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ARTICLE

The jurisdictional challenges to the prosecution of piracy cases in Kenya: mixed fortunes for a perfect model in the global war against piracy

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Abstract Since 2008 Kenya has distinguished itself in the global war against piracy by undertaking prosecutions in the national courts of suspected pirates arrested in the high seas and handed over by navies of leading maritime nations under bilateral agreements (MOUs) entered into between Kenya and these leading maritime nations. As of July 2011, Kenya had over 20 convicted pirates serving jail terms ranging between 7 and 20 years and over 100 suspected pirates awaiting trial in national courts. This is the largest number of suspected pirates held and tried in any one state at any given time in modern history. To achieve this, Kenya had to effect far reaching changes in the law. In the initial stages, suspected pirates were charged under Kenya's Penal Code (Cap 63 Laws of Kenya). However, the high court in the case of Re Mohamud Mohamed Dashi and eight others [2010] eKLR, ruled that Kenya had no jurisdiction to try suspected pirates under that law. In September 2009, Kenya passed a new law (the Merchant Shipping Act), which not only defined more comprehensively and extensively the offence of piracy, but also extended the jurisdiction of Kenyan courts to try piracy committed by non-nationals. Though the law gives Kenya a very broad jurisdiction to try suspected pirates, the process is still fraught with challenges due to lack of financial and human resources. In the case of Republic vs Hassan Jama Haleys Alias Hassan Jamal and five others [2010] eKLR, the court commented thus:

> "… I must note that the 'piracy trials' have presented a unique challenge to the Kenyan legal system. We cannot ignore the fact that these are suspects who having been arrested by foreign naval forces on the High Seas are brought to Kenya for trial. They are strangers in the country, do not understand the legal system, may not know what their rights are and do not understand the language… the Kenyan Government and the International partners supporting these trials put in place a system to provide free legal representation for the suspects…"

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This paper discusses Kenya's new model legislation and argues that while the model faces challenges, it should be replicated by all member states of International Maritime Organization as it not only grants extra territorial jurisdiction to national courts but also domesticates comprehensively the relevant key provisions in the fight against piracy found in the United Nations Convention on the Law of the Sea (UNCLOS), the Convention on the Suppression of Unlawful Acts against Maritime Navigation (the SUA Convention), the International Convention for the Safety of Life at Sea 1974 (the SOLAS Convention 1974), Code of Conduct Concerning the Repression of Piracy and Armed Robbery against Ships in the Western Indian Ocean and the Gulf of Aden (The Djibouti Code of Conduct), and the International Ship and Port Security Code (the ISPS Code).

> "In the 21st century more than ever before, no state can stand wholly alone. Collective strategies, collective institutions and a sense of collective responsibility are indispensable. The case of collective security today rests on three basic pillars. Today's threats recognize no national boundaries are connected, and must be addressed at the global and regional as well as national levels" (UN 2005, A More Secure World: Our Shared Responsibility—Report of the United Nations Secretary General High Level Panel on Threats, Challenges and Change. New York UN Publications).

Keywords Piracy · Jurisdiction · Kenya

1 Introduction

The concepts and principles underlying the construction and understanding of maritime security manifest the veritable truth embodied in the above quotation. Insecurity in the maritime domain poses transboundary challenges that call for cooperation among states at the regional and international level in order to effectively address them. The complexity of issues involved in maritime security and the diversity of interests at stake are broader in scope than any single state or group of states can effectively handle.

Sea piracy is as old as seafaring.[1] It has been recognized as a worldwide problem with several areas recording particularly high levels of piratical activity. These areas include: the Gulf of Aden and sea off the coast of Somalia and the southern entrance to the Red Sea; the Gulf of Guinea especially the sea off the coast of Nigeria and the Niger River delta; the Malacca Strait between Indonesia and Malaysia; and the Indian subcontinent, particularly the seawaters between India and Sri Lanka. However, it is the piracy off the coast of Somalia that has attracted the attention of the international community. In the last 3 years, piracy off the coast of Somalia has continued to make international headlines. The daring hijackings[2] of vessels at sea and the huge ransoms

[1] The earliest documented instances of piracy are the exploits of the sea peoples who threatened the Aegean and the Mediterranean in the 13th Century BC. In 75 BC Julius Caesar was kidnapped by Cilician pirates while on a voyage across the Aegean Sea. See http://pirateshipwrecks.com/history_of_piracy(last accessed on 3rd October 2011.

[2] The pirates off the Coast of Somalia are routinely hijacking ships as far as 1,000 nautical miles off the coast of Somalia, see for instance the story carried out by the British Broadcasting Corporation entitled 'Somali pirates move towards India' available at http://news.bbc.co.uk/2/hi/africa/8583027.stm (last accessed on 6th September 2011)

paid[3] to the Somali pirates have continued to excite the international press. At the same time, the piracy menace has forced international law scholars and maritime security experts to burn midnight oil searching for immediate and long-term solutions.

In 2010, the International Maritime Bureau Piracy Reporting Centre (IMB PRC) reported that there were a total of 406 piracy attacks in the year 2009. It was further reported that, the recorded incidents of piracy increased for the third successive year since 2006.[4] The report indicated that the global piracy incidents in 2009 were as follows: 153 vessels were boarded, 49 vessels were hijacked, 84 attempted attacks, and 120 vessels fired upon. Two hundred and seventeen (217) of all these incidents occurred in waters off the coast of Somalia. This translates to more than 50% of the incidents worldwide taking place in waters off the coast of Somalia.

The increase in piratical attacks in the Gulf of Aden and off the coast of Somalia has had a negative impact on global trade. Approximately US$463 billion worth of goods travel through the Horn of Africa annually. In 2009, pirate attacks potentially disrupted 2% of traffic through the Suez Canal, which directly affected US$7.4 billion worth of goods. This is more than the individual GDPs of 75 economies in the world including Somalia..[5] According to the Suez Canal Authority 2009 Yearly Report[6] southbound goods registered a decrease of 14.2 million tons, or 4.6%, and the northbound goods decreased by 149.5 million tons, or 36.2%. This represents a US$1.09 billion loss to Egypt's economy due to piracy and the global recession. According to Egyptian officials, revenue lost from piracy equated to 10% or US$109 million. Ships have the ability to carry a large volume of goods, and it is a cost-effective means of transportation hence have become a target of the Somali pirates (Harrison 2010).

