

UNIVERSITY OF NAIROBI
SCHOOL OF LAW
MASTER OF LAWS

**PIRACY OFF THE COAST OF SOMALIA: AN ANALYSIS OF THE
INTERNATIONAL LAW REGIME AND ITS APPLICATION IN KENYA**

**A RESEARCH PAPER SUBMITTED IN PARTIAL FULFILMENT FOR
THE AWARD OF THE DEGREE OF THE MASTER OF LAWS, (LL.M)
UNIVERSITY OF NAIROBI**

SUBMITTED BY: NGALYUKA MAGDALENE MBULI

G62/71284/2011

DECLARATION

I **MagdaleneMbuliNgalyukado** hereby declare that this is my original work and that it has neither been submitted nor is it currently being submitted for a degree in any other university.

.....

Magdalene MbuliNgalyuka

This research paper has been submitted with my knowledge and approval as the University supervisor.

.....

Dr. AkungaMomanyi

University of Nairobi

DEDICATION

To Brian, Karen and Mwendwa so that this may inspire you to be better than I was.

ACKNOWLEDGEMENTS

First and foremost I thank the Lord Almighty for it is by his grace that I have come this far. I would like to appreciate my supervisor Dr. AkungaMomanyi for selflessly guiding me through my work, for his advice, patience and constructive criticism. I will forever be grateful for his support. My gratitude also goes to my family for their encouragement, prayers and support and for never giving up on me. To my husband Ambrose Wambua, for always encouraging me and urging me to submit my work on time and for having so much faith in me. I appreciate the Office of the Director of Public Prosecution for the approval to pursue this course, for all the support I got during the studies. I am grateful for the support I got from my friends and colleagues and especially Katherine and Jacob. I hereby acknowledge all sources of data that has been used in this research and I appreciate the University of Nairobi Law Library and the Office of the Director of Public Prosecution resource centre where most of my research was done.

Finally I express my sincere thanks to all those whose efforts made this research paper a reality.

ACRONYMS

CGPCS	Contact Group on Piracy off the Coast of Somalia
EC	European Commission
EU	European Union
EU NAVFOR	European Union Naval Force
ECHR	European Convention on Human Rights
ICC	International Criminal Court
ILC	International Law Commission
IMB	International Maritime Bureau
IMO	International Maritime Organisation
PRC	Piracy Reporting Centre
ReCAAP	Regional Cooperation Agreement on Combating Piracy and Armed Robbery
SUA	Convention for the Suppression of Unlawful acts against the Safety of Maritime Navigation
TFG	Transnational Federal Government
UK	United Kingdom
UN	United Nations
UNCLOS	United Nations Convention on the Law of the Sea
UNDP	United Nations Development Programme
UNODC	United Nations Office on Drugs and Crime
UNSC	United Nations Security Council
USA	United States of America

TABLE OF CASES

Attorney General v. Mohamud Mohammed Hashi and others [2012] eKLR

Bolivia v Indemnity Mutual Marine Assurance Co [1909] 1 K B 785

Hassan M Ahmed v Republic Criminal Appeals Nos. 198-207 of 2008 [2009] eKLR

Republic v Chief Magistrates Court, Mombasa ex-parte Mahamud Mohamed Hashi alias Dhodi and others [2009] eKLR

Republic v Abdirahman Isse Mohamud and others [2011] eKLR

Republic v. Hassan Jama Haleys alias Hassan Jamal and others [2010] eKLR

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

Republic v Mohamed Dahir and others (Criminal Side No. 51 of 2009) Supreme Court of Seychelles

Samanyolu Case (10/600012-09) Rotterdam District Court Netherlands 2010

SS Lotus (France v Turkey) 1927 PCIJ

United States of America v. Mohamed Ali Said aka Maxamad Ali Saciid et al (case 2: 10-cr-00057) USA 2010

United States v. Smith (1820) 18 US 5

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Merchant Shipping Act, Chapter 389 Laws of Kenya

Penal Code, Chapter 63 Laws of Kenya

Seychelles Transfer of Prisoners Act CAP 180

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CHAPTER 1

INTRODUCTION

1.1 Background to the Study

The international community has in the recent past witnessed unprecedented incidences of sea piracy, a crime which had for a long time ceased to be viewed as a menace in the international arena. The rise in sea piracy was largely attributed to hijackings in the Gulf of Aden which then propelled Somali piracy to the forefront of international attention.¹ Somalia was generally viewed as a failed state following the collapse of its government in the early 1990s. Attacks on ships in the Gulf of Aden were not only escalating but growing in frequency, scope and in sophistication.² This generated a series of responses from the international community including frequent patrols in the Gulf of Aden, and the capture and prosecution of suspected pirates. The prosecution of such suspects was, however, carried out by third party states that had no direct link to the pirates but to whom such suspects were handed over by the arresting states for prosecution.

Kenya became a major destination for the prosecution of pirates captured off the coast of Somalia from late 2008 to late 2009.³ The pirates being tried in Kenya were not captured by Kenyan naval forces but, rather, by non-Kenyan forces whose countries had signed agreements with Kenya for it to conduct such trials.⁴ Accordingly, Kenya had concluded agreements on prosecuting suspected pirates with the United Kingdom, the United States, the European Union and Denmark.⁵ These agreements were intended to confer jurisdiction to Kenya, the suspects having been arrested by others states and handed over to Kenya for prosecution.

The term piracy is used to mean sea piracy as defined under the United Nations Convention on the Law of the Sea of 1982 (UNCLOS).⁶ It is therefore confined to piracy in the nature of

¹ Eugene Kontorovich “A Guantanamo on the Sea: The Difficulty of Prosecuting Pirates and Terrorists” (2010) 98(1) California Law Review 243 at 248.

² Ibid.

³ James Thuo Gathii “Kenya’s Piracy Prosecutions” (2009) 104 The American Journal of International Law 416.

⁴ Ibid.

⁵ Ibid.

⁶ The 1982 United Nations Convention on the Law of the Sea (UNCLOS), 1833 U.N.T.S. Adopted on 10th December 1982 at Montego Bay, Jamaica. Entered into force on 16th November 1994.

waylaying or otherwise interfering with ships, as opposed to the unauthorized use of someone's production or invention, which is the other sense in which piracy is understood.⁷

Historically, the crime of piracy has however been a persisting problem for thousands of years, indeed for as long as ships have sailed the oceans and for as long as maritime commerce has existed between states.⁸ Piracy has a long tradition with significant roots in various historical periods. In Greek mythology, it was considered a reputable profession⁹ like any other and was only later regarded as an illegal activity with the establishment of states. Affected states decided to act in order to protect the maritime trade between them.

The Roman Empire, for example, embraced the fight against piracy and in 67 B.C., a Roman commander Pompey was finally ordered to rid the Mediterranean of pirates.¹⁰ Because of the Romans fight against piracy, the definition of piracy can be traced back to the Roman Republic: Cicero dubbed pirates "*hostis humani generi*", and contemporaneous laws drafted by Cicero and the Roman senate construed piracy as both action against individual and against the nation as a whole.¹¹ Customary international law thus prohibited piracy and treated pirates as enemies of mankind. Pirates were considered to have waged war not just against any one state but on all states.¹² It was a crime that was perceived to occur outside the jurisdiction of any state and therefore a state that captured pirates would try them under its own municipal laws.

These early laws still form the foundation of International Criminal Law on Piracy and introduce the notion of universal jurisdiction over the crime of piracy.¹³ Piracy is the first and foremost universal jurisdiction crime.¹⁴ It is the original crime of universal jurisdiction and formed a basis for the extension of universal jurisdiction to other crimes after the World War II.¹⁵

⁷ Lawrence Abazuike "International Law Regime against Piracy" (2009) 15(1) Annual Survey of International & Comparative Law 43 at 44.

⁸ Ibid 45.

⁹ Milena Sterio "Fighting Piracy in Somalia (and Elsewhere): Why More is needed" (2009) 33(2) Fordham International Law Journal 375.

¹⁰ Ibid page 376.

¹¹ Ibid.

¹² Abazuike, (n 3) 45.

¹³ Ibid.

¹⁴ Ibid.

¹⁵ Antonio Cassese (et al) *International Criminal Law Cases and Commentary* (2011) Oxford University Press 312.

Various attempts have been made to make legal provisions for the crime of piracy. As early as 1924, during the era of the League of Nations, an attempt was made to provide an international agreement on the subject.¹⁶ The efforts, however, fizzled out as it was thought that piracy was not an urgent problem then,¹⁷ furthermore, it was no longer a pressing issue to the international community and the realisation of a universal agreement seemed somewhat difficult at that time.¹⁸ The United Nations was more successful in that it subsequently adopted the 1958 Convention on the High Seas.¹⁹ Thereafter, the United Nations Convention on the Law of the Sea of 1982 (UNCLOS) was later adopted as being a more holistic treaty on the law of the sea.

The year 2008 witnessed increased incidences of piracy off the coast of Somalia and in the Gulf of Aden, thus the United Nations Security Council linked piracy attacks in the area with the notion of a threat to international peace and security.²⁰ The Security Council responded with a series of resolutions that authorised increasingly broad encroachment into Somali territory.²¹ Under resolution 1816 (2008),²² States cooperating with the Transitional Federal Government of Somalia were allowed entry into Somalia territorial waters for the purpose of repressing piracy and armed robbery at sea. This authorization was for an initial period of six months but continued to be renewed periodically through subsequent Security Council resolutions.

This response brought all acts of piracy off the coast of Somalia under Chapter VII of the United Nations Charter.²³ All incidences of piracy and armed robbery in the territorial waters of Somalia and in the high seas off the coast of Somalia were deemed to constitute a threat to international peace and security in the region.²⁴ The authorisation to enter into Somali territory was however limited to states cooperating with the Somali Transitional Federal Government (TFG) and for

¹⁶Abazuike, (n 3) 48.

¹⁷ Ibid.

¹⁸Rubin P Alfred *The Law of Piracy* (2006) University Press of the Pacific Honolulu Page 333-334.

¹⁹Convention on the High Seas, 450 U.N.T.S. 82 Signed at Geneva April, 29 1958. Entered into force September 30 1962.

²⁰TullioTreves “Piracy Law of the Sea and Use of Force: Developments off the Coast of Somalia” (2009) 20 *European Journal of International Law* 399 at 400.

²¹Kontorovich, (n 1) page 249.

²²Resolution 1816 (2008) Security Council Resolutions adopted by the Security Council at its 5902nd meeting on 2 June 2008.

²³ United Nations Charter signed at San Francisco on 26th June 1945.

²⁴Ibid.

which advance notification had been provided by the TFG to the Secretary General of the United Nations²⁵.

Whereas piracy in Somalia was perceived as a threat to international peace and security, it should be noted that this is not the only area where piracy incidences have been reported to have occurred. Modern piracy is a growing global issue which has affected various areas such as the Straits of Malacca, the South China Sea, the Gulf of Nigeria and the Indian Ocean. Further, the upsurge of piracy recorded globally in recent years is an indicator, not just of its growing intensity in already established target areas, but also of the emergence of new target zones.²⁶

According to data collected by the International Maritime Organisation (IMO), incidences of piracy and armed robbery that were reported to have occurred or to have been attempted from the year 1984 had risen from fourteen (14) reported incidences as at July 1984 to a total of 6,569 as at December 2012.²⁷ Of this number, a total of 341 cases were reported to the organisation in the year 2012. The number of reported cases had however significantly decreased as compared to the year 2011 in which a total of 480 cases had been reported.

There was significant decrease in Somali based attacks which could be attributed to the frequency of patrols in the Gulf of Aden. However, despite this decrease, the majority of the reported incidences were still ascribed to Somali pirates characterised by attacks in the Arabian Sea and East Africa. Reports were also received in significant numbers from the South China Sea, West Africa, Indian Ocean and the Malacca Strait. The majority of these attacks were reported to have occurred in international waters while territorial waters had the least number.²⁸

This decrease does not mean that piracy attacks have ceased. In April 2013, IMO reported that 31 incidences were reported to have occurred or to have been attempted.²⁹ According to the International Maritime Bureau Piracy Reporting Centre (IBM PRC)³⁰, as at July 2013 there were

²⁵Treves, (n 20) 407.

²⁶Ibid.

²⁷International Maritime Organization (IMO), Reports on the acts of piracy and armed robbery against ships, annual report 2012.

²⁸Ibid.

²⁹Ibid.

³⁰International Maritime Bureau Piracy Reporting Centre (IMB) is the world's only manned centre that receives and disseminates information on piracy and armed robbery at sea around the globe. It is based in Kuala Lumpur Malaysia. This information is available at <http://www.icc-ccs.org/piracy-reporting-centre/piracynewsfigures> accessed on 5th August 2013.

143 reported cases worldwide in the first half of the year 2013. Of this nine were Somali based incidences including two hijackings. As at the same date there were 68 crew held hostage by Somali based pirates with 4 vessels. The centre has also reported a significant increase in the number of cases reported in West Africa.

The information demonstrates that piracy is still a menace that needs to be addressed. Therefore, does the international law regime on piracy adequately address this crime?

1.2 Statement of the Research Problem

Piracy continues to be a persistent problem in the modern world. There are still significant numbers of piracy cases reported both in international and territorial waters. Over the past decade, observers have increasingly recognised that piracy, while certainly not an existential threat to the global economic system, can pose significant challenges to international order and stability.³¹

The United Nations Convention on the Law of the Sea, (1982 UNCLOS), calls for punishment of pirates by courts of the arresting state. This provision has proved to be inadequate and did pose a major challenge with piracy off the Coast of Somalia where most of the arresting states resorted to the practice of either disarming and releasing suspected pirates or more often transferring them to third party states for prosecution. Kenya did receive a number of Somali pirates for prosecution such suspects having been transferred to Kenya by arresting states.

Under the 1982 UNCLOS, piracy is defined as an act that occurs in the high seas outside the jurisdiction of any state. According to IMO reports on piracy off the Coast of Somalia,³² incidences of piracy were reported to have occurred in territorial waters. The Security Council in addressing the situation passed Resolution 1816 (2008) and 1846 (2008) that allowed entry into Somalia territorial waters for the purpose of repressing acts of piracy and armed robbery at sea. These resolutions which have been renewed over the years are only applicable to the situation in Somalia and cannot address acts of piracy in the territorial waters of other states.

³¹Neakoh Raissa Timben “Piracy: A Critical Examination of the Definition and Scope of Piracy and the Issues Arising there from that Affect the Legal address of the Crime Globally” (2011) University of Tromso.

³²IMO reports (n 27).

This study explores the international legal regime on piracy with particular emphasis on the prosecution of piracy cases occurring off the coast of Somalia and their prosecution in Kenya. The study also seeks to determine the adequacy of the piracy provisions under the 1982 UNCLOS.

1.3 Objective of the Study

The general objective of the study is to examine the legal and institutional framework relating to the crime of piracy with particular emphasis on its application to piracy off the coast of Somalia and the prosecution of such cases in Kenya.

The specific objectives of the study are:

- a. To critically evaluate the definition, elements and requirements of the crime of piracy as contained in international legal instruments and its application to Kenya;
- b. To examine the existing international legal and institutional framework to combat piracy;
- c. To evaluate the inadequacies of Kenya's legal framework on piracy;
- d. To analyse key court decisions in Kenya relating to piracy;
- e. To propose changes in the legal and institutional framework aimed at addressing the crime of piracy more effectively.

1.4 Research Questions

The study will seek to answer the following question;

- a. Does the definition, elements and requirements of piracy as provided for in the international legal instruments sufficiently address the crime?
- b. Is the existing legal and institutional framework adequate in combating the crime of piracy?
- c. Are there any weaknesses or shortcomings in Kenya's legal framework that need to be addressed?
- d. What changes are necessary for a more robust system in combating piracy?

1.5 Hypothesis

The study tests the hypothesis that the existing international legal, policy and institutional framework is insufficient in the effort to combat the crime of piracy *jure gentium*.

1.6 Justification

Whereas the current international legal framework on piracy defines the offence and calls for state cooperation in dealing with the crime, it does not sufficiently provide for the substantive offence. The Somali related incidences have significantly reduced in the recent past. However, there has been a dramatic increase in piracy cases in the Indian Ocean and in West Africa.

Research is necessary in this area mainly to analyse in detail the international legal and institutional framework to fight piracy. Inherent weaknesses within the legal instruments should be highlighted and recommendations made on the basis of those findings. The research should also address the necessary institutional reforms needed to effectively combat this crime.

This study, in interrogating the efficacy of the international law regime on piracy will seek to identify weaknesses in the system and suggest necessary reforms needed in the fight against piracy.

1.7 Theoretical Framework

This research is guided by a number of legal theories but mainly on the sociological school of thought. One of the most influential proponents of the sociological school of thought was Roscoe Pound. His jurisprudence laid down the foundation for studying why there has often existed a substantial 'lag' or 'gap' between social change and legal change.³³ He distinguishes between the law in books and the law in action. The call is for a new functional approach to law.³⁴

This gap between the social and legal change is apparent in this study in that the crime of piracy was for a long time deemed to be something of the past. There was little or no municipal legislation existing on the same in many states. Its re-emergence off the coast of Somalia and

³³James Harris *Legal Philosophies* 2nd ed. (1997) Butterworth's London 36.

³⁴Michael Freeman *Lloyd's Introduction to Jurisprudence* (2001) Sweet and Maxwell London 673.

other areas demonstrated a clear gap between the change in society and the slow pace of the change in law.

The sociological legal theory inquires into social development of legal institutions, the social construction of legal issues and the relation of law to social change for the betterment of the society in general.³⁵ The sociological jurist pursues a comparative study of legal systems, legal doctrines, and legal institutions as social phenomena, and criticizes them with respect to their relation to social conditions and social progress.³⁶ They hold law as a social institution which may be improved by intelligent human effort, and hold it their duty to discover the best means by furthering and directing such effort.³⁷

Another proponent of the sociological school of thought is Emile Durkheim. At the centre of Emile Durkheim's science of morals and rights is the comparative analysis of rules of conduct reinforced by sanctions.³⁸ According to Durkheim, every society possesses a certain number of common ideas and sentiments which are passed on from generations to generations.³⁹ Some of these common ideas are formulated as maxims which are so important to society that it sets up organs in order to guarantee its observance and compliance.⁴⁰ The rules of conduct are then reinforced by sanctions.⁴¹

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

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

³⁵Freeman, (n 31).

³⁶Roscoe Pound "The Scope and Purpose of Sociological Jurisprudence" (1912) 25 Harvard Law Review page 516.

³⁷Ibid.

³⁸Wolfgang Schluchter "The Sociology of Law as an Empirical Theory of Validity" 19(5) European Sociological Review 537.

³⁹Ibid 538.

⁴⁰Ibid.

⁴¹Ibid 540.

Another important theory is Legal positivism as supported by H.L.A Hart. Hart argued that there were two necessary and sufficient conditions for the existence of a legal system; 1) that the valid rules of the system must be generally obeyed; and 2) that the criteria set forth in the systems rule of recognition must be effectively accepted as common public standards of official behaviour by its officials.⁴² The concept of the internal aspect of rules is central to his approach. The idea is that one cannot understand a social system unless one understands how the people who created the system or who participated in the system perceive it.⁴³ His argument is that law is a social institution set up to achieve certain human purposes and also to give guidance to citizens.⁴⁴ Thus law is a social science that must be properly described.

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

1.8 Conceptual Framework

Jurisdiction is the power of the state to regulate affairs pursuant to its laws and it tends to inhere in states for the purpose of protecting their own interests.⁴⁵ Jurisdiction may be exercised based on several principles namely; nationality, territoriality, protective, passive personality and universality. Reference to jurisdiction for the purposes of this study shall refer to all aspects of jurisdiction other than universal jurisdiction.

Universal Jurisdiction is probably the most controversial principle of jurisdiction in International Criminal Law.⁴⁶ Universal Jurisdiction refers to jurisdiction established over a crime without

⁴²Brian Bix *Jurisprudence: Theory and Context* (2009) Sweet and Maxwell United Kingdom.

⁴³Ibid .

⁴⁴Ibid .

⁴⁵Robert Cryer (et al.) *An Introduction to International Criminal Law and Procedure* (2010) Cambridge University Press 51.

⁴⁶Ibid.

reference to the place of perpetration, the nationality of the suspect or the victim or any other organised linking point between the crime and the prosecuting state.⁴⁷

Piracy is one of the oldest crimes for which universal jurisdiction was applicable. Other than piracy, which is subject to universal jurisdiction owing to its occurring by definition on the high seas, states are entitled to assert universal jurisdiction over war crimes, crimes against humanity, genocide and torture.⁴⁸ The purpose of universal jurisdiction is linked to the idea that international crimes affect the international legal order as a whole.⁴⁹ Owing to the recognition that such offences affect all states and peoples and awareness that territorial and nationality states do not always respond fairly and effectively to allegations of international crimes, international law grants all states the right to prosecute international crimes.⁵⁰

Piracy is defined under Article 101 of the 1982 UNCLOS as consisting of any of the following acts;

- a) any illegal acts of violence or detention, or any act of depredation, committed for private ends by the crew or the passengers of a private ship or a private aircraft, and directed:
 - i. on the high seas, against another ship or aircraft, or against persons or property on board such ship or aircraft;
 - ii. against a ship, aircraft, persons or property in a place outside the jurisdiction of any State;
- b) any act of voluntary participation in the operation of a ship or of an aircraft with knowledge of facts making it a pirate ship or aircraft;
- c) any act of inciting or of intentionally facilitating an act described in subparagraph (a) or (b).

