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**INSTITUTE OF DIPLOMACY AND INTERNATIONAL STUDIES**

**MA INTERNATIONAL STUDIES**

**TITLE: THE 1982 UN CONVENTION ON THE LAW OF THE SEA AND  
PIRACY: A CASE STUDY OF PIRACY OFF THE SOMALI COAST IN 2005-  
2009**

**PRESENTED BY: EDMOND KIPLAGAT GICHURU**

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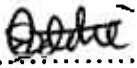
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## DECLARATION

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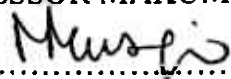
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DATE:.....23/11/10.....

SEPTEMBER, 2010

## **DEDICATION**

To my dearest wife Marion and our lovely prince Myles. I love you guys.

## ACKNOWLEDGEMENTS

I wish to first and foremost thank the Almighty God for giving me good health and provision throughout this painstaking journey. His grace has been sufficient.

Secondly, I am very indebted to Professor Makumi Mwagiru whose intellectual mastery is unequalled. I sat under his feet and wisdom as he guided me throughout this academic odyssey.

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Last but not least, I wish to thank my dear wife Marion and son Myles for allowing me to take my leave off them for endless hours as I pursued this endeavor.

## **ABBREVIATIONS**

AJIL	American Journal of International Law
EU	European Union
EUNAVFOR	European Union Naval Force
ICC	International Criminal Court
ILC	International Law Commission
IMO	International Maritime Organization
MSPA	Maritime Security Patrol Area
NATO	North Atlantic Treaty Organization
SUA	Convention on the Suppression of Unlawful Acts Against the Safety of Maritime Navigation
TFG	Transitional Federal Government of Somalia
UIC	Union of Islamic Courts
UNCLOS	United Nations Convention on the Law of the Sea

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## Abstract

The 1982 United Nations Convention on the Law of the Sea is the main treaty dealing with all maritime affairs. The treaty criminalizes the offence of piracy. Piracy has become a major topic for intellectual analysis in the world today in terms of how to respond and contain the menace. This study will seek to find out whether the treaty effectively curbs piracy. It will carry out this investigation against the backdrop of piracy off Somalia's coast in 2005-2009.

Moreover, the study will seek to identify the methods and means under the treaty that are used to address the piracy problem. This will entail a detailed analysis of the provisions enshrined in the treaty and singling out what anti-piracy enforcement mechanisms exist for purposes of evaluating their efficacy. The study will further identify areas of co-operation that states employ in order to manage and control piracy.

The study is an exploratory one. It has formulated a problem for more precise investigations and shall develop research questions. The method of data collection shall incorporate the use of open ended questionnaires as well as structured interviews. The study shall obtain primary data using the random sampling method from a wide cross section of the population. The target population of the study shall be those who have interacted with the subject either directly or indirectly.

This study further adopts the concept of universal jurisdiction as its conceptual framework. This is because one cannot talk about piracy without talking about universal jurisdiction. This concept is the basis upon which states exercise their rights to prosecute pirates captured in the high seas.

The study will conclude that the 1982 treaty has to be changed to incorporate developments associated with modern piracy because more and more piratical attacks are now happening in the territorial waters. Secondly, the study will conclude that terrorism should be included as piracy according to the law of nations in order to pre-empt the defence of hijacking ships for political ends as that does not constitute piracy.

Moreover, the study will also conclude that there is need for states to enter into and enforce regional bilateral and multilateral treaties to combat piracy, a window allowed under the 1982 treaty. Again, the study will conclude that there is need to establish an *ad hoc* international piracy court with universal compulsory jurisdiction to try pirates. Lastly, the study will conclude that there is need for states to interpret provisions that exist in treaties liberally as allowed by Article 31 of the Vienna Convention on Treaties so that meanings can be given to new prevailing situations that had not been foreseen.

# Chapter One

## Introduction To The Study

Without a coast guard or navy to monitor and prevent illegal activities along Somalia's 4,000 kilometer coastal stretch, Somali fishermen began organizing themselves to confront what they claimed to be dumping of waste by foreigners as well as collect fees from foreign vessels taking fish out of their territory. Nonetheless, it has been argued that what began as a legitimate fight against foreign exploitation graduated into a criminal enterprise when everyone discovered its lucrative potential.<sup>1</sup>

Piracy exploded and became an industry in Somalia. In 2008 alone it was reported that there were 111 pirate attacks in the Gulf of Aden and the Indian Ocean. This problem has threatened to stall the commercial sea trade routes yet ninety percent of the world's goods are shipped through the sea.<sup>2</sup>

The 1982 United Nations Convention on the Law of the Sea (UNCLOS) that has been ratified by more than 150 countries defines piracy as illegal acts committed on the high seas for private ends.<sup>3</sup> However, this convention has been criticized for failing to address the emergence of countries like Somalia. UNCLOS leaves the jurisdiction to prosecute offences under the territorial waters to the coastal state while any state can prosecute pirates caught in the high seas. However, as noted above Somalia does not have an effective government that can help police its coastal breath.

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<sup>1</sup> See the International Expert Group on the Piracy off the Somali coast, Final Report.22/04/2009:p.15.

<sup>2</sup> See January 2008 Piracy Report of the International Maritime Bureau, January 28, 2008.

<sup>3</sup> See Art 101.

UNCLOS requirement limits piracy provisions to acts committed in the high seas as noted above. If an act of robbery or depredation against a ship occurs in territorial waters it is not piracy unless the host state defines it as such. This study enquires on the effectiveness of UNCLOS to curb piracy while using a case study of piracy off the Somali coast in 2005-2009.

### **Statement of The Research Problem**

Piracy has become a perennial problem in the Gulf of Aden and the Indian Ocean ever since the collapse of the Somali State 19 year's ago. This has affected this crucial trade route disrupting shipping activities leading to high insurance premium rates which in turn lead to high cost of business.<sup>4</sup> Global and regional efforts to curb this menace have not succeeded.

The world uses the sea route and straits off Somalia for transport, navigation and scientific exploration yet the challenge of piracy off Somalia creates a serious problem as this sea route is now perilous. Thus, countries in the Horn of Africa and indeed the world cannot trade in exports and imports thus stifling global trade yet global trade is the lifeline of national economies.

These are concerns that grapple the mind and form the subject of this academic enquiry. The problem of piracy within the Horn of Africa is of current interest globally and is

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<sup>4</sup> See CRS Report R40081, *Ocean Piracy and Its Impact on Insurance*, Group:03/05/09:Issue No.16147:P.26.

likely to continue into the future unless it is addressed urgently and adequately. Indeed, more information about this problem will lead not only to practical application but also theoretical importance. Moreover, the study will extend existing knowledge and lead to some useful change in best practice.

### **Objectives of The Study**

- i.** To find out whether UNCLOS effectively curbs piracy.
- ii.** To identify the methods and means under UNCLOS that are used to address piracy.
- iii.** To identify areas of co-operation amongst states in order to manage and control piracy.

### **Literature Review**

#### **Piracy In International Law**

International law on piracy developed from the 1958 Conventions on the Law of the Sea. This was after numerous state conferences were organized that resulted to four 1958 Conventions on the Law of the Sea and ultimately the 1982 Convention on the Law of the Sea.<sup>5</sup> The 1958 Convention on the High Seas was generally declaratory of established

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<sup>5</sup> The 1958 Convention on the Territorial Sea and Contiguous Zone came into force in 1964; the 1958 Convention on the High Seas came into force in 1962; the 1958 Convention on Fishing and Conservation of

principles of international law<sup>6</sup> whereas the remaining three conventions confirmed what existed as new rules and what constituted as new rules.

As International law scholar Rebecca Wallace rightly observed there was need to preserve the seas as the common heritage of all mankind and the danger of a “scramble for the seas” precipitated the calling of the Third United Nations Conference on the Law of the Sea.<sup>7</sup>

UNCLOS replicates previous principles from earlier instruments. However, some principles have since become customary rules. Consequently, what governs the network of relationship among states and even individuals are both customary rules and treaty rules.<sup>8</sup> It is critical to note that the 1958 Conventions are now considered customary rules which affect all states while UNCLOS binds the parties to it.<sup>9</sup> The intervening period of twelve years before UNCLOS came into force the provisions enshrined thereof were applied as state practice.<sup>10</sup>

It is worth to note that public ships and warships are excluded from this definition in effect thus confirming in effect that only private ships can commit piracy. Admittedly,

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Living Resources came into force in 1966 and the 1958 Convention on the Continental Shelf came into force in 1964.

<sup>6</sup> See Preamble to the 1958 Convention on the High Seas.

<sup>7</sup> Wallace R, *International Law* (London: Sweet and Maxwell: 1992) P.129.

<sup>8</sup> See the *North Sea Continental Shelf* cases, ICJ Reports, 1969 PP.3,39;41 PP.29,68; the *Fisheries Jurisdiction (UK v Iceland)* case, ICJ Reports, 1974, P.1; P.23.

<sup>9</sup> Note that by Article 311 (1) of UNCLOS the provisions of this convention will prevail as between the states parties over the 1958 conventions.

<sup>10</sup> See Stevenson et al., “The Future of the UN Convention on the Law of the Sea” (AJIL, 1994) P.488.

international law seems to conclude also that a public ship or warship acting on orders from a belligerent government cannot be said to commit acts of piracy and thus any redress can only be addressed by the flag state which has to punish the offenders and pay damages.<sup>11</sup>

However, this does not mean that public vessels cannot commit acts of piracy which in diplomatic terms are called, 'unlawful acts'. When such acts take place then the ship ceases to enjoy the protection of the state until such time that order is restored and belligerency has stopped.<sup>12</sup> The English Judge, Moore in his judgment in the *Lotus* case said that piracy is a crime committed in the high seas by persons acting in defiance of all law and acknowledging obedience to no flag state whatsoever.<sup>13</sup>

However, Lauterpacht states that vessels of unrecognized insurgents interfering with ships of third states may be treated as piratical where such attacks lead to loss of life and property. Such crew may be held responsible for piracy *jure gentium*.<sup>14</sup> UNCLOS, the International law of the sea outlines piracy to include, 'acts committed by a ship against another ship or aircraft'. This in essence means that acts committed on board a ship by crew or passengers directed against the ship itself or against persons or property on board a ship does not amount to piracy.<sup>15</sup>

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<sup>11</sup> Watts A et earl (eds), *Oppenheim's International Law* (London: Longman: 1996) p. 746

<sup>12</sup> See Art 102 of UNCLOS.

<sup>13</sup> (1927), PCIJ, No 10 at p. 70

<sup>14</sup> For a survey of the practice of states in this matter see Lauterpacht, RG 46 (1939) PP. 513-49.

<sup>15</sup> See the *Santa Maria* incident (1961) *Whitemen*, Digest 4 pp 665-7 here a Portuguese passenger liner was seized in mid-Atlantic by men who had boarded as passengers and who were supporters of General Delgado an opponent of the Portuguese President. One crew member was killed and others injured. The ship was eventually handed over to Brazil which country also gave the men political asylum.

This is replicated under Article 101 of UNCLOS where if the vessel has been converted by the crew or passengers for purposes of committing illegal acts then that would amount to piracy. This would then mean that even where persons take 'dominant control' of the ship as Article 101 of UNCLOS puts it with an intention to use it for criminal acts then such acts amount to piracy.

It has been noted by George Gabel that the UNCLOS definition of piracy should be so broad so that it can include unauthorized act of violence committed at sea or closely connected with the sea without any requirement that the act occur outside a state's territorial jurisdiction.<sup>16</sup> Gabel further notes that this confusion is exacerbated when the definition of piracy includes attempted robberies and attacks on ships for political gain as have been suggested by some scholars.<sup>17</sup> Gabel notes that this difficulty in having one clear definition is as a result of the broad nature of modern day piracy given that today acts of piracy have become so sophisticated that they take place in territorial waters. This goes against UNCLOS since it limits piracy to acts in the high seas.<sup>18</sup>

International scholar Ian Brownlie<sup>19</sup> has also registered his displeasure with this controversy regarding piracy under international law. He notes that the only improvement under UNCLOS is the provision with reference to aircraft. Under the International Law

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<sup>16</sup> See Gabel George, "Smoother Seas Ahead: The draft Guidelines as an International Solution to Modern Day Piracy", *Tulane Law Review*: June 2007; 81 Tul L.Rev. 1433; p.2.

<sup>17</sup> Acts of political terrorism are also excluded from UNCLOS which adopted verbatim the language of Art 15 of the 1958 Convention on the High Seas.

<sup>18</sup> See Art.101.

<sup>19</sup> Brownlie I, *Principles of Public International Law* (Oxford:OUP:2003) pp.229-230

Committee that prepared the draft that preceded UNCLOS aircrafts were not envisage as vessels used for piracy.

Brownlie points out that under international law piratical acts must be committed for private ends. He notes therefore that piracy cannot be committed by warships, government ships or government aircraft except where the crew has mutinied and taken over the ship or aircraft. Brownlie notes that acts committed on board a ship by crew and directed against the ship itself or against persons or property on the ships are not within the definition.

However, Brownlie cautions that the definitions by municipal courts are often out of date and may involve an amalgam of municipal rules and international law or the narrow issue of the meaning of 'piracy' in an insurance policy. He proceeds to give examples of municipal judicial definitions of piracy in cases such as *The Serhassan Pirates*<sup>20</sup>, *The Magellan Pirates*<sup>21</sup> and *Republic of Bolivia v Indemnity Mutual marine Assurance Company*<sup>22</sup>.

Tina Garmon states that most modern piratical acts occur in the ports and territorial waters of heavy shipping zones that lack effective law enforcement. The acts she notes

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<sup>20</sup> (1845), 2, Wm.Rob.354.

<sup>21</sup> (1853), 1 Sp.Ecc & Ad.81

<sup>22</sup> (1909)KB 785.



always includes pirates searching for cash or port goods. They may use speedboats and rocket launchers aimed at the ship's hull as a means of obtaining their prize.<sup>23</sup>

Additionally, Garmon argues that UNCLOS makes it difficult to consider other arguments when it limits piracy to acts for "private ends". By focusing on the private ends requirement it begs the question as to whether the use of force and crimes committed outside this requirement are not in themselves piratical. With these gaps scholars have sought to expand the international law relating to piracy. Case law broadly characterizes piracy as acts of forceful depredation on the high seas without lawful authority.

It has been argued by Terence Fokas that UNCLOS loses focus by offering conflicting views on the level of intent required whether the acts are limited to crimes committed against the prosecuting states and whether a belligerent plunder of enemy shipping falls under the definition of piracy.<sup>24</sup>

Fokas argues that the disarray within the legal community caused by the international law results largely because "no international legislature exists to codify the crime and because there is no international mechanisms that can help to settle the disputes with regard to how best to interpret the concept."<sup>25</sup> Furthermore, Fokas notes that this has led two problems. To begin with he notes that characterizing a crime as a piratical act can cause a

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<sup>23</sup> Garmon T, "International Law of the Sea: Reconciling the Law of Piracy Terrorism in the Wake of September 11<sup>th</sup>", 27 Tul.Mar.L.J.257,261 (2002).P4.

<sup>24</sup> Fokas T "The Barbary Coast Revisited: The Resurgence of International Maritime Piracy", University of San Francisco maritime Law Journal; Summer 1997;9 U.S.F.Mar.L.J.427 P.2

<sup>25</sup> Ibid p.6

state to invoke its jurisdiction under its municipal law and second a state can site customary international law.

He goes on to state that conflict arises when municipal and international law diverge over definition of the offence. Where municipal law defines piracy specifically the proceeding under municipal law may preclude enforcement and where international law defines piracy in broad terms its application might create liability where none would exist under municipal law.<sup>26</sup>

Moreover, Fokas notes that a broader definition of piracy demands that each affected nation should prudently choose whether to preserve its sovereign authority or have the international community expand international jurisdiction to effectively pursue and prosecute pirates.

On the other hand Malcolm Shaw looks at international law limiting piracy only as a crime committed for private ends.<sup>27</sup> He notes that any hijacking or takeover for political reasons should automatically be excluded from what piracy is under international law. Similarly, he notes that any acts committed on the ship itself or property or persons on the ship do not fall within this category.<sup>28</sup>

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<sup>26</sup> Ibid p.2

<sup>27</sup> Shaw N M, *International Law* (Cambridge: Cambridge University Press:1997):p423

<sup>28</sup> Ibid.