There is a need to address the challenge posed by piracy very urgently. Piracy poses security challenges with an international dimension that will need a multidimensional approach. In an increasingly networked and multifaceted global environment, a comprehensive and coordinated interagency approach must be adopted. Information gathering and dissipation and close coordination are vital to effective maritime security. For information and intelligence to be gathered and shared on a timely basis, a high degree of cooperation and coordination is required.

The international community has initiated elaborate initiatives in attempting to eradicate the piracy menace. These efforts are exemplified by the intervention of the United Nations Security Council (UNSC). In 2008, UNSC adopted no less than ten Chapter VII-based Resolutions (UNSCRs) aimed at containing the escalating threat of piracy and armed robbery against ships off the coast of Somalia UNSCRs 1816, 1838, 1846, and 1851 of 2008 gave authorization for states and regional organizations cooperating with the Somali Transitional Federal Government to enter

[3] For instance it was reported that a ransom of US$3.2 million was paid for the release of MV Faina, see BBC News, "Somali Pirates 'Free Arms Ship'", BBC News, February 5, 2009, http://news.bbc.co.uk/2/hi/africa/7871510.stm (last accessed on 6th September 2011)

[4] See http://www.icc-ccs.org/index.php?option=com_content&view=article&id=385:2009-worldwide-piracy-figures-surpass-400&catid=60:news&Itemid=51 (last accessed on 6th September, 2011)

[5] See Gilkey E (2009) When pirates attack at http://claimsmag.com/Issues/2009/May-2009/Pages/When-Pirates-Attack.aspx. last accessed on 6th December 2010

[6] Suez Canal Authority (2010) Annual report 2009

Somalia's territorial waters and use "all necessary means" such as deploying naval vessels and military aircraft, as well as seizing and disposing of boats, vessels, arms, and related equipment used for piracy. The resolutions also authorized states and regional organizations cooperating with the Somali Transitional Federal Government on giving notification to the Transitional Federal Government to use land-based operations in Somalia to fight piracy. This was followed by another four resolutions in 2009 (including UNSCRs 1863 and 1897 of 2009). Similarly, many other international organizations have made more exerted efforts to curb maritime insecurity off the coast of Somalia.

The International Maritime Organization (IMO) has adopted many legal instruments aimed at minimizing maritime security threats. These instruments include, inter alia, the 1988 Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation ("SUA Convention"); the International Ship and Port Facility Security Code (ISPS Code), IMO Code of Practice for the Investigation of the Crimes of Piracy and Armed Robbery against Ships, and the requirement for Long-Range Identification and Tracking of Ships. The IMO has also adopted various resolutions aimed at combating piracy, these resolutions include, inter alia resolution A. 1002 (25), A. 1026 (26), and A. 1044 (27) on piracy and armed robbery against ships in the waters off the coast of Somalia.

The United Nations Office on Drugs and Crime (UNODC), the European Union (EU), and the North Atlantic Treaty Organization have also been involved in anti-piracy activities.

Despite concerted efforts by the regional states and the international community to address piracy off the coast of Somalia, the menace still persists. The efforts by the regional states and the international community to curb piracy and maritime insecurity off the coast of Somalia and the Gulf of Aden have been greatly hampered by lack of appropriate legislative frameworks both at the international and national levels. At the international level, the most significant limitations to the legislative framework are posed by restrictive definitional and jurisdictional scopes in the provisions of article 101 of the United Nations Convention on the Law of the Sea (UNCLOS). In the present day, more than 85% of maritime insecurity acts occur within the territorial sea. Naval operations at sea have recorded considerable success in apprehending and intercepting pirates at sea. The efforts by the international community have gradually matured and the debate has narrowed to how to most effectively deal with pirates following their capture in a way that will further the overall efforts made to counter piracy off the coast of Somalia. This paper addresses this issue and argues that in as much as cooperative solutions through regional approaches is one of the ways to fight piracy off the coast of Somalia, the focal point still remains the national jurisdiction of regional states. Domestication of the key international instruments governing maritime security primarily UNCLOS and the SUA Convention and harmonization of regional legislative frameworks to promote greater cooperation and facilitate burden sharing in prosecution of perpetrators of maritime crimes is *sine qua non* in the success of fight against piracy.

Kenya has taken a lead in overhauling its legislative framework with a view to effectively dealing with the challenges that have been posed by the phenomenon of piracy. Kenya has not only enacted a legislation to deal with actual piratical attacks but has also legislated against phenomena that promote piracy including money

laundering and organized crimes. This paper examines the legislative approach taken by Kenya in the fight against piracy and discusses the lessons that other states may learn from Kenya's experience.

2 The domestication of international legal framework

2.1 The complex definition of piracy

Although piracy has existed for a very long time[7] there is no clear-cut definition of what constitutes piracy.[8] This definitional complexity partly stems from the fact that some scholars, such as, Phillip De Souza[9] and Alfred Rubin, do not regard piracy as an international crime. Alfred Rubin views piracy as solely a municipal law crime; the only question of international law being the extent of a state's jurisdiction to apply its criminal law to an accused foreigner acting outside the territorial jurisdiction of the prescribing state (Rubin 1998).[10] In 1932, Harvard University legal researchers concluded that piracy was not an international crime but was merely a basis for extraordinary jurisdiction in every state to prosecute suspected pirates (Harvard Research in International law, Draft convention on Piracy with Comments 1932). How far that extraordinary jurisdiction was used would depend on the municipal law of the state and not the law of nations. The group based their conclusion partly on the prevailing "orthodox" view at the time that international law existed between states only. According to this view, private persons were not regarded as legal persons under international law; that international law only defined duties privileges and powers between states.

