

**THE FIGHT AGAINST PIRACY IN THE GULF OF ADEN AND WESTERN INDIAN
OCEAN: AN APPRAISAL OF EMERGING LEGAL CHALLENGES**

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DECLARATION

I, RONALD GODWIN MULLOMI OKELLO do hereby declare that this project is my original work and that it has not been submitted either in part or in whole and is not being currently submitted for a degree in any other University.

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ABSTRACT

Most of commerce that fuels the world economy is transported by sea and the oceans are a primary source of food and natural resources. Over the years, this commerce has been threatened by violent attacks against marine vessels carried out by attackers who prey on other vessels and rob them of their goods, injure passengers and crew and sometimes capture the vessels for their own reasons.

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

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I wish to thank God for giving me the health and strength to complete this research and the entire course. I am also grateful to my lecturers in the Public International Law thematic area whose enthusiastic approach spurred my interest in this course.

DEDICATION

I wish to dedicate this thesis to my father John, mother Helen, sisters Annette and Nekesa, brothers Brian and Francis for the love and support they provided me through my entire life.

LIST OF CONVENTIONS/TREATIES

1. 1958 Convention on the Territorial Sea and the Contiguous Zone
2. 1958 Convention on Fishing and Conservation of the Living Resources of the High Seas
3. 1958 Convention on the Continental Shelf
4. 1988 Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation
5. 1958 Convention on the High Seas.
6. 1946 International Convention for the Regulation Whaling
7. 1950 European Convention on Human Rights
8. 1907 Hague Convention VII Relating to the Conversion of Merchant Ships into War-Ships
9. 1966 International Covenant on Civil and Political Rights
10. 1856 Paris Declaration Respecting Maritime Law
11. 1982 United Nations Convention on the Law of the Sea
12. 2002 International Ship and Port Facility Security (ISPS) Code
13. 2009 Djibouti Code of Conduct

LIST OF STATUTES

1. Alien Tort Claims Act, 28 U.S.C. § 1350.
2. Constitution of Kenya, 2010
3. Judicature Act (Cap.8), Laws of Kenya, came into force 1st August 1967
4. Merchant Shipping Act (Act No.4 of 2009), Laws of Kenya, came into force 1st September, 2009.
5. Penal Code (Cap.63), Laws of Kenya, came into force 1st August, 1930
6. Penal Code (Cap.158) of the Laws of Seychelles, came into force 1st February 1955

LIST OF CASES CITED

1. United States v. Yousef 327 F.3d 56, 104 (2d Cir. 2003)
2. Re Hassan M Ahmed & others [2009] eKLR
3. Institute of Cetacean Research v. Sea Shepherds, 43 ELR 20114. No. 12-35266, (9th Cir., 05/24/2013)
4. Re Mohamud Mohamed Dashi & 8 Others [2010] eKLR
5. Republic vs Abdirahman Isse Mohamud & 3 Others (Unreported) Mombasa HC
Misc. Criminal Application No.72 of 2011
6. Republic vs Hassan Jama Haleys Alias Hassan Jamal and five others [2010] eKLR
7. Republic vs Houssein Mohammed Osman and Ten (10) others others (Supreme Court
of Seychelles) Criminal Side No.19 of 2011

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LIST OF ABBREVIATIONS

AMISOM	African Union Mission in Somalia
AU	African Union
CGPCS	Contact Group on Piracy off the Coast of Somalia
ECCAS	Economic Community of Central African States
ECOWAS	Economic Community of West African States
EU NAVFOR	European Union Naval Force
FATF	Financial Action Task Force
GGC	Gulf of Guinea Commission
IGAD-SOM	Inter-Governmental Authority on Development Mission to Somalia
IMO	International Maritime Organization
IRTC	International Recommended Transit Corridor
MoU	Memorandum of Understanding
MSC-HOA	Maritime Security Centre – Horn of Africa
NATO	North Atlantic Treaty Organization
PLF	Palestine Liberation Front
PLO	Palestine Liberation Organization
RDP	Reconstruction and Development Programme
SUA	Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation
TFG	Transitional Federal Government

UN	United Nations
UNCLOS	United Nations Convention on the Law of the Sea
UNEP	United Nations Environment Program
UNSC	United Nations Security Council
WFP	World Food Programme

CHAPTER ONE: INTRODUCTION

1.1 Background to the study

90% of commerce that fuels the world economy is transported by sea.¹ The increase in pirate attacks has hampered the passage of ships in the Western Indian Ocean and Gulf of Aden, thus endangering the economies of countries that depend upon this waterway for international commerce. Acts of piracy are so reprehensible that suspects are considered *hostis humani generis* or enemies of all humankind. Goodwin states that, apparently, the Roman statesman Cicero was the first to issue the now-famous legal maxim, *Pirata est hostis humani generis*, meaning "a pirate is the common enemy of humankind."² As Cicero famously remarked, there are certain enemies with whom one may negotiate and with whom, circumstances permitting, one may establish a truce. A pirate is also an enemy with whom treaties are in vain and war remains incessant.³ Pirates do not discriminate among targets based on nationality and, thus, endanger the trade of all countries.⁴ In *United States v. Yousef*,⁵ the court observed that 'the concept of universal jurisdiction has its origins in prosecutions of piracy, which States and legal scholars have acknowledged for at least 500 years as a crime against all nations both because of the threat that piracy poses to orderly transport and commerce between nations and because the crime occurs statelessly on the high seas'.⁶

Till the 1980s, piracy was generally considered history and restricted to the silver screen, but the 1990s has seen resurgence in maritime piracy, with persistent surge in 2000s in the Western Indian Ocean and Gulf of Aden. Technological development and the Cold War

¹ International Maritime Organization, 'Introduction to IMO'.

<<http://www.imo.org/About/Pages/Default.aspx>>. accessed 30 October 2013

² J.M. Goodwin, 'Universal Jurisdiction and the Pirate: Time for an Old Couple to Part.' Vanderbilt Journal of Transnational Law, Vol. 39, 973-91.

³ D. Heller-Roazen, *The Enemy of All: Piracy and the Law of Nations*' (1st, Zone Books, New York 2009)

⁴ P.B. Larsen and others, *Aviation Law: Cases, Laws and Related Sources*(2nd, Martinus Nijhoff Publishers, The Netherlands 2012) 115

⁵ 327 F.3d 56, 104 (2d Cir. 2003)

⁶ Larsen (n 4)104

cease-fire, resulting in a shrinking Soviet navy and the limited US naval presence, may have also contributed to encouraging piracy. Likewise, the handover of Hong Kong to the People's Republic of China led to the exit of the British Royal Navy.

Today, this group of international criminals threatens to bring much of international shipping to a standstill. According to the International Maritime Organization (IMO), between September 2009 and January 2011 there were 172 acts of piracy attacks and attempted attacks on ships off the coast of Somalia.⁷

International law against maritime piracy is codified in various international conventions. The 1982 United Nations Convention on the Law of the Sea (UNCLOS)⁸ which has been largely ratified contains the definition of piracy.⁹ Article 101 of the Convention states that piracy consists of any of the following acts:

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

⁷ International Maritime Organization, IMO. *Reports on Acts of Piracy and Armed Robbery against Ships: Annual report 2010*, Maritime Safety Committee (MSC).4/Circ.169, Annex 5, Apr. 01, 2011.

⁸ United Nations Convention on the Law of the Sea (adopted 10 December 1982, entered into force entered into force on 16 November 1994)1833 U.N.T.S. 397

⁹ On August 2013, Niger was the 166th country to ratify UNCLOS.

http://www.un.org/Depts/los/reference_files/chronological_lists_of_ratifications.htm accessed 17 May 2014

- (c) Any act of intentionally inciting or facilitating an act described in subparagraph (a) or (b)

Article 105 of the Convention further grants every state jurisdiction to arrest and prosecute persons suspected of committing acts of piracy regardless of where the acts may have occurred. Article 105 reads as follows:

On the high seas, or in any other place outside the jurisdiction of any State, every State may seize a pirate ship or aircraft, or a ship or aircraft taken by piracy and under the control of pirates, and arrest the persons and seize the property on board. The courts of the State which carried out the seizure may decide upon the penalties to be imposed, and may also determine the action to be taken with regard to the ships, aircraft or property, subject to the rights of third parties acting in good faith.

The maritime acts of depredation often fall outside this definition due to several reasons. First, whereas the definition covers acts committed on the “*high seas*”, armed groups have captured and held for ransom crews of ships engaged in the exercise of the right of innocent passage in territorial waters as provided for under Article 45 of UNCLOS. Similarly, some of these acts of violence are committed partially on the high seas and partially in territorial waters or wholly in territorial waters and, thus, not covered within this definition. Second, this definition of piracy only includes acts committed by one ship against another ship; acts not involving two ships do not fall within this definition. Third, the definition only includes criminal acts committed for “*private ends*”. The plain language of this definition provides that the motive for piracy must be pecuniary; hence, any acts committed for political or other ends are excluded from this definition.

These definitional shortcomings were however addressed by the Convention for the Suppression of Unlawful Acts of Violence against the Safety of Maritime Navigation, 1988 (SUA Convention) which was adopted following the *Achille Lauro* attack.¹⁰

Article 3 of the SUA Convention, provides that a person commits an offence if that person unlawfully and intentionally:

- (a) seizes or exercises control over a ship by force or threat thereof or any other form of intimidation; or
- (b) performs an act of violence against a person on board a ship if that act is likely to endanger the safe navigation of that ship; or
- (c) destroys a ship or causes damage to a ship or to its cargo which is likely to endanger the safe navigation of that ship; or
- (d) places or causes to be placed on a ship, by any means whatsoever, a device or substance which is likely to destroy that ship, or cause damage to that ship or its cargo which endangers or is likely to endanger the safe navigation of that ship; or
- (e) destroys or seriously damages maritime navigational facilities or seriously interferes with their operation, if any such act is likely to endanger the safe navigation of a ship; or
- (f) communicates information which he knows to be false, thereby endangering the safe navigation of a ship; or
- (g) injures or kills any person, in connection with the commission or the attempted commission of any of the offences set forth in subparagraphs (a) to (f).

The provisions of UNCLOS in relation to piracy have been domesticated into Kenyan law through the Merchant Shipping Act (Act No.4 of 2009) of the Laws of Kenya.¹¹ Section 369

(1) (a) of the Act provides that piracy consists of any of the following acts:

¹⁰ On October 7, 1985 four members of the Palestine Liberation Front (PLF), a faction of the Palestine Liberation Organisation (PLO), took control of the *Achille Lauro* an Italian flag cruise ship as it was sailing from Alexandria to Port Said. They held the passengers and crew hostage, and directed the vessel to sail to Tartus, Syria, while they demanded the release of 50 Palestinians then in Israeli prisons. After being refused permission to dock at Tartus, the hijackers killed wheel chair bound Jewish-American passenger, Leon Klinghoffer, and then threw his body overboard.

¹¹ Merchant Shipping Act (Act No.4 of 2009 of the Laws of Kenya)
<http://www.kenyalaw.org/kenyalaw/klr_app/frames.php> accessed 14 July 2013

- (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 provisions of the SUA Convention in relation to hijacking and destruction of ships were domesticated into Kenyan law through Section 370 of the Merchant Shipping Act which provides as follows:

- (1) Subject to subsection (5), a person who unlawfully, by the use of force or by threats of any kind, seizes a ship or exercises control of it commits the offence of hijacking a ship.
- (2) Subject to subsection (5), a person commits an offence if he unlawfully and intentionally—
 - (a) destroys a ship;
 - (b) damages a ship or its cargo so as to endanger, or to be likely to endanger, the safe navigation of the ship;
 - (c) commits, on board a ship, an act of violence which is likely to endanger the safe navigation of the ship; or
 - (d) places or causes to be placed on a ship any device or substance which is likely to destroy the ship or is likely so to damage it or its cargo as to endanger its safe navigation.

The above provisions of the Merchant Shipping Act and the repealed Section 69 of the Penal Code (Cap.63) of the Laws of Kenya¹² have been used by Kenya to prosecute suspected pirates following execution of bilateral agreements with western countries. These prosecutions have not been without obstacles which this study aims to investigate.

1.2 Statement of the problem

Regional states have ratified and domesticated international conventions that codify international law on maritime piracy. It is therefore imperative to critically examine the international conventions relating to maritime piracy and also how the same have been domesticated into their national legislations.

The aim of this study is to examine the complexities and challenges surrounding the enforcement of both international law and national law in combating the problem of maritime piracy in the Gulf of Aden and the Western Indian Ocean.

1.3 Hypotheses

This study is guided by the following basic assumptions that:

- (i) the international law on maritime piracy has lacked enforcement capacity and dynamism to deal effectively with the acts of violence in the Western Indian Ocean and Gulf of Aden; and,
- (ii) Lack of proper interface between international law and national law on maritime piracy leaves room for perpetrators of acts of maritime violence to escape prosecution.

¹² Penal Code (Cap.63) of the Laws of Kenya. < http://www.kenyalaw.org/kenyalaw/klr_app/frames.php.> accessed 14 July 2013

1.4 Research questions

This study seeks to answer the following questions:

- 1.4.1. What are the key challenges and limitations faced in enforcing the law in respect to acts of maritime piracy in the Gulf of Aden and Western Indian Ocean? How can these challenges be overcome?
- 1.4.2. Do the laws of regional states sufficiently encompass what is envisaged in the various conventions that codify the international law on maritime piracy? If not how can these gaps be addressed?

1.5 Theoretical framework

International law can be defined as “.....rules and principles of general application dealing with the conduct of states and of international organizations and with their relations inter se, as well as with some of their relations with persons, whether natural or juridical.”¹³ It is therefore critical to understand how international law is enforced in national jurisdictions and similarly the relationship between international law and national laws. This is best captured by two divergent theories of monism and dualism.

Proponents of the monism contend that international law and the national laws of each national form an integrated legal system. As such international law is part and parcel of each country’s legal system.¹⁴ In monist states international law does not need to be domesticated into national law. As such, ratification of international treaties by states automatically incorporates them into national law.

¹³American Law Institute, *Restatement of the Law, The Foreign Relations Law of the United States*, vol 1(3rd, American Law Institute, Washington D.C 1987) § 101 at 22

¹⁴W. Slomanson, *Fundamental Perspectives on International Law* (6th, Wadsworth, Boston 2011) 17

Monists assert that international law takes priority over national law in cases of conflict. Proponents of monism are normally interested in authority and in laws that are higher than those that are associated with the state.¹⁵ Hans Kelsen opines that international law is superior to national law and that states are subordinate to international law in the same manner that individuals are subordinate to national law.¹⁶

On the other hand we have the dualist theory which presupposes that international law and national law are two separate legal and distinct systems operating independently from each other. According to Rosalyn Higgins, 'international law and municipal law comprise two essentially different legal systems, existing side by side within different spheres of action — the international plane and the domestic plane.'¹⁷ Dualists assert that international law addresses itself to states and not individuals. States are therefore free to regulate their internal affairs in whichever manner they may desire with international law having little or no control over national laws.¹⁸

Proponents of the dualistic theory assert that international law must be translated into municipal law before it can be applied by domestic courts. Domestic courts may also apply international law when it is not in conflict with municipal law.¹⁹

The dualist theory has however received criticism since in modern times subjects of international law are not only states but also international organisations, individuals and other non-state entities.

¹⁵ J.J. Paust, 'Basic Forms of International Law and Monist, Dualist, and Realist Perspectives ' (www.ssrn.com 2013) <<http://ssrn.com/abstract=2293188> > accessed 07 July 2014

¹⁶ H. Kelsen, *Principles of International Law* (3rd, Law Exchange Ltd, Clark, New Jersey 1952) 104 - 105

¹⁷ R. Higgins, *Problems and Process: International Law and How We Use It* (1st, Clarendon Press, Oxford 1994) 205

¹⁸ Edwin Borchard, 'Relation Between International Law and Municipal Law ' (<http://www.law.yale.edu/> 1940) <http://digitalcommons.law.yale.edu/fss_papers/3498> accessed 08 July 2014

¹⁹ J.A.C. Cartner and others, *International Law of the Shipmaster* (1st, Routledge, London 2009) 62

1.6 Literature Review

According to Ivan Shearer, piracy is the first crime to be classified as crime against international law (offence against the law of nations) and subject to international jurisdiction.²⁰ Despite the fact that the field of operation of pirates is the high seas where no nation has a duty to police, the pirates are treated as outlaws without protection of any flag and any nation, out of the interest of all, can capture and punish them.