As per the definition above, certain distinct elements of piracy are apparent to wit; piracy occurs in the high seas outside the jurisdiction of any state, piracy must be for private ends and that piracy involves acts by one ship directed against another.

⁴⁷Cryer, (n 45).

⁴⁸Ibid.

⁴⁹Ibid .

⁵⁰Ibid.

Piracy *jure gentium* has been defined as piracy according to the law of nations.⁵¹ A distinction between piracy and piracy *jure gentium* was described by Wheaton⁵² as; ‘piracy under the law of nations (*jure gentium*) may be tried and punished in the courts of justice of any nation, by whomsoever and wheresoever committed. But piracy created by municipal (domestic, state) statute can only be tried by that state within whose territorial jurisdiction and on board of whose vessels, the offence created was committed. There are certain acts which are considered piracy by the internal laws of a state to which the law of nations (*jure gentium*) does not attach the same significance’.

The distinction therefore would seem to fall in the place of occurrence and the manner of punishment. Thus piracy under municipal law would refer to acts of piracy so recognised by a particular state and punishable under that states law while piracy *jure gentium* is that to which universal jurisdiction is applicable. As noted by Gaswaga J. in the Seychelles case of *Republic versus Mohamed Ahmed Dahir and ten others*,⁵³ ‘it is worth noting that Piracy *jure gentium* is justiciable by the courts of every nation. Such universal jurisdiction is provided for in international law, that the arresting State is free to prosecute suspected pirates and punish them if found guilty’.

For the purposes of this study the terms piracy and piracy *jure gentium* have been used synonymously and refer to piracy as defined under the 1982 UNCLOS.

The crime of piracy has been reported to occur both in the high seas and in a state’s territorial sea. One attribute of a coastal state is the sovereignty over a belt of sea adjacent to its coast described as the territorial sea.⁵⁴ International law imposes upon a maritime state certain rights arising from sovereignty which it exercises over its maritime territory.⁵⁵

⁵¹ Duhaime legal dictionary, <http://www.duhaime.org/legalDictionary/P/PiracyJureGentium.aspx>.

⁵² Duhaime legal dictionary; as quoted from Keith, A.B., *Wheaton’s Elements of International Law* 6th Ed. (London: Stevens and Sons 1929) 277.

⁵³ *Republic vs. Mohamed Ahmed Dahir & ten (10) others* Supreme Court of Seychelles Criminal side no. 51 of 2009.

⁵⁴ Florence Njenga *International Law and World Order Problems* (2001) Moi University Press Eldoret 99.

⁵⁵ Ibid .

The high seas on the other hand are ‘‘free and may not be apportioned by any one nation.⁵⁶Certain freedoms of the high seas are however recognised that may be exercised by both coastal and no coastal states including the freedom of navigation and over flight.

For the purposes of this study, the use of the concepts ‘‘territorial sea’’ and the ‘‘high seas’’ shall be as provided for under the 1982 UNCLOS. Article 3 recognises the right of every state to establish the breadth of its territorial sea up to a limit not exceeding 12 nautical miles. Article 86, the high seas applies to all parts of the sea that are not included in the exclusive economic zone, in the territorial sea or in the internal waters of a State, or in the archipelagic waters of an archipelagic State.

1 .9 Literature Review

There has been a rapid rise in publications on the subject of piracy especially in the wake of cases of piracy off the coast of Somalia and in the Gulf of Aden. This reflects the mounting international concern with the crime of piracy and the available means to combat it.

Tullio Treves (2009)⁵⁷discusses the revival of piracy and other violent acts off the coast of Somalia. He argues that the increase in piracy in Somalia was a result of the lack of an effective government. This led to the success in capturing ships and crews and in obtaining substantial amounts of money as ransom as well as their efficient way of dealing with money so obtained hence making the Somali pirates once again *hostes humani generis*.⁵⁸

This paper is useful in this study as it gives insight in the decision by the UN Security Council to declare Somali piracy as a threat to international security under Article VII of the UN Charter. The paper is also quite relevant as it analyses the application of the Security Council resolutions to Somalia and the role of the Somali Transitional Federal Government. The article, is however, six years old and some of the material relied on is out-dated due to recent developments in the field an area that the current study will seek to address.

⁵⁶Njenga(n54) 150.

⁵⁷Treves, (n 20).

⁵⁸ibid 400.

Mario Silva (2010)⁵⁹ attributes piracy off the coast of Somalia to the notion of a failed state. The paper explores the problems experienced by Somalia as a failed state, and the impact of piracy on international commerce and maritime security. The paper discusses the political and economic instability in Somalia and demonstrates the reason for the flourishing of piracy in Somalia and the Gulf of Aden.

Mario argues that it is not possible to confront piracy without addressing the collapse of the Somali state and the inherent poverty, governance issues, and absence of the rule of law. The international community must play a role in peace-building and state reconstruction to enable Somalia to deal with piracy in a meaningful and effective way.⁶⁰

The paper is relevant in my study in addressing some of the factors that contributed to the rampant increase in incidences of piracy in Somalia. However, the paper does not address the sufficiency or otherwise of the international instruments on piracy an issue that this study will seek to evaluate.

Kelly P. Ryan (2011)⁶¹ focuses on overcoming obstacles to the prosecution of maritime piracy. The paper discusses the historical development of the crime of piracy to what is today considered as modern piracy and the relevant instruments of international law. It evaluates a myriad of modern responses to piracy in terms of international norms and agreements in order to determine whether current responses comply with international law. The paper then concludes that criminal proceedings for suspected pirates should first be undertaken by states with the strongest jurisdictional claim.

The paper is relevant to this study by pointing out some of the major responses to modern piracy. It also calls for long term solutions and unified action by states in addressing piracy. However the paper is not exhaustive in addressing the legal and institutional framework and does not deal with the weaknesses in the existing framework. This study will engage in an in depth analysis of the framework with a view to identifying the weaknesses therein.

⁵⁹Mario Silva “Somalia: State Failure, Piracy, and its Challenge to International Law” (2010) 50(5) Virginia Journal of International Law 553.

⁶⁰Ibid.

⁶¹ Ryan Kelley “UNCLOS, but No Cigar: Overcoming obstacles to the prosecution of Maritime Piracy” (2011) 95 Minnesota Law Review 2285.

James Thuo Gathii (2009)⁶² examines Kenya's decision to receive and prosecute suspects from third party states such as the United Kingdom, Denmark and the United States of America and the jurisdiction of Kenyan courts to undertake these prosecutions. He further discusses jurisdictional problems that had been posed by the definition of piracy as an offence under the then repealed section of the Kenyan Penal Code. He examines the provisions of the Merchant Shipping Act of 2009 and the nature of jurisdiction it confers on Kenyan courts. The author concludes that there is lack of nexus between such suspects captured by third party states and any exercise of jurisdiction by Kenyan courts on them.

This paper is quite informative in this study since it examines the legal framework in Kenya. It also considers whether the practice of transferring suspects for trial to third party states can be justified under universal jurisdiction. The paper is however six years old and some of its findings have been overtaken by new developments in law and practice. This study will rely on current information to address the time lapse.

Lucas Bento (2011)⁶³ has written on the dual nature of maritime piracy law and how it has enabled piracy to flourish. His paper explores the divergence between international and national responses to maritime piracy with England as a case study. The paper argues that the lack of a comprehensive legal framework that addresses piracy and one that states and other actors can rely on in dealing with the crime has undermined the ability of states to effectively deal with piracy. This author calls for reforms in the international legal framework in order to have uniformity of laws and the creation of an international institution that states can rely on in prosecution of piracy cases.

This paper will be useful in this research in that it explores options that could be pursued in reforming the international legal framework to combat piracy. The paper is also relevant to my study in that it acts as a guideline in exploring the international legal framework on piracy and some of the challenges that may be encountered. This research will also build on the article and give a more detailed analysis of the shortcomings posed by the definition of piracy under the 1982 UNCLOS.

⁶²James Thuo Gathii "Jurisdiction to Prosecute Non-National Pirates captured by Third States under Kenyan and International Law" (2009) 31 *Loyola of Los Angeles International and Comparative Law Review* 363.

⁶³ Lucas Bento "Towards an International Law of Piracy Sui Generis: How the Dual Nature of Maritime Piracy Law Enables Piracy to Flourish" (2011) 29 *Berkeley Journal of International Law* 399.

Eugene Kontorovich (2010)⁶⁴is another author on the question of piracy prosecutions. He has written a paper on the difficulties of prosecuting pirates and terrorists. The paper discusses the epidemic that broke out in the Gulf of Aden and the response by the International Community. The paper then explains the countervailing international norms and considerations that have undermined the effectiveness of the regime to combat piracy.⁶⁵The paper then considers the failure to prosecute piracy cases in the context of universal jurisdiction.

Kontorovich`s article is very useful to my study since it addresses some of the contemporary legal obstacles that arise in fighting piracy. Some of the obstacles faced arise in exercising jurisdiction to prosecute pirates and the burden of trial especially where the state in which the trials are conducted was not involved in the arrest of suspected pirates. The article will be useful in analysing the extent to which some of the legal instruments also pose as obstacles in the fight against piracy.

J. Ashley Roach (2010)⁶⁶has written on the international law and international institutions to counter piracy in Somalia and the Gulf of Aden. The paper explores the international legal framework for the suppression of piracy and its operation in Somalia. The paper discusses the role of international and national institutions in the effort to combat piracy.

The paper is useful in this study as it explores to a certain extent the international law for the suppression of piracy and its operation in Somalia. The paper also discusses some of the rights and duties of states under international instruments with regard to piracy. This discussion is important in understanding the decision by certain states not to prosecute suspected captured pirates and the resort to transfer such suspects to third party states for trial.

The study will build on the paper on certain issues such as the counter piracy operations and on the international efforts for the suppression of piracy. One major shortcoming of Roach`s paper is that it is not exhaustive with regard to the international instruments and institutions for the suppression of piracy. The present study will seek to cure this shortcoming by addressing in detail the international law regime on piracy.

⁶⁴Kontorovich, (n 1).

⁶⁵ Ibid.

⁶⁶Ashley Roach “Countering Piracy off Somalia: International Law and International Institutions” (2010) 104 American Journal of International Law 397.

Yvonne M. Dutton (2010)⁶⁷ has written a paper on bringing piracy under the jurisdiction of the International Criminal Court. The paper examines the culture of impunity that surrounds piracy and the failure of nations to prosecute acts of piracy.⁶⁸ The paper argues that piracy is a serious crime that affects the international community and therefore an international solution is warranted. The paper explores various reasons that warrant the inclusion of piracy in the jurisdiction of the ICC. The author then concludes that the ICC is the best international solution to the problem of piracy. The large and growing impunity gap for piracy can only be closed if the international community decides to act to bring pirates to justice.⁶⁹

Dutton's article is very useful in this study in that it addresses various issues why the crime of piracy should be addressed differently by the international community. Piracy is a serious crime of international concern that is only increasing in frequency and severity despite the unique ways in which the international community has been working together in an effort to repress and combat it.⁷⁰ Dutton appreciates that whereas acts of piracy will not cease because pirates are prosecuted, a more robust approach by the international community would help end the culture of impunity for the crime of piracy. The article is relevant in my work in that it gives an option that can be explored by the international community in bringing piracy under the ambit of the ICC.

Peter Lehr (2007)⁷¹ has edited a book that discusses maritime piracy in the age of global terrorism. Piracy is now considered to be an international and global phenomenon, impinging on the security of maritime traffic in various areas. The book discusses the tactical methodologies of contemporary piracy and the reaction from the global world all the way down to the tactical sphere.⁷² The book also considers the sufficiency of 1982 UNCLOS in facilitating the fight against piracy. The book is quite relevant in this study and especially in analysing the elements of the definition of piracy as contained in the 1982 UNCLOS.

⁶⁷ Yvonne Dutton "Bringing Pirates to Justice: A Case for including Piracy within the Jurisdiction of the International Criminal Court" (2010) 11 *Chicago Journal of International Law* 120.

⁶⁸ Ibid.

⁶⁹ Ibid.

⁷⁰ Ibid.

⁷¹ Peter Lehr *Violence at Sea: Piracy in the Age of Global Terrorism* (2007) Taylor and Francis Group New York.

⁷² Ibid.

Cassese (2011)⁷³ has co-edited a book in which piracy is discussed as a crime under International Criminal Law. The book identifies piracy as the original crime of universal jurisdiction. Long before war crimes, crimes against humanity and genocide achieved this status, piracy that occurred on the high seas was prosecutable, pursuant to customary international law, and later treaty law, anywhere in the world⁷⁴. The book highlights the significant increase in piracy cases which is attributed to increase in piracy activity off the coast of Somalia. Universal jurisdiction is perceived as only just the beginning of the response in light of the renewed piracy activity. The book is quite informative in this study especially in understanding the background of the application of universal jurisdiction to the crime of piracy.

Robert Cryer (2010)⁷⁵ has co-edited a book on international criminal law and procedure in which jurisdiction over crimes under international law is discussed at length. The exercise of jurisdiction generally involves an assertion of a form of sovereignty. States have a right to exercise jurisdiction over all events on their territory including on ships and aeroplanes which are registered in those countries.⁷⁶ Jurisdiction tends to inhere in states for the purpose of protecting its interests.⁷⁷ Universal jurisdiction on the other hand is limited to specific crimes. This book is relevant in this study in understanding the concept of universal jurisdiction and its application to the crime of piracy.

Werle, Gerhard (2005)⁷⁸ has authored a book that discusses the general principles of international criminal law. The principle of universal jurisdiction gives authority to states to prosecute crimes. Crimes under international criminal law are directed against the interests of the international community as a whole.⁷⁹ It follows from this universal jurisdiction nature of international crimes that the international community is empowered to prosecute and punish the crimes, regardless of who committed them or against whom they were committed.⁸⁰ With universal jurisdiction, every country can prosecute a crime regardless of where the act took place or who the victims were.

⁷³Cassese, (n 15).

⁷⁴Ibid.

⁷⁵Cryer,(n 45).

⁷⁶Ibid.

⁷⁷Ibid.

⁷⁸Gerhard Werle *Principles of International Criminal Law* (2005) T.M.C Asser Press The Hague Netherlands.

⁷⁹Ibid.

⁸⁰Ibid.

This book is useful in this study in understanding the authority to prosecute and punish crimes under international law and especially the crime of piracy.

As evidenced from the review above, quite a lot has been written on the crime of piracy. Most of the research above was triggered by the incidences of piracy off the coast of Somalia. The concept of universal jurisdiction has been broadly discussed with piracy being the oldest crime for which universal jurisdiction was applied. The failure by arresting states to prosecute arrested suspects has been the subject of contention by most writers. However the question of the adequacy of the 1982 UNCLOS in conferring jurisdiction only to the arresting state and the challenge posed therein was not addressed hence a gap in the existing literature. This study seeks to address the question of jurisdiction as provided for by the 1982 UNCLOS and thereafter to make recommendations on possible amendments.

Whereas the institutional framework on piracy has been generally discussed by various authors above, an in-depth analysis on the role played by specific institutions has not been projected hence a gap. The role of institutions such the UNODC as witnessed in the recent past in the situation in Somalia and most recently on incidences of piracy in the Gulf of Guinea cannot be overemphasised. This study will discuss in detail the role played by specific institutions and the study will seek to make recommendations on other key areas that such institutions can be involved in combating piracy.

1.10 Research Methodology

This study required data on the definition of the crime of piracy and the nature of modern day piracy. Data was also required on the existing international legal and institutional framework to combat piracy.

The study was designed as an exploratory review of the existing literature on the subject. The research involved use of both primary and secondary sources of data. Primary data included the 1945 Charter of the United Nations, the 1982 UNCLOS, the 1988 Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation (SUA Convention), relevant Acts of parliament such as the Merchant Shipping Act Of 2009, United Nations Security Council resolutions, the Djibouti code of Conduct, law reports and other necessary conventions.

Secondary data included books, articles, working papers and academic journals. Other relevant material include reports on piracy from reputable institutions such as the United Nations (UN), United Nations Office on Drug and Crime (UNODC), International Maritime Organisation (IMO) and the International Maritime Bureau (IMB). Data collection methods involved desk review of existing literature. In conducting this research, the author relied on libraries especially the University of Nairobi's School of Law Library and the Office of the Director of Public Prosecution resource centre. The internet was also quite useful in this research.

1.11 Chapter Breakdown

Chapter one is basically introduction of the subject of study. It also incorporates the background of the study, the statement of the research problem, theoretical and conceptual framework, and the literature review on the subject.

Chapter Two discusses the elements of piracy as per its definition under the 1982 UNCLOS. This chapter will also discuss the nature of modern day piracy and the response by the international community especially in relation to incidences of piracy off the coast of Somalia.

Chapter Three will explore the legal and institutional frameworks on piracy and violence at sea both internationally and regionally. This will include the Djibouti Code of Conduct and the efforts by the IMO, IMB and the UNODC. The chapter will also discuss the possible weaknesses and shortcomings in the legal and institutional framework, and the challenges that may arise in prosecuting cases of piracy.

Chapter Four will discuss the practice of transferring captured pirates to third party states for trial. In doing so this paper will seek to address whether this is in line with the doctrine of universal jurisdiction. The chapter will narrow down on Kenya as a case study and its national legislation on piracy. Finally the chapter will discuss the options available in prosecution of piracy cases.

Chapter five will deal with conclusion and recommendations of the study.

CHAPTER 2

THE LEGAL NATURE OF PIRACY AND ITS REQUIREMENTS

2.1 Introduction

Today, piracy is an international and global phenomenon, impinging on the security of maritime traffic in African, Indian, Asian, and American waters. It is commonly recognized that pirate attacks have been largely confined to four major areas: the Gulf of Aden, near Somalia and the southern entrance to the Red Sea; the Gulf of Guinea, near Nigeria and the Niger River delta; the Malacca Strait between Indonesia and Malaysia; and off the Indian subcontinent, particularly between India and Sri Lanka.¹ However, according to the International Maritime Bureau (IMB) annual piracy reports, nearly 50% of such acts have been committed in the ‘Maritime Asia’ which is said to have the busiest traffic.² This is the maritime region stretching from the Red Sea, the Gulf of Aden, the Persian Gulf, the Arabian Sea, and the Bay of Bengal through the Strait of Malacca all the way to the South China Sea and even the East China Sea.

For many centuries, piracy was treated more as an aspect of Public International Law, thus the concept of *piracy jure gentium*. Any state could try and punish a pirate regardless of whether injury had been caused to such state or its nationals. By his act a pirate acquired a stateless status and placed himself beyond the protection of any state and was thus regarded as an enemy of all mankind - *hostis humani generis*.

Large scale piracy which was for decades viewed as obsolete reappeared in various parts of the world in a new form. Instead of cruising the oceans, modern pirates operate in coastal waters relatively close to shore.³ This has been a major challenge in dealing with piracy especially Somali based pirates operating in its territorial waters.

¹ IMO reports at <http://www.imo.org/ourwork/security/SecDocs/Documentary/PiracyReports/193-Apr2013.pdf> accessed on 5th August 2013.

² International Maritime Bureau Piracy Reporting Centre (IMB) is the world’s only manned centre that receives and disseminates information on piracy and armed robbery at sea around the globe. It is based in Kuala Lumpur Malaysia. This information is available at <http://www.icc-ccs.org/piracy-reporting-centre/piracynewsfigures> accessed on 5th August 2013.

³ Martin Murphy “Piracy and UNCLOS: Does International Law help Regional States Combat Piracy?” In Peter Lehr *Violence at Sea: Piracy in the Age of Global Terrorism* (2007) Taylor and Francis Group New York 157.

The International Law on piracy is set out in articles 100 to 107 and 110 of the 1982 UNCLOS. These articles repeat almost literally Articles 14 to 22 of the Geneva Convention on the High Seas of 1958.⁴ These provisions are based on the preparatory work of the International Law Commission (ILC), which was generally assisted by the research carried out at the Harvard Law School and which culminated in the draft convention in 1932.⁵ The 1982 UNCLOS is essentially a codification of the customary international law on piracy and is binding on every state.⁶ The 1982 UNCLOS, however, defines piracy more broadly than did the customary law of nations by including “any illegal acts of violence or detention, or any act of depredation, committed for private ends”.⁷ Despite the broad definition, the 1982 UNCLOS provisions have at times been viewed by various scholars as inadequate in the fight against piracy⁸.

This chapter sets out to give a historical perspective of piracy and its evolution through the centuries to what is today’s modern day piracy. Elements of piracy that arise from its definition under article 101 of the 1982 UNCLOS are analysed in this chapter. These elements are the high seas requirement, that piracy must be for private ends and that piracy is committed by one ship against another. The responses to modern day piracy especially in relation to piracy off the coast of Somalia are discussed at length and a conclusion drawn at the end of the chapter.