Arguably, all these analyses by the scholars have concentrated at what ingredients constitute piracy but they have failed to discuss the problem of piracy off Somalia's coast which has become a global problem that international law needs to address.

## **Universal Jurisdiction of Piracy**

Jurisdiction over ships in the high seas is exercisable by the flag state. The flag state is for example responsible for manning the ship and labour conditions for its crew.<sup>29</sup> UNCLOS under Article 94 spells out in broader details the measures the flag state should take to ensure safety at sea. The ship itself may be detained and crew members charged with the authority of the flag state.<sup>30</sup> However, Article 105 of UNCLOS gives universal jurisdiction to every state to arrest a pirate ship and charge them in court.

The courts of seizing states are competent to decide the penalties which may be imposed. It should however be noted that if the seizure proves groundless the state making the seizure is liable for any loss or damage it has caused as a consequence.<sup>31</sup> As noted above under UNCLOS piracy is viewed as an international crime that can only be committed in the high seas. Attacks that take place in the territorial waters of a state are subject to the municipal law of the coastal state.

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<sup>29</sup> Art 10 of the 1958 Convention.

<sup>30</sup> Art 97 of UNCLOS.

<sup>31</sup> See Art 106 of UNCLOS.

However, piracy *jure gentium* committed outside the territorial jurisdiction of any coastal state or in an island that is *terra nullius* is not subject to a territorial jurisdiction.<sup>32</sup> Additionally, piracy *jure gentium* can also take place in an Exclusive Economic Zone as outlined under Article 58 of UNCLOS.

The seizure of pirates according to UNCLOS may only be made by warships or other ships or aircraft on government service authorized to that effect.<sup>33</sup> It should be noted however, that capture of a pirate ship by the intended victim is not disallowed where they are acting in self defence. They should subsequently though hand over the pirates to a governmental authority.<sup>34</sup>

Another scholar Allan Watts notes that piracy *jure gentium* must not be confused with piracy according to the different municipal laws. He notes that states may confine themselves to punishing as piracy fewer acts of violence than those which international law defines as piracy.<sup>35</sup> Watts however, indicates that states may punish their own subjects as pirates for much wider range of acts. The dilemma here he notes is that states cannot enforce their municipal laws against foreigners unless they are pirates according to the laws of nations.

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<sup>32</sup> See The ILC *Commentary* gives the rationale of this rule as a desire to prevent such acts committed on ownerless territories from escaping all penal jurisdiction.

<sup>33</sup> Art 107 of UNCLOS.

<sup>34</sup> See ILC *Commentary*, *loc cit* p.283

<sup>35</sup> *Ibid* p.754

Judge Moore had these to say in the *Lotus* case<sup>36</sup> with regard to the jurisdiction over pirates in the high seas:

“in the case of what is known as piracy by the law of nations there has been conceded a universal jurisdiction under which the person charged with the offence may be tried and punished by any nation into whose jurisdiction he may come. I say “piracy by law of nations”, because the municipal laws of many states denominate and punish as ‘piracy’ numerous acts which do not constitute piracy by law of nations and which therefore are not of universal cognizance so as to be punishable by all nations. Piracy by law of nations in its jurisdictional aspects is *sui generis*. Though statutes may provide for its punishment it is an offence against the laws of the nation and as the scene of the pirate’s operations in the high seas which he may carry and is treated as an outlaw as the enemy of all mankind *hostis humani generis* whom any nation may in the interest of all capture and punish.”

Arguably, UNCLOS allows states to take universal jurisdiction over piracy by allowing all states to prohibit and prosecute pirates wherever they operate. Under Article 100, UNCLOS also requires all states to co-operate in the fullest possible extent to suppress piracy. This means that any state that fails to take measures against the crime is in breach of that duty under international law. This requirement is as a result of the commentary of the International Law Commission on the provision of the 1958 High Seas Convention on which the UNCLOS requirement is based.

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<sup>36</sup> PCIJ Ser.A no.10 (1927) p.70.

Watts says that every state has by international law the right on the high seas or any other place outside the jurisdiction of any state to seize a pirate ship or aircraft or ship or a ship taken by piracy and under the control of pirates arrest the persons and arrest the property on board.<sup>37</sup> He notes that it is for courts which have carried out the seizure to determine the penalties to be imposed and the action to be taken with regard to the ship, aircraft or other property subject to the rights of third parties acting in good faith.

Moreover, he points out that there was formerly a difference of opinion whether seizure of pirates could be made only by warships. He notes that an intended victim acting in self-defence can hand the pirate over to a governmental authority.<sup>38</sup> However, since a state cannot enforce its municipal laws on the high seas against other than its own subjects it cannot treat foreigners on the open sea as pirates unless they are pirates according to the laws of nation.

Rebecca Wallace in her work *International Law*<sup>39</sup> notes that jurisdiction over ships on the high seas lies with the flag state. She notes that the flag state is for instance responsible for manning of ships and the labour conditions of the crew. According to her also UNCLOS under Article 4 spells out in greater detail the measures which a flag state is required to take to ensure safety at sea.

Brownlie on the other hand states that UNCLOS confines piracy to acts on the high seas or in a place outside the territorial jurisdiction of any state. The latter phrase refers

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<sup>37</sup> Ibid p.753

<sup>38</sup> See Art. 106 of UNCLOS.

<sup>39</sup> Wallace R M M, *International Law*: (London: Sweet and Maxwell: 2005) p.185.

primarily to an island constituting *terra nullius* or the shore of an occupied territory.<sup>40</sup> Brownlie states that the subject of universal jurisdiction is dominated by the problem of keeping order outside the territorial jurisdiction of states and in particular of maintaining legal controls in respect of those not identified with a state or which responsibility may be placed.

Malcolm Shaw states that the foundation of the maintenance of order on the high seas has rested upon the concept of the nationality of the ship and consequent jurisdiction of the flag state over the ship. He states that the flag state will enforce rules and regulations not only of its own municipal law but of international law as well. He notes that a ship without a flag will be deprived of many of the benefits and rights available under the legal regime of the high seas.<sup>41</sup>

On universal jurisdiction, Shaw notes that every state may seize a pirate ship or aircraft whether on high seas or on *terra nullius* and arrest the persons and seize the property on board. In addition he notes that municipal courts of the states carrying out the seizures have jurisdiction to impose penalties and may decide what action to take regarding the ship or aircraft and property subject to the rights of third parties that have acted in good faith.<sup>42</sup>

Shaw argues that the fact that every state may arrest and try person's accused of piracy makes that crime quite exceptional in international law where so much emphasis is

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<sup>40</sup> Ibid p.236

<sup>41</sup> Ibid p.420

<sup>42</sup> See Art.105

placed upon the sovereignty and jurisdiction of each particular state within its own territory. Evidently, none of these authors have taken the time to research and write on the problem of piracy off the Somali Coast.

### **Judicial Enforcement of Piracy Law: Case Studies**

States have in the past meted out penalties to pirates all over the world based on the universality principle. This offence is particularly considered to be very offensive to the international community as a *jus cogens* as enunciated by the case of *Re Piracy Jure Gentium*<sup>43</sup>. The following cases also shed more light on how states have enforced piracy law.

In the case of *United States –vs-Lei Shi*<sup>44</sup> A foreign national defendant from China was convicted by jury of seizing control over ship by force and performing acts of violence likely to endanger safety of ship under the statute codifying obligations of USA under UNCLOS. The accused had forcibly seized control of a Taiwanese fishing vessel registered in Seychelles and sailing in the high seas off the Coast of Hawaii where he killed the captain and a first mate.

The court sentenced the accused to 36 years in prison. The court observed that the USA government had codified UNCLOS into federal law and the court had jurisdiction to try the accused. The argument was further developed in the case the case of *USA- v-*

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<sup>43</sup> (1934) AC 586

<sup>44</sup> No.06-10389 of 2007.



*Yunis*<sup>45</sup> where the US court indicated that both air piracy and hostage taking were susceptible to the jurisdiction of any state regardless of the fact that the offence was committed by an alien.

The English courts have jurisdiction to try all cases of piracy *jure gentium* in whatever part of the high seas without regard as to whether the accused are British subjects or the subjects of a foreign state.<sup>46</sup> In Kenya the universality principle was applied in the case of *Hassan Mohammed and Others vs Republic*<sup>47</sup>. The pirates were charged before a Mombasa Senior Principal Magistrate's court for among other things hijacking the vessel called Safina Al Bisaraat on January 16, 2006 in the High Sea threatening the lives of its crew and demanding a ransom.

In brief the facts of this case<sup>48</sup> were that the accused were charged with the offence of piracy *jure gentium* contrary to section 69 (1) as read with section 69 (3) of the Penal Code Cap 63 Laws of Kenya after they jointly attacked and detained the Indian Machine Sailing Vessel Safina Al Bissarat-M-.N.V-723 in the High Seas of Indian Ocean.

They were further accused assaulting and putting into fear the lives of the crew members and making demands upon the captain one Akbar Ali Suleiman for ransom payment of US \$ 50,000. They appealed but the lower court decision was upheld by High Court Judge F. Azangala who held that Kenya had jurisdiction to try suspected Somali nationals who had committed acts of piracy in the high seas.

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<sup>45</sup> (1988) 681 F.Supp 896.

<sup>46</sup> Jurisdiction is vested in the Crown Court under the Crown Courts Act.

<sup>47</sup> Mombasa HCCA Nos 198,199,200,201,202,203,204,205,206 and 207 all of 2008.

<sup>48</sup> Mombasa Chief Magistrate Criminal Case No.434 of 2006.

Acts of terrorism at sea may also be considered piracy. This was illustrated by the seizure in the Mediterranean Sea of the *Achille Lauro* an Italian registered cruise ship in 1985.<sup>49</sup> The terrorist threatened to kill the passengers who amounted to 454 unless 50 Palestinians held in jail in Israel were released. Unfortunately, one United States citizen of Jewish origin was killed even though the rest of the passengers were released.

Indeed these case studies are a pointer to the jurisprudential development on the adjudication of piracy in various states. It is important to note however, that none of these countries have taken the liberty to develop jurisprudence on the case of enforcing anti-piracy activities off Somalia.

### **Justification of The Study**

Many scholars who have written on piracy talk about the legislative history and the structure of the UNCLOS and its applicability in the international arena. However, very few writers have posed to critically look at the effectiveness of UNCLOS in curbing piracy off Somali's coast. The study seeks to examine the efforts that can be mooted to curb piracy and suggestions as to how states can play an effective role in curbing piracy off Somali's coast.

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<sup>49</sup> See *The Times* (London ,08/10/1988).

## Conceptual Framework

This study will adopt the concept of universal jurisdiction. This is a cannon concept around which the crime of piracy gravitates as well as the international regime that criminalizes the crime in this case, UNCLOS. Traditionally, states have enacted criminal laws which provide that their national courts can prosecute anyone accused of committing crimes on its territory regardless of the nationality of the accused or the nationality of the victim (territorial jurisdiction). However, under international law states can also enact national criminal laws which allow national courts to investigate and prosecute people suspected of crimes committed outside of the state's territory, including crimes committed by a national of the state, crimes committed against a national of the state and crimes committed against a state's essential security interests.

There is, however, an all inclusive form of jurisdiction called universal jurisdiction which provides that national courts can investigate and prosecute a person suspected of committing a crime anywhere in the world regardless of the nationality of the accused or the victim or the absence of any links to the state where the court is located.

When a crime is committed a state must be able to exercise some kind of jurisdiction in order to be able to take judicial action. States do so regularly on the principles of territoriality or nationality and sometimes on passive personality or the protective principle where national interests are affected.<sup>50</sup>

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<sup>50</sup> See Cassese A, *International Criminal Law* (Newyork:OUP:2003),pp.244-285.

Occasionally, however, courts have prosecuted defendants without any of the traditional jurisdictional links being present. They have done so by using the universality principle. The concept of universal jurisdiction portends that certain crimes are of such an atrocious and dangerous nature or *jus cogens* that all states have a responsibility or legitimate interest to take action.<sup>51</sup> This is the concept of universality and the root of universal jurisdiction. In other words international law permits any state to apply its laws to certain offences even in the absence of territorial, nationality or accepted contacts with the offender or the victim.<sup>52</sup>

Historically, the oldest and the most accepted application of the universality principle has been the prosecution of piracy on the high seas.<sup>53</sup> Piracy was identified as a problem as early as the 10<sup>th</sup> century<sup>54</sup> and states have exercised universal jurisdiction over pirates regardless of their nationality or where their crimes were committed for nearly 500 years.<sup>55</sup>

The practice evolved from the importance placed upon naval trade and communication links between states which were constantly and indiscriminately threatened by piracy. Additionally, the ability of pirates to flee territorial waters or commit these serious

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<sup>51</sup> Buergental T and Harold G. Maier (eds), *Public International Law in a Nutshell* (St. Paul: West Group: 1990). p. 172.

<sup>52</sup> Meron T, *War Crimes Law Comes of Age* (Oxford: Clarendon Press: 1998) p. 251.

<sup>53</sup> *Ibid.*

<sup>54</sup> In 1179 the Third Lateran Council condemned piracy but characteristically for the time only if it was committed against Christians. See Hannikainen L, *Peremptory Norms (Jus Cogens) In International Law, Historical Development, Criteria, Present Status* (Helsinki: Finnish Lawyers Publishing Co: 1988) p. 149.

<sup>55</sup> Amnesty International, "The History of Universal Jurisdiction" in *Universal Jurisdiction: The Duty of States to Enact and Implement Legislation* 2001, AI Index: OR 53/002/2001 p. 3

crimes on the high seas made them notoriously difficult to capture and prosecute. Pirates were therefore universally reviled and recognized as *hostis humani generis* which means punishable by courts of all nations.<sup>56</sup> As all states were affected by piracy they were all eager to prosecute pirates and universal jurisdiction was a neat compromise to settle potentially innumerable conflicts of jurisdiction.<sup>57</sup> Any state that apprehended a pirate could try him in its courts. This has been recognized as customary international law and has furthermore been codified by subsequent conventions notably the 1958 Convention on the High Seas and the 1982 Convention on the Law of the Sea which is the subject of this study.<sup>58</sup>

### **Hypothesis**

1. UNCLOS does not effectively curb piracy.
2. The methods and means under UNCLOS do not adequately address piracy.
3. States have identified areas of co-operation that have helped to manage and control piracy.

### **Methodology**

### **Research Design**

This study is an exploratory one. The study has formulated a problem for more precise investigations and shall develop research questions from operational points of view. This

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<sup>56</sup> See the case of *United States v Smith* 18 US 153, 156 (1820). This is the case where the US Supreme Court upheld the exercise of universal jurisdiction by US courts over piracy which was declared to be an offence against the universal law of society.

<sup>57</sup> See the case of *Congo vs Belgium* 13 EJIL 853 P.857 (2002).

<sup>58</sup> See Article 19 of the 1958 Geneva Convention on the High Seas and Article 105 of UNCLOS.

type of design is flexible enough to provide opportunity for considering different aspects of problem under study. The study shall obtain primary data from a sample population and a survey of existing secondary literature shall also be carried out.

### **Sample Population**

The study shall obtain primary data using the random sampling method from a wide cross section of the population. The target population of the study shall be those who have dealt with the subject either directly or indirectly. This has been arrived at after searching on various government agencies, embassies and non-government sources as well as the print and the electronic media reporting on Somali piracy.

### **Method of Data Collection**

This study shall be carried out using open ended questionnaires as well as structured interviews which shall consist of a number of questions done in a definite order on. This method has been adopted here due to the fact that the study is enormous and entails sourcing for information from a wider range of population and does not need the interviewer to travel.

This study is based on qualitative methods of data collection and analyses. Primary sources of data collection will include interviews with officials at the Somali, European Union ,British and United States of America Embassies as well as interviews with

Kenyan government officials at the Ministry of Justice and Constitutional Affairs, Ministry of Transport and in particular The Kenya Maritime Authority.

I shall also conduct interviews with government officials from the Ministry of Foreign Affairs, Ministry of Defense and Ministry of Internal Security. Furthermore, interviews shall be conducted with the Judiciary, the Attorney General's Office in particular the Department of Treaties and Agreements and the Department of Public Prosecution. Moreover, Non-Governmental Organizations as well as scholars in the field and all other relevant stakeholders shall be interviewed.

Secondary data will be collected through library research from such sources as academic journals, books, print and electronic media and also from unpublished works. Reports from conferences organized by various stakeholders and any other publications from them will also be utilized.