According to Shearer, international law allows states to apply and enforce their municipal (criminal) laws in their territorial areas. States are also allowed a right of hot pursuit on vessels committing crime in their territorial seas into high seas as long as the pursuit is hot and continuous, arrest them anywhere apart from the territorial waters of another state, and prosecute them in their local courts.²¹ International law further prohibits states from interfering with or pursuing vessels carrying another state's flag in the high seas. However, it made exceptions to pirate's vessels as they don't owe allegiance to any state. Alfred P. Rubin intimates that piracy is not a "war crime" but was historically used to distinguish those who fought as privateers under the laws of war and those who had no valid commissions or sailed under the commissions of unrecognized powers and thus were subject not at all to the laws of war but to the normal criminal law of some state with the necessary legal interest to try them.²²

James Thuo Gathii examined the jurisdiction in prosecuting non-national pirates captured by a third country in the Kenyan context. He finds that prosecution of pirates captured by other states such as US and handed over to Kenya for prosecution has provided a lot of challenges

²⁰ Ivan Shearer, 'Piracy' (<http://opil.ouplaw.com/> 2010)
<<http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1206?rskey=IDq25W&result=2&q=&prd=EPIL>> accessed 25 July 2013

²¹ Ibid.

²² A.P. Rubin, *The Law of Piracy* (2nd, Transnational Publishers, Inc, New York 1998) 294

owing to the Article 105 of UNCLOS which accords the sole mandate of handling and prosecuting non-national pirates to the state that captured them.²³ This led to the enactment of Merchant Shipping Act to give Kenyan courts expansive jurisdiction over these non-nationals. Besides the legal challenges that faced such prosecution, Kenya's judicial, investigative and rehabilitation system faces challenges such as congestion in prisons, case backlogs, and inadequate resources among others. This lowers the country's moral and legal standing in prosecuting non-national citizens; dumping ground for pirates captured by other countries.

Among the challenges facing African states in the governance of their maritime zones, among others, include: 'lack of appropriate frameworks for the delimitation and appropriate policy, legal and institutional frameworks for governance of the maritime zones... piracy and hostage taking, inadequate disaster preparedness to deal with maritime searches and rescues'.²⁴ These pirates take advantage of instability in the Western Indian Ocean and Gulf of Aden which forms perfect hideouts from where they carry out their criminal activities. Instability is further coupled by weak legal framework and enforcement capacities of states within the region.

Paul Musili Wambua examined the Kenya's jurisdictional challenges in prosecuting piracy. He noted that although Kenya has enacted domestic legislation (Merchant Shipping Act) and ratified most international conventions fighting piracy, 'it lacks capacity to fully

²³ J.T Gathii, 'Jurisdiction to Prosecute Non-National Pirates Captured by Third States under Kenyan and International Law' [2009] *Loy. L.A. Int'l & Comp. L. Rev* 363 <<http://digitalcommons.lmu.edu/ilr/vol31/iss3/2/>> accessed 25 July 2013

²⁴ P.M.Wambua, 'Enhancing regional maritime cooperation in Africa: The planned end state' (www.mercury.ethz.ch 2009)

<https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&cad=rja&uact=8&ved=0CBwQFjAA&url=http%3A%2F%2Fmercury.ethz.ch%2Fserviceengine%2Ffiles%2FISN%2F112051%2Fchaptersection_singledocument%2F605c290b-aa53-47bf-a48f-821aa173c36c%2Fen%2FChapter%2B4.pdf&ei=ILDGU5P-POTT0QWr04GoAw&usg=AFQjCNE1QQM-vVMdxczjGBvLuXywxXC4Y3A> accessed 16 July 2014

implement most of these legislative provisions'.²⁵ For instance, the Memorandum of Understanding (MoU) it signed with the western maritime nations, with regards to prosecution of captured pirates, is vague and lacks provisions for financial support. This makes it imprudent for the country to prosecute the pirates using its limited resources.

A report²⁶ from a workshop of international law and governance professors, legal experts, and judges indicates that while the legal framework for dealing with piracy is well established, there are practical difficulties in implementation and outstanding questions that would require further research. The report notes:

Piracy is a distinct crime in itself, but it often involves a complex nexus of other crimes, which are subject to different jurisdictional and legal rules than piracy. Pirate groups often commit, for example, assault, theft, kidnapping, torture, extortion, money laundering, and arms dealing some of which may under certain circumstances constitute piracy while others may not. The legal responses to piracy should take into consideration this complexity.

Diana Chang argues that the current international legal framework on piracy is flawed because it does not provide a universally applicable definition of piracy, and because it does not create uniform guidelines for the prosecution and punishment of pirates.²⁷ This is a view that seems to be shared by Lawrence Azubuike:

If there is any gap in the international regime, it is not in maintaining the universal jurisdiction usually associated with piracy, but in not providing its own mechanism for trial and punishment of pirates. It is a gaping omission that the Statute of the International Criminal Court did not deal with piracy. This is especially poignant

²⁵ P.M.Wambua, 'The jurisdictional challenges to the prosecution of piracy cases in Kenya: mixed fortunes for a perfect model in the global war against piracy' (www.springer.com 2012) <<http://link.springer.com/article/10.1007%2Fs13437-012-0021-6>> accessed 16 July 2014

²⁶ Elizabeth Andersen and others, 'Suppressing Maritime Piracy: Exploring the Options in International Law' (<http://oneearthfuture.org/> 2009) <<http://oneearthfuture.org/images/imagefiles/OEF%20-%20PIRACY%20-%20LAW%20WORKSHOP%20BOOKLET%20-%20FINAL%20VERSION.pdf>> accessed 25 July 2013

²⁷ D.M. Chang, 'Piracy Laws and the Effective Prosecution of Pirates' [2010] B.C. Int'l & Comp. L. Rev. 273, 281. Available at <http://lawdigitalcommons.bc.edu/iclr/vol33/iss2/3> accessed 25 July 2013

when it is realized that not every State has the facilities for such trials and those which do may not be willing to go through the trouble.²⁸

There are commentators who believe that the effective handling of maritime piracy in the Western Indian Ocean and Gulf of Aden is hampered by deficiencies in the law itself. Lucas Bento states:

Until now, states and international legal institutions have addressed the piracy problem through a series of conventions, treaties, resolutions, codes, and regional and bilateral agreements. Without a uniform, comprehensive legal framework to rely on, state, commercial and private actors have attempted to tackle piracy as best they can. These limited approaches highlight the deficiencies of international anti-piracy instruments.²⁹

Lucas Bento further blames the challenges of implementing the law on maritime piracy on its dual nature. At the centre of this dual development is the fundamental distinction between monist and dualist states. Whereas monist states, such as France, welcome international law without any further internal enactment, dualist states, like the United States, require national legislation to give effect to international law. To this end, dualist states inadvertently encourage divergent practices in the law as written and practiced because they insulate their national laws from external legal developments under international law (piracy *jure gentium*). They also inadvertently encourage dualist practices by enabling the proliferation of municipal laws that are sometimes inconsistent, not only with their international counterparts, but also *inter se*.³⁰

Saoirse de Bont argues that implementing piracy laws is complicated by the need to uphold human rights of any suspects who are captured. Saoirse de Bont cites Article 5(3) of the

²⁸ L. Azubuike, 'International Law Regime Against Piracy' [2009] *Ann. Surv. Int'l & Comp. L.* 43, 55 Available at: <http://digitalcommons.law.ggu.edu/annlsurvey/vol15/iss1/4> Accessed 25 July 2013

²⁹ L. Bento, 'Toward an International Law of Piracy Sui Generis: How the Dual Nature of Maritime Piracy Law Enables Piracy to Flourish' [2011] *Berkeley J. Int'l L.* 399, 400 Available at: <http://scholarship.law.berkeley.edu/bjil/vol29/iss2/1> Accessed 25 July 2013

³⁰ *Ibid.*

European Convention on Human Rights³¹ and Article 9(4) of the International Covenant on Civil and Political Rights (ICCPR)³² which require that once a suspected pirate is detained, that person has a right to be brought before a judicial authority without delay. For warships apprehending suspects on the high seas, it often takes a considerable amount of time to bring the suspects in front of a judicial authority.³³

On the other hand there are authors who believe that the legal challenges in dealing with piracy do not arise from law itself but from implementation and coordination of the law. Douglas Guilfoyle briefly analyses universal jurisdiction and the powers granted by UNCLOS³⁴ to nations that capture piracy suspects. He concludes as follows:

The legal problems in suppressing piracy are therefore not problems of authority; they are problems of implementation and coordination. The general international law of piracy imposes few express obligations on States other than the duty to cooperate. It contains no mandatory obligation to prosecute, nor any mechanism to facilitate transferring a suspect pirate from a capturing State to one willing to try that suspect.³⁵

This study hopes to contribute to the above writings with a focus on the implementation of the law on maritime piracy in Kenya.

³¹ Convention for the Protection of Human Rights and Fundamental Freedoms, 213 U.N.T.S. 222, *entered into force* Sept. 3, 1953, *as amended by* Protocols Nos 3, 5, 8, and 11 *which entered into force* on 21 September 1970, 20 December 1971, 1 January 1990, and 1 November 1998 *respectively*.

³² International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR)

³³ S. De Bont, 'Prosecuting Pirates and Upholding Human Rights Law: Taking Perspective' (<https://oneearthfuture.org> 2010) <<https://oneearthfuture.org/sites/oneearthfuture.org/files/documents/publications/Human-Rights-Law-Saoirse-de-Bont.pdf>> accessed 25 July 2013

³⁴ UNCLOS, *supra* n8

³⁵ Guilfoyle, Douglas. "Piracy off Somalia and the Gap Between International Law and National Legal Systems" Paper presented at the annual meeting of the Theory vs. Policy? Connecting Scholars and Practitioners, New Orleans Hilton Riverside Hotel, The Loews New Orleans Hotel, New Orleans, LA, Feb 17, 2010, available at http://www.allacademic.com/meta/p413520_index.html (Accessed December 04, 2012)

1.7 Methodology

This was a desk and literal based research. It analysed both primary and secondary sources of information on the topic. Internet sources were widely used.

Primary sources of information were treaties and conventions relating to maritime piracy, resolutions of the United Nations, and regional and bilateral agreements.

Secondary sources of information included journal articles, papers written by scholars, and finally, since Somali piracy is a current matter, news articles were closely followed. The approach to the information obtained from these sources was analytical in nature and sought to build on the existing literature on the challenges of enforcing the law on maritime piracy in the by maritime states in the Western Indian Ocean and Gulf of Aden in general and Kenya in particular.

1.8 Chapter breakdown

Chapter one: Introduces the study and lays down the basis of the research. It constitutes background of the study, statement of the problem, hypotheses, research questions, theoretical framework, literature review, methodology and the chapter breakdown.

Chapter two: Traces the historical development of the law against piracy. This chapter discusses the early attempts to codify the international law against piracy, efforts by the League of Nations, Harvard draft convention on piracy, codification of the Law of the Sea 1958. It also looks into contemporary international law on maritime piracy.

Chapter three: Looks at the upsurge of piracy in the Western Indian Ocean and Gulf of Aden. It further examines the international response to maritime piracy in the region

Chapter four: This chapter looks at the efforts to apprehend, prosecute and punish suspected perpetrators of acts of piracy in the Gulf of Aden and Western Indian Ocean together with the challenges faced by regional states in enforcing international law on piracy

Chapter five: Is the concluding chapter and it provides a brief recap of the study together with the findings of the study. This chapter also makes recommendations following findings of the study.

CHAPTER TWO: HISTORICAL DEVELOPMENT OF THE LAW AGAINST PIRACY

2.1 Introduction

This chapter traces the history and development of the international law against piracy including the efforts of the League of Nations. This discussion provides the context within which the rules of international law relating to the high seas were codified under the 1958 Convention on the High Seas and also other international conventions encompassing the law on piracy that followed it.

2.2 History of maritime piracy

It would not be unreasonable to assume that piracy has existed even since commerce started being carried out by navigation of the seas.³⁶ However, piracy really began to thrive between 1620 and 1720, a period commonly referred to as the Golden Age of Piracy.³⁷ The Golden Age of Piracy was characterized by three waves. First, was the buccaneering era which ran from around 1620's to the 1680's. This period was characterized by English, French and Dutch seamen who captured the island of Jamaica and used it as a safe haven for their attacks on Spanish colonies and ships in the Spanish Main.³⁸

Second, was the period from around 1693 and 1700 known as the Pirate Round which was characterised by seamen who journeyed around the Cape of Good Hope to the Indian Ocean and attacked ships loaded with the exotic products of India.³⁹ During this time the Indian

³⁶ Heller –Roazen, (n3).

³⁷ National Museum of the Royal Navy (Portsmouth), 'A brief history of piracy' (<http://www.royalnavalmuseum.org/> 2002) <http://www.royalnavalmuseum.org/info_sheets_piracy.htm> accessed 07 August 2013

³⁸ A. Konstam, *Buccaneers 1620-1700* (1st, Osprey Publishing, Oxford 2000) 3

³⁹ D. Cordingly, *Under the Black Flag: The Romance and Reality of Life Among the Pirates* (1st, Random House, New York 1996) 89

Ocean was a richer and more tempting target especially in high-value luxury goods like silk and calico carried by East India companies' vessels.⁴⁰

Third, was the post-Spanish-Succession period which was around 1713, when the peace treaties were signed to end the War of the Spanish Succession at the time numerous sailors and soldiers were relieved of their military duties started joining pirate captains at a time when the cross-Atlantic colonial shipping trade was beginning to boom.⁴¹

It was also during this age that governments authorized persons known as privateers through 'letters of marque and reprisal' to capture and pillage enemy vessels.⁴² Letters of marque were authorities formerly given to private persons to fit out an armed ship and use it to attack, capture, and plunder of enemy merchant ships in time of war.⁴³ Sailing for prizes armed with a letter of marque was considered to be an honourable calling combining patriotism and profit, as opposed to unlicensed piracy, which was universally vilified.⁴⁴ The Peace of Westphalia which was a series of peace treaties signed between May and October 1648 in Osnabrück and Münster renounced and outlawed privateering by signatories of those treaties.⁴⁵ These treaties ended the Thirty Years' War (1618–1648) in the Holy Roman Empire, and the Eighty Years' War (1568–1648) between Spain and the Dutch Republic, with Spain formally recognizing the independence of the Dutch Republic.

⁴⁰ G. Parker, *The World: An Illustrated History* (1st, Times Books Ltd, 1988) 317

⁴¹ M. Rediker, *Villains of All Nations, Atlantic Pirates in the Golden Age* (1st, Beacon Press, Boston 2004) 8

⁴² J. Franklin Jameson, *Privateering and piracy in the colonial period: illustrative documents* (1st, Macmillan, New York 1923) 295

⁴³ The Constitution Society, 'Letters of Marque' (www.constitution.org)

<http://www.constitution.org/mil/lmr/marque_it.htm> accessed 07 August 2013

⁴⁴ F. Upton, *Maritime Warfare and Prize* (1st, John Voorhies Law Bookseller and Publisher, New York 1863) 170

⁴⁵ R. Steenhard, 'Pirates, Buccaneers and Privateers : Concepts of International Law'

(<http://www.peacepalacelibrary.nl> 2002) <<http://www.peacepalacelibrary.nl/2012/01/pirates-buccaneers-and-privateers-concepts-of-international-law/>> accessed 09 August 2013

The Paris Declaration Respecting Maritime Law which was signed on 16 April 1856 abolished privateering.⁴⁶ The navies of the state signatories to this declaration were used to enforce it. The United States of America was not one of the initial signatories of the declaration and the Constitution of the Confederate States authorized congress to issue letters of marque and reprisal.⁴⁷ During the Civil War, on 17 April 1861 Confederate President Jefferson Davis made a proclamation offering to issue letters of marque to anyone who would employ their ship to either attack Union shipping or bring badly needed supplies through the Union blockade into southern ports.⁴⁸ The United States however renounced privateering during the Spanish American war in 1898.⁴⁹ The 1907 Hague Convention which was part of a series a series of international treaties and declarations negotiated at two international peace conferences at The Hague in the Netherlands further outlawed the use of privateers.⁵⁰

2.3 Early attempts to codify the law on piracy

In the eighteenth century Jeremy Bentham proposed a codification of a comprehensive body of international law in an idealist manner.⁵¹ However, following the First World War and the establishment of the League of Nations, the need for codification of international law arose. On 22 September 1924 the General Assembly of the League of Nations adopted a resolution

⁴⁶ Declaration respecting maritime law, signed by the plenipotentiaries of Great Britain, Austria, France, Prussia, Russia, Sardinia, and Turkey, assembled in congress at Paris, April 16, 1856. 1856. London: Printed by Harrison and sons.

