TANZANIA'S LEGAL REGIME FOR COMBATING THE THREAT OF PIRACY

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A THESIS SUBMITTED IN FULFILLMENT OF THE REQUIREMENTS FOR THE DEGREE OF DOCTOR OF PHILOSOPHY OF THE OPEN UNIVERSITY OF TANZANIA

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CERTIFICATION

The undersigned certify that they have read and hereby recommend for acceptance by The Open University of Tanzania a thesis entitled, **Tanzania's Legal Regime for Combating the Threat of Piracy,** in fulfilment of the requirements for the award of Degree of Doctor of Philosophy (PhD).

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DEDICATION

This Thesis is dedicated to my late father Mr. Burchard Rwechungura (1919 – 1995); my late mother Mrs. Agnes Marcel (1925 – 2020); my late brother Rev. Fr. Gaudiosius Rutakyamirwa (1948 – 2014); and my late sister Mrs. Esther Mushema.

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ABSTRACT

For a country to deal with piracy it has to implement the universal definition of piracy as provided in international law. However, piracy rules set by the international legal framework for piracy raise concerns. These concerns raise questions as to whether those rules can enable individual states to adequately curb piracy at their level. This study seeks to address these concerns. It investigates legal challenges at domestic level emanating from the universal definition of piracy. It also interrogates the adequacy of the existing legal framework in protecting maritime business against piracy. Similarly, the relevancy of general principles and guidelines enshrined in other international instruments for suppressing piracy are assessed. The study employs mainly doctrinal legal research methodology which is supplemented by comparative and historical methods. The study is delimited to Tanzania. After the consideration of the above issues the research finds that Tanzania lacks a comprehensive law to regulate piracy. Consequently, the research recommends a law reform in Tanzania. As well, the study recommends for adoption of a maritime policy.

Keywords*: Piracy Suppression, Universal Definition, National Legislation*

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LIST OF ABBREVIATIONS AND ACRONYMS

AU	African Union
Cap.	Chapter
CGPCS	Contact Group on Piracy off the coast of Somalia
CPA	Criminal Procedure Act
CURT	Constitution of the United Republic of Tanzania
Dr.	Doctor
EAC	East African Community
Ed.	Editor
Edn.	Edition
EEZ	Exclusive Economic Zone
et al	And another/others
ETU	Education and Training Unit for Democracy and Development
HCT	High Court of Tanzania
HESLB	Higher Education Students' Loans Board
Ibid/id	Ibidem (same as above)
ICC-IMB	International Chamber of Commerce International Maritime Bureau
IGAD	Intergovernmental Authority for Development
ILC	International Law Commission
IMO	International Maritime Organization
ISCs	Information System Centers
ISM	International Safety Management
ISPS	International Ship and Port Facility Security

Jr.	Junior
MEA	Multinational Environmental Agreements
MSS	Maritime Security Strategy
No.	Number
p.	Page
Para	Paragraph
PhD	Doctor of Philosophy
pp.	Pages
R.E	Revised Edition
ReCAAP	Regional Cooperation Agreement on Combating Piracy and Armed
RECs	Regional Economic Communities
Rev.	Review
RN	Royal Navy
SAR	Search and Rescue
SAR	Singapore Assault Riffle
SMG	Sub-Machine Gun
SOLAS	International Convention for the Safety of Life at Sea
SUA	Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation, 1998.
TASAC	Tanzania Shipping Agencies Corporation
TLS	Tanganyika Law Society
UK	United Kingdom
UN	United Nations
UNCLOS	United Nations Convention on the Law of the Sea, 1982

UNCTAD	United Nations Conference on Trade and Development
UNGA	United Nations General Assembly
UNSC	United Nations Security Council
UNSG	United Nations Secretary General
URT	United Republic of Tanzania
USA	United States of America
USD	United States Dollar
Vol.	Volume
WFP	World Food Program
WMD	Weapons of Mass Destruction
WMU	World Maritime University

CHAPTER ONE

GENERAL INTRODUCTION

1.1 Background to the Problem

Transport of goods by sea is very important in transporting goods across countries for the worlds' business trade. It is believed that carriage of goods by sea is number one means of transport in the world because of its ability to carry large amount of goods from one place to another. Hence, it facilitates trade and investment and contributes to the economic development. To obtain economic advantage of the carriage of goods by sea, maritime laws must effectively safeguard carriers in the high seas. In absence of proper protection by law, carriage of goods by sea likely to be affected by perils of the sea and other human actions likely to affect international trade. Piracy is one of the human actions which is affecting transport of goods by sea.

Piracy is any act of violence or detention or any act of degradation, committed for private ends. It includes participation in the operation of a ship with knowledge that the ship is intended to be used in acts of piracy.[1] It is a threat which has not only put seafarers' lives at great risk, but also has subjected the common man all over the world to higher cost of commodity prices as a direct result of escalating cost to ship

[1] Penal Code, s 66(1). At international level, piracy is described as: any illegal acts of violence or detention, or any act of depredation, committed for private ends by the crew or the passengers of a private ship or a private aircraft, and directed: on the high seas, against another ship or aircraft, or against persons or property on board such ship or aircraft, 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 of an aircraft with knowledge of facts making it a pirate ship or aircraft or any act of inciting or of intentionally facilitating any offence in the high seas.

goods to the region from overseas.[2] For example, between 2010 and 2012 piracy off the coast of Somalia estimated to cost the world more than USD12 billion.[3] This includes but not limited to, counter-piracy naval operations, ransom payment as well as higher insurance premium rates for commercial shippers.[4] Piracy is perceived as ancient as maritime commerce itself and has existed in virtually all of the world's oceans.[5] Notably, piracy is regarded as a continued threat because it has never gone.[6] For instance, from January to June 2021 there was 68 global maritime piracy and armed robbery incidents.[7] This means, the threat still exists as risks remain to seafarers.[8]

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2 The UNSC categorize piracy under transnational security threats. Other threats include drug and human trafficking, pandemics and transnational organised crime. A detailed account of this is available in SC, Research Report on The United Nations Security Council and Climate Change, 21 June 2021, No. #2. The exclusive character of the definition of piracy is covered under Article 101 of the United Nations Convention on the Law of the Sea,1982 (UNCLOS). According to this Article, piracy can only be committed on the High Sea. Section 66(1) of the Penal Code, Cap. 16 R.E. 2019 of Tanzania, defines piracy as (a) any act of violence or detention or any act of degradation, committed for private ends; (b) participation in the operation of a ship with knowledge that the ship was intended to be used in acts of piracy; or (c) incitement or intentional facilitation of either (a) or (b). Section 66(1)(c) appears aimed at financiers and pirate sponsors, permitting prosecution of individuals who never step foot aboard a pirate ship. Section 66(1)(b) permits prosecution of individuals who are not engaged in an attack of a vessel, provided that it can be proved that the ship in which they are traveling was intended to be used for piracy.

3 Scharf, M. and Taylor, M.S.C., "*A Contemporary Approach to the Oldest International Crime*," Utrecht Journal of International and European Law, 2017, Vol. 33, No. 84, pp 77-89, at p77, https://doi.org/10.5334/ujiel.373. (Accessed 21st November, 2018); and Dowdle, P., *A Dire Need for Legislative Reform*, Pace International Law Review, 2015, Vol. 27, No. 2, pp 613–639, https://digitalcommons.pace.edu/pilr/vol27/iss2/4 (Accessed 27th January, 2019).

4 *ibid*.

5 Mejia, Q.M., *et al*, ,,Ergonomics, Economics and the Law: The International Regime of Maritime Security, WMU Publications, Malmö, 2009, p. 5.

6 ICC-IMB, Report on Piracy and Armed Robbery against Ships Report for the Period: 1January – 31 March 2021, London, ICC-IMB Bureau, 2021, pp. 1-30, www.icc-ccs.org (accessed 31st August, 2021).

7 ICC-IMB, Piracy and Armed Robbery against Ships Report for the Period: 1January – 30 June 2021, London, ICC International Maritime Bureau, 2021, pp. 1-44, www.icc-ccs.org (accessed 31st August, 2021).

8 Allseas Global Logistics Ltd, The threat of piracy in the shipping industry, International Shipping News, 7th December, 2020, https://www.helleniscshippingnews.com, (Accessed 31st August, 2021).

By customary international law a pirate is *hostis humani generis*[9] and is subject to universal jurisdiction.[10] As a principle, piracy offence attracts universal jurisdiction in the sense that, every State can prosecute piracy.[11] This principle has been codified in the modern legal framework of maritime security particularly under Articles 100 to 107 of the United Nations Convention of the Law of the Sea of 1982 (UNCLOS).[12] However, just like any other international law, UNCLOS sets the offence and the issue of trial and punishment of pirates is left to be taken care by individual states under their domestic legal system.

Tanzania ratified UNCLOS in 1985,[13] and incorporated some of UNCLOS provisions in its law including piracy provisions.[14] However, despite having piracy provisions in its law, Tanzania did not have a legal base to prosecute piracy in the high seas.[15] In 2010 therefore, Tanzania amended among other laws[16] the Penal

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9 The term *hostis humani* generis lliterally means, 'the enemies of all mankind.'

10 Hovell, D., The Authority of Universal Jurisdiction, *European Journal of International Law*, 2018, Vol. 29, No. 2, pp. 427–456. https://doi.org/10.1093/ejil/chy037; Palmar, A., The New Pirates: Modern Global Piracy from Somalia to the South China Sea, Tauris and Company Ltd., New York, 2014; Akiyama, Masahiro, "New Approaches to Protecting Shipping from Piracy and Terrorism," in Van Dyke, Jon M., „(eds.), Governing Ocean Resources: New Challenges and Emerging Regimes, Leiden and Boston: Martinus Nijhoff Publishers, 2013, p. 375; Tuerk, H., "Combating Piracy: New Approaches to an Ancient Issue," in Castillo, Lillian Del (ed.), Law of Sea: From Grotius to the International Tribunal for the Law of the Sea, Leiden and Boston: Brill Nijhoff, 2015, p. 469.

11 Republic v Mohamed Nur Adam & 6 Others, Criminal Sessions No. 123 of 2015, HCT, Dar es Salaam, (Unreported), 4.

12 At international level, piracy is described 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: (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 (a) or (b) above. See UNCLOS, Article 101.

13 Hovell, D., the Authority of Universal Jurisdiction, (n 10), p10.

14 For example, territorial, economic and exclusive zone issues in Tanzania are provided under Territorial Sea and the Exclusive Economic Zone Act, No. 3 of 1989.

15 Penal Code, s. 6 (before amendment).

Code, Cap. 16 R.E. 2019 (herein after referred to as the Penal Code) so that courts of Tanzania can try high seas piracy cases. The criteria for an act to qualify as piracy in Tanzania are provided under Section 66(1) of the Penal Code.

The driving cause for the amendment was an alarming increase in reported cases of high seas piracy between 2008 and 2012 particularly off the Somalia coast.[17] During this period, the number of piracy incidents increased consistently, and the threat to shipping became highly alarming. Dar es Salaam Port in Tanzania is one of the shipping lanes through Tanzanian waters. Due to the increase of piracy attacks in Indian Ocean, there was a concern that the leading seafarers nations may refuse to crew ships which are sailing near the Gulf of Aden.[18] At least 111 incidents of piracy took place within off Somalia coast waters in 2008, whereas expansions of piracy incidents spread towards east and south of Somalia coast.[19] This situation resulted to the increase of piracy incidents within Tanzania's territorial waters, and within its Exclusive Economic Zone (EEZ).[20] Since 2008 therefore, examples of piracy activity became a common place in Tanzania.[21] During the year 2011, for instance, there were attacks both within Tanzania's territorial waters and within its

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16 *ibid* (after amendment).

17 Chang, D., *Piracy Laws and the Effective Prosecution of Pirates*, 33 B.C. International and Comparative Legal Review 273 (2010), http://lawdigitalcommons.bc.edu/iclr/vol33/iss2/3, p 278.

18 Phillips, R.L., A war on piracy (Part 1), Tanzania – a case study, *Communis Hostis Omnium*: Navigating the Murky Legal Waters of Maritime Piracy, https://piracy-law.com/2011/03/03/tanzania-%e2%80%93-a-case-study/. (Accessed 25th May, 2022).

19 ICC: Commercial Crime Services, 'Pirate attack off Somalia already surpass 2008 figures – IMB,' International Chamber of Commerce, London. https://icc-ccs.org/index.php/337-pirate-attacks-off-somalia-already-surpass-2008-figures (Accessed 1st September, 2021).

20 Mbekeani, K. K. and Ncube, M., (2011), Economic Impact of Maritime Piracy, Africa Economic Brief, African Development Bank (AFDB), Vol. 2, No. 10, July.

21 *ibid.*

EEZ.[22] In February 2011 for example, pirates were captured on the traditional tourist hot-spot of Mafia Island with various weapons, including magazines laden with rounds of ammunitions, sub machine gun (SMG) and Singapore Assault Rifle (SAR) guns.[23]

Due to the magnitude of Somalia piracy threat in the Indian Ocean, various anti-piracy international measures was taken between 2010 and 2011 although did not yield tangible success. For example, apprehended piracy suspects were released without any legal action because piracy legislation of various countries was either outdated or not comprehensive enough to effectively prosecute piracy.[24] Having affirmed that failure to prosecute piracy suspects off the coast of Somalia undermined international anti-piracy efforts, the United Nations Security Council (UNSC) compelled every nation to criminalize piracy under their respective national laws via Resolution 1918 (2010)[25]. Equally, the world community formed an anti-piracy coalition, and a Maritime Security Patrol Areas (MSPA) was established in the Gulf of Aden. Such coordinated international response to Somalia piracy including additional patrols of United States (U.S.) and European naval ships in the waters around Somalia, led to the negligible number of piracy attacks in the preceding five years.[26]

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22 Phillips, R.L., A war on piracy (Part 1), Tanzania – a case study, (n 18).

23 *ibid.*

24 The UNSC was concerned over cases when persons suspected of piracy were released without facing justice. Therefore, at its 6301st meeting on 27 April 2010 the SC adopted Resolution 1918 (2010) to create conditions to ensure that pirates are held accountable. Detailed information of this is available at https://digitallibrary.un.org/record/681282?ln=en.

25 *ibid.*

26 See in general ICC-IMB, Piracy and Armed Robbery Against Ships Annual Reports, at www.icc-ccs.org.

However, since 2017 the situation has changed[27]. Piracy has certainly increased.[28] Nine pirate attacks for example, were reported off the coast of Somalia in 2017. This was an increase of two attacks since 2016, prompting International Maritime Bureau (IMB) to warn that Somali pirates "retain the capability and intent to launch attacks against merchant vessels hundreds of miles from their coastline."[29] Furthermore, in 2018 a small Iranian fishing boat[30] was hijacked off the coast of Somalia.[31] In general, recently there has been mounting concerns that the period of relative calm may be over, and the threat from piracy could increase further.[32] While ratification of UNCLOS and amendment of domestic law to address piracy is an important step, the effectiveness of such developments requires further investigation to ensure security in the high seas in safeguarding interest of the country.

1.2 Statement of the Problem

The problem which this research sought to address is the controversial criteria set for an act to qualify as piracy in Tanzania. The provision of Section 66(1) (a) (i) and (ii) of the Penal Code, clearly grants the room for prosecution of piracy cases. Equally, Section 6 of the Penal Code grants jurisdiction to courts of Tanzania to try high seas piracy. The issue that remains is whether the current piracy provisions of Tanzania

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27 *ibid.*

28 *ibid.*

29 Johnson, B., Piracy Perk: Somalia 'Crucible of Innovation' Guides Maritime Strategies, 2 March, 2018. https://www.hstoday.us/subject-matter-areas/maritime- security/piracy-perk-somalia-crucible-innovation-guides-maritime-strategies/, (Accessed 20th April, 2018).

30 *ibid*. Fishing boats are normally used by pirates as "mother ships".

31 Monks, K., 'Piracy threat returns to African waters,' CNN, January 3, 2018, https://edition.cnn.com/2017/05/25/africa/piracy-resurgence-somalia/index.html. (Accessed 9thApril, 2018).

32 Raj, M. *et al.*, ,,Why pirates attack: Geospatial evidence, Future Development, 15 March, 2021, https://www.brookings.edu/blog/future-development/2021/03/15/why- pirates-attack-geospatial-evidence/. (Accessed 29th September, 2021).

legislation are adequate to address the gaps that exist in the universal definition of piracy under UNCLOS. The concern on the adequacy of piracy provisions in the existing legal framework of Tanzania raise doubts because they emanate from Article 101 of UNCLOS which has been problematic since its inception.

The rules enshrined under this Section 66 of the Penal Code require that, for an offence of piracy to exist there should be an illegal act of violence committed for private gain using a ship to attack another ship in a sea place outside the jurisdiction of another state.[33] In this case, the Section sets four rules that should be met. They include the illegal violence rule, [34] the private gain rule,[35] the two-ship rule,[36] and the high seas rule.[37] However, the rules provided under this Section are subject to controversies because piracy incidents today hardly meet these rules.

Furthermore, Section 66(5) of the Penal Code complicates the already complicated definition of piracy by excluding boats and skiffs from the definition of a pirate ship. This is challenging because from the provision of this Section perpetrators who use boats or skiffs to attack ships on the high seas are exonerated from liability.

Fundamentally, the application and effect of international conventions with the domestic legal order is governed by the domestic constitutional law or other supreme

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33 Penal Code, s 66(1) (a).

34 *ibid.*

35 *ibid*, s 66(1) (a) (i).

36 *ibid*, s 66(1) (a) (ii).

37 *ibid*. Although the terms 'high seas' is not appearing anywhere in Section 66 of the Penal Code, which defines piracy in Tanzania, yet the term 'a place outside the jurisdiction of any state' in this Section implies the high seas. This is in accordance with s 6(2) of the Penal Code; and also Article 86 of UNCLOS.

law of the land.[38] In this regard, to enable the application of piracy provisions under international law, Tanzania had to amend its piracy law[39] by incorporating the high seas piracy provisions regime under UNCLOS since she is a party to that convention.[40] However, the available jurisprudence reveal that, apart from being silent on the issue of prosecution since the advent of UNCLOS piracy provisions under it have been a serious global challenge. The use and application of the word "piracy" for example, has become problematic, since the vast majority of maritime attacks today do not meet the criteria set out in Article 101.[41]

For example, proving the intent of perpetrators at domestic level has always been difficulty.[42] Equally, as a 'constitution of the oceans,'[43] UNCLOS will not specify punishment. Just like any other international law, UNCLOS will normally make the prohibition but leave sanction to states to handle through their domestic legal system. So even in the area of crimes of universal jurisdiction or what others may call international crimes, international law does not prescribe punishment. That is a matter left to domestic legal systems.

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38 Mukherjee, P.K., Maritime Legislation, WMU Publications, Malmo, Sweden, 2002, p 126.

39 Penal Code, ss 6 and 66, after amendment.

40 List of parties to the United Nations Convention on the Law of the Sea, at https://en.wikipedia.org/wiki/List_of_parties_to_the_United_Nations_Convention_on_the_Law_of_th e_Sea#List_of_parties.

41 Evidentially issues for example, have posed a huge challenge in piracy prosecution. The cases of *Republic v Dahir*, *United States v Said, United States v Hassan12, the 'Cygnus' Case*, and *In re Hashi* can serve as good examples. See Rwechungura, H.B. and Mayagilo, T.J., *Enforcing Piracy Provisions in Tanzania*, Tanzania Lawyer Journal, 2020, Vol. 1, No. 1, pp. 133-143, p. 141.

42 *ibid.*

43 For a detailed account of this see Remarks by Tommy T. B. Koh, President of the 3rd United Nations Conference on the Law of the Sea, at https://www.un.org/depts/los/convention_agreements/texts/koh_english.pdf.

It is worth noting also that, although there have been incidents of piracy in Tanzanian waters from Somalia perpetrators there is only one decided piracy case in Tanzania. However, the available literature show that, numerous suspected Somali pirates encountered by navies are released without being sent for prosecution. Douglas, for example, provides an overview of how Somali pirates are presently being prosecuted, the practical challenges faced by international navies and the applicable law. He concludes that release of captured pirates without taking any legal action gives rise to assertions that other nations including Tanzania are not prosecuting enough pirates to create a deterrent effect.[44] These arguments withstand sustained scrutiny.

Most importantly, when surveying piracy cases in Tanzania, it is notable that in 2018 the High Court of Tanzania (Mlyambina; J.) sitting in Dar es Salaam observed that:

> *"…the interests of justice in piracy cases would be best served if the Penal Code of the United Republic of Tanzania Cap. 16 (R.E 2002) would be amended to catch up with the developments at international level and particularly Article 3 of the Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation, 1988…".*[45]

This opinion brings the need to assess the legal regime so as to identify the gaps in Tanzania legislation.

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44 Guilfoyle, D., *Prosecuting Somali Pirates: A Critical Evaluation of the Options*, Journal of International Criminal Justice, 2012, Vol. 10, No. 4, pp. 767–796. https://academic.oup.com/jicj/article-abstract/10/4/767/809028 (Accessed 28 November 2018).

45 Republic v Mohamed Nur Adam and 6 Others, (n 11), p 69.

1.3 Literature Review

There is a dearth of literature which comprehensively covers the subject of piracy in Tanzania. Some authors have dealt with piracy at different levels and perspectives, but not specifically in Tanzania. Nevertheless, the literature that the researcher has been able to come across have been a useful pointer towards understanding the main concepts relating to piracy at sea. They have also assisted a great deal to know how much has been done so far and what is left, hence, basing upon the findings, the researcher has been able to frame key issues in the area of study.

The literatures reviewed have been clustered into two clusters to give an easy coverage and understanding of the contents that has been analysed. The arguments of the authors in the literatures have covered an array of issues pertaining to maritime security, revolving around the complications in the definition of piracy. Therefore, despite the fact that scholars have been grouped in one cluster, they may have partially written something concerning a cluster to which they have not been included. In this regard, the contents should not be construed to totally limit coverage of the works for the authors reviewed.

The first cluster involves scholars who advocate for holistic response to maritime security crime. They posit that offences with admiralty nature are interconnected. These offences involve, for instance, suicidal terrorism where the perpetrator has no hesitation in dying for his cause. According to them, in this case there is hardly a proper sanction that can be imposed. Therefore, they recommend for a maritime

policy-based approach as an effective response which will cut across all maritime security crimes.

The second cluster involves authors who argue that, controversies in the definition of piracy under international instruments should be rectified in domestic legislation. The rationale for their argument is that, piracy is already defined under international law. International law will normally deal with substantive provisions. The procedural part of it is left to domestic jurisdictions. Their argument bases on the phenomenon that, unlike other maritime offences, piracy is a *jus cogens* offence. Therefore, states have room to develop their piracy legislation as per the universal jurisdiction vested to them by Article 105 of UNCLOS to capture and prosecute piracy.

Apparently, scholars who argue in favour of a maritime policy as an effective response to piracy and other maritime security crimes include Nordfjeld, Dalaklis and Mejia, Walker, Pyć, Hamad, Gurumo, and H. B., Williams and Pressly. In their study, Nordfjeld and his fellow authors make analysis of criminal activities which are related to piracy, armed robbery against vessels, including transnational organized crime. They equally identify possible solutions to respond to such illegal activities.[46] According to them, the development of a maritime transport policy is vital for effective response to piracy and the allied crime.

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[46] Dalaklis, D., *et al.*, „Technical Report on "Repercussions of a Weak Ocean Governance and a Non-existent Maritime Security Policy: The Resurgence of Piracy/Armed Robbery Against Vessels and Other Transnational Organized Crime at Sea in the Gulf of Mexico," Latin American E-Forum "Opportunities in the Americas and the Caribbean, beyond the 2020 global emergency," Santiago, Chile, 31st July, 2020.

The authors commend that the national transport policy should include a maritime security policy with respective strategies and specific actions to secure ports, vessels and their crews. They also suggest that, such strategy should include the combat of logistic infrastructure from pirates both at sea and onshore. Although their study focuses on Mexico, yet it unveils useful information with regard to salient features of a contemporary maritime security policy. However, it differs from this study because apart from piracy the study also covers other numerous transnational crimes.

Walker in his study titled SADC'S Pursuit of Maritime Security in a Region Lacking Regionalism, discusses the foreign policies of SADC member states regarding maritime security.[47] He cautions that, the kinds of maritime crimes, which include piracy, are becoming far more numerous in the African maritime domain. He asserts that, the crimes are transnational, sophisticated and complex in nature than in the past. Walker contemplates that these offences are interlinked intricately enough to mark them as presenting a complicated kind of security challenge.

The author cites the 39th Ordinary Summit of the Heads of State and Government of SADC[48] during which it was resolved to jointly address maritime security threats. These threats include piracy, maritime terrorism, drug trafficking and illegal carrying and trafficking of weapons and ammunition as part of a SADC Maritime Security Strategy (MSS). His study reveals that many SADC member states have embraced

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47 Walker, T., *SADC's pursuit of maritime security in a region lacking regionalism*, South African Journal of Military Studies, 2019, Vol. 47, No. 2, pp. 53-70. https://journals.co.za//doi/abs/10.10520/EJC-1ddd181dd4 (Accessed 31st August, 2021).

48 The 39th Ordinary Summit of the Heads of State and Government of SADC in Dar es Salaam, Tanzania in August 2019.

regionalism in their policies and preparations to address maritime insecurity issues. However, according to him, many SADC member states do not prioritise implementing the MSS to accomplish these objectives. Nevertheless, while Walker dwells on several maritime security issues within SADC member states, this study is limited to piracy in Tanzania.

Pyć joins other scholars who advocates for a maritime policy in the fight against piracy by presenting a few general comments on the effective global ocean governance through maritime policy.[49] He posits that, UNCLOS establishes fundamental legal principles for the governance of the marine environment and its resources to ensure secure and safe oceans. In his view, UNCLOS is no longer a solution for all new challenges arising within the scope of the law of the sea within which piracy is defined.

The author argues that there is a need to provide more practical approaches to global ocean governance at international and national level. He suggests that, governance of ocean should be implemented through the holistic paradigm of sustainable development. Pyć cites the EU as an example of the regional level where an integrated maritime policy is promoted. He expresses, for instance that, it is an obligation for each EU member state to prepare national integrated maritime policy as a part of the integrated maritime policy of EU.

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[49] Pyć, D., *Global Ocean Governance*, International Journal on Marine Navigation and Safety of Sea Transportation, Vol. 10, No. 1, 2016 at: http://www.transnav.eu. DOI:10.12716/1001.10.01.18.

Williams and Pressly also analyse the driving forces behind piracy. [50] Their areas of focus include the Gulf of Aden, Southeast Asia and the Gulf of Guinea. They posit that the modern transnational piracy paradigm calls for a solution that is both global and addresses modern piracy. They urge that, in light of the recent decades of developments in maritime piracy, it has become clear that multifaceted approach is called for. They recommend for an international court to coordinate and secure prosecutions against pirate financiers and destroy their transnational criminal networks. According to them, a set of policies that at once allows private industry to innovate while requiring it to internalize the maximum amount possible of the political, legal, and economic costs of the shipping industry is vital.

To some extent, the current study concurs with the opinion of the authors particularly on the issue of policy because it is from the policy that an effective legislation can be enacted. According to Education and Training Unit for Democracy and Development (ETU) a policy outlines what a Government Ministry hopes to achieve and the methods and principles it will use to achieve them. According to them, although a policy document is not a law yet it will often identify new laws needed to achieve government goals.[51].

Similarly, Hamad analyses the main maritime policy and maritime security challenges facing the six East African Community (EAC) states and how the EAC

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50 Williams, P.R. and Pressly, L., *Maritime Piracy: A Sustainable Global Solution*, Case Western Reserve Journal of International Law, 2015, Vol. 46, No. 1, pp 177 – 215. https://scholarlycommons.law.case.edu/, (Accessed 28th November 2018).

51 *ibid*.

can resolve them.[52] Hamad's research recommends for establishment of EAC maritime security strategy and a maritime security regime to improve and manage regional maritime security. Thus, although the current study relates to Hamad's but not exactly the same. This study focuses on Tanzania mainland, looking at the challenges in piracy provisions with a view that, piracy legal framework should be designed by individual states in such a way that they are functional, efficient, equitable and consistent with human abilities and limitations to ensure safe maritime operations for economic development.

Writing on blue economy concept, Gurumo reveals the potential of a maritime policy especially in a maritime country.[53] She posits for example that, following the good efforts made by Tanzania to achieve development through the maritime sector, it is good to have a strong plan for sustainability. According to her, this may include actions that define blue economy as well as having policies and other guidelines governing priorities in the maritime sector such as security at sea. Maritime security is one of the core components in ensuring a thriving blue economy which is the area of focus in Gurumo's work. Similarly, the author dwells on Tanzania just like this study. However, although Gurumo's area of study falls within the context of maritime security, yet her work does not deal with piracy.

On the other hand, the authors who advocate for rectification of piracy controversies in the domestic legislation under the second cluster involve Simelane, Rwechungura

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52 Hamad, H.B., The East African Community's Maritime Domain: An Innovative Institutional Framework, PhD Thesis, University of Greenwich, United Kingdom, 2017, p 94.

53 Gurumo, T.S., "*Uchumi wa Bluu: "Fursa na Chachu ya Maendeleo,"* Toleo la Kwanza," pS-Counseling Consultants, Dar es Salaam, 2021.

and Mayagilo, Guilfoyle and McLaughlin, Akshat, Honniball, Bendera, Fernando, Mujuzi, Gotlieb, Ahmad, and Wu. Simelane makes an analysis of piracy from both legal and security points of view.[54] His work focuses on piratical activity and the essential elements thereof.[55] He asserts that the definition of piracy under UNCLOS is vague to the extent that it is impossible to establish with a degree of certainty what the meaning, scope and content of piracy is.[56] He argues further that the elements of the crime of piracy at domestic level must not deviate from the essence of the crime the meaning of which is universal.[57] According to him, some of the elements in UNCLOS are outdated and find no relevance to contemporary piracy or modern international criminal law principles.[58] He therefore recommends for abandonment of the existing elements "in favour of a realistic practical elements which address the security threat posed by piracy."[59] While the author makes contribution to the existing literature of maritime security.

Rwechungura and Mayagilo present the contribution of the only piracy case decision in Tanzania by the HCT namely Republic v Mohamed Adam & 6 others. The gist of the authors' work is to enlighten stakeholders on their duty to ensure suppression of maritime security offences.[60] According to them, some challenges in the domestic implementation of international provisions for piracy will inevitably remain as they

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54 Simelane, T., Hostis Humani Generi: Towards an Effective Legal Framework to Combat Maritime Piracy – A South African Perspective, PhD Thesis, Stellenbosch University, South Africa, 2020.

55 *ibid.*

56 *ibid.*

57 *ibid.*

58 *ibid.*

59 *ibid.*

60 Rwechungura, H. B. and Mayagilo, T. J., *Enforcing Piracy Provisions in Tanzania*, (n 41) p 134.

stem from stringent criteria in UNCLOS. They argue that, although the issues in this case were not exhaustively described, should be sufficient for legal practitioners to work on tangible loop holes existing in the international legal framework for investigation and prosecution of piracy.[61] However, unlike the current study, the authors do not highlight the exact provisions which contain gaps in Tanzania's legal regime.

Guilfoyle and McLaughlin[62] concur with authors who admit that defining piracy is exceptionally difficult.[63] In their work the authors consider some of the difficulties in interpreting and applying the provisions of piracy as drafted under international and regional instruments. They focus on Article 101 of UNCLOS and Article 28A(5) of the Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights 2014.[64] The authors posit that, in as much as UNCLOS is a codification of customary international law which grants universal jurisdiction to all states to prosecute piracy suspects, the most likely technique for resolving the ambiguities in the Protocol would be to treat the relevant provisions of UNCLOS as stating customary law. They add that, so long as UNCLOS has not abrogated the universal jurisdiction over piracy, member states to the Protocol may, without violating the general principle, choose to exercise universal jurisdiction over piracy regardless of the geographical location.

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61 *ibid.*

62 Guilfoyle, D., and McLaughlin, R., (2019). The Crime of Piracy. The African Court of Justice and Human and Peoples' Rights in Context, pp. 388-408. DOI:10.1017/9781108525343.015.

