or aircraft. This retention or loss of nationality is dependent on the laws of the State that bequeathed nationality to the vessel.[69]

It has been said that "although one could in each instance regard the link between the ground on which extraterritorial jurisdiction is asserted and the offence in question as a rationalization of State interest, the point is that the interests of a State in exercising jurisdiction are usually rooted in its territorial self. This enables States, when seeking to justify specific assertions of jurisdiction through constructive extensions of that principle, to act within an accepted conceptual framework of legality and to build, by analogy, upon other similar rules of international law."[70]

At other times, jurisdiction may be based on the nationality of the perpetrator of piracy. This is referred to as the nationality principle and may be utilized by a state where it seeks to

[68] Norman MacKenzie, Lionel H. Laing op cit p 81
[69] Article 104, United Nations Convention on the Law of the Sea

[70] Michael Byers, *Custom, Power, and the Power of Rules: International Relations and Customary International Law.* (Cambridge: Cambridge University Press, 1999) p 64

exercise personal jurisdiction over crimes committed by its nationals wherever such crimes may have been committed.[71]

Another basis of exercising jurisdiction is the "effects principle" where a state may exercise jurisdiction over a foreign national on the basis that the action perpetrated has had an effect upon the state seeking to exercise jurisdiction. In criminal conduct harm is essential as the relevant effect. Importantly, "without an effect or end, it is impossible to have a cause or means, and everything in penal law associated with causation and imputation would be superfluous."[72]

There are however certain cases over which any court may exercise jurisdiction. These are offences that relate to crimes against humanity, genocide, war crimes, and piracy, amongst others. Where such offences are perpetrated, a state need not prove that it was its national who was involved or that the state's interests were affected. It is sufficient that the offence committed was one of those recognized as falling within the purview of universal jurisdiction. Therefore where "no general territorial sovereignty extends, the vessels and citizens of any nation would be under the protection of no law and amenable to none, except the law of nations ... unless the laws of the country to which the vessels belong were extended over them."[73]

UNCLOS is categorical on the issue of jurisdiction. It states that,

"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

---

[71]Rosalyn Higgins, Terrorism and International Law (London: Routledge, 1997) p 44.

[72] Jerome Hall , *General Principles of Criminal Law* (Indianapolis: Bobbs-Merrill, 1960)p 213

[73] Norman MacKenzie, Lionel H. Laing op cit p 82

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."[74]

It is worth noting that this article is identical with Article 19 of the 1958 Convention on the High Seas. The import of this article is that if a pirate from a given state X attacks a vessel from country Y on the high seas, any country even if not X or Y has the right to capture the pirate, and try him in accordance with the municipal laws of that capturing state. This Country can legally do so even where it has no connection with the pirate or the vessel attacked.[75] States therefore have the right to assume jurisdiction over such acts of piracy.

Under the UNCLOS definition of piracy, the offence only occurs if it is perpetrated on the high seas, that is, areas beyond the territorial waters recognized as belonging to a given state. It is worth noting that UNCLOS, inter alia, expanded the territorial seas of states and instituted exclusive economic zones.[76]

Interestingly, before the current regime on international on piracy developed, most of the world's oceans were considered high seas. [77]The import of that is that it was easier to net pirates since the coverage area was wider. Today, large portions of the world oceans have been taken

---

[74] Article 105, United Nations Convention on the Law of the Sea

[75] Goodwin, op cit

[76] Stuart Mcmillan, op cit

[77] Donald R. Rothwell, *Maritime Piracy and International Law,* CRIMES OF WAR PROJECT (2009)

over by states hence forming part of their territories. A state can today claim as much as 350 nautical miles of the sea from its shores.[78]

Due to the difficulties experienced from the fact that most piratical attacks were occurring within territorial waters, the International Maritime Bureau sought to merge the understanding of piracy as defined under UNCLOS and the issue of armed robbery against ships.[79] It therefore came up with an expanded version of the UNCLOS understanding, and defined piracy and armed robbery as follows:

> "An act of boarding, or attempting to board any ship with the apparent intent to commit theft or any other crime and with the apparent intent or capability to use force in the furtherance of that act."[80]

The 1988 Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation (the SUA Convention) went further and changed the long-standing definition of piracy to include attacks in territorial waters. It is noteworthy however, that the Convention did not extend to cover universal jurisdiction to states.

Under the Convention, state parties are bound to consider as offences acts done unlawfully and intentionally by a person who "seizes or exercises control over a ship by force or threat thereof or any other form of intimidation; or performs an act of violence against a person on board a ship if that act is likely to endanger the safe navigation of that ship; or destroys a ship

---

[78] Victor Prescott , Clive Schofield, *The Maritime Political Boundaries of the World* (Boston: Martinus Nijhoff, 2005) p 24

[79] Robert C. Beckman, *Combating Piracy and Armed Robbery Against Ships in Southeast Asia: The Way Forward*, 33 OCEAN DEV. & INT'L L. 317, 319 (2002).

[80]Ibid

or causes damage to a ship or to its cargo which is likely to endanger the safe navigation of that ship; or places or causes to be placed on a ship, by any means whatsoever, a device or substance which is likely to destroy that ship, or cause damage to the ship or its cargo which endangers or is likely to endanger the safe navigation of that ship; or destroys or seriously damages maritime navigational facilities or seriously interferes with their operation, if any such act is likely to endanger the safe navigation of the ship; or communicates information which he knows that is false , thereby endangering the safe navigation of the ship; or injures or kills any person, in connection with the commission or the attempted commission of the offences set forth" above.

These provisions are wide enough to cover acts of piracy whether in territorial waters or on the high seas. Even so however, it would be necessary to have arrangements that ensure that there are no jurisdictional conflicts. A state may for instance claim national sovereignty, and rightly so, should the suspected pirates be arrested from its territorial waters. It is therefore important, particularly under the provisions of the SUA Convention to ensure that there are coordination mechanisms including regional adjudication agreements. These could help resolve jurisdictional disputes as well as "supplement the prosecute- or -extradite provisions of the SUA Convention".[81]

The doctrine of universal jurisdiction cannot be overemphasized. Without it, crimes of certain types would flourish. Piracy has for instance been shown to severely impact not only domestic economies and regional stability, but also the international economy.[82] Piracy disrupts local fisheries activities leading to further impoverishment of the people and stagnation of

[81] Michael Bahar, *Attaining Optimal Deterrence at Sea: A Legal and Strategic Theory for Naval Anti-Piracy Operations*, Vanderbilt Journal of Transnational Law 40.1 (2007)

[82] Anna Hopper op cit

government programmes. Beneath the doctrine is the realization of the need for international cooperation in dealing with crime. Cooperation has been recognized as the only way to maintain regional maritime in other jurisdictions such as the South East Asia.[83] The East African region is no exception, and Kenya's involvement in the prosecution of cases of piracy off the coast of Somalia is testimony to this fact.

[83] Zou Keyuan, op cit

CHAPTER 3

INTERNATIONAL LAW, DIPLOMACY AND PIRACY

3.0 Introduction

States, being aware that their domestic policies are affected by their external environment are not content merely to observe one another at a distance, but rather feel the need to enter into a dialogue with other states. This dialogue between independent states is the substance of diplomacy.[1] Diplomacy thus arises out of the coexistence of a multitude of independent states in an inter-dependent world.[2] No single state is self sufficient. Even the powerful states reckon that their survival and interests are not entirely within their control. It is this realization that compels states to engage with others. This engagement is defined by diplomacy. In the same vein, states need a set of rules and procedures to govern and determine their relations. These rules are usually negotiated and form part of international law.

3.1 Diplomacy

Diplomacy is considered primarily as a political activity, whose key objective is to promote a state's foreign policy in a manner that will not require the intervention of the law, force or propaganda.[3] The entering into negotiations and all the business thereof is therefore the function of diplomacy.[4] In the light of the foregoing, diplomatic relations refer to the links between states that enable them to conduct business in the international arena through

---

[1] Adam Watson, *Diplomacy: The Dialogue between States* (New York: Routledge, 1991) p 14

[2] Ibid, p 15

[3] G.R. Berridge 3rd ed , *DIPLOMACY: Theory and Practice* (New York: Palgrave Macmillan, 2005) p 1

[4] Dietrich Kappeler, Makumi Mwagiru, Josephine Odera, *Diplomacy: Concepts, Actors, Organs, Process and Rules*, IDIS Monograpgh Series No. 1(Nairobi, 1996) p 7.

diplomacy.[5] Diplomatic practice has had a long history, and as has been alluded it is concerned with the management of relations between states inter se and between states and other actors.[6]

3.1.1 History of Diplomacy

Numerous documents to guide the practice of diplomacy have been written over the years. One of the key works to ever be written was *De la Maniere de Negocier avec les Souverains* by Francois de Callieres.[7] This work was greatly acclaimed by great diplomats such as Harold Nicolson. Such works, amongst others helped to educate prospective diplomatists in the art of diplomacy. The content varied from issues of representation, nature of ambassadorial status, immunities and privileges to questions regarding the status of an ambassador.[8]

The law relating to diplomatic relations developed to customary international law whereupon it was codified as the law governing diplomatic and consular relations. The Vienna Convention on Diplomatic Relations, 1961 (VCDR), is the treaty that governs diplomatic relations.

Until 1961, diplomatic law was located chiefly in customary international law, that is, the accumulated practice of states that they accepted as binding upon them. The VCDR codified the customary law on diplomacy, that is, it clarified and tightened it, refined its content and prelaunched it in the form of a multilateral treaty.[9]

---

[5] Richard K. Gardiner, *International Law* (Essex: Pearson Longman Education, 2003) p 344

[6] R. P. Bartson, *Modern Diplomacy* 3rd ed (Pearson Longman: Essex, 2006) p 1

[7] Francois de Callieres, *The Art of Diplomacy* H.M.A Keens-Soper, Karl W. Schweizer eds (Leicester University Press: London, 1983) p 19

[8] Ibid, p 21

[9] G. R. Berridge, Diplomacy: Theory and Practice 3rd ed (Palgrave Macmillan: New York, 2005) p 115

3.1.2 Establishment of Diplomatic Relations

Diplomatic relations may involve either bilateral or multi-lateral activity. In order to establish relationships, including the duties and responsibilities each party will have, states will enter into agreements. Prof Mwagiru states that "the landscape of modern diplomatic, international and regional relations is dotted with the various agreements that states have concluded with each other".[10] These agreements bear testimony to the fact that states are not islands and do indeed need other states in order to pursue their interests.

The VCDR is categorical that the establishment of diplomatic relations between States occurs by mutual consent.[11] Although, the emphasis has been on States, arrangements may also be made with other actors such as international organizations, regional organizations and supra-national organizations.