### **Data Analysis**

The collected data will then be analyzed with a view to meeting the main objective of this study which is to assess the effectiveness of UNCLOS to curb piracy. The analysis will be based on a case study of piracy off Somalia in 2005 to 2009.

Primary data will be analyzed using qualitative methods of social research such as content analysis. This method of social research shall entail analyzing the content of

messages and communication being studied to look for trends, patterns and themes. The qualitative method analysis shall attempt to understand reality from the perspective of the research audience. Presentation of the data shall be done descriptively because the data obtained shall give a qualitative opinion.

### **Chapter Outline**

1. **Chapter One:** Introduction.
2. **Chapter Two:** Piracy In International Law.
3. **Chapter Three:** Jurisdiction To Prosecute Piracy Under International Law.
4. **Chapter Four:** A Case Study of Piracy off The Somali Coast In 2005-2009.
5. **Chapter Five:** Conclusion



## Chapter Two

### Piracy In International Law

#### The Traditional Concept of Piracy

Pirates have often been described as brave freedom fighters that rob the rich ships to help their people. This conception is however far from the truth and not what piracy is in international law. Piracy has existed for centuries and has been more or less common at different periods but it has always been a major threat to international trade and shipping and to the work or travel on ships.<sup>1</sup>

The traditional conception of piracy was not included in a convention until the Geneva Convention was adopted in 1958. This means that piracy under international law until 1958 was dealt mainly by international customary law. The customary law regarding piracy had been created and accepted by states during the centuries when they had to find a solution to a major problem that faced all states that used the high seas to transport goods and for international trade.<sup>2</sup>

Traditional piracy as it has been seen in customary law often describes pirates as *hostis humani generis* or 'enemies of all mankind'. That description led to what became accepted among states that pirates in the high seas could be captured and punished by all states. Piracy under

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<sup>1</sup> Johansson K, "Changes in the views on Jurisdiction over Piracy under International Law", Masters Thesis, Faculty of Law, University of Lund, 2006, p.7

<sup>2</sup> Ibid p.7.

international law or piracy *jure gentium* as often called means that it violates the principles of law as they are interpreted by all nations.<sup>3</sup>

At the onset of the 17<sup>th</sup> century onwards the emergence of jurisdictional basis of the law of the sea coincided with a period of growth for piracy. During this period it was accepted that robbery, torture, rape, plunder and murder could be considered as piracy if it was committed against another ship. It could be committed by a private ship or by a warship if it belonged to a state that was at peace with the flag state of the victim. It was not clear whether piracy could only occur on the high seas because the maritime territorial zones were not yet fixed.<sup>4</sup>

Consequently, in the following centuries the seas were divided into rather narrow parts that were put under the exclusive jurisdiction of the coastal state and it led to the conclusion that piracy could only occur on the high seas. The coastal state had then complete sovereignty over that area and all areas beyond were considered as high seas where no state had exclusive jurisdiction or sovereign rights. Thus, freedom of the seas became the acceptable doctrine.

Freedom of the high seas is a general principle of law and has been accepted as such for centuries but it has for just as long been threatened by people who are willing to resort to piracy and to attack mainly merchant ships. Freedom of the high seas and of navigation was essential to the development of trade and the economic growth of many states and that was the main reason why piracy was seen with such dislike by states and had to be dealt with at any cost. The pirates

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<sup>3</sup> Joyner N.D , “Aerial Hijacking as an International Crime” Harvard Law Journal vol. XVII (2010) p.2.

<sup>4</sup> Johansson K, Changes in the views on Jurisdiction over Piracy under International Law”, Masters Thesis, Faculty of Law, University of Lund,2006.p.7

threatened international trade and they attacked all states indiscriminately and thus caused all seafaring nations serious damage with their violent plundering.<sup>5</sup>This was the reason why states accepted to have suspected pirates in the high seas captured and punished by any state. Thus, the jurisdiction over piracy had become universal.

When discussing the traditional concept of piracy in customary international law, it is difficult to find a proper definition of what *piracy jure gentium* was but robbery has been seen as a primary element of piracy. Piracy has therefore been used just as a term used at sea for the kind of acts that at land would be robbery. Arguably, if it was unclear what constituted *piracy jure gentium* under international customary law and it is often assumed that robbery was an essential element.

Indeed, it makes sense since pirates plundered ships in such a brutal way that it led to them being regarded as enemies of all mankind and fell under the universal jurisdiction of all states. The most common way of describing traditional piracy is to call it robbery on the high seas or the indiscriminate plunder by a private pirate vessel against commercial vessels at sea.

It is clear that the early conceptions of piracy and piracy under customary international law were not codified until 1958 when the Geneva Convention was adopted. The universal jurisdiction that applies to *piracy jure gentium* is a very effective weapon and it was accepted because it was necessary to get rid of pirates to protect the international trade and as these acts were committed on the high seas the universal jurisdiction did not clash with the territorial jurisdiction of a state.

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<sup>5</sup> Ibid p.132.

The states normally did not have any interest in exercising jurisdiction based on perhaps the flag state principle or the nationality of the pirates because they were seen as enemies of all mankind. Thus, it was perceived that they no longer had any nationality or flag state and it was instead left to all states to do as they deemed fit with the pirates.

The sea has been important to mankind ever since time immemorial. With this in mind states have always protected these waters ever since the birth of the state ushered by the Treaty of Westphalia. States have aggressively protected the sea not only because of the citizens deriving their livelihoods but also for navigational purposes.

As a result of this cultic attachment to the sea the development of legal rules to govern the same became inevitable. This invoked thoughts from such celebrated international law scholars like Hugo Grotius who advocated for the doctrine of the open seas where the oceans as *res communis* were to be accessed by all nations without them having proprietary rights.<sup>6</sup>

The freedom of the high seas garnered currency as a basic principle of international law. However, not all the seas were designated as such. It was generally agreed that a state could have a given length of maritime belt as its territorial waters.<sup>7</sup> There have been historical problems with regard to the size of the territorial sea and what constitutes as the boundary separating it from the high seas as well as other recognized zones. Military might of coastal states in the past has been

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<sup>6</sup> *Mare Liberum*, 1860. See also O'Connell, *International Law*, vol.1 pp.99 *et seq.*

<sup>7</sup> Shaw N M, *International Law* (Cambridge: Cambridge University Press: 1997): p390

the hallmark of territorial dominance historically to the extent that this determined the extent of the any country's territorial waters.<sup>8</sup>

Given the dynamism of the state system as well as international law it is worth noting that states begun to debate on how best they could optimize on the resources at sea and for their navigation.<sup>9</sup> Manifestly, due to many disagreements, conflicts and concerns on how states should exploit the sea attempts at legislating rules and regulations that would govern conduct at sea began in earnest. Numerous state conferences were organized that resulted to four 1958 Conventions on the Law of the Sea and ultimately the 1982 Convention on the Law of the Sea.<sup>10</sup>

The 1958 Convention on the High Seas was generally declaratory of established principles of international law<sup>11</sup> whereas the remaining three conventions confirmed what existed as new rules and what constituted as new rules. As International law scholar Rebecca Wallace rightly observed there was need to preserve the seas as the common heritage of all mankind and the danger of a "scramble for the seas" precipitated the calling of the Third United Nations Conference on the Law of the Sea.<sup>12</sup>

### **The 1958 Geneva Convention**

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<sup>8</sup> Ibid P.391

<sup>9</sup> Ibid P.391.

<sup>10</sup> The 1958 Convention on the Territorial Sea and Contiguous Zone came into force in 1964; the 1958 Convention on the High Seas came into force in 1962; the 1958 Convention on Fishing and Conservation of Living Resources came into force in 1966 and the 1958 Convention on the Continental Shelf came into force in 1964.

<sup>11</sup> See Preamble to the 1958 Convention on the High Seas.

<sup>12</sup> Wallace R, *International Law* (London: Sweet and Maxwell:1992) P.129.

The first real attempt to codify international law was when the Convention on the High Seas was done at Geneva in 1958. The Geneva Convention entered into force on 30 September, 1962 and has 46 signatories and 62 parties.<sup>13</sup> There was a conference in 1958 during which time some complaints were made by some states. One such complaint was that articles regarding piracy were no longer needed as piracy in its traditional form was no longer a problem and that such articles might conflict with other conventions and further that the articles on piracy already were obsolete because they failed to consider piratical acts that were politically motivated.<sup>14</sup>

The protests made during the discussions did not halt the Articles from being included in the Geneva Convention which defined piracy under draft Article 39. However, the draft Articles were then discussed and agreed upon on the piracy definition in Article 15 in the final Geneva Convention as follows:

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

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<sup>13</sup> UNTS, vol. 450 p. 11

<sup>14</sup> YBIL, Vol. II, 1956 p. 282.

It is worth noting the drafting history of the Articles that eventually were included in the Geneva Convention. It was during the seventh and eight sessions of the International Law Commission that the new regime of the high seas was discussed and then included in what was piracy in international law. A draft convention on the high seas was adopted in 1955 during the seventh session and the final report was adopted in 1956 during the eight session.

When trying to define piracy the International Law Committee (ILC) had to reach a conclusion regarding some rather controversial aspects of piracy. They decided that it was not necessary to rob as motives for piracy vary and it is not always robbery but can be everything from wanting revenge to hatred and it is therefore not limited to intention to rob. It is however, necessary that the acts are committed for private ends and that they are committed on the high seas or a place outside the jurisdiction of any state.<sup>15</sup>

The ILC also discussed whether political acts could be piracy and how to determine what is an act committed for private ends or for political ends. The ILC also decided that mutiny is not an act of piracy even if the purpose is to seize the ship. However, some major changes were made in the final version of the Geneva Convention especially the definition.

Arguably, it was agreed by ILC that when trying to codify international law the difficulty arose out of the different views in different states on how to define for example piracy as in this case. Additionally, all states had their own conceptions on what piracy is in their own municipal law that made it harder to agree on one international definition. China for example tried to include

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<sup>15</sup> Rubin A P, *The Law of Piracy*(Newyork:OUP:1947)PP.350-355

mutiny as a part of piracy based solely on the fact that it had two different definitions in Chinese municipal law.

In conclusion most of the convention is based on politics and trying to get states with very different conceptions of piracy to agree on one definition under international law. Indeed, many of the older conceptions of piracy would simply not work in the world today. The Chinese proposal was similar to the British during colonial times. However, such a broad jurisdiction would not work unless the state has complete dominance of the seas which is not possible today. Deductively, even if states have conceptions of piracy it might be based on very old and historical events that came from a different era and that would not work if applied in the modern world with for example larger territorial waters and a duty not to interfere in other state's affairs.<sup>16</sup>

### **The 1982 Law of The Sea Convention (UNCLOS)**

UNCLOS was a product of yet another Law of the Sea Conference that took a total of 9 years between 1974 and 1982. The reasons why it remained protracted for this long were mainly driven by political, social and economic needs. Various states and non-state actors pushed for their strategic goals and interests.

The third world states introduced and pushed for the idea of the Exclusive Economic Zone (EEZ) in order to tame the ever aggressive first world states who had the advantage of technology. The

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<sup>16</sup> Ibid p.355



idea of the EEZ was meant to ensure that third world coastal states could exploit the sea upto 200 mile after the territorial sea and also have access to the deep sea bed.

Developed states on the other hand wanted free and unlimited access to the international straights, navigation routes and the enormous resources in the high seas and the deep sea bed area. This conference became a charged hotbed unlike the previous conferences of 1958 and 1960 given that this particular conference did not have the advantage of previous existing work or document as a basis to begin negotiating.

In order to make headway the Conference adopted the United Nations framework via the First Political and Security Committee rather than the sixth Legal Committee.<sup>17</sup> Indeed, the raging divisive debate is evident from the interest groups that were formed to champion their causes. There were first the Group of 77 made up of over 100 developing countries, the western and communist groups.

Additionally, there were states with special interests that had formed alliances such as land-locked countries, geographically disadvantaged states, archipelago states and coastal states. To solve these myriad problems all the states decided to enter into pacts with each other for mutual benefits. For example the developing countries agreed to passage through straights and enhanced continental shelf rights beyond the 200 mile limit from the coasts in return for the internationalization of deep sea mining fronted by the developed countries.<sup>18</sup>

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<sup>17</sup> See Churchill and Lowe, *Law of the Sea*, P.14.

<sup>18</sup> See Caminos et earl, "Progressive Development of International Law and the Package Deal", 79 Asuza Journal of International Law.(1985) p.871

UNCLOS has 320 articles and 9 annexes. It was adopted by 130 votes to 4 with 17 abstentions. It entered into force on 16<sup>th</sup> November, 1994. This was 12 months after the required 60 ratifications. The implementation of part XI of UNCLOS was adopted on 29<sup>th</sup> July, 1994 in order to pre-empt the concerns of the developed states.<sup>19</sup> UNCLOS replicates previous principles from earlier instruments. However, some principles have since become customary rules. Consequently, what governs the network of relationship among states and even individuals are both customary rules and treaty rules.<sup>20</sup>

It is critical to note that the 1958 Conventions are now considered as customary rules which affect all states while UNCLOS binds the parties to it.<sup>21</sup> The intervening period of twelve years before UNCLOS came into force the provisions enshrined thereof were applied as state practice.<sup>22</sup>

The definition of piracy that is used in international law today can be found in Article 101 which replicates the 1958 Geneva Convention on the High Seas. UNCLOS defines piracy under Article 101 thus as:

- (a) Any illegal act of violence, detention or act of depredation, committed for private ends by the crew or passengers of a private ship or private aircraft and directed:
  - (i). On the high seas against another ship or aircraft or against persons or property on board such a ship.

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<sup>19</sup> See Ibid p.448.

<sup>20</sup> See the *North Sea Continental Shelf* cases, ICJ Reports, 1969 PP.3,39;41 PP.29,68; the *Fisheries Jurisdiction (UK v Iceland)* case, ICJ Reports, 1974, P.1; P.23.

<sup>21</sup> Note that by Article 311 (1) of UNCLOS the provisions of this convention will prevail as between the states parties over the 1958 conventions.

<sup>22</sup> See Stevenson et al., "The Future of the UN Convention on the Law of the Sea" *AJIL*, (1994) P.488.

- (ii). Against a ship, aircraft, persons or property in a place outside the jurisdiction of any state.
- (b) Any act of voluntary participation in the operation of a ship or of an aircraft with knowledge of facts making it a pirate ship or aircraft.
- (c) Any act of inciting or of intentionally facilitating an act described in sub paragraph (a) or (b).

When looking at the definition made in UNCLOS, it is evident that the definition of piracy today is still the same as when the Geneva Convention was drafted in 1958, now over 50 years. The reasons for using the same articles in UNCLOS as were used in the Geneva Convention was probably political. To be able to come up with a draft that would be acceptable to as many states as possible it was easier not to start debating the different opinions on how to define piracy. UNCLOS contains as mentioned above, a definition of piracy in Article 101 but Article 100 and Articles 102-107 are also devoted to piracy.

The fact that the definition of piracy in UNCLOS can be different from the definitions of municipal law mean that a variety of acts can be included under international law. For example Article 101(a) in UNCLOS clearly states that piracy consists of all acts committed for private ends which means that all acts committed for political reasons for example will not be classified as piracy under UNCLOS but can be considered as piracy under municipal law.

Therefore, different definitions of piracy also makes it more confusing and more difficult to understand what piracy is and that depends on what zone the attack occurs in. If the attack occurs

on the high seas then it can be an act of piracy according to international law but if it happens in territorial waters it can never be piracy according to international law.<sup>23</sup>

### **The Problem of Defining Piracy under UNCLOS**

Each of the elements of the definition by UNCLOS has been criticized by various scholars as being too narrow placing severe limitations on the types of attacks on ships that are governed by these provisions. Author Rosemary Collins notes that the UNCLOS provisions require violence, detention or depredation in an attack to constitute piracy. She notes that the methods employed by South East Asia pirates vary dramatically. This includes non violent attacks such as clandestine thefts while the vessel is underway or anchored, using the threats of violence, hijacking of the entire vessel for a short period or a long term hijacking.<sup>24</sup>

Collins notes that attacks without any physical violence where the attackers are visibly armed but threaten violence are common in the region. This is largely because shipping companies have a policy of co-operation with attackers in order to protect the seafarers. This makes it imperative as Collins suggests to analyze whether acts of threatened violence would fall under the elements of violence, detention or depredation.<sup>25</sup>

It has also been argued that the UNCLOS piracy definition limits the offence to acts occurring on the High Seas. High Seas are defined as all parts of the sea that are not included in the exclusive

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<sup>23</sup> Ibid p.140

<sup>24</sup> Collins R, "Applications and Shortcomings of the Law of the Sea In Combating Piracy: A South East Asian Perspective", Journal of Maritime Law and Commerce, vol.40 (2009) pp.3-6

<sup>25</sup> Ibid p.4

economic zones, territorial sea or in the internal waters of a State.<sup>26</sup> This significantly limits the geographical location of acts that can be considered piracy under UNCLOS. The surrounding circumstances that led to the initial introduction of this definition of piracy when the geographical area comprising the high seas was significantly larger.