2.2 Piracy: Historical Perspective

The concept of piracy has existed for thousands of years.⁹ Early historians have suggested that acts of piracy can be traced back to the beginnings of navigation when piracy was regarded only as one of the means of livelihood that the sea offered.¹⁰ Acts of piracy were not always considered as criminal in nature. Indeed, in the first century B.C., piracy was viewed as a legitimate practice in the Mediterranean because pirates supplied the Roman Empire with slaves

⁴ Convention on the High Seas 450 UNTS 82 Signed at Geneva April 29 1958 Entered into force September 30 1962; Tullio Treves “Piracy, Law of the Sea, and Use of Force: Developments off the Coast of Somalia” (2009) 20 *European Journal of International Law* 399 at 401.

⁵ Helmut Tuerk “The Resurgence of Piracy: A Phenomenon of Modern Times” (2009) 17 *University of Miami International and Comparative Law Review* 1 at 9-10.

⁶ Lawrence Abaziuke “International Law Regime against Piracy” (2009) 15(1) *Annual Survey of International & Comparative Law* 43 at 49

⁷ Eugene Kontorovich “A Guantanamo on the Sea: The Difficulty of Prosecuting Pirates and Terrorists” (2010) 98(1) *California Law Review* 243 at 252.

⁸ One such author is Ryan Kelley in the article; Ryan “Kelley UNCLOS, but No Cigar: Overcoming obstacles to the prosecution of Maritime Piracy” (2011) 95 *Minnesota Law Review* 2285.

⁹ Tuerk (n 5) 6

¹⁰ *ibid*

for its luxury markets.¹¹ It was not until pirates started disrupting vital trade routes to the East and to Africa that cities began to form alliances against pirates.¹² Under Roman law, all crimes constituting piracy had to occur outside the municipal jurisdiction of any nation; the pirate was viewed as an enemy of the entire human race and could be prosecuted under municipal law after capture, but the right to prosecute was common to all nations.¹³ As stated elsewhere in this text, these early laws formed the foundation of international criminal law on piracy thus making it a crime of universal jurisdiction.

While piracy was viewed as a universal jurisdiction crime during the Roman era, the view on pirates changed later in time, and piracy reached its so-called golden age during the sixteenth and seventeenth centuries.¹⁴ In the sixteenth century, the English Queen Elizabeth actually viewed pirates as adjuncts to the Crown's navy in its fight against Spanish trade.¹⁵ Piracy thus became a form of state-sponsored terrorism.¹⁶

Towards the late Seventeenth Century, with the end of many wars between the powerful naval nations (England, France and Spain among others), piracy suddenly stopped being used as a state sponsored weapon and pirates, instead of acting on behalf of certain states, turned against them.¹⁷ Such nations thus created laws that targeted pirates and their activities. In 1921 for example, England passed an even more stringent Piracy Act, thus bringing an end to the piracy golden age.¹⁸

The eighteenth and nineteenth centuries saw a shift in the nature of piracy such that although piracy was at times still state-sponsored it nevertheless did change significantly. Piracy became an act of savagery; if committed by English or French nationals belonging to civilised nations, it was viewed as treason, but if committed by savages it was both permissible and politically

¹¹Sterio Milena "Fighting Piracy in Somalia (and Elsewhere): Why More is needed" (2009) 33 Fordham International Law Journal.

¹² ibid

¹³ ibid page 376

¹⁴ ibid

¹⁵Milena, citing from, Peterson, M.J. "An Historical Perspective on the Incidence of Piracy" in Ellen E. ed *Piracy at Sea* (1989) 41at 52.

¹⁶ ibid

¹⁷ Ibid 378

¹⁸ ibid

useful.¹⁹ This view of piracy led to a paradoxical situation, because the more the great powers employed pirates against each other, the more their laws drove the definition of piracy towards *hostis humani generi*.²⁰

While piracy was cracked down on for disturbing the commerce and friendship between different nations, privateering authorised by a sovereign was often openly encouraged and became the preferred method of plunder on the high seas.²¹ However, with trade flourishing in the relative calm after Napoleon's demise, nations began to increasingly view not only piracy, but also the activities of privateers as detrimental to their commerce and national interests.²² To counter a menace that affected all nations indiscriminately and that could not be controlled by the normal means of diplomacy or warfare, the Declaration Respecting Maritime Law was signed in Paris in 1856, outlawing such state sponsored piracy and stating privateering is and remains abolished.²³ Finally great powers arrived at the modern-day definition of piracy as a crime so heinous towards humanity in general, that pirates can be defined as enemies of humanity on the whole.²⁴

Piracy dwindled to a controllable and almost unnoticeable level at the end of the nineteenth century only to make a strong comeback, though in a different cast, in recent years.²⁵ Indeed at the turn of the nineteenth century and for the greater part of the twentieth, piracy seemed to have faded away into the mists of history.²⁶ Though a phenomenon as old as shipping and maritime trade, it was thought to have forever been eradicated from most of the seven seas.²⁷ In the 1960's, however, piracy slowly started its resurgence and, by the 1980's, emerged once more as a regional, if not global menace.²⁸ South-East Asia was initially at the forefront of this phenomenon until the unprecedented incidences of piracy off the coast of Somalia.

¹⁹ Milena (n 11) 379.

²⁰ *ibid*

²¹ Tuerk (n 5) 8.

²² *Ibid*.

²³ *Ibid* 9.

²⁴ *ibid* 379.

²⁵ *Ibid*.

²⁶ *Ibid*.

²⁷ *Ibid*.

²⁸ *Ibid*.

In the mid-1990s, piracy re-emerged as a potent maritime problem, affecting all nations, and thriving in specific waters and sea passages.²⁹ Throughout the 1990s and the early 2000s, the straits of Malacca in Southeast Asia saw an increase in pirate attacks, most likely because thirty percent of the world's annual commerce and fifty percent of the world's oil pass through this narrow body of water.³⁰ Throughout the last decade, however, the Southeast Asian nations, in particular Indonesia, Malaysia, and Singapore, undertook significant effort to combat and reduce piracy off their shores.³¹ Their efforts yielded solid results, as piracy seems to have drastically subsided in that area.³²

With the reduction of piracy attacks in Southeast Asia, there was however increased piracy activity off the coast of Somalia. Starting in 2007, pirate attacks intensified off the coast of Somalia, particularly in the Gulf of Aden, a strait between northern Somalia- the Horn of Africa- and the Arabian Peninsula.³³ In 2008 alone, piracy attacks increased by two hundred percent, and the first few months of 2009 saw dozens of piracy attacks not only in the Gulf of Aden, but also further out in the Indian Ocean.³⁴ The frequent patrolling of naval forces from various states combined with other efforts to eradicate piracy led to a decrease in piracy off the coast of Somalia. Piracy attacks have however continued to be witnessed in the Indian Ocean and in the Gulf of Guinea in West Africa.

2.3 The Nature of Modern day Piracy

Piracy and other maritime crimes have occurred nearly as long as vessels have sailed in the oceans. Among the many criminological theories, environmental and ecological theories are most appropriate to explain the origins and opportunities for piracy.³⁵ Where a society's norms and institutions breakdown, social control becomes ineffectual and thus institution lose the

²⁹ Milena (n 11) 381.

³⁰ Ibid.

³¹ Milena 382; as quoted from Ashley Roach "Piracy Off Somalia: the Challenges for International" Law Panel Discussion at the 103rd Annual Meeting of the American Society of International Law March 26 2009.

³² Ibid page 382.

³³ Ibid 383; as quoted from Eugene Kontorovich *International Legal Responses to Piracy off the Coast of Somalia* (2009) 13 American Society of International Law.

³⁴ Ibid.

³⁵ Jon Shane and Charles Lieberman "Criminological theories and the problems of modern piracy" In M.R. Haberfeld and Agostino von Hassell *Maritime Piracy and Maritime Terrorism: The Challenge of Piracy for the 21st Century* (2009) Kendall Hunt Publishing Company 1.

ability to exert control over people and geographical areas. Criminal factions supplant conventional institutions and exert an influence over the citizenry that fosters tolerance for criminal behaviour because the inhabitants have lost the capacity to exercise control.³⁶ As a result, crime and violence are seen as a near inevitable consequence of life.³⁷

Piracy is predicated on rather crude operating methods that bring offenders into contact with valuable targets that are easily converted into cash. Because piracy typically takes place in vast ocean waters, the targets are largely unprotected. The social conditions associated with piracy typically include poverty, hunger, unemployment, poor housing, and political instability. Political instability, which results from a weak or non-existent central government, produces a social phenomenon known as *anomie* a condition in which social and moral norms are weak, conflicting, or simply absent.³⁸

Piracy is distinguished from simple hijacking in that first, an act of piracy requires that two vessels are involved in the incident and second, an act of piracy requires that the crime has been undertaken for private, not political, purposes. The nature of piracy has changed significantly since the sixteenth and seventeenth centuries. Today's pirate is often more barbaric and better prepared, due to the implementation of technological advancements, to fight than ever before.³⁹

Maritime piracy is a growing global issue in today's world with the number of piracy incidences consistently increasing over the last two decades. The re-emergence of piracy could also be attributed in part to the unfolding of globalization, which has provided greater economic opportunities for pirates as world trade intensifies.⁴⁰ Modern day piracy is also a by-product of the political and economic insecurity in some regions, an environment that enables it to flourish. This is especially true of Somalia, where the absence of a coherent and authoritative political body results in lack of economic security for Somali citizens as well as an ineffective police and

³⁶Shane (n 34).

³⁷ Ibid.

³⁸ Ibid.

³⁹ Ibid.

⁴⁰ Lucas Bento "Towards an International Law of Piracy Sui Generis: How the Dual Nature of Maritime Piracy Law Enables Piracy to Flourish" (2011) 29 Berkeley Journal of International Law 399 at 405.

naval force to patrol its borders.⁴¹ Poverty and the absence of an effective administration equally manifest as challenges in the fight against piracy in Somalia.

The modern pirate also differs from his historical counterpart in that piracy has adapted to modern technical, political, economic, and social developments.⁴² The pirate today is considerably more sophisticated than his counterpart in yesteryears and technologically savvy.⁴³ The use of modern equipment such as satellite phones and automatic weapons means that a piracy attack today is more effective and precise thus requiring a more concerted effort for its suppression.

Piracy today also has a human dimension⁴⁴ in that captured crew have at times been taken hostage for purposes of demanding payment of a ransom for their release. It is therefore apparent that nations today are faced with not only geographical but also logistical challenges in addressing modern day piracy. This calls for a concerted effort especially in realising the sufficiency of the international legal framework on piracy.

2.4 Elements of the Crime of Piracy

It is clear from the 1982 UNCLOS definition in article 101⁴⁵ that an act of piracy can be defined as such only when the said act (any illegal acts of violence or detention, or any act of depredation), is committed for private ends, occurs on the high seas or outside the jurisdiction of any State, and is committed against another ship or aircraft. Further the alleged illegal acts must be committed by the crew or passengers of a ship or aircraft, which is defined in Article 103 of the 1982 UNCLOS as a ‘pirate ship or aircraft’.

⁴¹Bento (n 40).

⁴² *ibid.*

⁴³ *Ibid.*

⁴⁴ *Ibid.*

⁴⁵ Article 101; Piracy consists of any of the following acts:

- (a) any illegal acts of violence or detention, or any act of depredation, committed for private ends by the crew or the passengers of a private ship or a private aircraft, and directed:
 - (i) on the high seas, against another ship or aircraft, or against persons or property on board such ship or aircraft;
 - (ii) against a ship, aircraft, persons or property in a place outside the jurisdiction of any State;
- (b) any act of voluntary participation in the operation of a ship or of an aircraft with knowledge of facts making it a pirate ship or aircraft;
- (c) any act of inciting or of intentionally facilitating an act described in subparagraph (a) or (b).

The elements of piracy as defined under Article 101 can be highlighted as; the restriction of piracy to private ends rather than public or political ends, the geographical restriction to the high seas, and the two ship requirement.

2.4.1 Piracy must be for Private Ends

This requirement that a pirate act must be committed for private ends had its origin in the distinction between piracy and privateering⁴⁶. The latter was state sponsored and was essentially piracy under licence. This distinction however did not matter if one was a victim but was quite important for the privateer in that being politically instigated, it gave such a person immunity from prosecution if caught in the act. It was also important for states, partly because they avoided the expense of maintaining a standing fleet as privateers acted as a substitute navy.⁴⁷ The Declaration of Paris abolished privateering in 1856, but the distinction between private and public ends was maintained because courts (and states) wanted to differentiate between piracy and acts of maritime depredation carried out by insurgents or rebels.⁴⁸

This distinction was drawn repeatedly by jurists and in court judgments⁴⁹ with particular emphasis in the case of *Bolivia versus Indemnity Mutual Marine Assurance Co.*⁵⁰ a case heard before the English courts in 1909. Whereas the case was essentially an action for indemnity for loss of goods, the court did make an important distinction between private and public ends in piracy. The court made a finding that piracy must be construed according to its popular sense which meant “persons who plunder indiscriminately for private gain, and not persons who are operating against the property of a particular state for political purposes”.⁵¹

The failure to give a meaning to the term private ends has posed difficulties in determining whether certain acts amount to piracy. The 1982 UNCLOS does not clarify who or how to determine what the true purpose was of an attack by one vessel against another.⁵² It is rather unclear what amounts to acts for private ends and more so since it excludes politically motivated

⁴⁶Peter Lehr *Violence at Sea: Piracy in the Age of Global Terrorism* (2007) Taylor and Francis Group New York 159.

⁴⁷ Ibid.

⁴⁸ Ibid.

⁴⁹ Ibid.

⁵⁰ *Bolivia v Indemnity Mutual Marine Assurance Co* (1909) 1 K.B 785; See also Murphy (n 3)160.

⁵¹ *ibid*

⁵² Bento (n 40) 417.

acts. It may also pose a challenge to ascertain precisely when the private boundary ends and the public one commences. In view of most commentators today this means that the convention cannot be used against terrorists.⁵³ It also excludes acts carried out by warships or other recognised government vessels.⁵⁴ The private ends proviso thus excludes acts of terrorism that are politically motivated, such as hijacking and ones of internal seizure.⁵⁵

Modern day piracy on a large scale is usually economically motivated. Somali based pirates, for example, are purely profit-motivated actors. Whether the benefit is private or public may be difficult to determine. Some scholars consider the distinction between public and private as being in the nature of the violence that occurs: that is, any violence on the high seas which is not state-sanctioned is unlawful irrespective of motive. Thus, the act ought to be considered as piratical regardless of whether it was committed for an alternative purpose, such as funding of terrorist activities⁵⁶.

2.4.2 High seas requirement

One of the tensions that runs through much of the discussions about piracy- and much of its history- is that between universality and particularity.⁵⁷ A pirate by being declared as *hostis humani generi* led to the universality of the crime of piracy. However the universality did not emerge as a result of its heinousness but as a practical response to a common problem due to its occurrence in the high seas. States were prepared to accept what amounted to an encroachment on their sovereignty because pirates attacked ships of all states and answered to no one in a part of the world that was beyond the jurisdiction of any state.⁵⁸ The subsequent codification of the laws on piracy recognised its uniqueness in jurisdiction unlike other crimes, that is, by its occurrence in the high seas.

The 1982 UNCLOS geographically restricts piracy to the high seas and does not address acts that occur in the territorial, internal waters, or any other areas of the sea excluding the high seas, such as the exclusive economic zone or the contiguous zone.⁵⁹ Article 101 defines piracy as

⁵³ Lehr (n 46) 160.

⁵⁴ *ibid*

⁵⁵ Bento (n 40) 418.

⁵⁶ *ibid*

⁵⁷ *ibid* 161.

⁵⁸ *Ibid*

⁵⁹ *ibid*

geographically committed “in the high seas” and “in a place outside the jurisdiction of any state”. Thus, for an act to qualify as piracy, it must be committed either within the high seas or in a place outside the jurisdiction of any state. Acts committed in territorial waters of any state would not qualify as piracy, even though they include the violent seizure of a victim vessel by an aggressor vessel, for solely private aims, such as monetary gain or hostage taking.⁶⁰ These acts are in many ways identical to piracy save for the location.

Acts referred to as piracy routinely committed in the early 2000’s in Southeast Asia, in the territorial waters of Singapore, Malaysia and Indonesia, were *stricto sensu* not piracy under the UNCLOS definition.⁶¹ Similarly acts committed by the Somali pirates in the Somali territorial waters would not constitute piracy, simply because they take place in the wrong geographical zone.⁶² This definition of piracy under the 1982 UNCLOS in this regard is therefore inadequate in that it does not cover acts of piracy that occur in territorial waters. The Somali case is a classic example in highlighting this shortcoming. Increased patrols and antipiracy measures in the territorial sea led to increased incidences of piracy in the high seas. However more often than not, Somali pirates would re-enter the territorial waters where foreign actors could not follow.⁶³

2.4.3 The two Ship Requirement

This requirement stems from the notion that any ship is always under the jurisdiction of its flag state.⁶⁴ It envisages an act of piracy as an attack committed from one vessel to another vessel. It does not cover the seizure of a vessel from within (internally) by passengers, stowaways or by its own crew. This can be seen from the phrasing of article 101(a)(i), which states that piracy is an act committed “ by the crew or passengers of a private ship....directed....against another ship”⁶⁵. The emphasis here is the attack of one ship/vessel by members of another vessel. Therefore, any act that fulfils the legal requirement of piracy must involve at least two vessels: the victim vessel and the aggressor vessel.

⁶⁰ Neakoh Raissa Timben “Piracy: A Critical Examination of the Definition and Scope of Piracy and the Issues Arising there from that Affect the Legal address of the Crime Globally” (2011) University of Tromso Page 3.

⁶¹ Ibid.

⁶² Ibid.

⁶³ Bento (n 40) 419.

⁶⁴ Lehr (n 46) 164.

⁶⁵ Article 101 UNCLOS; see also Bento (n 40) 421.

The 1982 UNCLOS further makes it quite clear that government vessels cannot commit piracy, unless the crew mutinies and uses the vessel to carry out acts of violence against other ships.⁶⁶ Outside of mutiny any unlawful acts of violence by a government vessel against another craft are a matter of state responsibility.⁶⁷ Aside from mutinying crews of state-owned ships, the two-ship requirement does not appear to contemplate internal seizure of a ship, or those instances where one or more of a ship's own crew or passengers take control, as was the case in the *Achille Lauro*.⁶⁸

Thus, the 1982 UNCLOS does not therefore contemplate an internal seizure of a ship such as if pirates were to board a victim ship as passengers and commit acts of violence while in the high seas, then logically such an act would not amount to piracy as no aggressor vessel is involved. Regardless, both in legal and practical terms, it is not clear that internal seizure should remain classified separate from piracy⁶⁹. The more compelling reason for this distinction is that a ship sails under the jurisdiction of its flag state, the state with which it is registered to operate.⁷⁰ It remains therefore, that any offence committed on board a ship as against the ship or its property falls under the jurisdiction of the flag state and not under international law.

2.5 Reverse Hot Pursuit

Hot pursuit of pirates from territorial waters onto the high seas has been recognized since the concept of territorial seas began to be accepted in the eighteenth century.⁷¹ Hot pursuit occurs where a state ship pursues a pirate ship from within a state's territorial waters onto the high seas.⁷² Hot pursuit is exclusively a coastal state right.⁷³ Reverse hot pursuit on the other hand is the right of ships of one state to pursue pirates from the high seas into or across the territorial waters of another state.⁷⁴ Whereas there are no problems posed by hot pursuit, reverse hot pursuit does pose a problem in that it requires a ship pursuing pirates on the high seas to enter into the

⁶⁶ Article 102 UNCLOS; see also Neakoh (n 60) 13.

⁶⁷ *ibid*

⁶⁸ Bento (n 40) 421.

⁶⁹ *ibid*

⁷⁰ *ibid*

⁷¹ Lehr (n 46) 163.

⁷² Bento (n 40) 420.

⁷³ Joseph Isanga "Countering Persistent Contemporary Sea Piracy: Expanding Jurisdictional Regimes" (2010) 59 *American University Law Review* 1267 at 1289.

⁷⁴ *Ibid*.

territorial waters of another state. The value of reverse hot pursuit is clear in that it allows a foreign state to continue pursuing pirates that have committed an international crime in international waters, even after the pirates have entered territorial waters and where the foreign state would otherwise require authorization from the sovereign state.⁷⁵

Territorial waters that are poorly monitored and patrolled are, in effect, pirate sanctuaries if the pursuing ships of interested states do not have this right.⁷⁶ Such sanctuaries provide pirates with great opportunities to escape and as such a safe haven to retreat into. Pirates already take advantage of these sanctuaries to operate with relative impunity within territorial waters.⁷⁷ The 1982 UNCLOS does not allow states the luxury of reverse hot pursuit.⁷⁸ What happens when a suspected pirate vessel being pursued by a foreign government's warship manages to escape into the territorial waters of a coastal state that is unwilling to continue pursuing the pirate vessel?⁷⁹ Article 111 expressly provides that [t]he right of hot pursuit ceases as soon as the ship pursued enters the territorial sea of its own state or of a third state. The provision defers to the sovereignty of other states, but it also assumes that the coastal state of the ship pursued or the third state is willing and able to capture and prosecute the suspected pirates.⁸⁰ As contemporary piratical acts amply demonstrate, deference to other states' sovereignty largely ignores the reality that some states are either unwilling or unable to prosecute suspected pirates.⁸¹

This was one of the challenges posed by Somali based pirates who would retreat into Somali territorial waters after an attack. The Security Council Resolution 1816⁸² was a reprieve in authorizing entry into Somali territorial waters for purposes of repressing acts of piracy and armed robbery at sea. The UN Resolution 1816 permitting reverse hot pursuit in Somali territorial waters however cannot be considered as establishing customary international law since it is only applicable to the situation in Somalia and cannot be extended to other regions.