Diplomatic activity is wide and consists of multiple elements. These range from actions that are of a purely representational nature, for instance, taking part in national funerals, national holidays, military parades and national banquets, to the negotiation of highly complex international agreements.[12]

3.1.3 Diplomatic Relations and National Interests

States engage in diplomatic relations in order to secure their interests. These interests may be proximate to their territories or even in distant lands. These domestic and international

[10] Makumi Mwagiru, *DIPLOMACY: Documents, Methods and Practice* (Nairobi: Institute of Diplomacy and International Studies, 2004) p84

[11] Article 2 VCDR

[12] Jose Calvet De Magalhaes, *The Pure Concept of Diplomacy*, trans. Bernardo Futscher Pereira (New York: Greenwood Press, 1988) p 101

environments of states will inevitably shape the policies they undertake and the relations they enter into. They will seek to address issues such as economic growth, inflation, or national security, with the resources at their disposal. [13]

It must be understood that although states will be part of efforts internationally to solve problems, their own security and other concerns ultimately take precedence. They will act to ensure their own interests. Indeed a nation like the US will intervene in international crises and situations because it recognizes that the interconnectivity and interdependence of states is not only a strength but also creates serious vulnerabilities to its own security. It also recognizes that issues such as regional conflict, terrorism, and lawlessness have a potential to threaten not only world prosperity but US national security.[14]

The question of both national and international security is critical when looked at in the context of piracy. Indeed, the incidents of piracy and armed robbery at sea in the waters off the coast of Somalia are seen as constituting a threat to international peace and security in the region.[15] In conceptualizing international security, it is first important to appreciate national security. This is because international security has to do with the international system that itself denotes a collectivity of independent entities that interact with each other. These entities or states

---

[13] Gabriel A. Almond, and G. Bingham Powell, eds., *Comparative Politics Today: A World View*, 4th ed. (Glenview, IL: Scott, Foresman and Company, 1988) p 16
[14] James T. Conway, Gary Roughead, and Thad W. Allen, *A Cooperative Strategy for 21st Century Seapower*," Naval War College Review 61.1 (2008),

[15] United Nations Security Council Resolution 1851 (2008)

have their own self interest which when multiplied by their numbers form a collective interest to be enjoyed and pursued in common.[16]

According to Ayoob, the traditional conceptualization of national security lies on the assumptions that the major threats to a state's security are external and that they are military in nature.[17] It is noteworthy however that the conceptualization of security has gone beyond the military. Barry Buzan and other scholars have indeed questioned the primacy given to the military in security conceptualizations and argued that the understanding and appreciation of security ought to be broader.[18] This position is vindicated when one sees the dimensions that piracy has taken, particularly off the coast of Somalia and the Western Indian Ocean.

Donald Snow argues that national security and by extension international security is no longer limited to the traditional conceptualizations of military action.[19] The national menu has broadened to include problems that are either semi-military or non military at all. The referent object of security may therefore be an individual, a group, a state, a regional or even the global system.[20]

The piracy menace has made sea trade along Indian Ocean more expensive. Insurance premiums imposed on the shipping lines have skyrocketed; ships are taking longer routes around

---

[16] Mohammed Ayoob, *The Third World Security Predicament: State Making, Regional Conflict, and the International System* (Lynne Rienner: London, 1995) p 7

[17] Ibid p 5

[18] Barry Buzan, et al, *A New Framework for Analysis* (Lynne Rienner: London, 1998) p 195

[19] Donald M. Snow, *National Security For A New Era: Globalization and Geopolitics* (New York: Pearson, 2004) p 269

[20] S. Neil Macfarlane, "1: Taking Stock," *The Third World beyond the Cold War: Continuity and Change*, ed. Louise Fawcett and Yezid Sayigh (Oxford: Oxford University Press, 1999) p 17

the Cape to avoid attacks, and some shipping lines have already begun hiring armed security to escort their ships. The inevitable effect is the increase of costs on basic goods including food, thus heightening food insecurity and threatening a state's security. Food insecurity is the greatest threat to state security in Africa.[21] At a broader level, continued disruption of sea trade by pirates could seriously end up affecting economies across the globe, hence threaten their economic security. Indeed, while discussing the piracy situation at the Security Council, it was pointed out that piracy had become more rampant and was not only posing a great threat to international humanitarian assistance and navigational security, but that it had potential dire consequences for the international economy and the lives of Somalis.[22]

Another area of concern is the possible link of piracy and terrorism. There is yet no clearly reported nexus, but it cannot be wished away. Such a link would be a major challenge to international security.

3.2 International law

The traditional parameters of international law consisted of rules and principles governing the relations between states. Today, the scope of international law has been expanded to include not only relations between states, but also states and individuals and between international organizations. International law has a number of sources, although unlike national jurisdictions, these do not provide a firm and compelling basis. National sources of law carry with them power and the threat of sanctions. International law on the other hand is however

[21] Lecture entitled " *Intelligence Institutions in National Security*" delivered by Major General (Rtd) Michael Gichangi, Director General, National Security Intelligence Service at National defence College on 4th February, 2011

[22] Security Council Meeting No. 6026 of 2nd Dec, 2008

largely dependent on the willingness of an actor to comply. Since there is no supranational executive, compliance is dependent on the action of states either individually or collectively.[23]

The major source of international law is treaties. These are entered into between the actors, usually states, and form a basis of having relations.

Over the years, International law has gained more interest. It has not only generated more interest, but has also seen an increase in the teaching of international law, and in the number of public institutions utilizing international law.[24] This is an important point since the world continues to interact in more intensive and regular patterns as time goes by. Indeed, international law is a means of dealing with problems that are not solvable by a single state.[25] Where a state can handle a situation on its own, international law hardly comes into play. Usually, the matter is restricted to the national jurisdiction. However, many issues today are cross-cutting and require the collective effort of states, thus the significance of international law.

Apart from states there are also numerous organizations that require to use international law. Such organizations include the International Police (INTERPOL), IMO, the African Union, and the supranational European Union.

---

[23] Adam Watson, p 40

[24] Quincy Wright, and Social Science Research Council (U.S.), *Research in International Law since the War: A Report to the International Relations Committee of the Social Science Research Council* (Washington, DC: Carnegie Endowment for International Peace, 1930) pg. 2

[25] Ibid

3.3 International law and diplomacy

International law and diplomacy have a fused connection that aids to give the other effect. International law on the one hand is responsible for the creation of organizations and procedures that determine diplomacy, while diplomacy in its own right facilitates the creation of international law. It is therefore a relationship that is dependent.

As mentioned earlier, one major source of international law is treaties or agreements. There is now a huge body of agreements, both bilateral and multi-lateral, in force between states. States are continually in negotiations with other states and other bodies regarding rules of the international society. This ongoing process of negotiation between actors in the international system is one of the greatest achievements of diplomacy. Since these rules are numerous and complex, there is a need for continued discussion to ensure they are amended and updated for effectiveness. This continued discussion occupies a major place in the dialogue between states.[26] Here, one sees a clear nexus between international law and diplomacy. Diplomacy is used as the cloak under which international law issue are discussed. It provides a basis for states to meet, negotiate, amend rules, and adopt procedures and regulations for the better ordering of the international system.

It is upon this basis that there have been major diplomatic initiatives to deal with piracy. States have met under the auspices of the United Nations and other organizations and discussed numerous efforts to combat and prevent piracy off the coast of Somalia. All these efforts have been conducted under existing international norms based on international law. One of the key issues that for instance stands out in the UN Security Council Resolutions on piracy off the

[26] Adam Watson, p 42

Somalia coast is that the sovereignty, territorial integrity and political independence of states is key. The security Council affirmed that the authorization provided to intervene applied only with respect to the situation in Somalia and would not affect the rights or obligations or responsibilities of member states under international law, including any rights or obligations under UNCLOS, with respect to any other situation, and underscored in particular that such intervention would not be considered as establishing customary international law.[27] This clarification within the body of the resolution was important because it helped to allay fears that the relation of states was being redefined in a manner that would have been prejudicial to weaker littoral states. In this instance, diplomacy was being used to underscore the significance of existing international law.

Diplomacy is also used as a forum by states to give their position on important international issues. Regarding the piracy situation off the coast of Somalia for instance, China stated that piracy had become more rampant and was posing increasingly grave threats to international humanitarian assistance and navigational security, with dire consequences for the international economy and the lives of Somalis, but further noted that piracy was merely a symptom of a larger Somalia crisis, and that it was important not to lose sight of its root causes. It therefore proposed that a reconciliation process was needed to resolve disputes between Somalia's various factions and promote economic development. It further called on the international community to support the work of AMISOM, as well as on the Council to heed the

[27] UNSCR 1816

appeal of Somalia and AU officials to support early deployment of a UN peacekeeping force and for the various factions involved to create favourable conditions for deployment.[28]

In the same resolution 1846, Indonesia stated that piracy in Somalia was the result of political conflict, lawlessness and poor law enforcement, and that the international community needed to stop paying lip service but act with greater immediate support to AMISOM and the political process, as well as provide international military resources over the long term.

[28] UNSCR 1846 of 2008

CHAPTER 4

RESPONSES TO PIRACY OFF THE SOMALIA COAST

4.0 Introduction

Piracy off the coast of Somalia has taken such an unprecedented surge since 2008 that it has raised significant concern amongst the international community. The lack of a functioning government in Somalia has largely contributed, if not been the cause of the spiraling of piracy in the region. The Transitional Federal Government of Somalia (TFG) has itself admitted to its lack of capacity in combating the crime and sought for international assistance, going as far as consenting to have States patrol and operate in its territorial waters as well as engage suspected pirates in their hideouts on land. The international community on the hand has responded with a raft of diplomatic and other measures including far reaching Security Council resolutions aimed at combating the problem off the coast of Somalia.

The suppression of piracy must involve joint efforts of states and international organizations that can bring to bear their capacities to deter and defeat the menace. Such efforts would include the interception of transfer of ransom monies, selective military action in the pirates' hideouts on land, and patrolling the high seas.[1]

The counter piracy diplomacy from the period beginning October 2008 to date has been more than there has been in any other period in history.[2] Such diplomatic efforts have spanned the development of a United Nations comprehensive report on the issue of piracy off the Somalia

---

[1] James Kraska, and Brian Wilson, "Maritime Piracy in East Africa," *Journal of International Affairs* 62.2 (2009)

[2] James Kraska, *Fresh Thinking for an Old Problem: Report of the Naval War College Workshop on Countering Maritime Piracy,* Naval War College Review 62.4 (2009)

coast, the adoption of key Security Council Resolutions, the creation of a multinational Contact Group consisting of more than twenty states, relating to piracy in the region, and agreement amongst States in the region to facilitate greater regional cooperation against piracy through the nonbinding Djibouti Code of Conduct.[3]

In addition, Kenya concluded agreements with the international community relating to the prosecution of suspected pirates caught by naval forces off the Somalia coast. More specifically the agreements were concluded between Kenya and the UK, USA, Denmark, European Union, Canada and China.

Some nations, notably France, Denmark, Malaysia, India, Iran and Russia, have already sent war ships. Other efforts include the Combined Task Force 151, a multinational coalition that is coordinating with the U.S. Navy's Fifth fleet, the European Union's Operation "Atalanta" through (contributions of Belgium, the UK, France, Germany, Greece, the Netherlands, Spain and Sweden) naval vessels and surveillance planes to the area, and Chinese and Japanese warships.[4]

Even where there is no threat to a nation in its home, military deployment is considered appropriate to handle threats of an international nature. The Danish for instance appear ready to deploy their navy where there are needs around the world that have been sanctioned as such by

[3] Ibid

[4] Ibid

the international community.[5] This may have been the policy that informed Denmark's involvement in the Indian Ocean to deal with the piracy problem.

