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Domestication of Extraterritorial Jurisdiction: A Critique of the Kenyan Legislative Framework: A Case of the Merchant Shipping Act, 2009

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Abstract: *The Merchant Shipping Act of Kenya, 2009 is a merchant shipping legislation. This is for purposes, inter alia, to provide for the safety of navigation, to make provision for the control, regulation and orderly development of merchant shipping and related services. Section 370 of the Act therefore prescribed offences against safety of ships which included hijacking and destroying of ships. The controversy surrounding Section 370 (4) of the Act is with regard to the extraterritorial jurisdiction that Kenya has clothed itself with regard to prosecuting suspected pirates arrested in the high seas where there is no nexus between the pirates and Kenya as provided for under Article 6 of the SUA Convention. Section 370 (4) of the MSA, 2009 provides that the offences created pursuant to Section 370 shall apply: "Whether the ship is in Kenya or elsewhere, or whether the offences were committed in Kenya or elsewhere or whatever the nationality of the person committing the act". This provision therefore confers on Kenyan Court's jurisdiction wider than the SUA Convention under international law. The controversy is bound to create jurisdiction uncertainties in instances where two states claim prosecutorial powers over suspected pirates or where a suspected pirate challenges the jurisdiction based on Article 6 of the SUA Convention.*

INTRODUCTION

Kenya has distinguished itself in the global war against piracy by undertaking prosecutions in its National Courts of suspected pirates arrested in the high seas and handed over by navies of leading maritime nations under bilateral agreements and memorandum of understanding (MOUs) entered into between Kenya and these leading maritime nations. For example, MOUs signed on 16th January, 2009 between Kenya and the United States of America, Kenya agreed to prosecute captured pirates. By a Memorandum of Understanding signed on 11th December, 2008, Kenya agreed to receive and prosecute suspected pirates captured in the High Seas by the United Kingdom. Further, on 6th March, 2009, Kenya signed a similar agreement with the European Union.

Foreign naval ships operating along the Gulf of Aden and the Indian Ocean arrested the pirate suspects, which has created a legal and jurisdictional quagmire. Following UNSC Resolution 1846 which called for countries to establish an effective legal jurisdiction to bring alleged offenders to justice, protect seafarers and passengers, Kenya responded with the prosecution of suspected pirates. Other countries, however, responded through the deployment of naval vessels to protect the lives of the seafarers and passengers and escort other vessels, leaving Kenya to carry the burden of justice[1].

To achieve this, Kenya had to effect far reaching changes in the law. In the initial stages, suspected pirates were charged under Kenya's Penal Code (Cap 63 Laws of Kenya). These opened up legal controversy which led to the High Court in the case of ***Re Mohamud Mohamed Dashi and Eight Others [2010] eKLR***. The Court held that Kenya had no jurisdiction to try suspected pirates under that law. The decision was, however, overturned on appeal by the Court of Appeal. In a bid to lay to rest the ambiguities surrounding issues of jurisdiction as raised in the decisions of Justice Ibrahim and later the Court of Appeal. Kenya passed a new law in September 2009 (the Merchant Shipping Act), which not only defined more comprehensively and extensively the offence of piracy, but also extended the jurisdiction of Kenyan Courts to try piracy committed by non-nationals. Though the law gives Kenya a very broad jurisdiction to try suspected pirates, the process is still fraught with legal and jurisdictional challenges.

The prosecution of piracy in Kenya is currently undertaken under the Merchant Shipping Act of 2009. Prior to the enactment of the MSA, 2009[2], the offence of piracy was provided for under

Section 69 of the Penal Code (hereinafter, the repealed section). The MSA, 2009 has not only extended the jurisdiction of the Kenyan Courts to prosecute piracy committed by non-nationals in the high seas, it also defines more extensively and comprehensively the offence of piracy than was previously defined under the repealed section. The MSA, 2009 has domesticated most key international conventions aimed at curbing piracy and other forms of insecurity at sea. The key instruments and/or documents are UNCLOS, the SUA Convention[3] and the Djibouti Code of Conduct (the Djibouti Code).

Section 369 of the MSA, 2009 adopts the definition of piracy that is found in article 101 of UNCLOS. Section 370 of the MSA 2009 adopts the offences of hijacking and destroying of ships contained in article 3 of the SUA Convention. Article 6 of the SUA Convention requires that there be a nexus between the offence committed and the state establishing jurisdiction. The nexus is established in the following manner:

If the ship flies the flag of the state; if the offence is committed in the territory of the state or its territorial sea; if the offence is committed by the national of that state[4]; if the offence is committed by a stateless person whose habitual residence is in that state; if a national of that state is seized, threatened, injured, or killed in the process of committing the offence; or if the offence is committed to compel that state to do or abstain from doing any act.

Section 370 (4) (a) (b) and (c) of MSA 2009 provides that the offences created under Section 370 apply:

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

In this sense, the MSA, 2009 confers on Kenyan Court's jurisdiction wider than what is provided for in the SUA Convention. The SUA Convention further requires that, if a state wishes to establish jurisdiction in the last three instances then such a state should notify the Secretary General of the IMO. Kenya did not give any notification to the IMO secretary general and therefore the legality of provisions of Section 370 of the MSA 2009 remains doubtful under international law.

In a situation where nationals of one state are captured by another state on suspicion of piracy in the high seas, international law has to find application. In particular, the UNCLOS and SUA Conventions would find application between two sovereign states because they widely reproduce international customary law on the matter. The Kenyan case to extend domestic laws out of the limit of the territorial waters might lead to jurisdictional and diplomatic disputes. Any judgment taken by a domestic Court would be biased not because of the involvement of its Courts, but because of the possible application of domestic legislation instead of international law. In a tense event involving two independent States the only applicable law is international law in respect of the basic and undeniable principle of equality of States.

The paper will seek to interrogate the application of Section 370 of the MSA 2009 and whether or not that particular section can be successfully challenged under international law in relation to the provisions of Article 6 of the SUA Convention.