⁷⁵ Isanga (n 73).

⁷⁶ *ibid*

⁷⁷ Bento (n 40) 421.

⁷⁸ *ibid*

⁷⁹ *Ibid* 1291

⁸⁰ *ibid*

⁸¹ *ibid*

⁸² Security Council Resolution 1816 (2008).

2.6 Duty to Cooperate

Article 100 imposes a duty on all signatory States,” to cooperate to the fullest possible extent in the repression of piracy on the high seas or in any other place outside the jurisdiction of any State”.⁸³ The implication here as rightly pointed out by the International Law Commission in its commentary is that any state having an opportunity of taking measures against piracy, and neglecting to do so, would be failing in a duty laid upon it by international law. The aspect of international cooperation is fundamental towards achieving an effective legal regime in fighting piracy.⁸⁴ The extent of the duty to cooperate and whether or not states have any obligation to so cooperate is debatable. Doubts have been expressed historically as to whether this duty extends to requiring that states have an adequate national criminal law addressing piracy.⁸⁵

The 1982 UNCLOS is based on the assumption that states would have in place a comparable municipal law that deals with piracy. Under Article 105, the courts of the state which carried out the seizure may decide upon the penalties to be imposed and may determine the action to be taken with regard to the ship, aircraft or property seized subject to third party rights. This has however not been the case as not all states have criminalised piracy in their municipal laws. Arresting states have also on various occasions failed to prosecute piracy cases and have resulted into handing them over to third party states for prosecution and punishment.

There are however a large number of regional cooperation initiatives in place that deal with piracy. The Regional Cooperation Agreement on Combating Piracy and Armed Robbery (ReCAAP) is the first multilateral government-to-government anti-piracy effort in Asia.⁸⁶ Its main objectives are; information sharing, capacity building and cooperative arrangements. It requires signatories to prevent and suppress piracy and armed robbery against ships while sharing information on piracy incidences. The IMO Djibouti Code of Conduct is yet another significant regional agreement that promotes cooperation. Its focus is mainly on the Western Indian Ocean and the Gulf of Aden.

⁸³ Article 100 UNCLOS.

⁸⁴ Neakoh (n 60) 31.

⁸⁵ Ibid.

⁸⁶ Bento (n 40) 426.

2.7 Institutional and other Responses to Modern Piracy

2.7.1. Action by the United Nations

In reaction to the lack of legal alignment and mainly the alarming situation in Somali coastal areas, the UN Security Council passed several resolutions on piracy incidences. The first of a series of related resolutions was Resolution 1816⁸⁷ which empowered states cooperating with Somalia's Transitional Federal Government (TFG) to take actions in order to prevent pirate activity off the coast of Somalia. It allowed foreign naval forces to enter Somalia's territorial waters for the purposes of repressing acts of piracy and armed robbery at sea. However, it must be emphasized that the authorization permitted by the Resolution was only limited to the situation in Somalia. This authorization has been extended periodically by various UNSC Resolutions over the years.

Resolution 1846 (2008)⁸⁸ is couched in similar terms as 1816. It allows entry into Somali territorial waters for purposes of repressing acts of piracy and armed robbery at sea. Further, it calls upon states with relevant jurisdiction such as flag and coastal states to cooperate in determining jurisdiction, investigation and prosecution of persons responsible for acts of piracy and armed robbery off the coast of Somalia. This mandate has equally been extended over the years by various resolutions. This authorization has currently been extended for a period of twelve months through resolution 2184(2014).⁸⁹

In addition to the requirement that states continue to cooperate with Somalia authorities in the fight against piracy, states are equally called upon to criminalize piracy under their domestic laws and to favourably consider the prosecution and imprisonment of pirates apprehended off the

⁸⁷ Security Council Resolution 1816 (2008).

⁸⁸ Security Council Resolution 1846 (2008) Adopted by the Security Council at its 6026th meeting on 2nd December 2008.

⁸⁹ Security Council Resolution 2184 (2014). Adopted by the Security Council at its 7309th meeting, on 12th November 2014. Available at www.un.org/en/sc/documents/resolutions/2014.shtml This Resolution also commends states such as Kenya, Mauritius, Seychelles, and Tanzania for their efforts to prosecute suspected pirates in their national courts, and appreciates the assistance provided by the UNODC Maritime Crime Programme, the Trust Fund, and other international organizations and donors, in coordination with the CGPCS, to support Kenya, Mauritius, Seychelles, Tanzania, Somalia, and other States in the region with their efforts to prosecute, or incarcerate in a third State after prosecution elsewhere, pirates, including facilitators and financiers ashore, consistent with applicable international human rights law, and emphasizes the need for States and international organizations to further enhance international efforts in this regard.

coast of Somalia.⁹⁰ The authorizations as renewed in resolution 2184, however, only apply in respect to the situation in Somalia and do not affect the rights and responsibilities of other states under international law.⁹¹

Notably therefore, the measures taken by the Security Council are within the framework of Chapter VII of the United Nations Charter. Although the main effect of Resolution 1816 and subsequent resolutions is to extend both *ratione loci* and *ratione materiae* the scope of the international law rules concerning piracy, the Security Council has framed the relevant resolutions rather cautiously.⁹² The authority as per Resolution 1816 was limited in validity for six months and later renewed via Resolution 1846 for twelve months. The subsequent renewal of this mandate such as in resolution 2184 has been for a period of twelve months. The scope of the authorization is equally limited in that it applies only to the situation in Somalia.

The Security Council resolutions are couched in a manner that recognises UNCLOS as the major international legal framework to combat piracy. The mandate of these resolutions and efforts from other organisations has led to significant decrease in piracy off the coast of Somalia. The mandate of these resolutions while effective in Somalia cannot however be applied in other areas experiencing piracy incidences.

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

On 14 January 2009 the Contact Group on Piracy off the Coast of Somalia (CGPCS) was established in accordance with UNSC Resolution 1851(2008).⁹³ CGPCS comprises of several

⁹⁰Resolution 2184.

⁹¹ The UNSC affirmed under Resolution 2184 that the authorizations so renewed apply only with respect to the situation in Somalia and shall not affect the rights, obligations, or responsibilities of Member States under international law, including any rights or obligations under The Convention with respect to any other situation, and underscores in particular that this resolution shall not be considered as establishing customary international law; and *affirms further* that such authorizations have been renewed only following the receipt of the 4 November 2014 letter conveying the consent of Somali authorities.

⁹² TullioTreves “Piracy Law of the Sea and Use of Force: Developments off the Coast of Somalia” (2009) 20 European Journal of International Law 399 at 404.

⁹³ Security Council Resolution 1851(2008) Adopted by the Security Council at its 6046th meeting, on 16th December 2008.

Encourages all States and regional organizations fighting piracy and armed robbery at sea off the coast of Somalia to establish an international cooperation mechanism to act as a common point of contact between and among states, regional and international organizations on all aspects of combating piracy and armed robbery at sea off Somalia’s coast; and *recalls* that future recommendations on ways to ensure the long-term security of international navigation off the coast of Somalia, including the long-term security of WFP maritime deliveries to Somalia and a possible

States and is intended to help mobilize and co-ordinate the international efforts in the fight against piracy and armed robbery against ships in the waters off the coast of Somalia. The CGPCS provides a forum for the exchange of information and ideas, and coordinates the efforts of states and relevant organizations through five working groups.⁹⁴ The role of the working groups is to promote military coordination and regional maritime capacity development; to address legal issues; to strengthen self-awareness and self-protection in commercial shipping and to coordinate international efforts to identify and disrupt the financial networks of pirate leaders and their financiers.⁹⁵

2.7.3 Other Responses by the International Community

These include efforts aimed at ensuring the successful prosecution of captured pirates. Whereas piracy is one of the oldest crimes for which universal jurisdiction was applicable, states have at times been reluctant to prosecute pirates in their domestic courts. This has led to the practice of transferring captured pirates to third party states for trial. Somali pirates fall in this category as various countries such as Kenya and Seychelles have been major destinations for prosecution of piracy related cases.

2.8 Conclusion

Whereas modern day piracy does not significantly differ from piracy in yesteryears, it has posed a major challenge to the international community. Today's pirates constitute a serious threat not only for those at the front line (e.g., seafarers, fishermen and shipping companies), but also for the international community at large because of the repercussions they have on world trade and

coordination and leadership role for the United Nations in this regard to rally Member States and regional organizations to counter piracy and armed robbery at sea off the coast of Somalia are to be detailed in a report by the Secretary-General no later than three months after the adoption of resolution 1846;

Further encourages all states and regional organizations fighting piracy and armed robbery at sea off the coast of Somalia to consider creating a Centre in the region to coordinate information relevant to piracy and armed robbery at sea off the coast of Somalia, to increase regional capacity with assistance of UNODC to arrange effective ship rider agreements or arrangements consistent with UNCLOS and to implement the SUA Convention, the United Nations Convention against Transnational Organized Crime and other relevant instruments to which States in the region are party, in order to effectively investigate and prosecute piracy and armed robbery at sea offences;

⁹⁴ Contact Group on Piracy off the Coast of Somalia at <https://www.thecgpcs.org> last accessed on 8th May 2014.

⁹⁵ Ibid.

international security.⁹⁶ Modern day piracy can be attributed to various causes with political and economic insecurity taking the lead in piracy off the coast of Somalia.

The elements of piracy require that piracy must be for private ends, committed by one ship against another and, occurs in the high seas. These serve as limitations in that acts of piracy have also been committed in the territorial sea and not only in the high seas as envisaged under Article 101 of the 1982 UNCLOS. The response by the United Nations Security Council through its resolutions 1816(2008) and 1846(2008) was mainly due to the deficiency of the 1982 UNCLOS in dealing with the situation in Somalia which was largely viewed as a failed state. These Resolutions allowed foreign naval forces to enter Somalia's territorial waters for the purposes of repressing acts of piracy and armed robbery at sea. These Resolutions do not, however, expand the customary international law on piracy as they are only applicable to the situation in Somalia. To address piracy generally, there is need to expand the provisions of UNCLOS especially its definition of the crime of piracy in order to cater for situations such as piracy incidences occurring within the territorial sea and not the High Seas.

⁹⁶ Tuerk (n 5) 5.

CHAPTER 3

LEGAL AND INSTITUTIONAL FRAMEWORK FOR COMBATING PIRACY

3.1 Introduction

In efforts to combat piracy and other maritime offences, states have adopted Conventions and Treaties that address piracy and above all, enacted national laws aimed at bringing suspected pirates to justice. Other than the 1982 UNCLOS that covers the crime of piracy, there is a host of international conventions dealing with similar offences.¹ Some states have surpassed the nation-state collective action problem by participating in coordinated regional efforts to address piracy. Such efforts include the Contact Group on Piracy off the Coast of Somalia (CGPCS), created pursuant to UN Security Council Resolution 1851.² Regional efforts aimed at cooperation among states in piracy prone areas have also led to a sustained decrease in piracy cases.

This chapter examines the international legal framework on piracy and the extent to which the offence is provided for under the 1958 Convention on the High Seas and the 1982 UNCLOS. The requirement under Article 105 UNCLOS that arresting states exercise jurisdiction over suspected pirates in my view is not binding on states as the same has not been strictly adhered to in instances where arresting states have transferred such pirates to third party states for trial. The chapter then covers other acts of violence that endanger the safe navigation of a ship as provided under Article 3 of the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation (SUA). The chapter then highlights the importance of the SUA in providing for acts that are similar to piracy but that are not provided for under the 1982 UNCLOS.

The chapter then goes on to highlight efforts of various international institutions involved in combating piracy. These institutions include the International Maritime Organisation, the International Maritime Organisation and the United Nations Office on Drugs and Crime. Challenges that arise in prosecuting piracy cases under this framework are thereafter addressed.

¹ Such as the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation .

² Yvonne Dutton “Bringing Pirates to Justice: A Case for including Piracy within the Jurisdiction of the International Criminal Court” (2010) 11Chicago Journal of International Law .

3.2 Legal Framework

3.2.1 1958 Convention on the High Seas

The 1958 United Nations Convention on the High Seas was one of the four Conventions concluded in Geneva in 1958. Articles 14 – 23 deal with matters of piracy and are identical to the provisions on piracy in the 1982 UNCLOS. Article 2 of the Convention recognises that the high seas are open to all nations and no state can claim sovereignty over any part. The Article further recognises the freedom of the high seas for both coastal and non-coastal states to be exercised with reasonable regard to the interests of other states.

Piracy is defined as consisting of any of the following acts:

- (1) Any illegal acts of violence, detention or any act of depredation, committed for private ends by the crew or the passengers of a private ship or a private aircraft, and directed:
 - (a) On the high seas, against another ship or aircraft, or against persons or property on board such ship or aircraft;
 - (b) Against a ship, aircraft, persons or property in a place outside the jurisdiction of any State;
- (2) Any act of voluntary participation in the operation of a ship or of an aircraft with knowledge of facts making it a pirate ship or aircraft;
- (3) Any act of inciting or of intentionally facilitating an act described in sub-paragraph 1 or sub-paragraph 2 of this article.³

The definition lays emphasis on piracy being committed on the high seas and outside the jurisdiction of any state. In addition to calling on the cooperation of states in the repression of piracy, the Convention does further recognize the role of states that seize a pirate ship or arrest persons on board in determining the penalties to be imposed or the action to be taken in regard to such ships, aircraft or property.

³ Article 151 1958 Convention on the High Seas.

3.2.2 The 1982 United Nations Convention on the Law of the Sea (UNCLOS).

The United Nations Convention on the Law of the Sea (UNCLOS) 1982 which has been ratified by almost every country in the world codifies the universal jurisdiction status of piracy.⁴ The preamble to the 1982 UNCLOS states that the convention's purpose is "to settle ... all issues relating to the law of the sea" so as to maintain "peace, justice and progress for all peoples of the world."⁵ It addresses piracy within the framework of this ambitious goal, in addition to other issues like the rights of landlocked states, the execution of maritime research, and the legal status of different sea areas.⁶ It adopts a definition of piracy that is similar to that of the 1958 High Seas Convention.⁷ Generally speaking, the 1982 UNCLOS defines the rights and responsibilities of nations in their use of the world's oceans, establishing guidelines for businesses, the environment, and the management of marine natural resources.⁸

Under Article 100, the Convention merely places a duty on states to cooperate in the repression of piracy. The assumption is that states would have in place domestic legislation on piracy and thus any seizing state would penalize any acts amounting to piracy. While the wording of Article 100 may be open to the interpretation that all states should have such a law, the Security Council has noted that it remains the case that many states do not.⁹

Article 105 gives every state the right to capture suspected pirates and permits the courts of the capturing state to determine their penalty.¹⁰ This article echoes Article 19 of the 1958 Convention on the High Seas. Under Article 105, the flag state of the seizing ship enjoys very

⁴ Eugene Kontorovich "A Guantanamo on the Sea: The Difficulty of Prosecuting Pirates and Terrorists" (2010) 98 California Law Review 243 at 252. Kenya ratified the Convention on 2nd March 1989.

⁵ Lucas Bento "Toward an International Law of Piracy Sui Generis: How the Dual Nature of Maritime Piracy Law Enables Piracy to Flourish" (2011) 29 Berkeley Journal of International Law 399 at 416.

⁶ Bento, (n5).

⁷ UNCLOS Article 101.

⁸ Neakoh Raissa Timben "Piracy: A Critical Examination of the Definition and Scope of Piracy and the Issues Arising there from that Affect the Legal address of the Crime Globally" (2011) University of Tromso page 10.

⁹ Neakoh, (page 19); from UNSC Resolution 1851(2008); the Security Council Resolution 2184(2014) has further noted the continued limited capacity and domestic legislation to facilitate the custody and prosecution of suspected pirates after their capture has hindered more robust international action against the pirates off the coast of Somalia too often has led to pirates being released without facing justice, regardless of whether there is sufficient evidence to support prosecution.

¹⁰ Ryan Kelley "UNCLOS, but No Cigar: Overcoming obstacles to the prosecution of Maritime Piracy" (2011) 95 Minnesota Law Review 2285 at 2297.

broad powers.¹¹ These consist of the right to arrest persons and to seize property, and, through the abovementioned rights, to decide upon penalties and on action to be taken with regard to the ship, aircraft and property, the right to submit the persons arrested and the property seized to judicial proceedings.¹² The language of Article 105 ('may seize') seems to indicate that the exercise of jurisdiction by the seizing state's courts is a possibility, not an obligation.¹³

Under Article 106, where such seizure is carried out without adequate grounds, then the state that executed the seizure becomes liable to the state under which the seized ship was registered. Article 107 clarifies that pirates may only be seized by "warships or military aircraft" or another vessel "clearly marked and identifiable as being on government service and authorized to that effect."¹⁴

From the foregoing it is clear that under Article 105, a state that seizes a pirate ship or suspected pirates ought to determine what measures are to be taken subsequently or what punishment is to be meted out. However, as a matter of customary international law, every state has jurisdiction to prosecute a pirate subsequently present within its territory irrespective of any connection between the victims or vessel attacked and the prosecuting state.¹⁵ Essentially, this is the basis of the exercise of universal jurisdiction. Every state that arrests a pirate within its jurisdiction ought to punish. Article 105 vests jurisdiction on the high seas on every state however, the state that captures or arrests ought to exercise such jurisdiction. Since the exercise of such jurisdiction under article 105 is discretionary, then some states that have on various occasions captured pirates have failed to exercise such jurisdiction and have opted to release suspected pirates or hand them over to third party states for trial. This has been so notwithstanding the lack of a nexus between the captured pirates and such third party states.

The 1982 UNCLOS remains the main international legal framework on piracy and on matters, armed robbery at sea and other matters related to the ocean a fact that has been highlighted by the UNSC.¹⁶ Thus, the 1982 UNCLOS while not ratified by all states (such as the United States

¹¹ TullioTreves "Piracy Law of the Sea and Use of Force: Developments off the Coast of Somalia" (2009) 20 European Journal of International Law 399 at 402.

¹² Ibid.

¹³ Ibid.

¹⁴ Bento (n 5).

¹⁵ Neakoh (n 8) 23.

¹⁶ UNSC Resolution 2184 (2014).

of America) nonetheless represents the best evidence of international law relating to the maritime regime, and is therefore binding on all nations.¹⁷ The definition of piracy under Article 101 is widely accepted and has been replicated in other agreements and in domestic pieces of legislation.¹⁸ This definition, while widely accepted as a reflection of customary law and recognized as the most authoritative codification of piracy law, significantly narrows the definition of piracy.¹⁹ The definition creates certain elements that ought to be present for an act to be categorized as piracy.

The elements of piracy as discussed in chapter 2, seem to limit the application of the 1982 UNCLOS to the high seas and does not cover acts of internal seizure of a vessel due to the requirement that two vessels be involved. Incidences of piracy in the territorial sea such as the Somali related piracy clearly highlighted this deficiency. The UNSC Resolutions on the situation in Somalia were meant to address piracy in Somali territorial waters thus the qualification that they are not applicable in any other region. Further incidences such as the *Achille Lauro*²⁰ hijacking demonstrated that the 1982 UNCLOS provisions could not apply to acts of internal seizure or those that are politically motivated.

3.2.3 Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation (SUA).

Whereas the Convention for the Suppression of Unlawful acts against the Safety of Maritime Navigation (SUA Convention)²¹ does not refer to the word piracy in its text, it does proscribe to certain aspects of the elements of the crime of piracy. The SUA Convention while intended to ensure the safety of maritime navigation is however closely linked to terrorism as is evident from its preamble. The definition of piracy as seen elsewhere in this text has been viewed by various

¹⁷ Neakoh (n 8) 30; as quoted from Peppetti, J. D. "Building the Global Maritime Security Network: A Multinational Legal Structure to Combat Transnational Threats" (2008) 55 Naval Law Review.

¹⁸ Such as the Djibouti Code of Conduct and the Merchant Shipping Act CAP 89 Laws of Kenya.

¹⁹ *ibid*

²⁰ This involved the 1985 hijacking of the Italian cruise ship the MS *Achille Lauro* by members of the PLF faction who had posed as passengers.

²¹ The SUA Convention was concluded at Rome on the 10th March 1988 and came into force on 1st March 1992.

scholars as limiting²² in that, it deals with illegal acts of violence or detention, committed for private ends, on the high seas and by the crew or passengers of one ship against another.

Thus, balancing between private and public ends especially in politically motivated acts of piracy could diminish the ingredients of the offence. Similarly, attacks committed by the crew or passengers on board a ship do not amount to piracy due to the two ship requirement. The international maritime community, recognising the need to expand the definition of modern day piracy in order to encompass the acts like the *Achille Lauro* hijacking, drafted the SUA convention.²³ The abovementioned *Achille Lauro* incident demonstrated the inadequacy of the international regime governing piracy under the 1982 UNCLOS because it excluded cases of internal seizure and was silent as to prosecuting pirates.²⁴ The sponsoring governments who first introduced the draft convention cited as part of their reason for doing so the restrictions inherent within the definition of piracy: that it necessarily involved an act for private ends, and in requiring an attack from one vessel against another, it could not cover the internal seizure of a vessel.²⁵ Thus the principal reasons the SUA Convention was seen as necessary were first, as noted above, the law of piracy did not cover internal hijacking of vessels; and second, that while there existed treaties concerning the hijacking and sabotage of airplanes no similar Conventions yet existed for the shipping industry.²⁶

Article 3 of the SUA Convention creates a number of offences and especially acts that endanger or are likely to endanger the safe navigation of a ship. A person commits an offence under the Convention if that person unlawfully or intentionally; seizes or exercises control over a ship by force, threat or any other form of intimidation, performs an act of violence on a person on board a ship, destroys a ship or causes damage to a ship or its cargo, destroys, seriously damages or interferes with maritime navigational facilities among others.