The expansion of the territorial sea under UNCLOS however means today that few attacks occur in the high seas. It is now more common for attacks to occur closer to shore because the concentration of vessels near ports and within straits used for international navigation such as the Malacca and Singapore Straights which make ships easier targets. Indeed straits have the single highest frequency of attacks on ships in the world. The majority of the of the Malacca Straights waterway is within the territorial control of the coastal states. Thus, the UNCLOS provisions are a very weak tool for preventing and suppressing attacks on ships in South East Asia since very few attacks on the Singapore and Malacca Straights on ships satisfy the definition of piracy. Consequently, the high seas requirement fails to adequately address modern piracy.<sup>27</sup>

Moreover, it has been stated that the restrictiveness of the high seas requirement undermines obligations under Article 100 of UNCLOS for states to repress piracy. Here there is no obligation on states to repress piracy that occurs within their territorial waters. Thus, this makes states hesitate not to take responsibility for pirates based within their territorial limits even if those pirates also prey on ships on the high seas.<sup>28</sup>

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<sup>26</sup> See Art 86 of UNCLOS.

<sup>27</sup> Ibid p.6

<sup>28</sup> Ibid p.6

Another contest with regard to the UNCLOS definition as advanced by Collins is when it defines piracy to mean acts committed for private ends. This then means that this piracy provisions cannot govern an attack on a vessel if it was committed for a public purpose such as the highlighting of a cause or as terrorism. These two elements of the definition prevent terrorist acts and what has been termed 'political piracy' from constituting piracy under UNCLOS. The 1985 *Achille Lauro*<sup>29</sup> case that shall be discussed later in greater detail in this chapter suffices. In brief the facts of this case were such that Palestinian terrorists who had posed as passengers on the ship *Achille Lauro* hijacked it in the Mediterranean Sea where an American Passenger of Jewish decent was killed. The purpose of the attacks were for a political goal and the hijackers could not be apprehended in violation of UNCLOS piracy provisions. The incident also failed to satisfy the 'two ships' requirement in the definition of piracy.<sup>30</sup>

Indeed, it has been noted that the attacks on *USS Cole* and the French Supertanker *Limberg* in Yemen in 2000 and 2004 respectively are recent examples of maritime terrorism. In both cases a small boat with explosives came alongside the ship and detonated itself blowing off the ship. Since the September 11, 2001 terrorist attacks on the United States of America there have been concerns over similarities between terrorism and piracy. Both have some similarities.<sup>31</sup> The tactics used are the same since when a ship is hijacked it can be difficult to tell whether the attackers are pirates or terrorists. Additionally, the circumstances under which both flourish are similar that is poverty, political instability and ineffective enforcement mechanisms.

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<sup>29</sup> See Halberstam M, "Terrorism on the high Seas: The Achille Lauro, Piracy and the IMO Convention on Maritime Safety." The American Journal of International Law, pp.269-270.

<sup>30</sup> Collins R, "Applications and Shortcomings of the Law of the Sea In Combating Piracy: A South East Asian Perspective". Journal of Maritime Law and Commerce, vol.40 (2009) pp.3-6

<sup>31</sup> See Hannington J, "Why Piracy and Terrorism Converge". Newsweek, 12th July, 2010, p15-17.

Still under UNCLOS two ships are required to constitute an act of piracy. This means that if attackers can gain access onto a ship and overpower the crew during the voyage the attacks would not constitute piracy under UNCLOS. For example the *Achille Lauro* case above involved passengers overpowering its crew and hence failed the two ships requirements.

Additionally, the piracy definition within Article 101 of UNCLOS does not specifically include attempted attacks. For example if the attackers boarded a ship but were then repelled by the crew before any violence occurred then this would not constitute piracy because there was no violence, detention or depredation. Sometimes evasive action by the crew of the ship succeeds in repelling attacks yet such acts would satisfy the violence element.

It is worth to note also that public ships and warships are excluded from this definition in effect thus confirming that only private ships can commit piracy. Admittedly, this definition seems to conclude also that a public ship or warship acting on orders from a belligerent government cannot be said to commit acts of piracy and thus any redress can only be addressed by the flag state which has to punish the offenders and pay damages.<sup>32</sup>

However, this does not mean that public vessels cannot commit acts of piracy which in diplomatic terms are called, 'unlawful acts'. When such acts take place then the ship ceases to enjoy the protection of the state until such time that order is restored and belligerency has stopped.<sup>33</sup>

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<sup>32</sup> Watts A et al (eds), *Oppenheim's International Law* (London: Longman: 1996) p.746

<sup>33</sup> See Art 102 of UNCLOS.

This was well ably captured by Judge Moore in his judgment in the *Lotus* case where he said that piracy is a crime committed in the high seas by persons acting in defiance of all law and acknowledging obedience to no flag state whatsoever.<sup>34</sup> However, Lauterpatch states that vessels of unrecognized insurgents interfering with ships of third states may be treated as piratical where such attacks lead to loss of life and property. Such crew may be held responsible for piracy *jure gentium*.<sup>35</sup> The definition also includes the ingredients of piracy to include, 'acts committed by a ship against another ship or aircraft'. This in essence means that acts committed on board a ship by crew or passengers directed against the ship itself or against persons or property on board a ship does not amount to piracy.<sup>36</sup>

This is captured under Article 101 of UNCLOS where if the vessel has been converted by the crew or passengers for purposes of committing illegal acts then that would amount to piracy. This would then mean that even where persons take 'dominant control' of the ship as Article 101 of UNCLOS puts it with an intention to use it for criminal acts then such acts amount to piracy. It has been noted by George Gabel that the UNCLOS definition of piracy should be so broad so that it can include unauthorized act of violence committed at sea or closely connected with the sea without any requirement that the act occur outside a state's territorial jurisdiction.<sup>37</sup>

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<sup>34</sup> (1927), PCIJ, No 10 at p.70

<sup>35</sup> For a survey of the practice of states in this matter see Lauterpatch, RG 46 (1939) PP.513-49.

<sup>36</sup> See the *Santa Maria* incident (1961) Whitemen, Digest 4 pp 665-7 here a Portuguese passenger liner was seized in mid-Atlantic by men who had boarded as passengers and who were supporters of General Delgado an opponent of the Portuguese President. One crew member was killed and others injured. The ship was eventually handed over to Brazil which country also gave the men political asylum.

<sup>37</sup> See Gabel George, "Smoother Seas Ahead: The draft Guidelines as an International Solution to Modern Day Piracy", Tulane, Tulane Law Review; June 2007; 81 Tul L.Rev.1433; p.2.



Gabel further notes that this confusion is exacerbated when the definition of piracy includes attempted robberies and attacks on ships for political gain as have been suggested by some scholars.<sup>38</sup> Gabel notes that this difficulty in having one clear definition is as a result of the broad nature of modern day piracy given that today acts of piracy have become so sophisticated that they take place in territorial waters. This goes against UNCLOS since it limits piracy to acts in the high seas.<sup>39</sup>

International scholar Ian Brownlie<sup>40</sup> notes that UNCLOS provides for piracy to include aircraft attack. Under the International Law Committee that prepared the draft that preceded UNCLOS aircrafts were not envisaged as vessels used for piracy. Brownlie points out that piracy will be held as such if the acts are committed for private ends. He notes therefore that piracy cannot be committed by warships, government ships or government aircraft except where the crew has mutinied and taken over the ship or aircraft. Like Oppenheim, Brownlie notes that acts committed on board a ship by crew and directed against the ship itself or against persons or property on the ships are not within the definition.

However, Brownlie cautions that the application of piracy law by municipal courts are often out of date and may involve an amalgam of municipal rules and international law or the narrow issue of the meaning of 'piracy' in an insurance policy. He proceeds to give examples of municipal

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<sup>38</sup> Acts of political terrorism are also excluded from UNCLOS which adopted verbatim the language of Art 15 of the 1958 Convention on the High Seas.

<sup>39</sup> See Art.101.

<sup>40</sup> Brownlie I, *Principles of Public International Law* (Oxford:OUP:2003) pp.229-230

judicial definitions of piracy in cases such as *The Serhassan Pirates*<sup>41</sup>, *The Magellan Pirates*<sup>42</sup> and *Republic of Bolivia v Indemnity Mutual marine Assurance Company*<sup>43</sup>.

Tina Garmon states that most modern piratical acts occur in the ports and territorial waters of heavy shipping zones that lack effective law enforcement. The acts she notes always includes pirates searching for cash or port goods. They may use speedboats and rocket launchers aimed at the ship's hull as a means of obtaining their prize.<sup>44</sup>

It has been argued by Terence Fokas that UNCLOS loses focus by offering conflicting views on the level of intent required whether the acts are limited to crimes committed against the prosecuting states and whether a belligerent plunder of enemy shipping falls under the definition of piracy.<sup>45</sup> Fokas argues that the disarray within the legal community caused by the definitional confusion results largely because "no international legislature exists to codify the crime and because no there is no international mechanisms that can help to settle the disputes with regard to how best to interpret the concept."<sup>46</sup> Furthermore, Fokas notes that this has led two problems. To begin with he notes that characterizing a crime as a piratical act can cause a state to invoke its jurisdiction under its municipal law and second a state can site customary international law.

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<sup>41</sup> (1845), 2, Wm.Rob.354.

<sup>42</sup> (1853),1 Sp.Ecc & Ad.81

<sup>43</sup> (1909)KB 785.

<sup>44</sup> Garmon T, "International Law of the Sea: Reconciling the Law of Piracy Terrorism in the Wake of September 11<sup>th</sup>." 27 Tul.Mar.L.J.257,261 (2002).P4.

<sup>45</sup> Fokas T "The Barbary Coast Revisited: The Resurgence of International Maritime Piracy". University of San Francisco maritime Law Journal: Summer 1997;9 U.S.F.Mar.L.J.427 P.2

<sup>46</sup> Ibid p.6

He goes on to state that conflict arises when municipal and international law diverge over definition of the offence. Where municipal law defines piracy specifically the proceeding under municipal law may preclude enforcement and where international law defines piracy in broad terms its application might create liability where none would exist under municipal law.<sup>47</sup>

Moreover, Fokas notes that a broader definition of piracy demands that each affected nation should prudently choose whether to preserve its sovereign authority or have the international community expand international jurisdiction to effectively pursue and prosecute pirates. Consequently, it is necessary to examine the applicability of jurisdictional principles and their inherent deficiencies before attempting to formulate a definition or strategy to deal with piracy.<sup>48</sup>

This debate can be summarized by the discussion of Robert C Beckman who notes that in determining what principles of international law apply to pirate attack against a ship the most important factor is where the acts took place. One would have to ask himself whether the attack took place in an area under the sovereignty of a coastal state or whether it took place in international waters. As examined above different sets of rules apply on both occasions notes Beckman<sup>49</sup>.

## **Modern Piracy and International Law**

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<sup>47</sup> Ibid p.2

<sup>48</sup> Ibid p.2

<sup>49</sup> Beckman C R, "Issues of Public International Law Relating to Piracy and Armed Robbery Against Ships in the Malacca and Singapore Straights." Singapore Journal of International & Comparative Law (1999) p.516.

The convention that applies to international piracy or piracy *jure gentium* is still UNCLOS. It means that it is the traditional conception of what piracy is, what jurisdiction applies and where piracy can occur that is applicable today. The fact that rules against piracy have not changed does not mean that piracy has not. Modern piracy has evolved and the Santa Maria, the Mayaguez and the Achilles Lauro cases are illustrative of when acts committed at sea cannot be classified as piracy because they do not fit the traditional ingredients that define piracy under UNCLOS.

Indeed, many of the incidents that occur today would have been classified as piracy had they occurred on the high seas. Instead they are committed within the territory of a state and are therefore not acts of piracy under international law. Such incidents have also increased and become very common in certain parts of the world.

*The Santa Maria* incident took place in 1961 and the Geneva Convention was not yet in force at the time having entered into force in 1962. On January 23, a Captain Galvao and his seventy men managed to take over the Santa Maria, a Portuguese Ship belonging to the Portuguese Colonial Navigation Company and the ship was at the time carrying over 600 passengers. It had just left the Port of Curacao in the Netherlands Antilles and was supposed to go to Florida and then return to Lisbon, Portugal. The course of the ship changed after Galvao had seized the ship. Galvao himself had previously been employed by the Portuguese government to report on conditions obtaining in Angola and Mozambique, then colonies belonging to Portugal.

Galvao's reports were critical and he even claimed that people were treated like slaves and this led to that the report being published in Portugal. Galvao then became an opponent of the Salazar regime in Portugal. He was imprisoned but managed to escape after eight years and he then joined General Humberto Delgado in South America. Galvao made an announcement in the radio on January 24 where he said that the Santa Maria had been captured.

The passengers of the Santa Maria were not treated badly but the crew was not lucky. The crew on deck had been wounded by machine guns and hand grenades. Eight wounded men and the body of one officer were put in a life boat in the British West Indies. It is believed that some of Galvao's men were hiding among the original crew but most of them boarded the ship the same time as Galvao. Portugal requested help to search for and capture the Santa Maria and stated that it was a piratical attack. British and American Naval ships in the international waters first found the Santa Maria and Galvao subsequently said that he would bring the ship to safety if he and his men were treated as political insurgents.

The ship went to Brazil where Galvao was granted political asylum even though the United States claimed that they had acted under international laws against piracy. Delgado however, claimed that it was a political act and one that was carried out of his orders. Admittedly, Article 15 of the Geneva Convention and Article 101 of UNCLOS does not cover the Santa Maria incident as it has a two ship requirement and this all happened on one ship. It was also an act for political purposes and not for private ends.

*The Mayaguez* incident raised the question whether a state can commit piracy or not. *The Mayaguez* an American ship was seized by a patrol boat at least 60 miles off the coast of Cambodia. The United States of America saw this as a piratical attack. The incident was different in the way that it was not a private ship and the Cambodia patrol boat was a warship. The reason that the United States of America saw it as a piratical attack was because they had not recognized the Khmer Rouge government of Cambodia.<sup>50</sup>

A more recent incident is the *Achille Lauro* an Italian ship that was seized on October 7, 1985 on the way from Alexandria to Port Said. Members of the Palestinian Liberation front made the attack and they got on board the ship by pretending to be tourists. They demanded that 50 Palestinian prisoners would be released by Israel or they would kill the passengers. When their demands had not been met, an American Jewish man in a wheelchair, Leon Klinghoffer was shot and then thrown overboard. The hijacking ended on 10 October 1985 when Egypt granted the hijackers free passage if they let the passengers go. The hijackers were on their way to Egypt on an Egyptian plane when the plane was forced to land by American military aircraft. The plane landed in Italy. However, the alleged mastermind did get away. The United States of America saw this attack as an act of piracy.<sup>51</sup>

International Law Scholar Halberstam has looked at the incident from a customary law perspective and found that such acts as the seizure of the ship and the murder of the passenger would be included in piracy as it has been seen in customary law. Even when the insurgents were

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<sup>50</sup> Dubner B H, *The Law of International Sea Piracy* (Wisconsin: N.D. Joyner: 1992) p. 149

<sup>51</sup> Halberstam M, "Terrorism on the high Seas: The Achille Lauro, Piracy and the IMO Convention on Maritime Safety." *The American Journal of International Law*. pp. 269-270.

exempted it applied only on those that directed their acts against a certain state.<sup>52</sup> She also discusses whether it would be considered as piracy under the Geneva Convention. Her conclusion is that the requirement “for private ends” can be interpreted as excluding insurgents as well as those that act with no personal motive from the laws of piracy.

