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Role of Courts in Harmonizing International and Domestic Legal Frameworks on Piracy

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Declaration

I, **GATERU MERCY WANJIRU** declare that this Project is my original work and has not been submitted for the award of a degree in any other university.

Signed_____ Date 9/11/2012

Gateru Mercy Wanjiru

This Project has been submitted for examination with my approval as a University Supervisor.

Signed_____ Date 9/11/12

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Professor of Diplomacy and International Conflict Management,
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Dedication

This project is dedicated to my dad and mum, for always believing in me and encouraging me to be the best I can. To my brothers and sisters, I am challenging you to take over the mantle and rise to the highest level in the fields you have chosen.

Acknowledgement

I pay special tribute to my employer, Office of the Director of Public Prosecutions for offering me a chance to pursue this Masters Programme at the University of Nairobi. I thank my colleagues who stood in for me in court during times when my court matters coincided with my exams.

I thank Professor Mwagiru for his tireless efforts in evaluating this work and ensuring that this work reaches this level.

My acknowledgement goes to my family and friends for being there for me and the encouragement to soldier on even when the going was rough. Special tribute goes to Major Catherine Gichuki for her constant encouragement that it was possible to clear the project on the year I was scheduled to graduate. The choosing of a graduation party venue for my masters when I was still stuck on the proposal gave me the determination to at least try before giving up!

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To the Almighty God for the gift of life and daily sustenance.

Abstract

The study seeks to investigate the role of courts in harmonizing international and municipal laws on piracy. The study appreciates that piracy is an international crime and has become endemic off the coast of Somalia calling for concerted efforts to curb the vice. It proceeds on the premise that at least for the time being, the international community must rely on national courts to prosecute modern day pirates.

The objective of the study is to investigate the international and domestic legal regime on piracy and examine the role of court in harmonizing the two. The study uses dualism theory which represents the world view that international and domestic law are separate legal orders needing to be transformed into domestic law by legal acts of states. The methodology of the study entails both primary and secondary data sources. The primary sources are content analysis of court decisions issued in various jurisdictions handling piracy cases focusing on the United States, the Netherlands, Seychelles and Kenya.

The study finds that courts have a significant role to play in determination of piracy cases since they are the ones which address common questions of international law regarding the exercise of universal jurisdiction and the elements of the crime of piracy. The study establishes that courts through case law influences existing hard law regulations and its interpretation. It however notes that the courts are yet to achieve the necessary consistency in resolving key issues of international law in these cases. In this regard, the study finds that in applying universal jurisdiction in such cases such as piracy, judges should be guided by international law in so far as the same does not conflict with domestic law of the forum state. It further demonstrates that the decisions by the courts do not address the root causes of piracy and argues that if the menace of piracy is to be comprehensively addressed, such root causes need to be addressed.

TABLE OF CONTENTS

Abbreviations

BC	Before Christ
CPC	Criminal Procedure Code
EEZ	Exclusive Economic Zone
HSC	High Seas Convention
ICL	International Customary Law
IMO	International Maritime Organisation
KLR	Kenya Law Reports
MLA	Mutual Legal Assistance
MSA	Merchant Shipping Act
PC	Penal Code
PLF	Palestine Liberation Movement
PLO	Palestine Liberation Organisation
SUA	Suppression of Unlawful Acts
UK	United Kingdom
UN	United Nations
UNCLOS	United Nations Convention on the Laws of the Sea
UNSCR	United Nations Security Council Resolution
UNTOC	United Nations Convention against Transnational Organised Crime
USA	United States of America

CHAPTER ONE

INTRODUCTION TO THE STUDY

1.0 Introduction

The collapse of Somalia which is a state within the Horn of Africa sub-system gave rise to piracy within the sub-region. Maritime piracy inflicts clear danger and physical harm upon sea farers. In some cases, piracy has resulted to a loss of life not to mention the trauma inflicted on the hostages and their families. Piracy has also resulted to significant losses to shipping companies. In addition, it also has significant implications for the environment, trade and the national security of states that are dependent on foreign imports.

Through the multilateral approach, many states around the world have contributed in one way or another in dealing with the menace. Some of the powerful states such as United States of America (USA), United Kingdom (UK) and Germany have contributed by sending their naval ships to patrol the waters within the waters off the coast of Somalia while others such as Kenya, Seychelles and Mauritius have offered to prosecute the suspects in their domestic courts.

International law is predominantly legislative and consists of quite an elaborate set of laws, but has weak judicial and executive institutions.[1] The enforcement of international law is often thus left to domestic courts. This applies to the crime of piracy where there is no international tribunal to hear and determine cases involving piracy.[2] This means that for the time being, the international community must rely on domestic courts to try modern day pirates who have developed sophisticated operational capabilities and have acquired weaponry, equipment

[1] Eric A Posner, 'International Law: A Welfarist Approach', *The University of Chicago Law Review*, Vol. 73, No. 2 (Spring, 2006), pp. 487-543:539

[2] Kenneth C. Randall, *Universal Jurisdiction Under International Law*, (66 Texas Law Review ,1988) pp 785-88

and funds that place them at par with or even more effective than the forces arrayed against them.[3]

Since 2006, Kenya has actively participated in the fight against Piracy more so from late 2008 to late 2009 when Kenya became a primary destination for the prosecution of pirates captured off the coast of Somalia.[4] Seychelles has also done the same from the year 2009. Notably, none of the Pirates being tried in Kenya or Seychelles were captured by Kenyan or Seychelles naval forces but by foreign naval forces patrolling the high seas.

This study examines the international legal regime on piracy. It examines the interplay between international and domestic law on matters relating to maritime piracy narrowing down to Kenya and Seychelles as the case study. The study examines the piracy cases that Kenya has taken up for prosecution from 2006 and scrutinises how different courts have adjudicated on the question whether courts have jurisdiction to try suspected Somali pirates arrested on the high seas and the elements to required to prove the offence of piracy. It also examines the piracy cases decided in the Seychelles and other courts. Using the conflicting decisions on the issue, this study will examine the legal framework under which the suspected Somali pirates have been tried or are being tried, and critically analyses the role of the courts in interpreting and or harmonizing the provisions with international law.

1.1 Statement of the Research Problem

With regard to crimes defined by international law such as that of piracy, that law has no means of trying or punishing them. This means that their recognition as constituting crimes and the trial

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[3] Ibid

[4] Jeffrey Gettleman, 'Rounding up Suspects, the West Turns to Kenya as Piracy Criminal Court', *New York Times*, April, 24 2009 at p. A8

and punishment of them is left to the municipal law of each country. Kenya for example has been prosecuting suspected pirates under the Penal Code for the offence of piracy jure gentium and recently under the provisions of the Merchant Shipping Act. Looking at the various conflicting judgments on the issue of jurisdiction in Kenya in respect to piracy cases before court, the question arises as to what extent international law is applicable in those cases.

If the burden of prosecution is to fall on domestic courts, it is important that these courts apply the relevant international law correctly and consistently. This has not been the case so far. Indeed, despite an increase in incidences of piracy off the coast of Somalia, a problem has arisen in the interpretation of domestic (municipal) law on piracy when addressing common questions of international law regarding the exercise of universal jurisdiction, the elements of the crime of piracy and the principle of legality or *nullum crimen sine lege.* This is a challenge to the domestic courts especially on the issue of whether municipal courts have jurisdiction to try suspected Somali pirates and the elements required to prove the offence of piracy as conflicting decisions have been given on the issue. These conflicting decisions by the courts have precipitated a crisis in the prosecution of piracy cases and has resulted in orders of release of suspected somali pirates even where there is overwhelming evidence. This brings into focus the signifinant role of the courts especially in international crimes in harmonizing domestic law with international law. It is this that nessecitates this study.

1.2 Objectives of the Study

The objectives of this study are to:

- Investigate the international legal regime on piracy
- Investigate the domestic legal frame works on piracy and international law.

- Critically analyse the role of courts in harmonizing municipal and international legal regime on piracy

1.3 Literature Review

This section presents and discusses the theme of the study, demonstrates various scholarly works on the subject, identifies the gaps in the existing literature, shows where the study enters the debate, and its justification.

1.3.1 Definition of piracy

According to Anderson piracy is a subset of violent maritime predation in that it is not part of a declared or widely recognized war.[5] Within the general category of maritime predation, a precise definition of piracy universally acceptable over time and between places has eluded jurists. A broad definition that emerges from historical writing is that of the essentially indiscriminate taking of property (or persons) with violence, on or by descent from the sea.[6] This concept of piracy includes one of the widely accepted elements of stealing that is, the taking and carrying away of the property of another but doubt may arise about a further element, the lack of "color of right."

Molloy defines a pirate as a sea thief or *hostis humani generis* who to enrich himself either by surprise or open face sets upon merchants or other traders by sea.[7] Molloy does not regard piracy as necessarily involving successful robbery or as being inconsistent with an unsuccessful attack. However, in certain trials for piracy held in England under the Act of henry

[5] Anderson J.L 'Piracy and World History: An Economic Perspective on Maritime Predation' *Journal of World History*, Vol. 6, No. 2 (Fall, 1995), pp. 175-199: 176

[6] ibid

[7] Molloy (1646-1690) "De Jure Maritimo et Navali" or " A Treatise of Maritime Affairs" 1769 Chapter 4 headed "Of Piracy"

VIII, a narrower definition of Piracy has been adopted. In the case of *R vs Joseph Dawson*[8] described as the sheet anchor for those who contend that robbery is an ingredient of piracy, Sir Charles Hedges gave the charge to the grand jury and said

> " now piracy is only a sea term for robbery, piracy being a robbery committed within the jurisdiction of the admiralty. If any man assaulted within that jurisdiction, and his ship or goods violently taken away without legal authority, this is robbery and piracy"

Hale in his "*Pleas of the Crown*[9]" also limits the definition of piracy to robbery on the high seas when he states that 'it is out of question that piracy by the statute is robbery' But Hawkins defines a pirate rather differently. According to him, "a pirate is one who, to enrich himself, either by surprise or open force, sets upon merchants or others trading by sea, to spoil them of their goods or treasure."[10] Unlike Hale's definition, this does not necessarily import robbing.

For American authorities, Kent[11] calls piracy " robbery of a forcible depradation on the high seas, without lawful authority and done animo furandi, and in the spirit and intention of universal hostility." Moore on the other hand defines a pirate as "one who without legal authority from any state, attacks with intention to appropriate what belongs to it. The pirate is a sea brigand. He has no right to any flag and is justifiable by all."[12] Church and Lowe define Piracy[13] to include any illegal act of violence, detention or depredation committed for private ends by the

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[8] *R versus Dawson* (1696) 13 st.Tr. col. 451

[9] In Re a Reference under the Judicial Committee Act, 1833, In Re Piracy Jure Gentium *The American Journal of International Law*, Vol. 29, No. 1 (Jan., 1935), pp. 140-150:144 referring to Hale (1609 -76) "Pleas of the Crown" ed.1737,cap,27,p305

[10] Ibid at p 145 citing Hawkins (1673-1746) "Pleas of the Crown" (1716), 7th ed. Vol 1, p 267(1)

[11] Stychin Carl F, 'The Commentaries of Chancellor James Kent and the Development of an American CommonLaw, *The American Journal of Legal History*, Vol. 37, No. 4 (Oct., 1993), pp. 440-463

[12] Moore, *Digest of International Law* (Washington, 906), p.953

[13] Churchill R.R and Lowe A.V, *The Law of the Sea*, 3rd ed. (Manchester: Manchester University Press,1988)P.209

crew or passengers of a private ship (or aircraft) against another ship (or aircraft) or persons or property on board (or over) the High seas.

According to Hall,[14] the various acts which are recognized or alleged to be piratical may be classified as either robbery or attempt at robbery of a vessel, by force or intimidation, either by way of an attack from without, or by way of revolt of the crew and conversion of the vessel and cargo to their own use. The definition by Kenny is worth mention particularly since it was referred to by the Committee of the Privy Council in the *re Piracy Jure Gentium* case and found to be the one which comes nearest to accuracy coupled with brevity [15] Kenny defines piracy "as any armed violence at sea which is not a lawful act of war"[16]

The *Re Piracy Jure Gentium* case[17] is important as it clarifies whether an accused person may be convicted of piracy in circumstances where no robbery has occurred. In answer to the question put to it, the privy council in England supported the view that actual robbery is not an essential element of the crime of piracy *jure gentium* and that a frustrated attempt to commit a piratical robbery is equally piracy *jure gentium.*

1.3.2 Piracy in International law

The issue of piracy had such a profound impact throughout the ages that by the sixteenth century jurists such as Grotius had already developed the concept that nationals who committed piracy on *terra nullius* (the high seas) placed themselves beyond the protection of any state and

[14] Hall W.E, *A Treatise on International Law,* 8th ed (Oxford: Clarendon Press, 1924) p 314
[15] In Re a Reference under the Judicial Committee Act, 1833, In Re Piracy Jure Gentium *The American Journal of International Law*, Vol. 29, No. 1 (Jan., 1935), pp. 140-150
[16] Kenny (1847-1930), Outlines of Criminal law," 14th ed., p 332
[17] Re Piracy Jure gentium 1934 A.C. 586

were deemed *hostis humani generis* meaning enemies of the human race.[18] As a result, such offenders were capable of being tried by the courts of any state for the crime of piracy.[19] This was reaffirmed in *re Piracy Jure Gentium.* In this case the Committee of the Privy Council's opinion in a special reference made statements which remain valid to date. First they observed and correctly so, that with regard to crimes as defined by international law, that law has no means of trying or punishing them. This means that the recognition of them as constituting crimes and the trial and punishment of them is left to the municipal law of the each country.[20] This case went on to recognize that whereas according to international law the criminal jurisdiction of municipal law is ordinarily restricted to crimes committed on its *terra firma* or territorial waters or its own ships, and to crimes by its own nationals wherever committed, the criminal jurisdiction is also recognized as extending to piracy committed on the high seas by any national on any ship. The rationale for this is that a person guilty of such piracy has placed himself beyond the protection of any state and is therefore '*hostis humani generis*' and as such justiciable by any state anywhere.

Churchill and Lowe[21]noted that as a matter of law, pirates may be tried by any state before the courts they are brought and that that state may determine by its laws the penalties to be imposed. Martin Dixon[22]also notes that under international law, there are certain crimes which are regarded as so destructive of the international order that any state may exercise jurisdiction in respect to them. He observes that piracy, war crimes and crimes against humanity for example genocide are crimes susceptible to universal jurisdiction under customary

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[18] Grotius (1583-1645) "De Jure belli ac Pacis, "vol.2, cap.20, & 40
[19] Keith, A.B, *Wheaton's Elements of International Law*, 6th Ed. (London: Stevens and Sons, 1929), p 277
[20] ibid p 589
[21] Churchill R.R and Lowe A.V, *The Law of the Sea*, 3rd ed. (Manchester: Manchester University Press,1988) p.210
[22] Martin Dixon, *Text book on international law*, 5th ed (Oxford: Oxford University Press, 2005) p. 76

international law. After the Committee of the Privy Council's opinion in *Re Piracy jure gentium* case, piracy jure gentium was defined later in article 15 of the High Seas Convention in 1958. It was later again reaffirmed in article 101 of the United Nations Convention for the law of the sea (UNCLOS) 1982 showing that piracy still exists today.

Universal jurisdiction over piracy has been accepted under international law for many centuries and constitutes a long established principle of the world community.[23]Under universal jurisdiction all states may both arrest and punish pirates, provided they are arrested on the high seas.[24] Thus it does not matter the nationality of the pirates or wherever they happened to carry out their criminal activities. Such pirates are to be punished since the offence is one of the ones regarded as particularly offensive to the international community.[25] The fact that every state may arrest and try persons accused of piracy makes the crime quite exceptional in international law, where so much emphasis is placed upon the sovereignty and jurisdiction of each particular state within its own territory.[26] Article 100 of UNCLOS calls upon the community of nations to cooperate to the greatest possible extent in the repression of piracy. The Coastal flag and regional states are supposed to cooperate in this regard. The states could do so through prosecutions [27], incarceration of convicted prisoners [28] maritime patrols and capacity building in Somalia.

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[23] D.H Johnson, 'Piracy in Modern International Law', 43 *Transactions of the Grotius Society*, London, 1957 pp.63-85

[24] Article 105 of the 1982 Convention on the Law of the Sea. The article reproduces article 19 of the Geneva Convention of the High Seas 1958

[25] Randall, *Universal Jurisdiction under International Law*, (66 Texas Law Review,1988) p 785

[26] Shaw Malcolm N, *International Law*, Fourth ed (Cambridge University Press, 1997) p.423

[27] Kenya has taken the leading role in prosecutions

[28] Puntland has accepted transfer of prisoners from Seychelles and is actively involved in the effort to combat piracy.

1.3.3 Piracy under Municipal law and international law

Shaw observes that piracy is a crime under international law and municipal law.[29] Piracy *jure gentium* under international law is different from piracy under municipal law. Offences that fall under the definition of municipal law do not necessarily fall within the definition of piracy under international and, subsequently, are not susceptible to universal jurisdiction.[30]

Domestic law can have a bearing on international law. The reverse is also true. That is international law can affect domestic law both directly and indirectly. States take different approaches to the effect of international law in their domestic legal systems. Different theories have been developed to explain the interaction between international and domestic or municipal law. The transformation theory says that each individual rule of international law must be 'transformed' or 'incorporated' into domestic law by a statute or judge made law before it can have any domestic effect.[31] This was the preferred approach under the old Constitution of Kenya although it was not entirely dualist and international law was a source of or influence on domestic law in a variety of ways.