The views of the Harvard Research Group influenced the work of the International Law Commission (ILC) in drafting the 1958 Convention on the High Seas (Dubner 1980). The work of the Harvard Research Group formed an essential theoretical foundation on which the ILC heavily relied on in the preparation of the draft articles of the 1958 Convention on the High Seas. The ILC, however, modified the proposals of the Harvard Research Group for practical and political purposes. The most notable modification was the definition of the conditions under which a state would be conferred with jurisdiction over piracy. In providing that piracy could only occur in the high seas or any place outside the jurisdiction of any country, the ILC effectively made piracy an international crime.[11]

The widely accepted and celebrated Article 101 of UNCLOS defines piracy as:

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

[7] See Phillip De Souza, *Piracy in the Graeco-Roman World,* Cambridge University press
[8] Rubin Alfred, *The law of Piracy* (2nd edn.) New York Transnational Publishers 1998. Rubin Identifies 6 different meanings of the word piracy ranging from the vernacular usage with no legal meaning to the international law meaning from treaties and meanings derived from domestic laws of individual states.
[9] Ibid at 10
[10] Alfred Rubin, The law of Piracy (2nd e.d) new York Transnational Publishers 1998
[11] Ibid at 15

(i) On the high seas, against another ship or aircraft, or against persons or property on board such ship or aircraft;
(ii) Against a ship, aircraft, persons or property in a place outside the jurisdiction of any State;

(b) Any act of voluntary participation in the operation of a ship or of an aircraft with knowledge of facts making it a pirate ship or aircraft;
(c) Any act of inciting or of intentionally facilitating an act described in subparagraph (a) or (b).

There are three distinct characteristics that distinguish piracy from any other form of maritime violence: firstly, piracy must be committed in the high seas outside the jurisdiction of any state. This sets piracy apart from the crime of armed robbery against ships that is committed in the jurisdiction of a coastal state. Secondly, piracy must be committed for private ends. This limits the crime of piracy to acts that are committed purely for personal gain. It excludes acts that are motivated by ideology, religion, or politics. Thirdly, there must be two ships involved for a crime to fulfill the definition set forth in article 101. This is often referred to as the two "ship rule." Fourthly, piracy can only be committed by crew and passengers of a private ship (i.e., not military- and government-owned ships or ships in government service (see article 107)).

The definition in Article 101 of UNCLOS has obvious limitations, and there have been attempts to ameliorate the deficiencies by expanding and modifying the definition of certain crimes that may well cover acts of piracy as well as the jurisdiction of states in other international instruments to deal with such crimes. The most significant of these instruments is the SUA Convention. Although the SUA Convention does not directly address piracy, it covers a wide range of offences (listed in article 3) that constitute maritime violence including terrorism. The offences listed therein cover acts of piracy. The SUA Convention is broader in scope and does away with the two-ship rule. Article 5 obliges the state parties to criminalize the acts listed in article 3 in their domestic legislation. Article 6, however, requires that a nexus between the offence and the state establishing jurisdiction.[12] Article 11 of the SUA Convention provides that the acts set forth in article 3 constitute extraditable offences under extradition treaties. This is to ensure that in case a state party is not willing to prosecute, then the suspect can be extradited to another state willing to prosecute.

2.2 The dichotomy between enforcement and adjudicative jurisdictions

Article 105 of UNCLOS provides that:

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

[12] See Article 6 of the SUA Convention discussed in the following paragraphs

It has been argued that Article 105 gives jurisdiction to prosecute pirates solely to capturing states (Kontorovich 2009). According to Alfred Rubin (1998), article 105 of UNCLOS was an embodiment of the reconciliation of the debate that had raged on for years as to whether piracy was an international crime over which there was universal jurisdiction or a municipal crime punishable in accordance with domestic law.

Rubin argues that, article 105 of UNCLOS resolved the conflict between "naturalist" jurists who view "piracy" as a crime against international law seeking only a tribunal with jurisdiction to apply that law and punish the criminal, and "positivist" jurists who view "piracy" as solely a municipal law crime, the only question of international law being the extent of a state's jurisdiction to apply its criminal law to an accused foreigner acting outside the territorial jurisdiction of the prescribing state.

The dichotomy between the enforcement and adjudicative jurisdictions allows arresting states not willing to prosecute suspected pirates in their national courts to enter into agreements with regional states to receive and prosecute the suspected pirates in their national courts. In the Kenyan and Seychelles situation, this has been achieved through bilateral agreements popularly known as Memoranda of Understanding (MOUs).[13]

Other regional agreements like the Djibouti Code also provide for agreements to embark officers from regional states in the vessels of foreign states to provide the required link to permit prosecution in the national courts of the states of the embarked officers.[14]

3 Salient features of Kenya's legislative framework

Since 2008, Kenya has distinguished itself in the global war against piracy by undertaking prosecutions in the national courts of suspected pirates arrested in the high seas and handed over by navies of leading maritime nations under bilateral agreements (MOUs) entered into between Kenya and these leading maritime nations. As of July 2011, Kenya had over 20 convicted pirates serving jail terms ranging between 7 and 20 years, and over 100 suspected pirates are awaiting trial in national courts.[15] This is the largest number of suspected pirates held and tried in any one state at any given time in modern history.

3.1 Historical background of piracy laws in Kenya

The history of Kenyan piracy laws dates back to the British East African Order in Council (1897) that extended to Kenya the application of certain Indian Acts (including the Indian Penal Code), the common law of England, doctrines of equity, and statutes of general application in force in England on the 12th day of August 1897. Some of these statutes of general application that were then applied to Kenya were the

[13] The MOUs are discussed in more detail in part 3.3 and 5.2 of the paper

[14] See Art 7 of the Djibouti code of conduct available at http://www.imo.org/OurWork/Security/PIU/Pages/DCoC.aspx (last accessed on 3 March 2012)

[15] This information was obtained from the Commissioner of Prisons vide a confidential brief to the author in the month of July 2011 by virtue of his position as the chair of the task force on persons in detention, held in custody or imprisoned

Admiralty Offences (Colonial) Acts of 1849 and 1860 and the Courts (Colonial) jurisdiction Act of 1874 which granted courts in the British colonies jurisdiction over admiralty offences including piracy.[16] After Kenya attained her independence, the Kenyan Penal Code was amended via Act no. 24 of 1967 to provide for the offence of piracy in Section 69.[17] On coming into force in 2009, the Merchant Shipping Act 2009 repealed the said Section 69 of the Penal Code.