Similarly, the US has argued that "credible combat power will be continuously postured in the ... Arabian Gulf/Indian Ocean to protect our vital interests, assure our friends and allies of our continuing commitment to regional security, and deter and dissuade potential adversaries and peer competitors. This combat power can be selectively and rapidly repositioned to meet contingencies that may arise elsewhere..."[6] With specific regard to piracy and other threats in Somalia the US has said that it needs a strategy that is comprehensive and sustainable and that "must be built around our work with international partners, including the U.N., African Union, the European Union, Inter-Governmental Authority on Development (IGAD), International Contact Group on Somalia (ICG), and the Contact Group on Piracy off the Coast of Somalia, among others, to achieve our foreign policy goals in Somalia of political and economic stability, eliminating the terrorist threat, addressing the dire humanitarian situation, and eliminating the threat of piracy."[7]

4.1 Djibouti Code of Conduct

Following the unprecedented rise of piracy off the coast of Somalia, the International Maritime Organization convened a meeting in Djibouti in January, 2009. The outcome was the adoption of the 'Code of Conduct Concerning the Repression of Piracy and Armed Robbery

---

[5] Jacob Reimers, *Practicing Law on a Different Battlefield*, Chicago Journal of International Law 2.1 (2001)

[6] James T. Conway, Gary Roughead, and Thad W. Allen, *A Cooperative Strategy for 21st Century Seapower*," Naval War College Review 61.1 (2008)

[7] Johnnie Carson, "Developing a Coordinated and Sustainable United States Strategy toward Somalia," *DISAM Journal of International Security Assistance Management* Nov. 2009

against Ships in the Western Indian Ocean and the Gulf of Aden' (the Djibouti Code of Conduct).[8] As at February 2011, 17 of the 21 countries eligible to sign the Djibouti Code of Conduct had joined. Under the Code, the participating countries commit themselves to share relevant information, conduct joint operations, interdict vessels including aircraft that are suspected of perpetrating piracy or armed robbery, ensuring that suspected pirates are arrested and prosecuted, and also ensuring that victims of piracy and armed robbery against ships are given proper treatment and care.

The information sharing and coordination is to be done through of national focal points and piracy information exchange centres located in Mombasa, Kenya, Dar as Salaam, Tanzania, and a regional maritime information centre expected to be established in Sana'a, Yemen by the end of March, 2011. These centres will receive and disseminate information regarding imminent threats or incidents regarding ships. They will also prepare reports based on information received from participants.[9]

The participants have also undertaken to ensure that their respective national legislations are reviewed to bring within their ambit the offences of piracy and armed robbery against ships, as well as ensuring that the issue of jurisdiction in terms of investigation and prosecution is addressed.

Under the Djibouti Code of Conduct, the IMO Djibouti Code of Conduct has been established in order to provide financial support towards the implementation of the provisions of

[8] James Kraska, "*Fresh Thinking*" Op cit

[9] Yvonne M. Dutton, "Bringing Pirates to Justice: A Case for Including Piracy within the Jurisdiction of the International Criminal Court," *Chicago Journal of International Law* 11.1 (2010)

the Code. A training centre is to be established in Djibouti to build the capacity of government officials and ensure that the Code is uniformly applied.

4.2 Contact Group on Piracy off the Coast of Somalia (CGPCS)

The Contact Group on Piracy off the Coast of Somalia (CGPCS) was created in January 2009, following a United Nations Security Council resolution.[10] Its purpose was to ensure facilitation of discussion and coordination of efforts by States and other organizations working to combat piracy off the coast of Somalia. The CGPCS established four Working Groups responsible for different functions. The first is tasked with the military and operational coordination of navies that are operating off the coast of Somalia, information sharing and building capacity within the region. The second working group focuses on legal issues surrounding piracy. These include the apprehension, prosecution, and transfer of suspected pirates. It also includes the issue of human rights of the arrested suspects. The third working group is tasked with developing shipping self- awareness and building capabilities of users of the sea. It is therefore very key in information sharing and works very closely with the International Maritime organization. The last working group deals with public information.[11]

Membership to the organization is open to countries that are seriously affected by piracy off the coast of Somalia, or to those states or organizations that feel they have a meaningful contribution to make towards the counter piracy efforts.[12] It is noteworthy that decisions are taken by consensus of the members, thus underpinning the diplomatic approach. The CGPCS has

[10] UN Security Council Resolution 1851 of 2008

[11] http://oceansbeyondpiracy.org/obp/matrix/counter-piracy-activities-static accessed on 19th March, 2011

[12] Lesley Anne Warner, "Pieces of Eight: An Appraisal of US Counter-piracy Options in the Horn of Africa," *Naval War College Review* 63.2 (2010)

established the International Trust Fund to support states that have initiated counter piracy efforts within their states.

In 2009 the CGPCS endorsed a report of Working Group 1 that had carried out a regional counter-piracy capability development needs assessment and prioritization mission to East Africa and the Horn of Aden. The report made a number of recommendations notably that, the Djibouti Code of Conduct should be the focal point of any regional counter-piracy activity, solutions to the piracy problem should, support the political process, and solutions should be comprehensive and national/sub-national training requirements should be matched with regional and international training opportunities.

4.3 ESA-10

ESA-10 refers to a Regional grouping of Eastern and Southern Africa – Indian Ocean states , and the European Union High Representative , notably Comoros, Djibouti, Kenya, Mauritius, Seychelles, Somalia, South Africa, Tanzania, and Reunion, on Piracy and Maritime Security by. In its second ministerial meeting[13], apart from the respective ESA-10 ministers and representatives present, others in attendance were Common Market for East and Southern Africa (COMESA), East African Community (EAC),Inter-Governmental Authority on Development (IGAD), Indian Ocean Countries (IOC) and Southern Africa Development Cooperation (SADC), the Minister of the Republic of Maldives, and representatives from China, India, Pakistan, Russian Federation and the United States (US), United Nations (UN), African Union (AU),International Police (INTERPOL) and Indian Ocean Naval Symposium (IONS).

[13] Held in Mauritius on 7th October, 2010, http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/EN/foraff/116942.pdf accessed on 18th March, 2011

At this meeting the ministers raised concern on the scourge of piracy and its effect on peace, security, trade, and its possible links to transnational organized crime, and terrorist activities. They also adopted a three pronged Regional Strategy (RS) providing for a framework to prevent and combat piracy, and promote maritime security. The first pillar was to develop Somalia Inland Action Plan to counter and prevent piracy within Somalia's land. This responsibility was given to IGAD. The Somalia Inland Action Plan is a will focus on promoting inter-Somali dialogue, rebuilding Somalia's institutions and engaging the international partners in dialogue and resource mobilization for purposes of coming up with a long term solution to the piracy scourge. The second pillar was to encourage states within the region to undertake prosecution of arrested suspected pirates, and finally to strengthen the capacities of states within the region to secure their maritime zones. They also adopted a Regional Plan of Action (RPA) that would form the basis of the implementation of the RS.

4.4 African Union

African Union has undertaken numerous efforts towards preventing and combating piracy. The Durban Resolution on Maritime Safety, Maritime Security and Protection of the Marine Environment in Africa moots for an integrated coast guard network at the sub-regional level and urges cooperation in coast guard activities amongst states. Under the African Maritime Transport Charter member states have undertaken to establish an efficient maritime communication network and create a framework for the exchange of information and mutual assistance so as to enhance safety and security at sea. In addition, the African Union participates in the CGPCS, the Djibouti Code of Conduct and conferences of the ESA-10 countries.

4.5 European Union

The EU has got initiatives both on land and in the sea to counter piracy off the coast of Somalia.[14] Its response to the Somalia piracy problem came through Operation ATALANTA established in 2008 and due to end in December 2012. It has a wide mandate that includes the safe passage of humanitarian aid under World Food Programme, support to the African Union Military Mission in Somalia (AMISOM) shipping, prevention and repression of acts of piracy, and the monitoring of fishing activities in the region. The EU has also established a centre to monitor vessels transiting through Gulf of Aden on a round-the-clock basis. In addition, EU provides military training to Somali Security Forces, as well as finacing various initiatives aimed at preventing and countering piracy. Apart from these, the EU is also focusing on building the capacity of regional prosecutorial authorities to ensure that the prosecution of suspected pirates is conducted within the rule of law.

4.6 Combined Maritime Force (CMF)

The Combined Maritime Forces (CMF) is a US led naval operation of 25 nations that conduct coordinated operations in the Gulf of Aden, the Gulf of Oman, the Arabian Sea, the Arabian Gulf, the Red Sea and parts of the Indian Ocean. The CMF includes the Combined Task Force 151 (CTF 151) which is a multinational task force established in January 2009 to conduct counter-piracy operations some of the CMF mandate areas.[15]

[14]Peter Chalk, "Piracy off the Horn of Africa: Scope, Dimensions, Causes and Responses" *The Brown Journal of World Affairs*. Volume: 16. Issue: 2, p 89+

[15] http://www.cusnc.navy.mil/cmf/151/index.html accessed on 19th March, 2011

4.5 European Union

The EU has got initiatives both on land and in the sea to counter piracy off the coast of Somalia.[14] Its response to the Somalia piracy problem came through Operation ATALANTA established in 2008 and due to end in December 2012. It has a wide mandate that includes the safe passage of humanitarian aid under World Food Programme, support to the African Union Military Mission in Somalia (AMISOM) shipping, prevention and repression of acts of piracy, and the monitoring of fishing activities in the region. The EU has also established a centre to monitor vessels transiting through Gulf of Aden on a round-the-clock basis. In addition, EU provides military training to Somali Security Forces, as well as finacing various initiatives aimed at preventing and countering piracy. Apart from these, the EU is also focusing on building the capacity of regional prosecutorial authorities to ensure that the prosecution of suspected pirates is conducted within the rule of law.

4.6 Combined Maritime Force (CMF)

The Combined Maritime Forces (CMF) is a US led naval operation of 25 nations that conduct coordinated operations in the Gulf of Aden, the Gulf of Oman, the Arabian Sea, the Arabian Gulf, the Red Sea and parts of the Indian Ocean. The CMF includes the Combined Task Force 151 (CTF 151) which is a multinational task force established in January 2009 to conduct counter-piracy operations some of the CMF mandate areas.[15]

[14]Peter Chalk, "Piracy off the Horn of Africa: Scope, Dimensions, Causes and Responses" *The Brown Journal of World Affairs.* Volume: 16. Issue: 2, p 89+

[15] http://www.cusnc.navy.mil/cmf/151/index.html accessed on 19th March, 2011

4.7 North Atlantic Treaty Organization (NATO)

NATO has been involved in counter piracy activities since 2008, mainly through a naval presence geared on protection of vessels transporting World Food Programme humanitarian aid. NATO's activities mainly include the deterrence against attacks, disruption of piratical attacks, and actively seeking pirates operating off the coast of Somalia for arrest. In this regard it is seeking to conclude arrangements on transfer of suspected pirates with the littoral states in the region.

4.8 United Nations Efforts

The United Nations has undertaken numerous efforts towards the prevention and combating of piracy as discussed below.