REVIEW OF KENYAN LEGISLATIVE FRAMEWORK ON PIRACY

The history of Kenyan piracy laws dates back to the British East African Order in Council (1897) that extended to Kenya the application of certain Indian Acts (including the Indian Penal Code), the common law of England, doctrines of equity, and statutes of general application in force in England on the 12th day of August 1897. Some of these statutes of general application that were then applied to Kenya were the admiralty offences (Colonial) Acts of 1849 and 1860 and the Courts (Colonial) Jurisdiction Act of 1874 which granted Courts in the British colonies jurisdiction over admiralty offences including piracy. After Kenya attained her independence, the Kenyan Penal Code was amended via Act No. 24 of 1967 to provide for the offence of piracy in Section 69. On coming into force in 2009, the Merchant Shipping Act 2009 repealed the said Section 69 of the Penal Code.

Until 2009 the substantive law relating to the maritime industry in Kenya was the Merchant Shipping Act of 1967, derived from the British Merchant Shipping Act (before repeal on 1st September 2009) but it never mentioned piracy nor did it define what constituted piracy. The Act was completely silent on the issue of piracy. The repealed Kenyan Act was borrowed heavily from the outdated British Merchant Shipping Act of 1894 which has undergone amendments several times. The Kenyan law was amended four times

(1967, 1968, 1973 and 1981), but none of the amendments touched on piracy.

Previously Kenyan Courts relied on the repealed Section 69 of the Penal Code to prosecute suspected pirates. The repealed Section 69 of the Penal Code only made piracy an offense and prescribed the punishment as life sentence if one is found guilty. The Penal Code did not define the offence.

The repealed Section 69 (1) of the Penal Code stated-
"(1) any person who, in territorial waters or upon the high seas, commits any act of piracy gentium is guilty of the offence of piracy."

The repealed Section 69 (1) of the Penal Code did not meet the requirements of the international conventions with regard to piracy hence there was need to legislate a new statute that would conclusively prescribe the offence of piracy as it's provided for in the UNCLOS and the SUA Conventions. The repealed provision also met its fair measure of judicial challenges with respect to jurisdiction as will be seen later on in this chapter.

The lacuna that was evident in the penal code in so far as piracy was concerned necessitated the enactment of the Merchant Shipping Act, 2009. The MSA, 2009 was meant to cure the legal loophole and strengthen Kenya's maritime legislation.

THE KENYAN MERCHANT SHIPPING ACT OF 2009

Kenyan statutes, jurisprudence and the new constitution of August 2010 highlight the incorporation of international legal standards progressively into Kenyan laws. The approach of the new Constitution as provided for under Article 2 (5) and (6) of the Constitution moves Kenya from a dualist system to a more monist approach of international law, allowing for the automatic domestic application of international law so long as it is not in clear violation of constitutional provisions. This therefore means that the SUA Convention of which Kenya is a state party forms part of our laws and ought to be read together with the MSA, 2009 not to forget that the MSA, 2009 has also borrowed heavily from the SUA Convention.

The UNCLOS Convection has been incorporated into the MSA, 2009 vide Section 369 (1) thereof. Hence the new Act now domesticates the UNCLOS Convention. The repeal of Section 69 (1) of the Kenya Penal Code by the new Merchant Shipping Act 2009 confirmed Kenya's legal position that the repealed law had inadequate legal framework to prosecute the offense of piracy. Key among the objectives of the new Act was to clear the jurisdictional uncertainity. Piracy is defined in the Merchant Shipping Act at section 369 (1) as follows:-

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

The repealed Section 69 of the Penal Code referred to "*piracy jure gentium"* which means piracy by the law of nations or piracy as known in international law. This gave the Courts the jurisdiction to hear matters of piracy that took place in the high seas. This was the position held by the Court of Appeal in the case of ***Attorney General v Mohamud Mohammed Hashi & 8 Others [2012] eklr.*** It should be noted that the decision of the Court of Appeal was in respect of the repealed Section 69 of the penal Code.

I have argued that the Merchant Shipping Act extends the Courts' jurisdiction beyond what international Conventions envisaged. Section 370(4) of Merchant Shipping Act provides that the offences in that section shall apply-

a) *Whether the ship referred to in those subsections is in Kenya or elsewhere;*
(b) Whether any such act as is mentioned in those subsections is committed in Kenya or elsewhere; and
(c) Whatever the nationality of the person committing the act

We have already established that the Conventions that deal with these maritime matters are primarily the 1982 United Nations Convention on the Law of Sea (UNCLOS) and the 1988 Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation (SUA).

In Article 6 of the Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation (SUA), States are urged to take the necessary steps to establish the jurisdiction for offences if they are committed against a ship flying the flag of the State, the offence is committed in the territory of the State and when the person committing the offence is a national of that State. A State Party can also establish jurisdiction over such offences if the offence is committed by a stateless person, if during the commission of the offence a nation of the State Party is a victim or where the offence is committed in an attempt to compel the State Party to do or abstain from doing a certain action.

The rules of jurisdiction require that there be a nexus between the state that is exercising jurisdiction and the perpetrator or victim of an extraterritorial crime, or the effects of the crime. This has not been illustrated in any of the cases brought to Kenya.

It is argued that Kenya has extended its jurisdiction through the passive personality principle, just as has been done by various countries in the wake of global terror attacks. The passive personality principle allows a country to extend and exercise jurisdiction over an act committed by an individual outside of its territory because the victim is one of that country's nationals. This also does not apply to the Kenyan situation.

The five generally accepted bases for asserting prescriptive jurisdiction are; Territoriality, which refers to conduct taking place within the country's territory, or designed to have effects within the country's territory. Second is Nationality which refers to conduct performed by the country's nationals. Third is Passive Personality which refers to conduct having the country's nationals as its victims. Forth is Protective Principle which refers to conduct directed against a country's vital interests and the fifth is the Universality Principle which refers to conduct recognized by the community of nations as of "universal concern."