3.2 The Merchant Shipping Act

The prosecution of piracy in Kenya is currently undertaken under the Merchant Shipping Act, (Act No. 4 of 2009 of the Laws of Kenya hereinafter: the MSA 2009).[18] Prior to the enactment of the MSA 2009, the offence of piracy was provided for under Section 69 of the Penal Code[19] (hereinafter, the repealed section). The MSA 2009 has not only extended the jurisdiction of the Kenyan courts to try piracy committed by non-nationals in the high seas, it also defines more extensively and comprehensively the offence of piracy than was previously defined under the repealed section. The MSA 2009 has domesticated all key international conventions aimed at curbing piracy and other forms of insecurity at sea. The key instruments are UNCLOS, the SUA Convention, the Djibouti Code of Conduct (the Djibouti Code), and the African Maritime Transport Charter.[20]

The MSA 2009, domesticates the relevant provisions of UNCLOS and SUA Convention. Section 369 of the MSA 2009 adopts the definition of piracy that is found in article 101 of UNCLOS. Section 370 of the MSA 2009 adopts the offences of hijacking and destroying of ships[21] contained in article 3 of the SUA Convention. Article 6 of the SUA Convention requires that there be a nexus between the offence committed and the state establishing jurisdiction.[22] The nexus is established if the ship flies the flag of the state[23]; if the offence is committed in the territory of the state or its territorial sea[24]; if the offence is committed by the national of that state[25]; if the

[16] See the case of Saad Saeed Bin Li Mahri vs Reginam (criminal appeal no. 142 of 1954) Court of Appeal for Eastern Africa EALR (1954) 222, where the court affirmed that the Eastern Africa courts had powers to try a case of piracy committed in the high seas by virtue of Admiralty Offences (Colonial) Act of 1849 and the Courts (Colonial) Jurisdiction Act of 1874. It is noteworthy that as per the Judicature Act (Section 3) Admiralty offences (Colonial) Act of 1849 and 1860 are still applicable in Kenya.

[17] Section 69(1) of the Penal Code, provided: "Any person who, in territorial waters or upon the high seas, commits any act of piracy jure gentium is guilty of the offence of piracy". It has been contended the provision encapsulated piracy jure Gentium and piracy by statute see J.B Ojwang in (Unreported) Miscellaneous Criminal Application no. 72 of 2011.

[18] Cited as the Merchant Shipping Act 2009 Act no. 4 of 2009 and available online at http://www.kenyalaw.org/kenyalaw/klr_app/frames.php (last accessed 1 September 2011). The Act came into force on 1 September 2009

[19] Cited as the Penal Code Cap 63 Laws of Kenya and available at http://www.kenyalaw.org/kenyalaw/klr_app/frames.php (last accessed 1 September 2011).

[20] For the full text see http://www.africa-union.org/root/au/Documents/Treaties/Text/AFRICAN_MARITIME_TRANSPORT.pdf and also http://www.africa-union.org/root/ua/Conferences/2007/fevrier/IE/doc/Report_The_Experts_Meeting.pdf (last accessed 1 September 2011)

[21] Section 369(6)

[22] See also Article 6(4)

[23] The SUA Convention Article 6(a)

[24] Above, Article 6(b)

[25] Above, Article 6(c)

offence is committed by a stateless person whose habitual residence is in that state[26]; if a national of that state is seized, threatened, injured, or killed in the process of committing the offence[27]; or if the offence is committed to compel that state to do or abstain from doing any act.[28] Section 370 (4a) provides that the offences created under Section 370 apply:

> "Whether the ship…is in Kenya or elsewhere," or whether the offences were "committed in Kenya or elsewhere" or whatever the nationality of the person committing the act."

In this sense, the MSA 2009 confers on Kenyan courts jurisdiction wider than that in the SUA Convention. The MSA 2009 also criminalizes acts of violence committed in the high seas in line with article 9 of the SUA Convention.[29] The SUA Convention further requires that, if a state wishes to establish jurisdiction in the last three instances then such a state should notify the secretary general of the IMO. Kenya did not give any notification to the IMO secretary general and therefore the legality of provisions of Section 370 of the MSA 2009 remains doubtful under international law. It has been argued by scholars such as Professor Gathii that most SUA states have followed the stipulations of SUA in crafting implementing legislation and unlike Kenya they do not create extraterritorial jurisdiction.

Professor Gathii cites the example the USA and notes that the US court more likely than not may exercise a much broader jurisdiction. This is particularly so, he argues, when the extraterritorial conduct is aimed purposefully at the USA based on the jurisprudence of the case of U.S. vs. Aikens. However, it is arguable that the jurisprudence of this case emanates from the provisions of article 6(2c) of the SUA Convention that enables a state to establish jurisdiction when the offences defined in the SUA Convention are committed to compel such state into doing a certain act.

With regard to customary international law, while it is generally accepted that states enjoy universal prescriptive jurisdiction over piracy *jure gentium*, the same is not the case with offences under the SUA Convention.[30] There must be prescriptive jurisdictional nexus between the offence and the state seeking to exercise jurisdiction over the impugned conduct.[31] Exercise of prescriptive jurisdiction[32] in

[26] Above, Article 6(a)
[27] Above, Article 6(b)
[28] Above, Article 6(c)
[29] Article 9 provides that the convention does not in any way affect "the rules of international law pertaining to the competence of States to exercise investigative or enforcement jurisdiction on board ships not flying their flag
[30] It is generally accepted that piracy is in fact the first crime in which states prescribed unto themselves universal jurisdiction, its perpetrators considered *hostis humanis generis*. For a detailed discussion on universal jurisdiction see Roger O' Keefe universal jurisdiction; JICJ 2 (2004), 735-760.
[31] Two views exist in international law over the exercise of extraterritorial prescriptive jurisdiction, the first view enunciated by the PCIJ in the lotus case suggests that a state is entitled to extend its prescriptive jurisdiction outside its territory, subject to any rules prohibiting such prescription in certain cases. The second view is that a state is not able to extend its prescriptive jurisdiction outside its territory unless permissive rules support such an exercise. For a more detailed discussion see supra note 36 page 738.
[32] Prescriptive jurisdiction as opposed to enforcement jurisdiction refers to a state's authority to make its laws applicable to a given set of circumstances or persons usually through legislation, while enforcement jurisdiction refers to a state's authority to arrest, detain, sentence, punish, or enforce liabilities for commission of acts proscribed. The exercise of enforcement jurisdiction is strictly territorial.

customary international law is premised on certain accepted bases of jurisdiction namely territoriality,[33] active,[34] and passive personality.[35] Therefore in as much Section 370 (4a) of the MSA 2009 does not require any of the aforementioned heads of prescriptive jurisdictional nexus between the offences created under Section 370 and Kenya, the same is not in line with customary international law.