⁴⁷ Constitution of the Confederate States of America, March 11, 1861. Article I Section 8(11)

⁴⁸ J. Davis, 'Important from Montgomery; Proposal to Issue Letters of Marque and Reprisal' (www.nytimes.com 1861) <<http://www.nytimes.com/1861/04/18/news/important-from-montgomery-proposal-to-issue-letters-of-marque-and-reprisal.html>> accessed 09 August 2013

⁴⁹ V. McDowell, *When Your Ox Is In The Ditch, Genealogical How To Letters* (Genealogical Pub Co Inc Baltimore (reprint) 1995) 117

⁵⁰ The Hague Convention VII Relating to the Conversion of Merchant Ships into War-Ships. (adopted 18 October 1907, entered into force 26 January 1910) 205 Consol TS 305. 285.

⁵¹ J. Bentham, 'The Works of Jeremy Bentham, published under the Superintendence of his Executor, John Bowring ' (<http://oll.libertyfund.org/> 1843) <<http://oll.libertyfund.org/titles/bentham-the-works-of-jeremy-bentham-vol-4>> accessed 09 August 2013

providing for the establishment of a standing 17 expert member committee for formulating a comprehensive system of international law on all outstanding issues. This committee known as Committee of Experts for the Progressive Codification of International Law was mandated to come up with subjects the regulation of which would be by international agreement. Among the subjects selected by this committee was piracy.⁵²

In January 1926, a sub committee consisting on M. Matsuda as Rapporteur and M. Wang Chui- Hui delivered its report to the Committee. After the committee's deliberations on the report, it proposed Draft Provisions for the Suppression of Piracy which were drafted by M. Matsuda contained the following provisions:

Article 1: Piracy occurs only on the high seas and consists of the commission for private ends of depredations upon property or acts of violence against persons. - It is not involved in the notion of piracy that the above-mentioned acts should be committed for the purpose of gain, but acts committed with a purely political object will not be regarded as constituting piracy.

Article 2: It is not involved in the notion of piracy that the ship should not have the right to fly a recognized flag, but in committing an act of piracy the pirate loses the protection of the State whose flag the ship flies.

Article 3: Only private ships can commit acts of piracy. Where a warship, after mutiny, cruises on its own account and commits acts of the kind mentioned in Article 1, it thereby loses its public character.

Article 4: Where, during a civil war, warships of insurgents who are not recognized as belligerents are regarded-by the regular Government as pirates, third powers are not hereby obliged to treat them as such. Insurgents committing acts of the kind mentioned in Article 1 must be considered as pirates, unless such acts are inspired by purely political motives.

Article 5: If the crew of a ship has committed an act of piracy, every warship has the right to stop and capture the ship on the high sea. On the condition that the affair shall be remitted for judgment to the competent authorities of the littoral State, a pursuit commenced on the high sea may be continued even within territorial waters unless the littoral state is in a position to continue such pursuit itself.

⁵² Encyclopaedia of the Nations, 'International Law ' (<http://www.nationsencyclopedia.com/>) <<http://www.nationsencyclopedia.com/United-Nations/International-Law.html>> accessed 09 August 2013

Article 6: Where suspicions of piracy exist, every warship, on the responsibility of its commander, has authority to ascertain the real character of the ship in question. If after the examination the suspicions are proved to be unfounded, the captain of the suspected ship will be entitled to reparation or to an indemnity, as the case may be. If, on the contrary, the suspicions of piracy are confirmed, the commander of the warship may either proceed to try the pirates, if the arrest took place on the high sea, or deliver the accused to the competent authorities.

Article 7: Jurisdiction in piracy belongs to the State of the ship making the capture, except: (a) in the case of pursuit mentioned in Article 5, paragraph 2; (b) in the case where the domestic legislation or an international convention otherwise decides.

Article 8: The consequences of capture, such as the validity of the prize, the right of recovery of the lawful owners, there ward of the captors, are governed by the law of the State to which jurisdiction belongs.⁵³

The Assembly of the League of Nations, in its Resolution of 27 September 1927 requesting the Council to arrange with the Netherlands for the Codification Conference, did not include "piracy" in the proposed agenda on the grounds that piracy was no longer a pressing issue to the international community and that the realization of a universal agreement seemed somewhat difficult at that time.⁵⁴ Although this convention outlawed privateering as a maritime crime, it did not specifically touch on 'piracy' which was generally disparaged.

2.4 Harvard Research in International Law

The work of the League of Nations on codification of international law and an announcement by the League that a codification conference would soon be held prompted the faculty of the Harvard Law School under the directorship of Professor Manley O. Hudson's, research initiative that was to contribute to the Codification Conference. The purpose of this initiative

⁵³ League of Nations, Committee of Experts for the Progressive Codification of International Law, Draft Provisions for the Suppression of Piracy (1927) League of Nations Doc. C.196. M.70.1927. V. 116.

⁵⁴Rubin, (n22), 308

was to prepare draft conventions on the subjects on the agenda of the First Conference for the Codification of International Law called to meet at The Hague in 1930.⁵⁵

Among the subjects that were considered by the Harvard Research was the international law of "Piracy". A Committee, whose Reporter was Professor Joseph W. Bingham of Stanford University, composed almost exclusively of residents of California considered this subject.⁵⁶

In 1932 the Harvard Research Published a Draft Convention of piracy containing the following provisions regarding the definition and jurisdiction:

Article 3: Piracy is any of the following acts, committed in a place not within the territorial jurisdiction of any state:

1. Any act of violence or of depredation committed with intent to rob, rape, wound, enslave, imprison or kill a person or with intent to steal or destroy property, for private ends without a bona fide purpose of asserting a claim of right, provided that the act is connected with an attack on or from the sea or in or from the air. If the act is connected with an attack which starts from on board ship, either that ship or another ship which is involved must be a pirate ship or a ship without national character.
2. Any act of voluntary participation in the operation of a ship with knowledge of facts which make it a pirate ship.
3. Any act of instigation or of intentional facilitation of an act described in paragraph 1 or paragraph 2 of this article.

Article 4:

1. A ship is a pirate ship when it is devoted by the persons in dominant control to the purpose of committing an act described in the first sentence of paragraph 1 of Article 3, or to the purpose of committing any similar act within the territory of a state by descent from the high sea, provided in either case that the purposes of the persons in dominant control are not definitely limited to committing such acts against ships or territory subject to the jurisdiction of the state to which the ship belongs

⁵⁵ R.P. Dhokalia, *The Codification of Public International Law* (1st, Manchester University Press, Manchester 1970) 68

⁵⁶ Rubin (n 22)

Article 6: In a place not within the territorial jurisdiction of another state, a state may seize a pirate ship or a ship taken by piracy and possessed by pirates, and things or persons on board.

Article 7:

1. In a place within the territorial jurisdiction of another state, a state may not pursue or seize a pirate ship or a ship taken by piracy and possessed by pirates; except that if pursuit of such a ship is commenced by a state within its own territorial jurisdiction or in a place not within the territorial jurisdiction of any state, the pursuit may be continued into or over the territorial sea of another state and seizure be made there, unless prohibited by the other state...

Article 9: If a seizure because of piracy is made by a state in violation of the jurisdiction of another state, the state making the seizure shall, upon the demand of the other state, surrender or release the ship, things and persons seized, and shall make appropriate reparation.

Article 13:

1. A state, in accordance with its law, may dispose of ships and other property lawfully seized because of piracy.

2. The law of the state must conform to the following principles:

... (b) Claimants of any interest in the property are entitled to a reasonable opportunity to prove their claims....

Article 14:

1. A state which has lawful custody of a person suspected of piracy may prosecute and punish that person.

2. Subject to the provisions of this convention, the law of the state which exercises such jurisdiction defines the crime, governs the procedure and prescribes the penalty...

3. A state may intercede diplomatically to assure [fair and humane treatment] to one of its nationals who is accused in another state.⁵⁷

⁵⁷ J.W. Bingham , 'Harvard Research in International Law: Draft Convention on Piracy' [1932] AJIL Supp 739, 749

While the League of Nations draft expressly excluded from the definition of piracy ‘acts committed with a purely political object’ which tended to only exclude actions that enjoyed state sanction, the drafters of the Harvard Draft recognized scenarios where insurgents had been treated as pirates and instead used the words ‘for private ends’ to exclude these instances from the law on maritime piracy.⁵⁸

Also, while the definition of piracy under the League of Nations draft Piracy consisted of the commission for private ends of depredations upon property or acts of violence against persons, the Harvard draft also included the intention to rape, wound, enslave, imprison and kill a person. The Harvard Draft committee explained the inclusion of for example rape and wound in Article 3, as there is no good reason not to include it.⁵⁹

The language contained in Article. 3 of the Harvard Draft Convention seemed to suggest a high seas requirement for commission an act of piracy. “Piracy”, according to Article.3, “is any of the following acts, committed in a place not within the territorial jurisdiction of any state: 1. Any act of violence or of depredation committed with intent to rob, rape, wound, enslave, imprison or kill a person.....”

The language in Article 3 did not make any suggestion of two ships for the commission an act of piracy. “.....if the act is connected with an attack which starts from on board ship, either that ship or another ship which is involved must be a pirate ship or a ship without national character”.

⁵⁸ D. Guilfoyle, 'Political Motivation and Piracy: What History Doesn't Teach Us About Law' (<http://www.ejiltalk.org/> 2013) <<http://www.ejiltalk.org/political-motivation-and-piracy-what-history-doesnt-teach-us-about-law/>> accessed 19 August 2014

⁵⁹ Bingham (n 57) 786

Although, the Draft Convention on Piracy was not of much practical use at the League of Nations Codification Conference of 1930, the International Law Commission relied heavily on Harvard's 1932 research when drafting the piracy provisions of the 1958 Geneva Convention on the High Seas.⁶⁰

2.5 Codification of the Law of the Sea 1958

The International Law Commission was established by the United Nations General Assembly in 1948 for the promotion of the progressive development of international law and its codification.⁶¹ At its first session, in 1949, the International Law Commission selected both the regime of the territorial waters and that of the high seas as topics for codification. The Commission appointed Mr. J.P.A François from Netherlands, as a Special Rapporteur for the topic of the high seas in 1949, and subsequently extended his mandate to include also the topic of the territorial sea.⁶²

In 1955 the International Law Commission presented a report to the United Nations General Assembly part of which was the regime of the high seas which contained ten articles dealing with piracy. Article 13 lay down the obligation for all states to co-operate in combating piracy. Article 14 contained the definition of piracy as follows:

Article 14. Piracy is any of the following acts:

1. Any illegal act of violence, detention, or any act of depredation directed against persons or property and committed for private ends by the crew or the passengers of a private vessel or a private aircraft: (a) Against a vessel on the high seas other than that on which the act is committed, or (b) Against vessels, persons or property in territory outside the jurisdiction of any State.

⁶⁰ J. Bellish, 'Breaking News from 1932: Pirate Facilitators Must Be Physically Present on the High Seas' (<http://www.ejiltalk.org/> 2012) <<http://www.ejiltalk.org/breaking-news-from-1932-pirate-facilitators-must-be-physically-present-on-the-high-seas/>> accessed 12 August 2013

⁶¹ United Nations General Assembly Resolution A-RES-174 (II) on passed November 21, 1947 <<http://daccess-ods.un.org/TMP/464275.516569614.html>> accessed 12 August 2013

⁶² International Law Commission, Report of the International Law Commission on the work of its first Session, 12 April 1949, UN Doc. A/CN.4/13 <<http://www.un.org/law/ilc/index.htm>> accessed 12 August 2013

2. Any act of voluntary participation in the operation of a ship or of an aircraft with knowledge of facts which make the ship or aircraft a pirate ship or aircraft.

3. Any act of incitement or of intentional facilitation of an act described in paragraph 1 or paragraph 2 of this article.⁶³

The Commission considered six controversial points as to the essential features of piracy. Namely: First, the intention to rob (*animus furandi*) was not required. Acts of piracy may be prompted by feelings of hatred or revenge, and not merely by the desire for gain. Second, the acts must be committed for private ends. Third, piracy could be committed only by merchant vessels, not by warships. Fourth, piracy could be committed only on the high seas or in a place situated outside the territorial jurisdiction of any State, and could be committed within the territory of a State or in its territorial sea. Fifth, acts of piracy could be committed not only by vessels on the high seas, but also by aircraft, if such acts are committed against vessels on the high seas. Sixth, acts committed on board a vessel by the crew or passengers and directed against the vessel itself or against the persons or property on the vessel could be regarded as acts of piracy.⁶⁴

Article 15 provided that the acts of piracy committed by a warship or a military aircraft whose crew mutinies were to be assimilated to acts committed by a private vessel. Article 16 defined a pirate ship as aircraft when it is devoted by the persons in dominant control to the purpose of committing an act described in the first sentence of article 14, paragraph 1. Article 20, granted the right of seizure of pirate ships only to warships and military aircraft.

Article 18 granted universal jurisdiction to any state that captured a pirate ship. Article 18 read as follows:

⁶³ International Law Commission, Report of the International Law Commission Covering the Work of its Seventh Session. 2 May - 8 July 1955, UN Doc A/CN.4/94 <<http://www.un.org/law/ilc/index.htm>> accessed 12 August 2013

⁶⁴ *Ibid.*

On the high seas or in any other place not within the territorial jurisdiction of another State, any State may seize a pirate ship or aircraft or a ship taken by piracy and under the control of pirates, and property or persons on board. The courts of that state may decide upon the penalties to be imposed, and determine the action to be taken with regard to the property, subject to rights of third parties acting in good faith.⁶⁵

The above provisions were adopted at the 1958 Geneva Conference in the Convention on the High Seas with some slight amendments as follows:

Article 14. 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.

Article 15 Piracy consists of any of the following acts:

(1) Any illegal acts of violence, detention or any act of depredation, committed for private ends by the crew or the passengers of a private ship or a private aircraft, and directed:

(a) On the high seas, against another ship or aircraft, or against persons or property on board such ship or aircraft;

(b) Against a ship, aircraft, persons or property in a place outside the jurisdiction of any State;

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

(3) Any act of inciting or of intentionally facilitating an act described in subparagraph 1 or subparagraph 2 of this article.

Article 16. The acts of piracy, as defined in article 15, committed by a warship, government ship or government aircraft whose crew has mutinied and taken control of the ship or aircraft are assimilated to acts committed by a private ship.

Article 17. A ship or aircraft is considered a pirate ship or aircraft if it is intended by the persons in dominant control to be used for the purpose of committing one of the acts referred to in article 15. The same applies if the ship or aircraft has been used to commit any such act, so long as it remains under the control of the persons guilty of that act.

Article 18. A ship or aircraft may retain its nationality although it has become a pirate ship or aircraft. The retention or loss of nationality is determined by the law of the State from which such nationality was derived.

Article 19. On the high seas, or in any other place outside the jurisdiction of any State, every State may seize a pirate ship or aircraft, or a ship taken by piracy and under the control of pirates, and arrest the persons and seize the property on board. The courts of the State which carried out the seizure may decide upon the penalties to be imposed, and may also determine the action to be taken with regard to the ships, aircraft or property, subject to the rights of third parties acting in good faith.

⁶⁵ Ibid.p.26

Article 20. Where the seizure of a ship or aircraft on suspicion of piracy has been effected without adequate grounds, the State making the seizure shall be liable to the State the nationality of which is possessed by the ship or aircraft, for any loss or damage caused by the seizure.