63 *ibid.*

64 The definition of piracy under these instruments is identical save for the addition of the word 'boat' in the definition of the Protocol.

Akshat on his side traces the formation of treaties, conventions, legal and non-legal documents formed under international law to combat piracy.[65] His study is limited to evolution of the definition of piracy.[66] The author investigates the way traditional and existing instruments define piracy and whether the definitions they provide covers all the legal aspects. He focuses on the modern definition of piracy under UNCLOS.[67]

Akshat asserts that, the definition of piracy continues to pose problems in today's community. According to him, the phrase "private ends" should be interpreted in an objective manner to include other incidents such as maritime terrorism which are left out of the scope by existing definition. Further the author recommends for a law reform. The current researcher departs from Akshat's view by looking at piracy as a threat to the maritime security for the purpose of examining whether the current legislation of Tanzania has taken care of the gaps under UNCLOS where the legislation emanates.

Similarly, Honniball attempts to resolve the challenge of the term 'private ends' as it appears in the universal definition of piracy under UNCLOS. His view is centered on the fact that, piracy provisions under UNCLOS grants states the right to exercise universal jurisdiction, so long as relevant rules are cumulatively met.[68] He posits further that, although current precedents are insufficient to establish a recognised

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65 Akshat, B., Defining Piracy Under International Law*: The Process and the Problems,* (April 2, 2018), https://ssrn.com/abstract=3362181 or http://dx.doi.org/10.2139/ssrn.3362181.

66 *ibid.*

67 *ibid.*

68 Honniball, A., *"Private Political Activists and the International Law Definition of Piracy: Acting for 'Private Ends,"* Adelaide Law Review, 2015, Vol. 16, No. 36(2), pp 279-328, www.internationalcrimesdatabase.org, (Accessed 26th August, 2021).

definition of 'private ends' under international law, it is hoped they will be followed and therefore not exclude violent acts perpetrated by individuals from effective punishment merely because such actors were motivated by political goals. Although Honniball touches on one of the chronic rules for piracy, yet it differs from the current study which concentrates on addressing the potential gaps in the definition of piracy under Tanzania's legal regime in line with the threat which piracy may pose to the maritime sector.

Bendera takes a different perspective.[69] He limits his work to admiralty and maritime law in Tanzania on general basis. [70] The author briefly touches on the main source of piracy.[71] He posits that, in Tanzania criminal matters with admiralty nature such as piracy are mainly covered under the Merchant Shipping Act, No. 21 of 2003 and the Penal Code. The author clarifies however that, procedural rules for admiralty matters do not exist in Tanzania. In his work, he proposes for enactment of such procedures by the relevant authority. In that respect, the author makes a good contribution towards improving admiralty law in Tanzania. However, while Bendera focuses on admiralty and a range of maritime law subjects, the current study interrogates the loop holes in the existing legal framework for piracy in Tanzania.

Fernando advocates for solving piracy definitional complications at domestic level. The author takes a different perspective by concentrating on legal issues that come

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69 Bendera, I.M., Admiralty and Maritime Law in Tanzania, Law Africa Publishing (K) Ltd., Nairobi, 2017, p 36.

70 *ibid.*

71 *ibid*, p 36.

up in piracy trials before national courts.[72] He writes on issues relating to jurisdiction, human rights, joint and secondary party liability, attempts, *mensrea*, presumption of piracy, and sentencing among other issues. According to him, there is room for improvement at national level to ensure a fair trial to persons accused of committing piracy in line with international standards. With regard to trial procedures, he instills that, derogation of fair trial procedures in piracy cases should not be justified in the name of fighting piracy. Fernando's study relates to ours as it aims at solving piracy problems at domestic level. However, while ours is limited to Tanzania, Fernando's work dwells on the Seychelles.

Equally, Mujuzi advocates for solving piracy definitional challenges in a national law.[73] In his work, he makes an assessment of the Mauritian Supreme Court's decision in *Director of Public Prosecutions v Ali Abeoulkader Mohamed and Others*.[74] In this case, the issue was whether the Piracy and Maritime Violence Act, No. 39 of 2011, could apply to non-Mauritians in case they are involved in committing high seas piracy.[75] Although Mujuzi's area of study relates with ours, yet they differ in terms of area of focus. The author focuses in Mauritius. He assesses the court's decision in a piracy case with an intention to suggest ways through which the national legislation on piracy can be reinforced. To the contrary, this research

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72 Fernando, A.F.T., *An insight into piracy prosecutions in the Republic of Seychelles*, Commonwealth Law Bulletin, 2015, Vol. 41, No. 2, pp. 173-212, DOI: 10.1080/03050718.2015.1067631.

73 Mujuzi, J.D., The Mauritian Piracy Act: A Comment on the *Director of Public Prosecutions v Ali Abeoulkader Mohamed* Decision, 2017, pp. 69-78 https://doi.org/-10.1080/00908320.2017.1265366

74 *ibid.*

75 *ibid.*

seeks to expose the challenges that Tanzania face in addressing piracy problems the objective being to give an insight for crafting of a workable legal framework.

Similarly, Gotlieb have the same opinion with the argument that controversies in the provisions of piracy under international law should be solved by countries at individual level.[76] He concurs with a phenomenon that, in recent years piracy has re-emerged as a serious threat to the international community. He posits that, UNCLOS simply defines piracy without creating criminal liability. Therefore, to prosecute piracy perpetrators, a corresponding national law is required. He is of the views that, the national law has room to provide a wider definition of piracy than UNCLOS. Nevertheless, Gotlieb's work and ours differ in terms of scope.

As well, Ahmad concurs with various authors who posit that, the gaps in UNCLOS have prompted changes in the international legal regime of piracy.[77] According to him, the problem of piracy flares up every few years. The author is of the view that, it is crucial to underscore legal issues which may flag the loop holes in piracy legal framework at international level. According to him, tracing the legal gaps which exist in international regime can assist law makers to decide whether such gaps need further development. Ahmad's work therefore contributes to the existing literature on piracy issues. However, the author fails to state exactly the legal measures which

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76 Gottlieb, Y., International cooperation in combating modern forms of maritime piracy: Legal and policy dimensions, PhD Thesis, University of Amsterdam, Netherlands, 2017, https://hdl.handle.net/11245.1/6b47d888-cb94-4766-973a-213ad50dbfb2.

77 Ahmad, M., *Maritime piracy operations: Some legal issues*, Journal of International Maritime Safety, Environmental Affairs, and Shipping, 2020, Vol. 4, No. 3, pp 62-69. https://doi.org/10.1080/25725084.2020.1788200.

should be taken by individual states to fill the gaps that exist in the legal framework for piracy at international level so that effective prosecution of piracy can be realised.

Wu examines mechanisms of change in the development of international law concerning the threat of maritime violence.[78] He considers how international law has responded to this threat, and analyses a variety of different law-making techniques. In his study, the author observes that major international law-making activities concerning maritime violence in the recent decades have been in response to international incidents and crises, such as the *Achille Lauro*, the September 11 attacks, and the Somali piracy crisis. The author also explores gaps in law regarding piracy and terrorism at sea.

He equally reviews the negotiation of two major maritime terrorism treaties namely SUA Convention and its 2005 Protocol. Among other things, Wu compares and contrasts the regional approaches across Asia, Africa and Europe in the fight against piracy and armed robbery at sea. The author contends that, each of the law-making technique employed in fighting maritime violence is not alternative or optional to one another, but rather used in a supplementary fashion to the overarching framework of the law of the sea. Nevertheless, although Wu touches on piracy like ours, yet the scope of his study is different from ours.

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78 Wu, Winston Yu-Tsang, Addressing maritime violence through a changing dynamic of international law-making: supplementation within evolution, PhD Thesis, The University of Edinburgh, Scotland, 2017.

Apparently, the analysis in the preceding literature reveals that the legal framework for piracy emanates from international law under which only substantive law is provided while remaining silent on procedures for piracy prosecution. The above literature serves as first glimpse in understanding the challenge that piracy continues to pose to the maritime business. It clearly reveals that piracy poses a serious threat to maritime security at sea. Consequently, the need to have a legal protection for the maritime business is evident. The literature portrays also that, piracy is not properly regulated for especially at domestic level. Inability to prosecute captured pirates under the existing law is also depicted as the main gap and that gap is what the current researcher seeks to fill. According to the literature, there is no global consensus as to what should be the procedures for prosecution of piracy.

Noteworthy, the literature is silent on the legal framework of piracy in Tanzania although much seems to have been discussed in relation to similar topics at international level and other jurisdictions including Seychelles and Mauritius. Apparently, no answers have been given by the previous writers as to whether existing piracy rules in Tanzania can adequately curb piracy. Similarly, no suggestions have been given as to what should be the strategies towards effective maritime security regime for effective piracy prosecution in Tanzania. To this effect, the research has closed the gap by advancing such answers. Moreover, the research has given the status of the legal regime of Tanzania in combating piracy, focused on two issues namely; proof of intent in piracy cases, and availability of resources to pursue pirates.

1.4 Objectives and Research Questions

The following objectives guided the present study:

1.4.1 General Objective

The general objective of this study is to interrogate the challenges involved in the legal system of Tanzania with regard to effective prosecution of piracy and suggest how it might be curbed to ensure safe maritime activities in Tanzania.

1.4.2 Specific Objectives

In order to achieve the general objective of the study the following specific objectives accompanied the general objective:

(i) To examine the legal framework governing maritime security in Tanzania.

(ii) To analyze the adequacy of the existing international principles and standards governing maritime security.

(iii) To suggest international standards and regulations for piracy suppression and propose for a law reform.

1.4.3 Research Questions

The researcher was guided by the following research questions in reaching to the answers to the problem of this study.

(i) What are the underlying rules in the legal framework of piracy?

(ii) How adequate are the existing international principles and standards of piracy rules in dealing with piracy in Tanzania?

(iii) To what extent are the international standards and regulations for piracy suppression relevant in ensuring safe maritime operations in Tanzania?

1.5 Significance of the Study

The significance of this research is premised on various areas. As Kothari points out, research means, among other things, searching for knowledge through objective and systematic method of finding solution to a problem, for the aim of gaining the knowledge which will help to find out the hidden truth or the truth which is not discovered yet so as to achieve new insights into a given phenomenon.[79] Thus, a comprehensive study of piracy issues, like the one at hand, can reveal a pattern of best practices a country can take in the face of a new wave of violence against maritime business along with wider crime and security issues at sea.

As it can be noted in the literature review to this research, so far there is no study of this nature in Tanzania. The author notices also that, local commentaries on this topic are scarce. In this regard, this kind of research could provide a contribution to the current global debate, not only on the issue of the Somali pirates but also the security of the maritime sector at large. In that regard, this study will serve as a platform for future research on maritime offences at sea in general.

As well, by providing an insight into legal loop holes, this study will provide fundamental information to the government which can be helpful for law makers to

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[79] Kothari, C.R., Research Methodology: Methods & Techniques, 2nd Edition, K.K. Gupta for New Age International (P) Ltd., New Delhi, India, 2002, p1; and Redman, L.V. & Mory, A.V.H., The Romance of Research, 1923, p10.

identify the areas which need legislative and administrative reform in order to strengthen and empower the maritime sector for the country's economy. Further, the current study unveils opportunities that the Tanzania maritime sector can offer if maritime security will be given its priority.

1.6 Research Methodology

The traditional doctrinal legal research methodology were mainly employed and complemented by comparative methods under historical legal approach. Traditional doctrinal legal scholarship involves analysis of primary and secondary sources of law in addressing the problem under the study. Doctrinal legal research is a methodology most used by legal scholars in similar legal studies.[80] It gives a room for a systematic exposition of the primary and secondary sources of law, governing a particular legal category, analyses the relationship between rules, explains areas of difficulty and, perhaps, predict future development.[81] Apart from examination of statutory provisions and case laws, the methodology also offers a room for a researcher to explore legal scholarly works with the intention of making a legal reform proposal as the law ought to be.[82]

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80 Masoud, B.S., Legal Challenges of Cross-Border Insolvencies in Sub-Saharan Africa with Reference to Tanzania & Kenya: A framework for Legislation & Policies, PhD Thesis, University of Nottingham, United Kingdom, 2012, p11.

81 Pearce, D., Campbell, E. and Harding, D., *'Australian Law Schools: A Discipline Assessment for the Commonwealth Tertiary Education Commission,'* Journal of Professional Legal Education, 2018, Vol. 5, No. 2, pp 201–212. The method also entails the analysis of primary and secondary sources of law. For a detailed account of this see Singhal, A.K. & Malick, I., *Doctrinal and Social Legal Research Methods: Merits and Demerits,* Educational Rrsearch Journal, 2012, Vol. 2, No. 7, pp252-256.

82 Dobinson, I. and Johns, F., *"Qualitative Legal Research"* in McConville, M., and Wing, H.C., (eds,) Research Methods for Law, Edinburgh University Press, Edinburgh, 2007, pp 18-19.

The use of various legal methods, especially rules of statutory interpretations, and various forms of legal reasoning including deductive reasoning and inductive reasoning have been applied in appropriate circumstances in the study for data analysis. It is through this methodology and from the mentioned sources that materials were generated, analysed and presented with explanations in relation to the context of this study. The sources were obtained mainly from libraries, relevant websites, such as those of governments, international and multilateral institutions.

The researcher also used various internet resources having relevant materials to the research title due to the reason that, the international instruments on maritime security, such as conventions, resolutions, agreements, codes, statutes and practices or cases from other jurisdictions, books, journals, can easily be accessed from various websites.

Primary legal authorities including statutes, case law and court opinions, authorized statements of law issued by governments, regional bodies, international bodies, treaties, conventions, protocols, charters, codes or subsidiary legislations, regulations, rules, orders, and other similar documents that carry the force of law were sought and used to determine whether the contemporary legal framework for piracy can adequately deal with piracy. The secondary sources of legal materials included experts' commentary on the various but relevant laws, court decisions, legal opinions, treaties and such similar authentic explanations by jurists.

The methodology was used to analyse literature on piracy challenges at international level and appraise the relevant national legislation. The methodology was used based on the rationale that, it primarily focuses on what a law is rather than what it ought to be.[83] The methodology was equally used to evaluate relevant literature on the subject matter of the study.

Moreover, the methodology facilitated the critical legal examination of relevant instruments at international and domestic level including case laws, policies, resolutions, circulars, journals, books, codes, conventions, treaties, thesis, and protocols which equally include primary and secondary sources of data. The objective was to gather the law in terms of international and municipal legislation in line with case laws, and apply them to a specific set of material facts with the intention of resolving a particular legal issue.

Under this methodology the researcher intended to comparatively analyse the legal framework at international level and domestic level and evaluate how they relate to the subject of the study. Equally, through statutory interpretation method the researcher critically analysed the collected materials in line with the research questions particularly the one which require an examination of the relevancy of the international principles and guidelines for piracy suppression in ensuring safe maritime operations in Tanzania. In general, each of the legal methods was applied in specific appropriate circumstances in the study.

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83 Mwamlangala, D.F., Privacy and Security in the Cloud: Tanzania and South Africa in Comparative Perspective, PhD Thesis, The Open University of Tanzania, Tanzania; 2020, p 18.

The methodology was found to be suitable especially due to its potentiality in giving rise to effectiveness and certainty of law. The application of this methodology made it possible for this study to make an analysis of the contemporary legislation relating to maritime security and piracy in particular. It further facilitated the analysis, discussion and recommendations that can be applied in Tanzania to foster enactment of a robust piracy legal framework.

Through historical perspective approach the researcher under took analysis of the obtained sources to trace the nature and substance of the legal framework for piracy.[84] Under this aspect, the researcher concentrated on: root cause for emergency of the legal framework for piracy; and mischief that the law intended to cure. The objective was to ascertain if the rationale and mischief that made that law to emerge are still relevant in modern environment; and analyse as to whether the legal framework is adequate to deal with modern piracy.

1.6.1 Comparative Research Method

A comparative legal analysis approach is utilized to make comparison of two aspects. First, to compare the adequacy of piracy provisions as covered under the core international instruments namely, UNCLOS and SUA. Second, the efficiency of East African regional instruments especially the UNSC Resolutions in relation to piracy off the coast of Somalia, and Djibouti Code of Conduct. The approach was utilized to compare analytically the adequacy of piracy provisions in domestic jurisdictions,

[84] Historical legal research involve among other things, the study of the historical growth of a certain legal principles or legal establishments or legal profession. For a detailed account of this see Kiunsi, H.B., Transfer Pricing in East Africa: Tanzania and Kenya in comparative Perspective, PhD Thesis, the Open University of Tanzania, Tanzania, 2017.

which derive their legitimacy from international and regional instruments, particularly Tanzania and establish a conclusion about them.[85] The rationale for using this methodology is that, it is widely used to align the laws applied in different legal jurisdictions.[86] It is also regarded a good means of disseminating fresh ideas into a legal system.[87] Comparative legal analysis methodology involves studying foreign law, domestic law, international law, and regional integration law.[88]

Through the method, it was possible for a researcher to make comparisons of international legal framework for piracy at international level, regional level and domestic level. Although comparative legal analysis approach does not deal with analysis of a body of rules and principles of substantive law, the method was primarily used to provide the researcher with a way of looking at national piracy legal frameworks in entrenching piracy crime as a maritime threat.

To some extent and without compromising the scope of this study, relevant experience from Kenya derived from source materials were used to assess the legal framework of the country under study and gain insights and lessons that could be considered in addressing the challenges and provide an insight into the crafting of a robust and appropriate piracy legal framework in Tanzania. The choice of Kenya based on trend in piracy prosecution and the magnitude of decided cases on the same. Kenya is a country that has carried out many piracy prosecutions hence there is a

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85 Richardson, H., *Characteristics of a Comparative Research Design*, 2018.

86 Mwamlangala, (n 83), p 21.

87 Vibhute, K., and Aynalem, F., *Legal Research Methods*, Teaching Material prepared under the sponsorship of the Justice and Legal System Research Institute, Ethiopia, 2009.

88 Ezekiel, R.B., Quality of Treatment in Social Security: Case of Migrant Workers in the East African Community, PhD Thesis, Open University of Tanzania, Tanzania, 2018, p 16.

lesson that Tanzania can learn from the handling of relevant cases. So Kenya's piracy law serves as benchmark to see where Tanzania should improve.

The objective of applying comparative legal scholarship methodological approach in addition to other research approaches was to lay down a comparative platform that would form the basis for Tanzania to make self-evaluation of its national legal framework to adequately deal with piracy. This method again helped the researcher into making a comparative analysis of the status of piracy provisions between Tanzania and UNCLOS, SUA, UNSC Resolutions, and Djibouti Code of Conduct and Kenya.

1.6.2 Ethical Considerations

Research ethics consists of a core set of scientific norms, developed over time and institutionalised in the international research community. All research ethical issues including clearance, seeking consent, anonymity, and confidentiality were adhered to. Similarly, the study followed procedures on plagiarism, falsification and fabrication.

1.7 Scope of the Study

This study was centred on piracy. It focused on Tanzania. The study analyses piracy legal framework at international, regional and national level namely; UNCLOS and SUA, UNSCRs and Djibouti Code of Conduct, and the Penal Code and the MSA respectively. The conventions were chosen because they are sources of piracy law under which the relevant domestic law derive its legitimacy.

Tanzania was selected due to the fact that, it is mentioned as one of the East African countries affected by Somalia piracy. Tanzania is also one of the countries which criminalise piracy but with scant jurisprudence on maritime crime offences especially piracy. Kenya was selected to serve as benchmark for comparative purposes. The choice of Kenya as an example based on piracy prosecution trend particularly the magnitude of decided cases on the same.

The availability of literature in English and reliable relevant websites for ease of legal reference contributed to selecting the country as benchmark. Security at sea is hampered by a sort of issues with many components which needs ample time to study. It is on this ground that, this study only focused on piracy.

1.8 Limitation of the Study

There are several limitations in this research.[89] Firstly, materials relevant to the study for Tanzania were not readily available and accessible. This was due to the lack of scholarship on maritime security undertaken specifically on piracy issues from the perspective of Tanzania. Analysis of the situation of Tanzania relied much on the primary sources of law. Yet, it was not easy to access a significant number of materials that could be relevant to the discussed issues. As reporting of case law for piracy at sea is inadequate and, in some instances, non-existent, it was rather difficult to establish the existence of relevant cases especially in Tanzania.

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89 Limitations simply mean barriers beyond the researcher's control during the study, which limit the extensity to which the study can go. See Mwamlangala (n 83), p 23. Thus, they often affect the study results and the conclusions that can be drawn. Simon, M. K. and Goes, J., Assumptions, Limitations, Delimitations and Scope of the Study in dissertations and Scholarly Research: recipes for Success, Seattle, WA: Dissertation Success LLC, 2013.

The researcher opted for use of relevant websites to obtain online sources. Further, the researcher used mainly the relevant cases mainly from Kenya to portray the challenge encountered in piracy proceedings. Further reliance had to be made on relevant secondary sources including journal articles and text books, some of them from disciplines other than law. In this regard, the above limitations were counteracted. Change of supervisors was a major limitation as I had to restart afresh whenever a new supervisor is allocated. This affected the pace of the study. The researcher had to seek to extension of study so as to overcome this challenge.

1.9 Structure of the Study

This study is structured in six chapters. The present chapter has laid out a contextual framework of the study. The chapter also states the contribution to knowledge that this study makes. Chapter two gives a definition of concepts and lays down the theoretical framework of maritime security in terms of piracy. A description of theoretical perspectives on human behavior and the problem of criminality and criminal law in relation to piracy are also discussed. Chapter three considers the history and development of the legal framework for piracy at international level. This chapter also analyses the pros and cons of the international legal frameworks for piracy to determine the extent of their adequacy.

Chapter four discusses regional instruments and resolutions on piracy off Somalia coast. It analyses the regional agreement under the patronage of IMO including most noteworthy UNSC resolutions. Chapter five addresses the existing legal framework for addressing piracy in Tanzania. It assesses compliance of the country to

international instruments examining selected conventions. The chapter further describes the extent current legal frameworks address piracy challenges with regard to existing theories and international guidelines. The issue of maritime policy is equally summarily scrutinized.

Chapter six covers the concluding part of the study which includes the analysis of the data collected and major findings of the research as per the research questions, concluding remarks and recommendations. The chapter also discloses the gaps for future research. Markedly, the main thrust of the abovementioned chapters is to expose piracy challenges that Tanzania faces and provide an insight for enactment of a robust piracy legal system.

1.10 Conclusion

Chapter one has built the base upon which the thesis has proceeded. Discussion in this chapter endeavoured to underscore the statement of the research by introducing key concerns involved in maritime security in the context of the study. It has introduced the research questions along with significance of the study. Background information has been analysed together with a review of prevailing literature in the subject of maritime security with regard to piracy. Methodological approaches have been explained as per reasons for their adoption in this study. Limitations and scope of the study according to the thesis outline have been provided. Ethical issues have also been captured under this chapter. Chapter two describes concepts and theories for piracy as far as maritime security is concerned in the context of existing literature.

CHAPTER TWO

CONCEPTS AND THEORIES OF PIRACY

2.1 Introduction

In as much as the study is centred on piracy challenges under the legal regime of Tanzania, the objectives cannot be achieved without having a clear understanding of the concepts underlying the thesis. This chapter therefore provides concepts and lays down theories of maritime security focusing on piracy. The main objective of the chapter is to provide a clear understanding of the term maritime security in terms of the origins and chances for committing piracy. Concepts which are defined in this chapter include maritime security that is safety and security at sea, and threats to maritime security in terms of core maritime security crimes which include the crime of piracy. Then a description of two groups of theoretical perspectives namely economic and criminological theories on human behavior and the problem of criminality and criminal law in terms of piracy, namely demand and supply; and environmental and ecological theories are discussed. This will yield results when analysing the adequacy of existing piracy legal regime in Tanzania.

2.2 Concepts Relevant to Maritime Security

2.2.1 Maritime Security

Maritime security simply means consideration of security solely within a maritime context. It includes protection of the sea environment from serious damage. The term serious damage is defined to mean, serious bodily injury; or extensive destruction of a place of public use, state or government facility, infrastructure facility, or public

transportation system, resulting in major economic loss; or substantial damage to the environment, including air, soil, water, fauna, or flora.[90] In essence, maritime security has to do with 'threats' that prevail in the maritime domain. They include illegal exploitation of living marine resources, increased competition over non-living marine resources, use of weapons of mass destruction (WMD), maritime inter-state disputes, maritime terrorism, piracy, trafficking of narcotics, people and illicit goods, arms proliferation, illegal fishing, environmental crimes, or maritime accidents and disasters including other similar incidents.[91]

However, the term maritime security has not been clearly defined in terms of having a particular document that provides for what it entails. As a result, it has attracted various definitions at international, regional and domestic level.[92] For example, under the 2050 Africa's Integrated Maritime Strategy (2050 AIM Strategy) the maritime security refers to enhancing sustainable social economic development which reflects the freedom of public and private entities to conduct legitimate activities such as the exercise of sovereign and jurisdictional rights, resource extraction, trade, transport and tourism, free of threats or losses from illegal acts or aggression, for an integrated and prosperous Africa.[93] The Brenthurst Foundation also defines maritime security from an African perspective as anything that creates, sustains or improves the secure use of Africa's waterways and the infrastructure that supports these waterways.[94]

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90 2005 Suppression of Unlawful Acts (SUA) Protocol, Article 3 and Article 1(c).

91 Africa Center for Strategic Studies, "Trends in African Maritime Security," *Spotlight,* 15 March 2019, https://africacenter.org/spotlight/trends-in-african-maritime-security/ (Accessed 8th August, 2021).

92 *ibid.*

93 2050 Africa's Integrated Maritime Strategy, African Union, Annex B, Version 1.0.2012, p1.

94 Brenthurst Foundation, Maritime Development in Africa: An Independent Specialist's Framework, Discussion Paper No. 2010/03, (2010): Johannesburg.

Historically, the international maritime community put concern on ‘safety’ and treated ‘security’ as a subset of ‘safety’. This state was prompted by the sinking incident of the *Titanic* with the loss of more than 1,500 lives which led to the adoption of the first version of International Convention for the Safety of Life at Sea (SOLAS) in 1914. The Convention covers a wide range of measures designed to improve the safety of shipping. Therefore, initially SOLAS was clearly a Convention on maritime safety. [95] SOLAS has been amended from time to time so as to cope with new safety technological issues in international shipping.

Worth noting that, the duty to keep up-to-date rules concerning international shipping is vested to the International Maritime Organisation (IMO). Thus, following the incident of flooding and loss of the Ro-Ro passenger ferry namely Herald of Free Enterprise on 6th March 1987, the IMO on 17th November 1993 through the Assembly Resolution A.741(18) adopted the guidelines concerning shipboard and shore-based management to ensure safe operation of all types of ships. These guidelines are better known as the International Safety Management (ISM) Code. Thus, ISM Code concerns itself with safety at sea and it is part of the present version of SOLAS under Part IX which was adopted in 1974 and entered into force in 1980.

On the other hand, the concern on maritime security was instigated first by the *Achille Lauro* incident of 1985 which led to the adoption of SUA. Thus, SUA is the first international convention devoted to ‘maritime security’ in contemporary terms. Prior to SUA is UNCLOS which covers one of the two crimes seen as most serious

95 The Preamble and the original *trauvaux preparatoires* of the SOLAS Convention).

and violent threats to maritime security today namely, piracy while remaining silent on the other ie maritime terrorism. SUA therefore, came up with the concept of 'unlawful acts against maritime navigation' trying to extend the definition to criminal acts which fell outside the traditional complicated definition of piracy under UNCLOS. However, post what is commonly known as 9/11 the international community recognized that SUA was inadequate to deal with all kinds of violent acts within contemplation. Therefore, following the tragic events of 9/11, the 22nd Session of the IMO Assembly agreed to the development of new measures relating to the security of ships and of port facilities.

These measures were adopted in a form of a Code and was adopted by the Diplomatic Conference on Maritime Security ie a Conference of Contracting Governments to the International Convention for the Safety of Life at Sea, 1974. The complete name of the Code is 'the International Code for the Security of Ships and of Port Facilities. The abbreviated name of this Code, as referred to in Regulation XI-2/1 of SOLAS 74 as amended, is the International Ship and Port Facility Security (ISPS) Code, or in short the ISPS Code. (For a detailed account of this see the Preamble to ISPS Code, at p. 3). Thus, the adoption of ISPS Code elevated security to a status of importance in its own right. ISPS Code sets the tone for promoting security awareness or a security culture aboard ship. Objectively, the ISPS Code establishes the respective roles and responsibilities of the contracting governments, government agencies, local administrations and the shipping and port industries of the national and international levels for ensuring maritime security.

Understanding maritime security therefore, goes in line with an understanding of the concept within the international maritime community which revolves around the application and impact of one of the treaty instruments namely, the ISPS Code.[96] Maritime security concern within the maritime fraternity was instigated first by the *Achille Lauro* incident of 1985 in Mediterranean Sea, and subsequently by the series of terror attacks generally known as "9/11".[97] Both events led to the adoption of treaty instruments of some consequence at the International Maritime Organization (IMO) namely, the 2002 security amendments to the Convention for the Safety of Life at Sea, 1974 (SOLAS), the International Ship and Port Security (ISPS) Code, and the Convention for Suppression of Unlawful Acts Against the Safety of Maritime Navigation (SUA Convention) of 1998.[98]

Further concern by the world community was triggered by the rapid increase in piracy activity off the coast of Somalia since 2006.[99] Piracy off the coast of Somalia is perceived as an organized crime and, in view of the scale level of sophistication and degree of violence of incidents reported, may be considered 'a special case'. The piracy incidents in East Africa exceed those in some of the traditional global hotspots of piracy. Traditional global piracy hotspots include Indonesia, Malaysia, Singapore and the Philippines.[100] Of the total 28 hijackings which took place between 2006 and

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96 Mejia, Q.M., *et al*., „Ergonomics, Economics, and the Law, (n 5), pp 5, 14, 30, 31 & 102.

97 "9/11" refers to terror attacks which occurred in September 11, 2001 against various targets including New York, Virginia and Pennsylvania.

98 Mejia, Q.M., *et al*., „Ergonomics, Economics, and the Law, (n 5), p 1.

99 UNCTAD, Report on Maritime Piracy, Part I: An Overview of Trends, Costs and Trade-related Implications, No. UNCTAD/DTL/TLB/2013/1, 2014,p1, https://unctad.org. (Accessed 15 May, 2021).

100 For a detailed account of this see ICC-IMB (2013): Piracy and Armed Robbery against Ships, Annual Report, 1 January – 31 December 2012; see also,

2012 worldwide, 10 hijackings were carried out by pirates off the coast of Somalia.[101] This scenario added to the adoption of various resolutions by the UNSC.[102]

Some scholars depict, in light of treaty instruments cited above, that maritime security has a much wider connotation that is often not adequately appreciated by all and sundry in the maritime fraternity. In view of Mukherjee, *et al*, a perfunctory perception of the appellation "maritime security" is the state of being free from the threat of unlawful criminal acts such as piracy, armed robbery, terrorism, or maritime violence.[103] The authors are also of the view that, at international level and within the maritime context, generally the words "safety" and "security" both represents protection against different types of threat to life and property at sea.

However, reports of IMO meetings and other relevant documents reveal that, safety pertains to threats of accidents caused by unsafe ships and unsafe ship operations, while security involves crimes perpetrated deliberately by humans against the crew, passengers and cargo on board ships, or the ship itself.[104] The distinction is manifested in two important IMO conventions, namely, SOLAS and SUA. Viewed

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101 ICC-IMB, Piracy and Armed Robbery Against Ships, Annual Reports on various issues covering the years 1995 to date are available from its website at www.icc-ccs.org.

102 These include Resolutions 1816 (2008), 1838 (2008), 1846 (2008), 1851 (2008), 1897 (2009), 1918 (2010), 1950 (2010), 1976 (2011), 2015 (2011), 2020 (2011), 2077 (2012) and 2125 (2013); and Donald, R. and Stephens, T., *The International Law of the Sea*, 2014, Hart Publishing, USA, p164.