Piracy is a crime under international law. The sources from which international law is derived include international conventions or treaties between various states, international custom, general principles of law recognized by nations, and judicial decisions and scholarly writings.[32] Treaties or international agreements are among the most important means by which states relate to one another and to different organs in the sphere of international law. Treaties are basically

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[29] Shaw Malcolm N., 'International Law', 4th ed, (Cambridge University Press, 1997).p 470

[30] Ibid

[31] Makumi Mwagiru, 'From Dualism to Monism: The Structure of Revolution in Kenya's Constitutional Treaty Practice' *Journal of Language, Technology & Entrepreneurship in Africa Vol. 3 No. 1 2011 pp.144-155:146*

[32] Statute of the International Court of Justice art. 38, June 26, 1945, 59 Stat. 1055

agreements between parties on the international scene.[33] A treaty brings about external effects which bind a state to fulfill an international obligation.[34] It may also produce internal effects if it has the consequence of producing some change in the municipal legal system. For a treaty to produce internal effects, it has to be incorporated in one way or another within the municipal legal system. Such incorporation, in its clearest forms, can come about automatically at the time of ratification (monist theory), or be indirect, by legislative enactment of the treaty (dualist concept)."[35]

Anderson observes that the legal aspects of piracy affect expected returns and costs in what was essentially a business.[36] The problems of legal definition and jurisdiction in cases of alleged piracy, when a given state's laws do not clearly apply, would tend to lessen the probability of a pirate being brought to trial and successfully prosecuted, which would in turn reduce the "costs" pirates might expect as a consequence of their activities.[37] The expectation of punishment would be lowered still further if the pirate had open or tacit protection[38] Courts therefore have a big role to play in ensuring that in international crimes such as piracy, the laws are not interpreted in such a way that pirates are given open protection as this would lead to an increase in piracy incidents.

Anderson also observes that the problem of framing and securing international recognition for laws that would rid the seas of pirates, without infringing the rights of sovereign states, appears not to have been resolved for many reasons, some relating to the character of the

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[33] Shaw N. Malcolm, *International Law,* Fourth ed (Cambridge University Press, 1997) p.633

[34] J. B. Ojwang and Luis G. Franceschi, ' Constitutional Regulation of the Foreign Affairs Power in Kenya: A Comparative Assessment' *Journal of African Law,* Vol. 46, No. 1 (2002), pp. 43-58

[35] D.J. Harris, *Cases and Materials on International Law,* 2nd ed., (London, 1979), pp 60-62.

[36] Anderson J.L, 'Piracy and World History: An Economic Perspective on Maritime Predation' *Journal of World History,* Vol. 6, No. 2 (Fall, 1995), pp. 175-199: 176

[37] Ibid

[38] Alfred H.Rubin, *The Law of Piracy* (Newport R.I: Naval War College.,1988) p.305-37

offense.[39] Private purpose has generally been held to be a necessary element of piracy, to distinguish the crime from political activity. If a pirate claims to be acting on behalf of a state rather than from private motives, then the issue turns first on whether the state is one entitled to authorize such actions and then on whether it accepts responsibility for them or not and whether it can or will act responsibly in either case.

The somewhat academic question of the indirect or direct application of international legal norms has not been addressed by many African states confronted with piracy.[40] In the absence of clarity on the issue, the assumption has been that there is no direct application requiring codification of the legal definition of piracy in municipal law prior to instituting any prosecution. Indeed this is the strategy adopted by the UN Security Council Resolution 1918 which calls on state members to criminalize piracy under domestic law.

Jurisdiction problems may arise because of conflict between national and international law. This is because it is possible that national law may provide for a different jurisdictional criterion from that stipulated at the international level.[41] In such cases, no doubt courts have a significant role to play in harmonizing the two laws.

1.4 Justification

This study is inspired by the lack of literature on the subject of the role of courts in harmonizing international law and domestic legal frameworks on piracy. Kenya has earned itself a name in the prosecution of suspected Somali pirates captured in international waters followed by Seychelles.

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[39] Anderson J.L, 'Piracy and World History: An Economic Perspective on Maritime Predation' *Journal of World History*, Vol. 6, No. 2 (Fall, 1995), pp. 175-199: 176

[40] The Constitution of Kenya, 2010 now addresses this issue

[41] Shaw Malcolm N., *'International Law'*, 4th ed, (Cambridge University Press, 1997).p 470

But as the old adage goes "all that glitters is not gold" this study interrogates decisions issued by courts determining piracy cases more so in Kenya where we have had inconsistent verdicts being given on similar legal issues.

Kenya has so far taken up for prosecution 18 cases involving 164 suspects. Of the 164 suspects 61 have since been convicted serving prison terms ranging from 4 years - 20 years imprisonment while the rest of the suspects are in remand awaiting trial. The Courts acquitted 17 suspects who were jointly charged in one case. Using the case studies that Kenya and Seychelles has prosecuted/ is prosecuting, this research is important as it will put in perspective the role of the courts in harmonizing international law and municipal law in matters relating to piracy and the importance of bringing the spirit of international instruments on piracy in domestic legal systems.

It examines the steps required to allow international law to operate as part of domestic law in Kenya and which law – domestic or international takes primacy in Kenya Courts in case of any ambiguity when it comes to piracy cases. The study is also justified in that it demonstrates that with the rising increase of piracy attacks off the coast of Somalia and a very enlightened lot of defence lawyers representing the pirates who are ready to stop piracy trials on any technicality, courts have a significant role to play in ensuring that international norms are applied when it comes to determining issues brought before the courts in piracy cases as this is the only way the courts can contribute significantly to the development of international jurisprudence. The study will make a case for the need of extensive training on international law for all judicial officers dealing with not only piracy matters but also other international crimes to enable them discharge their duties accordingly given the extensive workload that they have.

The study is also justified in that it inquires into the effectiveness of courts in harmonizing the past and present piracy laws in Kenya with international law and identifies the challenges encountered in the fight against piracy. The recommendations of this study is hoped to add value to the process of prosecuting pirates not only in Kenya but in other African countries as well as averting the dangers associated with conflicts between international and municipal law as will be discussed.

The study is also justified as it advocates the need to have piracy cases allocated to specific courts where the magistrates and judges have been trained on issues relevant to the ongoing piracy trials, including international law. This would have the effect of ensuring consistency in all aspects of the case for example the recent jurisdictional challenges.

1.5 Theoretical Framework

This research project will use the dualism theoretical framework to analyse the relationship between domestic and international law. Dualism paradigm represents the world view that international and domestic laws are separate legal orders.[42] Accordingly, international law cannot operate directly in the domestic sphere, needing it to be 'transformed' into domestic law by legal acts of states.[43]

Dualist approach is relevant in this study because it will enable the analysis of the relationship between international and domestic laws on piracy to explain why perhaps different judges of the High Court of Kenya prior to the enactment of the new constitution have interpreted the law differently when it comes to the issue of whether Kenya has jurisdiction

[42] Makumi Mwagiru, 'From Dualism to Monism: The Structure of Revolution in Kenya's Constitutional Treaty Practice' *Journal of Language, Technology & Entrepreneurship in Africa Vol. 3 No. 1 2011 pp.144-155:146*
[43] ibid

under section 69 of the Penal Code to try suspected Somali pirates arrested on the high seas. In dualist countries, rules of international law are binding as a matter of domestic law only when parliament has passed legislation to implement international norms.

1.6 Hypotheses

The following hypothesis will be tested.

- There is a relationship between international and domestic laws on piracy
- Courts have a role to play in harmonizing municipal with international legal regimes on piracy.
- Courts have no role to play in harmonizing municipal with international legal regime on piracy.

1.7 Research Methodology

The research will use both primary and secondary data. The researcher will use the case study method which according to Kothari is a form of qualitative analysis wherein careful and complete observation of an individual or a situation or an institution is done; efforts are made to study each and every aspect of the concerning unit in minute details and then from case data generalizations and inferences are drawn. [44]

The researcher has adopted a case study approach in order to conduct an intensive study of the units of investigations in order to deepen the understanding of the relationship between

[44] Kothari C. R, Research Methodology Methods and Techniques, 2nd Revised Edition, (New Delhi, New Age International (P) Limited Publishers, 1982) p 113.

international and domestic law in prosecution of piracy cases in Kenya and other countries and the role of courts in harmonizing the two.

The tool used to collect data in the case study method will be a documentation review of published primary data of judicial records kept at Mombasa law courts criminal registry in relation to all the piracy cases that Kenya has prosecuted and or is prosecuting both under the Penal Code and the Merchant Shipping Act. This will be done by perusing court proceedings and doing an in depth study of the cases in question. Notably, the cases to be considered are the piracy cases prosecuted by Kenya from 2006 to-date. Since the researcher is an advocate of the High Court of Kenya it will not be difficult to gain access to the court records.

Other secondary data will be obtained from analysis and review of books, journals and case law from Kenya Law Reports and other jurisdictions handling piracy cases with special focus on the United States, the Netherlands, Seychelles, and Mauritius. Secondary data will also be obtained from papers, reports, UN Security Resolutions, Exchange of letters/Memorandum of Understanding previously entered between the Government of Kenya and states involved in patrolling the waters off the Somali coast which will include those of the United Kingdom, United States, Canada, Denmark, European Union and China and such other available literature on the issue of Piracy. Notably, secondary data will be the main source of data in this study since the same is readily available.

The data will be analyzed using content analysis. Content analysis is a technique for making inferences by objectively and systematically identifying specified characteristics of responses and objectively identifying and using the same approach to relate trends. The results will be presented under identified themes.

1.8 Chapter Outline

This study consists of five chapters. In this Chapter (Chapter one) a general introduction to this study is presented. It outlines the research problem, objectives, the literature review, justification and theoretical framework upon which this research is anchored and the methodology applied in the study. Chapter two investigates the international Legal Regime on Piracy from the international law perspective. Chapter three examines the domestic legal regimes on Piracy and their relationship with international law and chapter four undertakes a critical analysis of the role of courts in piracy cases. Chapter five is the final chapter and contains conclusions.

CHAPTER TWO

INTERNATIONAL LEGAL REGIME ON PIRACY

2.0 Introductions

International law is the term given to the rules which govern relations between states. Despite the absence of any superior authority to enforce such rules, international law is considered by states as binding upon them, and it is this fact which gives these rules the status of law. Law consist of a series of rules regulating behaviour and reflecting to some extent the ideas and preoccupation of the society within which it functions.[1] Such international law applies to piracy.

The effects of modern maritime piracy indeed call for an international response to the menace. Piracy attacks lead to a significant change in trading patterns or increase in the prices of the imported goods which could have severe economic ramifications for the region. Increased insurance premiums and diverted trade affects economic growth while continued maritime insecurity contributes to the bad neighborhood syndrome which discourages investment and tourism. Although the threat to individuals may be small, the cumulative threat to trade, local economies, and human life is serious and warrants attention from the international community.[2]

This chapter examines the international legal regime on piracy to determine the place of piracy in international law. It looks at the sources of international law and the conventions entered into touching on the subject of piracy namely the United Nations Convention on the Law of the Sea (UNCLOS), the Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation 1988, commonly known as the SUA convention and the International Convention Against the Taking of Hostages 1979.

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[1] Shaw Malcolm N, *International Law*, Fourth ed (Cambridge University Press, 1997) p.1

[2] Bulkeley C.Jennifer, Regional Cooperation on Maritime Piracy: A prelude to Greator Multilateralism in Asia, *Journal of Public and International Affairs*, Vol. 14 (2003) pp 1-26

2.1 Sources of International Piracy Law

Modern piracy has been described as an "epidemic" calling for a coordinated and international response.[3] The sources of international piracy law are same as those of international law. It is generally accepted that Article 38 of the Statute of the International Court of Justice is a complete statement of the sources of international law. The sources of law described under article 38 are international conventions and treaties that establish rules that states expressly recognise; international custom as evidence of general practice(s) accepted by states as law; general principles of law recognized by civilized nations; and judicial decisions and the teachings of highly qualified publicists of various nations.[4]

2.2 Customary international law

Customary international law like conventional international law (treaties), is a source of international law.[5] Basic human rights obligations for example form part of customary international law. What is to be noted is that the legal effect of customary international law is totally different from that of conventional international law. For example, a rule of customary international law is binding on all nations other than a state that has become a persistent objector. On the other hand, non-parties are not bound by a treaty.

Article 38(1)(b) of the Statute of the International Court of Justice, provides that the court shall apply "international custom, as evidence of a general practice accepted as law". The question that arises is how a rule of customary international law can be established for the purpose of creating binding legal obligations among states. The International Court of Justice in

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[3] Eugene Kontorovich, *'A Guantanamo on the Sea: The Difficulty of Prosecuting Pirates and Terrorists'*, *California Law Review* Vol. 98 , No 243, (2010) pp. 243-275

[4] Statute of the International Court of Justice, chapter II.

[5] Brownlie, *Principles of Public International Law.* (New Delhi, Oxford University Press) pp 4-11

the *North Sea Continental Shelf Cases* stated that the evidence required in the establishment of custom is as follows:[6]

> Not only must the acts concerned amount to a settled practice but must also be such or be carried out in such a way, as to be evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it. The need for such a belief, i.e the existence of a subjective element, is implicit in the very notion of the *opinio juris sive necesitatis*. The States concerned must therefore feel that they are conforming to what amounts to a legal obligation.

In this regard, for customary international law to be created there need to be evidence of acts showing a settled practice among states and the belief that a state has obligation to be bound by a customary law (*opinio juris sive necessitatis*). It follows therefore that in examining the evidence in proof of a customary law, a court is bound "to access the existence of one objective element consisting of the general practice, and one subjective element, namely, that there is a belief among states as to the legally"[7] binding nature of this practice.

Widespread repetition of similar acts over time by states is relevant in determining state practice. Equally relevant are acts of states which must occur out of a sense of obligation. There must be some degree of generality and consistency over practice of states. In regard to piracy, because of its nature and long history, piracy has become an international crime based on customary law between the nations of the world, the law of nations.

Under customary international law, the penalty for pirates captured during an attack was summary execution.[8] Their behavior was considered so heinous as to render them unworthy of custody and feeding (ship's store being precious commodity) and the risk of their attempting to escape or actually escaping custody and attacking again too great a risk to justify preserving them. Both customary and statutory international law have condemned piracy for well over a

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[6] (1969) ICJ Reports 44 para 77.
[7] Brownlie I, *Principles of Public International Law*, 7th ed. (New Delhi, Oxford University Press, 1990) p 29
[8] www. en.wikipedia.org/wiki/piracy

century. Piracy is known as a maritime problem for thousands of years, indeed as long as ships were sailing through oceans and maritime trade has been existed between countries. It has a long term history in the international maritime system as it can be guessed that piracy has existed as long as the oceans were plied for commerce.[9]

Indeed, the origin of piracy could be traced to as early as 75 BC when Julius Caesar emperor of the Roman Empire was hijacked and held hostage by Sicilian pirates while on his way to Rhodes in the Aegean Sea, now named the Mediterranean sea.[10] The pirates demanded for a ransom for a sum of 20 gold talents. In conduct worthy of a modern politician, he insisted that he was worth at least 50 talents and the pirates lifted their claim accordingly. The Roman authorities paid the ransom and Caesar was released. Later in an act of retaliation, he then returned with a naval force, captured the pirates, inflicting upon them the punishment of crucifixion.[11] They were hanged in public.