Article 21. A seizure on account of piracy may only be carried out by warships or military aircraft, or other ships or aircraft on government service authorized to that effect.⁶⁶

While Article 3 of the Harvard draft included acts committed with intent to rob, rape, wound, enslave, imprison or kill a person, the International Law Commission removed these and replaced them with the broader term “illegal act of violence”. This amendment was brought about by different opinions of the members of the commission where some of them that the definition should not be too restrictive.⁶⁷

The International Law Commission also decided that acts of the motive of piracy should not be limited to the intention to rob (*animo furandi*), since they could also be motivated by other reasons such as revenge and hatred. However, the commission found it necessary that the acts are committed for private ends and that they are committed on the high seas or in a place outside the jurisdiction of any State just as it was concluded in the Harvard Draft. The Commission also felt that to assimilate unlawful acts committed by warships to acts of piracy would be prejudicial to the interests of the international community and would have grave consequences and as such excluded warships from the definition of piracy.⁶⁸

Three other separate conventions were adopted by the Conference on 29 April 1958 and were opened for signature until 31 October 1958, and thereafter opened for accession by all Member States of the United Nations, as well as other States and specialized agencies invited

⁶⁶ United Nations Convention on the High Seas (Geneva, 29 April 1958, entered into force 30 September 1962) 13 UST 2312; 450 UNTS 11 (HSC)

⁶⁷ International Law Commission, Report of the International Law Commission on the work of its seventh Session, 07 May – 08 July 1958, UN Doc. A/2934 <http://legal.un.org/ilc/publications/yearbooks/Ybkvolumes%28e%29/ILC_1955_v2_e.pdf> Accessed 29 March 2015

⁶⁸ Rubin (n 22) 324

by the General Assembly to become party to: the Convention on the Territorial Sea and the Contiguous Zone (entered into force on 10 September 1964); the Convention on Fishing and Conservation of the Living Resources of the High Seas (entered into force on 20 March 1966), and the Convention on the Continental Shelf (entered into force on 10 June 1964).⁶⁹

2.6 The United Nations Convention on the Law of the Sea, 1982 (UNCLOS)

UNCLOS is an international treaty that was the culmination of the third United Nations Conference on the Law of the Sea, with more than 160 nations participating, which took place between 1973 and 1982.⁷⁰ While UNCLOS was first signed on 10 December 1982, at Montego Bay in Jamaica, the treaty did not come into force until 16 November 1994, after a period of nearly twelve years. This was one year after Guyana became the sixtieth state to ratify the treaty. UNCLOS required sixty instruments of ratification and could only enter into force one year after the sixtieth state had ratified or acceded to the treaty.⁷¹ The main reason many industrialized states took long to ratify the treaty was difficulties with the seabed mining provisions contained in Part XI of the Convention which, among other things, establishes the International Seabed Authority (ISA) to authorize seabed exploration and mining and collect and distribute the seabed mining royalty. To address these difficulties the then UN Secretary-General Mr. Javier Pérez de Cuéllar convened in July 1990 a series of informal consultations which culminated in the adoption, on 28 July 1994, of the Agreement Relating to the Implementation of Part XI of the United Nations Convention on the Law of

⁶⁹ United Nations Conference on the Law of the Sea, 1958. United Nations Diplomatic Conferences. <<http://untreaty.un.org/cod/diplomaticconferences/lawofthesea-1958/lawofthesea-1958.html>> accessed 12 August 2013

⁷⁰ United Nations, Diplomatic Conferences: United Nations Conference on the Law of the Sea, 1973-1982, <<http://untreaty.un.org/cod/diplomaticconferences/lawofthesea-1982/lawofthesea-1982.html>> accessed 17 August 2013

⁷¹ UNCLOS, (n8), Art 308

the Sea of 10 December 1982.⁷² The 28 July 1994 Agreement addressed key issues which included costs to States Parties and institutional arrangements, decision-making mechanisms for the Authority, and future amendments of the Convention.⁷³ To add to the difficulties raised by industrialized states in relation to Part XI of the Convention was Article 309, which prohibits nations from making reservations to any part of the treaty.⁷⁴

The definition of piracy is contained in Article 101 of the Convention which provides that piracy consists of any of the following acts:

- (d) 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:
 - (iii) on the high seas, against another ship or aircraft, or against persons or property on board such ship or aircraft;
 - (iv) against a ship, aircraft, persons or property in a place outside the jurisdiction of any State;
- (e) 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;
- (f) any act of intentionally inciting or facilitating an act described in subparagraph (a) or (b)⁷⁵

The definition of piracy under UNCLOS, which is almost similar to the definition of piracy under the 1958 Convention on the High Seas, has been generally accepted as a reflection of pre-existing customary international law and it is recognized as the most authoritative codification of piracy law.⁷⁶

⁷² The UN Secretary-General, Consultations of the Secretary-General on Outstanding Issues Relating to the Deep Seabed Mining Provisions of the United Nations Convention on the Law of the Sea, delivered to the General Assembly, U.N. Doc. A/48/950 (09 June 1994).

⁷³ United Nations General Assembly, Agreement Relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea of December 10, 1982; A/RES/48/263. http://www.un.org/Depts/los/convention_agreements/texts/unclos/closindxAgree.htm (Accessed September 07, 2013).

⁷⁴ UNCLOS, (n8), Art.309

⁷⁵ Ibid, Art.101

⁷⁶ M. Sterio, 'Fighting Piracy in Somalia (and Elsewhere): Why More Is Needed' [2009] Fordham Int'l L.J. 372, 385 <<http://ir.lawnet.fordham.edu/ilj/vol33/iss2/3>> accessed 17 August 2013

This definition contains five criteria for an act to be considered as an act of piracy. First, it must involve acts of violence, detention, or depredation. Second, these acts must be committed for private ends. Acts that are committed for public reasons are not deemed to be acts of piracy. Third, the acts must be committed by the crew or the passengers of a private ship or a private aircraft. Acts of piracy cannot be committed by a warship or a government ship. However, Article 102 provides that in the event that the acts are committed by a warship or government ship whose crew has mutinied and taken control of the ship, they are considered to be acts of piracy.⁷⁷ Fourth, the acts must be committed by one ship against another ship; acts not involving two ships, like mutiny and barratry, do not fall within this definition.⁷⁸ The fifth and last criterion is that the act must be committed on the high seas or in a place outside the jurisdiction of any State.

UNCLOS provides that all States have an obligation to cooperate to the fullest possible extent in the repression of piracy.⁷⁹ It further grants all states universal jurisdiction on the high seas to seize pirate ships and aircraft, or a ship or aircraft taken by piracy and under the control of pirates, and arrest the persons and seize the property on board.⁸⁰

The provisions of UNCLOS regarding piracy have received different interpretations in different jurisdictions. For instance, the United States Court of Appeals for the Ninth Circuit has considered the “private ends” requirement of the crime of piracy under UNCLOS in

⁷⁷ United Nations Convention on the Law of the Sea, Article 102. December 10, 1982; 1833 U.N.T.S. 397.

⁷⁸ The Oxford Online Dictionary defines a mutiny as an open rebellion against the proper authorities, especially by soldiers or sailors against their officers. Available at <<http://oxforddictionaries.com/definition/english/mutiny>> accessed 20 August 2013. The Merriam-Webster Online Dictionary defines barratry as an unlawful act or fraudulent breach of duty by a master of a ship or by the mariners to the injury of the owner of the ship or cargo. Available at <http://www.merriam-webster.com/dictionary/barratry> accessed 20 August 2013

⁷⁹ UNCLOS, (n8), Art.100

⁸⁰ Ibid., Art.105

Institute of Cetacean Research v. Sea Shepherds,⁸¹ where the Federal Appeals Court panel reversed the Districts Court's decision and ordered the Sea Shepherds, an international non-profit, marine wildlife conservation organization, to halt attacks and stay at least 500 meters of any Japanese whaling vessels. The Institute of Cetacean Research, who hunt whales in the Antarctic waters pursuant to a permit issued under the 1946 International Convention for the Regulation Whaling,⁸² had filed suit against the Sea Shepherds under the Alien Tort Claims Act⁸³ for declaratory and injunctive relief, claiming that their acts of ramming ships, fouling propellers, and hurling fiery and acid-filled projectiles amounted to piracy. In dismissing the piracy claim, the lower court interpreted the term "private ends" as limited to those pursued for financial gain. It also held that the Sea Shepherds conduct was not violent because it targeted ships and equipment rather than people. In reversing the lower court's decision, Chief Judge Alex Kozinski held that Sea Shepherds satisfied the "private ends" requirement of UNCLOS, and that they could accordingly be considered pirates under international law, regardless of their political and non-pecuniary motivation. According to Judge Kozinski:

"You don't need a peg leg or an eye patch. When you ram ships; hurl glass containers of acid; drag metal-reinforced ropes in the water to damage propellers and rudders; launch smoke bombs and flares with hooks; and point high-powered lasers at other ships, you are, without a doubt, a pirate, no matter how high-minded you believe your purpose to be."⁸⁴

In November 2010, a group of ten Somali men were tried for piracy in the Hamburg Youth Court, Germany where they were accused of seizing the German vessel *MS Taipan* about 900

⁸¹ 43 ELR 20114. No. 12-35266, (9th Cir., 05/24/2013) <<http://elr.info/litigation/43/20114/institute-cetacean-research-v-sea-shepherd-conservation-society>> accessed 01 October 2014

⁸² International Convention for the Regulation of Whaling, December 02, 1946; 161 UNTS 72.

⁸³ Alien Tort Claims Act, 28 U.S.C. § 1350.

⁸⁴ *Supra* n 81

kilometres off the coast of Somalia in April 2010.⁸⁵ The case was held in a juvenile court as some of the accused were under 18 years old at the time of the attack.⁸⁶ The group were captured by a Dutch marine commando and taken to the Netherlands, from where they were extradited to Hamburg, Germany, where the ship's owner's company was registered. The trial took nearly two years and the group were found guilty of kidnapping and conducting an attack on maritime traffic and sentenced to imprisonment for terms ranging from two to seven years.⁸⁷ In the ruling, leading judge, Bernd Steinmetz, said the pirates had hoped for a ransom payment of at least \$1 million. Looking at the defendants, he said, "Each of you had been expecting a share, even if just a small one".⁸⁸

In this particular case, the offences were committed about 900 kilometres from the coast of Somalia which was on the high seas and there was established a nexus between the flag of the ship and the state in which the perpetrators were tried.

The definition of UNCLOS, however excludes many of the types of maritime attacks that are perpetrated around the world. First, UNCLOS requires that a crime be perpetrated on the high seas in order for it to be punishable as piracy. However, the majority of maritime attacks off the coast of Somali occur within its territorial waters. Second, the requirement that an attack be

⁸⁵ Aotearoa Independent Media Center, Borders Civil & Human Rights Racism International, *Reclaim The Seas - Piracy Trial in Germany* (January 7, 2011), available at <http://archive.indymedia.org.nz/article/79288/reclaim-seas-piracy-trial-germany>. accessed 10 September 2013

⁸⁶ A. Riley, 'Germany court opens country's first piracy trial in 400 years' (www.jurist.org 2010) <<http://jurist.org/paperchase/2010/11/germany-court-opens-countrys-first-piracy-trial-in-400-years.php>> accessed 10 September 2013

⁸⁷ Spiegel Online International, 'Verdict in Somali Hijacking Case: Court Rules in Germany's First Modern-Day Piracy Trial ' (www.spiegel.de 2012) <<http://www.spiegel.de/international/germany/hamburg-court-hands-down-somali-pirate-sentences-a-862350.html>> accessed 10 September 2013

⁸⁸ Ibid

motivated by 'private ends' excludes attacks that are politically motivated or, in the case of the Somali coast, for environmental protection. Third, is the two-vessel requirement that requires that perpetrators stage an attack from one vessel against the crew or passengers of another vessel in order for the attack to qualify to be piracy. Effectively, an attack on a ship committed by its crew, its passengers or stowaways would be mutiny, excluded from the ambit of piracy under UNCLOS.

2.7 The Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation, 1988 (SUA Convention)

The Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation, 1988 (SUA Convention) was adopted by the International Conference on the Suppression of Unlawful Acts against the Safety of Maritime Navigation at Rome on 10 March 1988, and came into force on 1 March 1992, after it had been ratified by 15 states.⁸⁹

The Convention was passed as a result of the seizure of the *Achille Lauro*, an Italian flag cruise ship, on October 7, 1985, when four members of the Palestine Liberation Front (PLF), a faction of the Palestine Liberation Organisation (PLO), took control of the *Achille Lauro* as it was sailing from Alexandria to Port Said. They held the passengers and crew hostage, and directed the vessel to sail to Tartus, Syria, while they demanded the release of 50 Palestinians then in Israeli prisons. After being refused permission to dock at Tartus, the hijackers killed wheel chair bound Jewish-American passenger, Leon Klinghoffer, and then threw his body overboard.⁹⁰

⁸⁹ Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation. March 10, 1988; 1678 U.N.T.S. 221

⁹⁰ M. Halberstam, 'Terrorism on the High Seas: The Achille Lauro, Piracy and the IMO Convention on Maritime Safety' [1988] AJIL 269, 269 <<http://www.jstor.org/stable/2203189>> accessed 10 September 2013

After the seizure of the *Achille Lauro*, an argument arose as to whether the seizure of the ship constituted an act of piracy. Some, like courts in the United States and Britain, were of the opinion that this act constituted piracy, regardless of the absence of *animus furandi*, the intention to rob.⁹¹ There are those who argued against the characterisation of this act as piracy on grounds that it was committed by insurgents fighting for independence.⁹²

By the time the *Achille Lauro* incident occurred, UNCLOS had been adopted, but was yet to come into force and the only conventional law touching on piracy in force at the time was the 1958 Geneva Convention on the High Seas.⁹³ Article 15 of the Convention on the High Seas described piracy as:

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

The Geneva Convention on the High Seas requirement that an act be committed by the crew or passengers of one ship against another ship, further fuelled arguments on whether the events on the *Achille Lauro* constituted piracy.⁹⁴ Following the events on the *Achille Lauro*, Austria, Egypt, and Italy which was the flag state of the ship, proposed the adoption of a treaty under the auspices of the International Maritime Organisation (IMO) to set forth

⁹¹ Ibid, 270

⁹² Ibid.

⁹³ Convention on the High Seas, (n66) Art.15

⁹⁴ Halberstam (n90)

comprehensive requirements for the suppression of unlawful acts committed against the safety of maritime navigation.⁹⁵

Article 3 of the SUA Convention, provides that a person commits an offence if that person unlawfully and intentionally:

- (a) seizes or exercises control over a ship by force or threat thereof or any other form of intimidation; or
- (b) performs an act of violence against a person on board a ship if that act is likely to endanger the safe navigation of that ship; or
- (c) destroys a ship or causes damage to a ship or to its cargo which is likely to endanger the safe navigation of that ship; or
- (d) places or causes to be placed on a ship, by any means whatsoever, a device or substance which is likely to destroy that ship, or cause damage to that ship or its cargo which endangers or is likely to endanger the safe navigation of that ship; or
- (e) destroys or seriously damages maritime navigational facilities or seriously interferes with their operation, if any such act is likely to endanger the safe navigation of a ship; or
- (f) communicates information which he knows to be false, thereby endangering the safe navigation of a ship; or
- (g) injures or kills any person, in connection with the commission or the attempted commission of any of the offences set forth in subparagraphs (a) to (f).⁹⁶

The Convention further creates an obligation for contracting states, without exception, to either extradite or prosecute alleged offenders.⁹⁷ The 2005 Protocol to the SUA Convention which came into force on 28 July 2010 after the Republic of Nauru became the twelfth country to ratify it when it deposited its instrument of ratification on 29 April 2010, adds a new Article 3bis which creates an offence within the meaning of the Convention a person unlawfully and intentionally:

⁹⁵ H.G. Hesse, 'Maritime Security in a Multilateral Context: IMO Activities to Enhance Maritime Security' [2003] Int'l J Marine & Coastal L 327
<http://www.jiscjournalarchives.ac.uk/openurl.html?ref=brill/09273522/pdf/09273522_v18n3_20051209_s2.pdf> accessed 10 September 2013

⁹⁶ SUA Convention, (n89)Art.3

⁹⁷ Ibid, Art.10

(a) when the purpose of the act, by its nature or context, is to intimidate a population, or to compel a government or an international organization to do or to abstain from doing any act:

(i) uses against or on a ship or discharges from a ship any explosive, radioactive material or BCN weapon in a manner that causes or is likely to cause death or serious injury or damage; or

(ii) discharges, from a ship, oil, liquefied natural gas, or other hazardous or noxious substance, which is not covered by subparagraph (a)(i), in such quantity or concentration that causes or is likely to cause death or serious injury or damage; or

(iii) uses a ship in a manner that causes death or serious injury or damage; or

(iv) threatens, with or without a condition, as is provided for under national law, to commit an offence set forth in subparagraph (a)(i),

(ii) or (iii); or

(b) transports on board a ship:

(i) any explosive or radioactive material, knowing that it is intended to be used to cause, or in a threat to cause, with or without a condition, as is provided for under national law, death or serious injury or damage for the purpose of intimidating a population, or compelling a government or an international organization to do or to abstain from doing any act; or

(ii) any BCN weapon, knowing it to be a BCN weapon as defined in article 1; or (iii) any source material, special fissionable material, or equipment or material especially designed or prepared for the processing, use or production of special fissionable material, knowing that it is intended to be used in a nuclear explosive activity or in any other nuclear activity not under safeguards pursuant to an IAEA comprehensive safeguards agreement; or

(iv) any equipment, materials or software or related technology that significantly contributes to the design, manufacture or delivery of a BCN weapon, with the intention that it will be used for such purpose.⁹⁸

Although Articles 3 and 3bis above creates offences that jeopardise maritime safety, they do not expressly cover the crime of piracy as defined under UNCLOS. Whereas, UNCLOS requires an offence to be committed on the high seas, the SUA Convention does not have such a requirement.