From the foregoing, therefore, the most irresistible conclusion is that considering the SUA Convention and customary international law, Kenya's extraterritorial jurisdiction is not premised on sound legal principles.

By domesticating the provisions of UNCLOS and SUA Conventions as hitherto discussed and by providing the legal basis for prosecution in Kenya of suspected pirates arrested off the coast of Somalia by international navies operating in the region, MSA 2009 also gives effect to article 26 of the African Maritime Transport Charter which requires member states to enact legislation to *inter alia* give full effect to the charter and other international instruments codes and regulations in the area of maritime, port safety and security, and also to adopt effective measures to combat acts of piracy, against shipping through cooperation with other international bodies.[36] Furthermore, Section 372 of the MSA 2009 also gives effect to the said article 26 on maritime safety by making it an offence for any person to unlawfully or intentionally destroy, damage, or interfere with the operation of any property used for the provision of maritime navigation facilities, where the destruction, damage, or interference is likely to endanger the safe navigation of any ship and where the act is committed in Kenya or the person is Kenyan.

Sections 369 and 370 of the MSA 2009 hitherto discussed also give effect to article 11 of the Djibouti code of conduct which requires signatory states to review their national legislation with a view to ensuring *inter alia* that there are national laws in place to criminalize piracy and armed robbery against ships.[37]

The MSA 2009 also gives effect to the Safety of Life at Sea (SOLAS) Convention, 1974 through the Merchant Shipping (Application of Safety Convention 1974) order 2004, which declares the SOLAS Convention, 1974, including the protocols and amendments thereto (including the ISPS Code) to be a convention applicable to Kenya.

[33] This refers to exercise of prescriptive jurisdiction by states over all persons for impugned conduct committed within its territory. The effects basis of exercise of jurisdiction (refers to extraterritorial exercise of jurisdiction over non-nationals where the impugned conduct is deemed to have deleterious effects within the territory of the prescribing state) is considered an offshoot of the objective territoriality principle and still remains controversial.

[34] Refers to extraterritorial exercise of prescriptive jurisdiction over conduct of a state's national and in some cases its residences.

[35] Refers to exercise extraterritorial prescriptive jurisdiction over conduct of non-nationals where the victim of the offence is a national of the prescribing state; exercise of jurisdiction on the basis of the protective principle (which refers to the ability of a state to assert jurisdiction over a certain conduct committed by foreigners outside its jurisdiction where the conduct could prejudice the state's most vital interests) is still controversial.

[36] Ibid Art. 26 (2)

[37] See supra note 25 Article 11

3.3 Bilateral MOUs

Kenya signed the MOUs with the UK, the USA, and the EU in late 2008 and early 2009.[38] These agreements were mainly designed to facilitate the prosecution in Kenyan courts of pirates captured in the high seas by the navies of the other states parties to the MOUs. In exchange, Kenya would get financial support from those states.[39] The objective of the MOUs was to support the Kenyan prosecutors, the police, and the judicial service to ensure that the trial of piracy cases are fair, humane, efficient, and conducted within the sound framework of the law. The western states would also enhance Kenya's capacity to undertake prosecutions by specialized training for prosecutors, police officers, and magistrates.

The MOUs were not intended to be legally binding agreements but mere framework documents[40] which facilitated further detailed and specific agreements on the pertinent issues covered by the agreements.

For example, the MOU between Kenya and EU is contained both in a formal draft document and in agreement by exchange of letters dated 6th of March 2009.[41] The formal document is divided into nine parts with part one dedicated to the objectives of the MOU; the main objectives being to support the Kenyan prosecutors, the police, and the judicial service to ensure that the trial of piracy cases are fair, humane, efficient, and conducted within the sound framework of the law. The MOU further enumerates the challenges that the Kenyan judicial system was facing including overstretched capacity, logistical requirements, and financial constraints. The MOU then notes the role Kenya is to play and lists the needs which have to be taken into account in implementing the MOU such as legislative review especially of the Evidence Act to allow for admission of new forms of evidence (e.g., video link evidence instead of direct oral evidence); the need for legal research and materials; and the need for specialized training for prosecutors, police officers, and magistrates; prisons reform pilot projects at Shimo La Tewa and Manyani prisons; and finally the

[38] The first MOU was signed between Kenya and the UK in December 2008 and the second with the USA on 16th of January 2009. A third MOU was signed with the EU on 6th of March 2009 with similar terms as the earlier two signed with the UK and the USA. The key provisions of these agreements is that Kenya agrees to try in its national courts suspected pirates arrested in the high seas or off the coast of Somalia by the navies of the USA, the UK, the EU (For the Kenya/EU MOU see Official Journal of the European Union L79/52 of 25 March 2009. Also, see story tilted "Leaders Question the Trial of Somali Pirates in Kenyan Courts" available at http://www.nation.co.ke/News/-/1056/610466/-/uk9mt7/-/index.html and House of Commons Report entitled "Kenya Piracy" available at http://www.parliament.the-stationery-office.co.uk/pa/cm200809/cmhansrd/cm090507/text/90507w0008.htm (last accessed on 30 March 2010); the prosecutions are premised on the Merchant Shipping Act (no. 4 of 2009) see note 30 ibid

[39] For an elaborate discussion of the MOUs see Dr. Paul Musili Wambua's *The Legislative Framework for Adjudication of Piracy Cases in Kenya; Review of the Jurisdictional and Procedural Challenges* and *the Institutional Capacity* in Sea Piracy Law, selected National Legal Frameworks and Regional Legislative Approaches, Max Planck Institute for International and Foreign Criminal Law, (Anna Petrig ed.) Freiburg 2010

[40] Under Section 9(a) of the Kenya/EU MOU entitled "implementing arrangements" the MOU provides that: "For the purpose of the application of these provisions, operational, administrative and technical matters may be the subject of implementing arrangements to be approved between the competent Kenyan authorities on the one hand and the competent EU authorities, as well as the competent authorities of the sending states on the other hand."

[41] *Official Journal of the European Union* dated 23 March 2009 L 79/49 and available at http://publications.europa.eu/official/index_en.htm#Section2-EU (last accessed on 27 November 2009).

need for Kenya to give support to other regional countries through sharing of experience.

There is a debate as to whether the practice of states handing over suspected pirates to third states to undertake prosecution resonates well with the provisions of article 105 of UNCLOS. For now, the MOUs are well and operational.