4.8.1 UNODC Counter-Piracy Programme

This United Nations Office on Drugs and Crime (UNODC) programme was established in 2009 with the aim of building the criminal justice capacity of states neighbouring Somalia so as to assure not only effective prosecution of suspected pirates, but also ensure that their rights are observed. Their focus is law enforcement, prosecution, courts and prison. It has completed reviews of the legal frameworks of Kenya, Mauritius, Seychelles and Tanzania to determine their capacity to prosecute piracy cases.

4.8.2 United Nations General Assembly Resolution

The United Nations General Assembly passed a resolution[16] expressing serious concern about the increase of piracy and armed robbery at sea against vessels off the coast of Somalia

[16] United Nations General Assembly Resolution 64/71

and supported the regional and global initiatives to combat the same. It emphasized the importance of prompt and accurate information sharing on the scope of the piracy problem as well as on specific incidents. It further called upon states to take steps under their respective national legislation to apprehend and prosecute suspected pirates. In addition, states should bring the alleged perpetrators to justice in accordance with international law. It also called upon States to give urgent attention to adopting, concluding and implementing cooperation agreements on combating piratical acts at the regional level. It recognized the need for a comprehensive and long term solution to the Somali situation while recognizing the very significant role of the TFG in rooting out piracy and armed robbery against ships.

4.8.3 Secretary General's Report on Piracy off Somalia

While noting that the effectiveness of naval disruptions to piratical activities and prosecutions had increased, the United Nations Secretary General nonetheless noted that both the levels of violence and the reach of the pirates had increased. He appointed a Special Adviser on Legal Issues related to Piracy off the Coast of Somalia. The Special Adviser has met with a variety of stakeholders in order to identify steps that can be taken to improve on the prosecution of piracy cases.[17]

4.8.4 United Nations Security Council Resolutions

As mentioned earlier, the UN Security Council passed a number of key resolutions, notably Resolutions 1816, 1838, 1846 and 1851, intended to combat piracy off the coast of Somalia.

[17] http://www.un.org/Docs/sc/sgrep10.htm accessed on 18th March, 2011

Resolution 1816

This Resolution[18] was the first in a series of UN Resolutions adopted by the Security Council on the Somalia piracy issue. The Resolution was adopted unanimously with the consent of Somalia. This was important because it proposed the use of all necessary means, including entering Somalia's territorial waters, to combat the menace. The Resolution more specifically decided that States cooperating with Somalia's transitional Government "would be allowed, for a period of six months, to enter the territorial waters of Somalia and use "all necessary means" to repress acts of piracy and armed robbery at sea." This would necessarily include military action.

Somalia consented to this drastic move since it lacked the capacity to interdict pirates or patrol and secure its territorial waters. This followed a surge in attacks on ships in the waters off its coast that posed a threat to the Somalia people receiving much needed humanitarian aid, not to mention the danger to the crew, passengers, cargo and the vessels involved.

The Security Council was careful to point out that the resolution was limited to the situation in Somalia and should not affect the rights and obligations under UNCLOS, nor should the resolution be considered as establishing customary international law. It further urged States using the sea routes off the Coast of Somalia for trade purposes to increase and coordinate their efforts as a means of deterring piratical attacks. It also urged further cooperation of States inter se, as well as cooperation with the IMO and regional organizations.

[18] Security council Meeting no. 5902 held on 2nd June, 2008

Resolution 1838

This Resolution[19] specifically asked States with the military capacity to intervene militarily in Somalia in dealing with the piracy issue. It more specifically called upon States "interested in the security of maritime activities to deploy naval vessels and military aircraft to actively fight piracy on the high seas off the coast of Somalia."

The Security Council also urged States that had the capacity to do so to cooperate with Somalia's Transitional Federal Government in terms of the provision of Resolution 1816, which gave express authority for States cooperating with the Government, for a period of six months, "to enter Somalia's territorial waters and use 'all necessary means' to repress acts of piracy and armed robbery at sea."

Resolution 1846

Under this Resolution,[20] the Security Council extended the period that States and regional organizations cooperating with Somalia's TFG may enter Somalia's territorial waters to deal with the piracy issue. The time extension given was 12 months. The resolution authorized the use of 'all necessary means' including deploying naval vessels and military aircraft, seizing and disposing of boats, vessels, arms and related equipment used for piracy. The Security Council also called for continued bilateral coordination and cooperation of States, use of the United Nations, the IMO, the international shipping community, flag States, and the TFG in their efforts to deter acts of piracy and armed robbery at sea off the coast of Somalia.

[19] Security Council Meeting no. 5987 held on 7th October, 2008

[20] Security Council Meeting no. 6026 held on 2nd December, 2008

The Security Council expressed its concern over the findings of a Report of the Monitoring Group on Somalia that escalating ransom payments were contributing to a rise in piracy off the Somalia coast, and called upon States, the IMO, and the shipping and insurance industries to provide advice and guidance to ships on how to avoid, evade and defend themselves against piratical attacks. The Security Council also re-emphasized the need to provide Somalia and its nearby coastal States with technical assistance to ensure maritime security.

The resolution also commended the efforts by Canada, Denmark, France, India, Netherlands, Russian Federation, Spain, United Kingdom and the United States, and other regional and international organizations in countering piracy off the Somalia coast pursuant to the previous resolutions 1814 , 1816 and 1838 , as well as the decision by the European Union to launch for a naval operation for a period of 12 months from December 2008 to protect maritime convoys bringing humanitarian assistance to Somalia.

The Security Council pointed out that piracy can only be fully eradicated off the Somalia Coast if there is peace and stability within the country, the State institutions are strengthened, and there is economic and social development and respect for human rights and the rule of law. The Security Council was keen to point out that it was seeking a long term solution and so requested a report giving ways on how the long-term security of international navigation off the coast of Somalia can be attained.

In seeking to provide a wider net for dealing with piracy, it urged States parties to the 1988 SUA Convention to fully implement their obligations under the convention and work to build judicial capacity for the successful prosecution of persons involved in piratical attacks off

the coast of Somalia. It is noteworthy that the SUA Convention provides for State parties to create criminal offences, establish jurisdiction, and accept receipt of persons suspected of "seizing or exercising control over a ship by force or threat thereof or any other form of intimidation."

Resolution 1851

This Resolution21 authorized states to use land-based operations in Somalia as part of the fight against piracy off the Somalia coast. More specifically, it called upon Member States to assist the TFG "strengthen its operational capacity to bring to justice those who are using Somali territory to plan, facilitate or undertake criminal acts of piracy and armed robbery at sea."

The Security Council invited States and regional organizations to conclude special agreements or arrangements with other states that would enable the latter states have law enforcement officers known as "ship-riders", on the ships of the former states and organizations in order to facilitate the investigation and prosecution of persons detained. States and regional organizations were also encouraged to establish an international cooperation mechanism to act as a common point of contact among them on all aspects of the fight against piracy. In addition, they were urged to increase regional capacity with assistance of the United Nations Office on Drugs and Crime (UNODC) for purposes of implementing the SUA Convention, the United Nations Convention against Transnational Organized Crime and other relevant instruments to which States in the region are party so as to effectively investigate and prosecute piracy related cases.

[21] Security Council Meeting no. 6046 held on 16th December, 2008

The Security Council noted that the lack of capacity, domestic legislation, and clarity about how to dispose of pirates after their capture, had hindered more robust international action against the piracy menace off the coast of Somalia. At other instances it had even led to pirates being released without facing justice.

An international expert group meeting on piracy off the coast of Somalia gave their input and analysis on the situation made suggestions. Key among these were that the UN Security Council, the International Maritime Organization, and the European Union are key global institutions in countering piracy; the Djibouti Code of Conduct should be made binding upon the African and Arab States that negotiated it; Egypt and Saudi Arabia to be encouraged to develop maritime security in the region, and that naval forces should be allowed to seize the accoutrements of piracy, such as high-horsepower outboard motors used by the pirates on their skiffs.[22]

Resolution 1976

This Resolution[23] was a significant one as it sought to address the need for a comprehensive approach in tackling the Somalia piracy problem. It stressed the need to build Somalia's potential for sustainable economic growth as a means of tackling the underlying causes of piracy.It also emphasized the importance of supporting judicial and prosecutorial capacity of both Somalia and the states in the region to more effectively prosecute piracy related cases. One major concern that was raised was the absence of domestic anti-piracy legislation and procedures amongst a number of states in the region. This has the effect of weakening counter

[22] James Kraska, op ct

[23] Security Council meeting no. 6512th held on 11 April 2011

piracy efforts. Another concern raised was the releasing of arrested suspected pirates without subjecting them to the due process of the law, thus encouraging continuation of piracy.

The Resolution further noted that the piratical activities off the Somalia coast exacerbate the situation in Somalia, which continues to constitute a threat to international peace and security in the region. The Resolution called upon states, regional organizations, the United Nations, IMO and other appropriate partners to provide technical and financial support to enable implementation of various initiatives undertaken in the region, notably the Djibouti Code of Conduct, the Regional Plan of Action of the ESA-10 and the CGPCS regional needs assessment report.

It further urged all states, including those in the region, to criminalize piracy under their domestic law. It encouraged states to go a notch higher and criminalize incitement, facilitation, conspiracy and attempts to commit acts of piracy. This was targeted at those who illicitly finance, plan, organize, or unlawfully profit from the Somali piracy, recognizing that individuals and entities who incite or intentionally facilitate an act of piracy are themselves engaging in piracy as defined under international law.

The Resolution reiterated that piracy is a crime subject to universal jurisdiction and made a plea to states to favourably consider the prosecution and imprisonment of those convicted. The Resolution requested states, UNODC and regional organizations to consider measures aimed at facilitating the transfer of suspected pirates for trial, and convicted pirates for imprisonment, including through relevant transfer agreements or arrangements.

A crucial proposition of the Resolution was the issue of building Somalia's capacity to prosecute and imprison convicted pirates. In that regard, it urged states and UNODC to consolidate international assistance to increase prison capacity in Somalia, including by

constructing in the short-term additional prisons in Puntland and Somaliland. It also decided to urgently consider the establishment of specialized Somali anti-piracy courts including an extraterritorial Somalia court.

The Resolution also made mention of and condemned the growing practice of hostage-taking by pirates. It expressed serious concern at the inhuman conditions that the hostages face and the impact these hostage incidents have on the hostage's families.

4.9 Other Efforts

Apart from the efforts enumerated and discussed above, the fight against piracy has attracted support and cooperation from other sources.

4.9.1 INTERPOL

INTERPOL is the world's largest police organization, and works through cooperation of police forces amongst nations in order to prevent or combat transnational crime. INTERPOL set up a working group in 2010 to coordinate its anti-piracy efforts. It has established information sharing relationship with the EU ATALANTA operation and other initiatives. It is at the forefront of creating a data base of suspected pirates including having a photo album. It has also assisted Kenyan authorities set up a National Central Bureau (NCB) for purposes of timely collection and sharing of valuable information potential suspects through its network. INTERPOL has also been involved in trainings in Seychelles in order to help officers understand and address the issue of maritime piracy financing.[24]

[24] http://oceansbeyondpiracy.org/obp/matrix/counter-piracy-activities-static accessed on 19th March, 2011

4.9.2 Shared Awareness and De-conflicting (SHADE)

SHADE is an initiative created in 2008 for the purpose of coordination and de-conflicting of the countries and coalitions that have a military counter –piracy operation on the Gulf of Aden and the western Indian Ocean.[25] The meetings are held once every six weeks in Bahrain and are co-chaired on a rotational basis by NATO, Coalition Maritime Force and the EUNAVFOR. Since its creation, other states, international organizations and players in the maritime industry have joined the initiative.