The 2005 Protocol to the SUA Convention also introduced a new Article 8bis which provides for co-operation and procedures to be followed if a state party desires to board a ship flying the flag of a state party when the requesting party has reasonable grounds to suspect that the

⁹⁸ IMO, Protocol of 2005 to the Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation, Article 3bis IMO Doc. LEG/CONF.15/21, November 1, 2005, Available at <http://www.state.gov/t/isn/trty/81727.htm> (Accessed on August 21, 2013)

ship or a person on board the ship is, has been, or is about to be involved in, the commission of an offence under the SUA Convention.⁹⁹

The SUA Convention was meant to fill the gaps left by the UNCLOS in its definition of the crime of piracy. The Convention not only covers acts occurring in territorial waters, but also acts motivated for political ends and also seeks to eliminate the two-vessel requirement.¹⁰⁰

However, the SUA Convention is not applicable where: (a) an offence is committed solely within a single state's territorial sea, (b) the vessel was not scheduled to navigate beyond that territorial sea, and (c) the suspected perpetrator was subsequently found within that coastal state's territory. This stems from its Article 4 which reads as follows:

1. This Convention applies if the ship is navigating or is scheduled to navigate into, through or from waters beyond the outer limit of the territorial sea of a single State, or the lateral limits of its territorial sea with adjacent States.

2. In cases where the Convention does not apply pursuant to paragraph 1, it nevertheless applies when the offender or the alleged offender is found in the territory of a State Party other than the State referred to in paragraph 1.¹⁰¹

In the Horn of Africa, many of the attacks are made on vessels exercising the right of innocent passage within the territorial waters of Somali, a state which finds itself lacking in capacity to deal with perpetrators due to lack of a stable government.

2.8 The International Ship and Port Facility Security (ISPS) Code

The International Ship and Port Facility Security (ISPS) Code is an amendment to the Safety of Life at Sea (SOLAS) Convention, 1974 on minimum security arrangements for ships,

⁹⁹ Ibid., Art.8bis

¹⁰⁰ SUA Convention, (n89) Art.3

¹⁰¹ Ibid

ports and government agencies was adopted by the International Maritime Organisation (IMO) on 12 December 2002 and came into force on 1 July 2004.¹⁰²

The Code was developed as a risk management response to the perceived threats to ships and port facilities after the 11 September 2001 terrorist attack on the World Trade Centre and Pentagon in the United States.¹⁰³

The main objectives of the Code are:

1. to establish an international framework involving co-operation between Contracting Governments, Government agencies, local administrations and the shipping and port industries to detect security threats and take preventive measures against security incidents affecting ships or port facilities used in international trade;
2. to establish the respective roles and responsibilities of the Contracting Governments, Government agencies, local administrations and the shipping and port industries, at the national and international level for ensuring maritime security;
3. to ensure the early and efficient collection and exchange of security-related information;
4. to provide a methodology for security assessments so as to have in place plans and procedures to react to changing security levels; and
5. to ensure confidence that adequate and proportionate maritime security measures are in place.¹⁰⁴

The Code applies to passenger ships including high-speed passenger craft, cargo ships including high-speed craft of 500 gross tonnage and upwards, mobile offshore drilling units and port facilities serving such ships engaged on international voyages.¹⁰⁵

2.9 Conclusion

From the above discussions, it is clear that the codification of the law on piracy and maritime security took many years and would not have been realised without the efforts of numerous

¹⁰² International Convention for the Safety of Life at Sea, (adopted 1 November 1974, entered into force 25 May 1980), 1184 UNTS 2

¹⁰³ International Maritime Organisation, 'ISPS Code' (www.imo.org 2014)

<<http://www.imo.org/ourwork/security/instruments/pages/ispscode.aspx>> accessed 31 August 2014

¹⁰⁴ ISPS Code, Article 1.2

¹⁰⁵ ISPS Code, Article 3

actors. This was in spite of divergent interests and opinions of the concerned actors. It is these various international conventions that provide the legal backbone for repression of piracy in the Horn of Africa and the Western Indian Ocean and by extension to Kenya.

CHAPTER THREE: INTERNATIONAL RESPONSE TO PIRACY IN THE WESTERN INDIAN OCEAN AND GULF OF ADEN

3.1 Introduction

This chapter discusses the nature and upsurge of violent acts on vessels in the Gulf of Aden and Western Indian Ocean. It looks at the international response to these acts which is unparalleled in terms of the variety of players involved in countering it. It has led to an array of international activities that range from media coverage throughout the world, travel advisories issued to travellers to donor conferences to generate financial sources to invest in state-building initiatives in Somalia, as well as deployment of international naval patrols.

3.2 Upsurge of Piracy in the Western Indian Ocean and Gulf of Aden

Piracy in the Western Indian Ocean and Gulf of Aden is a phenomenon that has continued evolving over time. In 1991, civil war broke out in Somalia, leading to the collapse of the Mohamed Siad Barre led government. When the government of Somalia collapsed, its navy and police coast guard services disintegrated, leaving the coast of Somalia unprotected. With no navy or coast guard to defend its coastline, Somalis began complaining that vessels from Asia and Europe were dumping toxic waste in their waters, and foreign fishing trawlers were illegally fishing off the coast of Somalia.¹⁰⁶ In some cases, foreign vessels had rammed their fishing boats to destroy them. They even took their fishing nets on numerous occasions.¹⁰⁷ In fact, illegal fishing in Somalia is estimated to be a \$100 million a year business.¹⁰⁸ Somali

¹⁰⁶ The Washington Times, 'Somali pirates a far cry from buccaneers of old' (<http://www.washingtontimes.com> 2009) <<http://www.washingtontimes.com/news/2009/apr/11/somali-pirates-a-far-cry-from-buccaneers-of-old/?page=all>> accessed 23 June 2013

¹⁰⁷ IRIN, 'SOMALIA: Fishermen driven from the sea by illegal trawlers' (<http://www.irinnews.org/> 2011) <<http://www.irinnews.org/report/93079/somalia-fishermen-driven-from-the-sea-by-illegal-trawlers>> accessed 23 June 2013

¹⁰⁸ C. Bedford, 'The View from the West: Piracy in Somalia: A Growing Crisis' [2008] Canadian Naval Review 36 <<http://www.navalreview.ca/volume4-issue3/>> accessed on 23 June 2013

fishermen and other citizens appealed for international help to deal with the illegal fishing and dumping, but no action was taken.¹⁰⁹ The rampant illegal fishing led to depletion of fish stocks and began destroying the livelihoods of local fishermen.¹¹⁰ *Time Magazine* quotes Tsuma Charo of the Nairobi-based East African Seafarers Assistance Programme, which monitors Somali pirate attacks and liaises with the hostage takers and the captured crews, as saying that "illegal trawling has fed the piracy problem."¹¹¹ The United Nations Environment Program (UNEP) Annual Report for the year 2005 acknowledged that, indeed, industrialized nations were dumping their hazardous waste in Somali territorial waters and the main reason for this practice was the low cost. It was estimated that it cost as little as \$2.50 per tonne to dump hazardous waste in Somalia as opposed to \$250 per tonne in Europe.¹¹² This happened since the outbreak of the civil war in 1991, but evidence of dumping only became available when the 2004 Tsunami washed containers and barrels onto the Somalia shores, causing disease bearing symptoms of radioactive exposure to the villagers.¹¹³ Unable to find any remedy from the international community, local fishermen subsequently started to come together, bearing arms to protect their resources by attacking commercial ships. Trawler ships then began to arm themselves with more sophisticated weapons to overpower the fishermen. It was only a matter of time that the fishermen upgraded their strategies and weapons, leading

¹⁰⁹ IRIN, 'SOMALIA: Fishermen appeal for help over foreign fishing ships' (<http://www.irinnews.org/2006>) <<http://www.irinnews.org/fr/report/58369/somalia-fishermen-appeal-for-help-over-foreign-fishing-ships>> accessed 23 June 2013

¹¹⁰ german-foreign-policy.com, 'The Advantage of Piracy' (www.german-foreign-policy.com 2010) <<http://www.german-foreign-policy.com/en/fulltext/57866>> accessed 23 June 2013

¹¹¹ I. Tharoor, 'How Somalia's Fishermen Became Pirates' (www.time.com 2009) <<http://content.time.com/time/world/article/0,8599,1892376,00.html>> accessed 26 June 2013

¹¹² United Nations Environment Programme, 'Tsunami Somalia Layout' (www.unep.org) <www.unep.org/tsunami/reports/tsunami_somalia_layout.pdf > accessed 02 July 2013

¹¹³ Aljazeera, 'Tsunami exposes Somalia toxic waste' (<http://www.aljazeera.com/> 2005) <<http://www.aljazeera.com/archive/2005/03/2008410112337717173.html>> accessed 02 July 2013

to a full blown illegal fishing and piracy attack conflict between the fishermen and commercial ships.¹¹⁴

The attacks on commercial vessels then evolved from a self-righteous defensive reaction, against illegal dumping and illegal fishing, to a criminal enterprise that received huge support from, among many others, government officials, businessmen, clan elders and members, militia and religious leaders, and members of local communities who funded their activities.¹¹⁵ The lure of money as well as social admiration of successful pirates as public heroes, enticed more and more participants till the entire enterprise became a thriving business.

In the 1990s and the early 2000s, the attacks were few and far apart, and normally involved the help of clan elders in opening negotiations for release of the crew and vessels with the representatives of the pirates. However, in the mid 2000s, with the realisation that more money could be made from these attacks, the pirates started holding larger vessels for longer periods of time while demanding larger ransoms.¹¹⁶ In the month of August 2008, attacks on commercial vessels in the Horn of Africa increased drastically, making waters off the coast of Somalia extremely dangerous for commercial ships.¹¹⁷ In its July 2011 report, the Organised Maritime Piracy and Related Kidnapping for Ransom, Financial Action Task Force (FATF),

¹¹⁴ M.A. Waldo, 'The Two Piracies in Somalia: Why the world ignores the other?' (www.wardheernews.com 2009) <http://wardheernews.com/Articles_09/Jan/Waldo/08_The_two_piracies_in_Somalia.html> accessed 02 July 2013

¹¹⁵ The World Bank, 'The Pirates of Somalia: Ending the Threat, Rebuilding a Nation' (www.worldbank.org 2013) <www.worldbank.org/Somalia/pirates-of-somalia-infographic.pdf> accessed 02 July 2013

¹¹⁶ International Expert Group on Piracy off the Somali coast , 'Piracy off the Somali Coast ' (<http://www.imcsnet.org/> 2008) <http://www.imcsnet.org/imcs/docs/somalia_piracy_intl_experts_report_consolidated.pdf> accessed 04 July 2013

¹¹⁷ International Maritime Organisation, 'Reports on Acts of Piracy and Armed Robbery against ships, Annual Report 2008' (www.imo.org 2009) <<http://www.imo.org/OurWork/Security/SecDocs/Documents/PiracyReports/133-Annual2008.pdf>> accessed 04 July 2013

found that the average ransom paid to Somali pirates had increased from a few hundred thousand dollars to an estimated USD 5.2 million per vessel or crew.¹¹⁸

Attacks on foreign vessels succeeded in fending off illegal foreign fishing in some places, resulting in improved fishing harvests for local fishermen. In addition to that, piracy ransom money has resulted to a boom in Somali local economy. Dr. Anja Shortland has observed that:

Significant amounts of ransom monies are spent within Somalia, but conspicuous consumption appears to be limited by social norms dictating resource-sharing. Around a third of pirate ransoms are converted into Somali shillings, benefiting casual labour and pastoralists in Puntland. Data analysis is complemented by examination of satellite imagery to establish where the beneficiaries are located. Pirates probably make a significant contribution to economic development in the provincial capitals, Garowe and Bosasso. Puntland's political elites are therefore unlikely to move decisively against piracy.¹¹⁹

The sums made from piracy ransoms have been so huge that a piracy stock exchange has been established in Somalia. According to Avi Jorisch, the world's first pirate stock exchange was established in 2009 in Harardheere, which is about 250 miles northeast of Mogadishu, Somalia. The stock exchange, which is open 24 hours a day, allows investors to profit from ransoms collected on the high seas, which can approach \$10 million for successful attacks against Western commercial vessels.¹²⁰

¹¹⁸ The Financial Action Taskforce, 'Organized Maritime Piracy and Related Kidnapping for Ransom' (<http://www.fatf-gafi.org/> 2011) <<http://www.fatf-gafi.org/media/fatf/documents/reports/organised%20maritime%20piracy%20and%20related%20kidnapping%20for%20ransom.pdf>> accessed 04 July 2013

¹¹⁹ A. Shortland, 'Treasure Mapped: Using Satellite Imagery to Track the Development Impact of Piracy' (www.chathamhouse.org 2012) <http://www.chathamhouse.org/sites/files/chathamhouse/public/Research/Africa/0112pp_shortland.pdf> accessed 04 July 2013

¹²⁰ A. Jorisch, 'Today's Pirates Have Their Own Stock Exchange' (The Wall Street Journal 2011) <<http://online.wsj.com/news/articles/SB10001424052702304520804576341223910765818>> accessed 04 July 2013

3.3 International approaches to repression of piracy

There have been four general international approaches to dealing with piracy in the Western Indian Ocean and Gulf of Aden each of which treats piracy as a different type of problem. These are (a) piracy as a development problem; (b) piracy as a deviant behaviour; (c) piracy as a technical problem; and (4) piracy as a national and international security issue.¹²¹ However, the approaches to tackling the problem cut across the four categorizations. The first approach deals with piracy as a developmental problem that is caused by weak governance structures, corruption, general collapse of infrastructure and other economic and social causes attendant to failing states. Proponents of this view, approach the problem through humanitarian aid, developmental assistance and other state building initiatives. By the year 2008, there were about 40 different international aid agencies operating in Somalia.¹²² The Somali Reconstruction and Development Programme (RDP) was a result of the Somali Joint Needs Assessment Process carried out by the United Nations and the World Bank. The RDP was a national plan that laid out, in a prioritized, sequenced manner, Somalia's five year key national recovery, reconstruction and development priorities, priority actions, outcomes and their financial implications. The RDP, which was coordinated jointly by the United Nations and the World Bank, was supported by donors and undertaken jointly with Somali authorities. The RDP highlighted three key recovery priorities, namely, peace, security and