²² See for example Sterio Milena “Fighting Piracy in Somalia (and Elsewhere): Why More is needed” (2009) 33Fordham International Law Journal page 386. Whereas the definition of piracy is the most authoritative codification of piracy law it significantly narrows the definition of piracy such that acts committed by the Somali pirates in the Somali territorial waters would not constitute piracy, simply because they take place in the wrong geographic zone.

²³ Neakoh (n 8) 15; the Italian cruise ship MS *Achille Lauro* was hijacked on the 7th October 1985 by members of the Palestinian Liberation Front.

²⁴ Bento (n 5) 424.

²⁵ Ibid.

²⁶ Ibid.

Thus the SUA Convention covers the possibility of the internal seizure of a vessel with no qualification as to the motive of the seizure. The Convention however limits its application to areas “beyond the outer limit of the territorial sea of a single state or the lateral limits of its territorial sea with adjacent states.”²⁷

The SUA Convention does not, however, expressly refer to the crime of piracy nor does it alter the definition of piracy as contained in the 1982 UNCLOS. It, however, does solidify the link between piracy and other similar offences committed on board a ship and more specifically those that endanger or are likely to endanger the safety of maritime navigation. The Convention is important in that it covers acts that fall short of the definition of piracy under the 1982 UNCLOS. Thus the aim of the Convention is to require states to create offences under their law and to provide for a seamless international criminal law framework that reduces the existence of safe havens for those who commit the acts covered therein.²⁸

The SUA Convention gives states more leeway and freedom in the exercise of jurisdiction. Article 6 requires states to take necessary measures to establish jurisdiction over offences created under Article 3. Such jurisdiction is to be exercised if such an offence is committed against a flag ship of that state, by its national or within its territory including its territorial sea. Jurisdiction may also be established under Article 6 if the offence is committed by a stateless person habitually resident within that state; if during its commission a national of that state is either seized, threatened injured or killed; or if the commission of such an offence is an attempt to compel such a state to do or to abstain from doing a certain act.

Thus unlike the 1982 UNCLOS the exercise of jurisdiction under the SUA Convention is quite clear and specific. Further states may extradite an arrested pirate to any other state that establishes jurisdiction as stated above. A state that has an offender within its territory and does not extradite is obliged to “without exception whatsoever and whether or not the offence was committed within its territory, to submit the case without delay to its competent authorities for the purpose of prosecution, through proceedings in accordance with the laws of that state”.²⁹

²⁷ Article 4 SUA Convention.

²⁸ Neakoh (n 8) 25.

²⁹ Article 10(1) SUA Convention.

3.3 Other Non-binding Instruments on Piracy

3.3.1 The Djibouti Code of Conduct

The Djibouti Code of Conduct was adopted in a meeting convened by the IMO and held in Djibouti by States in the region in an effort to combat incidences of piracy.³⁰ The code recognises the extent of the problem of piracy and armed robbery against ships in the region. Signatories to the Code of Conduct have declared their intention to co-operate to the fullest possible extent, and in a manner consistent with international law, in the repression of piracy and armed robbery against ships.³¹

The Code which became effective from the date it was signed takes into account and promotes the implementation of those aspects of the United Nations Security Council Resolutions 1816(2008), 1838(2008), 1846(2008) and 1851(2008) and of the UN General Assembly resolution 63/111 which fall within the competence of the IMO.³²

Its purpose and scope includes; sharing and reporting relevant information through a system of national focal points and information centres; interdicting ships suspected of engaging in acts of piracy or armed robbery against ships; ensuring that persons committing or attempting to commit acts of piracy or armed robbery against ships are apprehended and prosecuted; and facilitating proper care, treatment, and repatriation for seafarers, fishermen, other shipboard personnel and passengers subject to acts of piracy or armed robbery against ships, particularly those who have been subjected to violence.³³

³⁰ This was a Sub-regional meeting on maritime security, piracy and armed robbery against ships for Western Indian Ocean, Gulf of Aden and Red Sea States that was held in Djibouti from 26 to 29 January 2009. The Code of Conduct concerning the Repression of Piracy and Armed Robbery against Ships in the Western Indian Ocean and the Gulf of Aden was adopted and signed on 29 January 2009 by the representatives of nine countries -Djibouti, Ethiopia, Kenya, Madagascar, Maldives, Seychelles, Somalia, the United Republic of Tanzania and Yemen. It remains open for signature at the IMO headquarters and has since been signed by a total of 20 out of the 21 countries that are eligible to sign. The meeting also adopted other resolutions on Technical Cooperation and assistance, enhancing training in the region and on expressions of appreciation. Available at [www.imo.org/OurWork/Security/PIU/Pages/DCoC English.pdf](http://www.imo.org/OurWork/Security/PIU/Pages/DCoC%20English.pdf).

³¹ Djibouti Code of Conduct available at [www.imo.org/OurWork/Security/PIU/Pages/DCoC English.pdf](http://www.imo.org/OurWork/Security/PIU/Pages/DCoC%20English.pdf).

³² Ibid.

³³ Article 2 SUA Convention; this is subject to available resources, related priorities and respective national laws and regulations. Article 8 on Coordination and Information sharing provides that each participant should designate a national focal point to facilitate coordinated, timely and effective information flow among the participants consistent with the purpose and scope of the code.

In particular, the signatories to the Code have agreed to co-operate, in a manner consistent with international law, in:

- a) the investigation, arrest and prosecution of persons, who are reasonably suspected of having committed acts of piracy and armed robbery against ships, including those inciting or intentionally facilitating such acts;
- b) the interdiction and seizure of suspect ships and property on board such ships;
- c) the rescue of ships, persons and property subject to piracy and armed robbery and the facilitation of proper care, treatment and repatriation of seafarers, fishermen, other shipboard personnel and passengers subject to such acts, particularly those who have been subjected to violence; and
- d) the conduct of shared operations – both among signatory States and with navies from countries outside the region – such as nominating law enforcement or other authorized officials to embark on patrol ships or aircraft of another signatory.³⁴

The signatories also undertook to review their national legislation with a view to ensuring that there are laws in place to criminalize piracy and armed robbery against ships and to make adequate provision for the exercise of jurisdiction, conduct of investigations and prosecution of alleged offenders.³⁵

The code adopts a definition of piracy similar to that of the 1982 UNCLOS³⁶ such that piracy occurs in the high seas. Member States have also expressed their desire to work with other states and agencies such as the IMO, the United Nations Development Programme (UNDP), the United Nations Office on Drugs and Crime (UNODC), the European Commission (EC) and the Regional Co-operation Agreement on Combating Piracy and Robbery Against Ships in Asia (RECAAP) in technical assistance and capacity building in combating piracy and armed robbery.

³⁴ Djibouti Code of Conduct (n31).

³⁵ Article 11 Djibouti Code of Conduct.

³⁶ Article 101 UNCLOS.

Whereas significant progress has been achieved under the Djibouti Code of Conduct, it remains a non-binding agreement³⁷ hence curtailing its application as a state may opt not to implement any of the undertakings under the code. Given that the success of the Djibouti Code of Conduct thrives on the political goodwill of the governments involved, the efforts of the IMO are still key in providing a platform for continued cooperation. This notwithstanding there has been significant success in various aspects such as capacity building and information sharing which has been overseen through the code among the participating states.

3.4 Institutional Framework on piracy

3.4.1 International Maritime Organisation

The International Maritime Organisation (IMO) is a specialised agency of the United Nations responsible for the safety, security and environment performance of international shipping. Its main role is to create a regulatory framework for the shipping industry that is fair and effective universally adopted and universally implemented.³⁸ As the international organisation covering the international shipping industry, the IMO has long been concerned with countering the adverse effects of crime against merchant ships and their crews.³⁹

With the increase in acts of piracy and armed robbery against ships, the IMO initiated an anti-piracy project aimed at fostering the development of regional agreements on implementation of counter-piracy measures.⁴⁰ The IMO assembly has since adopted a series of resolutions that provide guidance on measures to prevent piracy and armed robbery against ships.⁴¹

For many years, the IMO has been active in attempting to protect the safety of shipping and mariners transiting the waters off the coast of Somalia⁴² and lately in the Gulf of Guinea. The

³⁷ Articles 13 and 15; it was intended that a binding agreement would be pursued within two years of the effective date of the code.

³⁸ International Maritime Organisation(IMO) www.imo.org

³⁹ Ashley Roach “Countering Piracy off Somalia: International Law and International Institutions” (2010) 104The American Journal of International Law page 409.

⁴⁰ Ibid.

⁴¹Such as Resolution A 1025 code of practice for the investigation of crimes of piracy and armed robbery against ships and also the guidelines to assist in the investigation of the crimes of piracy and armed robbery against ships (MSC.1 Circ. 1404).

⁴² Ibid.

IMO has promoted the adoption of various Conventions,⁴³ Protocols and codes concerning maritime safety and security. Its effort to promote and enable regional and international cooperation is evident in the adoption of the regional code of conduct to counter piracy entitled the Code of Conduct Concerning the Repression of Piracy and Armed Robbery against Ships in the Western Indian Ocean and the Gulf of Aden (the Djibouti Code of Conduct).⁴⁴

The efforts by the IMO in ensuring a level playing-field in the shipping industry cannot be over emphasized. This has been achieved by ensuring observance of laid down safety and security measures in the industry. Indeed as observed by the organisation itself, the world relies on a safe, secure and efficient international shipping industry provided by the regulatory framework developed and maintained by the IMO.⁴⁵ Because of the international nature of the shipping industry, it has long been recognized that action to improve safety in maritime operations is more effective if carried out at the international level rather than by individual countries acting unilaterally and without coordination.⁴⁶

The IMO has been instrumental in overseeing cooperation among states leading to not only the adoption of the Djibouti Code of Conduct but also overseeing its implementation. This has led to increased participation among states in issues aimed at the alleviation of piracy. IMO reports on incidences of piracy have led to great success in mapping out piracy prone areas.

3.4.2 International Maritime Bureau

Whereas the International Maritime Bureau (IMB)⁴⁷ was principally established to act as a focal point in the fight against maritime crime and malpractice, one of its main areas of expertise is in the suppression of piracy. Concerned at the alarming growth in the phenomenon, this led to the creation of the IMB Piracy Reporting Centre (PRC) based in Kuala Lumpur, Malaysia in 1992.⁴⁸

⁴³For example, the 1988 Convention for the Suppression of Unlawful acts against the Safety of Maritime Navigation (SUA Convention) and it's Protocol.

⁴⁴ IMO (N38).

⁴⁵ Ibid.

⁴⁶IMO (N38).

⁴⁷ The IMB is a non-profit making organization established in 1981 as a specialized division of the International Chamber of Commerce www.icc-iccs.org/icc/imb.

⁴⁸ The International Maritime Bureau aware of the escalating level of piracy wanted to provide a free service to the seafarer and established the 24 hour IMB Piracy Reporting Centre (PRC) in Kuala Lumpur, Malaysia.

The centre maintains a round-the-clock watch on the world's shipping lanes, reporting pirate attacks to local law enforcement and issuing warnings about piracy hotspots to shipping.⁴⁹

The main objective of the PRC is to be the first point of contact for the shipmaster to report an actual or attempted attack or even suspicious movements thus initiating the process of response.⁵⁰

The main aim of the PRC is to raise awareness within the shipping industry, which includes the shipmaster, ship-owner, insurance companies and traders of the areas of high risk associated with piratical attacks or specific ports and anchorages associated with armed robberies on board ships.

The PRC works closely with various governments and law enforcement agencies and is involved in information sharing in an attempt to reduce and ultimately eradicate this crime. The efforts of the IMBPRC have been instrumental in raising awareness among the shipping industry on areas that are prone to piracy attacks. The ability to report a piracy incident as soon as it occurs enables swift response by law enforcement agencies.

3.4.3 United Nations Office on Drugs and Crime

In response to Security Council resolutions calling for a concerted international response to the scourge of piracy off the horn of Africa,⁵¹ the United Nations Office on Drugs and Crime (UNODC) Counter Piracy Programme (now Maritime Crime Programme) was started in 2009 to assist states strengthen their capacity to combat maritime crime. The programme played a central role in capacity building initiatives for prosecuting states such as Kenya, Seychelles and Mauritius.

A prisoner transfer programme was also established under the maritime crime programme to facilitate the transfer of consenting sentenced detainees from prosecuting states back to their home country.⁵² Other initiatives under the programme include; building Somali maritime law

⁴⁹ IMB (N47).

⁵⁰ The IMB Piracy Reporting Centre operates a live piracy report that enables shipmasters to report any incidences of piracy. A live piracy map is also available showing all piracy and armed robbery incidences with exact coordinates or estimated positions.

⁵¹ www.unodc.org/unodc/en/piracy/index.html.

⁵² Ibid.

enforcement institutions and a hostage support programme to assist piracy hostages and their families.

Whereas the UNODC has been leading the way in supporting states around the East African and Indian Ocean region, to prosecute piracy, these prosecutions form only part of the solution to Somali piracy.⁵³ The focus has therefore remained on the long term goal of supporting law enforcement and criminal justice institutions within Somalia with a view to equipping them for future apprehension, prosecution and punishment of piracy cases.

The combined efforts of governments, naval forces and international organisations have resulted in a profound reduction in the rates of piracy in the Indian Ocean.⁵⁴ However, conditions in Somalia remain unstable and the risk of pirate attacks remains.⁵⁵ Thus the UNODC has played a central role in capacity building among prosecuting states which has led to effective apprehension and prosecution of piracy cases in the region. With the emergence of new maritime crime in West Africa, that has been characterised by increase in cases of piracy and armed robbery, the UNODC is now looking West with focus around the Gulf of Guinea.

3.5 Challenges in Prosecuting Piracy Cases

Prosecution of piracy cases has had its fair share of challenges. The 1982 UNCLOS while making piracy a crime does not make it mandatory for states to capture and prosecute. Third party states that have undertaken to prosecute have had to do so through separate agreements whose validity has at times been challenged. Some of the challenges in the legal and institutional framework are discussed here under.

3.5.1 Enforcement of the Legal Framework

The existing legal framework on piracy places it uniquely within the international law enforcement mechanism. When a pirate is captured on the high seas outside the territory of a particular state, the municipal laws of the capturing state, not international laws determine how

⁵³UNODC Maritime Crime Brochure- Issue 13 March 2014 available at www.unodc.org/documents/easternafrika/UNODC-MCP-Brochure-March-2014.pdf .

⁵⁴ Ibid.

⁵⁵ Ibid.

the pirate will be punished.⁵⁶ The reliance on municipal laws in enforcement has led to notable failures, one being the rarity in which piracy cases are brought in municipal courts.⁵⁷ This became evident with the rise in piracy incidences off the coast of Somalia and in the Gulf of Aden. This led to the practice of releasing captured pirates with only a few being prosecuted by the capturing nation. For example, although hundreds of pirates were caught by the coalition patrolling the Gulf of Aden, only a few have been brought back to the capturing nation to be prosecuted.⁵⁸

Various reasons have been associated with the reluctance to bring pirates to justice. Not only is prosecuting pirates burdensome, entailing innumerable logistic difficulties, it is also expensive and time-intensive as it can involve novel legal questions.⁵⁹ Additionally, some states are reluctant to prosecute pirates because their legal regimes are inadequate or because piracy presents delicate political considerations.⁶⁰ Such obstacles have effectively deterred states from exercising jurisdiction over pirates.

Further, the 1982 UNCLOS does not make it mandatory for states to prosecute but only calls for cooperation in tackling piracy matters. One of the responses to the challenges of enforcement of piracy law has been to enter into agreements with third countries, mainly developing countries, to prosecute suspected pirates.⁶¹ Whereas this has been the practice employed in prosecuting Somali related cases, the fact that the prosecuting states were not the capturing states has not been addressed substantively. Furthermore, a state's ability to prosecute arrested pirates depends on the provisions of its own municipal laws which must criminalize acts of piracy.

3.5.2 Application of Human Rights Requirements in Piracy Cases

Captured pirates must be treated in accordance with accepted international human rights standards. Right to liberty and security, right to fair trial and right to life are some of the

⁵⁶ Joseph Isanga "Countering Persistent Contemporary Sea Piracy: Expanding Jurisdictional Regimes" (2010) 59 American University Law Review 1267 at 1274.

⁵⁷ *ibid*

⁵⁸ *Ibid*

⁵⁹ *ibid*

⁶⁰ Isanga (n 56)

⁶¹ *Ibid*.

fundamental rights protected under various instruments such as the European Convention on Human Rights (ECHR).⁶²

European states which have naval vessels off the coast of Somalia are parties to the ECHR.⁶³ Although these states are acting under the authority of Security Council Resolutions, those resolutions make it clear that they do not displace the operation of human rights; indeed they expressly affirm them.⁶⁴ Whereas the ECHR effectively applies to persons within a state's jurisdiction, its extra-territorial application depends on whether a person is within a state's effective control.⁶⁵ The application of the ECHR to piracy cases is foreseeable where pirates are arrested with a view to bringing them under the criminal jurisdiction of the capturing state.

The application of the ECHR on issues of violation of rights of suspected pirates was considered in the Dutch trial of Somali pirates in the *Samanyolu* case⁶⁶ in which criminal charges were brought against five Somali pirates before the Rotterdam District Court. The five were accused of attacking the *Samanyolu* a cargo ship in the Gulf of Aden. The defence for one of the accused had argued that the rights of the accused had been violated under articles 5 and 6 of the ECHR to wit that there was no legal basis for the detention on board the Danish naval ship upon arrest, that the suspect was not immediately brought before a judge, and the suspect was not availed legal aid for a long time. The defence had therefore insisted that either the Public Prosecutor be barred from prosecuting or that the evidence tendered be dismissed, or taken into account while imposing sentence.

The court considered that the suspect together with four others had been arrested by Danish naval forces and later transferred to Netherlands for trial. The court was of the view that under

⁶² The European Convention on Human Rights (ECHR) was adopted in 1950 and came into force in 1953. It is the first Council of Europe's convention and the cornerstone of all its activities and its ratification is a prerequisite for joining the Organisation. The European Court of Human Rights oversees the implementation of the Convention in the 47 Council of Europe member states.

⁶³ Neakoh (n 8) 33; Under Article 1 of the Convention member states have an obligation to respect human rights and to secure to everyone within their jurisdiction the rights and freedoms under the Convention.

⁶⁴ Neakoh (n 8) 33 ; for example Security Council Resolution 1846 (2008) that called for entry into the territorial waters of Somalia for purposes of repression of acts of piracy and armed robbery at sea, at paragraph 14; Calls upon all members and in particular flag, port and coastal states....and other states with relevant jurisdiction under international law and national legislation to cooperate in determining jurisdiction, and in the investigation and prosecution of persons responsible for acts of piracy and armed robbery off the coast of Somalia, consistent with applicable international law including *human rights law*.....

⁶⁵ Neakoh (n 8) 33.

⁶⁶ *Samanyolu Case* LJN: BM8116, Rotterdam District Court, 10/600012-09 available at www.unicri.it.

Article 105 of the 1982 UNCLOS Danish authorities would have had to decide on the penalties to be imposed and as such both the 1982 UNCLOS and the SUA Convention could serve as legal basis for the detention. In determining whether the suspects were promptly brought before a court of law, the court was guided by the circumstances upon arrest and found that the suspects having been brought to court after the lapse of forty (40) days was not prompt. Despite agreeing with the defence that it took too long before the suspects were brought to court after their arrest, admitting that it should be done earlier and conceding that the delay in the trials constituted a breach of Article 5 of the ECHR, the court nevertheless found that the delay did not jeopardize criminal proceedings in the case.⁶⁷

The case above brings into focus the human rights challenges that face piracy suspects generally in that first the geographical area of commission of the offence being the high seas means that suspects are more often than not likely to be arrested in the high seas. The modalities of ensuring that such suspects are brought promptly before a court then come into play especially if the arresting state opts not to try the suspects such as in the Samanyolu case. The right to legal aid would also be premised on how soon the suspect is brought to court or how soon criminal procedural activities commence.

The African Charter on Human and Peoples' Rights⁶⁸ is yet another instrument applicable to pirates captured within Somalia. The Charter provides for equality before the law and the equal protection of the law for all individuals. Some of the rights under the Charter include the right to defense which includes the right to be defended by a counsel of one's choice and the right to be tried within a reasonable time.⁶⁹ It would be expected therefore that Somali pirates undergoing trial within African states would be guaranteed such rights. This has however not always been the position as discussed below.

The practice of handing over suspected pirates to third party states has at times led to detention of suspects beyond the required period. Thus the rights of such suspects have not been

⁶⁷ Odeke Ademun "Somali Piracy: Jurisdiction over Foreign Pirates" (2011) 17 Journal of International Maritime Law 122 at 124.