4 The preventive statutory provisions

Piracy as an organized transnational crime has to be facilitated by movement of money. Huge sums are paid as ransom, but this money is not received by the suspected pirates who commit the actual piratical attacks. The ransom money is paid through the informal "*hawala system*"[42] making it very difficult to track the money since it is not remitted through formal channels. It is widely believed that the sponsors of piracy off the coast of Somalia are wealthy and well-connected criminals involved in organized crime, who live lavishly in Nairobi.

If piracy off the coast of Somalia has to be controlled, then the strategy must be to target not only the pirates who actually commit the actual piratical attacks but also the sponsors who facilitate such attacks hoping to make huge returns from the lucrative business. In the following paragraphs of this part, this paper outlines and evaluates the current legal framework which can be used to target the sponsors of piracy.

Kenya has recently enacted three key legislations that may be used to fight and curb the sponsors of piracy. These are The Anti-Corruption and Economic Crimes Act (Cap 65 laws of Kenya), Proceeds of Crime and Money Laundering Act, and Prevention of Organized Crimes Act.

4.1 The Anti-corruption and Economic Crimes Act

In 2003, the Kenyan parliament enacted a legislation providing for the prevention, investigation, and punishment of corruption, economic crimes, and other related offences. The Act provides that a person who deals with property that he believes or has reason to believe was acquired in the course of or as a result of corrupt conduct (i.e., conducts constituting corruption or economic crime) is guilty of an offence.[43] For any such offence the Act imposes a fine of one million Kenya shillings and an additional mandatory fine if the person committing the offence received a quantifiable benefit or any other person suffered a quantifiable loss.[44]

The Act further provides that "it shall be no defense that the receiving, soliciting or offering of any benefit is customary in any business, undertakings, office, profession or calling."[45] The Act also provides that "unexplained assets may be taken by the

[42] See *Fransesco Fornari,* A *business worth 50 million dollars*, Freedom From Fear issue April 2009 at p. 8, (available at http://www.freedomfromfearmagazine.org/index.php?option=com_content&view=category&layout=blog&id=39&Itemid=182. (Last accessed on 1 August 2011).

[43] The Anti-Corruption and Economic Crimes Act Section 47

[44] Ibid, Section 48

[45] Ibid, Section 49

court as corroboration that a person accused of corruption or economic crime received a benefit."[46]

4.2 Proceeds of Crime and Money Laundering Act

The Act gives a broad legislative framework for combating the crime of money laundering and provides for the identification, tracing, freezing, seizure, and confiscation of the proceeds of crime.[47] The broad nature of the provisions in the Act can be seen from the definition of money laundering and the broad net it casts by including any person who knowingly enters into a transaction with another with a view to facilitating such other person to conceal the proceeds of crime or money laundering.[48]

It should also be noted that it does not matter whether the offence is committed in Kenya or outside Kenya or whether or not it was committed before the proposed law came into force.[49]

4.3 Prevention of Organized Crimes Act

This Act came into force in September, 2010.[50] The Act was enacted with the objective of not only preventing organized crime but also providing for recovery of proceeds of organized criminal activities.[51] The Act defines an organized criminal group as structured group of three or more persons, existing for a period of time and acting in concert with the aim of (1) committing one or more serious crimes; or (2) committing one or more serious crimes in order to obtain, directly or indirectly, a financial or other material benefit or any other advantage for the organized criminal group or any of the members of organized criminal group

The minister for internal security is empowered, under Section 22 of the Act, to declare any group an organized criminal group for the purposes of the Act.

Section 3 of the Act lists various instances where a person is deemed to have been involved in organized criminal activities and they include, professing membership to an organized criminal group, recruiting another person to join an organized criminal group, acting in concert with others to commit a serious crime in order to gain financial benefit among others. Section 4 makes it an offence to engage in organized criminal activities and on conviction a person is liable to a fine equal to KSh5,000,000 or 15 years in prison or both.

Section 15 of the Act empowers the attorney general to apply to the court to get an order to have a person who is suspected to be involved in organized crime to deliver any documents relevant in tracing and quantifying the property. Moreover, the attorney general may apply to the court to get an order requiring a bank or any other financial institution, trustee, cash dealer, or custodian to produce all information and

[46] Ibid, Section 57
[47] Proceeds of Crime and Money Laundering Act the Memorandum of Objects.
[48] Ibid, Section 3, Sections 2 and 3 but also see generally the provisions of Part II (Sections 3 to 18) which provides for the offence of money laundering and other related offences.
[49] Ibid, Section 3
[50] The Act can be accessed at http://www.kenyalaw.org/klr/fileadmin/pdfdownloads/Acts/PreventionofOrganisedCrimesAct2010.pdf (last accessed on 21 Septemeber 2011)
[51] Preamble to the Act

deliver up all documents and records regarding any business transaction conducted by or on behalf of a person suspected to be involved in organized criminal activities. Section 18 of the Act empowers the court to make an order of forfeiture of such property upon conviction. This Act has provisions which can be used to seize proceeds of piracy and therefore make it a high risk low return venture. It is worthy noting that no property has been seized under the Act since it was enacted and no prosecutions have been undertaken under the provisions of the Act.

5 Challenges facing Kenya's legislative framework

Despite the efforts by Kenya to have watertight legislative framework for prosecution of suspected pirates there are still many challenges that are being experienced in undertaking prosecutions in national courts. These challenges include jurisdictional uncertainties, financial constraints, and lack of capacity to implement the various legislative frameworks to fight piracy.

5.1 Jurisdictional uncertainties

The first case to be heard by Kenyan courts was Mombasa criminal case no. 464 of 2006 (later high court criminal appeal nos. 198-207 of 2008 Hassan M. Ahmed and others vs the Republic.[52] In Hassan M. Ahmed and Others vs the Republic (hereinafter the Hassan M. Ahmed case) the appeal judge did not consider the apparent contradiction between Section 4 of the Criminal Procedure Code (CPC) and Section 4 of the Judicature Act. This apparent contradiction in the provisions of the two statutes was not argued before the court, and the appeal judge dealt with the broad objection to jurisdiction of the court under the second point of the exercise of universal jurisdiction by Kenyan courts. Upon a closer look at the provisions of Section 4 of the Judicature Act, it is reasonable to argue that its mandatory provisions (by the use of the word "shall") on jurisdiction[53] are to be preferred to the permissive provisions (by the use of the word "may") in the CPC whose objective is "to make provision for the procedure to be followed in criminal cases." Although it is difficult to predict what the appeal judge would have found had the point been argued before him, at least it is reasonable to argue that such an argument would have found favor with the court as the most reasonable way to give effect to the provisions of the two statutes.