The Merchant Shipping Act, 2009 which definitively establishes jurisdiction in Kenyan courts over non-nationals captured on the high seas brought Kenya into compliance with parts of the UNCLOS and SUA Conventions. Section 369 of the Merchant Shipping Act, 2009 adopts the definition of piracy contained in Article 101 of the UNCLOS Convention. Section 370 lists as offenses those contained in Article 3 of the SUA Convention on hijacking and destroying ships with some minor modifications. To address non-Kenyan suspects operating outside Kenya's territorial and maritime jurisdiction, section 370 (4) provides that the law shall apply to these offenses "***whether the ship . . . is in Kenya or elsewhere," whether the acts were "committed in Kenya or else where," and "whatever the nationality of the person committing the act***." The new law therefore removes any doubt about jurisdiction over non-Kenyan pirates arrested extraterritorially, and is not limited in this respect by the nexus requirements for jurisdiction set forth in Article 6 of SUA.

Some scholars have stated that despite some challenges the Kenyan MSA, 2009 is a best model that ought to be replicated by other states that are keen in combating piracy. I however hold the view that though the Kenyan MSA, 2009 is a good legislation in so far as maritime legislation is concerned, it falls short of key international provisions with regard to proof of nexus and notification of the IMO Secretary General where the offence occurs in the high seas (and mostly the offences occur in the high seas). These provisions may render the intention of the drafters fight against piracy useless.

JUDICIAL DECISIONS ON THE JURISDICTION OF KENYAN COURT'S IN PIRACY CASES

Many countries, including the developed countries have tended to shy away from prosecution of pirates. Kenya on the other hand has done the exact opposite. Admiralty jurisdiction has been applied in the prosecution of pirates by Magistrates Courts. In **Republic vs. Mohamud Mohamed Hashi alias Dhodhi and Eight (8) others,** and **Republic vs. Abdirahman Isse Mohamed and Three (3) others,** the question arose as to whether the magistrate's courts had jurisdiction to try the offence of piracy in Kenya. Both cases ended up in the High Court albeit before different benches and at different times. In this first case, the High Court held that the Magistrates courts in Kenya had no jurisdiction to try the offence of piracy. This was owing to the fact that the old provisions under which they used to do so were repealed by the new Merchant Shipping Act of 2009. This decision was later overturned by the Court of Appeal and held that the Courts in Kenya have the requisite jurisdiction to hear and determine piracy offences. The second case came before **Honourable Justice Jackton Boma Ojwang'** who held that the Magistrates courts in Kenya had jurisdiction to prosecute the offence of piracy.

Regardless of the interpretation, it does not matter whether it is the High Court or Subordinate Court

that has powers to prosecute piracy cases in Kenya. The most significant thing worth noting is that piracy cases can be prosecuted in Kenya. At the moment, Kenya has established a specialized Piracy and Maritime Division in the office of the Director of Public Prosecution. It is based in Mombasa and tasked with the responsibility of prosecuting piracy cases.

A number of piracy related cases have been prosecuted in Kenya and judicial pronouncements made on some of those cases as enumerated below:

a) Hassan M. Ahmed v Republic [2009] eKLR

This was the first piracy case to be tried in Kenya. The ten appellants were tried and convicted of the offence of piracy contrary to section 69 (3) of the Penal Code. They were accused of attacking Safina Al-Bisarat a cargo ship flying the Indian Flag which was bound to Kismayu from Dubai. The suspected attackers were arrested by American Naval Officers and arraigned before the Kenyan Courts. They appealed the Prinicipal Magistrate's decision on the ground *interalia* that the Magistrate lacked the requisite jurisdiction to try the case.

The High Court of Mombasa held that the offence of piracy was triable in the country and that the courts with jursidiction to hear such matters were the those of 1st Class Magistrates save for Resident Magistrates. The judge further stated that if the Penal Code had been silent on the offence of piracy the Prinicipal Magistrate should have then resorted to the United Nations Convention on the Law of the Sea which provides for the offence in Article 101 as the convention has been ratified and domesticated by Kenya.

The judge further stated that the Magistrate was bound to apply international norms and instruments since Kenya is a member of the civilized world and is not expected to act in contradiction of expectations of member states of the United Nations. Piracy, the judge opined, is a crime which is regarded as so destructive to the international order that any state may excercise jurisdiction in respect of it.

b) Republic v Chief Magistrate's Court, Mombasa Ex-Parte Mohamud Mohamed Hashi & 8 Others [2010] Eklr

In this contrasting case the nine applicants had been accused of piracy and arraigned before the the Chief Magistrate's Court in Mombasa. They were accused of attacking MV Courier in the Gulf of Aden. The applicants filed this application seeking orders of prohibition to bar the Chief Magistrate from hearing the case on the grounds that the Court had no jurisdiction to hear the matter.

Ibrahim J in finding that the Chief Magistrate had no jurisdiction to hear the matter stated as follows-

"Jurisdiction of the Local Courts to adjudicate on all matters under the Penal Code is given by Section 5 of the Penal Code which reads that: -
"5. The jurisdiction of the Courts of Kenya for the purpose of this Code extends to <u>every place within Kenya, including territorial waters</u>." (Emphasis mine)
From what this court has discussed above I do hold that the Kenyan Courts are not conferred with or given any jurisdiction to deal with any matters arising or which have taken place outside Kenya. The Kenyan Courts have no jurisdiction in criminal cases and in particular in the offences set out in the Penal Code where the alleged incident or offence took place outside the geographical area covered by the Kenya state or the Republic of Kenya. The Local Courts can only deal with offences or criminal incidents that take place within the territorial jurisdiction of Kenya."