¹²¹ C. Bueger, 'Drops in the bucket? A review of onshore responses to Somali piracy' (www.academia.edu 2012)
<https://www.academia.edu/1151285/Drops_in_the_bucket_A_Review_of_Onshore_Responses_to_Somali_Piracy> accessed 06 July 2013

¹²² International Rescue Committee, 'Somalia Crisis Deteriorates, Aid Agencies Warn' (www.rescue.org 2008)
<<http://www.rescue.org/somalia-crisis-deteriorates-aid-agencies-warn>> accessed 06 July 2013

good governance. Basic services and social protection and private sector led growth to expand employment and reduce poverty.¹²³

The second approach views piracy as a social deviant behaviour that should be punished and dealt with by law enforcement initiatives. One of the initiatives that came from this approach is the African Union Mission in Somalia (AMISOM), which began in July 2007. This is a regional peacekeeping mission operated by the African Union (AU), with the approval of the United Nations (UN). AMISOM replaced the Inter-Governmental Authority on Development Mission to Somalia (IGAD-SOM), which was a peacekeeping deployment of the AU with the approval of the United Nations Security Council (UNSC). AMISOM operates under UN Security Council mandates, which are periodically renewed. AMISOM has worked actively with the Transitional Federal Government (TFG) to suppress the terror organization Al-Shabaab and, lately, with the Federal Government of Somalia, is aiding the government in stabilizing the country and tackling piracy on the ground and in the coastal waters, by providing law enforcement and coordinating with UN programmes.¹²⁴

The third approach views piracy majorly as a technical problem that can be addressed through defence mechanisms, such as sophistication of vessels and optimization of group transit. This approach has seen the establishment of the International Recommended Transit Corridor (IRTC) by the Maritime Security Centre – Horn of Africa (MSC-HOA), which is an initiative established by the European Union Naval Force (EU NAVFOR). The IRTC is a direct shipping lane through the Gulf of Aden in which each ship has to reduce her speed to

¹²³ United Nations and World Bank Coordination Secretariat, 'Somali Joint Needs Assessment Overview' (<http://www.somali-jna.org/> 2006) <<http://www.somali-jna.org/index.cfm?Module=ActiveWeb&Page=WebPage&s=home>> accessed 06 July 2013

¹²⁴ African Union Mission in Somalia (AMISOM), 'AMISOM Background' (<http://amisom-au.org/>) <<http://amisom-au.org/amisom-background/>> accessed 06 July 2013

the closest group speed level to transit the corridor together with ships of similar speed, having an advantage of better protection from present naval forces.¹²⁵

This study adopts the fourth approach, which views piracy as a matter of national and international security, addresses piracy mainly through deployment of naval vessels and military aircrafts to deter perpetrators of attacks on commercial vessels. This has been supported by various UN Security Council resolutions pertaining to the combating of piracy and armed robbery off the coast of Somalia.

3.3.1 United Nations Security Council Resolutions

Although the United Nations Security Council does not have legislative powers, its decisions are binding upon member states of the United Nations. Article 25 of the United Nations Charter provides that all members of the United Nations agree to carry out and accept the decisions of the Security Council in accordance with the Charter.¹²⁶ However, this does not apply with respect to the decisions of any other UN body, with the exception of the International Court of Justice decision once a state has accepted its jurisdiction. In recognising the limitations in UNCLOS and the SUA Convention, the UN Security Council has adopted various resolutions to address piracy in different parts of the world. In relation to combating of piracy and armed robbery off the coast of Somalia, it passed UN Security Council Resolutions 1816 (2008), 1838 (2008), 1846 (2008), 1851(2008), and 1897 (2009).

UN Security Council Resolution 1816 (2008), which was the first UN Security Council's resolution on Somali piracy, authorized naval forces of States cooperating with the Transitional Federal Government (TFG) to enter Somali territorial waters in pursuit of

¹²⁵ O. Hrstka and O.Vanek, 'Optimizing Group Transport in the Gulf of Aden' (Agent Technology Centre 2011) <<http://agents.felk.cvut.cz/publications#year2011>> accessed 06 July 2013

¹²⁶ United Nations, *Charter of the United Nations*, Article 25. October, 24 1945; 1 UNTS XVI, <<http://www.refworld.org/docid/3ae6b3930.html>> accessed 12 September 2013

pirates.¹²⁷ This resolution further permitted these states to use ‘all necessary means’ to repress acts of piracy and armed robbery at sea. On a request from the United Nations Secretary General, Ban Ki-Moon, the North Atlantic Treaty Organization (NATO) deployed its first-ever counter-piracy mission, Operation Allied Provider, off the coast of Somalia in October 2008. The aim of this mission was to offer close protection to World Food Programme (WFP) chartered ships and also to conduct deterrence patrols that prevented vessels from being hijacked and their crews being taken hostage during pirate attacks.¹²⁸

UN Security Council Resolution 1838 (2008), called on states “whose naval vessels and military aircraft operate on the high seas and airspace off the coast of Somalia” to suppress piracy and reaffirm the UNCLOS.¹²⁹ UN Security Council Resolution 1846 (2008) called on states to criminalize piracy and to implement their obligations under the 1988 Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation (SUA Convention).¹³⁰ This included building judicial capacity for prosecution of persons engaged in piracy and armed robbery at sea. It also welcomed the decision by North Atlantic Treaty Organization (NATO) to counter piracy off the Somalia coast.¹³¹ UN Security Council Resolution 1851 (2008), encouraged international counter-piracy cooperation and invited regional states to conclude agreements by which a law enforcement officer, known as a ship rider, is embarked on a vessel sailing a national flag different from the nationality of the ship

¹²⁷ UN Security Council (2008). Resolution 1816 (2008). Resolution Adopted by the Security Council, at its 5902nd meeting on June 2, 2008, S/RES/1816 (2008).

¹²⁸ North Atlantic Treaty Organization, 'Counter-piracy operations' (www.nato.int) <http://www.nato.int/cps/en/natolive/topics_48815.htm> accessed 08 July 2013

¹²⁹ UN Security Council, Security Council Resolution 1838 (2008) [on acts of piracy and armed robbery against vessels in territorial waters and the high seas off the coast of Somalia], 7 October 2008, S/RES/1838 (2008), <[http://www.un.org/Docs/journal/asp/ws.asp?m=S/RES/1838%20\(2008\)%20](http://www.un.org/Docs/journal/asp/ws.asp?m=S/RES/1838%20(2008)%20)> accessed 24 August 2013

¹³⁰ SUA Convention (n89)

¹³¹ UN Security Council, Security Council Resolution 1846 (2008) [on repressing acts of piracy and armed robbery at sea off the coast of Somalia], 2 December 2008, S/RES/1846 (2008), <[http://www.un.org/Docs/journal/asp/ws.asp?m=S/RES/1846%20\(2008\)%20](http://www.un.org/Docs/journal/asp/ws.asp?m=S/RES/1846%20(2008)%20)> accessed 24 August 2013

rider.¹³² Resolution 1897 (2009), invited all States and regional organizations engaged in the fight to conclude special agreements or arrangements with countries willing to take custody of pirates.¹³³

In order not to be seen as a 'legislator', the Security Council drafted these resolutions very guardedly, which introduced certain complexities that limited the scope of their application.¹³⁴

First, these resolutions were limited in terms of *rationae temporis*. The Resolution 1816 (2008) provided that States, cooperating with the Transitional Federal Government (TFG) in the fight against piracy and armed robbery at sea off the coast of Somalia, may enter the territorial waters of Somalia for the purpose of repressing acts of piracy and armed robbery at sea, in a manner consistent with such action permitted on the high seas with respect to piracy under relevant international law and use, within the territorial waters of Somalia, in a manner consistent with action permitted on the high seas with respect to piracy under relevant international law, all necessary means to repress acts of piracy and armed robbery for a limited period of six months from the date of its passing.¹³⁵ This authority was subsequently extended for a further twelve months by Resolution 1846 (2008). The Security Council through Resolution 1851 (2008), apart from calling on states to criminalize piracy and to implement their obligations under the 1988 Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation (SUA Convention), decided that for a period of

¹³² UN Security Council, Security Council Resolution 1851 (2008) [on fight against piracy and armed robbery at sea off the coast of Somalia], 16 December 2008, S/RES/1851 (2008), <[http://www.un.org/Docs/journal/asp/ws.asp?m=S/RES/1851%20\(2008\)%20](http://www.un.org/Docs/journal/asp/ws.asp?m=S/RES/1851%20(2008)%20)> accessed 24 August 2013

¹³³ UN Security Council, Security Council Resolution 1897 (2009) [on fight against piracy and armed robbery at sea off the coast of Somalia], 30 November 2009, S/RES/1897 (2009) <[http://www.un.org/Docs/journal/asp/ws.asp?m=S/RES/1897%20\(2009\)%20](http://www.un.org/Docs/journal/asp/ws.asp?m=S/RES/1897%20(2009)%20)> accessed 24 August 2013

¹³⁴ T. Treves, 'Piracy, Law of the Sea, and Use of Force: Developments off the Coast of Somalia' [2009] EJIL 399, 404 <http://www.ejil.org/article.php?article=1800&issue=91> accessed 06 July 2013

¹³⁵ UN Security Council Resolution 1816 (n127)

twelve months from the date of adoption of Resolution 1846, States and regional organizations cooperating in the fight against piracy and armed robbery at sea off the coast of Somalia, for which advance notification had been provided by the TFG to the Secretary-General, may undertake all necessary measures that are appropriate in Somalia, for the purpose of suppressing acts of piracy and armed robbery at sea.

Second, these resolutions were also limited *rationae loci* since they were limited to the situation in Somalia.¹³⁶ Consequently, this meant that the authorization for states to enter territorial waters for purposes of repressing piracy was not applicable to other states like Kenya.

The above complexities have meant that entry into the territorial sea of Somalia for purposes of apprehending perpetrators was limited to certain periods of time.

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

The Contact Group on Piracy off the Coast of Somalia (CGPCS) was created on 14 January 2009 pursuant to UN Security Council Resolution 1851 (2008) as a means of coordinating efforts of the international community and is comprised of countries, international organizations, and industry groups with an interest in suppressing piracy.¹³⁷

¹³⁶ UN Security Council Resolution 1816 (n127)

¹³⁷ US Department of State, 'The Contact Group on Piracy off the Coast of Somalia ' (www.state.gov 2014) <<http://www.state.gov/t/pm/ppa/piracy/contactgroup/>> accessed 06 September 2014

The CGPCS meets regularly and reports to the UN Security Council. It provides a forum for the exchange of information and ideas, and coordinates the efforts of states and relevant organizations through five working groups.¹³⁸ These are:

- (i) Working Group 1, chaired by the United Kingdom is responsible for facilitating effective naval operational co-ordination and coordinating international efforts to support the building of the judicial, penal and maritime capacity of Regional States to ensure they are better equipped to tackle piracy and maritime security challenges.
- (ii) Working Group 2, chaired by Denmark ‘provides specific, practical and legally sound advice to the CGPCS, states and organizations on all legal aspects of counter-piracy.’
- (iii) Working Group 3, chaired by the Republic of Korea ‘focuses on concerns of participant states, maritime industry and labour groups regarding the actions that should taken to provide self-defensive actions to protect vessels from hijacking by pirates in the high risk waters off Somalia’
- (iv) Working Group 4, chaired by Egypt ‘focuses mainly on the public diplomacy aspect of the problem of combating piracy over the coast of Somalia. It aims at raising awareness of the dangers of piracy and highlighting the best practices to eradicate this criminal phenomenon’
- (v) Working Group 5, chaired by Italy ‘focuses on how to advance information sharing internationally and between industry and government authorities to disrupt the pirate enterprise ashore, and works with other key partners such as INTERPOL, national law enforcement/prosecution agencies currently pursuing piracy

¹³⁸ The Contact Group on Piracy off the Coast of Somalia , 'Working Groups' (www.thecgpcs.org 2014) <<http://www.thecgpcs.org/work.do?action=work>> accessed 06 September 2014

investigations/prosecution, and the World Bank to better understand how illicit financial flows associated with maritime piracy are moving in the area'¹³⁹

On 27 January 2010 the UN Secretary General at the request of the CGPCS established a trust fund whose objective is to 'help defray the expenses associated with prosecution of suspected pirates, as well as other activities related to implementing the CGPCS's objectives regarding combating piracy in all its aspects.'¹⁴⁰

3.3.3 The Djibouti Code of Conduct

The Code of Conduct concerning the Repression of Piracy and Armed Robbery against ships in the Western Indian Ocean and Gulf of Aden (Djibouti Code of Conduct) was adopted by Comoros, Djibouti, Egypt, Eritrea, Ethiopia, France, Jordan, Kenya, Madagascar, Maldives, Mauritius, Mozambique, Oman, Saudi Arabia, Seychelles, Somalia, South Africa, Sudan, the United Arab Emirates, the United Republic of Tanzania and Yemen at a sub-regional meeting on maritime security, piracy and armed robbery against ships for Western Indian Ocean, Gulf of Aden and Red Sea States that was held in Djibouti from 26 to 29 January 2009.¹⁴¹ The code became effective from the date which was signed on 29 January 2009.

The signatories to the Djibouti Code agreed to co-operate in four ways:

(a) the investigation, arrest and prosecution of persons, who are reasonably suspected of having committed acts of piracy and armed robbery against ships, including those inciting or intentionally facilitating such acts;

¹³⁹ All information here is derived from the website of the Contact Group on Piracy off the Coast of Somalia <www.thecgps.org> accessed on 06 September 2014

¹⁴⁰ Trust Fund to Support Initiatives of States Countering Piracy off the Coast of Somalia, 'Annual Report 2010' (<http://www.unodc.org/>)
http://www.unodc.org/documents/easternafrika/piracy/Annual_Report_2010_Piracy_TF_eng_eBook.pdf
accessed 06 September 2014

¹⁴¹ International Maritime Organisation, 'Djibouti Code of Conduct' (www.imo.org 2014)
<<http://www.imo.org/OurWork/Security/PIU/Pages/DCoC.aspx>> accessed 06 September 2014

(b) the interdiction and seizure of suspect ships and property on board such ships;

(c) the rescue of ships, persons and property subject to piracy and armed robbery and the facilitation of proper care, treatment and repatriation of seafarers, fishermen, other shipboard personnel and passengers subject to such acts, particularly those who have been subjected to violence; and

(d) the conduct of shared operations both among signatory States and with navies from countries outside the region such as nominating law enforcement or other authorized officials to embark on patrol ships or aircraft of another signatory.¹⁴²

The adoption of Djibouti Code of Conduct was an effort to promote greater regional co-operation in order to enhance effectiveness, in the prevention, interdiction, prosecution, and punishment of those persons engaging in piracy and armed robbery against ships. A multi-national Project Implementation Unit (PIU) was formed within IMO in April 2010 to assist signatory States to implement the Djibouti Code of Conduct. The PIU consists of a head of unit and specialists in operations and training, technical and computing systems, and maritime law and operates solely with monies donated to the Trust Fund.¹⁴³

3.4. Conclusion

From the above discussions, it is clear that the violent attacks on vessels in the Western Indian Ocean and Gulf of Aden are a matter of grave concern that has drawn huge international attention. With Somalia finding itself incapable of combating the violent acts due to political turbulence, regional states and the international community at large have made multifaceted efforts to arrest the situation.

¹⁴² Djibouti Code of Conduct, Resolution 1

¹⁴³ International Maritime Organisation, 'Project Implementation Unit (PIU)' (www.imo.org 2014) <<http://www.imo.org/OurWork/Security/PIU/Pages/Project-Implementation-Unit.aspx>> accessed 20 September 2014

**CHAPTER FOUR: PROSECUTION OF PIRACY SUSPECTS SEIZED IN THE
WESTERN INDIAN OCEAN AND GULF OF ADEN**

4.1 Introduction

With all the efforts put in place by regional states and the international community to combat the violent attacks on vessels in the Western Indian Ocean and Gulf of Aden, it is imperative that persons suspected of perpetrating such attacks are arrested and prosecuted. However, there have been mixed approaches to dealing with suspected perpetrators who have been arrested. This chapter looks at the efforts to apprehend, prosecute and punish such suspected perpetrators with a specific focus on Kenya.