The appeal judge's finding that UNCLOS had been domesticated in Kenya is not convincing and is incorrect. The judge simply accepted the argument by the counsel for the respondent that UNCLOS had been domesticated "because a contrary view had not been given by the counsel for appellants." Kenya is a dualist state and

[52] [2009] eKLR) in respect of 10 pirates arrested and handed over to Kenya by the US navy after an attack on the Indian vessel *Safina al Bisarat* on 16th January 2006The

[53] See the provisions in the preamble section of the Act which provides that it is "an act of parliament to make provisions concerning the jurisdiction of the High Court, the Court of Appeal and Subordinate Courts and to make additional provision concerning the High Court, the Court of Appeal and the Subordinate Courts and the judges and the officers of the Courts"

therefore parliament has to pass enabling statutes to give effect to international conventions which the country has signed, acceded to, or ratified.[54] Until the last quarter of 2009, the Kenyan parliament had only enacted only a single legislation to domesticate part of the provisions dealing with delineation of maritime zones; to date there is no single Kenyan legislation domesticating all the provisions of UNCLOS.[55] The MSA 2009 domesticates the piracy provisions of UNCLOS, the SUA Convention, the SOLAS, and ISPS Code. The provisions of the MSA 2009 effectively do away with the nexus that is prescribed by Article 105 of UNCLOS.

This article gains particular significance when it is considered that out of over 100 suspected pirates that have been arraigned in Kenyan courts, not a single one of them has been arrested by Kenyan authorities. All the suspected pirates have been handed over to Kenya by western maritime nations under the MOUs. In the case of Re Mohamud Mohamed Dashi and eight Others [2010] eKLR, the requirement for a nexus between the offence and the state establishing jurisdiction was addressed by the counsel representing the state but was not ruled upon by the court.

The state counsel submitted that there was no need for a nexus as the offence that was created by the repealed Section 69 of the Penal Code was piracy *jure gentium* as opposed to piracy by statute and that all states had jurisdiction to try the offence. It is, however, important to note that the court accepted the differentiation between the offence of piracy *jure gentium* and piracy by statute. The court said:

> "The piracy envisaged in Section 69 was "piracy jure gentium". This was not expressly defined. The question that arises is whether "piracy" under Section 371 of the new Act is the same as "piracy jure gentium" in the repealed Act. In the repealed Section the offence was not defined and the court was obligated to find and determine its ingredients through other interpretive sources e.g. Dictionaries, texts and precedent. In this case, the definition is expressly given. It s not possible to state by reading the provision whether "piracy" defined in Section 371 of the new Act is "piracy jure gentium" as stipulated in the repealed Act."

[54] See Okunda vs Republic [1970] EA 453, The East African Community vs Republic [1970] EA 457 (per Mwendwa CJ), and the comments of the House of Lords in Re Piracy Jure Gentium (1934) AC 586.

In R.M. (suing thro' Next friend) J.K. Cradle (The Child Fund) Millie vs A.G. civil case no. 2002 (Nairobi) [2006] eKLR, the High Court noted that even where a treaty has been ratified but is yet to be implemented by a domesticating statute, the court take into account in interpreting an ambiguous section of the a statute. See also R v Keyn (1876)2 Ex. D.63 at p. 203 where the court held that (per Cockburn CJ): "Nor, in my opinion, would the clearest unanimous assent on the part of other nations be sufficient to authorize the tribunals of this country to apply, without an act of parliament, what would practically amount to a new law. In so doing, we should be unjustifiably usurping the province of the legislature. The assent of nations is doubtless sufficient to give the power of parliamentary legislation in a matter otherwise within the sphere of international law; but it would be powerless to confer without such legislation a jurisdiction over foreigners in foreign ships on a portion of the high seas." This decision was affirmed in R v Bow Street Metro. Stipendiary Magistrate, Exparte Pinochet Ugarte (no. 3) (2000) 1 AC 147 holding that it was only after coming into force of Section 134 of the Criminal Justice Act of 1998 that English criminal courts acquired jurisdiction over extra territorial torture. See also Bouisiani, M. Cherif Universal Jurisdiction for International crimes: Historical Perspectives and Contemporary Practice, 42 VA.J. INT'L L. 81, 136-151 (2001) who argues that universal jurisdiction over piracy is firmly established under international law and that it developed in parting the national laws and practices of major seafaring nations.

[55] Although Kenya signed UNCLOS in December 1982, it was not until March 1989. See discussion under the section on "Piracy" under the UNCLOS Regime and the text of supra note 12 above.

Justice J.B Ojwang, in the case of the Republic vs Abdirahman Isse Mohamud and three others[56] also acknowledged the difference but arrived at a different conclusion on the issue of jurisdiction. He said of the repealed section 69 of the penal code:

> "The meaning of the foregoing provision, as I perceive it, is that piracy was being given two dimensions – a territorial-waters dimension, regulated by the ordinary operation of local law, as well as an international dimension, coinciding with the demand of the law of nations, demand that all States should protect the high seas against piracy. Thus, an element of international law was in this way, being grafted into the Kenyan machinery of criminal justice.
> From the foregoing assessment of the repealed s.69 (1) of the Penal Code, I have difficulty appreciating Mr. Magolo's contention: that only "piracy" within the territorial waters (what may be typified as piracy-by-statute) was within the jurisdiction of Kenya's criminal Courts."

The conclusion that can be drawn from this judgment is that, the offence of piracy created under the MSA 2009 is premised on UNCLOS and therefore the provisions of UNCLOS must be followed in order to effectively establish jurisdiction. However, the two high court judgments contradict each other.[57] Although the court in Re Mohamud Mohamed Dashi and eight others did not rule on whether there ought to be a nexus between the offence committed and exercise of jurisdiction by Kenyan courts under the new MSA 2009, it is probable that a verdict in favor of Kenya having jurisdiction would not have carried the day.