4.9.3 Indian Ocean Naval Symposium (IONS)

IONS is an initiative that seeks to increase the coordination of maritime navies and maritime agencies among the littoral sates in the Indian Ocean region.[26]

4.9.4 World Maritime Day

The World Maritime Day is an IMO event held annually and used to draw attention to the importance of maritime safety and security. The 2011 theme focuses on establishing an orchestrated and coordinated response to maritime piracy. More particularly, its aims include the piling of political pressure to ensure the release of hostages held by pirates, promotion of anti-piracy coordination and co-operation procedures between and among stakeholders and assist states build capacity in deterrence, apprehension and prosecution of suspected pirates.[27]

---

[25] Lesley Anne Warner, Op cit

[26] http://oceansbeyondpiracy.org/obp/matrix/counter-piracy-activities-static accessed on 19th March, 2011

[27] Ibid

CHAPTER 5

ANALYSIS OF PIRACY PROSECUTION AGREEMENTS

5.0 Introduction

In 2008, the piracy menace off the coast of Somalia reached monumental levels. The international community needed to gear itself into action so as to stem the tide. A key component of the fight against piracy was going to be effective prosecution of pirates. It was in this context that numerous states approached Kenya in order to establish a collaborative mechanism in the prosecution of suspected pirates. The result was that Kenya signed agreements with the UK, US, Denmark, Canada, China and European Union respectively to prosecute suspected pirates that any of the respective naval forces would arrest off the coast of Somalia.

5.1 US Agreement

The Memorandum of Understanding between the Republic of Kenya and the United States of America Concerning the Conditions of Transfer of Suspected Pirates and Armed Robbers and Seized Property in the Western Indian Ocean, the Gulf Of Eden, and the Red Sea (hereafter "the US Agreement") was concluded on 16th January, 2009. It was informed by the rise of crimes of piracy and armed robbery against ships in the western Indian Ocean, the Gulf of Eden, and the Red Sea, and the grave danger that these crimes posed to, inter alia, the safety and security of persons at sea, and to the economies of countries.

The US Agreement took into account United Nations Security Council Resolution 1846 (2008), which called upon all States to cooperate in determining issues of jurisdiction, and in the investigation and prosecution of persons engaging in acts of piracy and armed robbery off the coast of Somalia. The US Agreement was further based on the SUA Convention, to which both the US and Kenya are parties. The SUA Convention obligates parties to create criminal offences,

establish jurisdiction, and accept delivery of persons responsible for or suspected of committing piratical acts.

The US Agreement was also premised on the United Nations General Assembly resolution 63/111,[28] Resolution A.922 (22) of the Assembly of the IMO of 29th November 2001, which adopted the Code of Practice for the Investigation of the Crimes of Piracy and Armed Robbery against Ships, the communiqué of 11 December 2008 of the International Conference on Piracy around Somalia stressing the importance of enhancing coordination and cooperation in the fight against piracy, UNSCR 1851 (2008) and the UNCLOS. The United Nations General Assembly Resolution[29] called upon states to cooperate in order to address issues of maritime safety and security. In the light of the above therefore, the US Agreement was concluded to facilitate maximum cooperation between the Governments of the US and Kenya in so far as dealing with the menace of piracy off the Somalia coast.[30]

Under the US Agreement, "security force officials" were defined to mean uniformed or other members of law enforcement clearly identified as such and/or Military services of the US and Kenya. Other third States conducting counter-piracy operations within the Somalia area in furtherance of the mandate to deal with piracy and armed robbery could also fall within this definition. This was a wide definition that was safe as it included "ship-riders" provided for under UNSCR 1851[31].

[28] Adopted on 5th December 2008

[29] UNGA Resolution 63/111

[30] Section 1, US Agreement

[31] Security Council Meeting no. 6046 held on 16th December, 2008

Under the US Agreement, Kenya was obliged, upon a reasonable request by the US to accept any person that the US would interdict on suspicion of being a pirate or armed robber at sea.[32] Upon receiving such a person or persons and any accompanying evidence, Kenya was to detain the persons, and the evidence, and submit them to its competent authorities for investigation, prosecution, or extradition as appropriate.

On its part, the US undertook to support and assist Kenya in the conduct of investigations and prosecutions, including facilitating the attendance of witnesses where that would be necessary. It also undertook to provide all relevant unclassified information in its possession, as well as the records of transferred persons, whether living or dead, to Kenyan authorities.

The US Agreement provided that both Kenya and the US would treat persons transferred to their custody territory humanely and in accordance with their obligations under applicable international human rights law, including the 1966 International Covenant on Civil and Political Rights and the Convention against Torture and other Cruel, Inhuman Treatment or Punishment. This particular provision was however too broad and therefore likely to predispose Kenya to allegations of abuse. The issue of humane treatment is relative and is dependant to a large extent on the economic resources of a country. Kenyan prison conditions may not meet international standards considered here and so it would have been better for the US to have undertaken to assist in ensuring this provision is complied with by providing the necessary infrastructure. In spite of many positive reforms in the Kenya Prison Service, Kenya has been struggling with an overpopulated prison, and one cannot expect that conditions will improve overnight.

[32] Section 3, US Agreement

Requests and communication in respect of the US Agreement are to be made between the US Embassy in Nairobi and the Kenyan Ministry of Foreign Affairs.[33] Any dispute arising from its implementation would be settled through consultation.[34] It would have been necessary to specify the persons to be involved in these consultations since the long bureaucracy may delay a quick resolution of issues such as whether to receive particular suspected pirates. The agencies involved are numerous and therefore a more specific reference such as the level of persons involved and a further reference to the expeditious disposal of such disputes would have been prudent.

The US Agreement made reference to implementing agreements that would be made for purposes of operationalizing it. Such implementing arrangements would cover identification of competent Kenyan law enforcement authorities to whom the US would transfer persons, the detention facilities where suspects would be held, the handling of evidence gathering documents, the points of contacts for notifications, and the forms to be used for transfers. It also made reference to the provision of technical support, expertise, training and other assistance for purpose of achieving the purpose of the agreement.[35]

Whereas the US Agreement attempted to enumerate the form of assistance it would provide, it still left it open enough to comfortably to allow the US determine what sort of assistance , and when and how it would provide it. Unfortunately that put Kenya in an awkward bargaining position once the agreement had been signed. This is because on the one hand Kenya had an obligation to receive and try suspected pirates, yet on the other if it felt that the US was

[33] Section 6, US Agreement

[34] Section 7, US Agreement

[35] Section 9, US Agreement

not doing enough to support the process, it would technically not argue that the US was not doing enough. Indeed, some of the issues that have arisen are that Kenya feels it is shouldering an unequal burden in this fight and the international community, including the US is not doing enough to support the efforts.[36] In addition, there are issues such as what to do with acquitted or discharged Accused persons that were not addressed in the US Agreement hence putting Kenya in a further awkward position. The burden is left squarely on Kenya's laps.

The US Agreement made provision for the withdrawal of either party from the agreement upon the issuance of a notice of at least six months.[37] This is the provision that Kenya relied on to withdraw from the agreement when it felt it was shouldering more than its share on the problem.

5.2 Canada Agreement

The Government of Canada and the Government of the Republic of Kenya entered into a Memorandum of Understanding on the Conditions of Transfer of Suspected Pirates and Seized Property to the Republic of Kenya (hereafter "the Canada Agreement"). The Canada Agreement was concluded on 12th January, 2010 and was premised on the various United Nations Security Council Resolutions on the Somalia piracy issue, more particularly UNSCR 1814 (2008), 1816 (2008), 1838 (2008), 1846 (2008) and successor resolutions, the UNCLOS, the 1966 Covenant on Civil and Political Rights, the 1984 Covenant Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, and other International Human Rights Law.

[36] Article 7, Denmark Agreement

[37] Section 11, US Agreement

The main objective of the Canada Agreement was to define the conditions and modalities for the transfer of persons suspected of having committed piratical acts, including the retention of property seized from such persons by Canadian forces, for purpose of their prosecution, treatment, and their eventual treatment upon conviction, release and completion of sentence.[38]

Although Canadian forces refers strictly to members of the Canadian Armed Forces ,Canadian Law Enforcement Services or agencies and Canadian ships , aircrafts and equipment specifically employed towards the Somalia counter-piracy efforts, it does not preclude military operational activities with the armed forces of other states.[39] Under the Canada Agreement, piracy has been assigned similar meaning as that found in UNCLOS[40] and generally under the relevant Kenyan Law.

Under the Canada Agreement, Kenya was obliged, upon a reasonable request by Canada to accept, the transfer of suspected pirates and associated seized property detained by the Canadian forces and to submit such persons and seized property to its competent authorities for investigation and prosecution. On its part, Canada was to transfer to Kenya all copies of relevant documentary evidence as well as all exhibits. Canada was also to ensure that the transfer of suspected persons to Kenyan authorities was within the stipulated time frame of Kenyan law.[41]

---

[38] Article 1, Canada Agreement

[39] Article 2, Canada Agreement

[40] Article 101, UNCLOS

[41] Article 3, Canada Agreement

This was a particularly important article since suspects were meant to be arraigned in Court to take plea within twenty four hours of arrest where the offence was not a capital one.[42]

Under the Canadian agreement, both Canada and Kenya confirmed that that the suspects would be treated humanely and would not be tortured or treated in a cruel, inhuman or degrading manner. The two states would also ensure that there was prohibition against arbitrary detention and in accordance with the requirement to have a fair trial. In addition, the states would ensure that the suspects receive adequate accommodation and nourishment, access to medical treatment and are able to carry out religious observance.[43] This particular article was not well thought through since the issue of adequate accommodation nourishment is a relative and contestable one. The prison conditions in Kenya, where the suspects would be held, cannot be said to have similar standards for both Kenyan and Canadian jails. It would therefore have been prudent to have a more elaborate article that states that this would happen within Kenyan means, or in the alternative have an undertaking by Canada that it would work to provide such accommodation and nourishment. Short of that, Kenya would be committing itself to an undertaking that it would not manage despite its best efforts, and therefore predisposing itself to allegations of human rights abuses.

Under the Canada Agreement, the States committed themselves to ensure that the suspects were promptly brought before a judicial officer and that they would ensure that the judicial power decides without delay on the lawfulness of the detention and make an appropriate

[42] Section ,abrogated Constitution of Kenya

[43] Article 4, Canada Agreement

finding.[44] That is a noble but lofty and presumptuous provision. A judicial officer acts independently and cannot be compelled, influenced or directed to act in a particular manner. The issue of speedy presentation of the suspects before the judicial officer is correctly an obligation of the law enforcement officers of the two states. However, speed of delivery of any finding by the court is a function of the Court that is totally out of the orbit of the two states. The provision is therefore superfluous.