103 Mejia, M.Q., Law and Ergonomics in Maritime Security, Doctoral Thesis, Lund University, Sweden, 2007, p 5.

104 IMO instruments can be accessed from its website at https://www.imo.org.

in comparative light, SOLAS deals with safety at sea whereas SUA relates to unlawful acts that threaten security at sea.[105]

In this sense, within the IMO circuit "maritime security" is vaguely perceived in juxtaposition to the definition of "maritime safety". From a perusal of reports of IMO meetings and other relevant documents it can be surmised that, the latter is evenly particularized and embraces "measures employed by maritime administrations, vessel owners and operators, port facilities, offshore installations, and other maritime organizations to prevent or minimize the occurrence of accidents at sea that may be caused by substandard ships, unqualified crew, or operator error."[106]

On one hand, African region describes the term "maritime safety" and "maritime security" as two different concepts.[107] While maritime safety in the region focuses on enhancing the ability of public and private entities to conduct legitimate activities free of threats or losses from natural and man-made disaster,[108] maritime security focuses on enhancing the freedom of public and private entities to conduct legitimate activities free of threats or losses from illegal acts or aggression.[109]

On the other hand, the available literature shows that there are different perceptions with regard to maritime security at domestic level. For example, the U.S. Navy

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105 *ibid.*

106 Mejia, M.Q., "*Defining Maritime Violence and Maritime Security*," in P.K. Mukherjee, M.Q. Mejia Jr., G.M. Gauci (eds.), Maritime Violence and other Security Issues at Sea, Malmo, Sweden: WMU Publications, 2002, p. 28.

107 2050 Africa's Integrated Maritime (AIM) Strategy, available at https://cggrps.com

108 *ibid.*

109 *ibid.*

defines maritime security as tasks and operations conducted to protect U.S. sovereignty and maritime resources, support free and open seaborne commerce, and to counter maritime- related terrorism, weapons proliferation, transnational crime, piracy, environmental destruction, and illegal seaborne immigration.[110]

In Tanzania the term 'maritime security' is embodied under Part XVII of the Merchant Shipping Act, No. 21 of 2003 (MSA). However, there is no any clear definition for the terms.[111] In Kenya, maritime security context is enshrined in the Merchant Shipping Act, Cap. 389 [R.E. 2012] where the term 'maritime security incident' refers to a threat of unlawful interference with maritime transport made, and the threat is, or is likely to be, a terrorist act.

Equally, if an unlawful interference with maritime transport is, or is likely to be an attack of organized intimidation, then the unlawful interference is a maritime security incident.[112] For the purpose of this study, a more comprehensive and contextually appropriate definition of the term "maritime security" is taken to mean "measures employed by maritime administrations, vessel owners and operators, port facilities, offshore installations, and other maritime organizations to protect against unlawful acts such as piracy".

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110 *ibid*.

111 Bueger, C., What is Maritime Security? Marine Policy Journal of Ocean Affairs, (2015), 159-164, p 1, http://creativecommons.org/licencesby/4.0/ (Accessed 25 May, 2022).

112 For a detailed account of this see Merchant Shipping Act, s 375.

2.2.2 Maritime Security Crimes

Maritime security crime generally refers to all incidents which are categorized as threats to maritime security. They include all crime or unlawful acts that endanger or put at stake the security at sea ie crimes perpetrated against security of life and property at sea.[113] In simple terms, they are acts which pose danger to the international maritime business. Some of these acts include high seas and coastal zone piracy,[114] armed robbery against ships, phantom ship phenomenon, kidnap for ransom, and terrorism.

Kidnap for ransom simply means the hijacking of vessels and kidnapping of crew for ransom. It is a practice that has been closely associated with Somali piracy. Maritime terrorism refers to attacks conducted or sponsored by terrorist groups at sea.[115] The most prominent example of maritime terrorism involved the hijacking of the *Achille Lauro* in 1985 where four Palestinian gunmen hijacked the Italian cruise ship as it navigated the Eastern Mediterranean with four hundred people on board. In this incident, the gunmen executed a 69-year-old Jewish-American paraplegic passenger from New York City by pushing him overboard in his wheelchair. The event

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113 *ibid.*

114 Notwithstanding UNCLOS provisions on piracy reflecting international law, laws dealing with piracy can also be found in municipal law which may sometimes differ in important respects. Different approaches can be found in the elements of the offence, the types of offensive acts, and the locus of the offence (O'Connell, The international Law of the Sea, Vol. 2, 979), with the effect that under municipal law acts of piracy may be committed within the territorial sea. Notably, in those instances it is the laws of the coastal State which will apply to any enforcement operations and unless exceptional arrangements have been put in place other state would have no jurisdiction over pirates within the territorial seas of a coastal State.

115 Sloan, M., "*Marine Piracy: A Continuing Challenge,"* In: The Future of Ocean Governance and Capacity Development; International Ocean Institute – Canada (eds.); Dalhousie University, Canada; 2019; pp 421-425.

prompted the formulation and adoption of the SUA Convention, where provisions for extradition are prominently featured.

Phantom ship phenomenon refers to attacks that are pre-meditated, highly sophisticated, and extremely violent. The famous hijack incident of the Alondra Rainbow vessel serves as the best example for the phenomenon.[116] These attacks take weeks or months of planning by well-organized crime syndicates. The perpetrators are more into targeting the ship itself and its entire cargo, "rather than looking for a few expensive possessions and pocket change."[117] In many cases, the entire ship is hijacked, renamed, re-crewed, and made available in the international maritime trade by the intruders. The ship takes on a fictitious identity and becomes a so-called "phantom ship" or "phantom vessel."

It commences a criminal existence that typically leads to the hijackers entering into contracts with unsuspecting cargo owners and then stealing, diverting, and selling their cargoes. This cycle is repeated in a successive pattern, inflicting enormous economic losses on ship owners, cargo owners, and marine insurers, not to mention exposing the hijacked crew to situations that could result in serious injury or even loss of life.[118] The famous hijack incident of the *Alondra Rainbow* vessel serves as a good example.

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116 Phantom ship incidents include the hijacking of M/T Petro Ranger in April, 1988; the hijacking of a cargo vessel Cheung Son in November, 1998.

117 Gray, J., M. and Monday, G. Stubblefield, *Maritime Terror,* Boulder, Colorado, USA: Sycamore Island Books, 1999, pp. 9-10.

118 Beckman, R.C., Combating Piracy and Armed Robbery Against Ships in Southeast Asia: The Way Forward, Ocean Development and International Law, Vol. 33, No3-4, 2002, p 321.

Other threats which prevail in the maritime domain include maritime inter-state disputes, trafficking of narcotics, people and illicit goods, arms proliferation, illegal fishing, environmental crimes or maritime accidents and disasters.[119]

2.2.3 Core Maritime Security Crimes

This item gives an overview of the crimes which are categorized as the most serious and violent threats to maritime security namely; 'piracy' and 'maritime terrorism.'[120] The intention is to give an understanding of what the crimes entails so as to be able to have an overview of what is referred throughout the thesis by use of the term maritime security crimes and particularly the use of the term 'piracy'. This is important because of two reasons; first, there are instances of overlap between piracy and terrorism, and second, all subsequent chapters revolve around the concept of maritime security. In the ensuing text, piracy will be addressed first followed by a brief discussion on maritime terrorism.

Piracy was made the universal crime under customary international law, over which all states has the capacity to arrest and prosecute offenders. Its definition was later

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119 This research focuses on the crime of piracy which ranks first in temporal order by virtue of its historical antiquity.

120 "Maritime crimes include terrorism, piracy, armed robbery and other forms of violence against ships, crew, passengers, and port facilities just to mention a few. It is noted that the terms that describe these unlawful acts are often used interchangeably in contemporary studies in the study of public policy relating to maritime affairs. Such an ambiguity may be acceptable in terms of statistics where the purpose is to provide security warnings to ship-owners and seafarers. It will, however, blur the insight into the differences in terms of the deterrence effect of law caused by different motives of individuals for committing these criminal acts. Where the formulation and enforcement of law is concerned, these differences must be fully appreciated and taken into account." For a detailed account of this see Coelho, J.P.B., African Approaches to Maritime Security: Southern Africa, Friedrich-Ebert-Stiftung Mozambique Avenida Tomás Nduda 1313, Maputo, Mozambique, 2013; and Mejia, Q.M., et al, pp 37-54, (n 5).

enshrined in the modern law of the sea under 1958 Convention and then in Article 105 of UNCLOS. An important aspect of addressing piracy is the inter-state cooperation as reinforced under Article 100 of UNCLOS. More recently, piracy has been described as the "only true case of universal jurisdiction" under customary international law.[121]

Acts of piracy are motivated by private financial benefit, that is, with intent to plunder ie. *animo furand*, or for the sake of monetary gain ie *lucri causa*. Article 101 of UNCLOS defines piracy as consisting of acts of violence or detention, or an act of depredation, committed for private ends by the crew of a private ship directed against another ship on the high seas or outside the jurisdiction of any state. Piracy also extend to the operation of a pirate ship which is a ship used by persons for the purposes of committing pirate acts. This general definition of piracy is consistent with the common expression that a pirate is *hostis humani generis* ie an enemy of all human kind.

To this effect, acts of piracy can occur either outside the 12 nautical mile limit ie beyond the territorial sea, or as far out as 200 nautical miles from shore ie beyond the EEZ. According to Article 58(2) which provides that, Articles 88 to 115 and other pertinent rules of international law apply to the exclusive economic zone in so far as they are not incompatible with this Part, the EEZ is within the coverage of geographical scope of Article 101. The prohibition against the commission of piracy, as

121 The Arrest Warrant Case (*Democratic Republic of the Congo v Belgium*) [2002]. ICJ Rep. 3.

an international crime, has attained the status of *jus cogens.*[122] *Jus cogens* is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is allowed and which can be modified only by a subsequent norm of general international law having the same character.[123]

It should be pointed at this juncture that, by limiting the definition to acts committed for private ends any actions taken for political motives such as terrorist attack are excluded. A crucial element of this definition is that piracy is an act which occurs on the high seas, and accordingly an equivalent act of violence which took place within the territorial sea would not be piracy for the purposes of international law.

It is worth also noting that, the definition of pirate ship or aircraft in Article 103 of UNCLOS extends to one that is "intended by persons in dominant control" to be used for an act of piracy. The importance of the characterization of a vessel as a pirate ship is highlighted by Article 105 of UNCLOS under which any State is given power or has the capacity to seize a pirate ship and to arrest the persons on board and their assets on the high seas.

In addition, notwithstanding UNCLOS provisions on piracy reflecting the international law, laws dealing with piracy can also be found in municipal law which may sometimes differ in important respects. As Rothwell and Stephens notes, different approaches can be found in the elements of the offence, the types of offensive acts, and the locus of the offence, with the effect that under municipal law

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122 Vienna Convention on the Law of Treaties, Article 53 of 1969.

123 *ibid*.

acts of piracy may be committed within the territorial sea.[124] Notably, in those instances it is the laws of the coastal state that will apply to any enforcement operations and unless exceptional arrangements have been put in place other state would have no jurisdiction over pirates within the territorial seas of a coastal state.[125]

Unlike piracy, the term "maritime terrorism" has not been clearly defined in terms of having a particular legal document that provides for what it entails. Virtually, the legal definition of maritime terrorism is enshrined under SUA Convention.[126] Understanding maritime terrorism therefore goes in line with an understanding of the provisions of SUA and SOLAS in terms of ISPS Code.

As distinguished from ordinary criminal conduct, acts of maritime terrorism are committed at sea for specific reasons fuelled and motivated predominantly by religious, ideological or political convictions.[127] Generally, terrorism is meant to influence the political behavior of governments and communities by attacking and threatening targets for their symbolic rather than their material significance.[128] As noted above, while acts of piracy exclude political motives, the currency of terrorism acts comprise attention and publicity ie political motivated.[129]

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124 Rothwell, D.R. and Stephens, T., The International Law of the Sea, Oxford and Portland, Oregon, Hart Publishing, 2010, p 163.

125 *ibid.*

126 SUA, Article 3.

127 Walker, C., The Prevention of Terrorism in British Law (2nd ed.), Manchester, UK: Manchester University Press, 1992, at. P 8; and Mejia, Q.M., *et al*, (n 5), pp39-77.

128 Mejia, Q.M., et *al*, (n 5), p 10.

129 According to an article by Safety4sea, titled: *Achille Lauro* hijacking: a tragic example of maritime terrorism, 'in Maritime Knowledge Security,' https://safety4sea.com/cm-achille-lauro-hijacking-a-tragic-example-of-maritime-terrorism/? (Accessed 29th September, 2021). The most prominent example of maritime terrorism involved the hijacking of the *Achille Lauro* in October 7, 1985.

2.3 Ergonomics Perspective

Ergonomics is not a young discipline.[130] The literature indicates that, formal consideration of the interactions between people and their working environments can be found in writings from ancient Greece, in medieval medical accounts, and from Poland and Germany about 100 years ago.[131] Customarily therefore, ergonomics is described as the process where a designer, taking into account environmental and organizational constraints, uses knowledge of human abilities and limitations to design the system, organization, job, machine, tool, or consumer product so that it is safe, efficient, and comfortable to use it.[132]

However, ergonomics is still under a constant process of being defined in the field of maritime security.[133] For instance, Mejia, M.Q. *et al* in their study about the conceptual frameworks of law, ergonomics, and economics in maritime security milieu narrate that, an ergonomics perspective implies an examination of the legal framework as it influences or affects the working environment on board ships, the design of shipboard tasks and organisations, and the management of risks arising from threats to maritime security; and implies a coordinated approach using law and ergonomics.[134] The authors' perspective is based on the premise that, the ship should be considered first whenever any anti-piracy measures are taken because when it

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130 Wilson, J. R., Fundamentals of Ergonomics in Theory and Practice, *Applied Ergonomics*, Vol.31, No. 6, 2000, p 558 in Mejia, Q.M., *et al,* ,,Ergonomics, Economics and Law (n 5)25.

131 *ibid.*

132 Helander, M.; A Guide to Human Factors and Ergonomics, Boca Raton, Florida, USA:CRC Press, 2006, p 6 in Mejia, Q.M., *et al,* ,,Ergonomics, Economics and Law, (n 5), p 25.

133 *ibid.*

134 *ibid,* p 2.

comes to piracy it is ships which are the main target. In other words, no ship no piracy.

Looking at ergonomics from international legal framework of maritime security point of view, namely UNCLOS, SUA and ISPS Code, the authors narrate further that, while UNCLOS and SUA deal with criminal law in terms of maritime crime, the ISPS Code deals with ergonomics, or to put it in more clear words, the ISPS Code deals with the interface between humans and systems. In their view, the ISPS Code therefore, attempts to influence the behavior of seafarers and port managers through elaborate regulatory procedures as preventive measures in relation to combating criminal offences.[135] That means, a ship should be designed to the extent that it is not easy to be attacked by maritime criminals such as pirates or maritime terrorists.

Similarly, Helander describes ergonomics as the process where a designer, considering environmental and organizational constraints, uses "knowledge of human abilities and limitations to design the system, or organization, job, machine, tool, or consumer product so that it is safe, efficient, and comfortable to use."[136] His perspective relies on the ground that, influencing human behavior is an important commonality between law and ergonomics. It implies a coordinated approach between the two disparate disciplines ie law and ergonomics.

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135 *ibid*. p 25.

136 Helander, M., A Guide to Human Factors and Ergonomics, Boca Raton, Florida, USA:CRC Press, 2006, p 6.

The above analysis implies that, although law and ergonomics are two disparate disciplines yet have great potential for synergy particularly in the maritime setting. It should be noted that, piracy is as ancient as maritime commerce itself. This means that, the ship should be considered first whenever any anti-piracy measures are taken because when it comes to piracy it is ships which are the main target. In other words, no ship no piracy.

According to Ogloff, Helander's perspective suggests that if all laws are designed with one ultimate purpose of regulating human behaviour, then maritime law, which has evolved from "codified practices which first served as a prescription for orderly behavior in maritime matter," is no exception.[137] This then calls for the legal framework for maritime security to be formulated in a manner which influences the behavior of seafarers and port managers through elaborate regulatory procedures as preventive measures in relation to combating criminal offences, such as piracy, that pose a threat to maritime security.

As noted in the preceding discussion, this research focuses on piracy as one of the two maritime security crimes which are perceived as the most serious and violent threat to the global maritime industry, the other being maritime terrorism. The previous discussion has hinted that the international legal framework for maritime security is mainly covered under UNCLOS, SUA and SOLAS ie ISPS Code. The

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137 Ogloff, J.R.P., "Two Steps Forward and One Step Backward: The Law and Psychology Movement(s) in the 20th Century," in J.R.P., Ogloff, (ed.); Taking Psychology and Law into the Twenty-First-Century, Secaucus, New Jersey, USA: Kluwer Academic Publishers, 2002, pp 1-33. in Mejia, Q.M., *et al,,, Ergonomics*, Economics and Law (n 5), p 25.

discussion has also indicated from a legal point of view that, the application of the term piracy and unlawful acts under UNCLOS and SUA respectively has become problematic in terms of their legal elements.

2.4 Rational Man Concept

The rational man concept was first put forward by economist and philosopher Adam Smith. He considered how the pursuit of self-interest could lead to an efficient outcome. The concept presupposes that individual respond to incentives. They modify behavior to increase personal satisfaction where an alteration of a given situation or environment or situation makes it possible to do so.[138] According to Mejia, Q.M. *et al* same premise applies to the study of maritime security. Based on this premise the authors argue that, authorities taking anti-crime actions behave rationally in the sense that they adopt optimal level of protective measures to lower the total social cost incurred by the phenomenon of maritime security which includes the social loss caused by security incidents as well as the cost of preventive and punitive measures.[139]

The authors further add that, criminals, whether they be murderers, thieves, pirates or terrorists also exercise their judgment. They also reason in the sense that they resolve to commit a crime. They consider the advantages and disadvantages of the crime they are about to commit against the most likely and potential criminal sanctions. They tend to efficiently utilize the scarce resources to maximize their expected utility, that is, the benefits they obtain by achieving their goals minus their resource

[138] Mejia, Q.M., et al., „Ergonomics, Economics, and the Law, (n 5), p 37.
[139] *ibid.*

endowments; they also respond to changes in circumstances. This by no means indicates that the goals of criminals are rational. The rationality here merely means that, in achieving their goals, criminals, in the same way as law-abiding citizens, attempt to obtain the greatest satisfaction out of their limited resources and effectively respond to changes in their constraints.[140]

It is acknowledged that maritime security incidents fall into the field of criminal law. Legal intervention in relation to criminal acts consists of two measures, namely preventive measures and punitive measures. Preventive measures are taken before the criminal act is committed, and punitive measures are imposed as sanctions by way of monetary penalties or incarceration, or both, after the criminal act is committed and the perpetrator is apprehended and tried.

2.5 Piracy Theories

2.5.1 Supply and Demand Theory

Supply and demand theory is an economic theory which is relevant in the field of maritime security in terms of core maritime crimes. The idea of supply and demand was brought by one of the founders of neoclassical economics namely Alfred Marshall.[141] In the field of criminal law, economists apply the theory of supply and demand to the issues of commission and punishment of crime.[142] Viewed from an economic standpoint, the expected criminal sanction faced by a criminal is the price

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140 *ibid*.

141 Britannica, The Editors of Encyclopedia. "Alfred Marshall". Encyclopedia Britannica, 22nd July 2021, https://www.britannica.com/biography/Alfred-Marshall. (Accessed 3rd September 2021).

142 *ibid.*

that he has to pay for his act.[143] Economists subscribe to the view that the sentence handed down following successful prosecution represents a warning to those considering committing such offences in the future.[144] According to them, being so warned, a potential criminal might withdraw his plan if the price he has to pay is higher than the expected benefit. By imposing appropriate sanctions, criminal law thus guides and deters people's behavior.[145]

However, some scholars are of the view that achievement of the optimal level of legal intervention for maritime security, punitive measures alone are neither realistic nor adequate as they regard preventive measures to be predominant.[146] Mejia, Q.M., et al, for instance, opine that in terms of maritime security in relation to terrorist threats the effect of punitive sanctions as a deterrent measure is relatively weak.[147] According to them the most straightforward reason is that piracy is distinguished from ordinary criminal conduct, acts of terrorism are committed for specific reasons fuelled and motivated predominantly by religious, ideological or political convictions.[148]

It is further argued that if the punishment is meant to offset the terrorist's benefit or satisfaction derived from the act, there is hardly a proper sanction that can be

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143 Cooter, R. and Ulen, T., *Law and Economics (4th ed.)*, Boston, Massachusetts, USA: Pearson Addison Wesley, 2004, at p. 3.
144 Bowles, R., Law and the Economy, Oxford, UK: Martin Robertson, 1982, pp 79-80.
145 *ibid.*
146 Mejia, Q.M., *et al*, (n 5).
147 *ibid.*
148 *ibid.*

imposed.[149] This is especially in cases involving suicidal terrorism where the perpetrator has no hesitation in dying for his cause. Even if capital punishment is considered to be an appropriate sanction it can only be imposed only if the perpetrator is apprehended alive. The perpetrators may welcome capital punishment as the sensational effect of their execution would only further advance their cause.[150] Nevertheless, the scholars posit that the application of economic theories is useful to examine the implications of the law in terms of issues relating to its implementation and enforcement from the standpoint of maritime security at domestic level.

2.5.2 Environmental and Ecological Theories

The study of criminology began in Europe during the late 1700s when concerns arose over the cruelty, unfairness, and inefficiency of the prison and criminal court system. Highlighting this early so-called classical school of criminology, several humanitarians such as Italian jurist Cesare Beccaria and British lawyer Sir Samuel Romilly sought to reform the legal and correctional systems rather than the causes of the crime itself. Their primary goals were to reduce the use of capital punishment, humanize prisons, and compel judges to follow the principles of due process of law. Criminology therefore is the study of crime and criminals, including the causes, prevention, correction, and impact of crime on society. Since it emerged as part of a movement for prison reform, criminology has evolved into a multidisciplinary effort to identify the root causes of crime and develop effective methods for preventing it, punishing its perpetrators, and mitigating its effect on victims.

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149 Ibid.

150 Walker, C., The prevention of Terrorism in British Law, (2nd ed.), Manchester, UK: Manchester University Press, 1992, p 8.

Likewise, piracy has been approached and analyzed using different criminological theories. Among them, environmental and ecological theories are most appropriate to explain the origins and opportunities for piracy.[151] Ecological theory for instance suggests that, resource availability eg light, water, and nutrients, places a large constraint on the relative advantages of different kinds of tissue deployment. On the other hand, environmental criminology theorizes that a person's physical environment, such as the neighborhood they live in, plays a role in criminal behavior.

The theories therefore together embody the notion that, when society's norms and institutions break down because of conflicting expectations, corruption, and political instability, social control becomes ineffectual.[152] Local institutions including schools, churches, or government lose the ability to exert control over people and geographical areas. When social controls wither and conventional traditions disintegrate, society loses the ability to regulate itself.[153]

Such state of affair gives way to a culture that begins to identify with deviant behaviors that become normalized. This reversion to a state of nature enables criminal groups to rise and propagate in an environment dominated by a survivalist ideology.[154] Criminal factions supplant conventional institutions and exert an

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151 Shane, J. N. and Leberman, C. A., (2009), Criminological theories and the problem of modern piracy. In M. R. Haberfeld and Agostino von Hassel (2009), *Maritime Piracy and Maritime Terrorism: The Challenge of Piracy for the 21st Century.* Dubuque, 1A: Kendall Hunt Publishing Company.

152 *ibid.*

153 *ibid.*

154 *ibid.*

influence over the denizen that fosters tolerance for criminal behavior because the inhabitants have lost the capacity to exercise control.[155] Living in this environment produces social isolation, where there is little or no contact with mainstream society. As a result, crime and violence are seen as a near inevitable consequence of life. People living in this environment develop a disposition or motivation to act in a criminal manner as a means to fulfil basic human needs.

Two clusters or typology of explanation serve to underscore the dynamics of piracy as embodied under the above two mentioned criminological theories namely, environmental and ecological theories. The first cluster includes opportunity theory. This theory explains principles for controlling crime. This approach consists of three opportunity-reducing principles namely, first, directing crime control measures at highly specific forms of crime; second, managing, designing, or manipulating the immediate environment in as systematic and permanent way as possible; and, third, increasing the perceived risk or effort to commit a crime, or reducing the rewards or removing the excuses for committing a crime.[156] Opportunities for piracy therefore, can be explained from three perspectives that converge into a single explanation known as opportunity theory. They include: 'the routine activities approach,[157] the rational choice perspective,[158] and, crime pattern theory.[159]

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155 *ibid.*

156 Clarke, R.V., 1997, *Situational Crime Prevention*, 2nd ed., New York: Harrow and Hesston.

157 Cohen, L. E. and Felson, M. 1979. Social change and crime rate trends: A routine activity approach. American Sociological Review, 44: 588-608.

158 Cornish, D. and R. V. Clarke, eds., 1986, *The Reasoning Criminal*, New York: Springer-Overflag.

159 Brantingham, P. and Brantingham, P., 1984, *Patterns in Crime*, New York: Macmillan.

The routine activities approach suggests that, crime is more likely to occur when three conditions are satisfied. The first condition is the presence of a motivated offender; the second condition is the presence of a suitable target; and the third condition is the absence of a capable guardian.[160] The presence of a motivated offender is a given; the theory assumes an offender is predisposed to acting on his or her criminal inclinations, for without an overt act there would not be a crime. Motivation for piracy is the oppressive social and moral foreground pirates are subjected to in their homeland, including poverty, unemployment, political and social strife, and economic deprivation.

Suitable targets are those that exhibit these four qualities, namely; value, inertia, visibility, and access.[161] Pirates typically go after targets that are easily converted to cash. However, some targets may be symbolic. Inertia refers to the target's weight and how easily it can be carried away or disposed of. Visibility refers to the target's sightlines. For example, a large seagoing vessel such as a tanker or container ship can be easily spotted from the shore line or from a boat used by pirates to scout the waters. Lastly, pirates must have access to the target. Pirates can pull up alongside a vessel and board it by using a grappling hook or similar climbing device.

The last segment of routine activities is the absence of capable guardians. The motivation to commit an act of piracy follows *Travis Hirschi's* line of thought which

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160 Felson, M. and Clarke, R.V., 1998, *Opportunity Makes the Thief: Practical theory for Crime Prevention*, London: Home Office.

161 Felson, M. and Clarke, R.V., 1998, *Crime and Everyday Life*, 2nd ed., Thousand Oaks, CA: Pine Forge Press.

state that, crime occurs in the absence of controls.[162] When temptations are high and controls are low, a motivated pirate can strike more easily. A guardian is not necessarily a formal agent such as police officer, soldier, or teacher, but anyone who can serve as a reminder that someone is watching. The lynchpin is "capable." Since most high seas piracy is an armed takeover, pirates can easily force an unarmed crew into submission and render them incapable of defending the ship. In this sense, even though a crew of able-bodied adults is aboard, they are no match for the overwhelmingly force applied by armed pirates.

On the other hand, crime pattern theory suggests that, people are intertwined with their environment and crime is a product of how they move about and converge in time and space.[163] This theory is useful for understanding how opportunities are concentrated at particular times in particle places. Pirates that embark from developing countries may seem to lack the technical wherewithal to hijack a ship. Admittedly, their operations are crude.

However, through corruption or basic reconnaissance they gain access to information about what type of cargo may be aboard, what routes the ships sail, what is the ships' port of call, when the ships will sail, and how often ships pass through certain regions such as time of day, day of week, or season. Armed with this knowledge, pirates can easily to recognize patterns of shipping and intercept the ships along their primary travel route.

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162 Hirschi, T. 1969. *Causes of Delinquency.* Berkeley, CA: University of California Press.

163 Brantingham, P. and Brantingham, P., eds. 1991, *Environmental Criminology,* Prospects Hights, OH: Waveland.

The rational choice perspective focuses on offender decision making. The premise is that, offenders weigh the costs, ie pain and punishment; and benefits, ie pleasure and gain; before committing a crime. Except, their decisions are never perfect and they rely on information that constrains their decisions, which results in flawed outcomes such as arrest, injury, death, or monetary loss.[164] Because the conditions in the pirates' homeland are so oppressive, the pleasure associated with seizing a ship's cargo and converting it to cash outweighs the pain associated with capture. The profile of the typical pirate operating in the Straits of Malacca is one of an "opportunist, who is perhaps working from a local village, or a local community. He may have had military training and he is doing it basically for his own gain or advantage."[165] Other reported cases involve juveniles who have been kidnapped and forced into piracy.[166] Liquidating stolen goods may involve cooperation from local officials who use the proceeds to further corrupt already destabilized governments.

Together, routine activities, crime pattern theory, and rational choice, form 'opportunity theory,' which suggests that, specific situations, environments, and products can be intentionally manipulated to reduce crime. In other words, interventions can be specifically constructed to "design-out" crime.[167] There is a large body of historical and contemporary research supporting this theory through a

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164 Cornish, D., and Clarke, R. V., eds., 1986, *The Reasoning Criminal*, New York: Springer-Verlag.

165 Bateman, S. 2001. Piracy on the rise. Correspondents' Report, Australian Broadcasting Corporation. Retrieved from abc.net.au/correspondents on 23rd November, 2018.

166 Zambito, T., Boyle, C. and Connor, T., 2009, Somali pirate's smile turns to tears; charged with crimes that could send him to jail for life. Daily News, U.S./World News, April 21, 2009, dailynew.com/us world.)Accessed 23rd November, 2018).

167 Felson, M. and Clarke, R. V., 1998, Opportunity makes the thief: Practical theory for Crime Prevention, London; Home Office, homeoffice.gov.uk.rs. (Accessed 24th September, 2018).

wide range of criminal behaviors including delinquency,[168] deceit,[169] burglary,[170] and auto theft.[171]

The consistent premise of this line of inquiry is that increasing risk or effort and reducing the benefits of crime, ie dimensions that can be intentionally controlled by industry, government, and individual citizens; has much to do with someone's decision to commit or forego criminal activity.

Shane and Lieberman argue that, despite the problems plaguing certain developing regions and the propensity of pirate youth to use violence to achieve their goals, a ship's master may unwittingly precipitate their own demise through the routine activities of shipping.[172] Vessel security is dependent upon the activities of the crew and the master's itinerary. The route travelled the season, the port of call, the regulations that govern shipping, the time of departure and arrival, and the nature of the cargo, among the many, all contribute to the routine of shipping.

In the interest of time, in as much as time is money, ship masters rely on the familiar; that which has saved time and effort in the past is likely to do so in the future, thus keeping deliveries on schedule. Deliveries that are on-time are dependable and cheaper, dependability and low cost ensure higher profit, irrespective of crew safety.

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168 Burt, C, 1925, *The Young Delinquent*, London: University of London Press.

169 Farrington, D. P. and Knight, B. J., 1980, *"Stealing from a 'lost' letter," Criminal Justice and Behavior*, 7:423-436.

170 Blantingham, P., and Blantingham, P., 1975, *"The spatial patterning of burglary,"* Howard Journal of Criminal Justice, 14 ,11-23.

171 Wilkins, L. T., 1964, *Social Deviance.* London: Tavistock.

172 Shane, J. N. and Leberman, C. A., (2009), Criminological theories, (n 150).

The quickest shortest route known to the master may also be known to the motivated pirate.

Once patterns are established, they become predictable. Predictable patterns breed complacency, and complacency breeds vulnerability. The opportunities for pirates to strike generated by routine shipping activities eventually create "hot-spots" or areas that produce a disproportionate amount of crime. With an understanding of how opportunity theory works, it is useful to describe the structure of opportunity.[173]

The second cluster is described as the reducing opportunity theory. This theory explains opportunity structure for piracy. As described by Clarke, opportunity structure includes victims, targets, and facilitators. The target is the commodities aboard the ship eg palm oil, lumber, textiles, and household goods. The victim is the ship's crew or the ship itself and the facilitators are the means by which piracy is carried out. These include speed boats, heavy weapons, and communications.

The source of targets and their nature is a product of two issues namely, the physical environment which include issues like design and size of the ship; and, the routine activities of the shipping industry including patterns of trade among nations, season, weather, supply and demand of commodities, number of crew, speed of travel, and ocean currents, together with any other thing which can affect guardianship.