Nonetheless, this would not exclude the persons that seized the *Achilles Lauro* because even if they were members of a terrorist group they attacked an Italian ship and killed an American Jewish man when they were discovered and according to Halberstam, the motive would then not have been political but maybe revenge. Even if it could be considered as act for private ends it would still not meet the two-ship requirement in Article 15 in the Geneva Convention and Article 101 of UNCLOS. Furthermore, Halberstam states that the biggest difference between the *Santa Maria* and the *Achille Lauro* is that the hijackers of the *Santa Maria* incident met the conditions for exemption of insurgents under customary law while but the hijackers of the *Achille Lauro* did not.

Against this back drop it has been noted that most modern piratical attacks firstly occur within the jurisdiction of states and secondly under circumstances that the traditional definition of piracy under UNCLOS does not cover. These attacks are not at all classified as piracy according to UNCLOS as noted by the debates above. This means that most of the attacks reported are not piracy in an international law sense but could instead be classified as armed robbery.<sup>53</sup>

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<sup>52</sup> Ibid p.276

<sup>53</sup> IMB Report 2006 p.2.

## **Chapter Three**

### **Jurisdiction To Prosecute Pirates Under International Law**

The previous chapter has discussed piracy in international law by looking at the traditional concept of piracy where there were no rules to contain the crime before state practice came into being. It then went ahead to look at the development of rules to govern maritime affairs which eventually became treaties that criminalized piracy. The first ever treaty was the 1958 Convention on the Law of the Sea which has since become customary international law. However, UNCLOS came into force and it has since become the mother treaty governing all affairs relating to the sea including piracy. Admittedly, it has been established by the debates in the chapter that the definition of piracy under UNCLOS has deficiencies on what constitutes the crime of piracy. This definition keeps out acts that would otherwise be deemed to be piratical in the modern world.

### **The Concept of Universal Jurisdiction**

The concept of universal jurisdiction is closely linked to the idea that certain international norms are owed to the entire world community that certain international law obligations are binding on all states and cannot be modified by treaty owing to the concept of *jus cogens*. Thus, these crimes pose so serious a threat to the international community as a whole that states have a logical and moral duty to prosecute an individual responsible for it. This heinous crimes include



genocide, crimes against humanity, extrajudicial executions, crimes, piracy, torture and forced disappearances.<sup>1</sup>

If a state wishes to prosecute someone it must have jurisdiction over the person. The state's relation to the actor or activity regulated often provides the basis of this jurisdiction. The most common and uncontroversial form of jurisdiction to prosecute is territorial jurisdiction.

Territorial jurisdiction gives a state power to prescribe, adjudicate, and enforce its laws as to those actors, activities and things that are found within its sovereign territory with few exceptions.<sup>2</sup>

In some circumstances a special form of jurisdiction called "flag-state" jurisdiction a quasi-territorial form of jurisdiction is recognized. The flag-state principle of jurisdiction states that a ship is an extension of the territory of its flag state. That means that the ship is to be treated as a floating island belonging to the flag state. Problems can arise though as to who has jurisdiction over the ship when it is in the territorial waters of a state other than its flag state. Almost all governments recognize this as a legitimate form of jurisdiction as evidenced by its inclusion in the UNCLOS.<sup>3</sup>

Under customary international law a state may base jurisdiction on factors other than territoriality. The nationality principle allows a state to exercise jurisdiction over its citizens for their conduct abroad. One of the reasons for this is that nationality is an essential link to statehood. Another is that if a person willingly chooses to remain a national of a state while

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<sup>1</sup> Khan L J, "Pirates, Rovers and Thieves: New Problems with an Old Enemy," Tulane Maritime Law Journal vol. 2 (1996) p.293:306.

<sup>2</sup> Ibid p.293.

<sup>3</sup> See Art 94 of UNCLOS.

traveling abroad and reaps the benefits of that citizenship, he should also remain subject to the jurisdiction of the state of which he is a citizen. This form of jurisdiction has been most prevalent in the area of private law regarding wills, divorce and so on. Jurisdiction based on nationality is a traditional exception to the exclusivity of territorial jurisdiction. Tension is possible if the state with territorial jurisdiction and the state with nationality jurisdiction are not the same and both are seeking to assert jurisdiction over an individual however, there has been little tension in practice.

While the nationality principle gives an individual's state of citizenship the right to exercise jurisdiction over him the passive personality principle grants a state the authority to exercise jurisdiction if one of its citizens is the victim of crime in a foreign state. In general scholars and governments have not viewed this form of jurisdiction as favorably as they have the nationality form of jurisdiction despite the link of citizenship.<sup>4</sup>

Another basis of jurisdiction is the protective principle. The protective principle allows a state to exercise jurisdiction over foreign nationals who commit acts in a foreign territory or outside the territory of any state when those acts will affect a state's interests. This has been the most controversial of the traditional bases of jurisdiction.

The preceding forms of jurisdiction all contain some nexus between the state wishing to assert jurisdiction and the actor. The other basis of exercising jurisdiction recognized is the universality principle or universal jurisdiction. Universal jurisdiction allows for the exercise of jurisdiction over certain actors or activities wherever they occur without regard to nationality or territoriality. Traditionally, the concept of universal jurisdiction has been limited to piracy. On the high seas or

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<sup>4</sup> Kantorovich E, "The Piracy Analogy: Modern Universal Jurisdiction's Hollow Foundation" Harvard International Law Journal vol.183 (2004) p.191

any place outside of the territory of any state any state has the right to seize any pirate ship and subject those on board to its legal regime. Thus, if a citizen of the United States aboard a ship bearing a flag of the United States piratically attacks another ship bearing the U.S. flag and carrying citizens and goods of the United States in the middle of the Atlantic Ocean any state can capture the pirate ship and subject the pirate to the capturing state's laws. It can do this despite the fact that only the United States has any relation to the actors, activities and items involved. This is an example of universal jurisdiction as applied to piracy.

A number of reasons have been put forth to explain why piracy is subject to universal jurisdiction. One of the reasons given for allowing states to exercise universal jurisdiction over pirates is that by practicing piracy the pirate and his ship become stateless. If pirates are stateless then any traditional form of jurisdiction predicated on the nationality of the pirate will not apply. Further, if the ship itself is stateless or loses its flag no state could exercise jurisdiction over the pirate through the flag-state principle.<sup>5</sup>

Since piracy occurs on the high seas the territoriality principle is difficult to apply. Since the early seventeenth century all governments have recognized the concept of *mare liberum*. In 1609, Hugo Grotius developed the concept of *mare liberum*, which is the idea that the seas can belong to no country and are entirely free to trade and travel. Therefore, ships while floating on the high seas float not within the territorial jurisdiction of any state but outside the jurisdiction of every state. Thus, the traditional territorial form of jurisdiction does not apply since the ships float in neutral waters while on the high seas.<sup>6</sup>

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<sup>5</sup> See Jesus J.S, "Protection of Foreign Ships Against Piracy and Terrorism at Sea: Legal Aspects," International Journal of Maritime Law Vol.363 (2003 p.374.

<sup>6</sup> Ibid p.374

UNCLOS leaves it up to each state to decide whether its ships lose their national character if they practice piracy. During the twentieth century and even before many states declared that its ships did not lose their national character by cruising as pirates. Thus, the only stateless ships would be those whose flag state denied nationality based on cruising piratically or those ships that flew more than one flag.<sup>7</sup>

Even if the ship itself were stateless however, there is nothing to suggest that the pirate himself loses his national character. When referring to pirates many courts refer to the nationality of the pirate which would suggest that nationality still matters. One of the more frequently cited rationales for subjecting piracy to universal jurisdiction is the notion that pirates are *hostis humani generis* or enemies of all mankind. The reasoning is that because pirates indiscriminately attack ships on the high seas they are waging war on all countries. They are the enemies of all of mankind. Therefore, any country can capture and punish a pirate.

Blackstone, in his Commentaries on the Laws of England, declared that piracy is a crime against the universal law of society. According to Blackstone, because a pirate was *hostis humani generis* the pirate has renounced all the benefits of society and government and has reduced himself afresh to the savage state of nature by declaring war against all mankind and therefore all mankind must declare war against him.

Universal jurisdiction is a concept that gained currency for certain international crimes as noted above. The concept of universal<sup>8</sup> jurisdiction embodied the principles of legality in criminal law and brought certain crimes within the jurisdiction of any state. Piracy is a natural place to begin

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<sup>7</sup> See Art 94.

<sup>8</sup> Ibid p.12

an inquiry into universal jurisdiction nature and limits because universal jurisdiction arose in the context of piracy and it remains the most longstanding universal jurisdiction crime as seen above.<sup>9</sup> However, scholars have not closely examined the many factors that combined to make piracy universally cognizable. Most discussions of universal jurisdiction have uncritically accepted the theory that piracy was universally cognizable because of its extraordinary heinousness.<sup>10</sup>

This explanation is convenient for universal jurisdiction because the current roster of universal jurisdiction offenses of genocide, war crimes, torture and so forth are expressly selected based on their intrinsic heinousness or against *peremptory norms*.<sup>11</sup> The aim of empowering national courts to establish universal anti-piracy jurisdiction is frequently counteracted by the opinion that universal jurisdiction should be preferably exercised by an international court. In modern times this question was exhaustively addressed after the Second World War.<sup>12</sup>

The decision to establish an international tribunal in Nüremberg to try Nazi war crimes was mainly inspired not by the features of the crimes committed but by the fact that the alleged offenders could not be prosecuted and punished by the Courts of the State where the offenders were citizens since this State was under occupation and accordingly could not establish jurisdiction.

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<sup>9</sup> Art 105 of UNCLOS

<sup>10</sup> See Eugene, "Kontorovich, A Positive Theory of Universal Jurisdiction," Notre Dame Law Review, November, 2004.

<sup>11</sup> See Kontorovich supra p.8

<sup>12</sup> *ibid* pp.11-15

It should be noted that since then international courts have been established mainly to judge war crimes or crimes against humanity committed during war like situations and not in connection with common crimes. Alternatively, many states have established universal jurisdiction entitling their courts to prosecute and punish offenders alleged to have violated human rights no matter their nationality and the place where these violations occur.

### **Jurisdiction Over Pirates In The Territorial Seas**

UNCLOS gives jurisdiction to coastal states to prosecute crimes committed in their territorial waters. Territorial waters are sovereign to coastal states. The territorial waters have a limit of not more than 12 nautical miles.<sup>13</sup> This covers the airspace over the territorial waters as well as its bed and subsoil.<sup>14</sup> The coastal states enjoy sovereign rights over its territorial waters and are only subject to rights of innocent passage.

The 1958 Convention on the Territorial Sea provides that the sovereign of a coastal state extends to the territorial sea<sup>15</sup>. This is replicated under UNCLOS in Article 2. The territorial sea forms an indivisible part of the land territory to which it is bound so that a cessation of land will automatically include any band of territorial waters.<sup>16</sup>

The coastal state may in fact exclude foreign nationals and vessels from fishing within its territorial waters and coastal trading and reserves the same for its citizens. It also has customs

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<sup>13</sup> See Art 3.

<sup>14</sup> See Art.2

<sup>15</sup> See Arts 1 & 2.

<sup>16</sup> See the *Beagle Channel* case HMSO, 197752 ILR.P.93

rights and rights to security matters. The municipal law of the coastal state is what is used for purposes of maintaining law and order here. Malcolm Shaw notes that coastal states have authority over foreign ships within their territorial waters to enforce its laws. However, he indicates that the judicial authorities of the flag state that is the state whose flag the ship flies may also act where crimes have occurred on board a ship.<sup>17</sup> He goes on to illustrate the two concurrent jurisdictions from two past decided cases.

The first case is that of *R V Anderson*<sup>18</sup> where an American national was convicted of manslaughter by a British court in the territorial waters of France onboard a British vessel. The accused could also be tried by the French court by virtue of the fact that he committed the crime in France's territorial waters. Moreover, any American court could also try the accused by virtue of him being an American national. Thus, all the three courts have jurisdiction to try the accused.

The US Supreme Court held in *Wildenhus* case<sup>19</sup> that the American courts have jurisdiction to try a crew member of a Belgian vessel for manslaughter over another Belgium national when the ship docked in port of Jersey City in New York.<sup>20</sup>

Shaw concludes that a merchant ship or foreign vessel in foreign territorial waters is subject to the local jurisdiction unless there is an express agreement to the contrary. He notes though that where there are issues to do with discipline with regard to crew members of a ship which do not bring turmoil in the territory then the flag state will regulate the same.

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<sup>17</sup> Shaw N M, *International Law* (Cambridge: Cambridge University Press:1997):p.393.

<sup>18</sup> 1 Cox's Criminal Cases 198.

<sup>19</sup> 120 US 1 (1887).

<sup>20</sup> See also the Madrid incident where US officials asserted the right to interview a potential defector from a Soviet ship in New Orleans, 80 AJIL, 1986 P.622.

Nonetheless, Shaw hastens to add that there would be a paradigm shift if the ship in question is a warship. In such cases diplomatic protocol and customary international law would apply. The coastal state would first have to seek authorization from the captain of the warship or the flag state to exercise jurisdiction.<sup>21</sup>

Moreover, UNCLOS allows coastal states to pursue any vessel and aircraft leaving its territorial waters when it suspects it of having violated its laws and regulations. However, the rider here is that the pursuit must be continuous and must cease immediately the pursued vessel reaches the territorial waters of another state. This includes the vessel's own state or a third state.<sup>22</sup>

However, the coastal state can only exercise the right of hot pursuit and pursue pirates beyond its territorial sea into its exclusive economic zone (EEZ).<sup>23</sup> However, such right of hot pursuit ends as soon as the ship the pirates are in enters its territorial sea of its own state or a third state.<sup>24</sup> The only exception is if the government authorities of the pursuing state receive authority from the coastal state to enter its territorial sea in pursuit of the pirates.<sup>25</sup>

Additionally, coastal states as seen from this discussion have the leeway to apply their municipal law for purposes of law and order including if they suspect that piratical activities are taking place in its territorial waters.

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<sup>21</sup> See *The Schooner Exchange v Mcfaddon*, 7 Cranch 116 (1812).

<sup>22</sup> Art 111 of UNCLOS.

<sup>23</sup> Art 111 of UNCLOS.

<sup>24</sup> Art 113 (3) of UNCLOS.

<sup>25</sup> Supra note 93.



Beckman states that areas under the sovereignty of a coastal state include internal waters and ports<sup>26</sup>, territorial sea (12 nautical miles from coast)<sup>27</sup>, archipelago waters (within baselines)<sup>28</sup> and parts of straits used for international navigation that are within the territorial sea.<sup>29</sup> He proceeds to also categorize areas under international waters or the high seas to include high seas (beyond 200 nautical miles)<sup>30</sup>, exclusive economic zone (12-200 nm)<sup>31</sup> and parts of straits used for international navigation that are within the EEZ.<sup>32</sup>

In areas under sovereignty of coastal states the acts of piracy would be criminal offences under the laws of the flag state and the coastal state and either the flag state or coastal state could prosecute the perpetrators if they obtain custody of them.<sup>33</sup> However, only the coastal state would have the authority to arrest the perpetrators while they are on a ship in the territorial sea.<sup>34</sup>

### **Jurisdiction Over Pirates In The High Seas**

Jurisdiction over ships in the high seas is exercisable by the flag state. The flag state is for example responsible for manning the ship and labour conditions for its crew.<sup>35</sup> UNCLOS under Article 94 spells out in broader details the measures the flag state should take to ensure safety at

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<sup>26</sup> Art 8 of UNCLOS.

<sup>27</sup> Art 2 of UNCLOS.

<sup>28</sup> Art 49 of UNCLOS.

<sup>29</sup> Art 34 of UNCLOS.

<sup>30</sup> Art 86 of UNCLOS.

<sup>31</sup> Art 58 of UNCLOS.

<sup>32</sup> Art 34 of UNCLOS.

<sup>33</sup> Arts 27 and 94 of UNCLOS.

<sup>34</sup> One of the fundamental principles of international law with respect to jurisdiction is that no State has a right to exercise its police power in an area under the territorial sovereignty of another state. The only exemption is where express permission or authorization is given by the State with territorial sovereignty.

<sup>35</sup> Art 10 of the 1958 Convention.

sea. The ship itself may be detained and crew members charged with the authority of the flag state.<sup>36</sup>

However, Article 105 of UNCLOS gives sweeping powers (universal jurisdiction) to every state to arrest a pirate ship and charge them in court. It provides thus as:

“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 seizing states are competent to decide the penalties which may be imposed. It should however be noted that if the seizure proves groundless the state making the seizure is liable for any loss or damage it has caused as a consequence.<sup>37</sup> As noted in this study UNCLOS views piracy as an international crime that can only be committed in the high seas. Attacks that take place in the territorial waters of a state are subject to the municipal law of the coastal state.