Under the Canada Agreement, the states would ensure that the suspects are entitled to trial within a reasonable time or released; that they are entitled to a fair and public hearing by a lawful, competent, independent and impartial court; that they are presumed innocent until proven guilty, and that they would enjoy certain minimum guarantees relating to the trial as would ensure that they have a fair trial. These guarantees include being informed promptly and in detail in a language which they understand of the nature and cause of the charge against them; adequate time and facilities for the preparation of their defense including communication with an advocate of their choice; being tried without undue delay and in their presence; defending themselves in person or through legal assistance of their own choice, and where they cannot afford, to be provided with one; to examine, or have examined, all evidence set to be adduced against them; to procure the attendance and examination of witnesses on their behalf under the same conditions as witness against them; to have the services of an interpreter if they so require; and not to be compelled to incriminate themselves.[45]

---

[44] Ibid

[45] Ibid

Canadian law unlike Kenyan law does not have death penalty. This position must therefore have informed the provision in the article that binds both states to ensure that suspects if convicted for whatever offence would not be subjected to the death penalty.[46]

With regard to the treatment of suspects, Kenya was obligated to initiate investigations into any allegations of mistreatment of such suspects. Upon request by Canada, Kenya would provide the status of steps taken to investigate the matter and any action taken.[47]

With regard to assistance, Canada made wide commitment to provide financial and technical support to Kenya towards the investigations, prosecutions, detention, repatriation or settlement of Accused persons upon completion of their sentence or upon their release.[48] This is a positive and well articulated article since it ensures that the issue of finance and other assistance is not left to speculation. It nonetheless omitted the issue of compensation for the Accused persons should they opt to pursue legal action for malicious prosecution. In the absence of a clear provision to that effect, Kenya would have found itself having to bear that future burden.

The Canada Agreement makes it unequivocal that the agreement does not of itself preclude any of the two states from exercising their rights and executing their obligations under other international agreements and other instruments establishing international courts and

[46] Article 5, Canada Agreement

[47] Article 6, Canada Agreement

[48] Article 7, Canada Agreement

tribunals.[49] This would appear to leave a window open to have a state pursue the option of taking suspected pirates to another state or before another tribunal for prosecution.

Under the Canada Agreement, implementing arrangements may be entered into in numerous areas to ensure proper execution of the agreement. These areas include the identification of competent law enforcement authorities of Kenya to whom suspects may be transferred, the detention facilities where suspected pirates would be held, the handling of documents by Canadian law enforcement authorities, the points of contacts for notifications, and the documents to be used for transfers.[50]

Under the Canada Agreement, the states would continue to be bound by the provisions until either state gave a six months written notification. The agreement could also be varied by the mutual written consent of both parties.[51]

5.3 Denmark Agreement

The Memorandum of Understanding between the Republic of Kenya and the Kingdom of Denmark on Condition of Transfer of Suspected Pirates and Seized Property to the Republic of Kenya (hereafter "the Denmark Agreement") was concluded on 9th July 2009. The Denmark Agreement was a near exact replica of the Canada Agreement. The two Agreements were based on the same premise, had similar definitions and general principles, similar provisions on treatment and prosecution of transferred persons, similar provisions on records and notifications, similar on the issues of liaison and disputes, similar on the question of implementing

[49] Article 8, Canada Agreement

[50] Article 10, Canada Agreement

[51] Article 11, Canada Agreement

arrangements and similar the issue of the coming into effect and the termination of the Agreement. There are however, a few areas where there were minor distinctions.

With respect to the question of the death penalty, there were similarities, save that the Denmark Agreement was more elaborate and accommodating. Although it provided that Kenyan authorities would not charge any transferred person with an offence that carried a death penalty, it nevertheless went on to provide that where a death sentence was handed down, Kenya would take steps to ensure that it was commuted to a sentence of imprisonment.[52]

Another distinguishing factor is that under the Denmark Agreement, national and international humanitarian agencies would be allowed to visit suspected pirates in detention, ostensibly to monitor the status of compliance with their rights.[53] The Canada Agreement did not have such a provision; rather it left the matter to the two states.[54]

A major distinction of the Denmark Agreement and the Canada Agreement was that the former committed very little in terms of support to Kenya. It stated that it would provide all assistance to Kenya "within its means and capabilities" in the areas of investigations, prosecutions, and detention of transferred persons.[55] Whereas it referred to "all assistance" it did not proceed to enumerate the specific assistance like the Canada Agreement did. This would likely lead to a situation where what Kenya considered necessary assistance may not fall within Denmark's definition of assistance. Furthermore, the issue of "within its means and capabilities"

[52] Article 5, Denmark Agreement

[53] Article 6, Denmark Agreement

[54] Article 6, Canada Agreement

[55] Article 7, Denmark Agreement

was also very restrictive and could have been employed at any moment that was convenient to it by stating that the assistance sought was not within its means. What would Kenya do for instance if suspected pirates handed in by Denmark were released and needed to be repatriated? Who would meet the costs? What if they sued the Kenyan Government for malicious prosecution? How would such loose wording of the agreement oblige Denmark to retake up the costs? In the light of the foregoing, it would therefore have been crucial to have a more elaborate definition of what assistance Denmark was going to provide.

5.4 UK Agreement

The Memorandum of Understanding between the Republic of Kenya and the United Kingdom of Great Britain and Northern Ireland on Condition of Transfer of Suspected Pirates and Armed Robbers and Seized Property to the Republic of Kenya was entered into on 11th December, 2008 (hereafter "the UK Agreement"). The UK Agreement and the Denmark Agreement discussed above are nearly identical in all respects. There is however several distinctions minor.

First of all, the UK Agreement is wider in its scope as it categorically included incidences of armed robbery in the seas, a provision that the Denmark Agreement did not specifically outline. According to the UK Agreement, armed robbery refers to acts of piracy committed within a coastal state's territorial sea.[56] Technically therefore, this would mean that Denmark could deal with persons engaged in piratical acts within the territorial waters of the states in the affected areas.

[56] Paragraph 2, UK Agreement

The UK Agreement was weak as far as providing assistance to Kenya is concerned. It stated that the UK, would provide all assistance "within its means and capabilities" towards the investigation and prosecution of transferred persons.[57] This commitment is subjective and prone to be misused and used as a justification for providing limited resources. Whereas it is understandable that every state can only act within its means, the emphasis in such a legal document opens room for strict interpretation that may go against the interest of Kenya. With regard to the scope of the assistance, the UK Agreement was equally unflattering. It limited the assistance to the investigation and prosecution of persons transferred to Kenyan authorities on suspicion of having engaged in piratical acts.[58] There was no commitment with respect to issues of detention of the suspects, their repatriation and much less compensation should that have arisen in the course of dealing with the suspects. The question that begs attention is whose responsibility would that have been?

Another important distinguishing feature of the UK Agreement is that it deferred to a prospective arrangement between the Republic of Kenya and the European Union. It specifically stated that its agreement with Kenya would cease immediately the European Union would conclude an agreement with Kenya with respect to the subject in question.[59]

5.5 European Union Agreement

The Exchange of Letters between the European Union and the Government of Kenya on the Conditions and the Modalities for the Transfer of Persons Suspected of Having Committed

[57] Paragraph 7, UK Agreement

[58] Ibid

[59] Paragraph 11, UK Agreement

Acts of Piracy and Detained by the European Union-led Naval Force (EUNAVFOR), and seized property in the possession of EUNAVFOR, from EUNAVFOR to Kenya and for Their Treatment after such Transfer (hereafter "the EU Agreement") was done on 6th March, 2009. The exchange was based on the framework of the European Union Council Joint Action 2008/851 CFSP on an EU military operation to contribute to the efforts targeted against piracy and armed robbery off the coast of Somalia. This initiative was known as operation "Atalanta".

Under the EU Agreement, EUNAVFOR was defined as the EU military headquarters and national contingent contributing to the operation "Atalanta", their ships, aircrafts and assets. It is instructive that the EU Agreement was identical to the UK Agreement, except that the parties involved were the European Union and EUNAVFOR on the one hand in lieu of the UK and UK Forces on the other.

5.6 China Agreement

The Memorandum of Understanding between the Government of the People's Republic of China and the Government of the Republic of Kenya on Transfer of Suspected Pirates captured at Sea off the Coast of Somalia (hereafter "the China Agreement") was concluded on 21st December, 2009. It was based on the United Nations Security Council Resolutions1814 (2008), 1816 (2008), 1838 (2008), 1846 (2008) and 1851 (2008), the 1982 (UNCLOS), and the 1988 SUA Convention. The China Agreement also emphasized that the collaboration would be based on mutual respect for the sovereignty, equality and mutual benefit of both States.

It adopted the definition of piracy given under Article 101 of UNCLOS and the Kenyan law.[60] Under its general principles, it obligated Kenya to accept the transfer of suspected pirates

[60] Article 2, China Agreement

detained by the Chinese navy for investigation and prosecution when such a request was made.[61] The China Agreement also confirmed that the transferred persons would be accorded fair trials concomitant with international law and applicable national law. It also emphasized that such persons were to be treated humanely and would not be subjected to torture or cruel, inhuman or degrading treatment or punishment in accordance with recognized International Human Rights law.[62]

The China Agreement was also clear that transferred persons should receive adequate accommodation and nourishment, be provided with medical treatment and allowed to perform religious service.[63] Whereas this was a noble provision, certain capacity issues should have been addressed in order to ensure that Kenya did not predispose itself to allegations of abuse of human rights. This is particularly so in the area of provision of nourishment and accommodation. What is it that would be considered adequate nourishment and accommodation? Was it based on international standards, the standards of developed countries, the standard of the Chinese, or was it dependent on Kenya's capacity? These are pertinent questions that ought to have been factored in the drafting of the provision.

The China Agreement sought to ensure that transferred persons had a fair judicial process by ensuring that all rights attendant to criminal proceedings were accorded to them. In addition, transferred persons would be entitled to have the lawfulness of their detention determined, and be released should the detention be found to have been unlawful. In the event that the suspects

[61] Article 3, China Agreement

[62] Article 4, China Agreement

[63] Ibid

were found to be lawfully held, they would be entitled to a speedy trial failing which they would be entitled to be released.[64]

With regard to assistance, the China Agreement stated that this would happen "within its means and capabilities".[65] The areas of this assistance would be in investigations, prosecutions, and detention of the suspected pirates. This was a limited and ambiguous commitment for support that could have left Kenya reeling under the burden of dealing with piracy cases. In addition, there was no commitment made to underwrite the costs of repatriation and compensation, yet there was such emphasis on ensuring that a suspect was released where he was unlawfully held or his trial had taken unduly long. This show of commitment to human rights ought to have been reflected through a corresponding willingness to meet costs related to the process of ensuring that justice is done.

With regard to implementing arrangements, the China Agreement stated that these may be concluded for the effective implementation of the agreement. The areas to be covered would include location of the detention facility for the holding of the suspected pirates, the relevant documents to be used for transfers and the provision of technical support, expertise, and training. It also provided that it would include "other assistance upon request by the Kenyan Government" in order to ensure that the objectives of the agreement were achieved.[66]This is a generalized statement that unfortunately bears little significance since article 5 was categorical as to the scope of assistance China can provide.