The Judge (as he then was) went ahead to find that section 69 (1) of the Penal Code was inconsistent with section 5 of the Penal Code in as far as it gave Kenyan Courts the jurisdiciton to hear matters outside Kenya's territory. The Judge rejected the respondent's argument that it was Parliament's intention to extend the Court's piracy jurisdiction to matters outside the territory opining that Parliament should have legislated expressly in the statutory provisions. The Judge also pointed out that the court with the requiste jurisdiction was in fact the High Court and not the Magistrate's Court. His argument was based on Section 4 of the Judicature Act which vests exclusive jurisdiction in the High Court to try admiralty matters in all matters arising the High Seas. Having found that the Chief Magistrate's Court lacked jurisdiction the court granted the applicants orders prohibiting the Court from going on with the matter, ordered the immediate release of the applicants and that they be protected and returned to their countries.

c) Attorney General v Mohamud Mohammed Hashi & 8 Others [2012] eklr

This was an appeal to the case above. Here the Court of Appeal unanimously agreed that Kenya

did have the jurisdiction to hear piracy matters. Onyango Otieno, JA pointed out that Section 5 of the Penal Code was enacted in 1930 and that later, it became necessary to provide for cases of piracy on the high seas or on the international waters prompting the enactment of Section 69 (a) as read with Section 69 (3) which was introduced in 1967 about 27 years later. To his mind he saw no conflict between the two provisions which were existent in the Penal Code when the offence took place.
Koome JA on the other hand could not find any justification in the Judge's attempt to prioritize section 5 over section 69. She held that the Judge should have relied on the provisions of the United Nations Law of the Sea Convention [UNCLOS] as Kenya is signatory to this convention and by virtue of Article 2 (5) of the Constitution, the Convention is part of our laws. Koome JA also observed that the High Court had failed to recognize that Kenyan courts were beginning to develop jurisprudence in this area of law For example, in ***United States District Court For Eastern District Of Virginia Norfolk Division, Usa Vs Mohamed Madin Hassan & 4 Others*** the American court held-

"Moreover, the courts of other countries have held UNCLOS to be applicable as customary international law in concrete cases, as reflected in recent judicial decisions from Kenya, the country currently handling many modern piracy cases. Courts in Kenya have relied on the piracy provisions in UNCLOS to interpret their own domestic criminal code proscribing general piracy."

Maraga JA, in affirming that the Kenyan Courts have jurisdiction, observed as follows:

"The universally applicable legal framework dealing with piracy as reflected in UNCLOS has also been endorsed by Security Council Resolutions 1816, 1838, 1846, 1851, 1897 and 1918 the most recent being UNSCR 1918 in April of 2010 in all of which Kenya participated and adopted. Developed under the authorization of Chapter VII of the UN Charter, these resolutions sanction states to use "all necessary means" to repress piracy." He further stated that: *"As the United States Security Council observed in the above mentioned resolutions, the offence of piracy on the coast of Somalia, which we are dealing with in this appeal, is of great concern to the international community as it has affected the economic activities and thus the economic wellbeing of many countries including Kenya. All States, not necessarily those affected by it, have therefore a right to exercise universal jurisdiction to punish the offence."*

Maraga JA concluded by indicating that the obligation under the universal jurisdiction in international law and the fact that the offence of piracy on the coast of Somalia has had an adverse effect on its economic welfare, Kenya had also codified the offence of piracy as an international crime in Section 69 of the Penal Code which has now been repealed and replaced by Section 369 as read with Section 371 of the Merchant Shipping Act of 2009. For the piracy offences committed after the 27th August 2010 when the current Constitution was promulgated, Article 2(5) and (6) which have respectively incorporated the general rules of international law and the treaties Kenya has and continues to ratify into Kenyan law, Kenyan courts, have added constitutional authority to prosecute piracy and other international crimes.

The Court of Appeal reversed the High Court's decision granting orders of prohibition against the Chief Magistrate's Court to hear the matter and held that the High Court had exceeded its jurisdiction in holding that the applicants were wards of the court. It should be noted that this case was determined on the basis of the repealed section 69 of the Penal Code.

UNCLOS AND SUA CONVENTIONS

Until 1958 no definition of piracy existed in International Law. The first important International Treaty, related to thereto was the 1958 Geneva Convention, known as the United Nations High Seas Convention (HSC). It is based on the 1932 Harvard Draft and generally declares established principles and customs in maritime law. Although as a text, it does not create new legislation or norms, HSC is significantly important as it includes the first modern definition of maritime piracy. The same definition was later adopted by the 1982 United Nations Convention on Law of the Sea (UNCLOS), currently ratified by 166 countries.

UNCLOS gives a detailed legal framework on nearly all nautical activity of significant importance, including maritime piracy. Piracy acts are spreading not only in the Gulf of Aden, but also in the Indian Ocean. The widespread of maritime piracy led to the necessity of adopting a number of International Treaties, related to the matter, such as the 1988 Convention for the suppression of unlawful acts against the safety of maritime navigation (SUA Convention).
Currently, Article 101 of UNCLOS provides the definition of piracy as follows:

(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).

As Article 309 of UNCLOS strictly forbids making reservations unless explicitly allowed, no country has made a reservation to article 101 making the definition unified. Article 101 reveals that piracy has four main characteristics:

a) The use of unlawful violence, detention, depredation

Usually a subject of discussion is whether the use of firearms is significant to classifying an act as a pirate activity. A closer look at Article 101 reveals that the use of firearms is by no means defining whether an activity is of pirate character or not, but the use of violence itself is what is significant. As the unlawful use of firearms is always an act of unlawful violence, such acts will be classified as pirate activity.

b) Committed for private ends

No definition of the term "private ends" is given either by the HSC, or by the UNCLOS. The term has been subject to discussion and two standpoints are mostly reasoned. Some authors claim that the term "private ends" should be viewed as the motivation of the actor of crime to receive financial gain from his or her activity. This view collaborates with the traditional doctrine for personal benefit, adopted by nearly every State's criminal law. The other view on the term "private ends" is more suited to the nature of maritime piracy as an international crime, an act cannot be piratical if it is done under the authority of a state.

c) On the high seas

As noted in the definition, piratical acts must occur in the high seas or within the Exclusive Economic Zone of a State (EEZ). Any attack within territorial waters of a state cannot be classed as piracy. In accordance with Article 1 of the HSC the term "high seas" means all parts of the sea that are not included in the territorial sea or in the internal waters of a State. Article 86 of UNCLOS gives a further detail to this definition, providing that the term "high seas" applies to all parts of the sea that are not included in the exclusive economic zone, in the territorial sea or in the internal waters of a State, or in the archipelagic waters of an archipelagic State and does not entail any abridgement of the freedoms enjoyed by all States in the exclusive economic zone.

d) 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.