The same case applied in Nova Scotia. The law required that the pirates be executed with their bodies displayed in public as a warning to other sailors. The body was covered in tar and hanged from chains in an iron cage called a gibbet.[12] The Royal Navy used the same treatment on mutineers. Two pirates were hanged this way on George's Island in 1785. Another, Jordan the pirate, was hanged at Point Pleasant Park, near the Black Rock beach in 1809. At the same time, the Navy hanged six mutineers at Hangman's Beach on McNab's Island, just across the Harbour. Any ship entering Halifax Harbour in 1809 had to pass between hanging and rotting corpses.[13]

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[9] Joshua Michael Goodwin, *Universal Jurisdiction and the Pirate: Time for an Old Couple to Part [notes]*, In: Vanderbilt Journal of Transnational Law, Vol. 39:3 (2006), p 977.
[10] Ormerod Henry, *Piracy in the Ancient World*, (London: John Hopkins University Press, 1996) p 54
[11] ibid
[12] www. en.wikipedia.org/wiki/piracy
[13] ibid

Pirates were regarded as true outlaws.[14] They were treated as persons without nationality and beyond the protection of any State. Their crimes on the high seas were justiciable by any State anywhere. Burgress contends that the central premise of *hostis humani generi* is that a pirate is not an enemy of the state but of human kind itself.[15] Indeed, until at least the late 18th century, civil law jurisdictions recognised that summary extra-judicial punishment could be inflicted on pirates. For example, if a vessel overcame an assault by pirates and the captured pirates were delivered to port, the captain of the vessel retained a prerogative to deal with the pirates if a judge at the port declined to conduct a trial, or if the captain determined that loss or peril would occur if the vessel awaited the attendance of a judge. According to the civil law, events may take their course with regard to the pirates and 'justice may be done on them by the law of nature, and the same may be there executed by the captors'.[16]

2.3 International Treaties/ Conventions

Although piracy became an international crime based on customary law or the law of nations, as the world further globalised after World War II, there was an apparent need for more regulation and codification besides the law of nations and certain treaties. At first, the Convention of the High Seas was created in 1958. However, as time passed this was not enough leading to creation of the United Nations Convention on the law of the Sea (UNCLOS) in 1982. Thus, although universal jurisdiction over piracy developed through unwritten customary international law, which prohibited piracy and treated pirates as enemies of humankind who were subject to

[14] Henry Kissinger, *The pitfalls of universal jurisdiction,* (Council on Foreign Relations, 2001) p128
[15] Douglas R. Burgess, 'Hostis Humani Generi, Piracy, Terrorism and A New International Law', 13 *University of Miami International and Comparative Law Review* Vol. 13 (2006) pp 293- 341:315
[16] *In re Piracy Jure Gentium* [1934] AC 586, 590 - 591.

universal jurisdiction by any state,[17] it has also been codified in the United Nations Convention on the Law of the Sea.[18]

UNCLOS defines piracy more broadly than did international customary law. Article 101, defines piracy as "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; 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; any act of inciting or of intentionally facilitating an act described in subparagraph (a) or (b)."[19] This provision is to be read in conjunction with Article 103 of UNCLOS, which contains the definition of what is considered a pirate ship or aircraft. The treaty includes "any illegal acts of violence or detention, or any act of depredation, committed for private ends."[20] In this regard, it can be argued that assault and murder on the high seas would be universally punishable under UNCLOS, whereas under traditional international law such crimes on the high seas went unpunished.[21]

As noted above, prior to the United Nations Convention on the Law of the Sea 1982 (UNCLOS) there was the High Seas Convention 1958 (HSC) which defines piracy in exactly the same terms as the UNCLOS with only negligible stylistic changes. The HSC continues to be relevant for those states not party to UNCLOS. Presently eight (8) States and the Holy See are parties to the HSC but not to UNCLOS. They include Afghanistan, Cambodia, the Holy See, Iran

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[17] W. E. Hall, *International Law*, (London, Oxford University Press, 1880) pp 222-223.
[18] Azubuike, Lawrence (2009) "International Law Regime Against Piracy," *Annual Survey of International & Comparative Law*: Vol. 15 (2009) pp 43-59
[19] United Nations Convention on the Law of the Sea, article 101.
[20] Ibid Art. 101(a)
[21] United States v. Furlong, 618 U.S. (5 Wheat.) 184 (1820)

(Islamic Republic of), Israel, Malawi, Thailand, United States of America and Venezuela.[22] However, UNCLOS represents the most recent international statement regarding the definition and jurisdictional scope of piracy. Articles 100 to 107 of UNCLOS in particular, provide the legal framework for the repression of piracy under international law. The preambles to UNSCR 1848 and 1851 (2008) reaffirm 'that international law, as reflected in UNCLOS, sets out the legal framework applicable to combating piracy and armed robbery at sea, as well as other ocean activities.'[23] UNSCR 1838 (2008) also has similar provisions.[24]

Article 100 of UNCLOS makes a provision that 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. The HSC convention has a similar provision under article 14. Doubt has been expressed historically as to whether this duty extends to requiring that states have an adequate national criminal law addressing piracy.[25] 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.[26]

The jurisdiction and powers granted to states to suppress acts of piracy apply in all seas outside any State's territorial waters.[27] Notably, article 101 makes a reference to piracy occurring on the "high seas" which may be slightly misleading. Although article 86, UNCLOS excludes the Exclusive Economic Zone (EEZ) from being counted as part of the high seas for other purposes, in a way suggesting that piracy in the EEZ is a matter for the coastal State, article

[22] See status of conventions by country (Sept.30.2012) available at http://www.imo.org
[23] United Nations Security Council Resolution 1848; United Nations Security Council resolution 1851 (2008);
[24] United Nations Security Council Resolution 1838(2008) operative paragraph 3.
[25] Joseph W. Bingham, 'Harvard Research in International Law: Draft Convention on Piracy', American Journal of International Law Vol.26 (1932) pp755–756 On the modern position see Laurent Lucchini and Michel Voelckel, *Droit de la mer*, Tome 2, vol. 2 (Pedone, 1996), pp 158-9.
[26] Preamble to UNSCR 1851 (2008)
[27] See article 105 UNCLOS and article 4(4) of the Djibouti Code of Conduct

58(2) qualifies this exemption by providing that articles 88 to 115 and other pertinent rules of international law apply to the exclusive economic zone in so far as they are not incompatible with this Part. This makes it clear that the provisions of the high seas regime (including all provisions on piracy) "apply to the exclusive economic zone in so far as they are not incompatible with" UNCLOS provisions on the EEZ.

Within the EEZ the coastal state enjoys sovereign rights "for the purpose of exploring and exploiting, conserving and managing the natural resources" and jurisdiction over certain other subject matters.[28] Otherwise in regard to the crime of piracy, article 56 shows nothing incompatible with the UNCLOS provisions on piracy, and therefore going by the provisions of Article 58(2), the general law of piracy applies to all pirate attacks outside territorial waters. Indeed, this was the position taken in a piracy case in Seychelles where the Hon. Judge Gaswaga agreed that:

> "The exclusive Economic Zone (EEZ) – stretching for up to 200 nautical miles past the territorial seas – is essentially concerned with resources. The law of the coastal state does not apply in the EEZ and it does not have general enforcement rights. Other than as regards resources, EEZ's are counted as the high seas."[29]

There are various powers granted to suppress piracy under UNCLOS. Under article 107 of UNCLOS, only a warship or military aircraft, or other ship or aircraft clearly marked and identifiable as being on government service and authorized to that effect on the high seas has the power: to visit any vessel that it has a reasonable ground for suspecting of being engaged in piracy and, if suspicions are not resolved by an inspection of its documents, proceed to search it[30]and to seize any pirate vessel and arrest any suspected pirates.[31] These powers are subject to a duty to compensate a vessel for any loss or injury suffered as a consequence of inspection/arrest

[28] United Nations Convention on the Law of the Sea, Article 56
[29] The *Republic vs Mohamed Ahmed Dahir & 10 others*, Supreme Court of Seychelles, p 57
[30] United Nations Convention on the Law of the Sea, article 110
[31] United Nations Convention on the Law of the Sea Under article 105

where suspicions of piracy prove unfounded and the vessel has not committed any act justifying them.[32]

Notably, under article 101(b) UNCLOS, Piracy includes "any act of voluntary participation in the operation of a ship with knowledge of facts making it a pirate ship." A pirate ship is one "intended by the persons in dominant control to be used" in a pirate attack or which has been used in such an attack and is still under the same control.[33] Thus a warship has a clear right of visit and inspection where it suspects a vessel is under the control of persons intending to use it for a future pirate attack. Indeed, it may arrest persons on the basis that they intended to carry out a future pirate attack.

By definition, the powers of visit, seizure and arrest are granted on the high seas or in the exclusive economic zone of a State as discussed above and thus do not extend to pursuing pirates into foreign territorial waters without the coastal State's consent. Without such consent, the exercise of law enforcement /powers by a pursuing warship over a fleeing pirate vessel within foreign territorial waters would *prima facie* be unlawful.[34] But UNSCRs 1816 (operative paragraph 7), 1846 (operative paragraph 10) and 1851 (operative paragraph 6) provide a mechanism for 'co-operating States' to enter the territorial waters and land territory of Somalia, based both on the consent of Somalia and the authority of Chapter VII.

2.4 Jurisdiction over pirates

UNCLOS Article 105 refers only to the power of the seizing state to try a seized pirate and decide upon the penalties to be imposed. However, as a matter of customary international law, every state has jurisdiction to prosecute a pirate subsequently present within their territory

[32] See article 106 and 110 (3) UNCLOS
[33] Art.103UNCLOS
[34] Lucchini and Voelckel, *'Droit de la mer', Tome* vol. 2, (Pedone, 1996) pp158-9

irrespective of any connection between the pirate, their victims or the vessel attacked and the prosecuting state under universal jurisdiction.[35]In addition to the existence of universal jurisdiction at public international law, states may also have jurisdiction over suspected pirates on other bases as a matter of national law. Following ordinary principles of criminal jurisdiction, the state of the suspected pirate's nationality, the state of nationality of the suspected pirate's victim and the flag state of any involved vessels may all also have valid claims of jurisdiction over a suspected pirate. An act of piracy, like a number of other offences, may provide a number of states with equally valid claims to exercise jurisdiction over an offence.[36] This is because a pirate vessel does not necessarily lose its nationality (Article 104, UNCLOS), and may still be subject to its flag State's jurisdiction *in addition* to the jurisdiction of the State of the seizing warship.[37]

The law of piracy under UNCLOS does not place any express responsibility upon a seizing state to try an arrested pirate. It merely provides under article 105 UNCLOS that the courts of the seizing state "may" decide upon the penalties to be imposed, that is, including prosecution and the action to be taken with regard to ships, aircraft or property, subject to the rights of third parties acting in good faith. On its face, this is a discretionary power not an obligation.[38] However, in exercising this discretion a state should bear in mind its duty under article 100 to "cooperate to the fullest possible extent in the repression of piracy." UNCLOS has some limitations. According to Article 101 of the UNCLOS Convention, there are three main conditions that must be met before an incident can be characterized as an act of piracy: Firstly, it has to be determined whether the act occurred on the high seas or outside the jurisdiction of all

[35] Ian Brownlie, *Principles of Public International Law*, 7th ed. (Oxford University Press, 2008) p 229;
[36] ibid
[37] United Nations Convention on the Law of the Sea, Article 104
[38] Lucchini and Voelckel, *Droit de la mer, Tome* , vol. 2 (Pedone, 1996) p 176.

states. Secondly, the aggressors must have attacked the vessel from another vessel and lastly "private ends" must have been the sole motivation.[39]

The UNCLOS definition thus has a second ship requirement which is a limitation in that it only covers, under Article 101(a)(i), attacks committed from a private vessel against another vessel. It therefore does not cover internal hijackings or the seizure of a vessel from within by passengers, or its own crew.[40] In this regard, hijackings such as the *Achille Lauro* incident discussed herein below and which prompted the drafting of the Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation 1988would therefore not be piracy under the UNCLOS definition.

UNCLOS also 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[41]. Besides mutiny any unlawful acts of violence by a government vessel against another craft are a matter of state responsibility, not the law of piracy. Some slight ambiguity is introduced by the words "any illegal acts of violence or detention, or any act of depredation" in Article 101(a). Under this article, the offence of piracy becomes operative only when illegal or violent acts are committed. What amounts to illegality remains subject of speculation for it is unclear under what system of law municipal or international must acts be illegal.

It did not take long for the perceived gaps in the convention to be exposed and for the provisions of UNCLOS to be tested. Barely three years after, in 1985, the *Achille Lauro,*[42] an Italian flag cruise ship, which was sailing from Alexandria to Port Said, was seized by some

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[39] Azubuike, Lawrence "International Law Regime Against Piracy," *Annual Survey of International & Comparative Law*: Vol. 15: 1 (2009) p14

[40] ibid

[41] Art.102 UNCLOS

[42] Dean C. Alexander, International Transportation Lae: Maritime Terrorism and Legal Responses, Transportation Law Journal Vol. 19 (1991) pp 453-493:464

members of the Palestine Liberation Front (PLF), a faction of the Palestine Liberation Organization (PLO). One passenger was killed by the hijackers. Some characterized the hijacking as piracy while others did not see it as such because there was no second ship or vessel involved and also because of the perceived political motives of the hijackers.[43] The supposed gaps coupled with the stark reality of the *Achille Lauro* incident gave the motivation for Italy, supported by Austria and Egypt, to propose a convention to address maritime terrorism.[44] The resulting Convention, the Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation 1988 hereinafter referred to as the SUA Convention, essentially eliminates the restrictions discussed above in relation to UNCLOS[45] 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 or internal hijacking.[46]

Article 3 of the Suppression of Unlawful Acts Against the Safety of Maritime Navigation 1988 creates a number of offences. Most relevant for present purposes is Article 3(1)(a), stating that "any person commits an offence if that person unlawfully and intentionally ... seizes or exercises control over a ship by force or threat thereof or any other form of intimidation". There is no requirement that the seizure be internal or be politically motivated. Thus any pirate seizure of a vessel off Somalia will clearly fall within this definition. Attempting, abetting and threatening such an offence are equally crimes under the Convention.[47]

A look at the SUA convention reveals that it does not expressly cover the crime of piracy or offences as defined under UNCLOS. The SUA Convention creates a separate offence as

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[43] Havina Halberstam, 'Terrorism on the High Seas: The Achille Lauro, Piracy and the IMO Convention on Maritime Safety', *American Journal of International Law* Vol 82. (1988) p 269-272

[44] Sittnick, State Responsibility and Maritime Terrorism in the Strait of Malacca: Persuading Indonesia and Malaysia to Take Additional Steps to Secure the Strait, *Pacific Rim Law. & Policy Journal* Vol 14 (2005) pp 743-769: 759

[45] Ibid p 760

[46] IMO Doc. PCUA 1/3 (3 February 1987), Annexe, paragraph 2

[47] Article 3(2) SUA Convention

among State parties. However, the type of piracy commonly committed off Somalia involves both an attack from one vessel against another and acts of violence intended to seize control of a ship. Such acts can clearly constitute both piracy and an offence under the SUA Convention.[48] Not all piracy however will fall within the SUA Convention. An act of theft ('depredation') that did not endanger the safety of a vessel, and was committed by one vessel against another, could be an example of piracy which would not be a SUA Convention offence. On the other hand, as noted, the internal hijacking of a vessel would be a SUA Convention offence but not piracy. The crimes are distinct but may overlap on some sets of facts.[49] It is important to note, however, that unlike UNCLOS, which is considered as reflective of customary international law, the SUA Convention is only binding on State parties to the Convention who are required to create appropriate domestic offences. Thus, in this regard, it is still of limited application when compared to UNCLOS.[50]

In regard to Jurisdiction under the SUA convention, unlike UNCLOS, the SUA Convention creates an express obligation upon parties to create appropriate domestic offences. In this regard, States parties must make the offences in Article 3 a crime under national law when committed either against or on board their flag vessels or within their territory, including their territorial sea; or by one of their nationals[51]. In addition States parties may establish criminal jurisdiction where a relevant offence is committed, *inter alia*, against one of their nationals or in an effort to compel their government to do or abstain from doing any given act.

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[48] Azubuike, Lawrence "International Law Regime Against Piracy," *Annual Survey of International & Comparative Law*: Vol. 15: No. 1 (2009) p 14

[49] Lucas Bento, 'Towards an international law of Piracy *Sui Generis:* How the Dual nature of Maritime Piracy law Enables Piracy to Flourish' *Berkeley of International Law* Vol.29:2 2011 pp399-455:425

[50] Azubuike, Lawrence "International Law Regime Against Piracy," *Annual Survey of International & Comparative Law*: Vol. 15: No. 1 (2009) p 14

[51] ibid

The most important jurisdictional provisions are those dealing with the obligation to either extradite or submit the case for consideration by prosecutorial authorities (commonly, referred to an obligation to "extradite or prosecute"). Where a state subsequently finds a suspect or offender within its territory (the territorial state) and another State party or parties have jurisdiction under article 6, then the territorial state: shall if it does not extradite him, be obliged 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.[52]

In this regard, each party must establish jurisdiction over the offences set forth in article 3 in cases where the alleged offender is present in its territory and it does not extradite him to any of the state parties which have established their jurisdiction in accordance with the obligations described above. This may be described as a limited form of universal jurisdiction as it allows the prosecution of individuals lacking relevant nexus to the prosecuting state and once a piracy suspect is within the territory of a state, the state may have jurisdiction over that person as a matter of universal jurisdiction over piracy; and/or as a matter of jurisdiction under the SUA Convention.[53]

Apart from the SUA convention we also have the International Convention Against the Taking of Hostages 1979. This convention entered into force on June 3 1983 after state parties become convinced that it was urgently necessary to develop international cooperation between states in devising effective measures for the prevention, prosecution and punishment of all acts of taking of hostages as manifestations on international terrorism.[54]

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[52] Lucas Bento, 'Towards an international law of Piracy *Sui Generis:* How the Dual nature of Maritime Piracy law Enables Piracy to Flourish' *Berkeley of International Law* Vol.29:2 2011 pp399-455:425

[53] ibid

[54] International Convention Against the Taking of Hostages, 1979, preamble

Article 1 of the Hostage Taking Convention provides that: "Any person who seizes or detains and threatens to kill, to injure or to continue to detain another person hereinafter referred to as the 'hostage') in order to compel a third party to do or abstain from doing any act as an explicit or implicit condition for release of the hostage" commits the offence of hostage-taking." This definition is clearly met where a hostage is detained, threatened with continued detention, and a condition of his or her release is that a private person or company pay a ransom as is typical with piracy offences being committed off the coast of Somalia.[55]

The Convention contains no express territorial limitations, a point brought out by Article 5 under which each party is obliged to establish jurisdiction over the offence defined in Article 1 where committed, *inter alia*: (a) In its territory or on board a ship or aircraft registered in that State;(b) By any of its nationals or if that state considers it appropriate by those stateless persons who have their habitual residence in its territory;(c) in order to compel that State to do or abstain from doing any act; or (d) With respect to a hostage who is a national of that State, if that State considers it appropriate. In this regard, one may conclude that the Convention is clearly capable of applying to events occurring at sea.[56]

Notably, the Convention provides no hierarchy of jurisdiction but does include an "extradite or prosecute" obligation drafted slightly differently to that in the SUA Convention. The most significant difference is that the Hostage Taking Convention contains a discretionary ground for refusing extradition where it has substantial grounds for believing that extradition has been requested for the "purpose of prosecuting or punishing a person on account of his race, religion, nationality, ethnic origin or political opinion" or where their position may be prejudiced

[55] Azubuike, Lawrence "International Law Regime Against Piracy," *Annual Survey of International & Comparative Law*: Vol. 15: No. 1 (2009 p 15
[56] Ibid

for such reasons under article 9 of the convention although such grounds are unlikely to apply in relation to current Somali pirate hostage-takings.