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[173] Some of the "hot-spots" for piracy include Indonesia, Malaysia, Singapore and the Philippines. See for example, Mbekeani, K.K., and Mthuli, N., 2011, Economic Impact of Maritime Piracy: (n 100).

The physical environment, routine activities and the broader socio-demographic structure which can be poverty, unemployment, or disaffection sets up a complex interaction that may induce sufficiently motivated offenders into acting while concurrently reducing guardianship, which makes piracy more likely.[174]

Therefore, from the analysis of the routine activities associated with shipping and analyzing the situational factors surrounding each act of piracy which contribute to the body of knowledge known as environmental criminology, the practical application of situational crime prevention can be undertaken. Several opportunity-reducing techniques have been identified some of which have already been incorporated into the shipping industry practices including target hardening, access control, deflecting offenders, entry or exist screening, surveillance by employees, formal surveillance, identifying property, reducing temptation, denying benefits, rule setting, stimulating conscience, and facilitating compliance.[175]

The selected concepts and theories so far discussed in this chapter have been chosen as relevant for purposes advancing the course of this study. However, not every theory and every concept so far exposed is intended to be used in assessing the state of adequacy of the existing piracy rules in dealing with piracy in Tanzania concerning the subject of maritime security. Some legal concepts on maritime security, application of ergonomics and economics theories are highly relevant in the analysis of maritime security as they seem to justify countries to strengthen maritime

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174 Clarke, R.V., 1997, Situational Crime Prevention, 2nd ed. New York: Harrow and Heston.

175 Shane, J.M. and Lieberman, C.A., (2009). Criminological Theories and the Problems of Modern Piracy, (n 150), p15.

security laws so as to counter piracy. Also, in no way the researcher claims that the described concepts and theories are exhaustive.

Apparently, every theoretical approach that is being advocated is not free from one disadvantage or another. While one approach might be seen as advantageous from the global perspective, it might not equally be seen as a favourable option to a particular country in view of various issues including its level of development. Equally, while an approach might be theoretically sound, in practical terms it might be unattainable. Nevertheless, the discussed theories serve to expose the benefits and ills of each approach, which then need to be considered in developing a legal framework in light of the existing global challenges, initiatives and the local contexts. All in all, the theories debated provide an important benchmark which any reform measure ought to consider while prioritizing the specific needs and values of the country under review.

The theories analyzed have revealed that, social conditions associated with piracy include poverty, hunger, unemployment, poor housing, and political instability. Those who exploit the vulnerabilities created by social disorganization are doing so in response to the strain and frustration that manifest from a lack of life's basic necessities such as food, shelter, and clothing. In these regions of the world, there is a subculture willing to support criminal behavior, operating in an environment too corrupt to stop it.

Also, the theories have shown that, political instability, which results from a weak or non-existent central government, leads to a condition in which social and moral norms are weak, conflicting, or simply absent. The lack of norms, that is a state without norms, creates deviant behavior and ultimately social upheaval. For example, Somalia, where piracy is prevalent, has been without an effective central government since President Siad Barre was overthrown in 1991. This means that, piracy gains a foothold in a state due to the country's economic instability, which poses threats to other nearby developing nations as well.

Thus, as conditions persist, opportunities for criminal activity arise. Opportunities exist because international commerce relies on ports and waterways that are adjacent to economically and politically unstable countries. Since there is no domestic force such as police or viable military, to stop the pirates in these countries, they can easily set upon unguarded vessels passing through international waters, seize the crew and their cargo, return to land, and liquidate the goods. According to the theories discussed above therefore, opportunities for piracy can be explained from three perspectives namely; routine activities approach, rational choice perspective, and crime pattern theory, which converge into a single explanation known as opportunity theory.

2.6 Conclusion

This chapter has looked into the conceptual and theoretical framework of maritime security with a focus on piracy as they impact on application of international law of piracy at domestic level. Although the subject of maritime security is full of concepts

and theories, the researcher has simply selected only the concepts and theories that serve to lay ground for understanding better the diverse discourse and approaches to tackling the underlying controversies in answering the research questions of this thesis. It is noted that, some common conceptual understandings are attained. For example, the discussion in all concepts has shown that the existing international elements of piracy have been criticized in all concepts. Similarly, various causes or initiation of continued ineffective piracy suppression are explained by criminological theories. This suggests that, if domestic legal framework is limited to piracy ingredients under UNCLOS can hardly deal with piracy in an effective manner.

Based on understanding of the concepts and theories built in this chapter, the researcher has been able to assess the current Tanzania legal regime on piracy, with a view that it is important for theories and concepts underlying piracy at national level to be understood from legal, ergonomics and economics point of view so as to avoid uncertainty that may occur while determining piracy matters.

CHAPTER THREE

INTERNATIONAL LEGAL FRAMEWORK FOR PIRACY

3.1 Introduction

Piracy is a universal crime which ranks first in terms of crimes perpetrated against security of life and property at sea by virtue of its historical antiquity. The crime affects all nations irrespective of where it occurs. In this regard, the international law makes it mandatory for all states to suppress piracy in line with international standards. However, the universal definition of piracy under international law raises concern. This chapter examines the adequacy of piracy standards under the international legal framework with a focus on UNCLOS and SUA Convention although not in a strict way. The discussion begins by providing the history and development of the legal framework for piracy.

3.2 Historical Development of Legal Framework for Piracy

Piracy has been an historical challenge in terms of its definition. In fact, the definition of 'piracy' was the most controversial aspect under customary international law.[176] Piracy as a term was not authoritative.[177] This scenario resulted to diverse definitions of the term by numerous writers. On one hand, Hall viewed pirates as persons who deprecate by sea or land without authority from a sovereign.[178] Thomas speculates that, piracy must occur outside the territorial

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176 Azubuike, L., *International Law Regime Against Piracy*, Annual Survey of International & Comparative Law, 2009, Vol. 15, No. 1.

177 Halberstam, H.,Terrorism on the High Seas: The *Achille Lauro*, Piracy and the IMO Convention on Maritime Safety, 82 A.1.I.L. 269, 272 (1988).

178 Hall, W.E., *International Law,* Oxford University Press, 1880.

jurisdiction of any civilized state.[179] William on the other hand, views piracy as committing acts of robbery and depredation upon the high seas, which, if committed upon land would have amount to a felony.[180]

As specified later in this chapter, piracy definition under the prevailing treaty regime has equally remained to be controversial. One controversy lies on the nexus between piracy and maritime terrorism in modern incidents at sea especially when it comes to proof of intent of perpetrators. Maritime terrorism was not captured when the existing convention namely UNCLOS, which incorporates customary piracy provisions, was finalized for adoption. Somalia based piracy incidents which is increasingly perceive as an organised crime serves as a good example for this scenario.[181]

Another historical controversy concerning the definition of piracy is that, according to international standards, an act can be termed piracy only when committed on the high sea. Customarily the high sea was located three nautical miles (nm) from shore. This means that, by then piracy could be committed just close to three nm. However, under the modern law ie UNCLOS; the high sea is an area located two hundred nm from shore. This is a challenge because as it happens nowadays most piracy incidents mainly occur within the territorial seas ie outside the high seas.

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179 *ibid.*

180 Stile, E. C., *Reforming Current International Law to Combat Modem Sea Piracy*, Suffolk Transnational Law Review, 2004, Vol. 27, pp. 304-305, p 299.

181 UNCTAD, Report on Maritime Piracy, Part I, (n 99).

Apparently, no corresponding modification to the modern high seas piracy regime has been made so far. The reason could be that, in modern times piracy was believed to have fallen to levels that did not demand international attention.[182] This has led to existence of a divergence between the definition of piracy according to the international law and that which is found in domestic law.[183] The obvious reason for this scenario is that various states retained the three nm version in their domestic framework. In East Africa for instance, piracy definition in the Penal Code of most of the countries in this region did not reflect UNCLOS definition. The Penal Codes of these countries were amended to reflect UNCLOS provisions in 2010 following piracy escalation off the coast of Somalia in 2008.

Another challenge embedded in history is that, piracy has its origins in the classical world where it was defined according to the existing situation by each state. For example, Greek and Roman texts refer to *peirato* and *pirata* respectively to mean the term piracy. However, these epithets referred to whole communities which were sustained by raiding ships at sea rather than merely those who engaged in the activity. Therefore, initially the term piracy was not considered in terms of criminality as clear cut as it is today.[184] Sometimes piracy was allowed to flourish to the benefit of states. It follows therefore that, pirates were not always universally

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182 Eugene Kantorovich, International Legal Response to Piracy of the Coast of Somalia, ASIL Insights Vol. 13, Issue 2, Feb 6, 2009.

183 William Edward Hall, A Treatise on International Law 275 (A. Pearce Higgins ed., 7th ed. 1917). ("The municipal laws extending piracy beyond the limits assigned to it by international custom affect only the subjects of the state enacting them and foreigners doing the forbidden acts within its jurisdiction.").

184 Rubin, A.P., The Law of Piracy, Vol. 8, Naval War College Press, 1988.

condemned, but instead were sometimes tolerated and employed by states for their own selfish benefits.[185] For instance, during eruptions of war time involving European powers, from the sixteenth century through into the nineteenth century, pirate would be called into service by governments as privateers to take ships of the enemies in the name of their states.[186]

Pirate attacks could be legitimated by governments through the authorizing of such activities as privateers, under what was known as 'a letter of marquee.'[187] Such an instrument would permit attacks on enemy vessels and would clothe what would otherwise be characterized as a pirate attack as a legitimate part of war at sea. Its scope would typically restrict attacks to vessels of a particular nationality, and extend over perhaps a limited geographical area or a limited period of time.

But when the war would end, those same ships would continue to sack commercial transport but now as pirates. As Nyman puts it, privateering, a resource for a state war, was therefore the breeding ground for piracy, a scourge to that same state in times of peace. [188] Letters of marquee were prohibited by the Declaration of Paris in 1856. As late as 1898, the US explicitly reserved the right to issue letters of marquee during the Spanish-American War.[189]

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185 Bahar, M., Attaining Optimal Deterrence at Sea: A Legal and Strategic Theory for Naval Anti-Piracy Operations, 40 Vand. J. Transnational L. I, 12 (2007).

186 Nyman, E. (2011). Modern Piracy and International Law: Definitional Issues with the Law of the Sea. Geography Compass, 5 (11), 863–874, p. 864.

187 Rubin, A.P.,, The Law of Piracy (2nd edn), Transnational Publishers, New York, 1998, p 58

188 Nyman, E. (2011). Modern Piracy and International Law: (n 184).

189 J Colombos, The International Law of the Sea (6th edn), Longmans, London, 1967, p 448.

Equally, the Romans referred to alliances they had from time to time with *pirata*, suggesting that if communities sustained by piracy directed their attacks against the enemies of Rome they were not committing criminal offences in the eyes of the Romans.[190] After the fall of the Western Roman Empire, the term *pirata* appears to fall out of use, although it is reasonable to assume that ship attacks did not end.

Noteworthy moreover that, the modern equivalent usage of the term 'pirate' more accurately has its origins during the Renaissance, when the ships of the western European powers engaging in widening trade, particularly those of Venice, England, France and Spain, began to increasingly fall victim to pirate attacks. Reaction to these attacks was an increasing recognition that attacks on ships at sea outside of wartime was a criminal offence, and further, that pirates could be captured and punished by any state, wherever they were encountered.[191]

British efforts to curb piracy saw early consideration of the nature of piracy as a crime. In view of subsequent events, it is logical therefore to consider the development of the law of piracy in England. In particular, England piracy law exerted a significant impact on the subsequent development of international law. Both Sir Edward Coke and Sir William Blackstone in their respective works identified piracy as a serious crime, one that states could respond to at sea when and where it was found.

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190 Rubin, A.P., The Law of Piracy, (n 185), pp 6-19.

191 H Lauterpacht, *Oppenheim's International Law*, Longmans, Green & Co, London, 1948, vol. 1, p 279.

Writing in 1628, Coke stated that pirates were '*hostis humani generis*' or literally 'the enemies of all mankind,' which was quoted with approval by Blackstone over a century later in an oft cited passage:

> *"Lastly, the crime of piracy, or robbery and depredation upon the high seas, a pirate being, according to Sir Edward Coke, hostis humani generis. As therefore he 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, all mankind must declare war against him: So that every community hath a right, by rule of self defence, to inflict that punishment upon him, which every individual would in a state of nature been otherwise entitled to do, for any invasion of his person or personal property.*[192]

British Parliament also passed a series of acts from the sixteenth century aimed at ensuring the ships of the Royal Navy (RN) had legislative authority to deal with pirates.[193]

Substantial development of the law of piracy in England took place in the nineteenth century, when, through a series of Admiralty cases, the operative extent of the law began to take place. For example, in the *Le Louis* Case in 1817, Justice Sir William Scott held that, pirates were essentially the equivalent of enemy belligerents in time of war, and therefore could be treated as subject to the 'extreme rights of war'.[194]

The extent of the law of piracy in England reached its apogee in *The Magellan Pirates* where the Chief Judge in Admiralty, Dr. Stephen Lushington held that, the pursuit of pirates within the Strait of Magellan; even to the extent of pursuing them

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192 W Blackstone, Commentaries on the Laws of England, Professional Books, Abingdon, 1982(reprint of 1802 edition), vol. 4, p71-72.

193 See Kaye, S., *The International Legal Framework for Piracy*, Australian Maritime Affairs, 2011, No. 31, pp 35-44.

194 *Le Louis* 165 ER 1464.

to anchor and on to their base onshore in Chilean territory was lawful. Lushington indicated that in the case of pirates pursued on to land, their arrest was lawful, but there was an obligation to hand the individuals over to lawful authority within the state on whose territory they were apprehended.[195]

The modern exposition of the offence of piracy at English law came in as reference to the Privy Council in *re Piracy Jure Gentium* where the judges looked favorably upon a definition of piracy given by Kenny that 'piracy is any armed violence at sea which is not a lawful act of war' which given its brevity came closest to the mark. The judges also indicated that attempt could also constitute an offence. What was significant in the definition apparently used by the Privy Council was that piracy would not encompass any assault that took place at sea. Rather, there was a necessity of the piratical act to include some element of assimilating the cargo, the ship or both to the pirate's control and personal benefit.[196]

The size and reach of the RN saw it at the forefront of counter-piracy operations in the nineteenth century and as hinted earlier it would be right to point out that British practice had a significant role in the formulation of the law of piracy in international law. For instance, the International Law Commission (ILC), in the lead up to the first United Nations Conference of the Law of the Sea in 1958, adopted a definition and operative provisions closely modeled on British law and practice. Their articles especially on piracy were transmitted essentially intact into the Convention on the

195 *The Magellan Pirates* 164 ER 47.
196 In *re Piracy Jure Gentium* [1934] AC 586.

High Seas of 1958, which opened for signature in April 1958,[197] and later in UNCLOS.

3.3 International Legal Framework for Piracy

The preceding analysis shows that the international legal framework for piracy as we see it today traces from the first time seas were used for trade. The framework therefore, is a branch of public maritime law commonly known as the law of the sea which provides for the regulation, management and governance of the ocean space. The framework originates from maritime customary norms commonly known as "general maritime law" or "maritime customs" or "codified rules of conduct" in maritime trade.[198] These norms resulted from traditional seafaring practices which include the concept of piracy.[199] Gradually throughout the nineteenth century a legal regime developed in response to the threat of piracy.

Subsequently customary international law evolved and made piracy in effect the first universal crime. For instance, in the famous "lotus case", which was heard before the Permanent Court of International Justice in 1927, Judge Moore described piracy as "an offence against the law of nations" and pirates as "the enemy of mankind (*hostis humani generis)* whom any nation may in the interest of all capture and punish".[200]

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197 1958 Convention on the High Seas, done at Geneva on 29 April 1958, entered into force 30 September 1962: 450 UNTS 11.

198 Pulungan, R.W., The Limitations of the International Law on Piracy And Maritime Terrorism: Options for Strengthening Maritime Security in The Malacca Straits, PhD Thesis, Melbourne Law School of the University of Melbourne, Australia, 2014.

199 Kantorovich, E., *International Legal Response to Piracy of the Coast of Somalia,* ASIL Insights, 2009, Vol. 13, No. 2.

200 The Lotus Case (ie France v Turkey) (1927). PCIJ Series. A No.10: 70.

As hinted earlier, the development in custom were incorporated into the modern law first in 1958 under the Convention on the High Seas and then under UNCLOS in 1982. Consequently, it may be justifiable to assume that before international law piracy law was.

Therefore, customary international law equally prohibited piracy and treated it as enemies of human kind.[201] The need for codification of international law was a result of the Second World War and the establishment of the UN.[202] With respect to this, two initiatives were made. The first attempt was made by the Committee of Experts for the Progressive Codification of International Law of the League of Nations which produced a proposal in 1926.

Another attempt was made by a group of prominent legal scholars ie Harvard Research in International Law, who produced a Draft Convention on Piracy in 1932.[203] The 1932 Draft Convention restated the existing international law on piracy in the form of a proposed treaty consisting of 19 articles.[204] Upon request by UNGA

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201 Burgess, D.R., *Hostis Humani Generis, Piracy, Terrorism and A New International Law*, U. Miami Int'l & Compo L. Rev., 2006, Vol. 3 pp 293-315 as quoted in Azubuike, L., *International Law Regime Against Piracy*, Annual Survey of International & Comparative Law, 2009, Vol. 15, No. 1, p 44.

202 Wallner, M., and Kokoszkiewicz, A., *Maritime Piracy and Limitations of the International Law of the Sea*, Historia i Polityka, 2019, Vol. 35, No. 28, pp 25-35, p 28.

203 Harvard Law School, Front Matter, (1935), The American Journal of International Law, Vol. 29, iii-656, http://www.jstor.org/stable/2213614. (Accessed 6 September, 2021).

204 The literature shows that, out of seafaring practices evolved customs of the sea commonly referred to as 'general maritime law' (maritime law is a branch of international law). These practices were codified into rules of conduct observed in trade. For a detailed note on maritime regulations see Justinian Digest; Code of Rhodes; Basilica; Consulate de Mar; Laws of Wisbie; and Rolls d'Oleron, quoted from Bendera, I.M., Admiralty Jurisdiction in Tanzania: The Law and Practice, The Tanzania Lawyer Journal, 2010, Vol. 2, No. 2.

in 1954, in 1956 the ILC produced a draft treaty on international rules to apply to the high seas and other areas of the oceans.[205] The 1932 Harvard Draft Convention on Piracy formed the bases for the 1956 ILC draft treaty.

These developments finally culminated in establishment of the modern laws on piracy via the Geneva High Seas Convention of 1958,[206] and subsequently the UNCLOS.[207] Subsequent to discussion of the report of ILC, UNGA adopted Resolution 1105 (XI) of 21 February 1957,[208] by which it decided to convene the first United Nations Conference on the Law of the Sea, which was held in Geneva, Switzerland from 24 February to 27 April 1958. On 29 April 1958, the conference adopted four conventions commonly known as the Generva Conventions including the Convention on the High Seas of 1958.

The Convention on the High Seas of 1958 is therefore a collection of provisions that were considered to be generally declaratory of established principles of international law at that time.[209] Later, in 1982 the third UN conference on the law of the sea adopted the UNCLOS.[210] UNCLOS superseded the earlier Conventions, which are now seen by many as obsolete,[211] as the contracting states to UNCLOS include most of the states previously bound by the Geneva Conventions.

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205 United Nations General Assembly Resolution 899 (IX), 14 December 1954.

206 Convention on the High Seas of 1958, Articles 14 to 21.

207 UNCLOS, Articles 100 to 107.

208 United Nations General Assembly Resolution 1105 (XI) of 21 February 1957.

209 UNCTAD, Report on Maritime Piracy, Part I, (n 99).

210 A second conference was held in 1960 to consider the topics which had not been agreed upon at in the 1958 Conference. Further information on this can be accessed from http://untreaty.un.org/cod/diplomaticconferences/lawofthesea-1960/lawofthesea-1960.html.

211 Article 311(1) of UNCLOS states that the 1982 Convention "shall prevail, as between State Parties, over the Geneva Conventions on the Law of the Sea of 29 April 1958".

Nevertheless, piracy definition under UNCLOS has been contradictory since its inception. The gaps under UNCLOS were evident through two incidents. First, was the hijacking of the *Achille Lauro* cruise ship in the Mediterranean which resulted to the death of one passenger. The second incident was a gradual increase of piracy attacks off the East African coast in 2008.[212] In this regard, numerous international instruments have been put in place to fill the gap which exists under UNCLOS. These instruments include but not limited to SOLAS amendments in terms of ISPS Code, SUA, UNSCRs, and other IMO instruments such as Conventions, codes and circulars. This discussion however is limited to UNCLOS and SUA although not in a strict sense.

3.4 Piracy under UNCLOS

The earlier discussion revealed that, the existing international legal framework on piracy is found in the provisions of UNCLOS.[213] As a treaty, UNCLOS should be binding only to state parties. However, since its provisions are considered a codification of customary international law, then UNCLOS provisions are binding on every state including non parties to it. In this context, the universal definition of piracy is equally covered under this convention.[214] Apparently, UNCLOS codifies the piracy provisions of customary international law in Articles 100 to 107.

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212 Rothwell, D.R. and Stephens, T., The International Law of the Sea, (n 123).
213 UNCLOS, Articles 100-107.
214 *ibid*, Article 105.

Article 100 of UNCLOS reinforces an important aspect of addressing piracy and that is inter-state cooperation. According to this Article, states are obliged to cooperate to the fullest possible extent in the repression of piracy on the high seas or in any other place outside the jurisdiction of any state. Article 101 of UNCLOS defines piracy to mean:

> *"Piracy consists of any of the following acts:*
>
> *(a) any illegal acts of violence or detention, or any act of depredation, committed for private ends by the crew or the passengers of a private ship or a private aircraft, and directed:*
>
> *(i) on the high seas, against another ship or aircraft or against persons or property on board such ship or aircraft;*
>
> *(ii) against a ship, aircraft, persons or property in a place outside the jurisdiction of any state;*
>
> *(b) any act of voluntary participation in the operation of a ship or of an aircraft with knowledge of facts making it a pirate ship or aircraft;*
>
> *(c) any act of inciting or of intentionally facilitating an act described in subparagraph (a) or (b)."*[215]

This is a general definition of piracy consistent with the common expression that a pirate is an enemy of all humankind ie *hostis humani generis.* The Article further defines ship-based piracy as consisting of acts of violence or detention, or an act of depredation, committed for private ends by the crew of a private ship directed against another ship on the high seas or outside the jurisdiction of any state.

Piracy also extends to the operation of a pirate ship which is a ship used by persons for the purposes of committing pirate acts. However, by limiting the definition to acts

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[215] United Nations Convention on the Law of the Sea, 10 December 1982, United Nations, Treaty Series, Vol. 1833, p 3.

committed for private gain negates acts done for political motives. In this context terrorist attacks at sea are not captured under the definition.

The provisions of Article 101 of UNCLOS also enshrine a crucial element that an act of piracy can only occur on the high seas. For that matter, an equivalent act of violence committed within the territorial waters would not be piracy for the purposes of international law. The same Article requires that, the act of piracy should involve two ships ie the victim ship and a pirate ship.

Article 103 contains definition of a pirate ship. This definition extends to a ship that is intended by the persons in dominant control to be used for an act of piracy. The importance of the characterization of a vessel as a pirate ship is highlighted by Article 105 of UNCLOS which also makes piracy a universal crime. By virtue of this Article any state has mandate to seize a pirate ship on the high seas and arrest the persons on board including their assets.

The definition of piracy under Article 101 of UNCLOS therefore comprises four rules namely; first, *the illegal violence rule*; second, the "*lucri causa"* or "*private gain rule"*; third is *the two ship rule*; the fourth and last is "*the high seas rule*." Summarily, the illegal violence rule requires that all the attacks alleged to be piracy should be illegal acts of violence.

The "*lucri causa"* or "*private gain rule"* means that the alleged act should be motivated by private gain. The legal requirement under the two-ship and high seas

rules is that the act must be committed in the high sea and the incident should involve two ships ie the victim ship and the perpetrator's ship.

3.4.1 Illegal Violence Rule

It is clear that, normally, the state sanctions legal or lawful acts of violence through its naval and public security machinery. The illegal violence rule therefore is straight forward as all the attacks reported should be illegal acts of violence. To be precise, the illegal violence element is an act obviously punishable under the law unless used for self-defence or the defence of others.

3.4.2 The *Lucri Causa* Rule

Unlike the illegal violence rule, the *lucri causa* or private gain rule is encumbered with controversies.[216] This rule requires that, for the act to amount to piracy such act should be motivated by private gain.[217] Nevertheless, the available literature shows that it has always been difficult to establish whether an act was motivated by private gain or political reasons.[218] Although so far there is no accepted universal legal definition for maritime terrorism,[219] yet piracy differs from maritime terrorism in

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216 The English case of *Republic of Bolivia v Indemnity Mutual Marine Assurance Co*., Ud (1909) I K.B. 785 (Eng C.A.).

217 UNCLOS, Article 101(a).

218 Shah, H.A.R., A Legal Analysis of Piracy and Armed Robbery at Sea in the Straits of Malacca: the Malaysian Perspective, A Thesis submitted for the Degree of Doctor of Philosophy in Law, University of Birmingham, 2013.

219 Bueger, C., Does Maritime Security Require a New United Nations Structure? Global observatory, 26 August, 202, https://theglobalobservatory.org/2021/08/does- maritime-security-require-a-new-united-nations-structure/. (Accessed 29th September, 2021).

terms of motives. While piracy is motivated by unscrupulous material greed, maritime terrorism is politically motivated.[220]

Raising concern on the private gain rule, Mukherjee *et al* submit that, in some instances the two acts ie piracy and maritime terrorism do overlap.[221] Also Hamad opine that, very often high seas piracy is associated with maritime terrorism as there is nexus between the two.[222] Furthermore, Nelson explains that the overlapping characteristics and marked similarities between pirates and terrorists operating at sea make it difficult to tell them apart.[223] These concerns are embedded on the premise that, the ambiguity between piracy and maritime terrorism has significant consequence that may impede legal measures to counter these threats.[224]

Another perceived challenge is that, there is some, but still inconclusive, evidence that the pendulum may be swinging back from the state to the private sector, as private military companies may be starting to encroach on missions which have so far been regarded as the prerogative of states and their navies, including that of protecting maritime trade from piracy and, to some extent, from maritime terrorism.[225]

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220 Ibid. Motive determines whether an incident will be classified as an act of piracy or as an act of terrorism. These motives are financial or material gain in the case of piracy, and publicity or political gain in the case of terrorism.

221 Mejia, Q.M., et al, „Ergonomics, Economics, and the Law, (n 5).

222 Hamad, H.B., The East African Community's Maritime Domain: (n 52), p 92.

223 Nelson, E.S., *'Maritime Terrorism and Piracy: Existing and Potential Threats'*. *Global Security Studies*, Winter 2012, Vol. 3, No. 1, p 15.

224 *ibid*.

225 Møller, B., Report on Piracy, Maritime Terrorism and Naval Strategy, Danish Institute for International Studies, No. 2009:02, 2009. Retrieved on 16, May 2021, from www.diis.dk.

Another issue lies on the meaning of the term itself. UNCLOS does not provide for the definition of private ends.[226] In this respect, private ends requirement is debatable.[227] It is uncertain whether the intent of the act must be financial gain while excluding acts that have a political or ideological motive.[228] Under this scenario prosecution of maritime terrorism might not succeed. While others take the view that the requirement serves to distinguish acts by private individuals from acts of a state or state agent,[229] some take the view that, the absence of state authority should be the determinant factor as to whether or not acts can be classed as for private ends, and not the actor's motivation.[230] This research finds the later view to be logical in the sense that, in a way states will have to effectively exercise their universal jurisdiction over piracy within their jurisdictions as there is no way now that they can be excluded from piracy committed by their citizenry.

3.4.3 Two-Ship and High Seas Rules

The two ship rule demands for the presence of a pirate ship and a victim ship at the scene, that is, the high seas.[231] The challenge posed by this rule is that, the majority

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226 Logina, A., The International Law Related to Maritime Security: An Analysis of its Effectiveness in Combating Piracy and Armed Robbery Against Ships, MSc. Dissertation, The World Maritime University, Sweden, 2009.

227 A Joint Centre of Academy, Counter-piracy under International Law, Academy Briefing No. 1, Geneva Academy of International Humanitarian Law and Human Rights, 2012, p 12.

228 'Introduction: Southeast Asian Piracy: Research and Developments,' in G.G., Ong-Webb (ed.), Piracy, Maritime Terrorism and Securing the Malacca Straits, Institute of Southeast Asian Studies, 2006, p. xiii, quoted from A Joint Centre of Academy, Counter-piracy under International Law, Academy Briefing No. 1, *ibid.*

229 Geiss, R., and Petrig, A., *Piracy and Armed Robbery at Sea, The Legal Framework for Counter-Piracy Operations in Somalia and the Gulf of Aden,* Oxford: Oxford University Press, 2011, pp 61–2; D. Guilfoyle, *Shipping Interdiction and the Law of the Sea,* Cambridge: Cambridge University Press, 2009, pp 36-40.

230 Bahar, M., *'Attaining Optimal Deterrence at Sea,'* 2007, Vol. 40, Vanderbilt Journal of Transnational Law, pp 1-32.

231 UNCLOS, Article 101.

of piracy incidents reported does not involve two ships nor occur on the high seas.[232] In essence, together the third and fourth rules constitute *"the two-ship rule"* in the sense that, for an act to qualify as piracy, the incident should involve two ships on the high seas.[233] Therefore, it is not piracy if the incident involves two ships but beyond the high seas.[234] According to the fourth rule namely, *high seas* for an act to amount to piracy should occur on or beyond jurisdiction of any state. Practically, this requirement is a challenge since ship attacks are, in most cases, made while a ship is at anchor or tied to the dock.[235] The above analysis reveals that the rules for piracy under UNCLOS are controversial to the extent analysed in this thesis.

As indicated previously, UNCLOS problems are partly addressed by SUA, which covers the same acts, regardless of the motivation and without the 'two-ship criterion,' thus also applying to, for instance, certain instances of maritime terrorism.[236] In other words, to circumvent piracy definitional challenges under UNCLOS, the provisions of SUA particularly the terms "unlawful acts against maritime navigation" which appears under Article 3 of the convention has been preferred as a suitable alternative.[237] Further analysis on SUA Convention is provided in the subsequent discussion.

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232 ICC-IMB, Piracy and Armed Robbery at Sea Annual Reports from 1995 available from ICC-IMB website at www.iccc-cc.org.
233 UNCLOS, Article 101.
234 *ibid*, Article 87.
235 ICC-IMB Piracy and Armed Robbery at SeaAnnual Reports from 1995, (n 231).
236 Møller, B., Report on Piracy, Maritime Terrorism and Naval Strategy, (n 224).
237 SUA, Article 3.

3.5 Piracy under the SUA Convention

As noted earlier, UNCLOS is silent about acts of maritime terrorism such as hijackings or internal seizures of a ship.[238] On the other hand, SUA Convention makes it an offence if a person seizes or exercises control over a ship by threat or use of force thereof together with any other form of intimidation.[239] In this context, SUA Convention was put in place to fill the gaps that exist in UNCLOS concerning terrorism acts at sea.

As hinted earlier, SUA Convention which entered into force in 1992 was a result of a diplomatic initiative in response to hijacking of *Achille Lauro* cruise ship. This maritime incident which occurred in 1985 served as an illustration of the inadequacy of the international legal regime on vessel security at sea provided under UNCLOS. SUA Convention therefore came up as a measure to expand the international law in the area of vessel security.