Article 101 clearly states what many critics of the provision define as the "two-vessel requirement". The text states that the piracy act should be committed against another ship. This means that a minimum of two ships ought to be involved in an act, in order to be classified as one of a pirate nature, that is, a ship that attacks and a ship, a subject to attack. Though it is argued that the mentioning of aircraft means that not just aircraft to aircraft and ship to ship attacks are possible to be classified as pirate crimes, the fact that there is a discussion on the matter proves that better legal framework is possible, therefore necessary. Furthermore the progress of technology allows more options for committing a pirate crime, including remote control activity and navigation disturbance. Thus an international effort in making the provision more clear is required.

It seems that the 1988 SUA Convention dealt with the problem originated from the so called "two-vessel requirement" by removing it. Under Article 3 of the SUA Convention states that any offence aiming to seize control over a ship, endanger the safe of navigation, destroy the ship, destroy the maritime navigational facilities or seriously interferes with their operation is criminalized. An advantage of the 1988 SUA Convention is its applicability anywhere at sea, which makes it a very effective instrument against violent acts in the sea. The Articles pertaining to piracy within the 1982 United Nations Convention on the Law of the Sea derive from the terms of the 1958 High Seas Convention. Article 105 of UNCLOS grants what many commentators have called universal jurisdiction, but the provisions clearly stop short of true universality:

On the high seas, or in any other place outside the jurisdiction of any State, every State may seize a pirate ship or aircraft, or a ship or aircraft taken

by piracy and under the control of pirates, and arrest the persons and seize the property on board. The courts of the State which carried out the seizure may decide upon the penalties to be imposed, and may also determine the action to be taken with regard to the ships, aircraft or property, subject to the rights of third parties acting in good faith.

On its face, Article 105 does not appear to authorize the transfer of prisoners to third states for prosecution. Rather, the courts of the seizing state are granted jurisdiction over pirates. Its my contention that Article 105 is permissive, illustrative and a compromise provision, rather than mandatory or exhaustive. The compromise nature of Article 105 has been given certainty by Article 6 of the SUA Convention which makes it mandatory for their to exist some nexus between the prosecuting state and the suspceted pirates.

Case Study For Suitable Models For Extraterritorial Jurisdiction

The preferred approach of many piracy-fighting nations has been to use regional partners, such as Kenya, the Seychelles, Mauritius and Tanzania, and to transfer captured pirates to the national courts of these states. All four nations have been remotely affected by piracy because of their geographic location and because of the potential harm to these nations' tourism revenues brought about by pirate attacks. Major maritime nations have been capitalizing on their position in East Africa and the Indian Ocean to persuade them to extend their national courts to Somali piracy prosecutions. While Kenya may have the potential to operate successful piracy prosecutions in its national courts, problems related to its financial capability to undertake such prosecutions, human resource capacity building and political undertones where Kenya would be seen as a dumping site of suspected pirates have plagued the Kenyan transfer program, prompting maritime nations to identify other regional partners, like the Seychelles, Mauritius and Tanzania. This chapter will evaluate the principle of extraterritorial jurisdiction with respect to piracy as applied in the other jurisdictions, for example the Seychelles, Mauritius and Tanzania.

a) The Seychelles

Several pirate attacks have occurred sufficiently close to the Seychelles to alarm the Seychelles government and to prompt it to participate in the fight against Somali piracy. For example, the Seychelles Government recently invited China to set up a military base on the Archipelago, in order to bolster security around the islands and increase anti-piracy military measures. The Seychelles' economy derives most of its revenue from tourism, and the prospect of Somali piracy spreading toward the Seychelles could deter tourists from visiting it. The Seychelles' Government, for this reason, has a direct interest in both preventing pirate attacks from taking place, and in ensuring that all detained pirates are effectively prosecuted. Thus, the Seychelles government, pursuant to the Kenyan model, has concluded several Memoranda of Understanding (MOU's) with major maritime nations. Under the terms of these MOU's, capturing nations will deliver pirates to the Seychelles for prosecution in the Seychellois courts. In each instance, the Seychelles Government will have the discretion to accept or reject the transfer.

Seychelles is a mixed jurisdiction, and in this respect its Constitution does not lend itself either to a classical monist or dualist system in terms of international law. Articles 64 and 48 of the Seychelles Constitution bear out this ambiguous position. Article 64(4) provides that international treaties, agreements and conventions do not bind the Republic unless they are ratified by an Act or passed by a resolution of a majority of members of the National Assembly. Article 48 of the Seychelles Constitution, on the other hand, instructs the courts to interpret the Seychellois Charter of Fundamental Rights in such a way so as not to be inconsistent with any international obligations of Seychelles relating to human rights and freedoms. It is not clear whether obligations at international law which have not been ratified locally can be implemented in circumstances when the provisions of the treaty in question are inconsistent with Seychellois domestic law. As a former British colony and with a public law regime based on the common law it may well adhere to the English principle that parliament should not intend to act in breach of international law.