When compared to SUA, the Hostage-taking Convention doesn't add much to the SUA for present purposes, but it may nevertheless provide an alternative basis of jurisdiction where a state is not a party to SUA and has no domestic laws suitable for the prosecution of pirates.

2.5 Piracy as a Breach of *Jus Cogens*

Jus cogens refers to the legal status that certain international crimes reach.[57] It follows that such a norm of *jus cogens* describes the barest minimum of acceptable behavior that no state may derogate from. The threshold question with respect to the consequences of recognizing an international crime as *jus cogens* is whether such a status places *obligations erga omnes* on states, or merely gives them certain rights to proceed against perpetrators of such crimes. Notably, the implications of *jus cogens* are those of a duty and not of optional rights; otherwise, *jus cogens* would not constitute a peremptory norm of international law. As a result, these obligations are non-derogable in times of war and peace.[58] Thus, recognizing certain international crimes as *jus cogens* carries with it the duty to prosecute or extradite[59] the non-applicability of statutes of limitation for such crimes[60] and universality of jurisdiction[61] over such crimes irrespective of where they were committed, by whom, against what category of victims, and irrespective of the context of their occurrence be it in times of peace or war. Above all, the

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[57] Leslie C.Green, 'Is There an International Criminal Law?', *Alberta Law Review* Vol.21 (1983) p 251

[58] Farooq Hassan, 'The Theoretical Basis of Punishment in International Criminal Law', *Journal of International Law*, Vol. 39, 1983.pp 51-60

[59] G.O.W. Mueller, 'International Criminal Law: Civistas Maxima', *Journal of International Law*, Vol. 39, (1983)

[60] M. Cherif Bassiouni, 'The Proscribing Function of International Criminal Law in the Process of International Protection of Human Rights', Yale *Journal World Publication*, vol. 8 (1982) p193

[61] Leslie C. Green, 'New Approach to International Criminal Law', *SOLIC.* Vol .28 (1961) p 106-108

characterization of certain crimes as *jus cogens* places upon states the obligation not to grant impunity to the violators of such crimes.

Systems of law usually establish a hierarchy of norms based on the particular source from which the norms derive.[62] *Jus cogens* norm holds the highest hierarchical position among all other norms and principles.[63] As a consequence of that standing, *jus cogens* norms are deemed to be "peremptory" and non-derogable.[64] Such a norm is defined by the Vienna Convention on the Law of the Treaties as one "accepted and recognized by the international community of states as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general inter-national law having the same character."[65]

Some scholars see *jus cogens* sources and customary international law as the same,[66] others distinguish between them,[67] while still others see *jus cogens* as simply another way of describing certain "general principles".[68] The legal literature however discloses that Piracy including other crimes such as genocide, crimes against humanity, war crimes, aggression, slavery and slave-related practices, and torture are part of *jus cogens*. [69]

2.6 Judicial decisions

Article 38 of the International Court of Justice includes among the possible sources of international law judicial decisions as a subsidiary means for the determination of rules of law.

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[62] Shelton Dinah,' Normative Hierarchy in International', *The American Journal of International Law*, Vol. 100, No. 2 (2006), pp. 291-323

[63] Leslie C. Green, 'New Approach to International Criminal Law' *Solic*, Vol. 28.(1961) p106-108

[64] Max Radin, 'International Crimes', *Law Review*, Vol 33 (1946) p. 41-42

[65] Vienna Convention on the Law of Treaties U.N Doc/A/CONF.39/27 Article 53

[66] Carlos Alcorta, 'La Doctrina del Derecho Penal Internacional', *Revisita Argentina de Derecho Internacional* Vol.2 No.271, (1931).

[67] Guiseppe Sagone, 'Pour un Droit Pénal International', Revue International de Droit Pénal Vol.5No 363 (1928).

[68] G. Glover Alexander, 'International Criminal Law', *Journal of Comparative legislation and & International Law* Vol. 5 (1923) p 90

[69] Ibid, p. 89

Apart from decisions of international judicial bodies, decisions of a national court may amount to a statement of what that court considers to be international law on a particular matter. Such a decision would only carry weight as evidence of international law where the court is of very high standing and where the international law issue is central to the case and receives careful consideration. Courts determining piracy cases as will be noted in chapter four have in many ways influenced the development or interpretation of international law.

The international community rely on the domestic courts to prosecute the modern day pirates. It is these domestic courts that address common questions of international law regarding the exercise of universal jurisdiction, the elements of the crime of piracy and the principle of legality.

CHAPTER THREE

DOMESTIC LEGAL REGIMES ON PIRACY AND INTERNATIONAL LAW

3.0 Introduction

The previous chapter looked at the international legal regime on piracy and highlighted the various sources of international law. It examined how universal jurisdiction over piracy developed through unwritten customary law and how it was later codified in the United Nations Convention on the Law of the Sea which has been ratified by 162 states[1].

Prosecutions of acts of piracy are currently ongoing in about 10 states: Kenya, Seychelles, Somalia (in the Somaliland and Puntland regions), Maldives, Yemen, the Netherlands, United States of America, France, Spain and Germany.[2] Mauritius is another country willing and ready to take up suspected Somali pirates for prosecution.

International law deals with international disputes and conflicts and like any other system of law, the role of international law is to regulate relations and thus help to contain and avoid disputes and conflicts in the first place.[3] Recognising that sometimes international and domestic law work at cross purposes in various areas, this chapter examines the municipal law on piracy of states actively engaged in undertaking piracy prosecutions with focus on Kenya and Seychelles and examines the relationship of such law with international law.

3.1 Interaction between international and domestic law

Considering the law of piracy is settled both in treaty as well as customary law, one may wonder if it is possible that it is directly applicable in municipal systems without the need for

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[1] See status of conventions by country (Sept.2012) available at http://www.imo.org

[2] United Nations Security Council S/2010/394, a report of the Secretary General (Distr.: General 26th July 2010) p 14

[3] Sam Blay, 'The Nature of International Law in Public International Law: An Australian Perspective' in S. Blay, R Piotrowicz and B.M Tsamenyi eds, 2nd ed, (Oxford University Press, 2005) 2005 p.3

implementing legislation. Some states accept that international law, especially with regard to *jus cogens* or very serious crimes (such as crimes against humanity and war crimes), applies directly within that state without the need to pass such legislation.[4] With regard to piracy, whether or not it may apply directly would appear to hinge on a number of factors, including the gravity of the offence, whether there is a duty to prosecute in international law, whether the applicable treaties are self-executing, and the nature of a municipal system as monist or dualist.

Direct application of international law has precedent in African states. An example is the 2010 Kenyan Constitution which provides in Article 2 that the general rules of international law shall form part of the law of Kenya and that any treaty or convention ratified by Kenya shall form part of the law of Kenya under the Constitution.[5]

States view the interaction between international and national law in two different ways. The theories of monism and dualism are the two main theories used to describe the relationship between international and domestic law.[6] The theories are important as they help to understand what happens if the two rules are in conflict. The monist school maintains that international law and municipal law are part of one overarching legal system. Thus treaties that a state has ratified are automatically part of municipal law, and are binding in that domain since there is no competing relationship between them. In this regard, municipal law must be consistent with international law and both municipal law and international law must respect the values of the overarching legal system which is founded on natural law.[7]

In this theory, all law is part of a universal legal order and regulates the conduct of the individual state. The difference in the international sphere is that the consequences are generally

[4] Shelton Dinah,' Normative Hierarchy in International', *The American Journal of International Law*, Vol. 100, No. 2 (2006), pp. 291-323

[5] Constitution of Kenya, eKLR, 2010

[6] D.J. Harris, *Cases and Materials on International Law*, 2nd ed., (London: Sweet &Maxwell, 1979) pp 60-62.

[7] Makumi Mwagiru, 'From Dualism to Monism: The Structure of Revolution in Kenya's Constitutional Treaty Practice' *Journal of Language, Technology & Entrepreneurship in Africa Vol. 3 No. 1 2011* pp 144-155:146

attributed to the state. Since all law is part of the same legal order, international law is automatically incorporated into the domestic legal order and does not need to be translated into law. Notably, "monist systems" do differ in their approach. Under some Constitutions direct incorporation of international obligations into the domestic law occur on ratification. In other states however direct incorporation occurs only for self-executing treaties. Some monist theorists consider that international law prevails over domestic law if they are in conflict; others, that conflicting domestic law has some operation within the domestic legal system.

Dualism on the other hand holds that international law and domestic law are separate bodies of law, operating independently of each other. Under dualism, rules and principles of international law cannot operate directly in domestic law, and must be transformed or incorporated into domestic law before they can affect individual rights and obligations. [8]

For states with a "dualist system", international law is not directly applicable domestically. It must first be translated into national legislation before it can be applied by the national courts. Therefore, for a dualist state taking the example of the SUA convention, ratification of the statute is not enough and national implementing legislation is necessary. Trials in relation to offences against the SUA Convention for example, can only take place when the national legislation is enacted, unless of course such legislation already exists in a state.

The main differences between international and domestic law are thought to be the sources of law, its subjects, and subject matter. International law derives from the collective will of states, its subjects are the states themselves, and its subject matter is the relations between states. Domestic law derives from the will of the sovereign or the state, its subjects are the

[8] Jackson J.H, 'Status of Treaties in Domestic Legal Systems: A Policy Analysis' *The American Journal of International Law*, Vol. 86, No. 2 (Apr., 1992), pp. 310-340: 315

individuals within the state, and its subject matter is the relations of individuals with each other and with government.[9]

Notably a third perspective also exist argued by Fitzmaurice and it maintains that municipal law and international law operate in distinct fields; each being supreme in its own field, and there is no common field between them.[10] In this perspective, coordination theory maintains that the two can never come into conflict; and that the only issue is the inability of the state to act domestically as required by international law. In this regard, states choose whether they want to be monists, or dualists, or how they wish to coordinate the two systems of law.

Kenya was traditionally a dualist system meaning that treaty provisions did not have immediate effect nor did they provide a basis upon which an action may be commenced in domestic courts. For international law to become part and parcel of national law, incorporation was necessary, either by new legislation, amended legislation or existing legislation. The court of appeal in *Rono vs Rono & Another* (2005)[11] extensively examined the applicability of international laws in the domestic context and noted that Kenya subscribes to the common law view that international law is only part of domestic law where it has been specifically incorporated.

In *RM & another vs. Attorney General* [12] the court noted *inter alia* as a general principle that unless there is a provision in the local law of automatic domestication of Convention or Treaty, the Convention does not automatically become municipal law unless by virtue of ratification. The court further went on to hold that where the words of the constitution or statute

[9] Shaw Malcolm N, *International Law,* Fourth ed (Cambridge University Press, 1997) p.1
[10] Fitzmaurice, G. 'The General Principles of International Law Considered from the Standpoint of the Rule of Law.' *Hague Recueil* Vol. 92 (1957) pp 68-94.
[11] *Rono vs Rono & Another* eKLR p538
[12] *R.M vs Attorney General,* (2006) eKLR . pp27-28

are unambiguous the courts have no choice but to enforce the local law irrespective of any conflict with international agreements.

Notably, the above mentioned cases were adjudicated under the repealed constitution which did not have any provisions regarding international laws or treaties. The current constitution[13] has however changed the treaty practice in what Kuhn would describe a paradigmatic shift and imports the Treaties and Conventions that Kenya has ratified, including the general principles of international law.[14]

Under Article two, the general rules of international law and any treaty or convention ratified by Kenya shall form part of the law of Kenya under the Constitution."[15]Therefore, unlike before when Kenya was operating under the dualism system of law, the current Constitution of the Republic of Kenya acknowledges and entrenches two other sources of the law of Kenya thereby moving from dualism to monism.

Apart from the Constitution which is the most supreme law of the land, section 3 of the Judicature Act,[16] sets out the remaining hierarchy of laws in so far they relate to criminal proceedings which is as follows:-

> (b) Subject thereto, all other written laws, including the Acts of parliament of the United Kingdom cited in part I of the schedule[17] to this Act modified in accordance with part II of that schedule;
>
> c) subject thereto and so far as those written laws do not extend or apply, the substance of the common law, the doctrines of equity and the statutes of general application in force in England on the 12th of August 1897 and the procedure and practice observed in courts of justice in England at that date"

[13] Approved by the referendum on 4 August 2010 and promulgated on 27 August 2010

[14] Makumi Mwagiru, 'From Dualism to Monism: The Structure of Revolution in Kenya's Constitutional Treaty practice' *Journal of Language, Technology & Entrepreneurship in Africa Vol. 3 No. 1 2011* p. 154

[15] The Constitution of Kenya, 2010

[16] Chapter 8 of the laws of the Kenya

[17] These include: The Admiralty offences (Colonial) Act 1849; The Evidence Act 1851, sections 7 and 11;The Foreign Tribunals Evidence Act 1856; The Evidence by Commission Art 1859; The British Law Ascertainment Act 1859; The British Law Ascertainment Act 1859; The Admiralty Offences (Colonial) Act 1860; The Foreign Law Ascertainment Act 1861; The Conveyancing (Scotland) Act 1874, section 51; and the Evidence by Commission Act 1885.

Notably, the common law, the doctrines of equity and the statutes of general application shall apply as the circumstances of Kenya and its inhabitants permit and subject to such qualifications as those circumstances may render necessary. In this regard, it is important to note that common law and equity have developed through the doctrine of judicial precedents and stare decisis which means that in trying and deciding cases as a judge, he must look back to see how previous judges have dealt with the case involving similar facts.

In regard to the court system, under the new Constitution, Kenya now has a four (4) tier court system hierarchy with the establishment of the Supreme Court.[18] The Supreme Court is the most senior court and its judgments, directions and orders under the principle of judicial precedent are binding on all courts throughout the republic except itself. For criminal proceedings, the relevant courts are the Supreme Court which hears appeals from the high Court followed by the High Court which hears appeals from the subordinate courts in both civil and criminal matters. The high court has unlimited original jurisdiction in criminal and civil matters, in addition to all other powers as may be conferred on it by the Constitution and any other laws.[19] In practice, however, it currently acts as the court of first instance in murder and treason charges. The magistrates courts are the lowest and ranked under the Magistrate's Courts Act[20] as follows in the descending order: Chief Magistrate, Senior Principal Magistrate, Principal Magistrate, Senior Resident Magistrate, Resident Magistrate and District Magistrate.

In respect to piracy trials under the Penal Code, section 3 of the Criminal procedure Code[21] provides that all offences contained in the Penal Code are to be dealt with according to the Criminal Procedure Code and under section 4, an offence may be tried before the High Court

[18] Constitution of Kenya, article 163(1) Previously, the court of Appeal was the most senior court and its decisions were binding on all courts throughout the republic except itself.
[19] Kiage Patrick, Essentials of Criminal Procedure in Kenya, (Nairobi Law Africa Publishing (K) Ltd, 2010) p 15
[20] Magistrate's court Act, Chapter 10 of the laws of Kenya eKLR
[21] Criminal Procedure Act, Chapter 75 of the Laws of Kenya eKLR

or by a subordinate court. The offence of piracy can be tried by a subordinate court of the first class presided over by a chief magistrate as provided by the first schedule to the code. Section 7 deals with the sentencing powers of subordinate courts and as piracy offences fall under the jurisdiction of a subordinate court of the first class, the relevant provision is section 7 (1).[22] The same provides that a subordinate court of the first class held by a chief magistrate, senior principal magistrate, principal magistrate or senior resident magistrate may pass any sentence authorised by law for any offence triable by that court.

In respect to trial under the Merchant Shipping Act in Kenya, the same are tried by the Magistrates' Court in Kenya just as the ones under then Penal Code. Objections have however been raised by defence counsels in various cases to the effect that the magistrates courts do not have jurisdiction to try piracy offences and that only the High Court has that jurisdiction. The High Court of Kenya[23] has since resolved that issue and held that the magistrate's courts have jurisdiction which decision has been used as a precedent in subsequent cases where the same issue has been raised in the magistrate courts.