4.2 Reluctance to Seize and Prosecute

Article 100 of UNCLOS creates an obligation for all states to cooperate to the fullest possible extent in the repression of piracy on the high seas or in any other place outside the jurisdiction of any State.¹⁴⁴ This provision, however, does not impose an obligation on states to take any alleged offenders present in their territory into custody nor does it impose any obligation on States to either prosecute or extradite alleged offenders present in their territory.

Article 105 of UNCLOS provides universal jurisdiction to the courts of the seizing state for the seizure and arrest of pirates on the high seas.¹⁴⁵ Some states have been reluctant to exercise such broad powers granted by Article 105 in prosecuting and subjecting to criminal proceedings in their courts the perpetrators of armed robbery in the high seas they arrest.¹⁴⁶

An example is an incident in which ten suspected pirates were captured in the Gulf of Aden along with various weapons and boarding ladders by the Danish Navy ship, *Absalon*, on 17

¹⁴⁴ UNCLOS, (n8), Art.100

¹⁴⁵ Ibid, Art.105

¹⁴⁶ Treves, (n134)

September 2008 for allegedly attacking merchant ships; however, they were released after six days as the Dutch government was not ready to try them in Denmark.¹⁴⁷ This was because the Dutch government had formed the opinion that the suspects risked torture and the death penalty if surrendered to Somali authorities. This, in their opinion, was because Danish law prohibits the extradition of criminals when they may face the death penalty and did not want to risk any possible abuses to the suspects if they were to deport them back to Somalia after their sentences were served.¹⁴⁸

As seen above, the reluctance by some state parties to UNCLOS to detain and prosecute perpetrators of such acts is partly due to failure by such states to review their domestic legislation on piracy to ensure that they have established universal jurisdiction over acts of piracy and that their government institutions have the requisite authority to take the necessary steps not only to seize and prosecute perpetrators, but to also to cooperate with other states to suppress piracy.

4.3. Prosecution by Capturing States

There are some examples of prosecutions carried out by states whose navy ships have captured persons suspected of committing acts of piracy. In some of these cases, there has been a clear national nexus to the piratical act, such as the flag of the victim vessel or the nationality of the victims or crew. For instance, a U.S. jury, in August 2013, sentenced three Somali men to life in prison for their part in the 2011 hijacking of the American yacht *S/V Quest*, which resulted in the killing of four U.S. citizens. Ahmed Muse Salad, Abukar Osman

¹⁴⁷ J. Knott and H.F. Willan, 'Piracy Off Somalia: Prosecutions, Procrastination and Progress' (Idarat Maritime 2010) <<http://www.idaratmaritime.com/wordpress/?p=259>> accessed 24 August 2013

¹⁴⁸ Ibid

Beyle, and Shani Nurani Shiekh Abrar were found guilty of 26 charges against them, including piracy, which carries a mandatory life sentence, by a court in state of Virginia.¹⁴⁹

In other instances, there was no national nexus between the piratical act and the flag of the victim vessel or the nationality of the victims or crew. For instance, in August 2011, the Dutch District Court of Rotterdam sentenced five Somali men to periods ranging from four to seven years for their role in abducting two South Africans off a yacht in the Seychelles in 2010. Two of the accused were proven to be involved in an attack on a South African yacht, the *Choizil*. The five accused persons were part of a group of 20 people picked up by a Dutch navy supply ship off the Somali coast in late November 2010.¹⁵⁰

4.4. Prosecution by Third States

Prosecution of piracy suspects by third states has been the subject of various scholarly writings. While some scholars like Eugene Konotorovich have argued UNCLOS precludes capturing nations from transferring piracy suspects to third states, others like Lawrence Azubuike are of the opinion that UNCLOS does not specifically prohibit transfer of piracy suspects to third states and it instead should be interpreted widely in order to broaden the scope of counter-piracy initiatives.¹⁵¹ However, of the captured suspected perpetrators of acts of piracy that have been prosecuted, some of them have been transferred to third states by the capturing states. This has been facilitated by written agreements between states for the transfer of captured suspects. For instance, in December 2008, Kenya entered into a Memorandum of Understanding in which it agreed to receive and prosecute suspected pirates

¹⁴⁹ M. Lowe, 'S/V Quest's Somali Hijackers Sentenced to Life in Prison' (Maritime Security Review 2013) <<http://www.marsecreview.com/2013/08/sv-quest-hijackers-jailed>> accessed 12 September 2013

¹⁵⁰ Aljazeera, 'Somali pirates sentenced in Dutch court' (www.aljazeera.com 2011) <<http://www.aljazeera.com/news/europe/2011/08/201181216256130636.html>> accessed 24 August 2013

¹⁵¹ M. Sterio, 'Piracy Off the Coast of Somalia : The Argument for Pirate Prosecutions in the National Courts of Kenya, The Seychelles, and Mauritius' [2012] Amsterdam Law Forum 104, 110 <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2167428> accessed 24 August 2013

captured on the high seas by the United Kingdom.¹⁵² The United Kingdom has signed similar Memoranda of Understanding with Mauritius, Seychelles and Tanzania that allow for the transfer of suspected pirates from Royal Navy vessels to these countries for prosecution.¹⁵³

4.5 Kenyan Experience in Piracy Prosecutions

Although Kenya ratified the 1982 UN Convention on the Law of the Sea (UNCLOS) on 2nd March 1989¹⁵⁴ it only domesticated the UNCLOS provisions relating to maritime piracy in 2009 when it enacted the Merchant Shipping Act 2009.¹⁵⁵ Section 369 (1) of the Merchant Shipping Act which came into force on 1st September 2009 defines piracy as:

- (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);

¹⁵² David Axe, *Somali Pirates Face Justice, Finally*, Wired, December 15, 2008. Available at <http://www.wired.com/dangerroom/2008/12/pirates-have-th/> (Accessed August 24, 2013).

¹⁵³ UK signs agreement with Mauritius to transfer suspected pirates for prosecution. Available at <https://www.gov.uk/government/news/uk-signs-agreement-with-mauritius-to-transfer-suspected-pirates-for-prosecution> (Accessed August 24, 2013).

¹⁵⁴ The United Nations Convention on the Law of the Sea of 10 December 1982, chronological lists of ratifications of, accessions and successions to the Convention and the related Agreements as at 3 October 2014 http://www.un.org/depts/los/reference_files/chronological_lists_of_ratifications.htm accessed 06 April 2015

¹⁵⁵ Merchant Shipping Act (Act No.4 of 2009 of the Laws of Kenya) Available at http://www.kenyalaw.org/kenyalaw/klr_app/frames.php. (Accessed on July 14, 2013).

This was an adoption of the definition of piracy contained in Article 101 of UNCLOS.¹⁵⁶

By enacting the Merchant Shipping Act, Kenya also domesticated Article 3 of the 1988 Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation (SUA Convention) relating to hijacking and destruction of ships. Section 370 of the Merchant Shipping Act provides as follows:

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

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

(a) destroys a ship;

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

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

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

The enactment of the Merchant Shipping Act repealed section 69 (1) of the Penal Code which provided that any person who in territorial waters or upon the high seas, committed an act of piracy *jure gentium* was guilty of the offence of piracy.¹⁵⁷

¹⁵⁶ UNCLOS, (n8), Art 101

¹⁵⁷ P.M.Wambua, 'The jurisdictional challenges to the prosecution of piracy cases in Kenya: mixed fortunes for a perfect model in the global war against piracy' [2012] WMU J Marit Affairs 95

In 2008, the United Kingdom and Kenya entered into a formal agreement for the Royal Navy to bring captured pirates to Mombasa for trial.¹⁵⁸ Further to this agreement, on January 16, 2009, Kenya and the US signed a bilateral agreement for piracy suspects to be tried in Kenyan courts.¹⁵⁹ Following these agreements, suspected perpetrators of acts of piracy captured in the Indian Ocean begun being delivered to Kenya for prosecution. These prosecutions have been faced by various challenges as discussed below.

4.5.1 Weak Bilateral Agreements

The bilateral agreements under which Kenya is prosecuting suspected perpetrators of piracy captured by navies of western maritime states do not clearly spell out the responsibilities of each party to the agreement and do not have an indemnity clause in case Kenya incurs civil liability for wrongful prosecution. By these agreements Kenya was meant to prosecute suspected pirates on the high seas in exchange for financial support from the western states.¹⁶⁰ Kenya terminated an agreement with the European Union in 2010 after it claimed it was not receiving the necessary support from the international community.¹⁶¹ Further to this, the agreements do not have their foundation in any international legal instrument making their enforcement difficult in municipal courts of either of the state parties.¹⁶²

¹⁵⁸ D. Axe, 'Somali Pirates Face Justice, Finally' (www.wired.com2008)
<<http://www.wired.com/dangerroom/2008/12/pirates-have-th/>> accessed 14 July 2013

¹⁵⁹ D. Morgan, 'Kenya agrees to prosecute U.S.-held pirates: Pentagon' (www.reuters.com 2009)
<<http://www.reuters.com/article/2009/01/29/us-usa-kenya-piracy-sb-idUSTRE50S4ZZ20090129>> accessed 14 July 2013

¹⁶⁰ P.M. Wambua (n157)

¹⁶¹ L. Leposo, 'Kenya ends agreement with EU to prosecute suspected Somali pirates' (www.cnn.com 2010)
<<http://edition.cnn.com/2010/WORLD/africa/10/04/kenya.eu.pirates/>> accessed 12 October 2014

¹⁶² P.M. Wambua, 'Inter-Agency Challenges in Maritime Security in Africa' <http://shrdocs.com/presentations/5985/index.html> accessed 12 September 2014

Article 105 of UNCLOS provides for trials by the courts of the states which carried out the seizure of the suspects but does not provide for transfer of suspects to third states to stand trial. Article 105 reads in part as follows:

“.....The courts of the State which carried out the seizure may decide upon the penalties to be imposed, and may also determine the action to be taken with regard to the ships, aircraft or property, subject to the rights of third parties acting in good faith”

This apparent lack of express authority to allow capturing states to transfer suspects to third states for trial could be a possible basis for challenges to such transfers in piracy trials, or even in claims against the transferring state in their own national courts.¹⁶³

4.5.2 Jurisdictional problems

Following the execution of bilateral agreements, the High Court of Kenya has issued contradictory judgments regarding the jurisdiction to try persons arrested outside the territorial waters of Kenya. In one judgment, Justice Festus Azangalala dismissed an appeal by Hassan M. Ahmed and nine others who had been found guilty of the offence of piracy under section 69 (1) of the Penal Code, for jointly attacking and detaining a vessel called *Safina Al Bisarat- M.N.V-723* on the high seas of the Indian Ocean and making demands upon its captain, Akbar Ali Suleman, for a ransom payment of US\$50,000. The appellants had filed their appeal on grounds that the principal magistrate did not have jurisdiction to try them. Justice Azangalala, in dismissing their appeal, found that the appellants had committed

¹⁶³ E. Kontorovich, 'The Role of International Law: Justice and the Legal Challenge' (<http://www.counterpiracy.ae/2012>) <<http://www.counterpiracy.ae/upload/Briefing/Eugene%20Kontorovich-Essay-Eng-2.pdf>> accessed 17 October 2014

the offence of piracy as provided for under section 69(1) and (3) of the Penal Code which read as follows:

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

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

Justice Azangalala also relied on the principle of universal jurisdiction as provided for in the United Nations Convention on the Law of the Sea (UNCLOS) that had been ratified by Kenya. He found that the trial magistrate was bound to apply international norms and Instruments.¹⁶⁴

Justice Mohamed K. Ibrahim in a judgment delivered on 10 November 2010, found that magistrate courts in Kenya lacked jurisdiction to try acts of piracy committed outside of Kenya's territorial waters on grounds that Section 4 of the Judicature Act conferred exclusive jurisdiction in the High Court to exercise admiralty jurisdiction in all matters arising in the High Seas, or in territorial waters, or upon any lake or other navigable inland waters in Kenya. He further found that Kenya had no jurisdiction to try perpetrators of piratical acts apprehended on the high seas on grounds that section 69(1) of the Penal Code which covered piracy had been repealed and also that section 5 of the Penal Code only grants Kenyan courts jurisdiction in places within Kenya and its territorial waters.¹⁶⁵ In an appeal lodged against Justice Ibrahim's decision, the Court of Appeal found that Section 5 of the Penal Code provided for local jurisdiction while Section 69 (1) as read with Section 69 (3) of the Code donated as at that effective time jurisdiction to try piracy *Jure Gentium* on the High Seas. It also found that the High Court misconstrued the territorial application of the law as provided

¹⁶⁴ Re Hassan M Ahmed & others (2009) eKLR. <www.kenyalaw.org/caselaw/cases/export_meta/55714/pdf> accessed 24 August 2013

¹⁶⁵ In Re Mohamud Mohamed Dashi & 8 Others [2010] eKLR.<http://kenyalaw.org/Downloads_FreeCases/78571.pdf> accessed 24 August 2013.

for under Section 5 of the Penal Code, which defined the geographical jurisdiction of the courts.¹⁶⁶ There was therefore no basis for the court's finding that Section 5 superseded Section 69. That section should have been read together with Section 69 which extended the jurisdiction of offences partly committed in Kenya and beyond the Kenyan courts. Thus, the Kenyan courts have jurisdiction to try such cases. The Court of Appeal further found that even if the High Court found that there was legislative misnomer, that could easily have been resolved by falling back on the provisions of the 1982 United Nations Law of the Sea Convention (UNCLOS), to which Kenya is signatory and by dint of Article 2 (5) of the Constitution, UNCLOS is part of the Kenyan laws. UNCLOS provides for offences of piracy and gives any state jurisdiction to try them.¹⁶⁷

In ruling delivered on 31 May 2011 Justice J.B Ojwang in the case of the Republic vs Abdirahman Isse Mohamud and three others differed with the position held by Justice M.K. Ibrahim when he ruled that magistrate's courts had jurisdiction to try acts of piracy.¹⁶⁸ He said of the Kenyan practice:

“By both the Kenyan practice and the practice in the High Court of England which is relevant under s.4 of the Judicature Act (Cap.8, Laws of Kenya) it is clear that the High Court's preoccupation with admiralty matters is a non-criminal preoccupation – essentially maritime commerce, and along with it, the High Court is to interpret and apply the civil law. I will take judicial notice of this historical fact, and hold that the basic jurisdiction of the offence of piracy lies with courts other than the High Court; and in Kenya, those Courts are the Magistrates courts.”

Justice J.B Ojwang in his ruling further held that Section 2 of the Merchant Shipping Act, 2009 which provides that “Court” mean the High Court “unless the context otherwise

¹⁶⁶ Attorney General v Mohamud Mohammed Hashi & 8 others [2012] eKLR Available at http://kenyalaw.org/CaseSearch/pdf_export.php (Accessed on September 24, 2013)

¹⁶⁷ P.M. Wambua (n157)

¹⁶⁸ Republic vs Abdirahman Isse Mohamud & 3 Others (Unreported) Mombasa HC Misc. Criminal Application No.72 of 2011

required” should be applied in the current case where the context so required and as such the proper court to try piracy acts be the Magistrates courts.

4.5.3 Legal Representation for Accused Persons

Piracy suspects who are arrested by navies of foreign states and brought to Kenya for trial are strangers to Kenya and do not understand the Kenyan legal system. It is therefore difficult for them not only to understand their rights as enshrined in Kenya law but also to access legal representation of their choice as provided for under Article 14 (3) (d) of the International Covenant on Civil and Political Rights (ICCPR).¹⁶⁹ In July 2010 Justice M. Odero in ruling that it was not the responsibility of the state to provide an accused person with legal representation commented that:

‘..... the decision on whether to act in person or to engage legal counsel lies squarely with the accused person. This is not a decision that a court ought to make on a suspect’s behalf. The only class of suspects who are provided with legal counsel at the cost of the State are suspects in murder trials.....’¹⁷⁰

This position has since changed with the coming into effect of Article 50(2)(h) of Constitution of Kenya, 2010 which grants each accused person the right to have an advocate assigned to the accused person by the State and at State expense, if substantial injustice would otherwise result, and to be informed of this right promptly. By the time the Constitution of Kenya 2010 came into force on 27 August 2010, several cases against suspected pirates were already underway.