However, piracy *jure gentium* committed outside the territorial jurisdiction of any coastal state or in an island that is *terra nullius* is not subject to a territorial jurisdiction.<sup>38</sup> Additionally, piracy *jure gentium* can take place in an Exclusive Economic Zone as outlined under Article 58 of UNCLOS.

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<sup>36</sup> Art 97 of UNCLOS.

<sup>37</sup> See Art 106 of UNCLOS.

<sup>38</sup> See The ILC *Commentary* gives the rationale of this rule as a desire to prevent such acts committed on ownerless territories from escaping all penal jurisdiction.

The seizure of pirates according to UNCLOS may only be made by warships or other ships or aircraft on government service authorized to that effect.<sup>39</sup> It should be noted however, that capture of a pirate ship by the intended victim is not disallowed where they are acting in self defence. They should subsequently though hand over the pirates to a governmental authority.<sup>40</sup>

Oppenheim notes that piracy *jure gentium* must not be confused with piracy according to the different municipal laws. He notes that states may confine themselves to punishing as piracy fewer acts of violence than those which international law defines as piracy.<sup>41</sup> Oppenheim however, indicates that states may punish their own subjects as pirates for much wider range of acts. The dilemma here he notes is that states cannot enforce their municipal laws against foreigners unless they are pirates according to the laws of nations.

Judge Moore had these to say in the *Lotus* case<sup>42</sup> with regard to the jurisdiction over pirates in the high seas:

“in the case of what is known as piracy by the law of nations there has been conceded a universal jurisdiction under which the person charged with the offence may be tried and punished by any nation into whose jurisdiction he may come. I say “piracy by law of nations”, because the municipal laws of many states denominate and punish as ‘piracy’ numerous acts which do not constitute piracy by law of nations and which therefore are not of universal cognizance so as to be punishable by all nations. Piracy by law of nations in its jurisdictional aspects is *sui generis*. Though statutes may provide for its punishment

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<sup>39</sup> Art 107 of UNCLOS.

<sup>40</sup> See ILC *Commentary*, *loc cit* p.283

<sup>41</sup> *Ibid* p.754

<sup>42</sup> PCIJ Ser.A no.10 (1927) p.70.

it is an offence against the laws of the nation and as the scene of the pirate's operations in the high seas which he may carry and is treated as an outlaw as the enemy of all mankind *hostis humani generis* whom any nation may in the interest of all capture and punish.”

Arguably, UNCLOS allows states to take universal jurisdiction over piracy by allowing all states to prohibit and prosecute pirates wherever they operate. Under Article 100, UNCLOS also requires all states to co-operate in the fullest possible extent to suppress piracy. This means that any state that fails to take measures against the crime is in breach of that duty under international law.

This requirement is as a result of the commentary of the International Law Commission on the provision of the 1958 High Seas Convention on which the UNCLOS requirement is based. As seen above conventional international law theory demonstrates five bases for a state to claim jurisdiction over offences of piracy<sup>43</sup>. The first principle is called the territorial principle. This is where states can exercise jurisdiction over acts that occur within their territorial boundaries.

The Second principle is the nationality principle. Here states can prosecute its nationals or citizens for crimes committed outside the territory of a particular state. The third principle is called the passive personality principle. Here a state can claim jurisdiction to try an individual for offences committed abroad which have affected or will affect nationals of that particular state.

The other principle is the protective principle where states can exercise jurisdiction over aliens who have committed an act which is deemed prejudicial to the security of particular state

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<sup>43</sup> Shaw N M, *International Law* (Cambridge: Cambridge University Press: 1997): pp.452-472

concerned. A good example here is the case of *DPP v Joyce*<sup>44</sup> where the court stated that the acts of the defendant while he was in Germany were harmful to the state.

Still on this score the case of *AG of Israel vs Eichmann*<sup>45</sup> suffices. The District Court of Jerusalem was called upon to decide whether Israel had any jurisdiction in respect of alleged atrocities committed by the defendant in World War Two. The court held that the crimes committed were so abhorrent that they offended the laws of nation.

The last principle is the universality principle. Here all states have a right to try particularly very serious offences. These offences are particularly considered to be very offensive to the international community. They include piracy, war crimes and crimes against humanity. On piracy the case of *Re Piracy Jure Gentium*<sup>46</sup> is illustrative. The court held that piracy attracts extraterritorial or universal jurisdiction as an offence against peremptory norms.

The second case under the universality principle is the case of *US v Yunis*<sup>47</sup> the US court indicated that both air piracy and hostage taking were susceptible to the jurisdiction of any state regardless of the fact that the offence was committed by an alien. In Kenya the universality principle was applied in the case of *Hassan Mohammed and Others vs Republic*<sup>48</sup>. Justice F. Azangala held that Kenya had jurisdiction to try suspected Somali nationals who had committed acts of piracy in the high seas.

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<sup>44</sup> 1973 AC 807

<sup>45</sup> 1961 36 ILR 5.

<sup>46</sup> (1934) AC 586

<sup>47</sup> (1988) 681 F.Supp 896.

<sup>48</sup> Mombasa HCCA Nos 198,199,200,201,202,203,204,205,206 and 207 all of 2008.

Acts of terrorism at sea may also be considered piracy. The need for rules as noted in the previous chapter to deal with terrorist acts as such were illustrated by the seizure in the Mediterranean Sea of the *Achille Lauro* an Italian registered cruise ship in 1985.<sup>49</sup> The terrorist threatened to kill the passengers who amounted to 454 unless 50 Palestinians held in jail in Israel were released. Unfortunately, one United States citizen of Jewish origin was killed even though the rest of the passengers were released.

The number of such related cases increased and the United Nations at the behest of International Maritime Organization (IMO) promulgated the Rome Convention for the Suppression Unlawful Acts against the Safety of Maritime Navigation (SUA) in 1988.<sup>50</sup> The state parties oblige to prosecute all offences that endanger maritime safety including piracy.<sup>51</sup>

In the high seas the general rule is that only the flag state has jurisdiction to arrest and prosecute persons for acts committed on board a ship flying its flag while in international waters.<sup>52</sup> There is no exception however if the acts constitute piracy as defined in international law. Any state can seize the ship and arrest and prosecute the offenders if the acts constitute piracy as defined in international law.<sup>53</sup>

However, if the ship committing the acts is a warship or government ship of another state, there is no right to seize the ship or arrest the offenders. This is because the warships of all states have

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<sup>49</sup> See *The Times* (London, 08/10/1988).

<sup>50</sup> Misc 15 1989 CM 884. The depository is IMO.

<sup>51</sup> See Article 5.

<sup>52</sup> Art 92 of UNCLOS.

<sup>53</sup> Art 105 of UNCLOS.

complete immunity from arrest.<sup>54</sup> Beckman notes that the rules governing the seizure of pirate ship are that any state may seize a pirate ship on the high seas or the EEZ and arrest the pirate.<sup>55</sup> Secondly, the seizure and arrest of the pirates can only be carried out by warships or military aircraft.<sup>56</sup> Thirdly, the states that arrest the pirate can prosecute them in its national courts and decide on penalties to be imposed<sup>57</sup>. Lastly, if the seizure is without adequate grounds the state making the seizure is liable for any loss or damage as a result of the seizure.<sup>58</sup>

It has been argued that even if it were possible to achieve a perfectly functioning legal process for captured pirates naval action would remain focused on deterring and disrupting pirate activity rather than expending the time and resources to take pirates to local countries for prosecution. It is not the mission of every naval vessel to take pirates for prosecution but rather to suppress piracy by other means including disruption. Many practical problems arise if ships are to be engaged in sailing to countries to deliver pirates with captains having to appear as witnesses instead of being involved in further disruption activities. Conversely, there are those who still believe that successful prosecutions represent the best means of deterring piracy.<sup>59</sup>

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<sup>1</sup> Art 95 of UNCLOS.

<sup>2</sup> Art 105 of UNCLOS

<sup>3</sup> Art 107 of UNCLOS.

<sup>4</sup> Art 105 of UNCLOS.

<sup>5</sup> Art 106 of UNCLOS.

<sup>6</sup> Middleton R, "Pirates and How to Deal With Them". Briefing Note From Africa Programme and International Law Discussion Group, Chatham House, (2009) p.7

## **Chapter Four**

### **A Case Study of Piracy off The Somali Coast In 2005-2009**

The previous chapter has dwelt at large with the question of jurisdiction to try pirates. It has been noted in this chapter that one cannot talk about jurisdiction to try piracy without talking about universal jurisdiction. This is the basis upon which any state can try a pirate captured in the high seas. However, all offences relating to territorial waters is left to the coastal state as this is considered to be part of the geographical boundary of the coastal state and it exercises exclusive sovereign rights. Thus, piracy would be considered a crime if the coastal state defines it as such.

#### **The Situation off the Somali Coast**

Somalia is deeply rooted in a number of socio-economic factors which includes poverty, hunger and civil insecurity of the coastal population. Puntland is currently the epicenter of piracy. This is due to the fact that vessels can be identified and targeted much more easily as they travel through the Gulf of Aden.<sup>1</sup>

Prior to 1990 piracy was not a major issue off the coast of Somalia but like most coastal nations there were irregular incidences of armed robbery against small fishing or leisure

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<sup>1</sup> Johansson K," Changes in the views on Jurisdiction over Piracy under International Law", Masters Thesis, Faculty of Law, University of Lund,2006.p.7



craft that fell prey to an armed groups or ships that steered off the coast. A more structured form of piracy began in the mid 1990's when some armed groups claiming they were authorized coast guards charged with protecting Somalia's fishing resources attacked vessels they claimed were fishing illegally in their territorial waters and held them for ransom.<sup>2</sup>

This slowly expanded after 2000 to any vessel that sailed within or close to Somali territorial waters. Both vessels and crews would be held hostage and ransom demanded. During 2005 an increase was noted in the number of attacks being attempted against vessels sailing in the Indian Ocean off the coast of Somalia. By 2006 some of the pirate attacks were extending as far as 350 nautical miles off the coast of Somalia.

During 2006 piracy escalated as more attempts were made to hijack ships not only in the Indian Ocean but also in the Gulf of Aden and the mouth of the Red Sea. The phenomenon grew through 2007 from the major pirate bases of Eyl, Hobyo and Haradheere concentrated along the east coast of Somalia. By 2008 this reached significant proportions with ships being attacked seemingly at random and whenever the pirates decide. Consequently, marine travel off the northern coast of Somalia known as Puntland has become the most dangerous region in the world for pirate attacks.<sup>3</sup>

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<sup>2</sup> Fokas T "The Barbary Coast Revisited: The Resurgence of International Maritime Piracy", University of San Francisco maritime Law Journal; Summer 1997;9 U.S.F.Mar.L.J.427 P.2

<sup>3</sup> Ibid p.22

Compared to pirate operations in other parts of the world namely the Java Sea, South China Sea and off the coast of Nigeria, Somalia does not have the natural coastal terrain so required by pirates namely numerous forested inlets and islands where ships can be hidden from aerial and maritime surveillance. Somali pirates do not need this type of terrain because their piratical aims are very singular and straight ransom for hostages only. They are not interested in stealing the cargo or re-using the ship for other purposes where there is a need to have a secure location hidden from view where a ship can be concealed while it is renamed and repainted. They are interested in ransom only. When a ship is taken by Somali pirates the ship and the crew are held for ransom. It is in effect a hostage situation.<sup>4</sup>

When a ship is captured it is sailed to one of the bases where the pirates can be supplied with food, water, qat, weapons and ammunition and other resources while the negotiations take place. This is all done very openly with the ship visibly anchored off the Somali coast. The pirates are fully aware that they are relatively secure from any rescue mission being launched directly against them while on the ship. The only alternative remaining to guarantee a secure and safe conclusion to the hostage situation is the payment of the requested ransom. The progress of negotiation, the amounts of ransom demands, the methods of receiving payments and ultimately release of ship and hostages are all identical. Some experts believe that these identical procedures come from a co-

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<sup>4</sup> Fokas T, "The Barbary Coast Revisited: The Resurgence of International Maritime Piracy", University of San Francisco Maritime Law Journal; Summer 1997;9 U.S.F.Mar.L.J.427 P.2

ordination of the pirates activities. Others believe that there is little or no central coordination.<sup>5</sup>

These experts think that the basic operational procedures were organically developed either in Puntland or in Central Region and transferred to other groups along the coast. It is also known that there is a fundamental operational directive or base code of practice among the pirates that once a ship has been ransomed and is released that it cannot be further targeted by any other group of pirates.<sup>6</sup>

### **Why Piracy Is Rife off the Somali Coast**

There are many factors that drive piracy in Somalia that this study has established. One should not be surprised that piracy has taken root in Somalia given the social upheavals, human hardship, environmental degradation and the entrepreneurial spirit of the Somali. Piracy is flourishing in Somalia as it is a quick way for all involved to earn a large amount of money way beyond any other means of income generation. While the action of piracy involves some risk the benefits far outweigh that risk, a fact indicated by the few arrests made and less deaths and injury suffered by pirates to date. Poverty, lack of employment, environmental hardship, pitifully low incomes, reduction of pastoralist and maritime resources due to drought and illegal fishing and a volatile security and political situation all contribute to the rise and continuance of piracy in

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<sup>5</sup> IMO Council Doc C 102/14.,2008 P.40

<sup>6</sup> See CRS Report R40081, *Ocean Piracy and Its Impact on Insurance*.  
Group:03/05/09:Issue No.16147:P.26.

Somalia. This situation will remain so until there is an effective and simultaneous action taken against the pirate trade and an alternative means of income support mechanism implemented to replace it. Thus, criminal activity in some shape or form will continue to take priority as a means of generating income among the armed militias of Somalia.<sup>7</sup>

The pirates also firmly believe that they have every right and entitlement to attack illegal fishing vessels operating in their territorial waters as their fishing resources are being pillaged daily by international shipping vessels from Asia and Europe. The international community is fully aware that this illegal activity has been going on for nearly seventeen years but has taken no action against it. The pirates believe that they have to engage in these activities to halt this exploitation.<sup>8</sup> This was narrated by Senior Correspondent Kenya Television Network Journalist Dennis Onsarigo.<sup>9</sup>

Equally, the pirates have admitted in the past that the initial idea of protecting their coast line has been hijacked to the current situation where any vulnerable vessel is a target. Targeting other ships is supposed to highlight the illegal shipping but has now become such a huge international problem that the origins for the initial actions have been forgotten. However, they do admit that humanitarian aid and other supporting commercial vessels should not be targeted for piratical gain.<sup>10</sup>

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<sup>7</sup> See CRS Report R40081, *Ocean Piracy and Its Impact on Insurance*, by Rawle O. King. Group:03/05/09:Issue No.16147:PP.26-32.

<sup>8</sup> Gabel J, "Smoother Seas Ahead: The draft Guidelines as an International Solution to Modern Day Piracy", Tulane, *Tulane Law Review*: June 2007;81 Tul L.Rev.1433;PP2-6

<sup>9</sup> Dennis Onsarigo is a KTN journalist who has been doing investigative journalism for over 7 years now.

<sup>10</sup> Ibid p.6

Piracy has been on the increase off the coast of Somalia since 2000. If we look at incidents reported since 2006 we get some interesting data. Between January and April there were 72 pirate incidents reported. Between April and December there were 10 incidents reported. This large difference between the first quarter of the year and the remaining three quarters of the year is often accredited to the anti-piracy work of the Union of Islamic Courts (UIC) who played a critical role in Somalia at that time. This was actually from June 2006 to December 2006 and reputedly clammed down on piracy. While there is a certain accepted level of credence to this, it should also be borne in mind that this period coincides with the monsoon period along the East African coast where attacks by the type of skiffs used by the pirates would be impractical and dangerous in the high seas between late April and September.<sup>11</sup>

In 2007, 45 incidents of piracy were reported. In 2008 the statistics reflect a total of 63 incidents in the first nine months with 51 in the Gulf of Aden, the major shipping lane linking Asia and Europe. Before the end of the year pirates had officially hijacked a total of 32 vessels and taken more than 540 crew hostage up to November 2008 with 81 attacks reported. Armed with a selection of weaponry they have fired on a further 21 vessels in unsuccessful attempts to hijack them.<sup>12</sup>

## **Effects of Piracy off the Somali Coast in Somalia, Regionally and Internationally**

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<sup>11</sup> Gabel J, "Smoother Seas Ahead: The draft Guidelines as an International Solution to Modern Day Piracy", Tulane, Tulane Law Review: June 2007; 81 Tul L.Rev.1433;PP.7-10

<sup>12</sup> Piracy Report of the International Maritime Bureau, January 28, 2008.pp58-62

There are many effects that have been brought about by the existence of piracy off the coast of Somalia. To start with piracy imposes additional costs on business for example massive increases in the costs of ship insurance which can run to hundreds of thousand of US\$ dollars per voyage or more and higher shipping freight costs necessary to persuade international ship owners to deploy ships to the country's ports.<sup>13</sup>This was corroborated by Mwangi Gitau<sup>14</sup>, Captain W.J.Kagimi<sup>15</sup>, Dennis Onsarigo and Peter Thuo<sup>16</sup> who were respondents in this study.