3.2 Municipal law on piracy in Kenya

Since 2006 when Kenya starts prosecuting suspected Somali pirates, the the offence of piracy in Kenya has been captured in two different statutes; the Penal Code[24] and presently the Merchant Shipping Act[25] The majority of piracy prosecutions in Kenya have been undertaken under the Penal Code. Indeed out of the eighteen (18) piracy cases that Kenya has taken up for prosecution,

[22] See section 7(1) (a) of the Criminal Procedure Code Cap 75 of the Laws of Kenya
[23] In the High Court of Kenya Mombasa, Misc. Criminal Application No.72 of 2011. Republic vs Abdirahman Isse Mohamud and 3 others. This was a reference from trial proceedings in Chief Magistrate's Court Criminal Case No. 3012 of 2010, by virtue of section 76 and 81 of the Criminal Procedure Code (Cap. 75 Laws of Kenya.)
[24] Chapter 63 of the Laws of Kenya
[25] Merchant Shipping Act , Act No 4 of 2009

twelve of them have been under the Penal Code and six (6) of them under the Merchant Shipping Act.

Under the Penal Code, the same does not outline the elements of piracy. The Act merely provides that any person who, in territorial waters or upon the high seas, commits any act of piracy *jure gentium* is guilty of the offence of piracy.[26] It also provides that any person who, being the master, officer or member of the crew of any ship and a citizen of Kenya, unlawfully runs away with the ship; or unlawfully yields it voluntarily to any other person; or hinders the master, an officer or any member of the crew in defending the ship or its complement, passenger or cargo; or incites a mutiny or disobedience with a view to depriving the master of his command, is guilty of the offence of piracy."[27]

The Penal Code does not define what constitutes piracy *jure gentium.* Thus one has to result to other sources to determine how to draft the charge and the ingredients thereof; what the elements of the crime of piracy *jure gentium* are; and what evidence should be presented in court to prove the offence.[28] One has therefore to resort to international instruments, Treatises and commentaries by authors of repute as to what constitutes piracy *jure gentium.*In this regard, domestic courts have a very important role as will be discussed in chapter four in determining whether the actions alleged to be piracy are indeed piracy *jure gentium* as recognised by international law.

The phrase "*piracy jure gentium*" is a latin phrase which means piracy by the law of nations or piracy as known in international law. From this provision and looking at the Penal Code provisions relating to piracy, it is clear that the offence of piracy created in Kenya is the

[26] Section 69(1) of the Kenyan Penal Code
[27] Section 69(2) of the Penal code
[28] Jacob Ondari, Head of anti Piracy Unit Mombasa, 'The Prosecution of Piracy Cases: The Kenyan Prosecutor's Experience todate' a paper presented in the EU/UNODC Counter Piracy Training programme, 25th June 2009.

one as known and understood in international law. However, since the Penal Code does not define that phrase "*piracy jure gentium*" or enumerate the acts that constitute the offence, resort has, in the circumstances to be had to international law for the definition and exact understanding of the offence. According to Stephen[29] 'Every one commits piracy by the law of nations who, without legal authority from any state and without any colour of right:-

> a)Seizes or attempts to seize any ship on the high seas within the jurisdiction of the Lord Admiral by violence or by putting into fear those in possession of such ship; or
>
> b) Attacks such ship and takes and carries away any of the goods thereon by violence or by putting those in possession of such ship in fear; or
>
> c)Attacks or attempts to attack such ship with intent to take and carry away any of the goods thereon by violence or by putting those in possession of such ship in fear; or
>
> d) Attacks such ship and offers violence to anyone on board thereof or attacks or attempts to attack such a ship with intent to offer violence as aforesaid'

By this definition, Kenya was conferred with what is referred to as 'Universal jurisdiction' under Customary International Law to try piracy.[30]

As discussed in chapter three, the doctrine of universal jurisdiction allows any nation to try certain offenders who have committed international crimes, even if the crime, the defendant and the victims have no nexus with the state carrying out the prosecution. An offence subject to the universal jurisdiction is one which comes under the jurisdiction of all states whenever it is committed. It is what is referred to as *piracy by law of nations.*

Notably, the definition of piracy under the repealed provisions of the Penal Code was broader than the definition under international law since it included the crime within Kenya's

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[29] Stephen's Digest of Criminal Law, 9th ed.(Macmillan, London 1950) pp 101

[30] M. Cherif Bassiouni, Universal Jurisdiction for International Crimes: Historical Perspectives and Contemporary Practice, Virginia Journal of International Law, Vol. 42 (2001) pp 136-51 arguing that universal jurisdiction over piracy is firmly established under international law and that it developed, in part, in the national laws and practices of major seafaring nations.

territorial waters. What is to be noted is that while UNCLOS adopts the view that piracy is committed in the high seas, there are differing opinions and views on the traditional content of the international law of piracy, as well as a variety of approaches adopted by national laws on piracy. [31] A person found guilty of the offence of piracy *jure gentium* under the Penal Code is liable to a maximum penalty of life imprisonment.[32]The repealed piracy provisions were replaced by more elaborate piracy provisions under the Kenya's 2009 Merchant Shipping Act as discussed here below. However, all the cases commenced under the Penal Code prior to the president signing the new law continue to be prosecuted under the provisions of the penal code.[33] Thus prosecutions under the Merchant Shipping are only based on crimes committed after the law took effect.

The Merchant Shipping Act of 2009 was passed by the Kenyan parliament on 12th February 2009. The president of Kenya[34] subsequently signed it into law on 29th May 2009 and it came into operation on the 1st September, 2009. The said Act domesticates the UNCLOS[35] definition of Piracy. The new law brings Kenya into compliance with a variety of international maritime conventions. The new law partly incorporates a variety of provisions of the UNCLOS and the 1988 Convention for the suppression of Unlawful Acts against the Safety of Maritime Navigation (SUA Convention).[36] Section 369 of the Merchant Shipping Act[37] adopts the definition of piracy contained in Article 101 of the UNCLOS. It provides as follows:

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[31] Barry Hart Dubner, *The Law of International Sea Piracy*, (The Hague: Martinus Nijhoff, 1980) pp38-39

[32] Section 69 of the Penal Code para. 3

[33] Constitution of Kenya section 77(4) (1998) provides: "No person shall be held to be guilty of a criminal offence on account of an act or omission that did not, at the time it took place, constitute such an offence, and no penalty shall be imposed for such an offence that is severer in degree or description than the maximum penalty that might have been imposed for that offence at the time when it was committed."

[34] President Mwai Kibaki

[35] Kenya ratified UNCLOS on March 23rd, 1989

[36] Apart from ratifying UNCLOS, Kenya has also ratified the 1988 SUA Protocol. See status of conventions by country (Sept.2012) available at http://www.imo.org

[37] Section 369(1) of the Merchant Shipping Act Kenya

"piracy" means -

> (a) "Any act of violence or detention, or any act of depredation, committed for private ends by the crew or the passengers of a private ship or a private aircraft, and directed—
> (i) Against another ship or aircraft, or against persons or property on board such ship or aircraft; or
> (ii) Against a ship, aircraft, persons or property in a place outside the jurisdiction of any State;
> (b) Any voluntary act of participation in the operation of a ship or of an aircraft with knowledge of facts making it a pirate ship or aircraft; or
> (c) Any act of inciting or of intentionally facilitating an act described in paragraph a or (b);"

The Merchant Shipping Act[38] also defines a "pirate ship or aircraft" to mean a ship or aircraft under the dominant control of persons who:

> (a) "intend to use such ship or aircraft for piracy; or
> (b) have used such ship or aircraft for piracy, so long as it remains under the control of those persons."

It is also defined to mean a ship or aircraft that is not owned by the Government or held by a person on behalf of, or for the benefit of, the Government.

Notably, piracy committed by a warship, government ship or government aircraft whose crew has mutinied and taken control of the ship or aircraft is assimilated to piracy committed by a private ship or aircraft.[39] Also the part relating to aircraft only applies to aircraft when they are on the high seas.[40] The sentencing provision for the offences of piracy and armed robbery is found in section 371 of the Merchant Shipping Act. Under that section, any person who (a) commits any act of piracy; or (b) in territorial waters, commits any act of armed robbery against ships shall be liable, upon conviction, to imprisonment for life.

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[38] Section 369 (1) of the Merchant Shipping Act
[39] Section 369(2) of the Merchant Shipping Act
[40] that is to say, in those parts of the sea to which Part VII of UNCLOS is applicable, in accordance with Article 86 of UNCLOS.

On offences against safety of Ships, section 370 of the Merchant Shipping Act lists as offences those contained in Article 3 of the SUA Convention on hijacking and destroying ships with some minor modifications. It provides as follows:

> "(1) Subject to subsection (5)[41], a person who unlawfully, by the use of force or by threats of any kind, seizes a ship or exercises control of it commits the offence /of hijacking a ship.

Under subsection 2 thereof, which is still subject to subsection 5 discussed hereinabove, a person commits an offence if he unlawfully and intentionally:-

a) Destroys a ship;

b) Damages a ship or its cargo so as to endanger, or to be likely to endanger, the safe navigation of the ship;

c) Commits, on board a ship, an act of violence which is likely to endanger the safe navigation of the ship; or

d) Places or causes to be placed on a ship any device or substance which is likely to destroy the ship or is likely so to damage it or its cargo as to endanger its safe navigation."

Notably nothing in subsection (2) (d) is to be construed as limiting the circumstances in which the commission of any act may constitute—

> "(a) an offence under subsection (2) (a), (b) or (c); or
>
> (b) attempting or conspiring to commit, or aiding, abetting, counselling, procuring or inciting, or being of and part in, the commission of such an offence."[42]

To address non Kenyan suspects operating outside Kenya's territorial and maritime jurisdiction, section 370(4) provides that the law shall apply to these offenses "whether the ship

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[41] Which provides that Subsections (1) and (2) shall not apply in relation to any warship or any other ship used as a naval auxiliary or in customs or police service, or any act committed in relation to such a warship or such other ship unless the—
a) person seizing or exercising control of the ship under subsection (1), or committing the act under subsection (2), as the case may be, is a Kenyan citizen;
(b) act is committed in Kenya; or
(c) ship is used in the customs service of Kenya or in the service of the police force in Kenya.

[42] Merchant Shipping Act, Act No 4 of 2009 section 370(3)

referred to in those subsections is in Kenya or elsewhere; whether any such act as is mentioned in those subsections is committed in Kenya or elsewhere; and whatever the nationality of the person committing the act.[43] The new law therefore removes any doubt about jurisdiction over non Kenyan pirates arrested extraterritorially, and is not limited in this respect by the nexus requirements for jurisdiction set forth in Article 6 of SUA.[44] In regard to the sentence, under the Merchant Shipping Act, the penalty for hijacking or destroying a ship is life imprisonment.[45]

Unlike the Penal Code, the Merchant Shipping Act elaborates on the specific elements constituting the crimes of hijacking or destroying by giving prosecutorial authorities invaluable guidance.[46] It also defines "unlawfully" in relation to an act committed in or outside Kenya as meaning an act which would constitute an offence under the laws of Kenya.

The Merchant Shipping Act [47] criminalizes endangering the safe navigation of any ship and makes the offence punishable whether it is "committed in Kenya or elsewhere...whatever the nationality of the person committing the act."[48] The statute also provides that the master of a ship has an obligation to deliver to Kenyan authorities, or to any SUA Convention country, a person they reasonably believe to have committed any of the foregoing offenses.[49]

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[43] Merchant Shipping Act , Act No 4 of 2009 section 370 (4) (a), (b), and (c)
[44] Gathii J.T, Kenya's Piracy Prosecutions, *The American Journal of International Law* (2010) Vol. 104:416-436 at pg 430
[45] Section 370 (6) Merchant Shipping Act
[46] Section 370 (7) (a) and (b) defines an act of violence as any act done in Kenya or outside Kenya which constitutes the offence of murder, attempted murder, manslaughter, or assault;
[47] Section 372 of the Merchant Shipping Act
[48] Section 372(7) of the Merchant Shipping Act
[49] Section 373 of the Merchant Shipping Act

3.3 Municipal law on Piracy in Seychelles

Several pirate attacks have occurred sufficiently close to the Seychelles to alarm this nation's government and to prompt it to participate in the fight against Somali piracy.[50] In order to facilitate piracy prosecutions in Seychelles, the parliament in 2010, revised the offence of piracy under the Seychellois Penal law. Before 2010, the offence of piracy was defined under the Seychellois penal law as follows:

> "any person who is guilty of piracy or any crime connected with or akin to piracy shall be liable to be tried and punished according to the law of England for the time being in force"[51]

The Seychellois courts according to established principles and case law[52] had interpreted the phrase "time being in force" as referring to the common law prevailing in England as at the 29th of June 1976 when Seychelles attained independence from Great Britain. This means that the offence of piracy did not exist as an independently defined crime under the Seychelles' law, and prosecutors needed to rely on British common law as of 1976 in each piracy prosecution. Later, in order to better facilitate piracy prosecutions, the Seychelles' parliament added a new piracy definition to the country's penal law under section 65(4) of the Seychelles Penal Code. Under the said section, piracy is defined as follows:

> "(a) Any illegal act of violence or detention, or any act of depredation committed for private ends by the crew or the passengers of a private ship or air craft for private ends by the crew or the passengers of a private ship or aircraft and directed-
>
> (i) On the high seas, against another ship or air craft, or against persons or property on board such a ship or aircraft;
>
> (ii) Against a ship or an aircraft or a person or property in a place, outside the jurisdiction of any State;

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[50] *Yacht Pals*, 'Pirate Attacks on Sailing Yachts-Piracy Warnings,' at http://yachtpals.com/pirates-yachts-4092 (reporting on several pirate attacks off the Seychelles' coast in 2009) (accessed on 13th September 2012).

[51] See Republic vs. Abdi Ali and 10 others in Criminal side No: 14 of 2010, in the Supreme Court of Seychelles at pg. 2 of the judgment dated 3rd November 2010, citing section 65 of Seychelles Penal Code

[52] See Republic vs Ali at pg. 2. A similar interpretation had also been followed by Gaswaga J. in the case of Mohamed Ahmed Dahir & ten others in criminal side No.51 of 2009

(b) Any act of voluntary participation in the operation of a ship or an aircraft with knowledge of facts making it pirate ship or a pirate aircraft; or

(c) Any act described in paragraph (a) or (b) which, except for the fact that it was committed within a maritime zone of Seychelles, would have been an act of piracy under either of those paragraphs."[53]

In addition, section 65(5) further provides that:

" A ship or air craft shall be considered a pirate ship or pirate aircraft if-

(a) It had been used to commit any of the acts referred to in subsection (4) and remains under the control of the persons who committed those acts; or

(b) It is intended by the person in dominant control of it to be used for the purpose of committing any of the acts referred to in subsection (4)."[54]

Notably, the new piracy provisions in the Seychelles law is modelled closely on the UNCLOS definition of piracy which codifies customary international law. However, the new law is broader in its application than UNCLOS in several respects. First and fore most, the revised section 65 criminalizes the offence of conspiracy to commit piracy, enabling Seychellois prosecutors to go after piracy conspirators and enablers in addition to prosecuting simply those who execute.[55] Secondly, section 65(4) effectively dispenses with the "high seas" requirement of the UNCLOS definition of piracy, by stipulating that acts committed in the Seychelles maritime zone will amount to piracy, provided that other requirements of the piracy definition are satisfied.[56] Last but not the least, section 23 of the Seychelles Penal Code enables prosecutors to charge several defendants with the same offence, as long as all of such defendants had a "common intention" to commit the crime in question. In this regard, the Seychelles' prosecutors have been charging group of Somali pirates, who had all participated in the same

[53] See Republic vs Sayid and 8 others, criminal side No. 19 of 2010 at pg.11- 12 citing Seycheles Penal Code, section 65(4)
[54] See Republic vs Sayid, at pg 12- 13, citing Seychelles Penal Code, section 65(5)
[55] Ibid...
[56] Seychelles Penal Code, section 64(4) (c)

piracy incident, with the same offences under the "common intention" theory of criminal liability.[57]

Unlike Kenya which now has a four tier system, Seychelles has a three tier court set up with the Court of Appeal being the highest court of jurisdiction. Below the Court of Appeal is the Supreme Court followed by the magistrate court and other subordinate courts and tribunals such as the juvenile court and the rent board. The Magistrate's courts are normally the courts of the first instance. Constitutional cases are brought before the Constitutional court. The Supreme Court hears and takes original jurisdiction of some cases and it also sits as the Constitutional court in which it sits with a panel of 3 judges. The Constitutional Court convenes once weekly or as needed to consider constitutional and civil liberties issues. The Court of Appeal hears appeals from the Supreme Court. The court of Appeal convenes thrice a year and considers appeals from the Supreme Court Constitutional Court only.

3.4 Municipal law on piracy in Mauritius

Apart from Kenya and Seychelles, Mauritius is another regional state willing to take up suspected Somali pirates for Prosecution. Like Seycheles, Mauritius is Island nation, located to the south east of Somalia.[58] Notably, Mauritius has not been directly harmed by any piracy incidents and the Somali pirates have not travelled as far south in their piratical endeavours but has nevertheless been identified as another possible regional partner in the global fight against piracy.[59]

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[57] Republic vs Sayid is a good example where a group of pirates have been charged together under the common intention theory of criminal liability and convicted accordingly.