⁶⁸ Adopted 27 June 1981, OAU Doc. CAB/LEG/67/3 rev. 5 21 ILM. 58 (1982) entered into force 21 October 1986.

⁶⁹ Ibid.

guaranteed. In the Seychelles case of *Republic v Mohamed Ahmed Dahir & 10 Others*.⁷⁰ Counsel for the eleven accused had submitted that the relevant Constitutional rights were not explained to them; that is the right- to counsel, to remain silent and to be informed of the reasons for arrest and detention in a language understood by them before being arrested. The Court held *inter alia* that;

Of course it is impracticable to provide a lawyer to the accused while at sea. Even if counsel were to be assigned at the time, there was no Somali/English interpreter in the country to assign him and the police as well as the court until the United Nations Office on Drug and Crime (UNODC) procured one from overseas,.... *as soon as it was reasonably practicable thereafter*⁷¹

Thus the court in considering the concerns raised by counsel for the accused was of the view that while the same were genuine, the immediate application of the human rights concerns was not practical under the circumstances. It would have been impossible for a counsel to be available upon arrest of the accused due to the geographical constraints with the arrest being effected in the high seas. Similarly it would also appear that the language barrier existing upon arrest meant that the law enforcement agencies plus the court could only effectively communicate with the accused as soon as an interpreter was available.

Similarly, in the Kenyan case of *Republic versus Hassan Jama Haleys alias Hassan Jamal and 5 others*⁷² while commenting on the application of the rights of the accused in the ongoing piracy trials, the court stated:

[t]hat the piracy trials have presented a unique challenge to the Kenyan legal system. We cannot ignore the fact that these are suspects who having been arrested by foreign naval forces on the high seas are brought to Kenya for trial. They are strangers in the country,

⁷⁰ *The Republic v Mohamed Dahir & 10 others*, Supreme Court of Seychelles, Criminal Side No. 51 of 2009. Judgment of Gaswaga J. dated 26th July 2010; *ibid* note 124 page 244; the eleven accused who were Somali nationals were charged before the Supreme court of Seychelles with various offences ranging from piracy to committing acts of terrorism against a Seychelles coast guard patrol vessel “*Topaz*”.

⁷¹ *Ibid*.

⁷² *Republic versus Hassan Jama Haleys alias Hassan Jamal and 5 others*, Misc. criminal application no. 105 of 2010 eKLR; The six accused persons had been charged before the Chief magistrates court in Mombasa in Cr. Case. No. 1340 of 2010 with the offence of piracy. The advocate on record for the accused withdrew from acting thus prompting the court to issue an order that the Attorney General provides legal representation for the accused. This order was then challenged by the state.

do not understand the legal system, may not know what their rights are and do not understand the language...

The court went on to note that the only way a fair trial would be guaranteed would be for the Kenyan government and other international partners supporting the trials to provide free legal representation to the suspects. The court, however, overruled the order by the trial magistrate requiring the Attorney General to provide legal representation to the accused.

Clearly then, the right to a fair trial in such instances cannot be guaranteed since the language barrier and the absence of legal representation could mean that the accused persons would not adequately prepare for their defense.

Thus due to the geographical location of the occurrence of the crime of piracy- in the high sea, states have been faced with the challenge of balancing between the rights of such suspects under the international instruments and the need to ensure that the crime is prosecuted. Bringing suspects promptly before a court of law and ensuring proper legal representation are some of the human rights issues that arise in prosecuting suspected pirates especially in third party states that have capacity constraints.

3.5.3 Jurisdictional Challenges

One major challenge facing the international community with regard to Somali piracy is the jurisdictional uncertainty of how to approach the suspected pirate ships, whether pirate suspects can be arrested, what to do with them once arrested and where and how to try them.⁷³ This is because the only country that has flag and coastal state jurisdiction is Somalia⁷⁴ thus resorting to third party states for exercise of jurisdiction.

The corollary of the flag state jurisdiction is the port state jurisdiction or control.⁷⁵ If Somalia was a functional state, it would have no problem exercising these rights over pirates based in or

⁷³ Ademun Odeke "Somali Piracy - Effects on Ocean borne Commerce and Regional Security and Challenges to International Law and World Order" (2011) 25 Australia and New Zealand Maritime Law Journal 134 at 160

⁷⁴ Odeke (n73); Article 92 of the 1982 UNCLOS provides for the status of ships and states that ships shall be under the exclusive jurisdiction of the flag state while on the high seas; Article 94 further provides for the duties of flag states which includes the exercise of jurisdiction and control.....over ships flying its flag and to assume such jurisdiction under its internal law.

⁷⁵ Ibid.

calling upon its ports.⁷⁶ However the Somali state having been dysfunctional for many years, it posed as a safe haven for pirates to operate from.

States whose naval forces were patrolling the Gulf of Aden for example were reluctant to exercise jurisdiction irrespective of whether or not their merchant vessels were victims of piracy attacks. The initial reservation of these states was that if the seizure of the alleged pirate ships was effected without any adequate justification, the state making the seizure is liable for any damage to the state of the ships nationality.⁷⁷

Jurisdictional challenges may also arise as a result of outdated piracy laws. For example, with the exception of Anglo-American countries, most still forbid domestic jurisdiction over foreign pirates unless the alleged piracy involved an attack on their flag vessel.⁷⁸ Thus, as stated above, third party states have had to exercise jurisdiction over captured pirates. Whereas piracy is a crime for which universal jurisdictional is exercisable the jurisdictional issues have arisen in that these states are not usually the capturing states as provided under the 1982 UNCLOS.

A further challenge to international law posed by Somali piracy is that for the first time pirate suspects are being tried in third countries of Kenya and the Seychelles; countries where the offence was not committed.⁷⁹ Whereas piracy is a crime of universal jurisdiction, the exercise of jurisdiction by these countries has no basis under customary international law. Both Kenya and Seychelles have on occasion tried suspects where there was no link whatsoever between the state and the captured pirates. Prosecution of pirates in these countries has nevertheless continued despite the jurisdictional concerns.

3.5.4 Capacity Problems

Since piracy is punishable under the municipal laws of the state undertaking trials, a functional legal and institutional framework ought to be in place if much success is to be achieved. Any legal system hoping to prosecute suspected pirates ought, as a condition precedent, to have

⁷⁶ Odeke(n73).

⁷⁷ Ibid.

⁷⁸ Ibid.

⁷⁹ Ibid.

sufficient capacity.⁸⁰ Such an undertaking calls for, among others, solid judicial and prison systems.⁸¹ Such a system must have sufficient resources to gather evidence both locally and internationally for effective and efficient prosecution. For instance, it is hard to find the shipping crew in one place to give evidence. Indeed, shipping crews are constantly on move, and it is very inconveniencing to bring them to a specific place at a specific time to testify in court.⁸²

Similarly, this calls for capacity building and expertise in international criminal law and in presentation of the evidence in a criminal trial. Language barrier poses a major constraint especially in dealing with Somali pirates as was evident in the case of *Republic v Mohamed Ahmed Dahir & 10 Others*.⁸³ However with regional cooperation and efforts of organizations such as the UNODC, states have made some progress in bridging the gap arising from such constraints.

3.6 Conclusion

The 1982 UNCLOS has for a long time remained the key international framework on piracy. Whereas the UN Security Council in its Resolutions continues to recognize the 1982 UNCLOS as the main international legal framework on piracy, the same does not provide for alternative modes of jurisdiction where arresting states are unwilling to prosecute. Arresting states have failed to exercise jurisdiction on piracy despite the provisions of article 105 of the 1982 UNCLOS. Article 105 calls for arresting states to decide on the penalty to be imposed on captured pirates. With incidences of piracy off the coast of Somalia, arresting states have resorted to the transfer of arrested pirates to third party states such as Kenya for prosecution. This practice is based on the Security Council Resolutions which are only limited to the situation in Somalia and not on the 1982 UNCLOS. Further, the 1982 UNCLOS does not provide for modalities of transfer of pirates for trial in other state, resulting in agreements such as those made between Kenya and Seychelles on the one hand and the USA, Great Britain and the EU on the other. Such informal arrangements have no basis under the 1982 UNCLOS.

⁸⁰ Osogo Ambani “Prosecuting Piracy in the Horn of Africa: The Case of Kenya” in Murungu C. & Biegon J: *Prosecuting International Crimes in Africa* (2011) Pretoria University Law Press Page 244.

⁸¹ Ibid.

⁸² Ibid.

⁸³ Ibid.

The SUA Convention on the other hand provides a clear framework on the obligations of states and the criteria for jurisdiction but does not deal with piracy per se but provides for other related offences. Further the SUA Convention deals with crimes within the territorial sea of a state. Whereas piracy is a crime for which universal jurisdiction is applicable, it is noted that states have at times failed to exercise such jurisdiction upon arrest of suspected pirates. The observations above clearly demonstrate the need for enhancement of the piracy provisions under the 1982 UNCLOS in order to provide clear provisions on the exercise of jurisdiction over the crime of piracy.

CHAPTER 4

JURISDICTION TO PROSECUTE PIRACY: A CASE STUDY OF KENYA

4.1 Introduction

Jurisdiction is the capacity of a state to prescribe and enforce the rule of law: a state's authority or power over persons, property or events within its purview to prescribe, adjudicate and enforce norms, principles or grounds of jurisdiction, which connect the accused and the crime to the jurisdiction.¹ At international Law, jurisdiction then becomes the legal power of one state *vis- a- vis* that of other states.² It describes the legal competence of a state to prescribe rules against other persons. The exercise of a state's domestic jurisdiction may at times extend beyond its territory and to non-nationals thus the exercise of extraterritorial jurisdiction.

Jurisdiction thus would be exercised on the basis of various principles. The nationality principle allows exercise of jurisdiction by the state in which the accused person is a national. With regard to piracy off the coast of Somalia, then jurisdiction would vest in Somalia since the captured pirates are its nationals. Under the passive personality and protective principles, a state may assert criminal jurisdiction where the victims are either its nationals or in order to protect the states interests. Thus the state whose nationals, ships or other interests are subject to piracy attacks off the coast of Somalia could also exercise jurisdiction over captured pirates.

As noted elsewhere in this text, piracy is the original crime of universal jurisdiction. Whereas piracy may not be exactly heinous in nature as compared to other international crimes, the rationale for application of universal jurisdiction is that by definition piracy occurs in the high seas and it is easy to avoid the jurisdiction of any state.³

Moore J. in the *SS Lotus Case*⁴ found piracy to be a crime for which universal jurisdiction applied and held *inter alia* that:

¹Ademun Odeke "Somali Piracy: Jurisdiction over Foreign Pirates" (2011) 17 Journal of International Maritime Law 122.

² Robert Currie and Joseph Rikhof *International and Transnational Criminal Law* (2013) Irwin Law Inc Toronto 52.

³ Ibid.

⁴ *SS Lotus (France v Turkey)* 1927 PCIJ page 70 Dissenting Opinion of Moore J.

Piracy by law of nations, in its jurisdictional aspects, is *sui generis*. Though statutes may provide for its punishment, it is an offence against the law of nations; and as the scene of the pirate's operations is the high seas, which it is not the right or duty of any nation to police, he is denied the protection of the flag which he may carry and is treated as an outlaw as the enemy of all mankind-*hostis humani generis* whom any nation may in the interest of all capture and punish.⁵

The notion behind the exercise of universal jurisdiction is that any state may exercise jurisdiction over criminal acts even where there is no link between the state and the perpetrator. Piracy is the original crime of universal jurisdiction by virtue of occurring in the high seas outside the jurisdiction of any state. Universal jurisdiction can be exercised in two ways; first, where the perpetrator is apprehended in the state's territory and secondly where the state initiates proceedings and subsequently issue a warrant of arrest or commence extradition proceedings.⁶

However generally, states have exercised restraint in making use of universal jurisdiction with some only doing so in situations where the offender was arrested within their territory. In the SS Lotus case it is implied that the link is in the capture of the pirate-any nation may in the interest of justice capture and punish. This however has not been the case with Somali pirates since even some of the capturing states were unwilling to prosecute.

This chapter examines the question of courts' jurisdiction in cases involving suspected pirates captured off the Coast of Somalia. The chapter focuses on Kenya as a case study by examining its legislative framework on piracy and a number of key decisions that involved Somali pirates. The issue of Kenyan court's jurisdiction over piracy has been highlighted. The chapter also discusses various options that can be explored in prosecuting piracy cases and narrows down on the best viable model drawn from the international response to piracy off the coast of Somalia.

4.2 Jurisdiction at Sea

The international law of the sea is itself a unique and complex body of international law that predates the modern Westphalian system of state sovereignty.⁷ It is centred upon the 1982

⁵ *SS Lotus* (n 4).

⁶ Currie, (n 2) 76.

⁷ *Ibid.*

UNCLOS which is a multi-layered and comprehensive legal regime governing the uses of the sea and maritime areas by states.⁸ The entire body of the law of the sea is essentially designed to regulate the rights and obligations of coastal states, that is, those states that have coastal areas; flag states, that is, states that have ships registered under their laws engaged in international shipping activity; and port states particularly as regards foreign vessels in domestic ports.⁹

The 1982 UNCLOS however does not place any express responsibility on states to prosecute captured pirates. It only requires states to cooperate in the repression of piracy,¹⁰ and empowers the courts of the state which carried out the seizure to decide upon the penalties to be imposed.¹¹ This lacuna has posed jurisdictional problems especially in relation to Somali based pirates.

Jurisdictional problems arise first because international law cedes jurisdiction to many parties even in a single instance.¹² Article 105 UNCLOS makes jurisdiction readily available for the seizing state. The 1988 SUA Convention proscribes certain unlawful acts inter alia amounting to piracy and requires states to take necessary measures to establish jurisdiction when such offence is committed: against or on board a ship flying the flag of the state at the time the offence is committed; in the territory of that state, including its territorial sea; and, finally, by a national of the state.¹³

Under the 1988 SUA Convention, a state may also establish jurisdiction over such an offence when: it is committed by a stateless person whose habitual residence is in that state or during its commission a national of that state is seized, threatened, injured or killed, or it is committed in an attempt to compel that state to do or abstain from doing any act.¹⁴

The implication of this broad jurisdictional criterion is that a state which seizes a vessel, one whose ship is the subject of piracy, one who's national is suspected of committing piracy, that in

⁸ Currie (n 2) 85.

⁹ Ibid.

¹⁰ UNCLOS Article 100 Duty to cooperate in the repression of piracy. All states shall cooperate to the fullest possible extent in the repression of piracy on the high seas or in any other place outside the jurisdiction of any state.

¹¹ Article 105.

¹² Murungu and Biegon *Prosecuting International Crimes in Africa* (2011) Pretoria University Law Press 238.

¹³ Article 6(1) SUA Convention.

¹⁴ Article 6(2) SUA Convention.

which a state less person is habitually resident, and, the victims' state may all simultaneously claim jurisdiction.¹⁵ In addition, the capturing state may exercise jurisdiction as well.

Such a multifaceted approach to jurisdiction should ordinarily cause confusion and conflicting claims to jurisdiction.¹⁶ However, in practice, this has not always been the case; jurisdiction over piracy cases especially in relation to piracy off the coast of Somalia has not been treated as a trophy and has hardly been contested. Many states have been unwilling to prosecute such cases with some opting to transfer captured pirates to third party states for trial. In the face of escalating cases of piracy off the coast of Somalia, the UN Security Council called for increased cooperation among states especially in determining jurisdiction over piracy.¹⁷

The issue in this case is which state, other than Somalia, has jurisdiction over Somali pirates in accordance with internationally accepted norms. The 1982 UNCLOS ordinarily vests jurisdiction over piracy on the arresting states. Patrolling states, as arresting states, have jurisdiction because piracy is a universal crime and their warships, in apprehending the pirates, bring them within the ambits of international law.¹⁸ States have exercised jurisdiction mainly in relation to Somali piracy where they were either they arresting states or where other jurisdictional links could be established.

The exercise of jurisdiction in piracy cases has been uniquely placed under international law with emphasis that any state that arrests such a pirate has a duty to ensure that punishment is meted out. In one of the oldest piracy trials in the United States of America (USA), in the trial of one Thomas Smith in *United States v. Smith*,¹⁹ in recognising the uniqueness of piracy, the court opined that, 'there is scarcely a writer on the law of nations, who does not allude to piracy as a crime of a settled and determined nature, and whatever may be the diversity of definitions in other respects, all writers concur in holding that robbery or forcible depredations upon the sea, *animo furandi*, is piracy'.²⁰ The court reaffirmed the common law position that piracy was

¹⁵ Article 6 SUA Convention.

¹⁶ Ibid.

¹⁷ Resolution 1816(2008) requires all states and in particular flag, port and coastal state, states of the nationality of victims and perpetrators of piracy and armed robbery, and other states with relevant jurisdiction under international law and national legislation, to cooperate in determining jurisdiction and in the investigation and prosecution of persons responsible for acts of piracy and armed robbery off the coast of Somalia.

¹⁸ Odeke (n 1) 124.

¹⁹ *United States v Smith* (1820) 18 US 5.

²⁰ Ibid.

recognised and punished not as an offence against municipal law but against the law of nations a pirate being an enemy of the human race.

In practice, the exercise of jurisdiction over piracy in the USA would apply to any person who commits piracy on the high seas if brought into or found in the USA. This exercise of jurisdiction in the USA has been applied in various matters arising from piracy off the Coast of Somalia. In one such case, eleven (11) suspected pirates were captured in the Indian Ocean and transferred to the USA where they were charged with piracy under the law of nations. This arose from two distinct incidences, first, five of the suspects were apprehended on 31st March 2010 after the *USS Nicholas* exchanged fire with a suspected pirate vessel off the Seychelles, sinking the skiff and confiscating its mother ship.²¹ The other incident involved six suspects arrested on the 10th April 2010 for shooting at the vessel *USS Ashland*.²² All suspects were later convicted of various offences including piracy under the law of nations.²³

In the incidences discussed above, the USA did exercise jurisdiction as the arresting state under the 1982 UNCLOS. The USA would similarly have exercised jurisdiction since the incidences involved its vessels. Thus the USA was both an arresting state and a victim state by virtue of registration of the vessels involved.²⁴ The exercise of jurisdiction in these incidences is distinguishable from the exercise of jurisdiction by third party states that had neither nexus to the offence committed nor the suspects.

4.3 Case study of Kenya

The resurgence of piracy cases off the coast of Somalia propelled Kenya into the forefront of the prosecution of suspected pirates. As at the year 2008, Kenya became a primary destination for piracy trials of suspects captured by naval forces off the coast of Somalia. The need to establish a nexus between Kenya and the suspects in those trials led to the establishment of agreements conferring jurisdiction to Kenya to conduct such trials. It was against this background and to supplement international law that the USA and certain EU arresting states with the support of the UNODC and the IMO concluded agreements with the non-arresting states (Kenya and

²¹ Odeke, (n 1) 128.

²² *United States of America v Mohamed Ali Said aka Maxamad Ali Saciid et,al* (Case 2: 10-cr-00057) USA 2010.

²³ *Ibid.*

²⁴ *Ibid.*

Seychelles) for the reception and prosecution of suspects.²⁵ The agreements between Kenya and Seychelles on the one hand and the EU, the USA, Denmark and the UK were intended to remedy any absence of jurisdictional links.²⁶ These agreements set the conditions of transfer of suspected pirates, armed robbers and seized property thus permitting arresting states to deliver suspects and property to Kenya and Seychelles for investigations and prosecution.²⁷

These agreements derive authority from Security Council resolutions that collectively provide member states legitimacy for the suppression of piracy²⁸ and also supplement Articles 100-107 of the 1982 UNCLOS and the 1988 SUA Convention.²⁹ These agreements were meant to create a jurisdictional link by enabling the transfer of suspected pirates from the arresting states to third party states for trial. The agreements form the link between the municipal laws and international law thus completing the process of legitimising the suspects' physical presence in non-arresting states in order to enable jurisdiction. These agreements did not however form part of Kenya's municipal law unlike in Seychelles where they were domesticated.³⁰ Prosecution of these cases in Kenya has continued under the municipal legislation which has at times been viewed as inadequate.³¹

4.3.1 Kenyan Legislative Framework on Piracy

A new challenge to the universality principle by Somali piracy is that, for the first time, pirates are being prosecuted in third states where neither the offence is committed nor where nationals, merchant vessels or warships are involved, thereby blurring the difference between extraterritoriality and municipal laws.³²

²⁵ Odeke (n 1) 130.

²⁶ *ibid* (1); the EU- Kenya agreement on the transfer of persons suspected of having committed acts of piracy led to prosecution of a number of cases of suspects arrested and handed over to Kenya by the EU NAVFOR. The agreement has since been terminated.

²⁷ *Ibid* page 132.

²⁸ Such as Resolution 1851(2008) which; invites all states and regional organizations fighting piracy off the Coast of Somalia to conclude special agreements or arrangements with countries willing to take custody of pirates in order to embark law enforcement (ship riders) from the latter countries, in particular countries in the region, to facilitate the investigation and prosecution of persons detained as a result of operations conducted under this resolution for acts of piracy and armed robbery at Sea off the coast of Somalia....

²⁹ *Ibid*.

³⁰ Seychelles Transfer of Prisoners Act No. 17 of 2010.

³¹ Odeke (n 1) 132.

³² *Ibid*.