¹⁶⁹ ICCPR, (n32) Article 14(3)(d)

¹⁷⁰ Republic vs Hassan Jama Haleys Alias Hassan Jamal and five others [2010] eKLR <http://kenyalaw.org/caselaw/cases/view/70926> accessed 12 October 2014

4.6 Piracy Prosecutions in Seychelles

An agreement through the exchange of letters concluded on 30 October 2009 between the European Union and the Republic of Seychelles allowed piracy suspects apprehended by the European Union Naval Force Somalia (EU-NAVFOR-ATALANTA) to be transferred to Seychelles to stand trial.¹⁷¹ In 2010 Seychelles amended its penal code to make acts of piracy punishable by at 30 years imprisonment. The Penal Code of Seychelles previously did not name piracy as an offence.¹⁷²

In order to facilitate prosecution of suspected pirates, in 2012 the Seychelles' Parliament amended Section 65 (1) of the Seychellois Penal Code by adding the words “within Seychelles or elsewhere”¹⁷³ to it. Section 65 (1) reads as follows:

“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”¹⁷⁴

The Seychelles parliament included a definition of piracy to the Penal Code.¹⁷⁵ Section 65 (4) reads as follows:

For the purposes of this section “piracy” includes-

(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 a private aircraft and directed-

¹⁷¹ European Union, 'EU naval operation against piracy (EUNAVFOR Somalia - Operation ATALANTA) ' (www.europa.eu 2010)

<http://www.consilium.europa.eu/uedocs/cms_data/docs/missionPress/files/100426%20Factsheet%20EU%20NAVFOR%20Somalia%20-%20version%2017_EN.pdf> accessed 17 October 2014

¹⁷² The Epoch Times, 'Seychelles MPs adopt anti-piracy law' (www.theepochtimes.com.com 2010)

<http://printarchive.epochtimes.com/a1/en/au/nnn/2010/03-Mar/Edition%20237/Edition%20237_p24.pdf> accessed 17 October 2014

¹⁷³ Penal Code (Amendment Act) 2012, (Act No.5 of 2012)

[http://www.seylii.org/files/Act%205%20of%202012%20Penal%20Code%20\(Amendment\)%20Act,%202012.pdf](http://www.seylii.org/files/Act%205%20of%202012%20Penal%20Code%20(Amendment)%20Act,%202012.pdf) accessed 17 October 2014

¹⁷⁴ Penal Code (Cap.158) of the Laws of Seychelles < <http://greybook.seylii.org/se/CAP158>> accessed 17 October 2014

¹⁷⁵ M. Sterio (n151)

(i) on the high seas, against another ship or aircraft, or against persons or property on board such a ship or aircraft;

(ii) against a ship, an aircraft, a person or property in a place outside the jurisdiction of any State;

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

The Seychellois penal code goes a step further to criminalize attempts to commit acts of piracy. Section 65 (3) of the code reads as follows:

“Any person who attempts or conspires to commit, or incites, aids and abets, counsels or procures the commission of, an offence contrary to section 65(1) within Seychelles or elsewhere commits an offence and shall be liable to imprisonment for 30 years and a fine of R1 million.”

Seychelles has successfully sustained convictions for attempted acts of piracy. For instance in Republic versus Houssein Mohammed Osman and 10 others, each of the accused persons was found guilty of attempting to commit piracy contrary to section 65 and 377 as read with section 23 of the Seychelles Penal Code.¹⁷⁶

The legal system in Seychelles is however faced with a challenge with regard to prosecuting suspected pirates due to lack of facilities and legislative framework to allow witnesses to give testimony via video link.¹⁷⁷ A single piracy attack could involve a number of victims including vessel owners, cargo owners, crews and passengers all from different parts of the world. The nature of employment of ship crews which is constant travel by sea around the

¹⁷⁶ Republic v. Houssein Mohammed Osman & Ten (10) others (Supreme Court of Seychelles) Criminal Side No.19 of 2011

¹⁷⁷ T. Paige, 'Emerging Voices: Pirates of the Indian Ocean—Enforcement in the Seychelles' (Opinio Juris 2013) <<http://opiniojuris.org/2013/08/19/emerging-voices-pirates-of-the-indian-ocean-enforcement-in-the-seychelles/>> accessed 17 October 2014

globe reduces their availability at trial.¹⁷⁸ Apart from the courts not having power to compel foreign witnesses to appear in court during trials, there is a huge cost implication attached to securing attendance for those witnesses who are willing to attend trial.¹⁷⁹

4.7 Piracy Prosecutions in Mauritius

A bilateral agreement between the European Union and the Republic of Mauritius on the conditions of transfer of suspected pirates and associated seized property from the European Union-led naval force to the Republic of Mauritius and on the conditions of suspected pirates after transfer was signed on 14 July 2011.¹⁸⁰ A similar agreement was signed between Mauritius and the United Kingdom in June 2012.¹⁸¹

In order to facilitate prosecution of suspects of piracy, Mauritius amended its laws by passing the Piracy and Maritime Violence Act, 2011 on 15 December 2011. The Act came into force on 1 June 2012.¹⁸² Besides the Act providing a definition of piracy that is in tandem with Article 101 of UNCLOS, its Section 8(1) provides that Mauritius may enter into an agreement or arrangement with another government or an international organisation with a

¹⁷⁸ A. Murdoch, 'Recent Legal Issues and Problems Relating to Acts of Piracy off Somalia' in C.R. Symmons (eds), *Selected Contemporary Issues in the Law of the Sea* (1st, Martinus Nijhoff Publishers, Leiden, Boston 2011)

¹⁷⁹ Y.M Dutton, 'Virtual Witness Confrontation in Criminal Cases: A Proposal to Use Videoconferencing Technology in Maritime Piracy Trials' [2012] *Vand. J. Transnat'l L.* 1283, 1328
<http://www.vanderbilt.edu/jotl/manage/wp-content/uploads/Dutton-Final.pdf> accessed 17 October 2014

¹⁸⁰ European Union, 'Agreement between the European Union and the Republic of Mauritius on the conditions of transfer of suspected pirates and associated seized property from the European Union-led naval force to the Republic of Mauritius and on the conditions of suspected pirates after transfer'[2011] <<http://ec.europa.eu/world/agreements/downloadFile.do?fullText=yes&treatyTransId=14801>> accessed 17 October 2014

¹⁸¹ Government of the United Kingdom, 'UK signs agreement with Mauritius to transfer suspected pirates for prosecution' (www.gov.uk 2012) <<https://www.gov.uk/government/news/uk-signs-agreement-with-mauritius-to-transfer-suspected-pirates-for-prosecution>> accessed 17 October 2014

¹⁸² Republic of Mauritius, Ministry of Public Infrastructure National Development Unit, Notice of entry into force of the Piracy and Maritime Violence Act, 2011 <http://portagent.mu/blog/wp-content/uploads/2012/05/20120530-Piracy-and-Maritime-Violence-Act-2011.pdf> accessed 17 October 2014

view to providing for a framework for the handing over of suspected pirates to Mauritian authorities for purposes of investigation and eventual trial in Mauritius.¹⁸³

The Act further provides for the possibility of adducing evidence through live video or television link and also the admissibility written statements of unavailable witnesses as evidence in piracy cases in specified circumstances.¹⁸⁴ The admissibility of out of court statements, particularly when relevant to the acts and conducts of an accused person could render trial of an accused person unfair. This is due to the limited ability of the accused or their defence counsel to test the veracity of such evidence when relied upon at trial in the absence of the witness.¹⁸⁵

4.8 Conclusion

From the above discussions it is clear that the violent attacks on vessels in the Gulf of Aden and Western Indian Ocean are a matter of grave concern that has drawn huge international attention. With Somalia finding itself incapable of combating the violent acts, the efforts by the international community to arrest the situation in the Gulf of Aden and Western Indian Ocean have exposed the limitations of the law meant to combat piracy. This is mainly due to states having national legislations that may not be in tandem with the provisions international.

¹⁸³ A. Narain, 'Preparing for piracy trials in Mauritius' [2012] Commonwealth Law Bulletin 53, 56
<http://www.tandfonline.com/doi/pdf/10.1080/03050718.2012.751201> accessed 17 October 2014

¹⁸⁴ Ibid

¹⁸⁵ M. Crippa , 'Mauritius Strengthens Its Anti-Piracy Capacity' (Communis Hostis Omnium 2012)
<<http://piracy-law.com/2012/07/25/mauritius-strengthens-its-anti-piracy-capacity/>> accessed 17 October 2014

CHAPTER FIVE: FINDINGS AND RECOMMENDATIONS

5.1. Introduction

This study sought to establish whether the acts of violence directed at foreign merchant ships in the Gulf of Aden and Western Ocean fall can sufficiently be addressed under both international and municipal laws of regional states. In order to do so this study explored the historical development of the law against piracy, the international framework of the law against piracy and the efforts of the international community to combat the violent crimes including the efforts by regional states to prosecute suspects apprehended in the Gulf of Aden and Western Indian Ocean.

5.2. Findings

This study has revealed the below key findings in respect to international law and the efforts to apprehend and prosecute suspected pirates under municipal laws of regional states:

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

The study has analysed the nature of the violent acts perpetrated in the Gulf of Aden and Western Indian Ocean and revealed that they do not fit within the definition of piracy as provided in UNCLOS. This is for various reasons. First, the attacks on vessels are often committed partially on the high seas and partially in territorial waters or wholly in territorial waters. Second, while the UNCLOS requires that an act of piracy should be committed by one ship against another, the attacks in the Gulf of Aden and Western Indian Ocean rarely involve two ships. Third, while UNCLOS provides that acts of piracy should be committed for private ends, the attacks on vessels in the Gulf of Aden and Western Indian Ocean are many times motivated by political ends or in the quest to protect the environment.

Article 105 of UNCLOS provides for trials by the courts of the states which carried out the seizure of the suspects but does not provide for transfer of suspects to third states to stand trial.

5.2.2. United Nations Security Council Resolutions

This study has found that in recognising the limitations of UNCLOS, the UN Security Council adopted several resolutions to counter piracy off the coast of Somalia. UN Security Council Resolution 1846 (2008) called on states to criminalize piracy and to implement their obligations under the 1988 Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation (SUA Convention). This included building judicial capacity for prosecution of persons engaged in piracy and armed robbery at sea. It also welcomed the decision by North Atlantic Treaty Organization (NATO) to counter piracy off the Somalia coast. UN Security Council Resolution 1851 (2008) invited regional states to conclude agreements by which a law enforcement officer, known as a ship rider, is embarked on a vessel sailing a national flag different from the nationality of the ship rider. However, these resolutions introduced certain complexities that limited the scope of their application. First, these resolutions were limited in terms of *rationae temporis*. The Resolution 1816 (2008) was for a limited period of six months from the date of its adoption. Its application was subsequently extended for a further twelve months by Resolution 1846 (2008). Second, these resolutions were also limited *rationae loci* since they were limited to the situation in Somalia. Consequently, this meant that the authorization for states to enter territorial waters for purposes of repressing piracy was not applicable to other states like Kenya.

5.2.3. Universal Jurisdiction

Drawing from the decisions of courts analysed in this study, there seems to be divergent interpretations of the concept of universal jurisdiction in relation to the criminal activities obtaining in the Gulf of Aden and the Western Indian Ocean. Whereas some courts are of the opinion that their states have automatic jurisdiction to try perpetrators of these offences, others are of the opinion that there needs to be a nexus between the offence and the state having custody of the perpetrator in order to establish jurisdiction. From this, it can be concluded that the intention of the drafters of the international law on piracy is subject to varied interpretations.

5.2.4. Bilateral Agreements

The bilateral agreements under which Kenya and other regional states are prosecuting suspected perpetrators of piracy captured by navies of western maritime states do not clearly spell out the responsibilities of each party to the agreement and do not have an indemnity clause in case Kenya incurs civil liability for wrongful prosecution. Further to this, the agreements do not have their foundation in any international legal instrument making their enforcement difficult in municipal courts of either of the state parties.

5.2.5. Witness Attendance at Trial

This study has found that a single piracy attack could involve a number of victims including vessel owners, cargo owners, crews and passengers all from different parts of the world who would be required to testify in piracy trials. Apart from the courts not having power to compel foreign witnesses to appear in court during trials, there is a huge cost implication attached to securing attendance for those witnesses who are willing to attend trial. The nature of employment of ship crews which is constant travel by sea around the globe reduces their

availability at trial. The municipal laws of some of the regional states like Seychelles do not provide for witnesses to testify by means of video link making it difficult to secure testimony of witnesses who are unable to physically attend trial. On the other hand states like Mauritius have laws that allow for the admissibility into evidence of written statements by unavailable witnesses. Due to the limited ability of the accused or their defence counsel to test the veracity of such evidence when relied upon at trial in the absence of the witness, this could raise challenges on fairness of such trials.

5.3. Conclusions

This study has analysed the ability of international law as it currently stands to effectively deal with the violent activities in the Gulf of Aden and Western Indian Ocean. This has revealed various challenges that call for a change in the approach in dealing not only with the violent activities in the Gulf of Aden and Western Indian Ocean, but also similar occurrences in other places in the world.

The various interpretations by courts regarding universal jurisdiction which is the core of any court hearing a case against a suspected pirate coupled with the lack of express provision in international law allowing transfer of captured piracy suspects to third states to stand trial are serious gaps that have been exposed by this study. Thus bilateral agreements that have been entered into by western maritime states and regional states to allow piracy suspects apprehended by the western states navies be transferred to regional states to stand trial have no grounding in international law and lack enforceability in national courts of either of the states. These gaps have proved the first hypotheses that international law on maritime piracy has lacked enforcement capacity and dynamism to deal effectively with the acts of violence in the Western Indian Ocean and Gulf of Aden.

International law and the bilateral agreements between western states and regional states did not envisage the practical challenge of securing physical attendance of witnesses during trial. The national legislations of some regional states also lack provision to allow for testimony via video link for unavailable witnesses while other national legislations they provide for admissibility of written statements of unavailable witnesses which raises doubts of fair trial of suspects. This proves the second hypotheses on lack of proper interface between international law and national law on maritime piracy which leaves room for perpetrators of acts of maritime violence to escape prosecution.

5.4. Recommendations

Having come to the above conclusions, this study proposes some measures to address the challenges revealed

5.4.1. Recommendation to Amend UNCLOS

While recognizing the numerous efforts of the international community that led to the codification of the international law on maritime piracy, further efforts should be made to come up with a more comprehensive and internationally accepted definition of the crime of piracy. This would eliminate cases of varied interpretation of what would constitute piracy. In developing a more comprehensive definition of piracy, the principle of universal jurisdiction, as contained in UNCLOS, should also be expounded to eliminate the requirement currently imposed by some states for the need of existence of a nexus between an attack and the state having custody of an offender for such a state to exercise jurisdiction and also to expressly allow capturing states to transfer seized suspects to third states to stand trial.

There also needs to be an amendment to UNCLOS that makes it mandatory for state parties to ensure that their national laws are reviewed to ensure that they have established universal jurisdiction over acts of piracy and that they have the necessary authority to take the necessary steps not only to seize and prosecute perpetrators but also to cooperate with other states to suppress piracy. This will ensure that the intention of the drafters of international treaty law on piracy which was to ensure that perpetrators are apprehended and prosecuted is realized.

International law should also be amended to cover acts that are perpetrated in territorial waters of states that are unable to apprehend or prosecute perpetrators of such acts for one reason or the other. This would ensure that crimes that occur in territorial waters of Somalia and other places that may find themselves in similar circumstances do not go unpunished.

5.4.2. Recommendation to Harmonise Legislations of Regional States

Regional states should consider harmonising their national legislation to ensure universal jurisdiction as envisaged by UNCLOS is entrenched. Seychelles and other regional states should consider amending their national legislations to allow for unavailable to testify by way of video link as opposed to written statement whose veracity cannot be tested by accused persons and their defence counsel leading to questions on fairness of trials.

5.4.2. Recommendation for Revision of Bilateral Agreements

Bilateral agreements between western maritime states and regional states that allow for transfer of capture suspects to regional states ought to be revised to ensure responsibilities of all parties are clearly spelt out. The revision should also include indemnity clauses to cover regional states against cases of wrongful prosecution.

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