[58] See www.mauritius.net

[59] Milena Sterio, ' Piracy off the Coast of Somalia: The argument for Pirate prosecutions in the National Courts of Kenya, the Seychelles and Mauritius' *Amsterdam Law Forum and Mauritius,* Vol.4.2 (2012) pp 104-123:117

In order to facilitate piracy prosecutions, Mauritius has recently revised its criminal law, to closely reflect the piracy offence under UNCLOS. Under the new Mauritian law, the piracy offence is identical to the one found in UNCLOS, thus requiring the presence of two vessels (aggressor and victim), and a violent act committed for private aims on the high seas.[60] In addition to the offence of piracy, the new Mauritian law also provides for the offense of a "maritime attack" which is defined as hereunder:

> "(a) an illegal act of violence or detention, or any act of depredation for private ends by the crew or the passengers of a private ship or a private aircraft and directed-
>
> (i) Against persons or property on board a ship or air craft, as the case may be; or
>
> (ii) Against a ship or aircraft as the case may be; or
>
> (b) any act of inciting or of intentionally facilitating an act described in paragragh (a) within the territorial sea or the internal, historic and archipelagic waters of Mauritius.[61]

Thus, the new Mauritian law views piracy in broader terms than UNCLOS. This is because it adds the offence of "maritime attack" to criminalise acts which fall short of the traditional definition of piracy because they may be committed in the Mauritian territorial waters.[62] The new law also criminalises acts such as the hijacking and destroying of ships and the act of endangering safe navigation of ships.[63] In this respect, it is to be noted that Mauritius law resembles the SUA approach as it criminalises a series of different maritime offences including violence against ship or persons onboard ships. Thus the drafters of this law seem to have blended UNCLOS and SUA to come up with a legislation that encompasses the traditional definition of piracy found in UNCLOS but one which also adopts a broader approach in its anti

[60] The Piracy and Maritime Violence Act, 2011
[61] ibid
[62] Milena Sterio, ' Piracy off the Coast of Somalia: The argument for Pirate prosecutions in the National Courts of Kenya, the Seychelles and Mauritius' *Amsterdam Law Forum and Mauritius,* Vol.4.2 (2012) pp 104-123:118
[63] Piracy and Maritime Violence Act, 2011 article. 4 and 5

piracy reach by criminalizing other maritime offences falling short of piracy. The new law also specifically contemplates the transfer of detained pirates by the authorities of the capturing state to Mauritius for prosecution in Mauritian courts.[64]

3.5 Municipal Law on Piracy in the United States

In the United States, the piracy statute (18 U.S.C & 1651) outlaws the crime of piracy as defined by the law of nations. The said Act provides that:

> "whoever on the high seas, commits the crime of piracy as defined by the law of nations and is afterwards brought into or found in the United States shall be imprisoned for life."

This provision bear some similarity with that of the Kenyan Penal Code on piracy. As professor Cassese has explained, a state legislating on the basis of international norms has two options: to detail precisely within national legislation the content of international norms (statutory adhoc incorporation of international rules) or to incorporate the international norm by general reference (automatic adhoc incorporation of international law).[65] According to Cassese, the former has the benefit of added clarity with the disadvantage of requiring further amendment to keep pace with international law while the latter requires those interpreting and applying the statute to take the extra step of identifying the referenced body of law although it has the advantage of allowing the national law to develop in tandem with international law.[66]

From the perspectives of international law, the choice of approach is left to the individual state, and it will fall to domestic courts to determine which approach the legislators in fact adopted. Logically one would however impute that when a statute only references an international norm without specifying its content as the Kenyan Penal Code and the US piracy

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[64] See Piracy and Maritime Violence Act, 2011 art 8
[65] Cassese, *International Law*, 2nd edition, (Oxford University Press, 2005) pp451-452
[66] Ibid pp121-122

statute do, there is an intention to automatically incorporate international law, including any developments in that law over time. This is more so with international crimes such as piracy where each municipal system of law should be part of one wider system working together.

In the case of *United States versus Smith*,[67] the question before the courts was whether Congress had properly and sufficiently exercised its authority under the constitution to define and punish piracies by relying on the law of nations for a definition of piracy. The supreme court held in the affirmative, stating that by incorporating the definition of piracy under the law of nations, congress had defined piracy as clearly as if it had listed the elements of the offence itself. Indeed, although the U.S. is not a party to the U.N. Convention on the Law of the Sea, this treaty contains the definition of piracy under customary international law which is incorporated by the U.S. piracy statute (18 USC 1651). Therefore, it can be argued that piracy is defined in the U.S. purely by reference to international law, and not domestic U.S. law.

[67] United States versus Smith, 18 US (5 Wheat) 153 (1820

CHAPTER FOUR

A CRITICAL ANALYSIS OF THE ROLE OF COURTS IN PIRACY CASES

4.0 Introduction

The previous chapter looked at domestic legal regimes on piracy focusing on Kenya, Seychelles Mauritius and the United States. It was noted that although by and large there is a relationship between international and domestic law on piracy, there are still instances when domestic law is not very clear and one has to result to other sources of international law to determine certain issues. Indeed, those concerned with piracy cannot consider the content of the international law rules of piracy in isolation from the processes by which such rules come to be interpreted and applied. The laws are interpreted by the courts which ultimately give their decisions. In large measure, the task of applying international law of piracy is left to municipal courts and legal systems. The bases nations use to exercise jurisdiction over pirates as well as how municipal courts interpret rules of international law outlawing piracy and how they distinguish international and municipal law approaches to the issue are facts relevant to anyone concerned with the functional application. This is what this chapter sets to do.

This chapter examines court as a peaceful method of settlement of conflict and examines the concept of judicial precedent. It looks at the case studies of piracy cases being prosecuted by courts in Kenya, the Netherlands, the Seychelles and the United States, and examines how the courts have harmonized the municipal and international law on piracy when determining piracy cases.

4.1 Court as a peaceful method of settlement of conflict

The requirement that conflict management must be peaceful is one of the bedrocks of the international legal and political system. In international law, the Charter of the United Nations not only forbids the use of force or threat of the use of force in the conduct of relation between states[1] but it also specifies a number of methods for peaceful settlement of disputes.[2] Judicial settlement of disputes is one such method.

Mwagiru observes that the challenge of conflict management is not how to do away with conflicts but how to deal with them so that their harmful effects do not affect our societies and ruin our relationships.[3]

Judicial settlement in the municipal sphere means that one party takes the matter and when this happens the other must attend a court which is not for the parties to choose. The court hears the case and eventually gives a judgment which is binding on all the parties meaning that the parties must do what the court orders.

The problem with this method is that it is a zero sum methodology and gives a zero sum outcome as the gains of one party translates into the loses in the other. It leaves one party happy and the other dissatisfied. The dissatisfied party can appeal, but once the highest court of appeal decides against its favour, there is nothing more that the party can do. Courts in this regard, only settle a conflict but do not resolve them.[4]

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[1] Article 2(4) of the Charter of the United Nations

[2] Article 33 of the Charter of the United nations

[3] Mwagiru M, et al, *Understanding Conflicts and its Management: Same Kenyan Perspective*, (Nairobi: CCR-WLEA Publications, 1998)

[4] Mwagiru M, *Conflict, Theory, Processes and Institutions of Management*, (Nairobi: Watermark Publications,2000) p111-112

In determining cases, courts sometimes do rely on judicial precedent. Judicial precedent means decision of judges laying down legal principles for cases coming before it.[5] They are referred to as case law. They are found in judicial decisions and case law. They contain two parts; Ratio decidendi and obiter dictum. Ratio decidendi is the rule acted on by the court in coming to a decision in a particular case i.e. the vital decision which leads the judge to decide a particular issue or the reason for his decision. It is the ratio of the decision that constitutes the binding precedent and the judge must therefore decide what is the ratio of the particular case and to what extent it is relevant to the case before it. An obiter dictum on the other hand includes explanations and other cases cited in a judges argument by way of comment or comments in passing and is not binding to other courts although it may be important in suggesting solutions especially when it comes from the highest court; it is persuasive in nature.

Judicial precedents provide common reference to judge made law and are to be found in law reports. As noted in chapter three, both common law and equity have developed through the doctrine of judicial precedents and stare decisis where in coming to a decision in a matter, a judge looks back to see how previous judges have dealt with a case involving similar facts. In this regard, courts play a significant role in setting precedent. This applies also to piracy cases.

Indeed, the land mark case of In re Piracy Jure Jure Gentium[6] discussed in chapter one continue to be made reference to in many piracy cases following thereafter in determining what amounts to piracy and the elements required to constitute piracy. In this case, the Privy Council did not venture to define piracy but stated as follows:-

> "A careful examination of the subject shows a gradual widening of the earlier definition of piracy to bring it from to time in consonance with situations either

[5] See also Black's law dictionary 5th ed.1979) at p 1059 which defines 'precedent' as a rule of law established for the first time by a court for a particular type of case and thereafter referred to in deciding similar cases.'

[6] In re Piracy Jure Gentium 1934 AC p 586

not thought of or not in existence when the older jurisconsults were expressing their opinions."[7]

The Privy Council also held that an actual robbery is not an essential element of the crime and that a frustrated attempt to commit a piratical robbery will constitute piracy jure gentium. This decision has been cited as a useful precedent in subsequent piracy cases in various jurisdictions as will be discussed hereunder. However as will be noted here below, from similar facts circumstances the courts have been reaching different conclusions regarding the elements of the crime of piracy and the ability of the domestic courts to try the accused persons which is a problem.

4.2 Piracy decision in the Netherlands: The 'Cygnus' Case[8]

On 2 January 2010, five Somali men in a small skiff attacked the MS Samanyolu, a ship registered in the Netherlands Antilles and sailing in the Gulf of Aden. The Danish Navy intervened and seized the defendants. On 15 January 2010, the Dutch authorities agreed to prosecute the suspects for piracy. The next day, the suspects were brought before an investigating magistrate and assigned a lawyer. The Rotterdam district court, in a decision issued 17 June 2010, convicted the five men of piracy and sentenced them to five years. The court noted that Dutch law explicitly establishes universal jurisdiction over piracy, and it reasoned that international treaties binding on the Netherlands did not preclude the exercise of such jurisdiction.

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[7] Ibid at p. 600

[8] Rb. Rotterdam 17 juni 2010, Case No. 10/600012-09, reprinted and trans. in *International Law Reports* [ILR] vol.145 p491

4.3 United States Piracy decisions: United States v. Said[9] and United States v. Hasan[10]

The Somali defendants in both Hasan and Said were apprehended, on 1 April 2010 and 10 April 2010, respectively, after they allegedly fired on United States naval ships but before any attempt to board and rob the targeted ships could have been made. In both cases, the defendants moved to dismiss the charge of piracy because the indictments only alleged they had committed acts of violence, not acts of robbery.

The United States piracy statute (18 U.S.C. x1651) outlaws 'the crime of piracy as defined by the law of nations', leaving the United States courts to determine the elements of the crime of piracy by reference to customary international law. In so determining, the Said and Hasan courts reached opposite conclusions. In a decision issued on 17 August 2010, the Said court determined that an act of violence alone could not constitute piracy and dismissed the count. On 29 October 2010, the Hasan court determined that such conduct could constitute piracy under section 1651. The defendants were subsequently convicted by a jury and sentenced by the court to life in prison. On 23 May 2012, the US Court of Appeals for the Fourth Circuit ruled that the Hasan court's analysis was correct; it affirmed the convictions and sentences in Hasan but vacated and remanded the Said decision for further proceedings consistent with its opinion.

4.4 Kenya Piracy decisions

The first piracy trial in Kenya under the Penal Code was *Republic vs. Hassan Mohamud Ahmed and 9 others*[11] concerning ten (10) suspected Somali nationals handed over to Kenyan authorities

[9] In the United States District Court Eastern District of Viriginia, Norfolk Division, United States of America vs Mohamed Ali said a/k/a MAXAMAD CALI SACID, et al, Criminal Action No. 2:10cr57

[10] In the United States District Court Eastern District of Viriginia, Norfolk Division, United States of America vs Mohamed Modin Hasan, Criminal Action No. 2:10cr56

by the United States after they were captured approximately 200 miles from the Somali coast by the US Naval force. They were charged before the senior principal magistrate in Mombasa for hijacking the Indian flagged and registered vessel MV Safina al Bisarat on the high seas on 16th January 2006, threatening the lives of the crew and demanding a ransom of fifty thousand U.S dollars. After the trial they were found guilty and sentenced to seven years imprisonment.

Notably, the trial court dismissed the defense counsel's argument that a Kenyan Court did not have jurisdiction over non Kenyan nationals captured on the high seas for offences committed outside Kenya. The defence had argued that although piracy is defined as an offence under the UNCLOS, no Kenyan court had jurisdiction because the convention had not been domesticated through implementing legislation. It was further argued on behalf of the pirates that the offence of piracy under the Kenyan Penal Code, did not conform with international maritime law.

In response to the argument that Kenyan Courts had no jurisdiction over piracy, the trial court noted that the defence had not demonstrated how the codification of customary international law under the UNCLOS negated the provisions of section 69 of the Penal Code which provided for the offence of piracy *jure gentium*. The court understood the Convention as amplifying what is already provided for under the Penal Code regarding piracy. The court agreed with the prosecution that any act of piracy jure gentium is a crime against mankind which lies beyond the protection of any state and that it is a crime with international dimensions. Describing piratical acts as including violence, detention, and the causing of harm or damage, the court invoked the definition of piracy under article 101 of the UNCLOS for the proposition that the offence consists of those acts.[12]

[11] Mombasa Chief Magistrate Criminal Case No. 434 of 2006, Republic Vs. Hassan Mohamud Ahmed and 9 others,
[12] ibid

Following the judgment of the lower court, the pirates were aggrieved by this decision and they filed an appeal in the High Court of Kenya, Mombasa[13] hereinafter referred to as the Ahmed's case contesting *inter alia* the jurisdiction of the Principal Magistrate's Court over the accused on the grounds that they were non- Kenyans and that the acts of piracy they had been convicted of had been committed outside Kenya.[14] Just as in the trial court, the republic argued that it did not matter where the crimes had been committed or who had committed them since piracy was a crime against mankind. The High court in the Ahmed's case in upholding the decision of the trial court noted that section 69(1) of the Penal Code, of piracy, which provides that any person on the high seas may be found guilty of the offence of piracy, was broad enough to cover the prosecution of non national suspects captured 300 kilometers off the Somali coast in international waters. The court buttressed its holding by referring to another statute, the Kenyan Criminal Procedure Code[15] and observed that first schedule of that statute grants jurisdiction to try such cases to the Kenyan magistrates 'courts. For this reason, as well as under relevant provisions of international law, the High Court concluded that the ground of appeal based on want of jurisdiction must fail.

Turning to international law, the High Court went over the prosecution's submission during the trial that Kenya had ratified and domesticated the UNCLOS and the apparent acceptance of that statement by counsel for the appellants and had this to state:

> "...I must hold that the learned principal magistrate was bound to apply the provisions of the convention (UNCLOS) should there have been deficiencies in our Penal Code and the Criminal Procedure Code. I would go further and hold that even if the

[13] High Court of Kenya Mombasa, Criminal Appeal Nos. 198,199,200,201,202,203,204,205,206 and 207 of 2008. Hassan M Ahmed and 9 others vs Republic

[14] The other grounds of appeal related to alleged inadequacies in the evaluation of and reliance on the evidence presented to the lower court as the basis for convicting the accused, dismissing their defense and imposing an excessive punishment.

[15] Cap 75 of the laws of Kenya

> Convention had not been ratified and domesticated, 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."[16]

The judge fortified his decision by quoting Martin Dixon, for the proposition that certain crimes such as piracy are considered so destructive of the international order that under customary international law, any state may exercise jurisdiction over them, regardless of where the offence took place or the nationality of the perpetrators; and that this universal principle of jurisdiction is based on the nature of the alleged crime rather than the identity of the perpetrator or the place of commission.[17]

The High Court in the Ahmed's case was in essence saying that even if the magistrate did not have jurisdiction based on an express statute, jurisdiction would be available under article 101 of the UNCLOS whether or not Kenya had domesticated the Convention. This supports the view taken by some judges even under the old Constitution that the High Court and the Court of Appeal may apply ratified but undomesticated treaties to resolve ambiguities or gaps in domestic statutes.[18]

The above decision which upheld the fact that Kenyan Courts had jurisdiction was made reference to as a precedent in subsequent piracy cases under the Penal Code. These cases include the case of *Republic vs Aid Mohammed Ahmed and 7 others* charged with attacking a vessel by the name Powerful,[19] *Republic vs Mohamud Abdi Kheyre*, charged with six others with attacking

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[16] High Court of Kenya Mombasa, Criminal Appeal Nos. 198,199,200,201,202,203,204,205,206 and 207 of 2008. Hassan M Ahmed and 9 others vs Republic pp 11

[17] Martin Dixon, *Text book on International law*, 5th ed (Oxford: Oxford University Press, 2005) pp 76-77

[18] For example in Rono Vs. Rono Civil. App. No.66 of 2002 (2005) eKLR the Court of Appeal, noting Kenya's endorsement of customary international law and ratification of various international covenants and treaties, stated that even if some of those treaties had not been domesticated, they should be taken into account in resolving the central question of discrimination when that was in issue.