In Kenya, the Constitution³³ is the supreme law of the Republic and binds all persons and all State organs at both levels of government.³⁴ Under Article 2(5) and (6), the general rules of international law and treaties or conventions ratified by Kenya now form part of the laws of Kenya following the promulgation of the Constitution of Kenya 2010. Kenya therefore recognises the duty to discharge its obligations under such treaties and conventions. The Constitution vests unlimited original jurisdiction in criminal and civil matters on the High Court.³⁵ On the other hand, subordinate courts in Kenya are vested with jurisdiction ‘throughout Kenya’ under section 3(2) of the Magistrates’ Courts Act.³⁶ In practice, piracy cases in Kenya are tried before the Magistrates courts.

Piracy is criminalised under section 369 of the Merchant Shipping Act ³⁷(the Act) that came into effect on 1st September 2009 repealing section 69 of the Penal Code. The repealed section of the Penal Code provided;

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

This section while providing for piracy *jure gentium* also provided for piracy occurring within Kenyan territorial waters. The amendment was necessitated by the need to bring Kenya into compliance with a variety of international maritime conventions.³⁸

The Merchant Shipping Act partly incorporates provisions of the 1982 UNCLOS and the 1988 SUA Convention. The crime of piracy is treated as a general offence under maritime security in part XVI of the Act. Section 369 of the Act adopts a definition of piracy that is similar to Article 101 of the 1982 UNCLOS. Under section 369, piracy is defined as;

- a) Any act of violence or detention, or depredation, committed for private ends by the crew or the passengers of a private ship or a private aircraft, and directed- against another ship or aircraft, or against persons or property on

³³ Constitution of Kenya 2010.

³⁴ Article 2(1) Constitution of Kenya 2010.

³⁵ Article 165 (3) (a).

³⁶ Cap 10 Laws of Kenya.

³⁷ Cap 389 Laws of Kenya.

³⁸ Gathii (n 25) 381.

- board such ship or aircraft; or against a ship, aircraft, persons or property in a place outside the jurisdiction of any state;
- b) any voluntary act of participation in the operation of a ship or of an aircraft with knowledge of facts making it a pirate ship or aircraft; or
 - c) any act of inciting or of intentionally facilitating an act described in paragraph(a) or (b);³⁹

For purposes of the Act, a pirate ship means a ship that is predominantly under the control of persons who have used or intend to use it for piracy or who have used such a ship or aircraft for piracy so long as it remains under the control of those persons while a private ship is one that is not owned by the government or on behalf or for the benefit of the government.

Sections 370 and 372 of the Act primarily implement the SUA Convention. The sections criminalise acts that amount to offences against the safety of ships which though not amounting to piracy, are nevertheless treated as piracy related offences.

Section 370 creates the offence of hijacking and destroying ships. The ingredients of the offence include the unlawful and intentional destruction of a ship, damage to a ship or its cargo, committing acts of violence on board a ship and placing a device or substance that could destroy or cause damage to a ship or its cargo.⁴⁰ The section criminalises acts that if committed are likely to endanger the safe navigation of a ship.

The offence of hijacking and destroying ships is committed “whether the ship is in Kenya or elsewhere”, “whether the act mentioned is committed in Kenya or elsewhere” and, “whatever the nationality of the person committing the act”.⁴¹ Whereas the offence herein is primarily a 1988 SUA Convention offence, the provisions of the section seem to impose wider jurisdiction for Kenyan courts.

With regard to jurisdiction, Article 6 of the 1988 SUA Convention requires that states establish jurisdiction through having a nexus with the offence.⁴² This includes offences committed (in

³⁹ Merchant Shipping Act S 369.

⁴⁰ Section 370.

⁴¹ Ibid.

⁴² Gathii (n 25); Article 6(1) SUA Convention.

relation to the state); against or on board its flag ship,⁴³ within its territory including the territorial sea,⁴⁴ by its nationals,⁴⁵ by a stateless person who is habitually resident in that state,⁴⁶ if during the commission a national of that state is seized, threatened, injured or killed⁴⁷ and if it is committed in an attempt to compel the state to do or abstain from doing any act.⁴⁸

Thus the jurisdiction conferred under section 370 is broad enough to cover Somali piracy but does not seek to establish any nexus between Kenya and the suspects as per article 6 of The SUA Convention. Thus it would appear that Kenyan courts would exercise jurisdiction under section 370 even situations where jurisdiction cannot be established as provided under article 6 of the SUA.

Section 372 criminalises acts such as the unlawful destruction or damage to property or the interference with the operation of such property. This includes any property used for the provision of maritime navigation facilities, land, buildings, ship, apparatus or equipment.

Sections 369 and 371 of the Act which are more relevant to piracy appear to be ambiguous and confusing for lack of linkage with the pirates and pirate vessels to Kenyan territory, its nationals, manner of arrest or flag registration.⁴⁹ Similarly, the offence is committed in any place outside the jurisdiction of any state which has been broadly interpreted as referring to the high seas. The approach adopted in the provisions is either due to poor drafting or was meant to give the paragraph extraterritorial jurisdiction.⁵⁰ Whatever the legislative intentions, the provisions have been viewed as largely restrictive in prosecution of piracy cases and several agencies such as the UNODC have called for its amendment⁵¹ for avoidance of such ambiguity.

The application of the Act is limited to Kenyan ships and other ships within the territorial and other and other waters under the jurisdiction of Kenya.⁵² Thus neither section 3 nor section 369 extends its application to the high seas where most piracy offences are committed. Thus the Act

⁴³ Article 6(1) (a) SUA Convention.

⁴⁴ Article 6(1) (b).

⁴⁵ Article 6(1) (c).

⁴⁶ Article 6(2) (a).

⁴⁷ Article 6 (2) (b).

⁴⁸ Article 6 (2) (c).

⁴⁹ Odeke (n 1) 134-5.

⁵⁰ Ibid.

⁵¹ Ibid.

⁵² Section 3(1) Merchant Shipping Act.

is ambiguous in terms of jurisdiction to the extent that it limits its application to Kenyan jurisdiction while at the same time appearing to import extraterritorial jurisdiction. Section 372(7)⁵³ seeks to import extraterritoriality while Section 372(8)⁵⁴ restricts it to national jurisdiction, maintaining the pattern started by section 371.⁵⁵ The above notwithstanding, Kenya has continued to prosecute piracy cases in which all persons accused had no nexus to Kenya.

4.3.2 Key Court Decisions in Piracy Cases in Kenya

The first piracy trial in Kenya started in 2006 after the capture of ten Somali nationals approximately 200 miles off the coast of Somalia by the guided-missile destroyer, U.S.S Winston Churchill.⁵⁶ The suspected Somali pirates were charged before the Chief Magistrate's court in Mombasa with the offence of piracy in *Republic versus Hassan M. Ahmed and 9 others*.⁵⁷ They were accused of attacking and detaining a machine sailing vessel-MV *Safina Al Bisarat* on the high seas, assaulting the crew and making demands for the payment of a ransom. The appellants had been charged under the now repealed section 69(1) as read with section 69(3) of the Penal Code.⁵⁸ The ten suspects were subsequently sentenced to seven years imprisonment after the trial court found that it had jurisdiction to hear the case and held inter alia that; "piracy is a crime against mankind which lies beyond the protection of any state".

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

⁵³ Except as provided by subsection 8, subsections (1), (3), (5) and (6) applies whether any such act as is mentioned in those subsections is committed in Kenya or elsewhere and whatever the nationality of the people committing the act .

⁵⁴ For the purposes of subsections (1), (3), (6) (b), any danger or likelihood of danger, to the safe navigation..... [i]s to be disregarded unless the-(a) person committing the act is a Kenyan citizen; (b) an act is committed in Kenya.

⁵⁵ Any person who- (a) commits any act of piracy; (b) in territorial waters, commits any act of armed robbery against ships...

⁵⁶ James Thuo Gathii "Jurisdiction to Prosecute Non-National Pirates captured by Third States under Kenyan and International Law" (2009) 31Loyola of Los Angeles International and Comparative Law Review 363at 365

⁵⁷*Republic v Hassan M Ahmed and 9 others* Mombasa Chief Magistrates Court Criminal Case No. 434 of 2006 (unreported).

⁵⁸ Penal Code Cap 63 Laws of Kenya Section 69(1) provided; Any person who, in territorial waters or upon the high seas, commits any act of piracy jure gentium is guilty of an offence of piracy. Section 69(3) provided; Any person who is guilty of the offence of piracy is liable to imprisonment for life.

Even if the Penal Code had been silent on the offence of piracy, I am of the view that the learned principal magistrate would have been guided by the United Nations Convention on the Law of the Sea....⁵⁹

The question thus was whether the 1982 UNCLOS did indeed confer jurisdiction for piracy cases to domestic courts in Kenya. Whereas piracy is broadly defined under Article 101, the said Article does not of itself confer jurisdiction to prosecute. Rather article 105⁶⁰ does confer jurisdiction to punish suspected pirates to the seizing state just like in the *SS Lotus case* above where the link to the punishment of a pirate was in the seizure of such a person. Kenya in this case had no link to the suspects, victims, the ship or territory and neither was it the capturing state.

In upholding the finding that indeed Kenyan courts had jurisdiction to try piracy cases the High Court went on to state that; ‘the Learned Principal Magistrate was bound to apply international norms and Instruments since Kenya is a member of the civilized world and is not expected to act in contradiction to expectations of member states of the United Nations’.⁶¹ The High Court rightly appreciated that piracy was a crime for which universal jurisdiction was applicable. The question as to the manner of the arrest of the suspects was never addressed.

In my view, the High Court did not look into the legality of how the pirates ended up in Kenya, that is, their apprehension and ultimate delivery to Kenya by the arresting state. This would have been necessary since Kenya was not the arresting state as per the provisions of the 1982 UNCLOS. The suspects who were Somali nationals had been arrested by non- Kenyan naval forces and handed over to Kenya for trial. Kenya therefore was not the capturing state as per Article 105 of the 1982 UNCLOS. As discussed above in the *SS Lotus case*, the nexus appears to have been in the capture. The suspects were charged under section 69 of the Penal Code which provided for the offence of piracy *jure gentium*. In the case of *Republic versus Mohamed Ahmed*

⁵⁹ *Hassan M. Ahmed v Republic* criminal appeals Nos. 198-207 of 2008 [2009]eKLR

⁶⁰ Article 105 UNCLOS; on the high seas, or in any other place outside the jurisdiction of any state, every state may seize a pirate ship or aircraft, or a ship or aircraft taken by piracy and under the control of pirates, and arrest the persons and seize the property on board. The courts of the state which carried out the seizure may decide upon the penalties to be imposed, and may also determine the action to be taken with regard to the ships, aircraft or property....

⁶¹ *ibid*

*Dahir*⁶² the Supreme Court of Seychelles in addressing the application of universal jurisdiction over the case stated that:

[p]iracy *jure gentium* is justiciable by courts of every nation. Such universal jurisdiction is provided for in international law, that the arresting state is free to prosecute suspected pirates and punish them if found guilty.⁶³

Once again the exercise of universal jurisdiction in this case was linked to the arresting state. Seychelles would nevertheless have exercised jurisdiction in the *Ahmed Dahir* case as the state whose flag ship was under attack.

The question of jurisdiction of Kenyan courts was revisited in *Republic versus Chief Magistrates Court, Mombasa ex-parte Mohamud Mohamed Hashi alias Dhodi and eight (8) others*⁶⁴ The High Court while sitting on appeal was of a different view in finding that Kenyan courts did not have jurisdiction over piracy cases under the repealed section 69 of the Penal Code. The ex parte applicants had been arraigned before the Chief Magistrates Court in Mombasa and charged with the offence of piracy. They were accused before the magistrate's court of attacking a machine sailing vessel namely *MV Courier* while armed with weapons including one RPG-7 portable rocket launcher and at the time of the act they put in fear the lives of the crew men of the vessel.

The nine accused were denied bail the court having found that their nationalities were unknown and thus they had no permanent place of abode. Through the testimony of witnesses it was revealed that the offence took place in the Gulf of Aden, outside Kenyan territory and that no Kenyan national or ship was involved.

The accused then applied for judicial review before the High Court contending that the offence took place outside Kenyan territorial waters and thus Kenyan courts did not have jurisdiction to try such an offence. On the issue of jurisdiction, the court observed that 'the question of

⁶² *The Republic v Mohamed Dahir & 10 others* (Criminal Side No. 51 of 2009), Supreme Court of Seychelles.

⁶³ *Ibid.*

⁶⁴ *Republic versus Chief Magistrates Court Mombasa ex-parte Mahamud Mohamed Hashi alias Dhodi and 8 others* [2009] eKLR

jurisdiction to try cases by the Kenyan courts has not been the subject of much judicial interpretation'.⁶⁵

It was apparent in the proceedings that the repealed section of the Penal code provided for piracy *jure gentium* which could be committed in the high seas or in Kenyan territorial waters. Further there was neither an express definition of the high seas in the penal code nor its distinction from the territorial sea. The court thus found that:

‘Kenyan courts are not conferred with or given jurisdiction to deal with any matters arising or which have taken place outside Kenya. The Kenyan courts have no jurisdiction in criminal cases and in particular in the offences set out in the penal code where the alleged incidence or offence took place outside the geographical area covered by the Kenya state... The local courts can only deal with offences or criminal incidents that take place within the territorial jurisdiction of Kenya’.⁶⁶

The High court further considered the provisions of the Merchant Shipping Act that had repealed section 69 of the Penal Code. It found that the offence under section 371 of the Act was that of piracy unlike *piracy jure gentium* as defined in the repealed section 69 of the Penal Code. The court held;

(t)hat the offence of piracy in section 371 of the new Act is a new offence and separate and distinct from the piracy *jure gentium* which came into existence centuries ago and found its way into our law.....the place the offence took place is no longer the high seas in the new law.⁶⁷

The court based this argument on the fact that piracy under section 369 of the Act is committed ‘outside the jurisdiction of any state’. The debate here is the meaning to be accorded to the words, ‘outside the jurisdiction of any state’. Does it mean the high seas or does it incorporate the high seas?

⁶⁵ *Ex-parte Mohamud* (n 64).

⁶⁶ *Ibid.*

⁶⁷ *Ex-parte Mohamud* (n 64).

The definition under the Act omitted the words ‘high seas’ which is a major element for piracy *jure gentium* thus the contention whether reference to ‘a place outside the jurisdiction of any state’ referred to the high seas. The lack of legislative clarity thus leaves the definition of piracy under the Act hanging as the commission of the offence of piracy in the high seas brings pirates under universal jurisdiction such that any state can prosecute a pirate upon arrest. The High court in allowing the appeal found that the offence created under the Act was distinct to piracy *jure gentium* as had been provided under the repealed section of the Penal Code.

While appearing to adopt the definition of piracy under the 1982 UNCLOS, the omission of the words ‘High seas’ gives the impression that the offence created under the Act is piracy by statute and not piracy *jure gentium*.

Jurisdiction of magistrate’s courts in Kenya to try piracy cases under the Merchant Shipping Act was also considered in the case of *Republic versus Abdirahman Isse Mohamud and 3 others*.⁶⁸ The accused Abdirahman Isse Mohamud, Mohamed Osman Farah, Feisal Abdi Muse and Noor Ali Mohamed had been charged before the magistrate’s court in Mombasa for the offence of piracy under sections 369 as read with 371 of the Merchant Shipping Act. They had been accused of attacking a fishing dhow namely the Sherry Fishing Dhow while armed with offensive weapons. The accused had challenged the jurisdiction of the magistrate’s court over piracy arguing that such jurisdiction vested in the High Court. The court did indeed find that admiralty jurisdiction in Kenya vested in the High Court but only for civil matters thus distinguishing jurisdiction over criminal matters that vests in the magistrate’s courts and jurisdiction over civil matters that vests in the High Court. The court noted that the High Court’s preoccupation with admiralty matters was a non-criminal preoccupation. In so doing the presiding judge further took judicial notice of the historical fact that the basic jurisdiction for the offence of piracy lies with the Magistrate’s Court.

Under Section 4 of the Criminal Procedure Code,⁶⁹ jurisdiction for the offence of piracy is vested on the subordinate courts. Piracy however is no longer a Penal Code offence thus and the Merchant Shipping Act confers jurisdiction to the High Court.

⁶⁸*Republic v Abdirahman Isse Mohamud and 3 others* [2011] eKLR

⁶⁹ Criminal Procedure Code Cap 75 Laws of Kenya.

The consideration of jurisdiction in *Republic versus Abdirahman Isse Mohamud and 3 others* was quite different from the findings in the *Hashi case*. The accused had been charged under the Merchant Shipping Act unlike in *Hashi* where charges had been brought under the repealed section 69 of the Penal Code. The court further seemed to suggest that the emerging picture was that Kenyan courts had extraterritorial jurisdiction over the offence of piracy irrespective of the mode of arrest. Thus a person would be tried for piracy if they were ‘now standing before the trial courts’.⁷⁰

In an appeal filed by the Attorney General challenging the findings in the *Hashi case* above,⁷¹ the court of appeal found that Kenyan courts did indeed have jurisdiction to try the crime of piracy *jure gentium*. A five judge bench sitting in the above matter arrived at a unanimous decision that the magistrate’s court did have jurisdiction to try the matter.

Koome, J. A while quoting from Security Council resolution 1897(2009)⁷² regarding the state of piracy off the coast of Somalia found that the crime of piracy was regarded as a threat to world peace as early as 1926. The judge further held that piracy *jure gentium* is a crime against customary international law which is recognised as *jus cogens* a norm which no derogation is ever permitted. Further, that piracy *jure gentium* has for centuries been considered a universal jurisdiction crime based also on international agreements that authorises all nations to capture and punish a pirate.

As to whether or not the Merchant Shipping Act retained the offence of piracy *jure gentium*, the court found that, although that Latin phrase is not used..... a reading of sections 369 and 371 thereof makes it quite clear that the Act retains the offence of piracy *jure gentium* in Kenya.⁷³ In

⁷⁰ *Abdirahman Isse Mohamud* (n68).

⁷¹ *Attorney General v Mohamud Mohammed Hashi & 8 others* [2012] eKLR; the appeal was heard by a five judge bench whose finding was unanimous.

⁷² S C resolution 1897(2009); noting with concern that the continuing limited capacity and domestic legislation to facilitate the custody and protection of suspected pirates after their capture has hindered more robust international action against the pirates off the Coast of Somalia and in some cases, has led to pirates being released without facing justice, regardless of whether there is evidence to support prosecutions, reiterating that, consistent with the provisions of the Convention concerning the repression of piracy the 1988 Convention of the Suppression of Unlawful Acts against the Safety of Maritime Navigation (SUA Convention) provides for parties to create criminal offences, establish jurisdiction and accept delivery of persons responsible for or suspected of seizing or exercising control over a ship by force or threat thereof or any other form of intimidation and stressing the need for states to criminalize piracy under their domestic law and to favorably consider the prosecution in appropriate cases of suspected pirates considered with applicable international law....

⁷³ *Ibid.*

this regard, the wording ‘in a place outside the jurisdiction of any state’ was interpreted to mean the high seas.

The court held that piracy *jure gentium* is a crime for which universal jurisdiction is applicable and that international law confers states with universal jurisdiction to prosecute international crimes regardless of the location of the offence and the nationalities of the offender or the victim. Every state thus has an interest in bringing to justice the perpetrators of international crimes. Whereas Kenya or any other state can exercise jurisdiction over piracy *jure gentium*, the implication of exercising such jurisdiction by a third party state that is not the capturing state has not been considered.

The fact that Kenya was not the capturing state as envisioned under the 1982 UNCLOS was not addressed in the first appeal in the superior court and the subsequent appeal. There was also no consideration of the absence of any other jurisdictional link to Kenya. The 1982 UNCLOS prescribes jurisdiction to the capturing state. Other states can nevertheless exercise jurisdiction if they can establish other jurisdictional links. A case in point is the *Samanyolu case* in which Netherlands exercised jurisdiction over pirates captured by Denmark since the vessel under attack flew the Dutch Antilles flag. Netherlands though not the arresting state thus exercised jurisdiction by virtue of being the flag state. This notwithstanding, Kenyan courts have continued to try piracy cases where the suspects had been arrested elsewhere by non-Kenyan forces.

The court of appeal decision in the *Hashi* case above has continued to be a reference point for jurisdiction of Kenyan courts to try piracy *jure gentium*. The court while finding that section 369 and 371 of the Merchant Shipping Act retained the offence of piracy *jure gentium* failed to realise that a key element of its commission in the High seas was lacking. The court did however appreciate the fact that piracy under the repealed section of the Penal Code was piracy *jure gentium* for which universal jurisdiction applied. Whereas courts in Kenya would exercise jurisdiction in the offence of piracy *jure gentium* over arrested pirates, the offence created under the Act appears to be ambiguous having left out the high seas requirement. For clarity of meaning, section 369 on the meaning of piracy ought to be amended to include the high seas.

The general approach as per the above decisions of Kenyan courts is that Kenyan Courts have jurisdiction over the crime of piracy. In my view, there is need to consider the implications of the

provisions of the Merchant Shipping Act on piracy for clarity of meaning with regard to the offence created therein.