The offences dealt with by SUA are set out in Article 3(1) which states that:

> *"1. Any person commits an offence if that person unlawfully and intentionally:*
>
> > *(a) seizes or exercises control over a ship by force or threat thereof or any other form of intimidation; or*
> > *(b) performs an act of violence against a person on board a ship if that act is likely to endanger the safe navigation of that ship; or*
> > *(c) destroys a ship or causes damage to a ship or to its cargo which is likely to endanger the safe navigation of that ship; or*
> > *(d) places or causes to be placed on a ship, by any means whatsoever, a device or substance which is likely to destroy that ship, or cause*

238 UNCTAD, Report on Maritime Piracy, Part I, (n 99).
239 SUA, Article 3.

> *damage to that ship or its cargo which endangers or is likely to endanger the safe navigation of that ship; or*
> *(e) destroys or seriously damages maritime navigational facilities or seriously interferes with their operation, if any such act is likely to endanger the safe navigation of a ship; or*
> *(f) communicates information which he knows to be false, thereby endangering the safe navigation of a ship; or*
> *(g) injures or kills any person, in connection with the commission or the attempted commission of any of the offences set forth in subparagraphs (a) to (f).*

Nevertheless, enforcement of offences created by SUA Convention relies upon the traditional jurisdictional bases of nationality and territoriality. Although SUA Protocol of 2005 expands the scope of the Convention to include piracy incidents with political elements yet there remains jurisdictional loopholes with respect to enforcement of criminal charges in case non-nationals or non-state vessels are involved.

SUA may therefore provide an additional basis for jurisdiction in cases where the act falls outside the geographic or substantive scope of UNCLOS, ie does not fall within the traditional definition of piracy as reflected in UNCLOS.[240] Moreover, the specific obligations imposed on contracting states to SUA may play an important part in the context of piracy.

Unlike UNCLOS, SUA creates attempted offence.[241] Similarly, although SUA does not explicitly refer to piratical acts or armed robbery against ships, many of the offences listed under it contain the basic elements of the crime of piracy, and

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240 *ibid.*
241 SUA, Article 3(2) (a).

therefore such acts may be covered by SUA.[242] That being said, SUA creates separate offences from those provided in Article 101 of UNCLOS. This allows a prosecuting state to choose whether to prosecute under SUA or UNCLOS, provided that the relevant offences are explicitly included in that state's criminal legislation.[243]

Article 3(2) of SUA requires the acts of attempting, abetting and threatening to carry out the offences in Article 3(1) to also be considered as crimes under the convention. The IMO secretariat has noted that the terminology employed in Article101(c) of UNCLOS, namely "inciting" and "intentionally facilitating" acts of piracy, is somewhat different, although some of the concepts may overlap, for example, "facilitating "and "abetting".[244] It is also worth noting that the SUA offences are not limited to those that involve more than one ship. As such, the internal seizure of a ship may fall within one of the listed offences.[245]

As hinted above, one of the key elements in the international definition of the crime of piracy is that it is committed for private gain. By comparison, the main requirement for an offence under SUA is that the person acts "unlawfully and intentionally." As such, the scope of Article 3 of SUA is much wider than Article 101 of UNCLOS, with piratical acts that are committed for private ends and piratical acts that are politically motivated both falling within the list of offences in Article

242 *ibid*, Article 3(1)(a) and (b).
243 IMO (2011d). Uniform and consistent application of the provisions of international conventions relating to piracy. Note by the secretariat. LEG 98/8, paragraph 11.
244 *ibid*, LEG 98/8, paragraph 13.
245 SUA, Article 3.

3.[246] This extended scope may facilitate prosecution in a broader range of offences at domestic level.

The offences listed in Article 3(1)(b)–(f) of SUA refer to acts that "endanger the safe navigation of that ship", making the safety or otherwise of the ship a key element in the definition of those offences.[247] Accordingly, if the offence does not, or is not likely to, endanger the ship, SUA will not be applicable to the offence.[248] By contrast, there is no requirement in Article 3(1)(a) to prove that the safety of navigation of the ship was endangered.[249] Given that in general acts of piracy will, or are likely to, endanger the safety of navigation of the ship, such acts should fall within the list of offences provided by Article3(1) of SUA.[250]

The scope of SUA is equally much wider.[251] For instance, offences that take place in the EEZ of any state or on the high seas fall within the scope of the convention by virtue of Article 4(1). In addition, SUA also applies where the offender or alleged offender is found in the territorial waters of another State.[252] Accordingly, the only case in which SUA would not apply is where the offence is committed solely within a single state's territorial sea and the suspected offender was subsequently found within that coastal state's territory.[253]

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246 *ibid.*
247 SUA, Article 3(1)(b)–(f).
248 *ibid.*
249 *ibid,* Article 3(1)(a).
250 *ibid,* Article3(1).
251 Article 4 of SUA as compared to Articles 101, 105 and 58(2) of UNCLOS.
252 SUA, Article 4(2).
253 *ibid,* Article 4.

The territorial scope of SUA therefore is wider than UNCLOS in so far as it covers piracy-related acts in the EEZ and the high seas, as well as in territorial waters in the circumstances provided within SUA's provisions.[254] Similarly, SUA convention requires states to make the offences listed in Article 3 punishable by appropriate penalties which consider the grave nature of those offences. The convention itself does not, however, prescribe specific penalties for any of the offences, which may result in a lack of uniformity among the national laws of state parties as regards the sanctions imposed.[255] Unlike UNCLOS, SUA empowers and oblige states to provide that, piracy constitute a criminal offence under the national legislation and to establish appropriate penalties".[256]

In respect of jurisdiction, there is an important distinction between the provisions of UNCLOS and of SUA. Article 105 of UNCLOS provides all states with universal jurisdiction in respect of the international crime of piracy as defined in Article 101.There is no additional requirement for a jurisdictional link between the state exercising jurisdiction and the suspected offender, pirate ship or victim. By contrast, Article 6 of SUA requires certain jurisdictional links pursuant to which a state must or may establish its jurisdiction over the offences listed in Article 3 of the Convention.[257]

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254 *ibid*, Article 4(1). See also IMO (2011d). Uniform and consistent application of the provisions of international conventions relating to piracy. Note by the secretariat. LEG 98/8, paragraph 20.

255 Mukherjee, P.K., (2004). *Piracy, Unlawful Acts and Maritime Violence*, Journal of International Maritime Law. Vol. 10, pp. 301–302.

256 IMO (2011d). Uniform and consistent application of the provisions of international conventions relating to piracy. Note by the secretariat. LEG 98/8, paragraph 21.

257 SUA, Article 6.

However, in respect of jurisdiction, SUA has a more restricted application than UNCLOS. Under SUA, a state may establish jurisdiction over an offence that is listed in Article 3, where the offence is committed against or on board a ship flying its flag, in its territory or by one of its nationals.[258] A state may also establish jurisdiction over an offence when it is committed by a Stateless person who is habitually resident in that State, the victim was a national of the state or it is committed in an attempt to compel that State to do or abstain from doing any act.[259]

SUA also offers important procedural rules that complement and reinforce the piracy provisions provided in UNCLOS.[260] Also, by virtue of Article 8 of SUA, the master of a ship of a state party may deliver to the authorities of any other state party any person whom he has reasonable grounds to believe has committed one of the offences listed in Article 3.[261] The receiving State is obliged to accept delivery of the person, except where it has grounds to consider that the Convention is not applicable to the acts giving rise to the delivery.[262] This provision is captured under the Merchant Shipping Act No. 21, 2003 of the laws of Tanzania.[263]

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258 *ibid*, Article 6(1)(a)–(c).
259 *ibid.*
260 *ibid*, Articles 7 and 8.
261 *ibid*, Article 8(1). According to Article 8(2) of SUA, the master of the ship is obliged to give notification to the authorities of the receiving State of the master's intention to deliver such a person and the reasons therefore.
262 *ibid*, Article 8(3).
263 Merchant Shipping Act, s 344(2).

The 2005 amendments to SUA ie SUA 2005[264] introduced provisions covering cooperation and procedures to be followed if a state party desires to board on the high seas a ship flying the flag of another State party, when the requesting party has reasonable grounds to suspect that the ship or a person on board the ship has been or is about to be involved in the commission of an offence under the 1988 SUA Convention.[265] The authorization of the flag State is required before such boarding. However, SUA 2005 which entered into force in July 2010, strengthens the legal basis for effective international cooperation, it should be noted that it has not yet been widely adopted.[266]

Where a state party has established jurisdiction in accordance with Article 6 of SUA, Article 10(1) oblige state to either extradite or prosecute the offender or alleged offender.[267] Article 11(1) of SUA provides that the offences listed in Article 3 shall be deemed to be included as extraditable offences in any extradition treaty between any of the state parties.[268]

UNCTAD posit that, in spite of the additional list of offences provided by SUA, it seems that states have been reluctant to use the convention directly as a basis for prosecution of maritime pirates, and this reluctance has been partially attributed to a

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264 The 2005 amendments to SUA, UNCTAD (2006), Review of Maritime Transport 2006, United Nations publication. UNCTAD/RMT/2006, New York and Geneva. Available at http://unctad.org/en/pages/PublicationArchive.aspx?publicationid=1666.

265 SUA 2005, Article 8bis.

266 Tanzania is a Party to the 2005 SUA Amendment.

267 SUA, Article 10(1) and Article 10(2).

268 *ibid*, Article 11(1).

lack of guidance as regards the SUA's application in the convention itself.[269] For instance, one commentator refers to the fact that the Aviation and Maritime Security Act of 1990 of the UK of Great Britain and Northern Ireland incorporated SUA into United Kingdom law, but in UK case-law no reliance has yet been placed on SUA.[270] Other states may have ratified SUA, but have not implemented it in their national legislation, thus being unable to charge offenders with a SUA offense.[271]

With regard to the Protocol for the Suppression of Unlawful Acts Against the Safety of Fixed Platforms Located on the Continental Shelf (SUA PROT), 1988, **w**hile SUA covers offences directed against ships, SUA Protocol 1988, as its title suggests, covers similar offences directed against fixed platforms.[272] According to the Protocol, "fixed platform" means "an artificial island, installation or structure permanently attached to the sea-bed for the purpose of exploration or exploitation of resources or for other economic purposes."[273]

It is noteworthy that, a number of amendments to the 1988 SUA Convention and its 1988 SUA Protocol were introduced by two Protocols adopted in 2005 namely; 2005 Protocol to the SUA Convention 1988 and 2005 Protocol to the SUA Protocol 1988.

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269 Kontorovich, E., *A Guantanamo on the Sea: The Difficulty of Prosecuting Pirates and Terrorists*, California Law Review, 2010, Vol. 98, p. 243.

270 Bento, L., Toward an International Law on Piracy Sui Generis: How the Dual Nature of Maritime Piracy Law Enables Piracy to Flourish, 2011, Berkeley Journal of International Law., Vol. 29, No. 2.

271 Problems resulting from failure to ratify or implement this Convention are illustrated for instance by the hijacking of the tugboat ASTA on 5 February 2010. For more information see for instance, Beckman R (2013).Piracy and Armed Robbery Against Ships in Southeast Asia. In Guilfoyle D, ed. Modern Piracy, Legal Challenges and Responses. Edward Elgar. Cheltenham, 13–34.

272 The Protocol for the Suppression of Unlawful Acts Against the Safety of Fixed Platforms Located on the Continental Shelf (SUA PROT), 1988.

273 *ibid*.

Nevertheless, these two Protocols have so far not attracted a large number of Contracting States. In summary, the relevant amendments are briefly noted below.[274] Amendments introduced by the 2005 SUA Protocol to the 1988 SUA Convention include (a) A broadening of the list of offences, to include, inter alia, the offence of using the ship itself in a manner that causes death or serious injury or damage and the transport of weapons or equipment that could be used for weapons of mass destruction (WMD) and inclusion of new procedures related to the transportation of WMD (article 3bis); and (b) Introduction of provisions for the boarding of ships where there are reasonable grounds to suspect that the ship or a person on board the ship has been or is about to be involved in the commission of an offence under the 1988 SUA Convention.

This is subject to a number of safeguards.[275] Moreover, authorization of the flag State is required before such boarding.[276] The 2005 amendments to the 1988 Protocol for the Suppression of Unlawful Acts Against the Safety of Fixed Platforms Located on the Continental Shelf reflect those in the 2005 Protocol to the SUA Convention.[277]

In as much as none of the maritime instruments for piracy in its own has comprehensive standards for piracy suppression, there has been recommendation that

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274 The texts of the 2005 SUA Protocols can be found in IMO documents LEG/CONF.15/21 and LEG/CONF.15/22.

275 Safeguards apply when a State party takes measures against a ship, including boarding. These safeguards include not endangering the safety of life at sea, ensuring that all persons on board are treated in a manner which preserves human dignity and in keeping with human rights law, taking due account of safety and security of the ship and its cargo, ensuring that measures taken are environmentally sound and taking reasonable efforts to avoid a ship being unduly detained or delayed (SUA 2005, Article 8bis (10)(a)).

276 SUA 2005, Article 8bis 8*bis*.

277 SUA 2005, Articles 1(1), article 2, 1(d), (2); article 2bis; article 2ter; article 3 (1), (3), (4).

measures should be taken by individual states to make their national legal framework adequate. On this point, UNCTAD recommends that countries should use UN Conventions which although not maritime conventions but in as much as they have bearing on security issues can be used to supplement the core instruments.[278] Two examples of the UN Conventions which can supplement other piracy instruments are the International Convention Against the Taking of Hostages, 1979[279] and the United Nations Convention Against Transnational Organized Crime (UNTOC), 2000.[280]

The International Convention Against the Taking of Hostages, 1979 is suggested due to the fact that, it is meant to develop international cooperation between States in devising and adopting effective measures for the prevention, prosecution and punishment of all acts of taking hostages as manifestations of international terrorism.[281] In the same line, the convention requires states to criminalize the taking of hostages.[282]

The offence of taking hostages is defined in Article 1 of the convention to include seizure or detaining and threatening to kill, to injure or to continue to detain another person ie 'hostage' in order to compel a third party, namely, a state, an international intergovernmental organization, a natural or juridical person or a group of persons, to

278 UNCTAD, Report on Maritime Piracy, Part I, (n 99).

279 For the text of the Convention see https://www.unodc.org/tldb/en/1979_Convention_Hostage%20Taking.html For more information on the interpretation of the provisions of the Convention at www.unodc.org/pdf/crime/terrorism/Commonwealth_Chapter_7.pdf. See also IMO (2011b). Establishment of a Legislative Framework to Allow for Effective and Efficient Piracy Prosecutions. Submitted by UNODC. LEG 98/8/2.

280 UNTOC.The full text of the Convention can be found at http://www.uncjin.org/Documents/Conventions/dcatoc/final_documents_2/convention_engdf

281 Preamble to the Hostage Convention, paragraph 5.

282 UNCTAD, Report on Maritime Piracy, Part I, (n 99).

do or abstain from doing any act as an explicit or implicit condition for the release of the hostage commits the offence of taking of hostages ie hostage-taking within the meaning of the convention.[283] Equally, the convention makes it an offence for a person who attempts to commit an act of hostage-taking; or participating as an accomplice of anyone who commits or attempts to commit an act of hostage-taking likewise commits an offence for the purp9ses of the convention.[284]

As is apparent, the definition is apt to cover detention under threat of personal injury and/or continued detention in order to compel an act, such as the payment of ransom, as a condition for the release of the hostage. Thus, piracy-related hostage-taking that involves holding crews for ransom would normally fall within the above definition.[285] The convention do not apply where the offence is committed within a single state, the hostage and the alleged offender are nationals of that state and the alleged offender is found in the territory of that state.[286]

Thus, hostage-taking in the territorial waters of a state is not covered by the convention, if victim and alleged offender are nationals of that State and the alleged offender is also found in that state. As concerns maritime piracy involving hostage-taking, this will only rarely be the case; in most instances an international element tends to be present, such as the nationality of the victim.

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283 Hostage Convention, Article 1.

284 *ibid.*

285 A detailed explanation of this is available in a Paper titled: "Global Conventions on Piracy, Ship-Jacking, Hostage-Taking and Maritime Terrorism" presented by Captain J. Ashley Roach, JAGC, USN (ret.) to CIL Workshop on Maritime Crimes Session 3 on 17th January 2011 at https://www.unodc.org/tldb/en/consolidate d-suap.html

286 Hostage Convention, Article 13.

With regard to jurisdiction the convention requires each state party to take such measures as may be necessary to establish its jurisdiction over any of the offences set forth in Article 1 of the convention which are committed in its territory or on board a ship or aircraft registered in that state; by any of its nationals or, if that state considers it appropriate, by those stateless persons who have their habitual residence in its territory; in order to compel that state to do or abstain from doing any act; or with respect to a hostage who is a national of that State, if that State considers it appropriate.[287]

The convention contains a standard extradition provision regarding the offences set forth in Article 1.[288] However unlike SUA, the Hostages Convention entitles a state party to refuse an extradition request if it has "substantial grounds for believing hat the request for extradition for an offence set forth in Article 1 has been made for the purpose of prosecuting or punishing a person on account of his race, religion, nationality, ethnic origin or political opinion; or that the person's position may be prejudiced.[289] These extradition provisions are different from those in SUA, but their practical relevancy may be limited in the context of hostage-taking by maritime pirates.

287 *ibid,* Article 5.
288 *ibid,* Article 10.
289 *ibid,* Article 9.

The United Nations Convention Against Transnational Organized Crime (UNTOC), 2000 is another convention which is suggested for piracy suppression.[290] The main purpose of this convention is to promote cooperation to prevent and combat transnational organized crime more effectively.[291] While piracy is not specifically addressed in the convention, several of the convention's provisions may be relevant in the context of international efforts to repress and effectively prosecute acts of piracy.[292] The convention requires states to establish specific offences as crimes and to introduce specific control measures, such as protection of victims and witnesses; it also encourages preventive policies and measures. The convention promotes international cooperation, for example through extradition, legal assistance and joint investigations, and provides for training, research and information-sharing measures.[293]

The convention applies to the prevention, investigation and prosecution of a number of specific listed offences, as well as to "serious crimes", defined as crimes "punishable by a maximum deprivation of liberty of at least four years or more or a more serious penalty".[294] Specific offences under the convention participation in an

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290 UNTOC. The full text of the Convention can be found at http://www.uncjin.org/Documents/Conventions/dcatoc/final_documents_2/convention_eng.pdf.

291 UNTOC, Article 1.

292 IMO (2011b), Establishment of a Legislative Framework to Allow for Effective and Efficient Piracy Prosecutions, submitted by UNODC. LEG 98/8/2.

293 For further information see also UNODC (2004), Legislative Guide for the Implementation of the United Nations Convention Against Transnational Organized Crime, United Nations publication. Available at http://www.unodc.org/pdf/crime/legislative_guides/Legislative%20guides_Full%20version.pdf.

294 UNTOC, Articles 2(b) and 3(1)(b).

organized criminal group,[295] laundering of proceeds of crime,[296] corruption;[297] and obstruction of justice.[298] In respect of these specific offences, the convention also contains a detailed provision on "prosecution, adjudication and sanctions,"[299] which, inter alia, requires states to make the commission of a relevant offence "liable to sanctions that take into account the gravity of that offence".[300] Equally, offences under UNCTOC are established in the domestic law of each member state independently of the transnational nature or the involvement of an organized criminal group as described in the convention.[301] To fall within Article 3(1) the offence must also be "transnational in nature" and committed by an "organized criminal group".[302]

For an offence to be transnational in nature, it should not be committed in one state. Similarly, an offence will not be transnational in nature unless a substantial part of the preparations occur in a different country; or involves any organized criminal group which engages in criminal activities in two or more states; or has substantial effects in a different state.[303]

According to the convention, "organized criminal group" refers to a structured group of three or more persons, existing for a period of time and acting in concert with the aim of committing one or more serious crimes or offence established in accordance with the convention, in order to obtain, directly or indirectly, a financial or other

295 *ibid,* Article 5.
296 *ibid,* Article 6.
297 *ibid,* Article 8.
298 *ibid,* Article 23.
299 *ibid,* Article 11.
300 *ibid*, Article 11(1).
301 *ibid,* Articles 34(2) and 3(1).
302 *ibid,* Article 3(1)(b).
303 *ibid,* Article 3(2) (a) – (d).

material benefit.[304] In this context, piracy committed on the high seas may be an offence of a "transnational nature "within the meaning of Article 3(2) of the convention, if committed on board a vessel flying that State's flag, as well as in cases where the offence is planned and prepared in one state and committed on board a vessel flying the flag of another State.[305]

Similar to SUA and the International Convention Against the Taking of Hostages, the convention requires a territorial link to the jurisdiction in question. The convention requires each state party to adopt such measures as may be necessary to establish its jurisdiction over the offences established in accordance with the convention.[306]

Equally, under the convention state parties are required to afford one another the widest measure of mutual legal assistance in investigations, prosecutions and judicial proceedings in relation to the offences covered by the convention.[307] For the purpose of requesting mutual legal assistance, the requesting state party needs only to have reasonable grounds to suspect that the offence is transnational in nature, including that victims, witnesses, proceeds, instrumentalities or evidence of such offences are located in the requested state party and that the offence involves an organized criminal group.[308]

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304 *ibid,* Article 2(a).

305 A vessel flying the flag of a state is subject to that state's exclusive jurisdiction on the high seas. This is in accordance with UNCLOS, Article 92(1).

306 Hostage Convention, Article 15(1).

307 *ibid,* Article 18(1).

308 *ibid.*

Mutual legal assistance under the convention may be requested in the circumstances stipulated in the convention.[309] Thus, inter alia, the convention may serve as a common framework for facilitating mutual legal assistance for the prosecution of pirates among States Parties. This is usually done through specific bilateral or multilateral agreements. Other provisions in this Convention that may be relevant to international efforts at combating piracy include (a) Measures to combat money-laundering and corruption[310] (b) Confiscation and seizure of money, property and other benefits deriving from a crime covered by the Convention, and international cooperation to that end[311] (c) Extradition[312] (d) Assistance to and protection of witnesses and victims[313] (e) Measures to enhance cooperation with law enforcement authorities[314] and (f) Law enforcement cooperation.[315]

The above analysis shows that, the fact that SUA's phraseology ostensibly overcame the zonal impediment of high sea piracy and also extended to criminal acts that fell

309 *ibid,* Article 18(3).
310 *ibid,* Articles 7 and 9.
311 *ibid,* Articles 12 – 14.
312 *ibid,* Article 16.
313 *ibid,* Article 24 and Article 25.
314 *ibid,* Article 26.
315 *ibid,* Article 27. For more information on the interpretation of the provisions of the Convention see also IMO (2011b). Establishment of a Legislative Framework to Allow for Effective and Efficient Piracy Prosecutions. Submitted by NODC. LEG 98/8/2 . For more information on UNODC response and activities related to witnesses and victims protection see http://www.unodc.org/unodc/en/organized-crime/witness-protection.html. The UNODC has also published model laws on mutual assistance in criminal matters, witness protection, extradition, money laundering and proceeds of crime and terrorist financing, which focus on obligations arising from international conventions and can be used by States as a basis for drafting their own laws on the subject. Texts of model laws can be accessed at http://www.unodc.org/unodc/en/legal-tools/model-treaties-and-laws.html. In addition, for the link between money-laundering and piracy, see for instance the Hindu Business Line (2013). All at Sea on Piracy. 3 January. Available at http://www.thehindubusinessline.com/opinion/all-at-sea-onpiracy/article4269509.eceSee also Public Intelligence (2010). Money-laundering for Somali Pirates is Good Business. 13 November. Available at http://publicintelligence.net/money-laundering-for-somali-pirates-isgood-business/.

out of the traditional definition of piracy; it attracted the attention of anti-piracy advocates because of its main features which makes it a potentially beneficial instrument in combating piracy-like incidents not within the scope of UNCLOS.[316] In other words, SUA simply describes unlawful act as an "act of violence against a person," and remain silent on "private gain motivation", "two ship rule" and the "high seas rule" requirements which, as noted in the foregoing discussion, can hardly be met in modern piracy incidents.[317]

One of the salient features of SUA is that, it applies to armed robberies at sea or acts which do not qualify as piracy under UNCLOS.[318] The term armed robbery under UNCLOS is unqualified. SUA also describes the crimes falling under its ambit.[319] As well, the convention extends to vessels in the territorial seas of states.[320] Thus, unlike piracy, which is limited to high seas under UNCLOS, an act even in territorial waters can be considered a crime under the SUA.[321] Equally, SUA puts its member states under an obligation to make the crimes falling under the ambit of the convention punishable by appropriate penalties which take into account the grave nature of those offences.[322] Another major feature of SUA is that, it specifies which state would have jurisdiction over the perpetrator. UNCLOS simply provide for universal jurisdiction.

316 Mejia, Q.M., *et al.*, „Ergonomics, Economics, and the Law, (n 5).
317 SUA, Article 3.
318 UNSC, Resolution 2008b.
319 SUA, Article 3.
320 *ibid,* Article 4.
321 *ibid.*
322 *Ibid,* Article 5.

Far from being a flawless improvement over the piracy Articles in UNCLOS, SUA has its own constraints and deficiencies to the extent shown in the preceding analysis.[323] One perceived deficiency under SUA results from making prosecution of an offence a matter of discretion of a state party. Another deficiency is that, SUA gives a room for coastal state to extradite the accused to a state which has jurisdiction appropriate to the case. In his view Garmon posit that, if both states are ambivalent or are not parties to SUA, piracy perpetrator will conveniently escape conviction.[324] This is due to the fact that, the crime under SUA does not amount to *jus cogens* which any state can proceed and assume enforcement jurisdiction.[325]

Extradition of apprehended pirates is not covered by UNCLOS. There have been some bilateral agreements between states for the prosecution of apprehended pirates: Kenya entered into Memorandum of Understanding with the US and the UK in 2008 and 2009 respectively.[326] As per the memorandum, Kenya would receive and prosecute Somalia pirates apprehended by both these states. Republic of Seychelles entered a similar understanding with the European Union in 2009, for the prosecution of pirates apprehended in Seychelles' exclusive economic zone, territorial sea, archipelagic waters, and internal waters.

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323 Mukherjee, P.K., "The New SUA Convention 2005 In Perspective," *Shipping and Transport International*, Vol. 6, No. 1, 2006, pp. 12-15.

324 Garmon, T., *"International Law of the Seas: Reconciling the Law of Piracy and Terrorism in the Wake of September 11th,"* Tulane Maritime Law Journal, Vol. 27, Winter, 2002, pp. 257-275, at p. 273.

325 *ibid.*

326 Scharf, M. and Taylor, M.S.C., "*A Contemporary Approach,* (n 3).

Mauritius and the European Union (EU) entered into an agreement for the prosecution of apprehended pirates in 2011. While considering prosecution and extradition of apprehended pirates we do need to keep in mind the principle of non-refoulement. An important question that may arise here is that can the detainee of an anti-piracy operation be deported to another country which does not qualify as "safe"? If we consider this question with regards to the Somalia pirates, we will see that the obligation of non-refoulement would be breached if a detainee is deported back to Somalia, as Somalia is not considered a safe place by most states.[327]

Apparently, prosecution of apprehended pirates is a major issue to the extent that not only that the coastal states have been grappling with this problem, but UN has also reiterated the same in various General Assembly and SC Resolutions. Thus, prosecution of piracy is a complex problem and it cannot be resolved unless appropriate steps are taken by states to cooperate with each other. State cooperation should go in line with the adequate framework for piracy.

Enforcement of anti-piracy instruments is an arduous task; this argument can be understood if we look at the maritime security regime in general. Maritime security measures usually operate at national, regional, and international levels simultaneously. It is submitted that the anti-piracy regime suffers from weak surveillance, capacity-building, and enforcement mechanisms.

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327 Ahmad, M., *Maritime piracy operations: Some legal issues*, (n 77).

On numerous occasions, UNGA has been concerned on the issue of judicial and law enforcement capacity to investigate, arrest, and prosecute suspected pirates and to incarcerate convicted pirates consistent with applicable international human rights law.[328] With regards to Somalia piracy, the UNGA has emphasized that the international community must assist the Somalia government in strengthening its institutional capacity to fight piracy and tackle underlying causes.[329] The UNSC has also called upon member states and international organizations to assist Somalia and nearby states by enhancing their capacity to ensure coastal security (UNSC 2008a).

The lack of capacity is mostly with regards to enforcement infrastructure, naval force, legal institutional, lack of trained personnel, and lack of appropriate law to deal with the issue and so on. With respect to Somalia, the US (United States Government 2010) and EU (European Union 2014) have initiated capacity building programmes which are based on the understanding that maritime security is a multi-dimensional concept and it requires capacity building at both sea and land. They aim at addressing the wider governance issue which is believed to be the root cause of maritime piracy. Some authors commend that, the US and EU therefore tend to provide a link between security, institution, and the socio-economic environments in such countries.[330]

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328 See for instance, Resolution 2383 (2017) adopted by the Security Council at its 8088th meeting, on 7 November 2017, https://digitallibrary.un.org/record/1312283. (Accessed 29th September, 2021).

329 *ibid.*

330 Bueger, C., and T.K., Edmunds. 2017. "Beyond Sea Blindness: A New Agenda for Maritime Security Studies." International Affairs 93 (6): 1293–1311. doi:10.1093/ia/iix174, quoted in Ahmad, M., *Maritime piracy operations: Some legal issues*, (n 77).

Furthermore, international cooperation is of utmost importance for suppression of piracy.[331] Ahmad submit that, "states have always taken international and regional cooperation against maritime security threats rather seriously, especially when piracy is involved."[332] In his view, international and regional cooperation can be influenced by geopolitical or other issues hence this leads to a challenging task to attain a conducive environment for global cooperation. This may include unresolved delimitation claims, amongst coastal states. This scenario may lead to poor inter-state relations.[333] This would not only cause strains in cooperation efforts but also cause overlap of efforts.[334]

Another important issue is the "soft law" nature of the regime. The conventions, including UNCLOS, UN Resolutions, IMO Resolutions and IMO Codes as mentioned above are couched in soft law terms. The adoption of such law is dependent upon the member states. In other terms, such laws do not have legally binding consequences, except for the UNSC Resolutions normally adopted under Chapter VII of UN Charter. But, as many scholars have pointed out, soft law instruments are politically important as a lot of negotiations are involved in the development of such instruments. With regard to this, Professor Bharat Desai point out that at the core of the efforts to put in place such a normative framework, is the

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331 Gottlieb, Y., *Combating Maritime Piracy: Inter-Disciplinary Cooperation and Information Sharing*, Case Western Reserve Journal of International Law, 2015, Vol. 46, No. 303.

332 Ahmad, M., *Maritime piracy operations: Some legal issues*, (n 77).

333 *ibid.*

334 *ibid.*

widely accepted view that it is permissive in nature, reflects the desire of the states to ensure flexibility as well as room for manoeuvring."[335]

Although this observation is concerning multinational environmental agreements, yet underscores the rationale behind the soft law nature of international instruments in general. In case of maritime security regime under UNCLOS as well, the element of national security makes international law-making a lot more difficult, as states are not willing to compromise with their sovereignty. Thus, in such a situation, soft law is the best possible option to make maritime security instruments, which give enough latitude to states with respect to enforcement and implementation.[336]

It is clear that, the instruments are not originally from Africa. Even the regional instruments were triggered by the ideas outside Africa. This is elaborate in chapter five to this thesis. Equally, although it is undeniable that when maritime businesses are compromised the effects go to every state around the world, yet in reality the major beneficiaries of the maritime business so far are hardly found in Africa. In fact, major beneficiaries are the ones who have volunteered to carry out surveillance in the piracy zones along Somalia coast as well as in other areas within the Indian Ocean.

If one has to scrutinize the international instrument on piracy will find out that they put more emphasis on enactment of piracy legal framework rather than insisting on formulation of comprehensive domestic maritime policy. The legal framework will

335 *ibid.*
336 *ibid.*

simply deal with the crime of piracy but will not touch on other issues that are normally taken care under the policy. Further, a law is most likely to be effective if it emanates from a well framed policy.

In addition, on 4th December, 2020 UNSC reported a steady decline in pirate attack since March 2017 as a result of joint counter-piracy efforts including the European Union Naval Forces (EUNAVFOR) Operation ATALANTA and EUCAP Somalia, Combined Maritime Forces' Combined Task Force 151 (CMF), China, India, Japan, the Republic of Korea, and the Russian Federation.[337]

The reports illustrate further that, piracy off the coast of Somalia has been repressed but not eradicated therefore recommends for further coordination. This means that, the attack has declined because of naval surveillance presence. In other words, in the absence of the surveillance, piracy will re-emerge. The issue then remains to be what may happen if those in mission decide to step down.