In order to facilitate piracy prosecutions in the Seychelles, Seychelles parliament revised the offence of piracy under the Seychellois penal law in 2010. Before 2010, the offence of piracy was defined as follows under the Seychellois penal law:

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

The Seychellois courts had interpreted the phrase "time being in force" as referring to the common

law prevailing in England as at the 29th of June 1976 (herein after referred to as the relevant time) when Seychelles attained independence from Great Britain. Thus, the offence of piracy did not exist as an independently defined crime under the Seychelles' law, and prosecutors needed to rely on British common law as of 1976 in each piracy prosecution. In order to facilitate piracy prosecutions, the Seychelles' Parliament added a new piracy definition to this country's penal law. The amended Section 65 provides that:-

1. *Any person who commits any act of piracy within Seychelles or elsewhere is guilty of an offence and liable to imprisonment for 30 years and a fine of R1 million.*
2. *Notwithstanding the provisions of section 6 and any other written law, the courts of Seychelles shall have jurisdiction to try an offence of piracy whether the offence is committed within the territory of Seychelles or outside the territory of Seychelles.*
3. *Any person who attempts or conspires to commit, or incites, aids and abets, counsels or procures the commission of, an offence contrary to section 65(1) commits an offence and shall be liable to imprisonment for 30 years and a fine of R1 million.*

Under the amended Penal Code Section 65(4) of the Seychelles Penal code, piracy is defined as follows:

(a) Any illegal act of violence or detention, or any act of depredation, committed for private ends by the crew or the passengers of a private ship or aircraft and directed-
   (i) on the high seas, against another ship or aircraft, or against persons or property on board such a ship or aircraft;
   (ii) against a ship or an aircraft or a person or property in a place, outside the jurisdiction of any State;
(b) Any act of voluntary participation in the operation of a ship or an aircraft with knowledge of facts making it pirate ship or a pirate aircraft; or
(c) *Any act described in paragraph (a) or (b) which, except for the fact that it was committed within a maritime zone of Seychelles, would have been an act of piracy under either of those paragraphs*.

Moreover, section 65(5) further provides that:

A ship or aircraft shall be considered a pirate ship or pirate aircraft if-

(a) It had been used to commit any of the acts referred to in subsection (4) and remains under the control of the persons who committed those acts; or
(b) It is intended by the person in dominant control of it to be used for the purpose of committing any of the acts referred to in subsection (4).

The penal Code was further amended under Section 65 (6) and (7) to provide as follows:-

> *A ship or aircraft may retain its nationality although it has become a pirate ship or a pirate aircraft. The retention or loss of nationality shall be determined by the law of the State from which such nationality was derived.*
>
> *Members of the Police and Defence Forces of Seychelles shall on the high seas, or may in any other place outside the jurisdiction of any State, seize a pirate ship or a pirate aircraft, or a ship or an aircraft taken by piracy and in the control of pirates, and arrest the persons and seize the property on board. The Seychelles Court shall hear and determine the case against such persons and order the action to be taken as regards the ships, aircraft or property seized, accordingly to the law.*

The new piracy provision in the Seychelles law is modeled closely on the UNCLOS definition of piracy, and thus corresponds to customary international law. However, the new law is broader in its reach than UNCLOS in several respects. First, the revised Section 65 criminalizes the offence of conspiracy to commit piracy, enabling Seychellois prosecutors to go after piracy conspirators and enablers in addition to prosecuting the executioners. Second, Section 65(4) effectively dispenses with the "high seas" requirement of the UNCLOS definition of piracy, by stipulating that acts committed in the Seychelles' maritime zone will amount to piracy, provided that other requirements of the piracy definition are satisfied. Finally, it should be noted that Section 23 of the Seychelles Penal Code enables prosecutors to charge several defendants with the same offence, as long as all of such defendants had a "common intention" to commit the crime in question. Thus, the Seychelles' prosecutors have been charging groups of Somali pirates, who had all participated in the same piracy incident, with the same offences under the "common intention" theory of criminal liability. This greatly facilitates piracy prosecutions in the Seychelles' courts.

Seychelles conducted its first piracy prosecution in 2009 in the *case of Dahir*. The charges brought

against the eleven accused were under the then provisions of the Penal Code and also under the provisions of the Prevention of Terrorism Act 2004.The Court relying on definitions of piracy as set out in *Re Piracy Jure Gentium*, on UNCLOS and on evidence adduced, convicted all eleven accused on the counts of piracy. The courts noted that piracy *jure gentium* is justifiable by the courts of every nation and that universal jurisdiction is provided for in international law and the arresting state is free to prosecute suspected pirates and punish them if found guilty.

The new section 65 (2) clearly imports the notion of universal jurisdiction into Seychellois law and the amendment replicates the UNCLOS definition of piracy. It also further extends the offence of piracy to its territorial and archipelagic waters, notwithstanding the fact that the international law of piracy does not apply to archipelagic waters. The amendment ensures that piracy committed on the high seas and outside the jurisdiction of Seychelles and even in the absence of extradition treaties can still be tried in its courts on the basis of universal jurisdiction.

However, such prosecution can only be entertained if members of the Police and Defence Forces of Seychelles on the high seas, or may in any other place outside the jurisdiction of any State, seize a pirate ship or a pirate aircraft, or a ship or an aircraft taken by piracy and in the control of pirates, and arrest the persons and seize the property on board as provided for under Section 65 (7) of the amended Penal Code.