Secondly, security measures have to be employed like deploying armed or unarmed security teams to protect ships upon arrival in Somali waters. Piracy also makes Somalia a 'no go' zone for international shipping which in turn discourages potential overseas business partners and investors. It also reduces port revenues and funds available for investment in port and related transport infrastructure and reduces incomes of communities dependent on port revenues. Moreover, it reduces customs revenues for local and central governments as well as contributes to currency inflation as a result of large inflows of US\$ earned by pirates through ransoms paid by ship owners to release hijacked ships.<sup>17</sup>This was confirmed by William Hirribae of the Ministry of Foreign Affairs.

On the humanitarian front piracy which is linked to civil war in Somalia has deprived millions of Somalis of their homes and livelihoods. At the same time Somalia is suffering

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<sup>13</sup> Ibid p.19

<sup>14</sup> Legal Officer, SDV Transami Kenya.

<sup>15</sup> Maritime Chief Security Officer at the Kenya Maritime Authority.

<sup>16</sup> Director Shipping and Maritime Affairs, Ministry of Transport and Communication.

<sup>17</sup> Confirmed by interviews carried out with Peter Thuo, Dennis Onsarigo as well as Captain Kigimbi.

from four years of recurrent drought considered to be the worst the region has experienced in decades. An estimated three million Somalis are already dependent on regular and unimpeded supplies of humanitarian food aid by sea. World Food Programme (WFP) transports by sea between 30 and 40,000 tones of food aid into Somalia every month.<sup>18</sup> The very real risk of a pirate attack has led to additional high insurance premiums for ship owners. It has become impossible for WFP to secure vessels delivering food aid to Somalia ports without securing naval escort. The cost of maintaining enough warships in the area to provide escort cover for as many ten humanitarian aid shipments each month is enormous and arguably not sustainable in the long term.

Moreover, Hirribae noted that piracy is both a criminal and parasitic activity as it creates an alternative parallel economy with revenue that exceeds what currently is available to Somalia's regional and local governments. Unopposed and rampant piracy is therefore corrosive to the credibility and authority of legitimate government and institutions of the state as well as traditional clan and other societal structures and morals. It also affects state building and the re-establishment of civil society and ultimately to the prospects of Somalia's early re-integration into international trade and re-admission into the international community of nations.<sup>19</sup>

These effects also extend to the regional States which are defined here as countries from the Horn of Africa highlighted by the respondents and the Arabic Peninsula which have

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<sup>18</sup> Piracy Report of the International Maritime Bureau, January 28, 2008.p.52

<sup>19</sup> Powell B et earl, *Somali After State Collapse: Chaos Improvements?*(Oxford:OUP:2006).PP.14-20.

suffered from the continued threat of hijack and the additional costs of shipping such as insurance premiums and ship security measures. In fact, international ship owners and traders have started to boycott the Suez Canal and Gulf of Aden. This is obviously a cost factor that leads to higher trading costs and reduced trade for Egypt, the Suez Canal, the Sudan, Saudi Arabia, Eritrea, Ethiopia, Djibouti and Yemen that will inevitably result in reduced port and state customs revenues and economic decline.<sup>20</sup>

This study did not manage to assess to what extent piracy revenues have fuelled the emergence and strengthening of alternative criminal elements in society that will challenge the credibility, authority and influence of both governments and traditional societal structures. Sources available to this study suggest that contacts already exist between pirates, the Al Shabaab and criminal groupings engaged in human trafficking, drug, migrant and arm smuggling who make use of the same sea corridor. These effects are likely to have far greater impact than currently is the case and cover all areas in the economic, political and social spectrum.<sup>21</sup>

As for the international community, ship owners with ships transiting the Gulf of Aden are exposed to significant additional insurance costs of up to about 0.5 per cent of ship values which are typically between US\$10 and 100 million per transit. Additionally, it was noted by my interview with Peter Thuo, the Director of Shipping and maritime Affairs, Ministry of Transport as well as Mwangi Gitau a Legal Officer with SDV Transami a shipping company noted that the cost of freight is further exacerbated by

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<sup>20</sup> Corroborated by interviews carried out with Peter Thuo, Dennis Onsarigo as well as Captain Kigimbi.

<sup>21</sup> Piracy Report of the International Maritime Bureau, January 28, 2008, pp.23-32



demands by ships' crews for bonus payments or 'danger money', demands by ships' crew to be allowed to disembark before entering high risks areas, the risk that their ships will be hijacked, resulting in loss of use of the ships and revenue and the need to pay substantial ransoms in order to obtain the safe recovery of ships and crew and theft of 'easy to carry' ship's equipment.<sup>22</sup>

National governments whose citizens are crew members on hijacked ships can come under very considerable public, political and media pressure to do whatever is necessary to secure their early and safe release. This was a revelation from captain W J Kagimbi who is the Chief Maritime Security Officer, Kenya Maritime Authority. These same governments will often and at the same time incur considerable diplomatic pressure from other governments and the international community not to take actions likely to give encouragement to hijackers or the wider criminal fraternity. Whichever way governments choose to act the political costs for them in terms of domestic and international trust and credibility are often very high.<sup>23</sup>

Dennis Onsarigo ,a Senior Kenya Television Network (KTN) Journalist notes that even though the international community has universally condemned piracy activity off the Somali coast, the signals it has sent to the pirates to the Somali federal and regional governments and indeed to ordinary Somalis have been mixed. It has tolerated the payment of ransoms by failing to provide support and alternatives for ship owners who wish to do otherwise. It has sanctioned the deployment of naval warships to the region

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<sup>22</sup> Ibid pp23-32

<sup>23</sup> Report of the Security Council pursuant to Security Council Resolution 1846 (2008) vol S 09-25727 PP.17-26

but failed to give these warships the authority necessary to take robust action against pirates. Indeed, he notes that the warships of some countries have variously demonstrated an unwillingness to arrest pirates but released captured pirates ashore in Somalia and even delivered ransom payments to pirates at the behest of their governments.<sup>24</sup>

Onsarigo laments that the overall impression even if unjustified is one of impotence and moral ambiguity and this carries costs of its own in the sense that it will undermine the authority and credibility of the international community, demoralize people of goodwill and empower the criminals and other groups around the world who are intrinsically hostile to civil society and the rule of law.<sup>25</sup>

### **Responses by States to Halt Piracy off the Somali Coast**

States in the Horn of Africa and indeed the world have noted the debilitating effects of piracy off Somalia and have decided not to watch helplessly. In this regard the study established that states as well as the United Nations could only address this phenomenon under policy and legislative frameworks. It was observed by Alex Mbuvi<sup>26</sup> and William Harribae<sup>27</sup> that Article 100 of UNCLOS makes the repression of piracy a collective duty for every state even in their non-jurisdictional waters. They further noted that Article 105

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<sup>24</sup> Ibid pp 17-26.

<sup>25</sup> Dennis Onsarigo's personal views were that the only way to stop piracy is to shun ransoms and use anti-piracy enforcement mechanisms such as use of naval ships and prosecution to deter the vice.

<sup>26</sup> State Counsel, Department of Treaties, State Law Office.

<sup>27</sup> Legal Officer, Ministry of Foreign Affairs.

states that any vessel has the right to seize and occupy the possessions of a pirate ship, arrest the crew and put them to trial under their national jurisdiction as long as such a seizure takes place on the high seas or any waters outside the jurisdiction of a particular state.<sup>28</sup>

They noted further that under these provisions, a ship may only fire at another ship in self-defence.<sup>29</sup> Therefore the two respondents noted that when piracy occurs in the territorial waters of a particular state the piracy is subject to that state's jurisdiction and capacity to prosecute.<sup>30</sup> UNCLOS define piracy as being all illegal acts of violence or detention or depredation committed for private ends and taking place on the high seas, outside the jurisdiction of any state. The two respondents further note that this definition excludes the territorial waters of states such as the coastal waters of Somalia.

International law authorizes warships to prevent, deter, and respond to acts of piracy and armed robbery on the high seas but it does not apply to territorial waters. However, under UNCLOS acts committed inside the territorial waters of a country do not fall under the definition of piracy but are simply considered 'sea robbery' under international law and are dealt with by the laws of that country. Domestic laws seldom permit a vessel or warship from another country to intervene. Illegal acts committed for political rather than private ends also fall outside the international law definition of piracy.

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<sup>28</sup> Sauvageot P E , "Piracy off Somalia and its Challenges to maritime Security: Problems and Solutions", UNISCI . Universidad Complutense de Madrid , Papers, N° 19 (Enero / January 2009) pp.22-23

<sup>29</sup> *Ibid.* pp.22-23.

<sup>30</sup> Gettleman J. " Somalia's Pirates Flourish in a Lawless Nation ". The New York Times. (31 October 2008), p. A1: Even if the naval ships manage to catch pirates in the act, it is not clear what they can do. In September, a Danish warship captured 10 men suspected of being pirates cruising around the Gulf of Aden with rocket-propelled grenades and a long ladder. But after holding the suspects for nearly a week, the Danes concluded that they did not have jurisdiction to prosecute, so they dumped the pirates on a beach, minus their guns.

The narrow scope of this UNLOS provision severely limits the availability of international law to deal with piracy in places such as Somalia a finding that this study has established from interviews conducted with the two respondents above as well as interviews with Kenya Television Network(KTN) Journalist Dennis Onsarigo,Captain W.J.Kagimbi who is the Chief Maritime Security Officer at the Kenya Maritime Authority and Peter Thuo who is the Director of Shipping and Maritime Affairs.

Michael Masinga of the Department of Public Prosecution in the office of the Attorney General of Kenya also concurred that UNCLOS limits states from pursuing pirates further into the territorial waters of other states and that there is need to revamp international law relating to piracy so that modern piracy as witnessed in Somalia can be curbed extensively.

It was also indicated by Michael Masinga that other international instruments apply more broadly to any state party that has pirates in its custody. He gave the examples of the 1988 Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation (SUA) and the 2000 UN Convention against Transnational Organized Crime. These two documents contain useful provisions relating to mutual legal assistance, assistance in prosecution and extradition matters not addressed in the law of the sea.<sup>31</sup>

The developments in the international arena as established by the findings in this study are also consistent with the hypothesis that UNCLOS does not effectively curb piracy.

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<sup>31</sup> UN Report, *ibid* note 17, p. 27.

Michael Masinga<sup>32</sup> as well as Captain Kagimbi<sup>33</sup> indicate that these were evident from the United Nations Security Council resolutions that have been adopted to fill the gap under UNCLOS and address the issue of piracy off Somali's coast. On June 2, 2008 the Security Council adopted unanimously the United States and France sponsored Resolution 1816 which authorized every state in co-operation with the Transitional Federal Government of Somalia (TFG) to enter Somalia's waters for the purposes of repressing acts of piracy and armed robbery at sea by all necessary means.<sup>34</sup> Additionally, a new initiative called Maritime Security Patrol Area (MSPA) was established for the purpose of patrolling waters.

UNCLOS as noted above leaves the jurisdiction to try pirates caught in the territorial sea to the coastal state but Masinga a respondent notes that the world needs to learn from the Kenyan experience with regard to the trial of Somali pirates in Kenya. Somalia he notes does not have an effective government which can police its coast. This was also corroborated by Dennis Onsarigo who indicated that Somalia does not have a coast guard or navy to police its coastal stretch.

Masinga<sup>35</sup> notes that the new Constitution of Kenya has taken a paradigm shift and made Kenya a monist state by providing under Article 2 (5) that the general rules of international law shall form part of the law of Kenya.<sup>36</sup> It provides further under Article 2

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<sup>32</sup> He is one of the prosecutors of captured pirates under the auspices of the Department of Public Prosecution in the State Law Office in Kenya.

<sup>33</sup> Chief Maritime Security Officer, Kenya Maritime Authority.

<sup>34</sup> Middleton, *ibid* note 71, p.8.

<sup>35</sup> Department of Public Prosecution, State Law Office.

<sup>36</sup> The new Constitution of Kenya was promulgated by the president of Kenya on 27/08/2010.

(6) that any treaty or convention ratified by Kenya shall form part of Kenya's Constitution.<sup>37</sup>

Masinga notes that the piracy trials in Kenya came about as a result of an undisclosed Memorandum of Understanding signed on January 16, 2009 between the Kenyan and the United States governments.<sup>38</sup> It was not the first time Kenya was agreeing to this arrangement. A similar Memorandum of Understanding was signed by the United Kingdom on Thursday December 11, 2008.<sup>39</sup> The British it is reported regarded Kenya as an alternative to trying suspects in Somalia which the British argued had no effective central government or legal system.<sup>40</sup>

In March 2009 Kenya again signed a Memorandum of Understanding with the European Union.<sup>41</sup> The first Kenyan encounter with piracy trials was in 2006. It began when the American government handed over to Kenya 10 Somali nationals captured about 200 nautical miles off the Somali Coast.

The pirates were charged before a Mombasa Senior Principal Magistrate's court for among other things hijacking the vessel called Safina Al Bisaraat on January 16, 2006 in the High Sea threatening the lives of its crew and demanding a ransom. They were jailed

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<sup>37</sup> Ibid.

<sup>38</sup> Gathii JT, "Jurisdiction to Prosecute Non-National Pirates Captured by Third States Under Kenyan and International Law" Loyola of Los Angeles International and Comparative Law Review, 2010 Albany Law School Research Paper No. 39, P.3

<sup>39</sup> Ibid p.3

<sup>40</sup> Houreld K, "U.K Kenya Sign Agreements to Prosecute Pirate." Associated Press, December 14, 2008. See also Jopson B, "Kenya Signs Deal to Prosecute Somali Pirates. Financial Times, December 12, 2008. Financial Times.

<sup>41</sup> Ibid p.3

for seven years after the court found them guilty. On appeal the High Court agreed with the decision of the Lower Court and stated that Kenya had ratified UNCLOS. Masinga and Captain Kagimbi observed that Kenya has passed a legislation called the Merchant Shipping Act which came into force on 1<sup>st</sup> September, 2009 after it was passed by Parliament and assented by the President of the Republic of Kenya on 28<sup>th</sup> May, 2009.

This new Act repealed the old 1967 Merchant Shipping Act and brought Kenya into compliance with its maritime obligations under UNCLOS.<sup>42</sup> In fact Masinga notes that the New Act gives Kenya extraterritorial jurisdiction beyond what UNCLOS prescribes. It even defines piracy to include acts committed in the territorial waters of Kenya or “elsewhere”.<sup>43</sup> The “elsewhere” requirement undoubtedly gives a very wide latitude for the Kenyan courts to even try pirates caught in the Somali territorial waters.<sup>44</sup> This he notes is a paradigm shift from the Kenyan situation before where the Penal Code<sup>45</sup> only criminalized piracy *jure gentium*.

The new Act under Section 370 he notes proceeds to also criminalize hijacking and destroying a ship or ships regardless of whether that offence is committed in Kenya and regardless of whether the ship is in Kenya or elsewhere. The nationality of the person committing the act is also immaterial. Under Section 370 (6) the Act provides that any person who commits the offence of piracy shall be upon conviction be liable for life imprisonment.

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<sup>42</sup> Kenya has also ratified the SUA Protocol. See International Maritime Organization *Status of Conventions By Country*.

<sup>43</sup> See S.370 of the Merchant Shipping Act.