3.6 Conclusion

The discussion in this chapter shows that, no single international convention solely dedicated to eradication of piracy. Equally, it is revealed in the chapter that so far none of the existing instruments has proved effective suppression of piracy in its isolation. It follows therefore that piracy legislation would be effective if sorted at national policy level in the first place. Voluminous international instruments on

337 Press Release by the United Nation, *Security Council Renews Authorization for International Naval Forces* Fighting Piracy Off Somali Coast, Unanimously Adopts Resolution 2554 (2020), New York, United Nation, SC/14373, 4th December, 2020, https://www.un.org/press/en/2020/sc14373.doc.htm. (Accessed 8th September, 2021).

piracy currently into existence and which are suggested for individual states to implement are equally imprecise in themselves, thus add complications to the already complicated piracy definition under UNCLOS. Their provisions lack clarity. They are equally too many. Instead, therefore, efforts should be put on maritime policy because it will offer guidance to individual states when considering signing treaties or conventions as to which issues should be placed in the policy and which ones should form part of the law.

CHAPTER FOUR

REGIONAL INSTRUMENTS FOR COMBATING PIRACY IN EAST AFRICA

4.1 Introduction

This chapter, analyses two categories of regional instruments for piracy in East Africa (EA) spearheaded by UNSC and IMO. The most noteworthy instruments for this analysis include UNSCRs 1814 (2008), 1816 (2008), 1846 (2008), 1851 (2008), 2554 (2020); and the Djibouti Code of Conduct, hereinafter referred to as 'the Code,' which was established under the backing of IMO. The discussion in this chapter therefore serves as benchmark and forms the basis for the assessment on the adequacy of piracy rules in Tanzania under chapter five. The subsequent discussion first narrates the base for the advent of the instruments in East African region, before making analysis of the instruments explained above.

4.2 Piracy Overview in East Africa

Initially, piracy incidents were not common in East Africa.[338] They were not perceived as a threat hence treated under the penal legislation just like any other offence within the territory without due regard to limitations of piracy the universal

338 The available jurisprudence shows that, the initial debate on maritime security in Africa can be traced to disconnected regional economic communities (RECs) some of them supported by international institutions such as the UN and its specialized agency namely, the IMO not to forget the United States. Initial African regional efforts on maritime security evolved within the context of the International Convention on Maritime Search and Rescue (SAR) of 2000. For a detailed account of this see Engel, U., The African Union, the African Peace and Security Architecture, and Maritime Security, Friedrich-Ebert-Stiftung, Addis Ababa, 2014, pp 7-8.

definition. The situation changed from 2008 and 2011 following escalation of pirate attacks in the Indian Ocean particularly off the Somalia coast.[339]

The scenario combined to create contemporary security challenges for international shipping not previously encountered during peacetime since the closure of the Suez Canal in 1956.[340] The most challenging issue was that, countries failed to invoke the universal jurisdiction to capture and prosecute the perpetrators as the incidents included terrorism elements. Equally, sometimes the incidents took place outside the scope of the universal definition for piracy ie within Somalia's territorial water.[341]

As a result, apprehended perpetrators had to be released again with no any legal action taken against them. Consequently, the existing gaps under international legal

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339 Gomez laments that: "Piracy has been a perpetual transnational threat to global trade and security. International cooperation has quelled much of the piracy surge around the Horn of Africa, but this threat is by no means eradicated, and it will continue to threaten the broader Indian Ocean." Gomez, P., Indian Ocean Piracy in the 21st Century, June 8, 2020, https://storymaps.arcgis.com. (Accessed 20th September, 2021).

340 On the 26th of July 1956 Egypt nationalized and closed the Suez Canal (a valuable waterway that controlled two-thirds of the oil used by Europe) five times. The last time was the most serious one as it lasted for 8 years before it was then reopened for navigation on the 5th of June 1975. The Suez Canal is an artificial sea-level waterway in Egypt, connecting the Mediterranean Sea to the Red Sea through the Isthmus of Suez; and dividing Africa and Asia. It was constructed by the Suez Canal Company and offers watercraft a more direct route between the North Atlantic and northern Indian oceans via the Mediterranean and Red seas, thus avoiding the South Atlantic and southern Indian oceans and reducing the journey distance from the Arabian Sea to London. For a detailed account of this see Blum, B.S. and Goldfarb, A.; "Does the internet defy the law of gravity?" (2006), *Journal of International Economics*, Vol. 70; No. 2; pp 384-405.

341 UNCLOS is silent as to what if the coastal state does not take action for piracy committed within its territorial water. The issue therefore remains to be whether the third states may still proceed and deal with pirates as they find them, even if this is inside the territorial waters of another state. The answer to this issue is in the negative unless there is an agreement between the respective states. Article 105 of UNCLOS which contains the operative provision, indicates jurisdiction to apprehend pirate vessels extends on the high seas, or in any other place outside the jurisdiction of any state. This has been interpreted to mean areas where a state may exercise its jurisdiction over criminal activity, which in this case is within its territorial sea. As such, piracy occurring within the territorial sea, usually 12nm width, falls within the exclusive jurisdiction of a coastal state to enforce in the absence of an agreement or other supervening authority.

framework for piracy ie UNCLOS and SUA were evident thus development of regional instruments to avert and grapple with that challenge was inevitable.[342] The undertakings led to a rise in numbers of UNSC Resolutions on Somalia piracy accompanied by other instruments which were developed under the auspices of IMO as revealed in the subsequent discussion.

Before going any further, it is also important to note that, although regional instruments on piracy provide guidelines for piracy legislation and also serve as benchmark that guide individual states in drafting domestic laws just like other international instruments, yet most of the guidelines that have set as benchmarks for guiding the drafting and development of domestic piracy laws by East African countries some of them are not legally binding to member states. Consequently, they may have some limitations.[343]

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342 During the 1990s, global focus on piracy was put much upon South East Asian waters, especially in the Strait of Malacca and within the Indonesian Archipelago. [342] However, following unprecedented gradual growth in the number of pirate attacks in 2008 off the East African coast, mainly in the Gulf of Aden but also in the Indian Ocean, significant international efforts to suppress pirate attacks were focused in East African region.

343 For a detailed account of this see: Baker, M.L., '*Toward an African Maritime Economy: Empowering the African Union to Revolutionize the African Maritime Sector,'* Naval War College Review, 2011, Vol. 64, No. 12; and also 'Joint Communiqué from the Eastern and Southern Africa–Indian Ocean Ministers and European Union High Representative at the 2nd Regional Ministerial Meeting on Piracy and Maritime Security in the Eastern and Southern Africa and Indian Ocean region' held on 7 October 2010; African Union Document AU/MT/MIN/1) available at http://www.au.int/en/content/revised-african-maritime-transport-charter; African Union, 'Durban Resolution on Maritime Safety, Maritime Security and Protection of the Marine Environment in Africa' (Africa Union document AU/MT/MIN/DRAFT/RES.II) 16 October 2009 at: http://www.africaunion.org/root/ua/conferences/2010/avril/psc/07avril/African_Union_Member_States_0607_April_2010_Experts_Meeting_on_Maritime_Security_and_Safety_StrategyDocumentation/African%20Maritime%20Transport%20Charter%20Durban%20Resolution.doc>.

Worth noting also that, the East African states have made other several attempts to cooperate on maritime security. For instance, in 2010, Ministers from Eastern and Southern Africa, at their second ministerial meeting on 'Piracy and Maritime Security,' adopted a regional strategy for the Eastern and Southern Africa and Indian Ocean region. The strategy was complemented by a 'Regional Plan of Action'. These two documents provided a regional framework to prevent and confront piracy.

Attempts have also been made to implement a regional structure for cooperation and communication within the existing regional organizations, including the Intergovernmental Authority for Development (IGAD), the EAC and the African Union (AU). Established in 1986, the IGAD was originally developed by the East African states in conjunction with the UN to address environmental crises that led to famine and economic hardship in the region. The IGAD Capacity Building Programme against Terrorism released a piracy report on the impacts of piracy in the IGAD region in March 2009.

In July 2010, IGAD developed a strategy to combat piracy on land in Somalia entitled 'Somalia Inland Strategy and Action Plan to Prevent and Counter Piracy 2010– 2015'. This was prepared as part of the overall Eastern and Southern Africa–Indian Ocean Regional Strategy and Regional Plan of Action. The strategy seeks to address the root causes of piracy through locally developed solutions.

Similarly, following the dissolution of the Organisation of African Unity (OAU) in 2002, the Durban summit officially launched the AU. The intergovernmental AU's

policy efforts to fight maritime piracy include the African Maritime Transport Charter (AMTC); the Durban Resolution on Maritime Safety, Maritime Security and Protection of the Marine Environment in Africa as well as Africa's Integrated Maritime Strategy.

In addition, the AU participates in the Contact Group on Piracy, the Djibouti Code of Conduct and the regional conferences on piracy organised by the Eastern and Southern Africa–Indian Ocean countries. The AU also works to establish an integrated coastguard network through partner agencies in the region.

4.3 UNSC Resolutions on Somalia Piracy

As hinted earlier, the scale of the pirate attacks in the Indian Ocean between 2008 and 2011 combined to create contemporary challenges for international shipping.[344] The nature of the incidents fell out of states universal jurisdiction over piracy as outlined in UNCLOS. Local courts in the region therefore, lacked jurisdiction to prosecute piracy.[345] The UNSC in this regard had to come up with Resolutions to confer upon maritime powers the capacity to enter Somalia waters to conduct anti-piracy operations and facilitate the prosecution of suspected pirates.

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344 In their view safety4sea lament that "Somali based piracy has not been eradicated and still poses a significant threat to shipping and the safety of human life at sea in the Indian Ocean."SAFETY4SEA, "*BMP 5 guidance necessary in every HRA transit, white paper says*," May 27, 2019, https://safety4sea.com/bmp-5-guidance-necessary-in-every-hra-transit-white-paper-says/. (Accessed 20th September, 2021).

345 Essentially this scenario triggered development regional instruments to suppress Somali based piracy.

Initially the reason for adoption of the Resolutions on piracy was the need to protect and provide escort for ships carrying World Food Program (WFP) aid .[346] Later on, a series of Resolutions[347] were adopted by the SC to set guidelines for suppression of piracy in Somalia, however only few will be covered in this discussion.[348]

Probably Resolution 1814 (2008) was the first Resolution to be adopted by the SC immediately after Somali piracy scenario. The Resolution was adopted in May 2008 and called upon states and regional organizations, in close coordination with each other and at the request of the TFG, to act to protect shipping involved with the transportation and delivery of humanitarian aid to Somalia and UN authorized activities.[349]

Indeed, the landmark resolution was Resolution 1816 (2008) which was adopted unanimously a month after the previous Resolution.[350] The SC at its 5902nd meeting on 2 June 2008 noted that: 'the incidents of piracy and armed robbery against vessels in the territorial waters of Somalia and the high seas off the coast of Somalia exacerbate the situation in that country which continues to constitute a threat to international peace and security in the region'. The Resolution which lasted for 6

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346 For a detailed account of this see Resolution 1814 (2008)/adopted by the Security Council at its 5893rd meeting, on 15 May 2008 at http://digitallibrary.un.org/record/626781; and https://undocs.org/en/S/RES/1814(2008).

347 Resolutions 1814 (2008), 1816 (2008), 1838 (2008), 1846 (2008), 1851 (2008) , 1897 (2009), 1918 (2010), 1950 (2010), 1976 (2011), 2015 (2011), 2020 (2011), 2077 (2012) and 2125 (2013), 2184 (2014), 2246 (2015), 2316 (2016) 2383 (2017), 2442 (2016), 2500 (2019) and 2554 (2020). UNSCRs can be accessed from the website of United Nations at https://www.un.org.

348 *ibid.*

349 Resolution 1814 (2008) adopted by the Security Council at its 5893rd meeting, on 15 May 2008 at https://digitallibrary.un.org/record/626781.

350 Resolution 1816 (2008) adopted by the Security Council at its 5902nd meeting, on 2 June 2008 at https://digitallibrary.un.org/record/627953.

months, authorized countries to enter Somalia territorial waters and use all necessary means to identify, deter, prevent, and repress acts of piracy and armed robbery at sea in a manner consistent with the provision of international law.[351]

Consequently, the international force could board, search and seize suspect vessels and arrest the perpetrators in the territorial waters of Somalia. However, the Resolution required the forces to cooperate with Somalia's interim government and notify the United Nations Secretary General (UNSG) when proposing to conduct anti-piracy operations in Somalia's territorial waters.[352] Somalia's interim Government gave approval for foreign forces to operate in Somalia's territorial waters and consented to the resolution.[353]

Having noted with concern, among others, that increasingly violent acts of piracy were carried out with heavier weaponry, in a larger area off the coast of Somalia, using long-range assets such as mother ships, while at the same time demonstrating more sophisticated organization and methods of attack, the UNSC at its 5987th meeting in October 2008 adopted Resolution 1838 (2008) which called upon States whose naval vessels and military aircraft operate on the high seas and airspace off the coast of Somalia to use on the high seas and airspace off the coast of Somalia the

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351 Press Release by the United Nations, *Security Council Condemns Acts of Piracy, Armed Robbery Off Somalia's Coast, Authorizes For Six Months 'All Necessary Means' to Repress Such Acts*, 1816 (2008), New York, United Nation, SC/9344, 2nd June 2008.

352 It appears that no powers other than those already existing in international law, ie under UNCLOS which codifies international law in this area, are granted under these UNSC resolutions.

353 *ibid.*

necessary means, in conformity with international law, as reflected in the UNCLOS, for the repression of acts of piracy.[354]

The Resolution however, cautioned that the provisions in this resolution apply only with respect to the situation in Somalia and does not affect the rights or obligations or responsibilities of member States under international law, including any rights or obligations under UNCLOS, with respect to any situation. The SC underscores in particular that the Resolution should not be considered as establishing customary international law.[355]

Further, it was Resolution 1846 (2008) which urged SUA state parties to fully implement their obligations under the same and cooperate with the UNSG and the IMO to build judicial capacity for the successful prosecution of persons suspected of piracy and armed robbery at sea off the coast of Somalia. Previously the SC noted that SUA provides for parties to create criminal offences, establish jurisdiction, and accept delivery of persons responsible for or suspected of seizing or exercising control over a ship by force or threat thereof or any other form of intimidation.[356]

A further significant step was taken with the adoption of UNSC Resolution 1851 (2008). This Resolution encouraged international cooperation by authorizing "ship-riders" agreements to facilitate more effective law enforcement capability. The Resolution also authorized capacity on the part of the international community to

354 UNSC Resolution 1838 (2008).
355 *ibid.*
356 *ibid*, Resolution 1846 (2008).

operate not only within Somali waters but also within the territory of Somalia so as to suppress acts of piracy in the region.[357]

The effects of such agreements is that, law enforcement officials of the relevant State parties are given reciprocal jurisdiction to undertake enforcement operations against suspect flagged vessels beyond the territorial sea thus facilitating enforcement operations against pirates by circumventing some of the limitations created by the international law against piracy.[358] Further, the Resolution encouraged the establishment of the Contact Group on Piracy off the coast of Somalia (CGPCS), as an important cooperating mechanism in the fight against piracy.[359]

It must be noted however that, although aimed at complementing the provisions of the main international conventions related to piracy previously described in this thesis, the Resolutions are only applicable to the situation in Somalia.[360] They do not affect the rights, obligations or responsibilities of UN Member States under

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357 *ibid*. And also Guilfoyle, D., *Shipping Interdiction and the Law of the Sea;* Cambridge, Cambridge University Press, 2009, pp 61-74.

358 Law enforcement officials face jurisdictional complications in chasing pirates into the territorial waters of neighbouring states. Despite piracy being a common threat to the coastal countries of the region, states are reluctant to allow external coastguards and navy to operate in their waters. UNCLOS fails to provide a mechanism to enable hot pursuit into another state's territorial waters. For a detailed account of this see Hassan, S.M.M, the Adequacies and Inadequacies of the Piracy Regime: A Gulf of Guinea Perspective, Master Degree, University of Western Sydney, Australia, 2014, p 58.

359 US chaired the group in 2013, and the European Union did so in 2014. The CGPCS's five working groups focus on sharing information, operational naval coordination, and capacity building; resolving legal and judicial issues; raising awareness among the shipping industry and capability building among seafarers; raising public awareness of the dangers of piracy; and disrupting piracy ashore and illicit financial flows.

360 This is stated in the Resolutions themselves, for example, UNSC Resolutions 1816 (2008), para 9 and 1846 (2008) para 11.

international law, including their rights or obligations under UNCLOS with respect to any other geographical region where piracy may occur.[361]

Several other subsequent Resolutions included similar provisions, urging state parties to SUA to fully implement their relevant obligations under the convention and customary international law and to cooperate with the UNODC, IMO and other international organizations and states to build judicial capacity for the successful prosecution of persons suspected of piracy and armed robbery at sea off the coast of Somalia.[362]

The most recent is Resolution 2554 (2020). While noting improvements in Somalia, this Resolution which was adopted by the SC on 4th December 2020, recognizes that piracy still exacerbates instability in Somalia by introducing large amounts of illicit cash that fuels additional crime, corruption, and terrorism.[363]

In this context, it stresses the need to investigate and prosecute not only suspects captured at sea, but also anyone who incites or intentionally facilitates piracy operations, including key figures of criminal networks involved in piracy including those who plan, organize, facilitate or illicitly finance or profit from such attacks.[364] Also, the Resolution reiterates concern over persons suspected of piracy but released without facing justice, or released prematurely. The Resolution reaffirms that the

361 *ibid.*
362 UNSC Resolution 1950 (2010).
363 *Ibid,* Resolution 2554 (2020), para 2, p 4.
364 *Ibid,* para. 5.

failure to prosecute persons responsible for acts of piracy and armed robbery at sea off the coast of Somalia undermines anti-piracy efforts.[365]

The Resolution urges states parties to UNCLOS and SUA and its Protocols to implement fully their relevant obligations under these conventions and customary international law and to cooperate with the UNODC, IMO, and other States and international organizations to build judicial capacity for the successful prosecution of persons suspected of piracy and armed robbery at sea off the coast of Somalia.[366]

However, it is noted from the Resolution that, there were no successful piracy attacks off the coast of Somalia in the 12 months prior to 4th December 2020, and that joint counter-piracy efforts have resulted in a steady decline in pirate attacks as well as in hijackings since 2011, with no successful ship hijackings for ransom reported off the coast of Somalia since March 2017.[367]

Nevertheless, the Resolution recognizes the ongoing threat that resurgent piracy and armed robbery at sea poses, noting the letter of 2 December 2020 from the Permanent Representative of the Permanent Mission of Somalia to the UN requesting international assistance to counter piracy off its coast, and recalling reports of the Secretary General and communication of the CGPCS, which continue to illustrate that piracy off the coast of Somalia has been repressed but not eradicated and commending countries and organizations that have deployed naval counter-piracy

365 *ibid,* para. 2.
366 *ibid,* para. 24, p. 6.
367 *ibid,* p. 6.

missions in the region to suppress piracy and protect ships transiting through the waters off the coast of Somalia and the region.[368]

However, the regional cooperation in East African region has been marked by unlinked and uncoordinated policies and activities. The regional approaches to combating piracy indicate poor coordination and planning. Many of the efforts suffer from lack of coordination and tend to address only maritime security issues.[369] Moreover, regional organizations such as the AU and IGAD have made some progress in developing and implementing counter-piracy plans and programs. Among all of the regional initiatives of the region, the adoption of the Djibouti Code of Conduct is seen as a 'starting point for successful cooperation and coordination in the region.'[370]

4.4 Djibouti Code of Conduct

The Djibouti Code of Conduct,[371] also referred to as the Code of Conduct concerning the Repression of Piracy and Armed Robbery against Ships in the Western Indian Ocean and the Gulf of Aden, hereinafter referred to as 'the Code', was signed on 29 January 2009 at a meeting convened by the IMO in Djibouti. A strong base for the work of the meeting was established during the sub-regional seminar on piracy and

368 *ibid*, Resolution 2554 (2020), p 1.

369 Baker, M.L., *Toward an African Maritime Economy: Empowering the African Union to Revolutionize the African Maritime Sector*, Naval War College Review; (2011), Vol. 64, No. 12.

370 Efthimios E. Mitropoulos, 'Opening remarks delivered at the Djibouti Meeting', Djibouti, 26 January 2009 available from IMO website at: http://www.imo.org.

371 For a detailed account of this see the Policy Paper on the same at: https://www.gov.uk/government/publications/djibouti-code-of-conduct; and Hassan, S.M.M., The Adequacies and Inadequacies of the Piracy Regime: A Gulf of Guinea Perspective, Master Degree Thesis, University of Western Sydney, Australia, 2014, pp 45-46.

armed robbery against ships and maritime security held in Sana'a, Yemen in 2005 and in 2006 the follow-up sub-regional workshop on maritime security, piracy and armed robbery against ships took place in Oman, 2006. In 2007, the Assembly of the IMO adopted Resolution A1002(25) on Piracy and Armed Robbery against Ships in Waters off the Coast of Somalia, and called upon Governments in the region to conclude and implement a regional agreement in cooperation with the IMO, to prevent, deter and suppress piracy and armed robbery against ships.

In 2008, pursuant to Resolution A1002(25), the IMO organized a sub-regional meeting on piracy and armed robbery against ships for the states from the Western Indian Ocean, Gulf of Aden and Red Sea areas, in Dar es Salam, URT. During this meeting, a draft cooperative framework agreement concerning the repression of piracy and armed robbery against ships in the Western Indian Ocean and the Gulf of Aden was prepared.

Subsequently, in 2009 the Djibouti meeting or rather the sub-regional meeting to conclude agreements on maritime security, piracy and armed robbery against ships for the states from the Western Indian Ocean, Gulf of Aden and Red Sea areas was held in Djibouti, attended by 17 out of the 21 states in the region, and 12 States from outside the region attending the meeting as observers, considered and adopted the instrument with the short title 'the Djibouti Code of Conduct'. All the above named meetings were convened under the patronage of IMO.

The Code became effective the date on which it was signed.[372] In principle, the hijacking of the *MT Sirius Star* laded with crude oil worth 100 million USD some 450nm southeast of Mombasa, Kenya; and *MV Faina* carrying a consignment of military armaments which included 33 battle tanks and allied incidents, were catalyst to expeditious adoption of the Code.[373]

The Code is the first regional agreement between Arab and African countries against acts of piracy, focusing primarily on the creation of mechanisms to promote enhanced cooperation between the member states. The main objective of the Code is to enhance the effectiveness of the prevention, interdiction, prosecution and punishment of persons engaged in piracy and armed robbery against ships.[374]

Under the Code, signatories declare their intention to co-operate to the fullest possible extent in the repression of piracy and armed robbery against ships in line with Resolution A.1002 (25) of IMO.[375] The Code took into account and promotes the implementation of relevant aspects of UNSC Resolutions[376] and Resolution 63/111 of UNGA on ocean and the law of the sea, which falls within the competence of IMO.

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372 *ibid.*

373 There were also reports of pirate attacks against cruise ships in the Indian Ocean whereas in 2009 there were a total of 406 reports of piracy and sea robbery, of which 217 were Somali sources attacks involving 47 hijacked ships and 867 crew being held hostage. For a detailed account of this see the report by IMB piracy reporting centre titled "2009 Worldwide Piracy Figures Surpass 400" available from the website at: www.icc-ccs.org.

374 For a detailed account of this, see the Preamble to the Djibouti Code of Conduct, para 11 available from IMO website at: www.imo.org.

375 Among other things, Resolution A.1002 (25) of IMO calls upon Governments in the region to conclude, in cooperation with IMO, and implement, as soon as possible, "a regional agreement to prevent, deter and suppress piracy and armed robbery against ships."

376 These include UNSCRs 1814 (2008), 1816 (2008),1838 (2008), 1844 (2008), 1846 (2008) and 1851 (2008).

Resolution 63/111 which was adopted at sixth-third session of UNGA on 5th December 2008, emphasizes the importance of prompt reporting of incidents to enable accurate information on the scope of the problem of piracy and armed robbery against ships and, in the case of armed robbery against ships, by affected vessels to the coastal State, underlines the importance of effective information-sharing with states potentially affected by incidents of piracy and armed robbery against ships, and takes note of the important role of the IMO.[377]

In addition, Resolution 63/111 recognizes the crucial role of international cooperation at the global, regional, sub-regional and bilateral levels in combating, in accordance with international law, threats to maritime security, including piracy, armed robbery at sea, terrorist acts against shipping, offshore installations and other maritime interests, through bilateral and multilateral instruments and mechanisms aimed at monitoring, preventing and responding to such threats, the enhanced sharing of information among states relevant to the detection, prevention and suppression of such threats, the prosecution of offenders with due regard to national legislation and the need for sustained capacity-building to support such objectives.[378]

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377 Resolution A/RES/63/111 adopted by the United Nations General Assembly on 5 December 2008. Available at https://www.un.org on 8th September, 2021.

378 In particular the signatories to the Code agree to co-operate, in a manner consistent with international law. The co-areas of cooperation include, the investigation, arrest and prosecution of persons, who are reasonably suspected of having committed acts of piracy and armed robbery against ships, including those inciting or intentionally facilitating such acts; the interdiction and seizure of suspect ships and property on board such ships; the rescue of ships, persons and property subject to piracy and armed robbery and the facilitation of proper care, treatment and repatriation of seafarers, fishermen, other shipboard personnel and passengers subject to such acts, particularly those who have been subjected to violence; and, the conduct of shared operations - both among signatory States and with navies from countries outside the region - such as nominating law enforcement or other authorized officials to embark on patrol ships or aircraft of another signatory. For a detailed account of this see the Preamble to the Code.

Just like Resolution 63/111, the Code is not silent on the duty to cooperate and suppress piracy. According to the Code, this duty has to be made in consistent with the available resources, related priorities and respective national laws and regulations of the participants and applicable rules of international law.[379] The Code requires the signatories to share and report relevant information through a system of national focal points and piracy namely information system centers (ISCs).[380] The national focal points are designated by the participating states.[381] These centers which have been fully operational since the first half of 2011 are to serve as a network of national focal points in all signatory states. Three ISCs established under the Code include Sana'a, Mombasa and Dar es Salam.[382]

Furthermore, the Code which defines piracy in similar terms as Article 101 of UNCLOS,[383] also provides in its preamble that, 'members were inspired by the Regional Cooperation Agreement on Combating Piracy and Armed Robbery against Ships in Asia (ReCAAP)' which was adopted in Tokyo, Japan on 11 November 2004.[384] The Code for that matter incorporates many provisions from ReCAAP to

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379 Article 2(1) of the Code.

380 The duty to cooperate under the Code also extends to (a) interdicting ships suspected of engaging in piracy or armed robbery against ships; (b) arresting, investigating and prosecuting persons committing piracy; (c) seizing pirate ships and property on board such ships; and (d) rescuing ships, persons and property subject to piracy. For a detailed account of this see Article 4(3) of the Code.

381 Article 8(1) of the Code.

382 *ibid.*

383 Article 1(1) of the Revised Code of Conduct concerning the repression of piracy, armed robbery against ships and other illicit maritime activity in the Western Indian Ocean and the Gulf of Aden.

384 Prior to the substantial rise in acts of piracy off the coast of Somalia, the region of Southeast Asia was known as a piracy hotspot. This led to the adoption of ReCAAP in 2004, the first intergovernmental regional agreement to combat piracy in Asia. A detailed account of this is available from ReCAAP Website at http://www.recaap.org.

provide a framework for the sharing of information, the review of domestic legislation, and training and capacity building in the region.[385]

The Code represents the first significant step towards the development of a regional capacity to suppress piracy. Although the Code is based to some extent on the model of ReCAAP, it covers more matters than the Agreement. For example, the Code commits the signatories to ensure the apprehension and prosecution of pirates. In this regard, the Code directs that each party review their domestic maritime legislation to ensure that it is adequate for criminalizing piracy and that adequate guidelines have been formulated for the exercise of jurisdiction, conduct of investigations and prosecution of piracy suspects.

The Code also expects that signatories will conduct combined maritime security operations, including exchanging law enforcement officials to embark on the patrol ships of other signatories. However, unlike ReCAAP, the Code is neither a formal agreement nor a legally binding treaty.

4.4.1 Limitations under the Code

Just like any other policy document, the Code has its own limitations. As the Code was not the result of initiatives by East African nations, the level of political support for the Code has been weak. As a result, IMO has remained to be the central forum for debating the future of the instrument. The Code has also been criticized as overly

385 The most recent code of similar type for preventing piracy, armed robbery against ships and illicit maritime activity is Yaoundé Code of Conduct for West and Central Africa region. These models constitute the best cases to study the effectiveness of the regional cooperation in East Africa region.

ambitious, as it tries to bring a host of countries in the region together in a common forum that does not have a successful legacy of political cooperation. This is reinforced by the fact that the states could not agree on one single information sharing centre under the Code.[386]

Despite these limitations, the framework for information sharing between states under the Code is seen as an important development in promoting cooperation in the region.[387] Thus far, much has been achieved under the Code in the field of information sharing. The three-regional counter-piracy ISCs established under the Code have been fully operational since the first half of 2011. These centers have been serving as a network of national focal points in all signatory states.

In addition, the information-sharing arrangement under the Code has been considerably enhanced with the signing of an agreement between the three ISCs and the Singapore-based ReCAAP ISC on 11 November 2011. The training of coastguards and staff through the Djibouti Regional Training Centre has also been a major achievement of the Code.

4.5 Conclusion

Somalia piracy, which affects the region of East Africa most, employs unique *modus operand* as compared to piracy committed in other regions. As a result, the universal definition of piracy suffers limitation in addressing it. That explains why new

386 Bueger, C. and Saran, M.S., 'Finding a Regional Solution to Piracy: Is the Djibouti Process the Answer?' in Christian Bueger and Mohanvir Singh Saran (eds), Piracy Studies (2012) available at: http://piracystudies.org/author/christian-bueger-and-mohanvir-singh-saran.

387 *ibid.*

initiatives of adopting some sort of instruments for Somalia based piracy have been made by relevant international establishments such as UNSC and IMO. In the same line, domestic penal legislation of individual countries within the region had to be amended as well. The main reason is that, these instruments had a very huge limitation in drafting and therefore are not robust enough to deal with Somalia-based piracy. Although some gaps still exist in the regional instruments, yet international and regional instruments can facilitate legislation of tough piracy legal framework at domestic level if not used in isolation.

CHAPTER FIVE

LEGAL FRAMEWORK FOR PIRACY IN TANZANIA

5.1 Introduction

Piracy has become extensive in the past few years and poses a threat to every single country.[388] Tanzania has no immune to piracy. The country is included under the "piracy affected areas in the world. As a coastal state, Tanzania "affords access to and benefits from a good number of local and conventional merchant ships including tanker, cargo, fishing and passenger ships. This situation calls for the need to provide legal protection for maritime activities at sea. However, the security of maritime activities depends on effectiveness of the law among other things. This chapter assesses adequacy of the regime in Tanzania.

5.2 An Overview of Social and Economic Context of Tanzania in Connection with Piracy

The earlier analysis indicated that there is scant literature in relation to piracy in Tanzania. This limits the availability of comprehensive information on the area of study. However, piracy has affected nearly all maritime users with the shipping industry bearing the brunt of the scourge regardless of the region it occurs. For instance, in 2010 the report on The Economic Costs of Piracy published by One Earth Future (OEF) Foundation show that, the international economic cost was

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388 Tanzania has no immune to piracy. The country is included under the piracy affected areas in the world. As a coastal state, Tanzania affords access to and benefits from a good number of local and conventional merchant ships including tanker, cargo, fishing and passenger ships. See further details on 10 Maritime Piracy Affected Areas around the World, from UNODC website at https://www.unodc.org.

estimated to be around $7 to $12 billion per year.[389] These costs are in form of direct financial costs which include insurance costs, ransoms, cost of rerouting ships via other route such as the Cape, security arrangements including private security detachments, as well as cost of maintaining navies among other related government expenses.