[19] Mombasa Criminal case No. 3486/08 Republic vs Aid Mohammed Ahmed and 7 others

the Marshall Islands MV Polaris on 11th February, 2009[20] *Republic vs Musa Abdullahi Said and 6 others*[21] charged with attacking a vessel by the name of Spessart *Republic vs Liban Ahmed Ali,* charged with ten others with attacking the Liberian flagged Safmarine Asia with rocket propelled grenades and gunfire on 15th April, 2009;[22] *Republic vs. Ahmed Abdikadir Hersi,* charged with ten others with attempting to attack the F*rench naval vessel FNS Nivose* on 3rd May 2009;[23] *Republic vs. Mohamed Hassan Ali* charged with six others with committing piracy against the Maltese vessel *Anny Petrakis on 7th May 2009;*[24]*Republic vs. Jama Abdikadir Farah,* charged with six others with the attempted hijacking of the Pamanian *Nepheli* on 6th May 2009;[25] Republic vs Abdirashid Jama[26] charged with 16 others with that attack of a vessel by the name of Amira *Republic vs Said Abdallah Haji,* charged with eight others with attacking the saint vincent and the *Grenadines flagged MV Maria K* on 22nd May 2009;[27] *and* Republic vs.Shafili Hirsi Ahmed, charged with six others with attempting to hijack the greek vessel *MV Antonis* on 26th May, 2009.[28] Some of these cases have been concluded but others are still pending in court.

Notably, before some of the cases herein above could be concluded, piracy prosecutions in Kenya were put in jeopardy when the High Court of Kenya at Mombasa[29] herein after referred to as the MV Courier decision ruled in 2009 that Kenya's magistrate level courts, which had been the ones where all pirate prosecutions had been taking place, did not have jurisdiction over

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[20] Mombasa Chief Magistrate criminal case No.791 of 2009, Republic vs Mohamud Abdi Kheyre and 6others
[21] Mombasa Criminal case No. 1184/09 Republic vs Musa Abdulahi Said and 6 others
[22] Mombasa Chief Magistrate Criminal Case No.1374 of 2009, Republic vs. Liban Ahmed Ali and 10 others
[23] Mombasa Chief Magistrate criminal case No.1582 of 2009, Republic vs. Ahmed Abdikadir Hersi and 10 others
[24] Mombasa Chief Magistrate Criminal case No. 1694 of 2009, Republic vs. Mohamed Hassan Ali and 6 others
[25] Mombasa Chief Magistrate criminal case No.1695 of 2009, Republic vs. Jama Abdikadir Farah and 6 others
[26] Mombasa Chief Magistrate criminal case No.1939 of 2009, Republic vs. Abdirashid Jama and 16 others
[27] Mombasa Chief magistrate criminal case No. 2127 of 2009,Republic vs. Said Abdallah Haji and 8 others
[28] Mombasa Chief Magistrate criminal case No. 2463 of 2009,Republic vs Shafili Hirsi Ahmed and 6 others
[29] High Court at Mombasa Misc. application no. 434 of 2009- in Re Mohamud Mohamed Hashi alias Dhodu and eight others

piracy offences unless the offences took place in Kenyan territorial waters.[30] This was following proceedings in *Republic vs. Mohamud Mohamed Hashi,* charged with eight others with attacking the German MV Courier on 3rd March 2009.[31]

The facts of the case were that the nine (9) applicants had been charged in the Chief Magistrates Court at Mombasa on 11th March, 2009 in Criminal Case No. 840 of 2009 with the offence of piracy contrary to Section 69(1) as read together with Section 69 (3) of the Penal Code, Chapter 63 of the laws of Kenya. The particulars of the offence are that "on the 3rd day of March 2009 upon the high seas of Indian Ocean jointly being armed with offensive weapons namely three AK 47 rifles, one pistol make Toklev, one RPG-7 portable rocket launcher, one SAR 80 rifle and one Carabire rifle, attacked a machine sailing vessel namely *MV Courier* and at the time of such act put in fear the lives of the crew men of the said vessel."

The suspects were tried before a magistrate court under Kenyan piracy statute then in force. After the close of the prosecution case, the accused persons sought an order of prohibition from the High Court to halt the trial for lack of jurisdiction. The defence argument was that because the prosecution had clearly established that the incident took place outside of Kenyan territory and that no Kenyan citizen or goods were involved, the magistrate court lacked jurisdiction to proceed with the case.

In determining the issue before it, the High Court in a decision dated 9th November 2010[32] herein after referred to as the MV Courier decision, based its ruling primarily on Section 5 of Kenyan Penal Code, which provides that:"the jurisdiction of the Courts of Kenya for the purpose of this Code extends to every place within Kenya, including territorial waters."[33]

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[30] ibid
[31] Mombasa Chief Magistrate Criminal Case No.840 of 2009, Republic vs Mohamud Mohamed Hashi and 8 others
[32] In the High Court of Kenya,*Mohamud Mohamed Hashi, vs. republic* (2010) eKLR
[33] ibid

According to the High Court, this provision, because it is the one defining all jurisdictional ability of Kenyan courts, trumps another piracy provision, Section 69(1), which provides that:"any person who in territorial waters or upon the high seas, commits any act of piracy jure gentium is guilty of the offence of Piracy."[34] This holding conflicted with the earlier decision of the High Court in Ahmed vs Republic, which had held that section 690 empowered all but the lowest magistrates courts of Kenya to exercise universal jurisdiction over piracy *jure gentium.*[35]

The MV Courier decision has been criticized on inter alia the ground that it ignored the express provisions of the new Constitution as well as Kenya's obligations under international law. An appeal by the state is pending in the Court of Appeal. Notably, the ruling failed to appreciate piracy as an international crime. Indeed, and as observed by M'inoti[36] citing Article 2(5) of the new Constitution which recognizes general rules of international law as part of the law of Kenya, "more importantly, the court lost an early opportunity to tell people of Kenya, the significance of the recognition of the constitution of general rules of international law and treaties ratified by Kenya as part of our law."[37]

However as noted in Chapter Three, piracy cases are tried in the subordinates court in Kenya, and the above MV Courier high court decision was therefore binding on the subordinates court especially bearing in mind that although there was the Ahmed's case decision mentioned herein above, which held that Kenya had jurisdiction to try suspected pirates arrested on the high seas, the latter was the latest decision and therefore binding on the lower courts until disturbed on appeal. The effect of this decision was therefore to stall all piracy prosecutions pending a decision by the court of appeal.

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[34] ibid
[35] In the High Court of Kenya, Ahmed vs Republic (2010) eKLR
[36] Chairman of the Law Reform Commision (Kathurima M'Inoti) in a newspaper commentary (Daily Nation Edition of November 16th 2010)
[37] ibid

Although initially the MV Courier decision stalled all piracy prosecutions both under the penal code and the Merchant shipping Act, the situation did not go for long in respect to the piracy cases brought under the Merchant Shipping Act and they continue to be prosecuted to date. This is because vide another high court decision in the MV Sherry case[38] (brought under the Merchant Shipping Act and not appealed against), the Hon. Justice J. B Ojwang held that Kenya had jurisdiction to try suspected pirates arrested on the high seas in a matter which had been commenced under that Act. Notably, the Merchant Shipping Act came into operation on the 1st September, 2009 domesticating the UNCLOS definition of Piracy and all piracy cases brought in Kenyan court from the said date were commenced under the said Act. The cases filed under the Merchant Shipping Act include, *Republic vs Barre Ali and 6 others*[39], *Republic vs. Hassan Jama and 5 others*[40], *Republic vs Abdirahman Isse and 3 others*[41], *Republic versus Ali Musee & 8 others*[42], *Republic vs. Abdi Aziz Abdullahi and 23 others*[43] and criminal case No 557 of 2012 *Hassan Adan and 3 others*[44]. In this regard, the MV sherry decision has successfully been used as a useful precedent in subsequent cases under the Merchant Shipping Act. This again underscores the role of courts and effects of judicial pronouncements in piracy cases.

In arriving at his decision in the MV Sherry case the judge made reference to the judicial Committee of the Privy Council's opinion, in re Piracy *Jure Gentium* case which acknowledged that "with regard to crimes as defined by international law, that law has no means of trying or

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[38] In the High Court of Kenya at Mombasa, Misc. Application No.72 of 2011 (being reference from trial proceedings in Chief Magistrate's Court Criminal Case No. 3012 of 2010, by virtue of ss.76 & 81 of the Criminal Procedure Code (Cap.75, Laws of Kenya) pp 1-22

[39] Mombasa Criminal Case No. 3601 of 2009 , Republic vs Barre Ali and 6 others

[40] Mombasa Criminal case no 1340 of 2010 , Republic versus Hassan Jama and 5 others

[41] Mombasa Criminal case no 3012of 2010 , Republic versus Abdirahman Isse and 3 others

[42] Mombasa Criminal case no 3149 of 2010 , Republic versus Ali Musee and 8 others

[43] Mombasa Criminal case no 2006 of 2011 , Republic versus Abdi Aziz Abdullahi and 23others

[44] Mombasa Criminal case no 557 of 2012 , Republic versus Hassan Adan and 3 others

punishing them and the recognition of them as constituting crimes and the trial and punishment of the criminals are left to the municipal laws of each country."

He noted that although that statement is in some respects overtaken by the development of new institutions of international criminal justice, it remains true, in respect to the crime which was the subject of his ruling – piracy. He also acknowledged guided by the statement in the re piracy jure gentium case that although in international law the criminal jurisdiction of municipal law is ordinarily restricted to crimes committed on its terra firma or territorial waters or its own ships, the same extends to piracy committed on the high seas by any national on any ship, because a person guilty of such piracy has placed himself beyond the protection of any state. He is no longer a national but '*hostis humani generis*' and as such justiciable by any State anywhere.[45]

He acknowledged that the statements in the Re Piracy *Jure gentium* case touches on the essence of piracy as a recognized threat to all maritime commerce, a crime to be punished by all States, without jurisdictional impediments, in international customary law. He quoted Churchill and Lowe[46] who had this to say:-

> " As a matter of international law, pirates may be tried by any state before whose courts they are brought, and that State may determine by its laws the penalties to be imposed..."

He therefore found guided by this ruling that it was not untenable for Kenyan law to confer extra-territorial jurisdiction upon the duly established Courts of criminal justice, in respect to piracy. At the end of his ruling he found that the objections to trial by each and all of the respondents named therein had no merit and dismissed the same and directed that lower court criminal case No.3012 of 2012 do proceed for hearing on priority bases. Of importance, and

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[45] Ian Brownlie, *Principles of Public International Law*, 7th ed (Oxford University Press, 2008) p 229
[46] R.R Churchill and A.V Lowe, *Law of the Sea*, 3rd edition (Manchester:Manchester University Press, 1988) p.210

recognizing that his ruling was to act as an important precedent in subsequent cases, he also directed that the ruling be forwarded, through the office of the principal judge of the High Court, to all magistrates before whom charges of piracy may be laid.[47]

The significant role played by the courts in interpreting and harmonizing municipal law with international law on piracy is again evident in a recent pronouncement issued by the court of appeal in the MV. Courier case which had been pending for hearing in the said court.[48] As noted before, the MV Courier ruling by the Kenya High Court effectively precluded any additional piracy prosecutions in Kenyan magistrate level courts, because none of the Somali piracy incidents have taken place in the Kenyan territorial sea. This ruling which effectively would have ended the possibility of bringing to book the suspected Somali pirates already in Kenyan courts facing charges under the Penal Code has recently on 18th October 2012 been overturned by the five bench court of appeal decision which unanimously held that Kenyan courts had jurisdiction to try piracy cases irrespective of where the crime was carried out and the nationality of the offenders.[49] This is a powerful precedent in Kenya which will see the matters pending in court resume and proceed to logical conclusion and this underscores the important role played by the courts in piracy matters.

4.5 Piracy decisions in Seychelles

As in Kenya, Seychelles has become the hub for prosecution of Somali pirates in the Indian Ocean and has already concluded a number of piracy cases six of which are publicly available on

[47] In the High Court of Kenya at Mombasa, Misc. Application No.72 of 2011 (being reference from trial proceedings in Chief Magistrate's Court Criminal Case No. 3012 of 2010, by virtue of ss.76 & 81 of the Criminal Procedure Code (Cap.75, Laws of Kenya) p.22

[48] In the Court of Appeal at Nairobi, Civil Appeal No.113 of 2011, Attorney General versus Mohamud Mohammed Hashi and 8 others.

[49] Paul Ogemba, 'Major Boost For War on Piracy: Court of Appeal reverses earlier ruling that Kenya has no jurisdiction to try high seas robbery cases' *Daily Nation, Nairobi,* 19th October, 2012, p66

the Grotian Moment website. The Seychelles case law constitute an important precedent for the international community since they establish that universal jurisdiction for piracy is well recognized and that the concept of *hostis humani generis* creates a strong basis for exercising jurisdiction in piracy prosecutions even in cases in which a third state initially apprehended the pirates. Another thing worth noting is that the Seychelles cases establish that pirate sentences must be appropriately severe. Notably, and as noted in chapter two, the international conventions relevant to acts of piracy do not provide guidance on sentencing leaving it to domestic courts which in some instances have given very lenient sentences to convicted Somali pirates. The decisions of the Seychelles courts clearly demonstrate the severity with which the crime of piracy should be viewed even in instances where no victims were killed or the acts of piracy were not completed.

In the case of the *Republic vs Mohamed Ahmed Dahir and 10 others,*[50] the honourable justice Gaswaga relied on the case of Re Piracy Jure gentium 1934 A.C. 586 in finding that an actual robbery is not an essential element of the crime. The court found that the intent of the accused persons was to commit piracy and that the manifest intentions and actions constituted the complete crime, regardless of their lack of success. In finding that the prosecution had proved all the ingredients of the offence in count three, the court had this to say:-

> "I am convinced beyond doubt that the activities of each and every accused as outlined and proved herein tantamount to assault and a frustrated attempt to commit a piratical robbery which according to the cited authorities and definition constitutes the offence of piracy *jure gentium*. In doing all these activities the accused had no legal authority or any colour of right from any state."

The accused persons in this case were charged with *inter alia* the offence of piracy contrary to section 65 of the Penal Code as read with the common law of England. The

[50] Supreme Court of Seychelles , Criminal Side No. 51 of 2009, Republic vs Mohamed Ahmed Dahir & ten (10) others

particulars being that .....on the 6th December 2009 with common intention, whilst being in two different vessels on a part of the high seas which falls within the Seychelles Exclusive Economic Zone assaulted and put in fear the lives of the crew of the Seychelles Coast Guard Patrol vessel "Topaz" in an attempt to commit robbery of the said vessel "Topaz."

The Seychelles judge referred to the High Court of Kenya at Mombasa Ahmed case referred to herein above to wit *Hassan M. Ahmed vs. Republic* Criminal appeals No. 198 to 207 of 2008, in finding that the Topaz incident was not an isolated incident since in the Kenyan case the accused who had accessed a vessel called Safina Al Bisarat in high speed boats and fired in the air were convicted on piracy charges although there was no damage at all occasioned on the vessel. This reasoning was followed in the case of the *Republic vs Abdukar Ahmed & Five (5) others*[51] where although the accused persons fired at the coast guard vessels in question thereby engaging in an exchange of fire for quite some time, none of the crew was injured. There was also no damage caused to the said vessels. The court nonetheless relied on the case of Re Piracy Jure Gentium in finding that a frustrated attempt to commit a piratical robbery (as in the instant case in respect of the coast guard vessels) will constitute piracy *jure gentium*. The accused persons were convicted and sentenced to 24 years imprisonment.

The Seychelles judge also in determining the issue on whether piracy committed by vessels found on the Seychelles EEZ would be said to be committed in the high seas noting that the case of piracy jure gentium and UNCLOS provide that such acts must have been committed in the high seas, noted that the EEZ stretching up to 200 nautical miles past the territorial seas is essentially concerned with resources. The law of the coastal state does not apply in the EEZ, and

[51] Supreme Court of Seychelles , Criminal Side No. 21 of 2011, Republic vs Abdukar Ahmed & five (5) others at pg.17

it does not have general enforcement rights. He noted that other as regards resources, EEZ's are counted as the high seas.

In the case of the *Republic vs Hussein Mohammed Osman & ten Others*[52] the Honourable justice Gaswaga referred to various texts of international law[53] and case law[54] before arriving at his judgment. He noted as follows:-

> "additionally, we must note that a pirate is treated as an outlaw, as the enemy of all mankind (hostis humani generis) and since the crime is committed at the high seas, he places himself beyond the protection of any state and any nation may in the interest of all capture, prosecute and punish. Hence bringing to the fore the principle of universal jurisdiction."