<sup>44</sup> See Wambua M P, “The Legislative Framework for Adjudication of Piracy Cases in Kenya; Review of Jurisdictional and Procedural Challenges and the Institutional Capacity”, The Law Society of Kenya Journal, vol. 6 (2010) pp.123-158.

<sup>45</sup> Cap 63 of the Laws of Kenya.

Consequently, the respondents above observed that Kenya's broad extraterritorial reach to try Somali pirates stemming from the various memoranda of understanding with various countries provides a unique experience to test the new law. They suggested that countries in the region need to pass such legislation that seeks to extend the jurisdiction to try suspected pirates to territorial waters as opposed to the high seas as restricted by UNCLOS.

Dennis Onsarigo, Mwangi Gitau and Peter Thuo observed that the United Nations Security Council passed Resolution 1816 authorizing a series of measures designed to combat all acts of piracy and armed robbery against vessels off the coast of Somalia. For example for a period of six months states co-operating with the country's transitional government were allowed to enter Somalia's territorial waters and use "all necessary means" to repress acts of piracy and armed robbery at sea in a manner consistent with relevant provisions of international law.<sup>46</sup> With Somalia's consent, the Resolution was adopted to allow foreign warships the right to enter its territorial waters.

Moreover, Peter Thuo, Alex Mbuvi and Captain Kagimbi also noted that the United Nations Security Council acting under Chapter VII of the United Nations Charter passed Resolution 1846<sup>47</sup> to address the issue of piracy in Somalia's territorial waters. The resolution extended the authorization of other states to enter Somalia's territorial waters provided by Resolution 1816 for another twelve months. Resolution 1846 emphasized the

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<sup>46</sup> Resolution 1816 (2 June 2008) Adopted Unanimously with Somalia's Consent; Measures Do Not Affect Rights, Obligations un UNCLOS.

<sup>47</sup> Passed on 02/12/2008.



need for states to prosecute pirates legally under the SUA Convention<sup>48</sup> and to work together with the IMO to achieve this goal.<sup>49</sup>

The Security Council reiterated its condemnation of all acts of piracy and armed robbery against vessels in Somali territorial waters and the high seas off the coast of Somalia and called upon organisations to co-operate with the shipping industry and the International Maritime Organization (IMO). This was to be consistent with this resolution and relevant international law by deploying naval vessels and military aircraft and through seizure and disposition of boats, vessels, arms and other related equipment used in the commission of piracy and armed robbery off the coast of Somalia or for which there is reasonable ground for suspecting.<sup>50</sup>

The findings established that states have identified areas of co-operation to fight piracy as exemplified by Resolution 1851<sup>51</sup> inviting states to make special agreements with other nations in the region to facilitate prosecution. Kenya and Seychelles have already established prosecutorial courts for pirates after entering into agreements with a number of nations. It also encouraged the creation of an international co-operation system and a centre for the sharing of information. This is also consistent with the Djibouti Code of

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<sup>48</sup> The SUA Convention provides a legal basis to effect the rapid transit ashore of pirates captured at sea where both the flag State and the receiving State are States Parties to SUA. The receiving State Party to SUA is required to make an immediate inquiry into the facts, and to notify other State Parties that might have jurisdiction as to whether it intends to exercise its jurisdiction. The receiving State Party is required to extradite such offenders to another State Party with jurisdiction or to submit the case to its competent authorities for the purpose of prosecution. Where one or both of the States concerned are not Parties to SUA, ad hoc arrangements would have to be made to effect the transfer ashore. If the receiving State is unwilling to accept the offender from the ship, the compulsory dispute settlement provisions of SUA are unlikely to provide a timely resolution.

<sup>49</sup> UN Security Council, S/RES/1846 (2008), (2 December 2008).

<sup>50</sup> SC Resolution 1846, *Ibid.* p.3.

<sup>51</sup> Adopted on 16/12/2008.

Conduct on piracy in which eight coastal states and other states from the Gulf of Eden and the Red Sea under the auspices of IMO.<sup>52</sup>

Furthermore, from the date that resolution 1846 was adopted states and regional organizations co-operating in the fight against piracy and armed robbery at sea off the coast of Somalia for which advance notification has been provided by the TFG to the Secretary-General may undertake all necessary measures that are appropriate in Somalia for the purpose of suppressing acts of piracy and armed robbery at sea pursuant to the request of the TFG.<sup>53</sup> Mr Peter Thuo<sup>54</sup> gave the example of the Malacca Straits that have seen states in the region coming together to combat piracy which has to a great extent been met with marked success. He notes that there is need for countries in the Horn of Africa to replicate the model.

These resolutions were adopted after it was suggested that hijackers off Somalia could escape the UNCLOS definition of pirates by claiming they are motivated by 'political' rather than 'private' gain although it appears that the funds are being used for private enrichment in Somali communities.<sup>55</sup>

Thus, the third hypothesis of the study has been confirmed as true to some extent even though Dennis Onsarigo and Mwangi Gitau were unhappy that these efforts were done

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<sup>52</sup> The Djibouti Code is available at <http://www.fco.gov.uk/resources/en/pdf>

<sup>53</sup> United Nations Security Council, Security Council authorizes states to use land based operations in Somalia as part of fight against piracy off coast unanimously adopting Resolution 1851 on 16 December 2008.

<sup>54</sup> Director Shipping and Maritime Affairs, Ministry of Transport.

<sup>55</sup> Hirsch A. "Efforts to tackle epidemic hindered by lack of internationally agreed definition." *The Guardian*, 20/10/2008. legal affairs correspondent. <http://www.guardian.co.uk/world/2008/nov/20/piracy-law-international-definition-commons>.

too late in the day. Several countries including the United States, Russia, France and India have sent their warships to the vicinity of Somalia to combat pirate attacks, with France having taken the strongest stand against such piracy.<sup>56</sup> Recently, India began to take a greater interest in Somali piracy for a number of reasons, including a desire to compete with China. In December 2008, the Indian Navy reportedly arrested 23 Somalis. In February 2009, the U.S. Navy arrested 16 suspected Somali pirates, and the Russian Navy has also arrested a number of suspected Somali pirates.<sup>57</sup>

As noted earlier, the United States and the United Kingdom signed agreements with Kenya that allowed for the extradition of suspected pirates for prosecution in Kenya.<sup>58</sup> Although such agreements are a step in the right direction, it was established that most respondents in particular Michael Masinga, Peter Thuo and Captain Kagimbi that the Kenyan judicial system needs support to bring such pirates to trial. Moreover, it was also observed that appropriate domestic legislation must be enacted by countries which seek to prosecute pirates just as Kenya has done recently. If there is to be some extraterritorial application of domestic laws such laws must apply on the high seas as well as the territorial seas. It was also established that even though Kenya had passed the necessary anti-piracy legislation<sup>59</sup>, it has been argued that Kenya's corrupt judicial system cannot be trusted to conduct free and fair trials. However, the respondents were quick to point out the New Constitution of Kenya may bring a paradigm shift.

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<sup>56</sup> UN Report. *ibid* note 17, p. 5.

<sup>57</sup> UN Report, *Ibid.*, p.5.

<sup>58</sup> Dagne, *ibid* note 28, p. 5.

<sup>59</sup> The Merchant Shipping Act, 2009 assented by the President of Kenya on 28, May, 2009.

Additionally, IMO has outlined several principal areas of concern and adopted an important regional agreement to share information in the repression of piracy and armed robbery against ships. The agreement also seeks to stabilize the situation in Somalia through intervention by the UN Security Council, the UN Political Office for Somalia, the UN Development Programme, the Contact Group on Piracy off Somalia, and other international entities.<sup>60</sup>

It was also noted that other multilateral undertakings by NATO and the EU have met with some success in dealing with pirate attacks. In late 2008, at the request of UN Secretary-General Ban Ki-Moon, NATO started providing escorts to the UN World Food Programme under Operation Allied Provider, and later Operation Allied Protector.<sup>61</sup>

Captain Kagimbi and Anita Koech<sup>62</sup> noted that states have taken a proactive role to contain the menace in the region. In support of several UN Security Council resolutions, the European Union launched the EU Naval Forces For Somalia Operation (EUNAV) in December 2008 to deter, prevent and repress acts of piracy and armed robbery off the coast of Somalia.<sup>63</sup> This is the first ever naval operation by the European Union, escorting ships affiliated with the World Food Programme when they deliver aid to Somalia and protecting merchant ships moving through the area. Other anti-piracy initiatives in the region include the Piracy Reporting Centre operated by the International Maritime

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<sup>60</sup> International Maritime Organization, *Ibid.*

<sup>61</sup> North Atlantic Treaty Organization (NATO), "Counter-piracy operations" (26 August 2009). Available at: [http://www.nato.int/cps/en/natolive/topics\\_48815.htm?selectedLocale=en](http://www.nato.int/cps/en/natolive/topics_48815.htm?selectedLocale=en)

<sup>62</sup> State Counsel, Department of Treaties, State Law Office.

<sup>63</sup> Available at: <http://www.consilium.europa.eu/uedocs/cmsUpload/EN.pdf>

Bureau, which releases reports on trends and incidents.<sup>64</sup> Evidently, these initiatives as narrated by the respondents above were created by states reacting to the limited approach taken by UNCLOS to fight piracy. This finding is indeed consistent with the second hypothesis.

The United States navy furthermore has been actively patrolling the Gulfs of Aden and Oman the Arabian and Red Seas and the Indian Ocean as part of its anti-terrorism mandate. Anti-piracy may in fact be its first priority since its ships have been involved in preventing pirate attacks.<sup>65</sup> A Maritime Security Patrol Area (MSPA) has also been constituted creating a defined zone which will be in range of military assistance by the navies.<sup>66</sup>

In the waters off Somalia's nearly 4,000-kilometer-long coast, warships from more than a dozen countries have formed what U.N. Secretary-General Ban Ki-moon recently described as "one of the largest anti-piracy flotillas in modern history."<sup>67</sup> Ships from NATO and European Union member states are among those that have been dispatched to that region in recent months to fight a sharp upsurge in piracy. The United Nations has stated that 111 pirate attacks took place in 2008 in the corridor linking the Suez Canal and the Indian Ocean, representing a nearly 200 percent increase over 2007.<sup>68</sup>

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<sup>64</sup> Sauvegeot, *ibid* note 92, p. 260.

<sup>65</sup> Middleton, *ibid* note 71, p. 8.

<sup>66</sup> Middleton, *ibid*.

<sup>67</sup> Ryu, *ibid* note 24.

<sup>68</sup> "Somalia: Current Conditions and Prospects for a Lasting Peace," sec. i. p. 4.

The warships presently patrolling the Gulf of Aden and the Indian Ocean are doing so under the legal framework of UNCLOS and Security Council resolutions. UNCLOS has been criticized evidently from this study for failing to contemplate the emergence of piracy off states such as Somalia and failing to address the situation where an act of piracy occurs within a country's territorial waters or in those of a neighbouring country, rather than on the high seas.<sup>69</sup>

Captain Kagimbi noted further that UNSC Resolution 1851 adopted on 16/12/2008 called upon states and regional organizations fighting piracy to establish an international co-operation mechanism to act as a common point of contact between states, regional and international organizations. This resolution he notes led to the formation of Contact Group on Piracy off the Coast of Somalia which has four working groups. Group 1 dealt with matters on military co-ordination, information sharing and regional capacity building. Group 2 was to deal with international legal obligations and domestic legal framework for piracy prosecution. Group 3 was to foster communication within the industry including promotion of best practices. Group 4 lastly was to deal with raising awareness on the negative effects of piracy on maritime trade among the states and the international organization. Kenya he notes belongs to group 1 chaired by the United Kingdom.

Even though all respondents were of the view that a lasting solution to curb piracy off Somalia would entail supporting the TFG and Somalians have an effective government

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<sup>69</sup> The international law on piracy assumes that individual states would assume the responsibility of policing and patrolling their own waters and prosecute those seized in the act of piracy. But not all states have the resources and capacity to ensure maritime security within their waters. This being highlighted by the on-going piracy problem in Somalia, which after 18 years is still trying to establish a functioning government.

control, it was not lost on them that there are significant challenges facing anti-piracy activities off the coast of Somalia. There are significant obstacles to using international law to address the problem of piracy off Somalia. The Somali government lacks any means to investigate, detain or prosecute pirates operating within its jurisdiction. Although the UN's maritime law makes high seas piracy illegal throughout the world this law has proven to be ineffective as evidenced by the dramatic recent increase in piracy in the Horn of Africa. Furthermore, although the UN Security Council resolutions authorize the pursuit of pirates into Somali waters most states have been reluctant to take such pirates into custody for prosecution in their own domestic courts.<sup>70</sup>

Moreover, NATO (None Aligned Treaty Organization) and the European Union anti-piracy undertakings also face serious challenges such as in co-ordinating their delivery among many different states.<sup>71</sup> Very large and sophisticated naval vessels were not designed to engage with small pirate vessels hence are of limited use. The success of anti-piracy operations depends on such factors as the proximity of pirate vessels to target ships and the availability of military resources such as helicopters.<sup>72</sup> Military personnel are also reluctant to intervene in situations where vessels have already been boarded and are under the control of pirates.<sup>73</sup>

Therefore, it is readily apparent that institutional, legal and practical realities severely hamper efforts to effectively deal with maritime piracy off Somalia and indeed in other

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<sup>70</sup>For instance, the Danes have held on to five pirates accused of carrying out an attack until it decides which country would take on the prosecution. Sauvegeot, *ibid* note 92, p. 254.

<sup>71</sup>Sauvegeot, *Ibid.*, p. 259.

<sup>72</sup>Sauvegeot, *Ibid.*, p. 253:

<sup>73</sup>Sauvegeot, *Ibid.*, p. 254.

areas of the world. The net effect of these circumstances serves to sustain piracy activities at best and at worst likely encourages the continuation and expansion of such illegal acts as a means of securing income for all those involved in these activities from the top of such illicit organizations to the bottom.



## Chapter Five

### Conclusion

The study has analyzed critically the effectiveness of the 1982 UN Convention on the law of the sea to curb piracy using a case study of Somalia's coast. Pertinent issues relating to UNCLOS against the backdrop of Somalia's coast have been articulated. The crime of piracy has exacerbated in this twenty first century yet not so much attention has been accorded to it with such force as has been done to other international crimes such as genocide and crimes against humanity. Through a combination of factors such as the collapse of effective governance and weak policing mechanisms within some coastal states piracy has been allowed to thrive in certain situations.

This study has culminated into a couple of reflections that will improve the ability of states to suppress piracy. The first suggestion is that there is need to change the regulations in UNCLOS to incorporate developments that are more recent for example the fact that now most incidents of piracy occur in territorial waters and not on the high seas. The definition of piracy should also be changed to include acts committed for political ends other than the "private ends" requirement. Therefore, the International Law Commission should be called upon to review the definition of piracy.

Secondly, Terrorism should also be included as piracy *jure gentium*. This is because the modern world is increasingly seeing incidences of terrorism piracy. The offense would

include single ship hijackings by political groups for political ends. The doctrine of hot pursuit enshrined under Article 111 of UNCLOS should be expanded to allow states to pursue alleged pirates from the high seas into the jurisdictional waters of another state. A warship can therefore enter and capture suspected pirates in those areas. This sounds rather radical especially against the backdrop of sovereignty but to contain any abuse this right should be exercised judiciously and within defined regulatory limits.

Moreover, there is need for states to enter into and enforce regional bilateral and multilateral treaties to combat piracy. This should be followed up with action plans so that states can agree on the strategies to be used. This is a window allowed under Article 311(3) of UNCLOS that states should exploit fully.

Additionally, there is need to have a court with compulsory jurisdiction to try pirates. This court should be established on an *ad hoc* basis so that the court is constituted only where there are prosecutions to be conducted. The court should have international universal jurisdiction where states that have captured pirates can forward them to this court for prosecution. This court can be modeled along the International Criminal Court (ICC).

There is also need for states to interpret provisions that exist in treaties liberally. This is allowed under Article 31 of the Vienna Convention on Treaties. For example terms such as “private ends” can be given an interpretation that makes it effective and apply to a prevailing situation. Lastly, states such as the United States that have not ratified

UNCLOS should be encouraged to do so that greater legitimacy is given to them when fighting piracy individually and collectively.

Deductively, the events on the world stage demonstrate clearly that piracy and threats to maritime security can no longer take a back seat. States have to redirect their efforts towards the development of a robust and universally applicable legal regime and take a more co-ordinated approach if this vice is to be contained with a measure of success.

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