Other indirect costs occur as negative effects on other related areas like trade, fishing, inflation and tourism resulting to decrease in foreign revenue. Basically, these costs affect every state around the globe. Tanzania has no immune to these effects.

Similarly, psychological effects such as trauma to the seafarers and their families for those held by pirates for ransom and also for those working in the piracy affected areas are common. By June 2011 there were 462 seafarers and 22 ships held by Somali pirates for ransom.[390] The setting on fire of *MV Yasin C* in 2010 and *MV Pacific Express* in 2011 after the crew escaped to citadel is an indication of what seafarers can be exposed to by frustrated pirates.

Sea transport is a key economic sector that underpins international trade, supports globalization and deepens global economic integration.[391] Unfortunately, as contemporary international trade routes developed, slow moving and undefended

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389 Bowden, A. (2010, December), Oceans beyond Piracy. Retrieved from www.oceansbeyondpiracy.org.See also (IMO, 2011).

390 IMO, 2011.

391 UNCTAD, Report on Maritime Piracy, Part I, (n 99).

merchant ships were an easy target for pirates set on looting and plunder.[392] At a basic level therefore, maritime piracy is a maritime transport issue[393] that directly affects ships, ports, terminals, cargo and seafarers.

Above all, piracy is associated with considerable human costs, as seafarers are the first to be affected by piracy attacks. They are usually held hostage and may be injured or killed. Between 2005 and 2012 for instance, 61 seafarers were killed as a result of piracy and 5,420 were held hostage on some 279 ships hijacked worldwide, while piracy off the coast of Somalia accounted for nearly 50 per cent of all the hijackings over this period.[394]

Equally, in the fragile country, the pirates have greater chances to net more money than government which may result to political instability. In addition, as it is a case of money equating power and the pirates are exploiting their newfound influence and affluence.[395]According to Oceans Beyond Piracy (OBP) report on the State of Maritime Piracy in 2016, the economic cost of piracy caused by groups in Somalia increased to $1.7 billion in 2016, from $1.3 billion in 2015.[396]

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392 Rothwell, D. R. and Stephens, T., (n 210), p. 162.

393 Peter Chalk (2008). The Maritime Dimension of International Security, Terrorism, Piracy, and Challenges for the United States. Prepared for the Air Force of the United States of America.

394 ICC International Maritime Bureau, Piracy and Armed Robbery Against Ships, Annual Report. Various issues in 2012, of the total 28 hijackings taking place worldwide, ten hijackings were carried out by pirates off the coast of Somalia and of the six seamen killed in 2012, two killings resulted from the piracy off the coast of Somalia and four from Nigeria.

395 Payne, J. C. (2010). Piracy today: Fighting Villainy on the High Seas. New York: Sheridan House Inc., 2010, p 34.

396 See Luke Graham's Article *titled "Somali piracy is back with a $1.7 billion problem after shipping firms lower vigilance,"* retrieved from: https://www.cnbc.com/2017/05/03/somali-piracy-is-back-17-billion-dollar-problem-shipping-firms-lower-vigilance.html.

In addition, the OPB Report 2017 which was released on 23 May 2018, shows that, despite the actions taken to counter piracy, it still poses a serious threat in all the regions. East Africa the region in which Tanzania belongs, remains with the higher total economic cost of piracy, which amounts to 1.4 Billion $ in 2017, a figure that remains within the historical norms of the past 3 years. In 2016, the total cost amounted to 1.7 Billion $. Compared to the other regions, in East Africa the threat is posed by hijacked vessels more than in the other regions where the nature of incidents is more related to kidnapping-for-ransom or the kidnapping of cargos and yachts.[397]

Equally, reporting 47 attacks in the first three months of 2020 up from 38 in the same period last year, ICC IMB suggests seafarers face continuing threats from pirates on the world's seas.[398]Noteworthy also that, the available literature shows that, the threat of piracy in Tanzania is greatly posed by Somali sourced attacks. The literature reveals further that, piracy off the coast of Somalia is increasingly perceived as an organized crime and, in view of the scale, level of sophistication and degree of violence of incidents reported may be considered a special case.[399]

Essentially motivated by the prospect of large monetary gains from ransom payments and cargo theft, maritime piracy in East African waters has its own ‘business model’ that involves complex web of interaction between numerous stakeholder, including

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397 See The Ocean Beyond Piracy Report of 2017, available at: https://criticalmaritimeroutes.eu/2018/05/25/the-2017-ocean-beyond-piracy-report/.

398 2020 1st Quarter IMB Piracy Report, retrieved from: www.icc-ccs.org.

399 UNCTAD, Report on Maritime Piracy, Part I, (n 99).

financiers, instigators and pirates.[400] According to the literature, piracy off the coast of Somalia remains a serious threat, as pirates appear to be changing their modus operandi to increasingly attack ships while anchored.[401]

To this end, strong legal framework is crucial so as to tackle the problem especially with the available experience that the Somalia pirates normally extend their attacks off the east and south coast off Tanzania, among other areas.[402]

5.3 Historical Development of Piracy Law in Tanzania

In Tanzania, criminalization of piracy traces in 1930 when the Penal Code was imported in Tanganyika.[403] By then the Tanganyika Order in Council gave the King of Britain power to promulgate Orders and Ordinances for Tanganyika.[404] Consequently, in 1930 the Penal Code which contained piracy provisions was imported into Tanganyika.[405] However, under the 1930 Penal Code piracy was limited within the Tanganyika territory.[406] By then high seas piracy was not common in Tanzania.[407] Noteworthy, high sea piracy is subject to universal jurisdiction under which any state may, in the interest of all, capture and punish.[408] However, piracy

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400 *ibid.*
401 *ibid.*
402 See ICC-IMB Report on Piracy and Armed Robbery Against Ships for the Period of January-September 2009, p 23, at www.icc-ccs.org.
403 *ibid.*
404 *ibid.*
405 *ibid.*
406 *ibid.*
407 *ibid,* p. 7.
408 UNCLOS, Article 105. Further details can be available in UNCTAD, Report on Maritime Piracy, Part II, An Overview of the International Legal Framework and of Multilateral Cooperation to Combat Piracy, 2014, No. UNCTAD/DTL/TLB/2013/3.

incidents within territorial water are normally taken care by the national legal framework of the respective coastal state.[409]

Before independence, the High Court of Tanzania (HCT) was made the court of admiralty with power to adjudicate all matters arising on the high seas pertaining to ships or shipping in Tanzania.[410] After independence the High Court remained with admiralty jurisdiction in the country.[411] However, the available literature shows that relevant sources in Tanzania have limited records on high seas piracy statistics. One can alternatively depend on piracy reports issued by the International Chamber of Commerce-International Maritime Bureau (ICC-IMB) although these reports include armed robbery incidents which occur within territorial waters.[412]

Tanzania is a common law legal system under which a piece of legislation is needed for international convention to be entertained by local courts.[413] This is in accordance with Article 63(c) and (e) of the Constitution of the United Republic of Tanzania, 1977 (CURT). Apparently, the CURT is silent of the subject of maritime security and piracy in particular. The country has two pieces of legislation establishing piracy as a criminal offence. These include the Penal Code, and the Merchant Shipping Act,

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409 UNCLOS, Article 2

410 Tanganyika Order in Council of 1920, s 18(1). See further details in Bendera, I.M., Admiralty Jurisdiction in Tanzania, 2010, (n 204), p 57.

411 Judicature and Application of Laws Ordinance [Cap. 358], section 3.

412 The wording of the statutes in Tanzania clearly differentiates between piratical incidents in territorial water and high seas piracy. But statics include actual and attempted attacks whether the ship is berthed, at anchor or at sea. For a detailed account of this see Kamuli, R., "Tanzania's Legal Framework on Sea Piracy: An Obligatory but Inconsistent Model", Max-Planck Institute for Foreign and International Law, Germany, 2009, p 8; and also ICC-IMB Piracy and Armed Robbery Against Ships Annual Reports available at www.icc-ccs.org.

413 Bendera, I.M., Admiralty Jurisdiction in Tanzania, 2010, (n 204), p 54.

2003 [21 of 2003][414] (hereinafter referred to as the MSA).[415] Equally, case law is regarded as another source in Tanzania.

5.4 Legal Framework of Piracy in Tanzania

In Tanzania, piracy is defined under Section 66 of the Penal Code to mean:

> *"66.-(1) A person who-*
> *(a) does any act of violence or detention, or any act of degradation, committed for private ends by the crew or the passengers of a private ship or a private aircraft, and directed-*
> *(i) against another ship or aircraft, or against persons or property on board such ship or aircraft; or*
> *(ii) against a ship, aircraft, persons or property in a place outside the jurisdiction of any state;*
> *(b) participates in the operation of a ship or of an aircraft with knowledge of facts making it a pirate ship or aircraft; or*
> *(c) does any act of inciting or of intentionally facilitating an act referred to in paragraph (a) or (b), commits an act of piracy."*

With regard to jurisdiction, the Penal Code provides among others that, the jurisdiction of the Courts of Tanzania extends to offences committed by any person on the high seas.[416] The Penal Code defines the term "high seas" to mean the open seas of the world not under the jurisdiction of any country.[417]

Like the Penal Code, piracy under UNCLOS include any illegal act of violence, detention or depredation committed for private ends by the crew or passengers of a

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414 Accessed from https://tanzlii.org/node/14789 on 10th September, 2021.

415 Although in Tanzania criminal matters such as piracy are covered under the Penal Code and MSA, there is also a web of legislations which can be used to target the sponsors of piracy. These include Anti-Money Laundering Act, Cap. 423 [R.E. 2019], Economic and Organised Crime Control Act, Cap. 200 [R.E. 2019], Extradition Act, Cap. 368 [R.E. 2019], Proceeds of Crime Act, Cap. 256 [R.E. 2019], Mutual Assistance in Criminal Matters Act, Cap. 254 [R.E. 2002], Prevention of Terrorism Act, Cap 19, [R.E. 2002]. Accessed from https://tanzlii.org on 10th September, 2021.

416 Penal Code, s 6(1)(d).

417 *Ibid,* s 6(2).

private ship against another ship, or persons or property on board that ship on the high seas.[418]

In this regard, both definitions bare the same elements for an act to be termed piracy. Both definitions comprise four rules namely; first, *the illegal violence rule*; second, the "*lucri causa"* or *private gain rule*; third, *the two-ship rule*; the fourth is *the high seas rule*. Save for the first rule namely, illegal violence rule, the remaining rules are controversial to the extent analyse in this thesis.

The first rule is satisfactory because it is a normal legal principle that the state sanctions legal or lawful acts of violence through its naval and public security machinery. The illegal violence rule therefore is straight forward as all the attacks reported should be illegal acts of violence. However, the other three rules have challenge since piracy incidents do not fall within the limits of these rules.

For instance, while the *two ship rule* demands for the presence of a pirate ship and a victim ship at the scene, the reality is that majority of piracy incidents do not involve two ships nor occur on the high seas.[419] In essence, together the third and fourth rules constitute *"the two-ship rule"* in the sense that, for an act to qualify as piracy, the incident should involve two ships on the high seas. In simple terms, it is not piracy if the incident involves two ships but beyond the high seas.

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418 UNCLOS, Article 101.

419 Penal Code, s 66(1)(a)(ii).

According to the fourth rule namely, *high seas* for an act to amount to piracy should occur on or beyond jurisdiction of any state.[420] Practically, these requirements pose challenges since ship attacks are, in most cases, made while a ship is at anchor or tied to the dock.[421] According to IMB, most ships that are victimized while underway are boarded by perpetrators using rubber boats or skiff, not pirate ships.[422] Furthermore, pirates in Tanzania mostly use knives and attack ships when they are anchored.[423]

The scenario in Republic v Mohamed Nur Adam and 6 Others[424] whereby only boats were involved in the incident serves as a good example.[425] This is an admiralty criminal case based in Tanzania whose summary goes that, one of the guarding crew boats was invaded in the Indian Ocean. The invaders were in another small boat running in the direction of the guarding crew boat in issue. The invaders then inflicted violence on the crew in the vessels which was involved in oil exploration, causing the Tanzania forces to respond in retaliation.

The incidents went further to an extent of the said invaders entering into the guarding boat. Then there was tense exchange of fire to the extent that the navy officers had to mount to the engine room of the victim's boat in salvage of the danger through

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420 *ibid*, ss 66(1)(a)(ii) and 6(2).

421 ICC-IMB Piracy and Armed Robbery at Sea Annual Reports from 1995 available from its website at www.iccc-cc.org.

422 *ibid.*

423 Kamuli, R., "Tanzania's Legal Framework on Sea Piracy, p 8, (n 413).

424 (n 11).

425 *ibid*, p. 20. It was stated in this case that "According to the testimonies by PW1 – PW14, it is crystal clear that on the 3rd October, 2011, a boat knows as Sams - All good was invaded in the Indian Ocean by some invaders who were in another small boat known as skiff (invaders boat)."

exchange of firearms. Then the invaders' skiff was made tied alongside victim's boat.

A couple of shots were fired towards the navy officers' vessel which was then perforated with holes. Later on, the army officers desisted from more shooting after destroying the engine of the invader's skiff boat in which one of the pirates was in and he jumped to join his co–pirates in the attacked boat. At this time the shot skiff boat sunk, pirates were overpowered, and finally they surrendered to the Tanzania Navy Officers who took them ashore for prosecution procedures. All the accused were sentenced for life imprisonment having been found guilty.

Although the Court found the charges against all the seven accused persons in light of the adduced evidence to have been proved beyond reasonable doubts to be criminally responsible for the charged count of piracy, yet the *obita dicta* in the same judgment suggests for amendment of the Penal Code so as to catch up with international development putting emphasis on Article 3 of SUA convention.[426]

This shows that, the existing piracy ingredients under legal regime in Tanzania do not comprehensively enshrine all international principles provided in the instruments as discussed earlier. However, although SUA is recommended, yet has not been a complete solution to piracy challenges. For instance, SUA does not provide for definitions of some of the offences it creates including the definition of the term 'maritime terrorism.'

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426 In this case, the court in its own opinion confirms existence of legal gaps in piracy legislation of Tanzania which need attention.

In this respect, apart from SUA, when enacting piracy legislation, countries have to visit the provisions of the other conventions. These may include the Hostage Convention formerly known as "the International Convention against the Taking of Hostages," and the United Nations Convention against Transnational Organized Crime and the Protocol thereto.[427] Other suggested instruments to refer when working on maritime security issues at national level include UNSRs on piracy and IMO guidelines which are issued for its member states from time to time.[428]

Apparently, deficiencies under the Penal Code are not the only barriers which create inadequacy in piracy suppression in Tanzania. There are other factors complementing the diminished incentive for efficient implementation of piracy framework in the country. These factors include financial capability and technical know-how just to mention but a few. The available literature shows that, elimination measures taken to combat piracy do not come free. The operation of police forces and prisons for example, can be quite costly for society.[429]

The One Earth Future Working Paper estimated that the cost of piracy prosecutions in 2010 alone was around $31 million, obtained by estimating the cost of piracy prosecutions each year by multiplying the average cost of criminal prosecutions in a region; that is, East African region states particularly Kenya, the Seychelles, and

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427 UNCTAD, Report on Maritime Piracy, Part I, (n 99).

428 IMO instruments include, SUA, ISPS Code, IMO Code of Practice for the Investigation of the Crimes of Piracy and Armed Robbery against Ships, the requirement for Long-Range Identification and Tracking of Ships, 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. A detailed account of this is available from IMO website at: www.imo.org.

429 *ibid.*

Yemen; North America region, and Europe; by the number of prosecutions occurring in each of those respective regions.[430]

Writing on the efforts made by Tanzania in the course of implementing Section 66(3) of the Penal Code, Mwanga asserts that, arrangements for implementation and enforcement of the anti-piracy measures in terms of maritime security require financial and human resources. They include resources for paying interpreters and feed incarcerated pirates. More resources are equally needed for training of judges, investigators, prosecutors. In addition, payment for the cost of handling of exhibits in order to maintain a firm chain of their custody is another financial liability.[431] Thus, although it is a well-recognized principle that each state has universal jurisdiction to prosecute pirates, the preponderance of attacks near States that lack resources to effectively prosecute pirates create a gap in enforcement within the piracy legal framework.[432]

In addition, the wording of Sections 66(3) and 66(4) of the Penal Code indicate that Tanzania is aware of the significant resources that might be involved in pursuing pirate prosecutions. While Section 66(3) provides that, unless a pirate ship is registered in Tanzania, no prosecution shall be commenced unless there is a special arrangement between the arresting state or agency and Tanzania, Section 66(4) on the other hand provides for the need for the Director of Public Prosecution's prior

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430 Bowden, A., *et al*., „The Economic Cost of Maritime Piracy, One Earth Future Working Paper, 25 (Dec. 2010), http://oceansbeyondpiracy.org/sites/default/files/documents old/The Economic Cost of Piracy Full Report.pdf.

431 Mwanga, H., *Fighting Against Maritime Piracy Along the Indian Ocean*, the National Prosecutions Services Journal, No. 003, April- June, 2015, pp. 10 – 11, p 11.

432 Chang, D., *Piracy Laws and the Effective Prosecution of Pirates*, p 273.

consent in piracy cases. Such situation may create a loop hole for captured pirates to escape legal punishment. Hence, piracy law should not be formulated in a way that it is easy to capture a pirate but difficult to prosecute.

Another issue as analysed earlier is that, international treaty regimes that are primarily directed to Governments do not provide for inducements or incentives for state parties to effectively implement the treaties. Governments are left to act *bona fide* pursuant to the doctrine of *pacta sunt servanda*.[433] If Governments fail to act according to their treaty obligations they are only subjected to persuasion of fellow state parties, usually through competent international organizations such as IMO in case of maritime treaties. Tanzania has no immune to this situation.

As well, remarkably in 2018 the HCT sitting in Dar es Salaam delivered through Mlyambina, J an opinion that, for the interests of justice in piracy cases the Penal Code should be amended to comply with the developments at international level in particular Article 3 of SUA.[434] Such *obita dictum* confirms existence of the gaps within the legal framework. This can be effect of inefficient implementation of the ratified conventions. In a way, the opinion calls for the need to domesticate all international instruments with a bearing to suppression of piracy

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433 Every treaty in force is binding upon the parties to it and must be performed by them in good faith. See Vienna Convention on the Law of Treaties of 1969, Article 26.

434 Republic v Mohamed Nur Adam and 6 Others, (n 10), p 69.

5.4.1 Inadequacy of Piracy Definition

The provisions of piracy under the legislation emanate from international conventions namely, UNCLOS and SUA.[435] Apparently, the legislation does not give room for attempted piracy in Tanzania. Equally, prosecutions for piracy suspects would be dependent on the law of the extraditing state, as well as that of Tanzania.[436] Apparently, procedure and evidence in piracy cases are dealt with in the Criminal Procedure Act, Cap. 20 R.E. 2019[437] and the Evidence Act, Cap. 6 R.E. 2019[438] respectively, just like in non-maritime offence cases.

Apparently, as per the succeeding analysis, the definition of piracy under the Penal Code is narrow. The Penal Code reflects the definition of and jurisdiction over piracy as set out in Article 101 and Article 105 of UNCLOS, read together with Article 58(2) of UNCLOS.[439] Section 66 of the Penal Code defines piracy and provides for the inchoate offences of inciting or intentionally facilitating an act of piracy.[440] The jurisdiction of the court to try piracy is covered under Section 6 of the Penal Code.[441]

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435 Penal Code, s 66 and also MSA, s 341.

436 Penal Code, s 66(3).

437 The Acts can be accessed from https://tanzlii.org. Further details can be accessed from the Report of the Secretary-General on specialized anti-piracy courts in Somalia and other States in the region submitted pursuant to paragraph 16 of Security Council Resolution 2015 (2011) of 24 October 2011, No. S/2012/50 of 20 January 2012.

438 *ibid.*

439 Article 58(2) of UNCLOS provides that, Article 88 to Article 115 and other pertinent rules of international law apply to the EEZ in so far as they are not incompatible with Part V of UNCLOS.

440 Penal Code, s 66(1) (c).

441 *ibid*, s 66(1) (a)-(d).

The Penal Code sets a maximum penalty of life imprisonment for piracy.[442] Specifically, the law contemplates the possibility of prosecuting suspected pirates arrested by foreign navies, that a special arrangement between the arresting state or agency and Tanzania is necessary where Tanzania is not a flag state of the pirate ship.[443]

To the contrary, piracy definition under the MSA is broader as compared to the one covered under the Penal Code.[444] Apart from UNCLOS, the MSA includes also the offences provided in SUA namely, enabling or aiding, aiding or abetting, counseling or procuring joint offenders in prosecution of a common purpose and acts of omission.[445] In this respect the Penal Code is not elaborate with regard to SUA provisions particularly with regard to offences provided under Article 3 of the convention such as hijacking of a ship.[446]

The MSA empowers the master of a ship to deliver any person believed to have committed or attempted or aided, abetted, counseled, procured or incited, or been at and part in, the commission of offences under Sections 341, 342 and 343, to an appropriate officer in any state party to SUA.[447] However, the MSA merely defines offences and remains silent on the definition of maritime terrorism.[448] The manner in

442 *ibid,* s 66(2).
443 *ibid,* s 66(3).
444 Merchant Shipping Act, s 341.
445 *ibid.*
446 *ibid,* s 342 and 343.
447 *ibid,* s 344.
448 Kamuli, R., Tanzania's Legal Framework on Sea Piracy. p 113, (n 413).

which perpetrators will be prosecuted and punished equally remains within the exclusive criminal regulatory framework.[449]

As hinted earlier, although the 2010 amendment extended the jurisdiction of the courts in Tanzania under the Penal Code to try high seas piracy,[450] yet, nothing much was done with regard to the definition of piracy.[451] In simple terms, the definition of piracy under Section 66 of the Penal Code remains identical to the one found under Article 101 of UNCLOS thus equally encumbered with the same definitional contradictions. Further discussion on the adequacy of the regime in Tanzania will be provided later under this chapter.

Before going any further, noteworthy also that the Penal Code has so far domesticated only one ie UNCLOS, among other key international instruments aimed at curbing piracy and other forms of insecurity at sea, such as maritime terrorism. The key instruments include UNCLOS and SUA. On the other hand, core regional instrument for piracy in East Africa is the Djibouti Code of Conduct (herein after referred to as the Code). Tanzania is a party to the Code although the same is not binding to the member states. Other suggested UN treaties include the Hostages Convention as well as the United Nations Convention against Transnational Organized Crime and the Protocol thereto. Although UN treaties are not maritime related, yet can "potentially assist in piracy suppression due to their features."[452]

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449 *ibid.*
450 Penal Code, s 6.
451 *ibid*, s 66.
452 UNCTAD, Report on Maritime Piracy, Part II, (n 407).

Remarkably, in as much as piracy falls under criminal maritime law, the domestic legislation on piracy should comply with respective international instruments. Note should also be taken that, unlike other areas of law, maritime law is a branch of international law with distinctive features including specific procedures to deal with maritime issues.[453] Therefore, specific admiralty rules of procedures for crime with admiralty nature such as piracy are equally important.

It was also analysed in the preceding discussion that, Tanzania inherited the British common law system where international treaties have no direct application upon ratification, until a piece of legislation is enacted by a ratifying state.[454] Tanzania is a party to a number of maritime instruments,[455] including those which give a state party obligation to ensure promotion of maritime security such as suppression and prosecution of piracy at sea.[456]

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453 Bendera, I.M., Admiralty Jurisdiction in Tanzania, 2010, (n 204), p. 45.

454 Constitution of the United Republic of Tanzania, 1977, Article 63(3)(e). Under its rule, Britain had mandate to apply to Tanzania any general international conventions already in existence or to be concluded in the future with the approval of the League of Nations. This is according to Article 8 of the Mandate Agreement. The British Majesty therefore, ratified international conventions on behalf of itself and all dominions under it including possessions and dependencies. In this regard, all British colonies were made to abide to British laws. Detailed information of this is available in Bendera, I.M., Admiralty Jurisdiction in Tanzania, 2010, (n 204), p. 55.

455 These include but not limited to UNCLOS; United Nations Convention against Transnational Organized Crime; Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime; Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organized Crime; Protocol against the Illicit Manufacturing of and Trafficking in Firearms, Their Parts and Components and Ammunition, supplementing the United Nations Convention against Transnational Organized Crime; The Hostage Convention; and SUA.

456 Formerly the jurisdiction of domestic courts in piracy cases was limited to the territory of Tanzania. This is illustrated further in the subsequent discussion. Also, the Penal Code did not incorporate the international definition for piracy. This situation remained so until 2010 when the country amended its penal legislation by incorporating the international ingredients for piracy. The amendment also gave the HCT jurisdiction to prosecute high seas piracy. Prior to that, domestic courts could only deal with piracy incidents occurring within territorial waters of Tanzania.

Similarly, the available literature reveals that being one of the former British colonies, Tanzania applied British statutes and rules before and after her independence.[457] It is equally noted from the literature that, admiralty or maritime jurisdiction was conferred to British colonies under the Colonial Courts of Admiralty Act of 1890. However, no standard rules were made by the British to apply in the colonial admiralty courts, although these rules existed in Britain.[458]

As well, so far the researcher has not come across any record on existence of a specific maritime policy in Tanzania before and after independence. What exists is a National Transport Policy of 2003 within which maritime issues are scantly covered in a short single paragraph.[459] Apparently, pieces of domestic maritime legislation in the country have been enacted in the absence of an inclusive maritime policy. It follows therefore that, probably challenges noticed within the existing piracy legal framework in Tanzania can be attributed to non-existence of a maritime policy. The core effect is that a law enacted in the absence of a policy is likely to be inadequate. Further effects of a maritime policy will be analyzed later in this thesis.

5.5 Treaty Domestication and its Implications on Adequacy of the Regime

With the above understanding, this part gives analysis on the adequacy of the legal regime in Tanzania. This is done by looking at the extent of domestication of relevant international instruments some of which were analysed earlier. The referred instruments include UNCLOS, SUA Convention 1988 and its Protocols namely SUA

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457 A detailed information of this is available from the URT website at https://www.tanzania.go.tz.

458 High Court Rules of 1875.

459 National Transport Policy of 2003, para 8.1.3.2.3. Available from https://www.mwt.go.tz.

Protocol 1988, SUA Protocol 2005, United Nations Convention against Transnational Organised Crime, the Hostage Convention, Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children, supplementing the United Nations Convention against Transnational Organised Crime, Protocol against the Smuggling of Migrants by Land Sea and Air, supplementing the against Transnational Organised Crime, and Protocol against the Illicit Manufacturing of and Trafficking in the Firearms, their Parts and Components and Ammunition, supplementing the United Nations Convention against Transnational Organised Crime.[460]

The status of Tanzania in relation to ratification of international instruments impacting on piracy shows has ratified 8 out of 10 instruments mentioned above. However, only 2 instruments out of 8 ratified are incorporated in the penal legislation. It follows therefore that domestication of ratified instruments remains as a setback in the fight against piracy in Tanzania.

The status of domestication of the ratified instruments has some implications on the legal regime of Tanzania in the context of maritime security. For instance, non-ratification of international instruments which have bearing on piracy has the implication that, the domestic legal framework for piracy in Tanzania will remain with latent gaps to the extent that it will lack contemporary issues in this area of law.

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460 Only UNCLOS and SUA have been implemented although not comprehensively.

Such scenario will always create difficulty in judicial proceedings on piracy cases and may further lead to inefficient prosecution of piracy suspects. This is so because, the basis upon which to build the foundation under which the perpetrator can be convicted depends on the provisions of a ratified relevant instrument. Equally, ratified instruments should be supplemented by political will to enact a robust domestic law which can adequately deal with piracy threats.

In principle, all the conventions clearly stipulate that they can become binding laws only to ratifying states. As a common legal principle, ratified instruments which are yet to be transformed in domestic law cannot be entertained by courts in Tanzania as well.[461] In this regard, courts of law in Tanzania cannot apply piracy provisions under non-ratified conventions discussed above.

As discussed earlier, the definition of piracy under the legal regime of Tanzania is subject to controversy same as those under UNCLOS. Although to a certain extent SUA's unlawful acts definition fills UNCLOS piracy definitional gaps that have always been experienced by various domestic courts when adjudicating piracy matters, the HCT was not able to comprehensively invoke SUA's provision in Republic v. Mohamed Nur Adam and 6 Others, as some SUA's provisions are yet to be made part of the law in Tanzania.[462]

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461 Constitution of the United Republic of Tanzania, 1977, Article 63.

462 *ibid,* Article 63(3). According to this Article, the implementation process for SUA in Tanzania is incomplete, ie SUA cannot be enforceable to its entirety by courts in Tanzania, a dualist country, simply by mere ratification of some few provisions.

Such state of affairs may not only lead to acquittal of piracy suspects, but also act as "incentive" for potential pirates. Eventually, the ways through which non-ratification challenge can be settled is twofold. First, is through making regulations under the principal legislation ie the MSA. This Act affords room for implementation of international agreement or other international treaty or instruments relating to shipping to which Tanzania is a party, simply by making regulations.[463]

Equally, the law gives room in Tanzania for the provision of the convention or instrument to prevail in case a provision of an international convention or other international instrument which applies to Tanzania conflicts with a provision of the MSA in any manner.[464] The second option would be to shift from *dualistic* legal system to *monistic* approach so that all international instruments in Tanzania can have effect simply after ratification.[465]

An example with respect to domestication of international treaties is that, initially Kenya had a dualist legal system prior to the promulgation of its 2010 Constitution.[466] Article 2(6) of the 2010 Kenyan Constitution incorporates into Kenyan law all treaties ratified by Kenya. In this case, under the existing Kenyan

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463 Merchant Shipping Act, s 427.

464 *ibid,* s 428.

465 Kenya was traditionally a *dualist* country and therefore needed to implement international conventions for them to have effect before domestic courts. However, this has been changed since the new constitution was passed. The 2010 Kenyan Constitution has transformed the country into a *monistic* state making international conventions directly applicable without a need of domesticating them. This is in accordance with Article 2(5) and 2(6) of the Constitutions of Kenya.

466 Kenya Nat'l Comm'n On Human Rights, Report To The Human Rights Committee To Inform Its Review Of Kenya's Third Periodic Report On Implementation Of The Provisions Of The International Covenant On Civil And Political Rights, 8 (2012), http://www2.ohchr.org/english/bodies/hrc/docs/ngos/knchr_kenya _hrc105.pdf. (Accessed 7th May, 2021).

2010 Constitution, the general rules of international law form part of the law in Kenya.

Therefore, international law, including customary international law, is a source of law in Kenya. Kenyan 2010 Constitution states that, any treaty or convention ratified by Kenya shall form part of the law.[467] The Kenyan constitution therefore, introduces far-reaching changes in Kenya's legal system, as they open the domestic legal system to international law.[468] This could be done also in Tanzania. For instance, as Mutoka commends, an Article in a national constitution which incorporate all ratified treaties in a country's legal framework "avoids situations where the country signs a treaty more as a ceremonial gesture rather than a real commitment to the tenets of the treaty, thereafter shelving its implementation."[469] Such system gives room for the courts to play a tangible role in implementing international standards at the national level. [470]

5.6 Challenges of Enforcement of Anti-Piracy Rules

One aspect with regard to piracy challenges lies on the nature of the rules. Anti-piracy rules enshrined in international instruments falls within the category of soft law. Thus, enforcement of these rules as well usually depends on the willingness of

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467 Constitution of Kenya, 2010, Article 2(6).

468 *ibid*, Article 2(5) and 2(6).

469 Mutoka, R., *Assessing current trends and efforts to combat piracy: a case study on Kenya*, Case Western Reserve Journal of International Law, Vol. 46, No. 1-2, 2013, pp 125, https://link.gale.com/apps/doc/A377861154/AONE?u=anon~1ca70f7&sid=google Scholar&xid=b6e3fbef (Accessed 1 Oct. 2021).