Although the Seychelles Penal Code (Amendment) Act 2012 greatly improves the previous provisions, it has not been free of judicial challenges especially with respect to Section 65 (7). The decision of ***R vs Osman* (*Draco*)** was the first case in which Seychelles undertook a prosecution where its nexus with the piratical activity was tenuous. The *Draco* was indeed registered in Seychelles hence nexus was established but its crew was Spanish and African and the pirates had been intercepted by a Spanish EUNAVFOR (European Union Naval Force) ship, but the Seychelles Supreme Court made it clear in the decision of *R vs Osman* that:

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

The international community has assisted the Seychelles in Somali piracy prosecutions in various ways. Like Kenya, the Seychelles have benefited from financial aid by donor states as well as by assistance by the United Nations Office on Drugs and Crime (UNODC). Thus, a new prison wing was built to accommodate pirate detainees, and new, larger courtrooms are currently being built. Moreover, because of capacity issues associated with the small island nation of the Seychelles, major maritime nations have been searching for other stable regional partners, like Mauritius.

b) Mauritius

Mauritius has not been directly harmed by any piracy incidents, and the Somali pirates have not traveled as far south in their piratical endeavors. However, Mauritius has also been identified by the international community as another possible regional partner in the global fight against piracy. Mauritius has enacted piracy-specific legislation to address the challenges that could arise in piracy prosecutions in its jurisdiction. The Mauritian Piracy and Maritime Violence Act 2011 is a piece of legislation in which considerable thinking has gone has gone into. The Act aims at providing a comprehensive framework for prosecuting, in Mauritius, persons suspected of having committed piracy and related offences.

The main feature of the Mauritian piracy legislation is that it incorporates Articles 100 through 107 of UNCLOS in its Schedule, thereby aligning Mauritian domestic law with the international legal framework for the repression of piracy. In this respect, Mauritius has adopted the principle that national legislation on piracy may provide for the exercise of universal jurisdiction regardless of the nationality of the suspected offenders or victim ships, pursuant to Article 105 of UNCLOS concerning the repression of piracy. Further, the definition of piracy, the geographic scope, the private ends requirement, the two-ship requirement, and the definition of a pirate ship or aircraft as laid out in UNCLOS were all adopted verbatim. Other salient features of the Mauritian law on piracy include acts of piracy (on the high seas) and maritime attack (in territorial seas). In these instances, police officers have the power to board, search, detain pirate ships or aircraft, and use such force as may be necessary for that purpose.

In July 2011, Mauritius concluded an MOU with the European Union, pursuant to the Kenyan and Seychellois models. Under the terms of the MOU, pirates detained by European forces will be transferred to Mauritius for prosecution in

Mauritius national courts. In order to facilitate such piracy prosecutions, Mauritius amended its criminal law to model the piracy offence on UNCLOS more closely. Under the new Mauritian law, the piracy offence is identical to the one found in UNCLOS, thus requiring the presence of two vessels (aggressor and victim), and a violent act committed for private aims on the high seas. In addition to the offence of piracy, the new Mauritian law also provides for the offence of a 'maritime attack', which is defined as follows under Section 3 of the Mauritius Piracy and Maritime Violence Act 2011:

(a) *An illegal act of violence or detention, or any act of depredation for private ends by the crew or the passengers of a private ship or a private aircraft, and directed –*
   (i) *Against persons or property on board a ship or aircraft, as the case may be; or*
   (ii) *Against a ship or aircraft, as the case may be; or*

(b) Any act of inciting or of intentionally facilitating an act described in paragraph (a), within the territorial sea or the internal, historic and archipelagic waters of Mauritius."

The new Mauritian law conceives of piracy in broader terms than UNCLOS, because it adds the offence of 'maritime attack' to criminalize acts which fall short of the traditional definition of piracy because they may be committed in the Mauritian territorial waters. Finally, the new law also criminalizes acts such as the hijacking and destroying of ships, and the act of endangering safe navigation of ships. In this respect, the Mauritian law resembles the SUA approach, it criminalizes a series of different maritime offences including violence against ships or persons on board ships. The drafters of this law seemed to have blended UNCLOS and SUA, to come up with a law that encompasses the traditional definition of piracy found in UNCLOS, and that also adopts a broader approach in its anti-piracy reach by criminalizing other maritime offences falling short of piracy. By all accounts, the revision in the Mauritian piracy and maritime legislation was dictated by European Union authorities, which promised financial and logistical assistance to Mauritius transfer model on the condition that Mauritius pass and implement the new legislation.

It is worthy to note that the Mauritius law just like the Seychelles legislation has provided for a nexus between the arresting state and the suspected pirates. Section 3 (2) of the Mauritius Piracy and Maritime Violence Act 2011 provides that:

A police officer may –
(a) on the high seas or in the territorial sea, or the internal, historic and archipelagic waters of Mauritius; or
(b) in any other place outside the jurisdiction of a State,
stop, board, search, detain or seize a pirate ship or aircraft, or a ship or aircraft taken by and under the control of pirates, arrest any person suspected of having committed an offence under this Act and seize any property on board which is suspected to have been used in connection with the commission of an offence under this Act, and may use such force as may be necessary for that purpose.

The revised Mauritian legislation, described above, specifically contemplates the relationship or link between Mauritius and the suspected pirates for prosecution as provided for in the SUA Convention. It contemplates a situation where the police may undertake the arrest. The nexus provision, however, has been drafted in a compromise or discretionary manner just like Article 105 of the UNCLOS by using the word "may" as opposed to "shall".

Mauritius, like the Seychelles, may face prison capacity issues and may thus wish to explore the possibility of repatriating convicted pirates to their homeland, for prolonged detention purposes. Whether this model can function in the future will depend on conditions in Somalia, but like in the case of the Seychelles, it is an important step for a small country like Mauritius to at least explore other detention options.

c) Tanzania

Tanzania has a significant economic and has indicated it intends to protect commercial and private ships within its exclusive economic zone. But until recently it did not have a legal basis to prosecute piracy on the high seas. However, in May 2010, Tanzania amended its Penal Code and added Section 6 thereof. This Section enables the Courts of Tanzania jurisdiction over offences committed by any person on the high seas, where "high seas" is defined as "the open seas of the world outside the jurisdiction of any state." Section 6 of the Tanzania Penal Code was amended to extent the jurisdiction of the Courts of Tanzania as follows:

6.-(1) The jurisdiction of the Courts of Tanzania for the purposes of this Code extends to

(a) every place and within the territorial waters;
(b) any offence committed by a citizen of Tanzania in any place outside Tanzania;
(c) any offence committed by any person on an aircraft registered in Tanzania; and
(d) offences committed by any person on the high seas.
(2) For the purposes of this section the term "high seas" means the open seas of the world outside the jurisdiction of any state."