---

[64] Article 5, China Agreement

[65] Article 8, China Agreement

[66] Article 11, China Agreement

The China Agreement would be terminated by either party by issuing a six month notice in writing to the other party. However, it also gave provision for the revision of the agreement through mutual consent, in writing.[67]

From the foregoing it is evident that there was a flurry of diplomatic activity between Kenya and various states as seen through the conclusion of agreements on the prosecution of piracy cases. They were all concluded within a period of about one year, between 11th December, 2008 and 12th January, 2010. These agreements, six in total, were in material respects similar to each other. A major issue running through all of them with the exception of the Canada Agreement was the crucial provision on the complimentary assistance offered to Kenya. This provision was mostly ambiguous and non committal, what with the notorious phrase "...within its means and capabilities..." used to define the extent of assistance.

5.7 Analysis of Interview Findings

The first objective of this study was to identify the contentious issues in the agreements on prosecuting piracy signed by Kenya. The subject of assistance to Kenya was identified as one such issue. It was stated by the interviewees that the assistance promised was not adequate. Others, notably from the prosecution were more specific stating that even the promised assistance was not forthcoming. One of the generally identified challenges was the fact that the provision on assistance in the agreements was ambiguous hence leaving room for speculation and limited interpretation. Indeed, in some instances interviewees stated that their attempts to seek the promised assistance was met with claims that the assistance being sought was not the responsibility of the other state. This clearly brought to the fore the aspect of ambiguity. The

[67] Article 12, China Agreement

result was a sense of frustration on the part of Kenyan law enforcement who felt that they had gotten a raw deal in the agreements yet they were handling the bulk of piracy cases in the region.

Another significant comment was that the agreements were not comprehensive. One of the interviewees stated that the agreements were entered into before a "needs assessment" was conducted. The inevitable result of this was that the agreements were by and large theoretical and lacked a strong practical base. Consequently, there were many important issues that should have been included in the agreement that were left out. These included the handling of the suspected pirates, the prison facilities and the repatriation of the suspects. The interviewee was of the opinion that there should have been a broader and clearer framework provided in the agreements for the handling of the suspected pirates. In addition, the issue of prison facilities should have been addressed. It is noteworthy that the only mention of detention in the agreements relates to implementation arrangements that were to determine where the suspected pirates would be incarcerated, and the reference to the suspects being detained under humane conditions. There was no mention of Kenya's capacity to detain suspected pirates considering both the existing strained infrastructural set up, and the very nature of the suspects in question. On the question of repatriation, only one of the six agreements had a specific provision relating to handling of suspects once they are released.

Another issue that was raised with respect to the agreements is that they did not take into consideration the capacity of Kenya to handle pirates. In that regard, the agreements should have reflected that reality and made adequate provision to ensure that Kenya's capacity was bolstered. One of the suggested ways of doing this would have been to have clear provisions in the

agreements on procedures to be followed in handling these suspects from the time of arrest to their release.

The second objective of this study was to explore the outcomes of the agreements on Kenya's diplomatic relations with the States it signed the agreements with. All the respondents stated categorically that Kenya's diplomatic relations were not affected by Kenya's withdrawing from the agreements. This was a surprise finding since the study's hypothesis was that the withdrawing from the agreements had actually negatively affected Kenya's diplomatic relations.

It was argued by some interviewees that since Kenya had withdrawn from all the six agreements at a go, no single state would feel "victimized". In addition, the states understood that Kenya had been overstretched because at the point of signing the agreements, it was not anticipated that Kenya would handle so many cases of suspected pirates. In any event, one interviewee added, Kenya still continues to relate with those states in piracy matters. In addition, Kenya has received recognition from the United Nations Security Council for doing a commendable job under difficult circumstances. It was stated that these partners recognize that Kenya withdrew not out of a lack of commitment to prosecution but in order to set itself on a proper footing. It was in a sense slowing down to take stock. In any event, it is not as though Kenya was in breach of the agreements. Indeed all the agreements had a clear stipulation regarding the withdrawal procedure, which Kenya had faithfully followed.

The third objective was to find out problems of prosecuting piracy cases. One of problems identified was the sheer volume of the cases. The cases handled were far higher than had been anticipated and well beyond the limited capacity of such organs as the prosecution service. Another challenge identified was the lack of adequate investigatory capacity for piracy

related cases. A third yet very significant challenge was the lack of appreciation by the courts of the law relating to piracy, notably that Kenya had jurisdiction to try such cases. Recent pronouncements in court have taken the view that Kenya lacks jurisdiction to try cases where the suspected pirates were not engaging in their criminal activities within the territorial waters of Kenya. Several interviewees were concerned that the courts had misdirected themselves on the law on this matter. The result is that the prosecution of piracy cases has become more complicated, with some others stalling as a decision is awaited from the Court of Appeal on Kenya's jurisdiction or lack of it in handling such cases.

From the foregoing findings, it is clear that the agreements on the prosecution of suspected pirates were not in the interest of Kenya. They were hurriedly done without considering crucial matters such as Kenya's capacity including its facilities to handle suspected pirates. In addition, the question of assistance was woefully addressed by the agreements. The lackluster and ambiguous provisions left wide room for selective interpretation of the agreements in favour of the other signing states. It is also evident that it was never anticipated that Kenya would be handling so many piracy cases. In view of the above, it was no wonder therefore that Kenya chose to withdraw from the same. The withdrawal from these agreements does however in any way signify Kenya's lack of commitment to the cause of combating piracy off the coast of Somalia. Indeed, Kenya has not only been commended by the UN Security Council for its role in the prosecution of such cases, but continues to do so under its international obligations even in the absence of such agreements.

It is also clear from the study that Kenya's withdrawal from the agreements has not resulted in the straining of diplomatic relations between Kenya and its signing partners. The

relations remain cordial. This was one finding where there was unanimity amongst all the interviewees.

CHAPTER 6

CONCLUSION

Piracy is not only alive today but it has spiraled to unprecedented levels. Piracy finds thriving ground in areas where there is weak or total lack of law enforcement on the seas as exemplified in the state of Somalia. The East Coast of Africa where the Somalia state lies therefore makes one of the most volatile and dangerous seas in the world today.

Piracy was the first offence to be considered as one that could be tried by any state irrespective of that state's interest in the piratical attack. That encapsulates the principle of universal jurisdiction. This doctrine of universal jurisdiction is very important as it seeks to reduce the operating theater of the pirates. Without it, crimes of certain types would flourish and economies would be severely affected. Already, the piracy off the coast of Somalia has recorded a significant cost of doing business. Insurance premiums for shipping lines using the Gulf of Aden and the western Indian Ocean route have increased several fold to take care of the risk. Tourism has also been negatively impacted particularly the cruise ship business.

Beneath the doctrine is the realization of the need for international cooperation in dealing with crime. Cooperation has been recognized as the only way to maintain regional maritime security. The region of South East Asia has been successful in that regard. The suppression of piracy must involve joint efforts of states and international organizations that can bring to bear their capacities to deter and defeat the menace.

It is in this regard that the diplomatic efforts undertaken since the rise of piracy off the coast of Somalia must be commended. The counter piracy diplomacy from the period beginning October 2008 to date has been monumental. Initiatives have ranged from adoption of a UN

General Assembly Resolution , the adoption of several UN Security Council Resolutions, the formation of international response and monitoring groups, the adoption of various institutional and legislative framework such as the Djibouti Code of Conduct, and a host of other regional and international activities.

Although much has been done, yet more needs to be done. Governments, non-governmental organizations, international organizations, and the private sector must form partnerships and collaborate in order to counter this threat. The Somalia piracy situation is a complex one that requires a multi-dimensional approach. It is a complex political, social, economic and cultural set up. The import of this is that a long lasting solution to the Somalia problem needs to be found. Piecemeal and reactionary measures will not serve. The ESA-10 initiative has already proposed the means of achieving this under IGAD. Under the initiative, the Somalia Inland Action Plan is the road map to be used to promote inter-Somali dialogue, to rebuild Somalia's institutions and engage the international partners in dialogue and resource mobilization for purposes of coming up with a long term solution to piracy off the coast of Somalia. This initiative should be strengthened and encouraged.

Another key area that must addressed is the need to build the capacity of states within the region. States such as Kenya that are willing to play their role internationally and prosecute pirates need to be fully supported in terms of training, infrastructure and other financial and material ways. Although Kenya is proximate to Somalia, piracy is not a Kenyan problem. It is an international concern which if goes unchecked could result in a serious threat to international peace and security.

There must also be efforts towards addressing the legislative framework dealing with piracy so as to ensure that there is effective cooperation and a tighter noose for pirates. A number of states, notably the US have not signed the UNCLOS. These should be encouraged to ratify the Treaty so as to have a stronger framework. Many others have for various reasons not signed the SUA Convention that would be very useful in dealing with acts of "piracy" within the territorial waters of states. In the spirit of cooperation and mutual benefit, states should be encouraged to ratify this convention. The underlying fears of interfering with another state's jurisdiction and the question of territorial integrity and sovereignty should be amicably discussed so that a workable framework is adopted. Happily, the US is one state that has ratified the SUA Convention, as has Somalia.

Certain regions such as the South East Asia have had successful initiatives that East Africa could borrow from. One of the most significant developments is the Regional Cooperation Agreement on Combating Piracy and Armed Robbery against Ships in Southeast Asia. This initiative involves 16 Asian countries with the areas of cooperation ranging from extradition matters to mutual legal assistance. During the past five years, this cooperation has been credited with the reduction of piracy incidences in the straits of Malacca and Singapore and throughout Southeast Asia. In the Somalia region, states could do well to focus their energies on the Djibouti Code of Conduct and ensure that they follow through with their commitments.

Under the Code, the participating countries commit themselves to share relevant information, conduct joint operations, interdict vessels suspected of perpetrating piratical acts, ensure that suspected pirates are arrested and prosecuted, and also ensure that their respective national legislations are reviewed to effectively deal with piracy. Out of the 21 States eligible to

sign the Djibouti Code of Conduct, 17 have signed. The remaining states should be encouraged to sign. In addition, in view of the seriousness of the piracy menace, the states should re-negotiate the Code to make it binding, since it is non-binding.

In spite the fact that African Union has had several initiatives, usually of an institutional and regulatory nature on the issue of piracy, its role has not been as conspicuous as it should have been in the piracy problem off the coast of Somalia. As the foremost regional body, the African Union needs to play a more active and visible role. This would be a good opportunity for it to assert itself as the continental body.