5.2 Financial constraints

Kenya is facing financial constraints and as such the implementation of the legislation discussed above is not very effective. In the case of the Republic vs Hassan Jama Haleys Alias Hassan Jamal and five others [2010] eKLR the court noted that:

> "Having said that and before I end I must note that the 'piracy trials' have presented a unique challenge to the Kenyan legal system. We cannot ignore the fact that these are suspects who having been arrested by foreign naval forces on the High Seas are brought to Kenya for trial. They are strangers in the country, do not understand the legal system, may not know what their rights are and do not understand the language. With such barriers it would in my view be crucial that the Kenyan Government and the International partners supporting these trials put in place a system to provide free legal representation for the suspects in these piracy trials"

Without legal representation for suspected pirates, the prosecutions may not meet the internationally accepted standards for prosecutions and thus expose Kenya to the risk of human rights abuses. The Kenyan penal system is already congested, and influx of suspected pirates will just serve to make a bad situation worse.

[56] (Unreported) miscellaneous criminal application no. 72 of 2011

[57] It is interesting to note that the judges who are involved in two of the cases, Justice Mohammed Ibrahim and Justice J.B Ojwang have both been appointed as judged of the Supreme Court of Kenya which was created by under the new Kenyan Constitution.

There is also a need to train Kenya officials, prosecutors, magistrates, and advocates on the law regarding piracy if the country is to effectively prosecute the crime.

As noted earlier, Kenya is conducting prosecutions of suspected pirates pursuant to the terms of bilateral agreements (MOUs) signed between herself and western maritime nations. The provisions of the MOUs are vague on the question of financial support and do not contain a firm commitment of financial resources to fully and successfully implement the terms of the MOUs. For instance, with regard to the Kenya/EU MOU,[58] although Kenya had prepared and submitted a budget of US$5.1 million for the period of 18 months covering the first cycle of the MOUs, the United Nations Office on Drugs and Crime (UNODC) committed itself to financing only US $2.3million leaving a resource gap of US$2.6 million.[59] The opening paragraphs the MOU committed UNODC to giving "limited support" to Kenya, under the arrangement. Under the circumstances, it would be very difficult (and politically imprudent too) for Kenya to support the prosecutions by its limited resources. By March of 2010, the MOU framework had started to collapse when Kenya rejected pirates brought in by foreign navies patrolling the high seas.[60]

5.3 Capacity to implement legislation

Although Kenya has passed legislation to domesticate most international instruments on the fight against piracy it lacks capacity to fully implement most of these legislative provisions. The provisions of the Anti-corruption and Economic Crimes Act cannot be considered to be watertight by any standard and are definitely not directly applicable to piracy cases. The Act can be used to curb remittance of money received as ransom payments to the accounts of the sponsors of piracy off the coast of Somalia. By allowing investment of such money into the Kenyan economy the sponsors of piracy are able to sanitize it and distort the demand in the property market.

The Proceeds of Crime and Money Laundering Act 2010 does not specifically target the ransom money paid to sponsors of piracy, it does not specifically target artificial persons who may be beneficiaries of the proceeds of crime, it does not specifically include terrorist financing, and it does not place obligations on the financial institutions to ensure that they fully participate in the war against money laundering.[61] The various institutions required to be set up under the Act are yet to be

[58] Supra note 44

[59] Part 10 the Kenya/EU MOU entitled "Breakdown of Activities" where a sum of US$2.3million or €1.75 million is provided for as the budget to implement the terms of the MOU.

[60] On Thursday 25 March, 2010, Kenya rejected four suspected pirates who had been arrested the regional police chief Leo Nyongesa said the police hands were tied since there were many pirates on trial in Kenya and they could not accept more as it was a government directive, and there is no way they could bend it to allow the four suspected pirates on Kenyan soil. See story at http://webcache.googleusercontent.com/search?q=cache:CMzYdfb68nMJ:es.ganges.com/news/view/Overwhelmed_Kenya_rejects_suspected_819482/+Overwhelmed+Kenya+rejects+suspected+pirates&cd=2&hl=en&ct=clnk&gl=ke&client=firefox-a&source=www.google.co.ke (last accessed on 1 August 2011)

[61] For a discussion on the expected international standards in fighting money laundering see the report of the Council of Europe's Committee of Experts on the Evaluation of Anti-Money Laundering Measures and Financing of Terrorism (MONEYVAL) in the 1-2/2009 edition of *eucrim* (The European Criminal Law Associations Forum) at p. 31.

set up. These include the Financial Reporting Centre to disseminate information collected pursuant to the Act and to ensure compliance with international standards in anti-money laundering measures[62]; the Anti-Money Laundering Advisory Committee to advise the director of the centre on the performance of his functions[63]: the Assets Recovery Agency[64]and the mechanism to enforce obligations of reporting institutions.[65]

6 Conclusion

Kenya has set the pace in the fight against piracy in the high seas and armed robbery against ships in its territorial waters by criminalizing the two offences and expanding the jurisdiction to try suspected pirates whether the offences are committed in Kenya or elsewhere, whether by Kenyans or non-Kenyans, and whether on Kenyan ship or on a foreign ship. Other regional states should follow the legislative model adopted by Kenya so that there is a uniform legislative framework in the region. However, states should adopt legislation that is consistent with international legal instruments to which they bear obligation. Any departure from the norms spelt out in the international legal instruments will create uncertainties in the domestic laws of regional states.

The burden of prosecuting suspected pirates should not be left to a few states. All states in the region should be involved in fighting the piracy menace. This calls for the regional states to internally harmonize their policies and laws relevant to the fight against piracy in order to facilitate harmonization of regional policies and laws.

There is also a need for the regional states to cooperate with western maritime nations. The fight against piracy off the horn of Africa can only succeed if the regional states cooperate with other maritime nations with expeditionary (blue-water) navies. Such a framework of cooperation exists under the Djibouti Code. Regional states should hasten to fully implement the Djibouti Code so as to achieve coordinated approach in the fight against piracy.

The fight against piracy should not just target the actual perpetrators of the piratical attacks, but it should also target the sponsors. Kenya has put in place an elaborate legislative framework to fight organized crime and money laundering with clauses for provision of mutual legal assistance. Other states in the region should follow this model and not only enact legislation that can be used to net sponsors of piracy but should also accept to receive suspected pirates for trial or alternatively receive convicted pirates to serve jail terms in their domestic prisons. This will help share the burden of fighting piracy between the regional states.

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