He also noted that the Seychelles Penal Code Act, Cap 158, section 65 thereof as amended by act No 2. of 2010, has incorporated some of these relevant international law principles as well as provisions of the United Nations Convention on the Law of the Sea, 1982 (UNCLOS).[55]

Reference was also made to international law in the case of *Republic vs Mohamed Aweys Sayid*,[56] In this piracy case, the honourable justice Dodin noted that maritime piracy according to UNCLOS had been adopted as the amendments to section 65 of the Seychelles Penal Code and that the same consisted of any criminal act of violence, detention or depredation committed for private ends by the crew or the passengers of a private ship that is directed on the high seas against another ship or against persons or property on board a ship. He noted that piracy can be committed against a ship, aircraft, persons, or property in a place outside the jurisdiction of any state. He observed as follows:-

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[52] Supreme Court of Seychelles , Criminal Side No. 19 of 2011, Republic vs Housse in Mohammed Osman & ten (10) others

[53] Some of these texts include;- Grotius (1583-1645) "De Jure Belli ac Pacis," Vol.2, Cap. 20,... 40 and Halsbury's Laws of England, fourth edition as revised in 1977 Vol.18 at 787 -789

[54] SS Lutus (France vs Turkey), 1927 PCIJ (Ser.A), No.9 at 70

[55] See Supreme Court of Seychelles , Criminal Side No. 19 of 2011, Republic vs Houssein Mohammed Osman & ten (10) others at pg.17

[56] Supreme Court of Seychelles, Criminal Side No 19 of 2010, Republic vs. Mohamed Aweys Sayid and eight (8) others

" In fact piracy has been one of the first examples of universal jurisdiction. The crime of piracy is considered a breach of *jus cogens* (compelling law), a conventional peremptory norm that states must uphold. Those committing thefts on the high seas, inhibiting trade, and endangering maritime communication are considered by sovereign states to be *hostis humani generis* (enemies of humanity).

Similar sentiments were made by the Honourable Justice Gaswaga in *Republic vs Mohamed Ahmed Ise and four (4) others* [57] where he noted as follows:- " it has long been settled under customary international law, that a pirate is no longer a national but *hostis humani generis* (enemy of humanity) when the privy council, vide –In re Piracy Jure gentium, 1934 at pg 536 stated that a person guilty of piracy at the high seas places himself beyond the protection of any state... This Universal jurisdiction makes it possible for the arresting state, like the republic of Seychelles in this case, to freely prosecute suspected pirates, from anywhere in the world and punish them if found guilty under municipal law, since the crime of Piracy *jure gentium* is considered to be a contravention of jus cogens (compelling law) a conventional peremptory norm that States must uphold[58]." He observed that those principles of international law together with some provisions of UNCLOS have been adopted and are clearly reflected in the Seychelles law. Thus even if the attacks in this case were committed by non- Seychellois against French registered vessels carrying French nationals upon the high seas, the court found that this was a matter which the courts could determine and proceeded to convict the accused as charged based on the evidence on record.

Similary, in the case of *Republic vs Liban Mohamed Dahir & twelve (12) others*[59] decided this year defence counsel had submitted that the courts in Seychelles lacked jurisdiction to hear the matter since the alleged attacks occurred in the Exclusive Economic Zone (EEZ) of

[57] Supreme Court of Seychelles, Criminal Side No 75 of 2010, Republic vs. Mohamed Ahmed Ise and four (4) others
[58] Ibid at pg 10. The judge also cited Halsbury's laws of England, fourth edition as revised in 1977 vo. 18 at 787-789
[59] Supreme Court of Seychelles, Criminal Side No 7 of 2012, Republic vs. Liban Mohamed Dahir and twelve (12) others

Oman, which is a sovereign State, and not on the high seas. The court noted citing previous case law to wit *Republic Vs Mohamed Ahamed Dahir & Ten Others*, Supreme Court, Criminal Side No. 51 of 2009, para 57 that it has already been settled by the Seychelles court that other than as regards resources, EEZs are counted as the high seas and the law of the coastal State does not apply. Besides, pirates have long been declared as enemies of mankind who have placed themselves beyond the protection of any State and can therefore be arrested, tried and punished pursuant to the municipal law of any country. He made reference to the case of in re Piracy *Jure Gentium*, 1934 and noted that the Seychelles Penal code Section 65(1) provides that any person who commits any act of piracy within Seychelles or elsewhere is guilty of an offence and liable to imprisonment for 30 years and a fine of R1. Million." Subsequently, he found that the prosecution had proved its case against each of the accused persons with the exception of one and proceeded to convict them and sentenced them to 12 years imprisonment.

4.6 Effectiveness of courts in resolving the menace of piracy

The decisions discussed above show that the majority of suspected Somali pirates have been found guilty and convicted accordingly. The menace of piracy however still remains and indeed for the past few years, piracy has become endemic off the coast of Somalia. It has become a growing problem that benefits from the instability of Somalia which has not had a government in effective control since 1991. This is mainly because courts only settle the conflict but do not address the underlying issues. In the case of piracy the root causes are many. They include rampant unemployment, poor education, environmental hardship, pitifully low incomes, reduction of pastoralist and maritime resources due to draught and illegal fishing, rising poverty among the youth in Somalia and a volatile security and political situation. The world bank

estimates that 40 percent of Somalis live in extreme poverty (less than a dollar a day) and almost 75 percent of households subsist on less that $2 a day.[60] Approximately two thirds are without jobs.[61] A combination of interclan rivalry, corruption, arms proliferation, extremism and pervasive impunity has facilitated crime in most parts of Somalia, particulary in Puntland and Central Somalia. This criminal activity is eventually moved from land to sea.

Indeed, Somali pirates interviewed by international media sources frequently link their piracy activities to trends such as illegal fishing and dumping in Somali waters that have emerged as the country has lost its ability to patrol its waters over time.[62] This is not a matter that is addressed by the courts. The upshot of the above is that the underlying problems contributing to the engagement in piracy activities are not addressed leading to further engagement in piracy activities.

Courts play an important role in the determination of piracy cases and in giving effect of the principles of international law. The decisions made especially by the higher courts provide useful guidance in subsequent cases and it is therefore important that judges be well trained in international law and on other relevant instruments regarding piracy. This is important as it encourages uniformity in decisions and avoids the pronouncements of different decisions over the same subject matter which brings uncertainty as has been evidenced in the decisions of Piracy cases in Kenya.

However, judicial settlement is one of the coercive methods of settlement of conflict and according to Mwagiru it is short lived as opposed to non coercive methods like negotiation,

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[60] Gilpin Raymond, Counting the Costs of Somali Piracy, (Center for Sustainable Economies, United Institute of peace, June 2009) p 1

[61] ibid

[62] Report of the Secretary General Pursuant to Security Council Resolution (1846(2008), S/2009/146, March 16, 2009 and international Expert Group on Piracy off the Coast of Somali Coast, Final Report: Workshop Commissioned by the Special Representative of the Secretary General of the UN to Somalia Ambassador Ahmedou Ould Abdallah, November 10-12, 2008, Nairobi Kenya. P 15

mediation and problem solving workshops which lead to the resolution of a conflict with long lasting outcomes. He adds that settlement does not address the causes of the conflict but readjusts and regulates conflict relationships.[63]

Indeed piracy just as any other conflict has many causes. The causes of conflict are as diverse as the conflicts themselves and the parties to them. A conflict should be seen as a process that starts at a given point, develops through a given pattern and terminates or transforms into another phase.[64] An effective resolution package should only therefore be arrived at after a thorough diagnosis of the underlying issues have been identified and exhaustively and conclusively negotiated. It may therefore be important in regard to piracy to understand and appreciate all the underlying issues from the perception of the parties and identify all the actors to the conflict and their interests.[65] Only this way can one gain sufficient knowledge on the genesis and dynamics of the conflict.

[63] ibid
[64] Okioma V, Office of the President Kenya, the Challenges of Managing Ethnic Conflicts in Kenya, *National Defence College Journal for course 11 of 2008* (NDC Nairobi:2008) p 124
[65] Ibid

CHAPTER FIVE

CONCLUSIONS

5.0 Introduction

The previous chapters examined the international legal regime on piracy, domestic legal frameworks on piracy and critically analysed the role of courts in piracy cases while looking at issues of piracy off the coast of Africa. It established that domestic courts have a big role to play in determining piracy cases in order to bring out the spirit of international law which requires that piracy be justiciable by all states. This confirms the hypotheses that; the courts have a role to play in harmonizing international and domestic legal frameworks on piracy.

The study has also established that the relevant legal sources apart from customary international law are treaties and different soft law instruments. Here, the Convention on the High Seas, United Convention on the law of the Sea as well as the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation (SUA Convention) do apply. There are as well several regional non-binding soft law treaties on piracy implemented by regional legal regimes such as the Djibouti Code of Conduct which are important with regards to interpretation of existing hard law regulations and instruments like LOS Convention or SUA Convention. These soft law treaties with regards to piracy will influence the direction of political discussions as well as possible implementation of hard law regulations in the future.

The study has also established that courts through case law influences existing hard law regulations and its interpretation. They are useful in addressing common questions of international law regarding exercise of universal jurisdiction and the elements of crime of piracy. In this regard, courts have a big role to play in matters of piracy.

Piracy off the coast of Somalia has been a growing concern in recent past bring into the focus the role of courts which have had to determine many of the cases. Prior to 1990 (when there was a government though not very effective and the judiciary system together with the security apparatus were somewhat working), piracy was not a major issue off the coast of Somalia, but like most coastal nations, there were irregular incidences of armed robbery against small fishing or leisure craft that fell prey to an armed group, or ships that foundered off the coast.

Current piracy activities are more structured and began in the mid 1990's when some armed groups, claiming they were authorized coast guards charged with protecting Somalia's fishing resources, attacked vessels they claimed were fishing illegally in their territorial waters and held them for ransom. This slowly expanded after 2000 to any vessel that sailed within or close to Somali territorial waters. Both vessels and crew would be held hostage and the pirates could demand ransom.

In recent years, piracy has provided funds that feed the vicious war in Somalia, hinders vital humanitarian supply to Somalis and has a strong potential to become a weapon of international terrorism or a cause of environmental disaster. However, the most important for regional and international actors is that it threatens to drastically disrupt international trade. Only due to intensified and diversified recent impact on international trade of oil, has piracy emerged as an international security concern grave enough to trigger an international coordinated response. To fight the problem, the international community has to engage more actively in tracking the cause, not the symptoms of the current crisis, and facilitate state stability and gun control inland.

This study has noted that piracy off the coast of Somalia Coast is largely driven by poor economic conditions. Enhancing and building of internal security apparatus, economic and political empowerment would be the best remedy for East and Horn of Africa countries. The

increased piracy incidents have posed a major threat to trade via the Horn of Africa waters. The effects have included deaths or injuries to crewmembers, hefty ransom payments and an overall decline in the number of vessels willing to risk such voyages. The insecurity has also hampered food aid transportation via the waters. The increased insurance premiums costs have also been carried forward to the clients. There has also been a suggestion of change of routes by shipping companies, which would grossly affect the population that depend on port trade to earn a living.

Poverty among the coastal communities in East and Horn of Africa states is a contributory factor in engaging in piracy. Poverty makes the coastal communities vulnerable to manipulations to engage in crime. Most of the efforts to curb the menace of piracy are however by and large reactive in nature and include arresting suspected Somali pirates and prosecuting them in courts. Not much has been by the international community in for example initiating economic programs to empower the communities economically as a strategy to curb piracy.

Despite recent international efforts, experts claim that the piracy increase off the lawless coast of Somalia is not likely to abate anytime soon and is even likely to deteriorate. The way to eradicate Somali piracy is looking at the bigger picture and collecting enough intelligence on how pirates operate to be able to interrupt the larger, complex system that supports it inland.

The counter-piracy efforts mostly used have been concerned with combating the sea-based symptoms of piracy. Indeed even capacity building initiatives being carried out although focused on Somali infrastructure and capacity, are still focused on responding to pirate attacks, not the causes of piracy. Efforts to address root causes of Somali piracy on land have been less prominent. The situation on the ground in Somalia does not lend itself to easy fixes. It is a very complex and dangerous mix of failed state, intractable conflict, clans and religious strife, underdevelopment and humanitarian emergencies, such as famine, drought and displacement.

Adding to that, there is little agreement over what the root causes of piracy actually are and how to deal with them.[1]

Indeed, it is to be noted that even though some suspected pirates have been arrested and prosecuted in various courts in Mombasa and Seychelles for the last few years, the piracy attacks are still ongoing. This indicates that the punitive measures have not been a total deterrent. The continuing piracy is threatening world commerce and ocean tourism with some governments such as the United States of Nairobi have been issuing warnings to their citizens on sea travel to this region. There is still the problem of what are the root causes of these high numbers of piracy reports off the Somalia coast. Until these issues are addressed, the problem is bound to persist. The issue of illegal fishing and toxic waste dumping as claimed by local 'pirates' has brought to the table the question of implementation of international conventions on the environment.

Nevertheless, Piracy being a breach of *jus cogens* norm which is a universal norm that must be upheld by all states means that even its management has to be universal. It therefore follows that all the states have a duty to prosecute or extradite the suspects. All States therefore need to have the capacity under international law to prosecute persons who perpetrate acts of violence against foreign ships in all settings, except within the internal waters of other States. The courts on the other hand have a very important role in ensuring that the spirit of international law is given effect.

Indeed, defendants prosecuted domestically for the international crime of piracy should have weak arguments that they lacked adequate notice that their conduct was prohibited. Piracy is the oldest international crime, and the specific conduct that constitutes piracy has been internationally codified for more than 50 years. The right of states to exercise universal jurisdiction over that crime has also been firmly established for decades, if not centuries.

[1] R. Beri, 'Piracy in Somalia: Addressing the Root Causes', 35 Strategic Analysis (2008) 452-464

Individuals engaging in piratical conduct on the high seas should thus be prepared to be hauled before any court in any jurisdiction and that is the very nub of the concept of universal jurisdiction.[2] At least under the fair trial standards of international human rights conventions, defence arguments based on the alleged vagueness of this particular criminal norm should fail.

Non legal methods should also be considered in order to curb piracy. In this regard, an important aspect in reducing pirates' power is through curbing gun flows which they use to supply themselves with modern weaponry and surveillance technology. It is important that international actions initiate more programs aiming at researching the genesis of the arms and eventually curbing the flow of guns in the region.

Another remedy to solve the problem of piracy off the coast of Somalia is for the international community to establish an effective cooperation framework between regional states combating piracy, both at the operational and the legal levels to facilitate the peace process in the country and strengthen Somalia's fragile governance. As long as there is no effective legal enforcement to prosecute pirates on land, the country provides a safe haven for their activities which usually spread to the seas. This solution cannot be led by a single country, not even by a single international organization; it requires a concerted action on the part of the international community as a whole.

Other possible solutions is to have a broader interpretation of UNCLOS and customary law, arguing that internationally law does not specifically prohibit capturing states from transferring pirates to third states for prosecution, or reliance on other conventions, such as SUA and other anti terrorism treaties, which do not limit capturing states to prosecution in their own courts. The 1998 Suppression of Unlawful Acts against Safety of Maritime Navigation (SUA) is considered

[2] See e.g. United States v. Shi, 525 F.3d 709, 723 (9th Cir. 2008)

the most progressive convention against ship attacks. SUA is considered to be legally all embracing than UNCLOS and states should be encouraged to heed the convention.

Kenya's new merchant shipping law gives Kenyan courts broad jurisdiction over such suspects, the new law is broad and go far beyond Kenya's obligations under both the SUA Convention and UNCLOS, which in their express terms only allow capturing states the right to prosecute. However the inability of Somalia to arrest and prosecute such suspects suggest Kenya may exercise such jurisdiction as part of its contribution to the burden sharing in the prosecution of captured suspects. In addition the Kenyan legislation is consistent with the common law norm that crimes defined by international law require domestic law to try or punish them.

Another solution would be to maintain a database of all court decisions relating to piracy from all jurisdictions to provide a useful guide/ source of precedents for states intending to prosecute pirates as well as a guide for prosecutors, magistrates and judges, researchers and academics concerned with repression of piracy. Applying lessons learned to future cases will help resolve criticisms that domestic courts lack the experience and expertise to handle these cases,[3] and that differences in the domestic application of international law will lead to unfairly disparate treatment of piracy defendants.[4]

It may also help if all member states dealing with piracy can review pertinent domestic legislation with the aim of aligning it as much as possible with the provisions on piracy in relevant international instruments including UNCLOS and SUA.

In applying universal jurisdiction, judges (especially in Kenya where international law now form part of our law under the new constitution) should be guided by relevant international law

[3] M. Arsanjani and W.M. Reisman, 'East African Piracy and the Defense of World Public Order', in H. Hestermeyer et al. (eds), Law of the Sea in Dialogue (Springer, 2011) 1371-59, at 155.
[4] Goodwin J, 'Universal Jurisdiction and the Pirate: Time for an Old Couple to Part', 39 *Vanderbilt Journal of Transnational Law* Vol. 39 No. *973* (2006) pp 1004-1005:1000

when presiding over a case involving universal jurisdiction such as piracy in their national courts in so far as international law does not conflict with domestic law of the forum state. In this regard, relevant international law should be understood to include conventions that deal with crimes subject to universal jurisdiction and customary international law.[5] In recognition of the role of international and foreign national courts in the elaboration of international law and foreign courts in the elaboration of international law regarding universal jurisdiction, relevant international law should be understood to include decisions of such courts addressing equivalent questions in cases involving universal jurisdiction and other pertinent issues regarding piracy. Judges are also encouraged in determining content of relevant international law to consult with international law experts.

[5] R. Collins and D. Hassan, 'Applications and Shortcomings of the Law of the Sea in Combating Piracy', *Journal of Maritime Law & Commerce*, Vol. 40 No.89 (2009) pp 102-103

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