BIBLIOGRAPHY

Almond Gabriel A., and G. Bingham Powell, eds., *Comparative Politics Today: A World View*, 4th ed. (Glenview, IL: Scott, Foresman and Company, 1988)

Ayoob Mohammed, *The Third World Security Predicament: State Making, Regional Conflict, and the International System* (Lynne Rienner: London, 1995)

Bartson, R. P., *Modern Diplomacy* 3rd ed (Pearson Longman: Essex, 2006)

Berridge G. R., Diplomacy: Theory and Practice 3rd ed (Palgrave Macmillan: New York, 2005)

Black, Jeremy, *Britain as a Military Power, 1688-1815* (London: UCL Press, 1999)

Buzan Barry, et al, *A New Framework for Analysis* (Lynne Rienner: London, 1998)

Byers, M., *Custom, Power, and the Power of Rules: International Relations and Customary International Law.* (Cambridge: Cambridge University Press, 1999)

Callieres Francois, *The Art of Diplomacy* H.M.A Keens-Soper, Karl W. Schweizer eds (Leicester University Press: London, 1983)

Damrosch, Lori Fisler, et al, *International Law: Cases and Materials and Basic Documents Supplement*, 4th Ed (St. Paul, Minnesota: West Publishing Company: 2001)

Dougherty, James E., Robert L. Pfaltzgraff, Jr, *Contending Theories of International Relations* (Philadelphia: J.B.Lippincott Co., 1971)

Gabriel, Jurg Martin, Worldviews and Theories of International Relations (London: MacMillan Press, 1994)

Gardiner, Richard K., *International Law* (Essex: Pearson Longman Education, 2003)

Gerald B. Helman, Steven R. Ratner, *Saving Failed States: Foreign policy 89* (1992-1993)

Goodwin, J.M., *Universal Jurisdiction and the Pirate: Time for an Old Couple to Part.*

Haas, E.B., Allen S. Whiting, Dynamics of International Law (New York, McGraw-Hill, 1956)

Hall, Jerome, *General Principles of Criminal Law* (Indianapolis: Bobbs-Merrill, 1960)

Higgins, Rosalyn, *Problems and Process: International Law and How We Use it* 64 (Clarendon Press:1994)

Higgins, Rosalyn, Terrorism and International Law (London: Routledge, 1997)

Holsti, Ole R., *Theories of International Relations and Foreign Policy: Realism and Its Challengers*, in Charles W. Kegley, Jr. *Controversies in International relations Theory* (New York: St. martin's Press, 1995)

Iriye, Akira, *Global Community: The Role of International Organizations in the Making of the Contemporary World* (Berkeley, CA: University of California Press, 2002)

Juda, L., *International Law and Ocean Use Management.* (New York: Routledge, 1996)

Kappeler Dietrich, Makumi Mwagiru, Josephine Odera, *Diplomacy: Concepts, Actors, Organs, Process and Rules*, IDIS Monograph Series No. 1(Nairobi, 1996)

Kaufmann, Johan, *The Diplomacy of International Relations* (Hague: Kluwer Law International, 1998)

Kegley Jr.,Charles W., *The Neoliberal Challenge to Realist Theories of World Politics: An Introduction* in Charles W. Kegley, Jr. *Controversies in International relations Theory* (New York: St. martin's Press, 1995)

Little, Richard, *International Relations and the Triumph of Capitalism*, in Ken Booth, Steve Smith (eds), *International Relations Theory Today* (Pennsylvania: Pennsylvania State University Press, 1995)

Macfarlane S. Neil, Taking Stock, *The Third World beyond the Cold War: Continuity and Change*, ed. Louise Fawcett and Yezid Sayigh (Oxford: Oxford University Press, 1999)

MacKenzie N., Lionel H. Laing (eds),*Canada and the Law of Nations: A Selection of Cases in International Law, Affecting Canada or Canadians, Decided by Canadian Courts, by Certain of the Higher Courts in the United States and Great Britain and by International Tribunals*, ed. (Toronto: The Ryerson Press, 1938)

Magalhaes, Jose Calvet , *The Pure Concept of Diplomacy*, trans. Bernardo Futscher Pereira (New York: Greenwood Press, 1988)

Malanczuk , Peter , *Akehurst's Modern Introduction to International Law*, (London: Routledge, 1997)

Mwagiru, M., *Foreign Policy, Economic Diplomacy And Multilateral Relations: Framing The Issues In Kenya' Emerging Asia-Pacific Policy*, Vol. 4, no.1(Nairobi: Ruaraka Printing Press,2006)

Mwagiru, M., *DIPLOMACY: Documents, Methods and Practice* (Nairobi: Institute of Diplomacy and International Studies, 2004)

Palmer, Norman D., Howard C. Perkins, *International Relations* (Delhi: AITBS Publishers, 2007)

Pearson, Michael, *The Indian Ocean* (New York: Routledge, 2003)
Prescott, V., Clive Schofield, *The Maritime Political Boundaries of the World* (Boston: Martinus Nijhoff, 2005)

Schraeder, Peter, *United States Foreign Policy Toward Africa: Incrementalism, Crisis and Change* (Cambridge: Cambridge University Press, 1996)

Schuman, Frederick L., *International Politics: The Western State System in Mid-Century,* 5th ed. (New York: McGraw-Hill Book Co.,1953)

Sheehan, Michael, *International Security: An Analytical Survey* (Lynne Rienner Publishers: Colorado, 2005)

Slaughter, Anne-Marie, *Defining the Limits: Universal Jurisdiction, National Courts And The Prosecution Of Serious Crimes Under International Law* 168-69 (2004).

Snow, Donald M., *National Security For A New Era: Globalization and Geopolitics* (New York: Pearson, 2004)

Viotti, Paul R., Mark V. Kauppi, *International Relations Theory: Realism, Pluralism, Globalism, and Beyond* 3rd ed (Boston: Allyn and Bacon, 1999)

Wallace, Rebecca M.M., *International Law* 4th ed (London: Sweet & Maxwell, 2002)

Watson, Adam, *Diplomacy: The Dialogue between States* (New York: Routledge, 1991)

Wolfers, Arnold, *Discord and Collaboration* (Baltimore: John Hopkins Press, 1962)

Wright, Quincy, and Social Science Research Council (U.S.), *Research in International Law since the War: A Report to the International Relations Committee of the Social Science Research Council* (Washington, DC: Carnegie Endowment for International Peace, 1930)

Young, A. J., Mark J. Valencia, *Conflation of Piracy and Terrorism in Southeast Asia: Rectitude and Utility*, Contemporary Southeast Asia 25.2 (2003)

Bahar, M., *Attaining Optimal Deterrence at Sea: A Legal and Strategic Theory for Naval Anti-Piracy Operations*, Vanderbilt Journal of Transnational Law 40.1 (2007)

Beckman, C. Robert, *Combating Piracy and Armed Robbery Against Ships in Southeast Asia: The Way Forward*, 33 OCEAN DEV. & INT'L L. 317, 319 (2002).

Boyd, K. Lee, *Universal Jurisdiction and Structural Reasonableness*, Texas International Law Journal 40.1 (2004),

Burton, V., *British Privateering Enterprise in the Eighteenth Century*, Business History Review 65.4 (1991)

Campo, Joseph N.F.M. A., *Discourse without Discussion: Representations of Piracy in Colonial Indonesia 1816-25*, Journal of Southeast Asian Studies 34.2 (2003)

Carson, Johnnie, "Developing a Coordinated and Sustainable United States Strategy toward Somalia," *DISAM Journal of International Security Assistance Management* Nov. 2009

Conway, J.T., Gary Roughead, and Thad W. Allen, *A Cooperative Strategy for 21st Century Seapower*," Naval War College Review 61.1 (2008)

Dutton, Yvonne M., "Bringing Pirates to Justice: A Case for Including Piracy within the Jurisdiction of the International Criminal Court," *Chicago Journal of International Law* 11.1 (2010)

Halberstam, Malvina, *Terrorism on the High Seas: The Achilles Lauro, Piracy and the IMO Convention on Maritime Safety*, The American Journal of International Law, Vol. 82 No. 2 (Apr., 1988)

Hopper, A., *Squashing the Skull and Bones: Reforming the International Anti-Piracy Regime*, Harvard International Review 29.4 (2008)

Kent, Ann, "China's International Socialization: The Role of International Organizations," *Global Governance* 8.3 (2002)

Keyuan , Zou, *Seeking Effectiveness for the Crackdown of Piracy at Sea*, Journal of International Affairs 59.1 (2005)

Kontorovich , Eugene, *Implementing Sosa v. Alvarez-Machain: What Piracy Teaches about the Limits of the Alien Tort Statute*, 80 NOTRE DAME L. REV. 111, 151 (2004)

Kontorovich, Eugene, *The "define and Punish" Clause and the Limits of Universal Jurisdiction [Dagger]* Northwestern University Law Review, Vol. 103, 2009

Kontorovich, Eugene, *International Legal responses to Piracy Off the Coast of Somalia*, American Society of International Law Vol. 13:2 (2009)

Kraska James, and Brian Wilson, "Maritime Piracy in East Africa,"*Journal of International Affairs* 62.2 (2009)

Kraska James, *Fresh Thinking for an Old Problem: Report of the Naval War College Workshop on Countering Maritime Piracy,* Naval War College Review 62.4 (2009)

Landrum, Bruce D., *The Globalization of Justice: The Rome Statute of the International Criminal Court,* ARMY LAW, (Sept. 2002)

McMillan, Stuart, *Piracy: An Old Menace Re-merges Stuart McMillan Comments on a Maritime Problem That Has Grown Steadily Worse in the Last Decade,* New Zealand International Review 27.2 (2002)

Passman, Michael H., *Protections Afforded to Captured Pirates Under the Law of War and International Law,* TULANE MARITIME LAW JOURNAL VOL. 33 (2008)

Reimers Jacob, *Practicing Law on a Different Battlefield,* Chicago Journal of International Law 2.1 (2001)

Rothwell, D.R., *Maritime Piracy and International Law,* CRIMES OF WAR PROJECT (2009)

Sara Schubert, *Piracy, Riches, and Social Equality: the Wreck of the Whydah off Cape Cod,* Historical Journal of Massachusetts 34.1 (2006)

Warner Lesley Anne, "Pieces of Eight: An Appraisal of US Counter-piracy Options in the Horn of Africa,"*Naval War College Review* 63.2 (2010)

Wedgewood, Ruth, *The Revolutionary Martyrdom of Jonathan Robbins,* 100 YALE L.J. 229, 239 n.26 (1990)

Zackrison , J.L., and James E. Meason, *Chile, Mar Presencial and the Law of the Sea,* Naval War College Review 50.3 (1997)

Reports and Internet Sources

ICC International Maritime Bureau, *Piracy and Armed Robbery against Ships,* (2006)

Luft, G., Anne Korin, *Terrorism Goes to Sea,* Institute for the Analysis of Global security

US National Security Presidential Directive NSPD-41, December 21, 2004

Lecture entitled "*Intelligence Institutions in National Security*" delivered by Major General (Rtd) Michael Gichangi, Director General, National Security Intelligence Service at National defence College on 4th February, 2011

http://www.iags.org/fa2004.html last visited on 29th August, 2010

http://wwww.nytimes.com/2009/04/24/world/africa/24kenya.html?_r=1 last visited on 29th August, 2010

http://www.icc-ccs.org/ last visited on 16th November, 2010

http://news.yahoo.com/s/ap/piracy checked on 22nd February, 2011

http://www.icc-ccs.org/index.php?option=com_content&view=article&id=70&Itemid=58 last visited on 16th November, 2010

http://news.yahoo.com/s/ap/piracy checked on 22nd February, 2011