470 *Attorney General v. Mohamud Mohammed Hashi and Eight Others*, Civil App. 113 of 2011, [2012] eKLR 9 (Ct. App.) (Kenya). Accessed from http://www2.ohchr.org/english/bodies/hrc/docs/ngos/knchr_kenya _hrc105.pdf, on 7th May, 2021.

politicians in a given state. For instance, IMO as a specialized agency of UN vested with a duty to keep all international maritime safety and security instruments up to date, has all of its anti-piracy instruments typically in a soft law form.[471]

It follows therefore that, the international standards in public maritime law, a branch of law under which the crime of piracy falls, have not established strict and legally enforceable sanctions against any state which does not implement anti-piracy conventions.[472] What exists is only soft mechanism acting as "a soft stick" merely laying down procedure and demonstrating some progress towards compliance with the rules set by the world community through IMO in case of public maritime law conventions.

Similarly, the literature reveals that, the universal definition for piracy is enshrined in UNCLOS.[473] It has also indicated that, Tanzania has been a party to UNCLOS since 1985. After ratification Tanzania incorporated into its legal system a total of 52 out of 320 Articles of UNCLOS including Articles in the Territorial Sea and Exclusive Economic Act, 1989.[474] Incorporation of piracy provisions covered under UNCLOS was made in 2003 when the universal definition of piracy was enshrined in the MSA.[475]

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471 Further details on these are available from IMO website at www.imo.org.

472 But according to Article 26 of the Vienna Convention on the Law of Treaties, 1969 no derogation is allowed to ratified treaties by any state.

473 UNCLOS, Article 105.

474 Bendera, I.M., Admiralty Jurisdiction in Tanzania, 2010, (n 204), pp 10-11.

475 MSA, s 341.

However, as analyzed in this thesis, for more than 19 years, piracy provisions which mainly range from Article 100 to 107 in UNCLOS were not domestically legislated under the Penal Code until 2010. Again, this scenario justifies the need for Tanzania to shift to *monism* to facilitate immediate application of ratified conventions in the country's legal system.

On another note, for a domestic court to prosecute international crime there must be a law giving it jurisdiction.[476] Piracy is an international crime. As it is a common legal principle that any law that deals with an international crime should be a direct reflection of the existing international law,[477] the definition of piracy under MSA incorporates UNCLOS and SUA provision, in the same line, with respect to maritime security crime.[478] However, MSA is also not as comprehensive as it ought to be because it does not incorporate all the relevant provisions found in SUA. This aspect takes us to the discussion on the rules of procedures under which piracy perpetrators should be prosecuted.

5.6.1 Lack of Clear Procedures on Admiralty Matters

International treaty regimes that are primarily directed to governments do not provide for inducements or incentives for state parties to effectively implement the treaties. This is equally the case when it comes to rules of procedures on matters with admiralty nature such as piracy. Thus, UNCLOS as a 'constitution for the oceans'

476 Kweka, G. J., National Prosecution of International Crimes in Africa: Law and Practice, PhD Thesis, University of Dar es Salaam, Tanzania, 2017, p 197.
477 *ibid.*
478 MSA, s 341.

covering almost all aspects of the oceans, [479] does not provide for rules of procedure for prosecution of captured pirates as well. [480] Such issues are left to the discretion of each individual state's legal systems, although of course, adhering to UNCLOS provisions as a guideline.

Apparently, rules regulating practice and procedure of admiralty matters do not exist in Tanzania. According to Section 4 of Judicature and Application of Laws Act, Cap. 358 R.E. 2019, the powers to make admiralty rules in Tanzania are vested to the Chief Justice of the URT. [481] In this regard, piracy proceedings in the country are not done under specific admiralty rules but entertained under rules found in the Criminal Procedure Act, Cap. 20, R.E. 2019.[482] In essence, application of criminal procedural rules in criminal matters is a common legal principle which should not be disputed. Nothing is compromised in case normal criminal procedure rules apply in piracy cases as well because piracy is a crime just like any other crime.

However, considering the scene under which piracy incidents take place, special or additional rules for piracy cases seem unavoidable. In other words, the challenges experienced by courts in piracy prosecution process suggest that existence of admiralty rules can shed light to those engaged in counter piracy measures including

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479 The *travaux preparatoire* of UNCLOS. See remarks by Tommy T.B. Koh, President of the UN Conference on the Law of the Sea at the final session of the UNCLOS conference, https://cil.nus.edu.sg/wp-content/uploads/2015/12/Ses1-6.-Tommy-T.B.-Koh-of-Singapore-President-of-the-Third-United-Nations-Conference-on-the-Law-of-the-Sea-_A-Constitution-for-the-Oceans.pdf (accessed 22nd October, 2018).

480 Ong (2005) 47; N Khalid 'Security in the Straits of Malacca' Japan Focus, p. 279.

481 Bendera, I.M., Admiralty Jurisdiction in Tanzania, 2010, (n 204), p. 57.

482 Republic v Mohamed Nur Adam and 6 Others, (n 11).

navies hence facilitate not only speedy but also effective and efficient prosecution of piracy suspects in Tanzania.[483]

Analysing the effects of non-existence of admiralty rules in Tanzania Bendera asserts that,

> "In cases where some statutes have attempted to incorporate some aspects under the ambit of admiralty jurisdiction the changes have added confusion rather than offering much assistance to the claimants and defendants alike."[484]

Similarly, UNODC maintains that, rules of procedure and evidence "should be a satisfactory basis on which to conduct piracy prosecutions."[485] In addition, Tanzania is not an exception to the international phenomenon that counter piracy mechanisms pertain to navies.[486] This state of affair however, is likely to generate detrimental consequences in the judicial proceedings because navies are generally not trained to carry out judicial procedures such as collecting evidence and receiving confessions.[487]

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483 For example, Republic v. Mohamed Nur Adam and 6 Others took almost 8 years. The incident occurred in 2011, the case was filed in 2015, while judgment was delivered in 2018.

484 Ibid. See also Bendera, I.M., Admiralty Jurisdiction in Tanzania, p. 66, (n 204).

485 Report of the Secretary-General on specialized anti-piracy courts in Somalia and other States in the region submitted pursuant to paragraph 16 of Security Council Resolution 2015 (2011) of 24 October 2011, No. S/2012/50 of 20 January 2012.

486 Kamuli, R., "Tanzania's Legal Framework on Sea Piracy, p 34, (n 472).

487 It is difficult to collect and keep evidence for the ship hijacked by pirates because is a moving object floating in a large body of water. Further, under this scenario scarcity of witnesses is obvious. For a detailed account of this see See J. L. Anderson, "Piracy and World History: An Economic Perspective on Maritime Predation", Journal of World History, Vol. 6, No. 2, 1995, at p 178.The scenario in *Republic v. Mohamed Nur Adam and 6 Others* as discussed above is that, among other, Sams-All Good, the boat which was attacked by pirates, could not be tendered in evidence as the same went back to UK after the exploration exercise. Sams-All God was one of the guarding crew boats to vessels which were involved in oil exploration in the Indian Ocean.

For instance, in Republic v. Mohamed Nur Adam and 6 Others where navy officers were involved in capturing the suspects, there were some indications that the alleged evidence was not related to the case. As note from the proceedings, “chain of custody” was one of the issues which were disputed by the defense side in the course of tracing link between the referred firearms and the whole piracy offence.

5.6.2 Challenges in Undertaking Prosecutions in Piracy Cases

It was revealed in the preceding analysis that; international instruments deal with substantive law leaving the procedural part of it to national law. Apparently, having a legal framework which covers extensively all the core international instruments for piracy may however not be complete panacea. The base for this argument is that, despite having a legal framework which defines piracy comprehensively yet prosecution process may still be fraught with challenges.

Taking an example of Kenya is that, 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 ie the Merchant Shipping Act, 2009 (hereinafter the MSA, 2009), 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. The law therefore gives Kenya a very broad jurisdiction to try suspected pirates.

For instance, the MSA, 2009 as read together with the Constitution of Kenya,[488] grants the Kenyan courts' jurisdiction over piracy offenses, regardless of whether the ship in question was in Kenya or elsewhere, and irrespective of the nationality of the accused.[489] Furthermore, the MSA 2009 has domesticated a various key international convention aimed at curbing piracy and other forms of insecurity at sea. These instruments include UNCLOS and SUA; and also, Djibouti Code of Conduct and the African Maritime Transport Charter (AMTC) at regional level.

Equally, MSA 2009 gives effect to SOLAS through the Merchant Shipping (Application of Safety Convention 1974) order 2004, which declares the SOLAS, 1974, including the protocols and amendments thereto including the ISPS Code to be a convention applicable to Kenya. In this regard, Kenya signed the MOUs with the UK, the USA, and the EU in late 2008 and early 2009.[490]

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.[491] 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

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488 Article 165(3) of the Constitution of Kenya, 2010 stipulates that "the High Court shall have unlimited original jurisdiction over civil and criminal matters."

489 Merchant Shipping Act, No. 4 (2009), The Laws of Kenya, Revised Edition (2012) Cap. 389, s 430, 430(1), and 430(3).

490 For the MoU between Kenya and EU see Official Journal of the European Union L79/52 of 25 March 2009.

491 Wambua, M.P., 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.

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.

Apparently the legal regime of Kenya similarly provides for the prevention, investigation, and punishment of corruption, economic crimes, and other related offences. Under Kenya's regime, 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.[492]

However, although much effort has been made to fight piracy, the prosecution process is still fraught with challenges. These challenges are attributed to financial constraints, jurisdictional uncertainties, and lack of capacity to implement the various legislative frameworks to fight piracy.[493]

It has been revealed that, Kenya is facing financial constraints and as such the implementation of the legislation discussed above is not very effective. With regard to this challenge, the court noted that the piracy trials have presented a unique challenge to the Kenyan legal system. [494]

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492 Merchant Shipping Act, No. 4 (2009), The Laws of Kenya, Revised Edition (2012) Cap. 389, section 3. Also Prevention of Organized Crimes Act is the recent legislation enacted in 2010 with the objective of not only preventing organized crime but also providing for recovery of proceeds of organized criminal activities.

493 *ibid.*

494 Republic v Hassan Jama Haleys Alias Hassan Jamal and 5 Others [2010] eKLR.

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 may just serve to make a bad situation worse. There is therefore a need to train Tanzanian officials, prosecutors, magistrates, and advocates on the law regarding piracy for efficient suppression of piracy in the country.[495]

Capacity to implement legislation is another challenge facing Kenya.[496] 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.[497] 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.[498]

It is also argued that, 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

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495 *ibid*.
496 *ibid.*
497 *ibid.*
498 *ibid*.

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.[499]

5.7 Conclusion

As per the analysis made in this chapter it is right to underscore that, the legal regime for piracy in Tanzania is not adequate enough to deal with piracy. Just like anywhere in the world, the threat of piracy to Tanzania is significant. Although Tanzania has domesticated UNCLOS provisions for piracy, the only hurdle is the controversy existing in the key ingredient of piracy in its legal regime. The HCT has set base for the need to have the legal framework of piracy amended in *Republic v. Mohamed Nur Adam and 6 Others.* Unambiguously, the court indicates that the current penal legislation is not addressing piracy sufficiently. Being the first piracy case to be prosecuted in Tanzania, the challenges experienced are lessons for improvement. However, in the absence of a legislative clarification, the celebrated judgment in *Republic v. Mohamed Nur Adam and 6 Others* could be a short-term gain.

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499 For a detailed account of suggested 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.

CHAPTER SIX

CONCLUSION AND RECOMMENDATIONS

6.1 Introduction

This chapter presents conclusion of the study which basically sums up insights of the research, provide recommendations and points out possible avenues for further direction of research.

6.2 Main Insights of the Study and Key Findings

The study has carried out in depth assessment and analysis on piracy laws in particular legal challenges that Tanzania encounters in piracy prosecution. The study sought to address key definitional challenges of piracy under the existing law. The main focus of the study was the assessment of adequacy of piracy laws and international standards in curbing piracy within the maritime sector. The study was guided by the following research questions: -

(i) What are the underlying rules in the legal framework of piracy?

(ii) How adequate and appropriate are the existing piracy rules in dealing with piracy in Tanzania?

(iii) To what extent are the international regulations and guidelines for piracy suppression relevant in ensuring safe maritime operations in Tanzania?

The study has demonstrated that the existing piracy laws are inadequate in dealing with piracy. The traditional doctrinal legal research methodology were mainly employed and complemented by comparative methods under historical legal

approach. The study was limited to Tanzania. The literature review revealed that scant literature has been developed; hence substantive jurisprudence in the area is missing from Tanzania perspective. The thrust of this study was to expose piracy prosecution challenges and provide an insight for crafting a workable and appropriate legal framework for safe business within the maritime sector.

The theoretical and concept of piracy analysis and discussion made in chapter two reveals that, every theoretical approach that is being advocated is not free from one disadvantage or another. While one approach might be seen as advantageous from the global perspective, it might not equally be seen as a favourable option to a particular country in view of various issues including its level of development. Equally, while an approach might be theoretically sound, in practical terms it might be unattainable.

Nevertheless, the discussed theories serve to expose the benefits and ills of each approach, which then need to be considered in developing a legal framework in light of the existing global challenges, initiatives and the local contexts. All in all, the theories debated provide an important benchmark which any reform measure ought to consider while prioritizing the specific needs and values of the country under review.

The theories analyzed have revealed that, social conditions associated with piracy include poverty, hunger, unemployment, poor housing, and political instability. Those who exploit the vulnerabilities created by social disorganization are doing so

in response to the strain and frustration that manifest from a lack of life's basic necessities such as food, shelter, and clothing. In these regions of the world, there is a subculture willing to support criminal behavior, operating in an environment too corrupt to stop it.

Also, the theories has shown that, political instability, which results from a weak or non-existent central government, leads to a condition in which social and moral norms are weak, conflicting, or simply absent. The lack of norms, ie a state without norms, creates deviant behavior and ultimately social upheaval. For example, Somalia, where piracy is prevalent, has been without an effective central government since President Siad Barre was overthrown in 1991. This means that, piracy gains a foothold in a state due to the country's economic instability, which poses threats to other nearby developing nations as well.

Thus, as poor social conditions persist, opportunities for criminal activity arise. Opportunities exist because international commerce relies on ports and waterways that are adjacent to economically and politically unstable countries. Since there is no domestic force such as police or viable military to stop the pirates in these countries, perpetrators can easily set upon unguarded vessels passing through international waters, seize the crew and their cargo, return to land and liquidate the goods.

A review of piracy standards under international instrument in chapter three reveals that, no single international convention solely dedicated to eradication of piracy. However, the universal definition for piracy is captured under UNCLOS. In this

regard, it is the findings in this study that there is a bunch of other instruments which have been put in place to supplement UNCLOS. Equally, it is revealed in the chapter that so far none of the existing international instruments has proved effective suppression of piracy in its isolation. The provision of these instruments are fraught with gaps hence lacks adequacy and clarity in some aspects. Countries are therefore encouraged to consider other instruments when enacting their national legislation for piracy.

According to the findings, the mischief which the framework intended to cure under international customary law of piracy was to protect the merchant vessels of Europeans powers against traditional piracy. The provisions for piracy under customary law were later on enshrined under the modern law of piracy found in UNCLOS. In this regard, the existing framework reflects the challenges faced by developed countries thus not necessarily reflect challenges in developing countries.

Such experience has never felt by developing countries for a greater extent because they are traditionally not ship owners. Hence the rules were developed based on solving developed countries by declaring piracy a universal crime. Consequently, modern piracy such as Somalia based piracy was not taken into consideration. For example, the international legal framework all along has been silent in relation to holding ships and crew under hostage for ransom as it is the case in Somalia. Similarly, the framework did not take into account piracy acts within the territorial waters. The framework has also been silent in relation to difficulties involved in

prosecution of piracy suspects. Further, challenges brought by nexus between piracy and maritime terrorism as it is the case in modern piracy was equally not captured.

It follows therefore that piracy legislation would be effective if sorted at national policy level in the first place. Voluminous international instruments on piracy currently into existence and which are suggested for individual states to implement are equally imprecise in themselves, thus add complications to the already complicated piracy definition under UNCLOS. Their provisions lack clarity. They are equally too many. Instead therefore, efforts should be put on establishment of a maritime policy since law should emanate from policy. Equally, the policy will offer guidance to individual states when considering signing treaties or conventions as to which issues should be made part of the policy and which ones should form part of the law.

Presentation and discussion of EAC regional instrument for piracy under chapter four found that prior to piracy off the coast of Somalia regional instruments on the same did not exist. The analysis revealed also that piracy provisions under national legislation in countries under this region did not reflect the universal definition. High seas piracy was not common in this region and therefore the definition for piracy in countries under this region was limited to territorial waters. The analysis revealed further that, like the framework of piracy at international level, regional instruments for piracy in EA were initiated by international authorities. Therefore, the piracy instruments as we see them today in EA were put in place under the patronage of

IMO and UNSC after piracy off the coast of Somalia became a threat to the global merchant ships.

The analysis showed also that, piracy instruments in EA have no legal force hence not binding. In addition, it was found that most of EA countries dwell under monism system. In this case, the pace in implementing maritime instruments is not appealing. This means that, the national regime for piracy remains inadequate.

In addition, it was revealed that Somalia piracy, which affects the region of East Africa most, employs unique modus operand as compared to piracy committed in other regions. As a result, the universal definition of piracy suffers limitation in addressing it. That explains why new initiatives of adopting some sort of instruments for Somalia based piracy have recently been made by relevant international authorities such as UNSC and IMO. In the same line, domestic penal legislation of individual countries within the region had to be amended as well. The main reason is that, these instruments had a very huge limitation in drafting and therefore not adequate to deal with Somalia-based piracy effectively. Although some gaps still exist in the regional instruments, yet international and regional instruments can facilitate legislation of tough piracy legal framework at domestic level if not used in isolation.

The analysis and discussion of the legal framework for piracy in Tanzania under chapter five found that the legal framework for piracy lack adequacy and clarity. Equally, the CURT is silent on the general subject of maritime security and piracy in

particular. Just like anywhere in the world, the threat of piracy to Tanzania is significant. Although to some extent Tanzania has domesticated UNCLOS provisions for piracy, it is yet to incorporate other recommended instruments. Controversy existing in the key ingredient of piracy in its legal regime will defeat the purpose of the law with regard to prosecution of piracy perpetrators. It was the findings of the study in the analysis of the chapter under review that, the HCT has set base for the need to have the legal framework of piracy amended in Republic v Mohamed Nur Adam and 6 Others. Unambiguously, the court indicates that the current penal legislation is not addressing piracy sufficiently. Being the first piracy case to be prosecuted in Tanzania, the challenges experienced are lessons for improvement. However, in the absence of a legislative clarification, the celebrated judgment in Republic v Mohamed Nur Adam and 6 Others could be a short-term gain.

The provisions of piracy under the legislation emanate from international conventions namely, UNCLOS and SUA which provides nothing on attempted piracy. Apparently, the legislation does not give room for attempted piracy in Tanzania. Equally, prosecutions for piracy suspects would be dependent on the law of the extraditing state, as well as that of Tanzania, whereas procedure and evidence are dealt with in the Criminal Procedure Act, Cap. 20 R.E. 2019 and the Evidence Act, Cap. 6 R.E. 2019 respectively.

Apparently, the definition of piracy under the Penal Code is narrow. The Penal Code reflects the definition of and jurisdiction over piracy as set out in Article 101 and

Article 105 of UNCLOS, read together with article 58(2) of UNCLOS. Section 66 of the Penal Code defines piracy and provides for the inchoate offences of inciting or intentionally facilitating an act of piracy. The jurisdiction of the court to try piracy is covered under Section 6 of the Penal Code.

The Penal Code sets a maximum penalty of life imprisonment for piracy. Specifically, the law contemplates the possibility of prosecuting suspected pirates arrested by foreign navies, that a special arrangement between the arresting state or agency and Tanzania is necessary where Tanzania is not a flag state of the pirate ship.

It was also found that, piracy definition under the MSA is broader as compared to the one covered under the Penal Code. Apart from UNCLOS, the MSA includes also the offences provided in SUA namely, enabling or aiding, aiding or abetting, counseling or procuring joint offenders in prosecution of a common purpose and acts of omission. In this respect the Penal Code is not elaborate with regard to SUA provisions particularly with regard to offences provided under Article 3 of the convention such as hijacking of a ship.

The MSA empowers the master of a ship to deliver any person believed to have committed or attempted or aided, abetted, counseled, procured or incited, or been at and part in, the commission of offences under Sections 341, 342 and 343 to an appropriate officer in any state party to SUA. However, the MSA merely defines offences and remains silent on the definition of maritime terrorism. Similarly, the

MSA is silent in relation to the manner in which perpetrators will be prosecuted and punished.

Further the findings revealed that, although in 2010 Tanzania amended its Penal Code to extend the jurisdiction of the courts in Tanzania to try high seas piracy, yet nothing much was done with regard to the definition of piracy. The definition of piracy under Section 66 of the Penal Code remains identical to the one found under Article 101 of UNCLOS thus equally encumbered with the same definitional contradictions.

It was also found that the Penal Code has so far domesticated only UNCLOS, among other key international instruments aimed at curbing piracy and other forms of insecurity at sea. In relation to regional instruments Tanzania is a member although the instruments are not part of the law in the country.

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However, in as much as piracy falls under criminal maritime law, the domestic legislation on piracy should comply with respective international instruments. Equally, unlike other areas of law, maritime law embraces distinctive features including specific procedures to deal with maritime issues. Therefore, specific admiralty rules of procedures for crime with admiralty nature such as piracy are equally important.

It was also found that, Tanzania inherited the British common law system where international convention has no direct application upon ratification, until a piece of

legislation is enacted by a ratifying state. Tanzania is a party to a number of maritime instruments, including those which give a state party obligation to ensure promotion of maritime security such as suppression and prosecution of piracy at sea. The findings revealed that Tanzania has ratified only 2 out of 8 instruments.

The analysis revealed also that being one of the former British colonies, Tanzania applied British statutes and rules before and after her independence. It was equally noted from findings that, admiralty or maritime jurisdiction was conferred to British colonies under the Colonial Courts of Admiralty Act of 1890. However, no standard rules were made by the British to apply in the colonial admiralty courts, although these rules existed in Britain.

As well, the study found that maritime policy has never existed in Tanzania before and after independence. This shows that, pieces of domestic maritime legislation in the country have been enacted in the absence of an inclusive maritime policy. It follows therefore that, probably challenges noticed within the existing piracy legal framework in Tanzania can be attributed to non-existence of a maritime policy.

Suffice therefore to conclude that, domestication of ratified instruments remains as a setback in the fight against piracy in Tanzania. The status of domestication of the ratified instruments has some implications on the legal regime of Tanzania in the context of maritime security. For instance, non-ratification of international instruments which have bearing on piracy has the implication that, the domestic legal framework for piracy in Tanzania will remain with latent gaps to the extent that it

will lack contemporary issues in this area of law. Such scenario will always create difficulty in judicial proceedings on piracy cases and may further lead to inefficient prosecution of piracy suspects. This is so because, the basis upon which to build the foundation under which the perpetrator can be convicted depends on the provisions of a ratified relevant instrument. Equally, ratified instruments should be supplemented by political will to enact a robust domestic law which can adequately deal with piracy threats.

It appears that, all the conventions clearly stipulate that they can become binding laws only to ratifying states. In this regard, courts of law in Tanzania can not apply piracy provisions under non-ratified conventions discussed above. As a common legal principle, ratified instruments which are yet to be transformed in domestic law cannot be entertained by courts in Tanzania as well.

As discussed earlier, the definition of piracy under the legal regime of Tanzania is subject to controversy same as those under UNCLOS. Although to some extent SUA's unlawful acts definition fills UNCLOS piracy definitional gaps that have always been experienced by various domestic courts when adjudicating piracy matters, the HCT was not able to comprehensively invoke SUA's provision in Republic v. Mohamed Nur Adam and 6 Others, as some SUA's provisions are yet to be made part of the law in Tanzania.

Such state of affairs may not only lead to acquittal of piracy suspects, but also act as incentive for potential pirates. Eventually, the ways through which non-ratification

challenge can be settled is twofold. First, is through making regulations under the principal legislation ie the MSA. This Act affords room for implementation of international agreement or other international treaty or instruments relating to shipping to which Tanzania is a party, simply by making regulations.

Equally, the law gives room in Tanzania for the provision of the convention or instrument to prevail in case a provision of an international convention or other international instrument which applies to Tanzania conflicts with a provision of the MSA in any manner. The second option would be to shift from *dualistic* legal system to *monistic* approach so that all international instruments in Tanzania can have effect simply after ratification.

In addition, anti-piracy rules enshrined in conventions falls within the category of soft law. Thus, enforcement of these rules usually depends on the willingness of politicians in a given state. For instance, IMO as a specialized agency of UN vested with a duty to keep all international maritime safety and security instruments up to date, has all of its anti-piracy instruments typically in a soft law form.

It follows therefore that, the international rules in public maritime law, a branch of law under which the crime of piracy falls, have not established strict and legally enforceable sanctions against any state which does not implement anti-piracy conventions. What exists is only soft mechanism acting as “a soft stick” merely laying down procedure and demonstrating some progress towards compliance with

the rules set by the world community through IMO in case of public maritime law conventions.

Similarly, the literature reveals that, the universal definition for piracy is enshrined in UNCLOS. It has also indicated that, Tanzania has been a party to UNCLOS since 1985. After ratification Tanzania incorporated into its legal system a total of 52 out of 320 Articles of UNCLOS including Articles in the Territorial Sea and Exclusive Economic Act, 1989. Incorporation of piracy provisions covered under UNCLOS was made in 2003 when the universal definition of piracy was enshrined in the MSA. However, as revealed in the analysis in this thesis, for more than 19 years, piracy provisions which mainly range from Article 100 to 107 in UNCLOS were not domestically legislated under the Penal Code until 2010. Again, this scenario justifies the need for Tanzania to shift to *monism* to facilitate immediate application of ratified conventions in the country's legal system.

On another note, for a domestic court to prosecute international crime there must be a law giving it jurisdiction. Piracy is an international crime. As it is a common legal principle that any law that deals with an international crime should be a direct reflection of the existing international law, the definition of piracy under MSA incorporates UNCLOS and SUA provision, in the same line, with respect to maritime security crime. However, MSA is also not as comprehensive as it ought to be because it does not incorporate all the relevant provisions found in SUA.

The analysis showed that, international treaty regimes that are primarily directed to governments do not provide for inducements or incentives for state parties to effectively implement the treaties. This is equally the case when it comes to rules of procedures on matters with admiralty nature such as piracy. Thus, UNCLOS does not provide for rules of procedure for prosecution of captured pirates as well. Such issues are left to the discretion of each individual state's legal systems, although of course, adhering to UNCLOS provisions as a guideline.

Apparently, rules regulating practice and procedure of admiralty matters do not exist in Tanzania. In this regard, piracy proceedings in the country are not done under specific admiralty rules but entertained under rules found in the Criminal Procedure Act, Cap. 20, R.E. 2019. In essence, application of criminal procedural rules in criminal matters is a common legal principle which should not be disputed. Nothing is compromised in case normal criminal procedure rules apply in piracy cases as well because piracy is a crime just like any other crime.

However, considering the scene under which piracy incidents take place, special or additional rules for piracy cases seem unavoidable. In other words, the challenges experienced by courts in piracy prosecution process suggest that existence of admiralty rules can shed light to those engaged in counter piracy measures including navies hence facilitate not only speedy but also effective and efficient prosecution of piracy suspects in Tanzania.

The analysis revealed further that, effects of non-existence of admiralty rules in Tanzania is that, in cases where some statues have attempted to incorporate some aspects under the ambit of admiralty jurisdiction such changes have added ambiguity rather than offering much assistance to the parties. Similarly, the analysis revealed that, rules of procedure and evidence in piracy cases should be a satisfactory basis on which to conduct piracy prosecutions.

Tanzania is not an exception to the international phenomenon that counter piracy mechanisms pertain to navies. Navies are generally not trained to carry out judicial procedures. Situations where the alleged evidence are found not to be related to the case will benefit the suspect in terms of escaping punishment.

6.3 Recommendations

In order for a greater level of adequacy and clarity in the legal framework of piracy in Tanzania to be achieved for any counter piracy measures to succeed, the thesis recommends the following:

First, the provisions of piracy under the MSA should be merged to the one under the Penal Code to avoid unnecessary ambiguity of the definition for piracy.

Second, after merging the provisions, Tanzania should amend the Penal Code to repeal the contradictory conditions set under Section 66 for an act to amount to piracy. The previous chapter indicated that, the current criteria are considered as frustrating complications. To address this issue, the regime should reflect all

recommended international rules covered under various maritime security instruments. Piracy acts are bound to adopt new tactics and means with chances that they may resurface in different geographical localities provided that the underlying factors exist in that particular geographical area, such as lack of effective legislations, weak surveillance and lack of law enforcement at sea. This calls for adoption of clear and adequate legislations aimed at discouraging pirates to engage in criminal acts at sea.

Third, after ratification, international maritime or shipping instruments in Tanzania should be implemented simply by making regulations as per Section 427 of the MSA. Alternatively, Tanzania may opt to transform its legal system to *monism* approach so that all international instruments in Tanzania can have effect simply by mere ratification. Under the current system which was inherited from Britain, international conventions cannot be applicable in Tanzania until a piece of legislation is enacted to localize the ratified instrument. This defeat the purpose of law as it contributes to both delays and difficulty on prosecution side in piracy proceedings where the threshold of proof is beyond reasonable doubt. Thus, the existing contradicting legal ingredients of an offence will normally benefit the perpetrator.

Fourth, Tanzania may opt to enact admiralty rules special for piracy cases to expedite piracy proceedings. The analysis in chapter five has revealed that admiralty rules do not exist in the legal system of Tanzania. The power to enact admiralty rules in Tanzania are vested to the Chief Justice of the URT under the Judicature and Application of Laws Act, Cap. 358 R.E. 2019.

Fifth, Tanzania should invest in maritime law training programs. Essentially maritime law is a branch of international law with notorious difficulty. However, acquiring maritime law training is equally expensive and can only be obtained in foreign countries. The study in chapter five indicated that maritime law expertise is a cross cutting challenge. Tanzania may therefore decide to promote maritime law programs within the country. This can be done by amending Dar es Salaam Maritime Institute Act, No. 22 of 1991 to elevate the institute up to university level so that postgraduates' programs in maritime law subjects can be offered at affordable training costs.

Tanzania is endowed with vast maritime resource in the Indian Ocean including oil and gas. The country has recently made improvements on ports infrastructure to afford access to merchant ships from all over the world. The country is also working on blue economy the concept which basically refers to all maritime economic activities. Efforts have also been made by the country to establish the maritime administration endowed with a duty to take care of all maritime issues at national level. The maritime sector is too legalistic and full of both public and private disputes. Effective handling of maritime cases can be possible only if legal professionals have the necessary exposure to the relevant laws. Apparently, all these call for the need to have maritime law programs offered within Tanzania.

Sixth, unlike other sectors, there has never been any policy for the maritime sector in Tanzania. The maritime sector is wide covering numerous issues which involve unique legal principles. Maritime law therefore should start as a policy. The policy

will shed light as to how the law should be formulated. The government of Tanzania intends to work and see realization of contribution of the blue economy in fostering its economy by creating employment opportunities and poverty reduction, among other things. This calls for a comprehensive policy in the first place for effective implementation of this strategy. It is recommended therefore that time is high now for an inclusive maritime policy to be formulated so that the domestic maritime legislation enshrines the maritime context in its entirety.

A well-designed maritime policy capturing all aspects of the sea will equally ensure smooth successions in maritime administration as people get transferred, go on retirement or somehow leave employment. A new staff will make reference from the policy and move forward hence a room for departure will not exist. Also, a policy will offer guidance in enactment of relevant maritime laws. The policy will equally play primary guidance on various issues such as natural resources and water, defence and security, industrial development, economy and ocean governance as well as maritime training and education, just to mention a few.

6.4 Suggestions for Future Research

Shipping remains indispensable because no better economy without it. Maritime research therefore is of utmost importance. Chapter five has revealed that technical know-how is a cross-cutting challenge in antipiracy measures within the maritime fraternity. This is also the case in other maritime law subjects. The current study covered only the adequacy of the legal regime for piracy in Tanzania. There is therefore a room to research about other maritime legal issues in Tanzania,

preferably the rights and challenges of Tanzania, as a coastal state, in the continental shelf regime as provided in UNCLOS.

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