The Penal Code under Section 66 thereof was amended to define Piracy as follows:-

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.
(2) A person who does or participate in piracy commits an offence of piracy and on conviction is liable to imprisonment for life.
(3) Where a pirate ship is not registered in Tanzania, no prosecution shall be commenced unless there is special arrangement between the arresting state or agency and Tanzania.
(4) No prosecution shall be commenced under this section without the consent of the Director of Public Prosecutions.
(5) For the purposes of this section pirate ship or aircraft means a ship or aircraft under the dominant control of person who
(a) intend to use such ship or aircraft for piracy; or
(b) have used such ship or aircraft for piracy, so long as it remains under the control of that person: and private ship or private aircraft means a ship or aircraft that is not owned by the Government or held by a person on behalf of or for the benefit of the Government.

Two other interesting provisions of the piracy law show that Tanzania is aware of the significant import of the SUA Convention with regard to proving nexus between the suspected pirate and the prosecuting state involved in pursuing pirate prosecutions. Section 66(3) of the Penal Code 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. Likewise, pursuant to Section 66(4), the Director of Public Prosecutions must consent to any prosecution for piracy. Tanzania also does not want to become the dumping ground for every pirate captured on the high seas.

The government of Tanzania and United Kingdom (UK) signed a Memorandum of Understanding on February 23rd 2012, for the transfer of suspected pirates from UK marine forces to Tanzania for prosecution. Likewise on March 6th, 2013, Tanzania and the Kingdom of Denmark signed a Transfer Agreement for suspected pirates. Further, the Tanzanian government on April 1st, 2014, signed another agreement with European Union with a view to prosecute the transferred suspected pirates arrested by the Naval Forces operating under the EU mission.

It remains to be legally demonstrated whether the transfer agreements signed by Tanzania, the Seychelles, Mauritius and Kenya can withstand the test of the nexus requirement as provided for in the SUA Convention since the suspected pirates are only transferred to other countries for prosecution purposes hence the prosecuting state did not participate in arresting nor no nexus can be ascribed all together.

SUMMARY OF FINDINGS

The danger posed by pirates in the high seas has greatly affected trade among states. This situation has enabled affected states like Kenya, The Seychelles, Mauritius and Tanzania to either amend their existing maritime legislation or enact a new maritime legislation. However for there to exist a legislation that will significantly achieve the need to prosecute and convict the suspected pirates the following key elements ought to be included.

a) Evidence of nexus between the prosecuting state and the suspected pirates

As already discussed under Chapter 1 of this study, Article 6 of the SUA Convention requires that there be a nexus between the offence committed and the state establishing jurisdiction. Article 105 of the UNCLOS Convection on the other hand has been described as a compromise provision since the language used therein is of a discretionary nature and not mandatory as opposed to the provision

under the SUA Convention. The nexus as established under the SUA Convention is as below:

If the ship flies the flag of the state; if the offence is committed in the territory of the state or its territorial sea; if the offence is committed by the national of that state; if the offence is committed by a stateless person whose habitual residence is in that state; if a national of that state is seized, threatened, injured, or killed in the process of committing the offence; or if the offence is committed to compel that state to do or abstain from doing any act.

I have already established that Mauritius, the Seychelles, Kenya and Tanzania have enacted legislation modeled along the SUA and UNCLOS Conventions. However, of the four nations it is only Kenya which has enacted its maritime legislation without the need of providing any nexus between the prosecuting state and the suspected pirates where the offence was undertaken in the high seas. This may bring about jurisdictional challenges when raised in a court of law either by the suspected pirate or even where there is a conflict between two states where each state pleads jurisdiction to prosecute the suspected pirates, the question of nexus will be significant.

b) Notification to the Secretary General of the International Maritime Organization (IMO)

The SUA Convention further requires that, if a state wishes to establish jurisdiction in the last three instances then such a state should notify the Secretary General of the IMO. The last three instances where a state may exercise jurisdiction are as follows:

If the offence is committed by a stateless person whose habitual residence is in that state; if a national of that state is seized, threatened, injured, or killed in the process of committing the offence; or if the offence is committed to compel that state to do or abstain from doing any act.

Kenya did not give any notification to the IMO Secretary General and therefore the legality of provisions of Section 370 of the MSA 2009 remains doubtful under international law. It is therefore imperative that any state that wishes to exercise such jurisdiction should notify the IMO Secretary General of its intention to do so as stipulated in the SUA Convention under Article 6 (3).

CONCLUSION

Whilst UNCLOS and other treaties provide for the basic legal architecture for the prosecution of piracy, the landscape of legal enforcement of anti-piracy provisions is unfortunately characterised by a lack of uniformity and coherence. Different nations have different municipal laws and universal jurisdiction is seldom exercised by world powers who are most often the "seizing" nations. Their reluctance and lack of regularity to prosecute has led to transfer agreements with third-party states like Kenya, Mauritius and Seychelles.

The idea of strengthening the local courts in Somalia is also utopian, as international donors will probably spend more money investing to the collapsed legal system of the country than on the proposed “high cost” international tribunal. The only options that would aid in combating the piracy menace, outlined above, would be establishing the regional tribunal on the basis of the Sub-regional meeting in Djibouti. As we may see, the national mechanisms are still ineffective, while the regional have not been decided yet. Therefore, the need to examine whether there is a room for an international tribunal is still topical.

RECOMMENDATIONS

The creation of an international tribunal for prosecuting pirates seems to be a more effective tool than strengthening the potential of domestic courts and expanding the jurisdiction of the ICC over the crime of piracy. There are many advantages of the proposed international body before the national courts. First, international institutions always comply with the fundamental standards of fair trial. Second, they can directly apply the relevant international treaties, principles and customs of international law.

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