4.4 Options in Prosecuting Piracy

Given that a Somali piracy suspect may be caught by one state's warships, tried by a second state's courts and imprisoned in a third states jail, it is reasonable to ask whether the present decentralised approach to prosecutions is particularly effective.⁷⁴ The United Nations Secretary-General in the report dated 26th July 2010⁷⁵ identifies seven options for prosecuting Somali pirates. Some of the most viable options according to the Secretary General's report are discussed below.

4.4.1 Piracy and the International Criminal Court

The reasons for including piracy within the jurisdiction of the International Criminal Court are many.⁷⁶ The treaty creating the International Criminal Court confers jurisdiction over serious crimes of concern to the international community.⁷⁷ Piracy is a serious crime, the quintessential crime of customary international law, and the original universal jurisdiction crime.⁷⁸ The International Criminal Court has jurisdiction over crimes that are viewed to be the most heinous. Piracy though a crime of universal jurisdiction is not heinous in nature and was categorised as such due to its geographical occurrence in the High seas outside the jurisdiction of any state. The desire to include piracy under the International Criminal Courts' jurisdiction has mainly been informed by the reluctance of states to prosecute even after arrest. Nations are not prosecuting acts of piracy with any regularity, either because they are unwilling or unable to do so.⁷⁹

⁷⁴Douglas Guilfoyle "Prosecuting Somali Pirates: A Critical Evaluation of the Options" (2012) 10 *Journal of International Criminal Justice* 767 at 777.

⁷⁵ United Nations Security Council S/2010/394 Report of the Secretary General on possible options to further the aim of prosecuting and imprisoning persons responsible for attacks of piracy and armed robbery at sea off the Coast of Somalia, including, in particular, options for creating special domestic chambers possibly with international components, a regional tribunal or an international tribunal and corresponding imprisonment arrangements, taking into account the work of the Contact Group on Piracy off the Coast of Somalia, the existing practice in establishing international and mixed tribunals, and the time and resources necessary to achieve and sustain substantive results. This report was made pursuant to Security Council Resolution 1918(2010).

⁷⁶ Yvonne Dutton "Bringing Pirates to Justice: A Case for including Piracy within the Jurisdiction of the International Criminal Court" (2010) 11 *Chicago Journal of International Law* 1 at 4.

⁷⁷ *Ibid.*

⁷⁸ *Ibid.*

⁷⁹ *Ibid.*

The historical record indicates that the drafters of what later formed the basis of the Rome Statute creating the ICC considered piracy—to the extent referenced in Article 3 of the SUA Convention—for inclusion within the ICC’s jurisdiction along with a host of other crimes which were termed “treaty-based” crimes.⁸⁰ Specifically, the 1994 draft of the Rome Statute prepared by the International Law Commission at the request of the United Nations referenced crimes that were established under about nine different treaty regimes and which constituted exceptionally serious crimes of international concern.⁸¹ Many state delegations firmly believed that jurisdiction should be limited to the core crimes of aggression, genocide, crimes against humanity, and war crimes.⁸² States further expressed concern that including additional crimes could overburden the court, especially because they believed many of the treaty-based crimes could be better handled nationally.⁸³

Bringing piracy under the ICC jurisdiction is not a foreseeable option as it would involve amendment of the Rome Statute which would be both a complex and slow process⁸⁴.

4.4.2 Creation of an Ad-hoc Tribunal

This is premised on option 7 of the report that suggested the establishment of an international tribunal by Security Council Resolution under Chapter VII of the UN Charter. Such a tribunal might be thought to imply an automatically available option that would resolve many of the complications inherent in disposition including the question of whether suspects were being transferred to a forum that would respect international human rights standards.⁸⁵ The question of procedural rules and evidence would have to be determined since such a tribunal would need establishment of its own procedural rules. This lack of uncertainty would mean that there is no guarantee of a quick disposal of piracy trials. Furthermore, there can be no guarantee that early trials will not be delayed by appeals on preliminary points as the tribunal fleshes out its own

⁸⁰ Dutton (n 76) 5.

⁸¹ *ibid*

⁸² *Ibid*

⁸³ *Ibid*

⁸⁴ Guilfoyle (n 74) 782.

⁸⁵ *Ibid*

procedural law and elements of crimes.⁸⁶ As noted in the Secretary General's report, the option of an international tribunal is not cost effective and thus not viable.

4.4.3 Prosecution before a Regional Court

Such a court would be based on a multilateral treaty amongst regional states. Premised on option 5 of the Secretary General's report, such a court would be pegged on assistance from the United Nations. Such a treaty would not only have to specify the covered offences and geographical scope of jurisdiction of the court but also establish its own procedural rules. Establishment of such a court would ensure capacity building among the regional states and would also greatly benefit from the local expertise within the judicial systems.⁸⁷ However, just like the international tribunal, a regional court as noted in the Secretary General's report would not be cost effective. Further with regard to Somali piracy, it is unlikely that regional states would wish to establish a regional court indefinitely hence this is not a viable option in the near future.

4.4.4 Prosecution before National Courts

This follows option 1 of the Secretary General's report that suggested the enhancement of United Nations assistance to build capacity of regional States to prosecute and imprison persons responsible for acts of piracy and armed robbery at sea off the coast of Somalia. This option was grounded on the fact that regional states such as Kenya and Seychelles were already involved in piracy prosecution. This option would build on the success already achieved in those states and would involve capacity building to enhance the ability of these states to sustain such prosecution. The principal advantage of this option is that it is already functioning and has demonstrated that it is effective; it has proven able to absorb hundreds of piracy suspects and complete trials within 12-18 months.⁸⁸ In conducting such prosecutions, national courts would rely on the existing domestic laws, which is more viable than having to create a tribunal and establish its procedural rules as this would be time consuming.

This option is however dependent upon the continued cooperation of the prosecuting states and their willingness to continue accepting suspected pirates for trial. Kenya, for example, has ceased

⁸⁶Guilfoyle (n74) 786.

⁸⁷ Ibid.

⁸⁸ Ibid.

taking in more suspects and has concentrated on finalizing the cases pending before its national courts. Prosecution before national courts has continued to be the best available option as it is more efficient and cost friendly. This is more so since the participating states already have their own systems in place thus enabling effective and efficient disposal of cases.

One of the main reasons national courts are considered preferable is because they are close to the evidence and scene of the crime.⁸⁹ However with piracy, this is not always the case as pirates will usually be arrested in the high seas by naval vessels. Despite the foregoing, prosecution in national courts has remained the most practical solution in dealing with piracy.

4.5 Conclusion

Kenya has so far concluded various cases under its domestic laws. However there has at times been experienced a gap between the ingredients of the crime and the statutory provisions of the domestic laws in Kenya. The Merchant Shipping Act is the only legislation in Kenya that bears piracy provisions. The offence created under Section 369 of the Act omits the words ‘high seas’ in its definition of piracy unlike the definition of piracy under Article 101 of the 1982 UNCLOS which recognises the occurrence of piracy as being in the high seas. The section appears to limit the offence to piracy by statute which occurs within a state’s territorial sea. The section is therefore ambiguous as it appears to codify the definition of piracy under the 1982 UNCLOS while at the same time limiting its application to territorial jurisdiction.

The general approach as per the decisions by a number of courts in Kenya is that Kenyan courts have jurisdiction over piracy cases. The fact that the Act omits the use of the words ‘high seas’ in its definition of the crime of piracy has not been addressed. In my view, the question of jurisdiction for Kenyan Courts to try piracy under the Merchant Shipping Act has not been subjected to sufficient judicial interpretation.

Various states as discussed above have continued to exercise jurisdiction over piracy. Cases tried in states such as the USA have, however, had a jurisdiction link in that the USA was the arresting state and that it was also a victim by virtue of registration of the vessels under attack. Kenya on the other hand has not had any jurisdictional link to persons on trial. Prosecution under national

⁸⁹ Dutton (n 76) 22.

courts has nevertheless remained the most viable option for the international community in dealing with piracy irrespective of the jurisdiction challenges. Other available options have been considered as untenable as per the report of the United Nations Secretary General due to the cost implications leaving national prosecution as the most practical and feasible option.

CHAPTER 5

CONCLUSION AND RECOMMENDATIONS

5.1 Conclusion

The study was an exploration of the international legal regime on piracy with particular emphasis on the prosecution of piracy cases occurring off the coast of Somalia. The study sought to evaluate five specific objectives, first to critically evaluate the definition, elements and requirements of the crime of piracy as contained in international legal instruments and its application to Kenya; second, to examine the existing international legal and institutional framework to combat piracy; third, to evaluate the inadequacies of Kenya's legal framework on piracy; fourth, to analyse key court decisions in Kenya relating to piracy and fifth, to propose changes in the legal and institutional framework aimed at addressing the crime of piracy more effectively.

The first objective was broadly covered in chapter Two that discussed the nature of modern day piracy and the elements of piracy as drawn from its definition under article 101 of the 1982 UNCLOS. Modern day piracy unlike its medieval counterpart is clearly more sophisticated hence posing major challenges to the world as a whole. The complex nature of Somali piracy left the international community grappling with jurisdiction and enforcement challenges. The application of the 1982 UNCLOS as the major international instrument against piracy has at times been limited in scope and application. One major limitation in this regard is the absence of a functional enforcement mechanism for piracy. This is more so where capturing states fail to exercise universal jurisdiction over the suspects and instead opt to surrender them to third party states for prosecution. This practice has posed a major challenge since the 1982 UNCLOS confers jurisdiction on the capturing state.

Piracy as a crime has certain aspects that are peculiar to the affected area or region. Somali piracy for example thrived mainly on the lack of a functional government as Somalia was largely a failed state. The absence of a functional law enforcement mechanism along the coast of Somalia enabled piracy to flourish providing a safe haven for pirates to hide.

The efforts of organisations such as the UNODC have however led to significant progress in the prosecution of piracy cases in third party states. The challenges discussed above have led to the question whether the current legal framework is adequate addressing piracy as a crime.

The second objective was addressed in chapter three where the legal and institutional framework was analysed. Other than the 1982 UNCLOS, the 1958 Convention on the High Seas and the SUA Convention do contain provisions that are useful in combating crime at sea. It thus emerged that the existing legal framework does as a whole adequately provide for seizure and punishment of suspected pirates. Other relevant provisions include United Nations Security Council resolutions, regional agreements and guidelines from institutions such as the IMO. States ultimately have to rely on their own municipal laws to prosecute and punish piracy.

The UNODC which has been at the forefront in capacity building has observed that naval forces patrolling the Indian Ocean and the Gulf of Aden have continued to arrest suspected pirates. Thus even with the decrease in cases in the area, there are still a number of incidences occurring. The last of this group was handed over to Seychelles in January 2014 for prosecution after apprehension at sea. It is observed that there is a streamlined handing over system between the naval forces and the domestic law enforcement agencies. Unlike Kenya, Seychelles continues to receive newly captured pirates. Although the frequent patrols of naval forces has led to a decline of piracy incidences off Somalia and in the Indian Ocean, the risk still remains thus the international community must be vigilant and must now consider the adequacy of the legal framework in combating piracy.

The UNODC Is currently working with West African countries with the highest number of piracy cases recorded in the recent past having occurred in the Gulf of Guinea. Thus, whereas piracy incidences may be on the decrease off the coast of Somalia the menace and the reoccurrence elsewhere cannot be ruled out. It is on this basis that the adequacy of the international legal and institutional framework to combat piracy is questioned.

The international response to piracy off the coast of Somalia was mainly characterised by naval patrols with many suspected pirates released since most states were unwilling to exercise jurisdiction. Subsequently third party states such as Kenya and the Seychelles did agree to take into custody captured pirates for trial. Whereas there has been successful prosecution of such

captured pirates, the legal basis of transfer of such suspects to third party states for trial has at times posed as a challenge. The 1982 UNCLOS confers jurisdiction to capturing states while at the same time imposing a duty on states to cooperate in combating piracy. Jurisdiction could also be exercised by the flag state, or by the state in which either the victim or suspect is a national.

As discussed above, whereas UNCLOS remains the major international instrument on piracy, other provisions are scattered featuring UN Security Council resolutions and IMO guidelines. Various institutions such as the UNODC, IMO and IMB are equally involved in combating piracy.

Somali has greatly been viewed as a failed state with piracy being a symptom of much wider problems. Piracy off the coast of Somalia and in the Gulf of Aden has however significantly reduced due to the multifaceted approach by the international community that involved naval patrols and capacity building of the law enforcement agencies within Somalia. The success story of the reduction of piracy in Somalia can be attribute to the efforts and contributions made by institutions such as the UNODC, IMO and other UN bodies in capacity building, infrastructure and institutional development. The UNODC for example has been vocal in creating awareness on piracy in Somalia, highlighting the harm that piracy causes and focusing on turning to alternative income sources.

Whereas the approach in Somalia has significantly reduced the piracy incidences, political instability is not always the only root cause of piracy and other crimes. Piracy in the Malacca strait on the other hand has been attributed to the geographical location thus different areas will therefore call for employment of different strategies. A long term solution lies in creating a solid legal and institutional framework with functional enforcement mechanisms.

The third and fourth objectives were dealt with under chapter four examines how Kenya has dealt with cases of piracy under its legal framework. Some of the decided cases highlight some of the challenges that are peculiar to piracy prosecutions. The chapter also discussed various options available in piracy prosecutions. The definition and scope of piracy as prescribed by international law, gives rise to numerous issues of dispute and global concern.¹ The application

¹ Neakoh Raissa Timben “Piracy: A Critical Examination of the Definition and Scope of Piracy and the Issues Arising there from that Affect the Legal address of the Crime Globally” (2011) University of Tromso page 38.

of the 1982 UNCLOS and its definition of piracy therein have at times posed jurisdictional challenges coupled with the fact that states have no obligation to arrest and prosecute piracy but merely to cooperate in its eradication. These issues which qualify as limitations towards the successful and effective implementation of a legal regime against piracy globally also demonstrate the inadequacies in the application of international laws at national and international levels.²

The key solution however, towards achieving global success and an effective legal address to piracy lies in the willingness of states to cooperate without restrictions towards the eradication of this crime globally.³ This is more so since the possibility of piracy incidences spreading to other regions cannot be overruled. In the recent past there has been an increase in such incidences in West Africa especially off the coast of Guinea. Thus the fight against piracy as a whole will not be complete without full re-examination, and possible elaboration, of international law, to define and sharpen the legal tools needed to capture and prosecute both pirates themselves and the masterminds of piracy operations.⁴ Without such reliance on international law, piracy may surge in other areas of the world, where poverty and unstable governments persist and continue to pose a problem to the world at large.⁵

The enforcement of the 1982 UNCLOS provisions especially on the prosecution of suspects by the capturing states is a way of ensuring that there are no jurisdictional challenges posed by prosecution in third party states. Agreements such as those signed by Kenya and Seychelles have, however, been instrumental in sealing the lacunae that existed, creating uncertainties where suspects were arrested and subsequently released without trial. All arresting states must therefore be encouraged to take full responsibility of prosecution of piracy cases in their domestic courts. Presence of domestic laws criminalising piracy *jure gentium* is a prerequisite to such prosecution.

Efforts of the UNODC and other institutions cannot be overlooked in technical support and in capacity building. The success of prosecution of piracy cases in Kenya could not have been

² Neakoh n1.

³ ibid

⁴ Ibid 42

⁵ ibid

achieved without the support of the UNODC. Whereas this appeared to have been a short term measure, such solutions have with time achieved permanent status.

The fifth objective is covered under the current chapter in which recommendations have been made that are aimed at achieving a more effective framework in addressing the crime of piracy.

The study tested the hypothesis that the existing international legal, policy and institutional framework is insufficient in the effort to combat the crime of piracy *jure gentium*. The study concludes that whereas the existing framework did go a long way in addressing challenges posed by piracy incidences off the coast of Somalia, there is need to broaden the provisions on piracy in order to ensure that a more robust legal framework is in place in future. Left unchecked, the piracy menace could spread to other areas as has been witnessed in West African states.

5.2 Recommendations

This study therefore makes the following recommendations;

1) Broadening of the 1982 UNCLOS provisions on piracy

There is no doubt that the 1982 UNCLOS has been widely accepted as the main international legal framework for piracy. It is important that the provisions for piracy be broadened to cater for challenges posed by modern day piracy. This study recommends the amendment of the 1982 UNCLOS to enhance the provisions of piracy in order to create a clear jurisdiction link. Such a provision can confer jurisdiction to states other than the arresting states as provided under article 105 of the 1982 UNCLOS. An amendment can be done by way of a conference of state parties under Article 312 of the 1982 UNCLOS. The effect of such an amendment would be to cater for piracy cases occurring within a state's territorial sea and for creation of jurisdiction for non-arresting states willing to exercise such jurisdiction.

2) Amendment of the Kenyan Merchant Shipping Act

The Act is not clear on whether the offence created therein is piracy *jure gentium* or piracy by statute. Section 369 of the Act omits the words 'high seas' in its definition thus appearing to limit its application to territorial jurisdiction. This study recommends the amendment of the sections of the Merchant Shipping Act that appear to be ambiguous in conferring jurisdiction to Kenyan courts for clarity in meaning and for avoidance of doubt in their application. The effect of such amendment would cure the ambiguity created by the absence of the words 'high seas' in its definition which tends to limit the application of the Act to territorial jurisdiction

3) Continued prosecution of piracy under National Courts

This continues to be the most viable option as per the secretary General's report. Whereas Kenya is no longer receiving piracy suspects for prosecution, other states such as Seychelles continue to receive and prosecute piracy cases. Kenya's noninvolvement can be attributed to the decline in the number of piracy incidences off the coast of Somalia. The study thus recommends Kenya's continued support in the prosecution of piracy cases if need be.

BIBLIOGRAPHY

Books

Bix B *Jurisprudence: Theory and Context* (2009) Sweet and Maxwell United Kingdom.

Bruce A.E et al *Piracy and Maritime Crime: Historical and Modern Case Studies* (2010) Naval War College Press, Rhode Island.

Cassese A (et al) *International Criminal Law: Cases and Commentary* (2011) Oxford University Press, New York.

Churchill R and Lowe A *The Law of the Sea* (1999) Manchester University Press, Manchester.

Cryer R (et al.) *An Introduction to International Criminal Law and Procedure* (2010) Cambridge University Press, New York.

Currie R and Rikhof J *International & Transnational Criminal Law* (2013) Irwin Law Inc., Toronto.

Lehr P *Violence at Sea: Piracy in the Age of Global Terrorism* (2007) Taylor and Francis Group, New York.

Murungu C and Biegon J *Prosecuting International Crimes in Africa* (2011) Pretoria University Law Press, Pretoria.

Njenga F N *International Law and World Order Problems* (2001) Moi University Press,
Eldoret.

Rubin P A *The Law of Piracy* (2006) University Press of the Pacific, Hawaii.

Werle G *Principles of International Criminal Law* (2005) TMC Asser press, The Hague.

Articles/ Journals

Abazuike L “International Law Regime against Piracy” (2009) 15 Annual Survey of
International and Comparative Law 43.

Bento L “Towards an International Law of Piracy Sui Generis: How the Dual Nature of
Maritime Piracy Law Enables Piracy to Flourish” (2011) 29 Berkeley Journal of
International Law 399.

Dutton Y “Bringing Pirates to Justice: A Case for including Piracy within the
Jurisdiction of the International Criminal Court” (2010) Chicago Journal of International
Law 1.

Gathii J “Jurisdiction to Prosecute Non-National Pirates captured by Third States under
Kenyan and International Law” (2009) 31 Loyola Los Angeles International and
Comparative Law Review 363.

Guilfoyle D “Prosecuting Somali Pirates: A Critical Evaluation of the Options” (2012) 10
Journal of International Criminal Justice 767.

Isanga J M “Countering Persistent Contemporary Sea Piracy: Expanding Jurisdictional Regimes” (2010) 59 American University Law Review 1267.

Kelley P R “UNCLOS, but No Cigar: Overcoming obstacles to the prosecution of Maritime Piracy” (2011) 95 Minnesota Law Review 2285.

Kontorovich E “A Guantanamo on the Sea: The Difficulty of Prosecuting Pirates and Terrorists” (2010) 98 California Law Review 243.

Mason R C “Piracy: A Legal Definition” (2010) Congressional Research Service CRS Report for Congress.

Milena S “Fighting Piracy in Somalia (and Elsewhere): Why More is Needed” (2009) 33 Fordham International Law Journal.

Odeke A “Somali Piracy: Jurisdiction over Foreign Pirates” (2011) 17 International Journal Maritime Law.

Roach J A “Countering Piracy off Somalia: International Law and International Institutions” (2010) 104 American Journal of International Law 397.

Treves T “Piracy, Law of the Sea, and Use of Force: Developments off the Coast of Somalia” (2009) 20 European Journal of International Law 399.

Thesis /Dissertations

Momanyi A N “The International Legal, Policy and Institutional Framework for the

High Seas Environment: An Evaluation” (2012) Ph D Thesis University of Nairobi.

Neakoh R T “Piracy: A Critical Examination of the Definition and Scope of Piracy and

The Issues arising there from that affect the Legal Address of the Crime globally” (2011)

LL.M University of Tromso, Norway.

Internet Sources

The IMB is a non-profit making organization established in 1981 as a specialized division of the

International Chamber of Commerce information available at www.icc-iccs.org/icc/imb

UNODC Maritime Crime Brochure- Issue 13 of March 2014 available at

www.unodc.org/documents/easternafrika//UNODC-MCP-Brochure-March-2014.pdf