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Assessing Current Trends and Efforts to Combat Piracy: A Case Study on Kenya

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A stylized world map in a light blue-grey tone serves as the background for the top section of the cover. The map shows the continents and is overlaid with a faint grid of latitude and longitude lines.

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ASSESSING CURRENT TRENDS AND
EFFORTS TO COMBAT PIRACY:
A CASE STUDY ON KENYA

Hon. Rosemelle Mutoka

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*Hon. Rosemelle Mutoka**

Despite the recent decline in piracy incidents, piracy continues to be a persistent problem in East Africa, and has now spread to West Africa and other regions. This article argues that in order to effectively eradicate piracy, an assessment of the current counter-piracy efforts and remaining challenges is required to pave the way forward. As Kenya was one of the first to try Somali pirates extraterritorially, it has seen many of the challenges played out in its courtrooms. Questions of jurisdiction, non-uniform evidentiary standards, and the lack of specialized training for judges in trying piracy cases are among the practical obstacles that persist in piracy prosecutions. Further, this article emphasizes that the international community must also look to broader, underlying challenges whose solution will ultimately inform a long-term solution to the piracy problem. Understanding the root causes and motivations of pirates, building a viable Somali state, and strengthening regional and international legal frameworks are the necessary building blocks of a sustainable solution to ending piracy.

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I. INTRODUCTION

Piracy in the Eastern shores of the Indian Ocean has been a growing threat to security, international shipping, and development since mid-2000. According to the International Chamber of Commerce International Maritime Bureau, the number of pirate attacks worldwide reached a five-year low in 2012, with 297 vessels attacked (compared with 439 in 2011).¹ Additionally, the number of mariners taken hostage or kidnapped for ransom fell from 802 in 2011 to 611 in 2012,² and the number of mariners killed fell from 35 in 2011 to six in 2012.³ This is primarily attributable to a large drop in attacks off the coast of Africa, specifically off the east coast of Somalia, as a result of international marine mobilization through naval forces and private on-board security measures. Temporarily, such action has disrupted the piracy business model. As of April 1, 2013, pirates operating out of Somalia held only five vessels and 65 mariners hostage.⁴

1. Memorandum from Staff of H.R. Subcomm. on Coast Guard & Mar. Transp. on Hearing on “Update of Efforts to Combat Piracy” to Members of Staff of H.R. Subcomm. on Coast Guard & Mar. Transp., at 1 (Apr. 5, 2013) [hereinafter *Efforts to Combat Piracy*] (reporting statistics of piracy).

2. *Id.*

3. *Id.*

4. *Id.*

In Kenya, the proliferation of pirate attacks is attributable to Somalia's unstable political situation,⁵ which has, in the recent past, given rise to a high proportion of pirates in the Indian Ocean and the Gulf of Aden. Kenya has only recently begun to acknowledge the implications of Somali piracy on its security, strategic, and economic imperatives. While there has been a direct benefit to some extent from an influx of pirate money, for example in the property market, the indirect costs to the shipping industry, tourism, consumer price levels, and foreign investment, among others, far outweigh any direct benefit from piracy.⁶

II. EMERGENT TRENDS AND EFFORTS IN PLACE IN THE FIGHT AGAINST PIRACY

As far back as the Roman times, pirates have been labeled *hostis humani generis*,⁷ and piracy has continued to be a crime under the law of nations. Today, as was in the Roman times, the threat of pirate assaults against merchant ships and private sea travelers is still a serious security problem the world over, although it has only recently affected the Indian Ocean and the Gulf of Aden. Therefore, tackling the threat of pirate attacks is a cause for concern not only for Kenya, but also for the international community as a whole. Due to the unrelenting international spirit to counter and eliminate the threats posed by piracy, numerous efforts have been generated.

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5. Instability has plagued Somalia for the past two decades leaving the country without an army, police, navy, or a permanent national government or national legal system. The first act of robbery or criminal violence at sea was reported in Kenya in 2006 when Hassan M. Ahmed and nine others were handed over to Kenyan authorities in what was Kenya's first ever piracy trial. The sentence of seven years imprisonment was subsequently appealed on the grounds that Kenyan courts had no jurisdiction. See Emily Wax, *Somali Lawlessness Spills into the Sea*, WASH. POST (Apr. 2, 2006), <http://www.washingtonpost.com/wp-dyn/content/article/2006/04/01/AR2006040101306.html>; Republic v. Hassan M. Ahmed & Nine Others, (2006) Crim. Case No. 434 (Chief Magistrate Ct.) (Kenya), *aff'd*, Hassan M. Ahmed v. Republic, [2009] eKLR (H.C.K.) (Kenya).
 6. See LISA OTTO, INST. FOR SECURITY STUDIES, KENYA AND THE PEST OF PIRACY: A PROSPECTIVE PARTNER FOR PEACE 2 (2012), *available at* <http://www.issafrica.org/uploads/22Feb12Kenya.pdf> (outlining the specific economic costs of piracy to the Kenyan economy).
 7. Enemies of all mankind. See, e.g., Samuel Shnyder, *Universal Jurisdiction over "Operation of a Pirate Ship": The Legality of the Evolving Piracy Definition in Regional Prosecutions*, 38 N.C. J. INT'L L. & COM. REG. 483, 484 (2013).

A. *Improvement of Security*

The world's economy is interconnected, and regional challenges sometimes have global impact, especially when it comes to piracy, transnational crime, and human trafficking. As a major component of the world's trade is carried onboard ships, global commerce is inexorably linked to maritime security.⁸ As a maritime nation, Kenya has faced vast challenges due to its geopolitical position, as it is a well-established fact that most pirate invasions affecting Kenya are due to the political instability in Somalia. As such, a permanent solution to piracy off the east coast of Africa will not arise until a stable and effective government returns to Somalia. Indeed, the World Bank, in its report on ending piracy in Somalia, has asserted that the only way to end piracy off Somalia's coast is to create a viable Somali state, and this can be accomplished by delivering key services to the entire country, reducing poverty, and creating opportunity.⁹

Stability and security in the region would indeed go a long way towards the protection of Kenyan interests and the safety of vessels in the Indian Ocean and the Gulf of Aden. Without proper border security, pirates will continue to take advantage of the situation in the country's territorial waters. It is therefore no coincidence that substantial effort has been put in place to aid in the restoration of normalcy in Somalia through initiatives supported by the international community. Kenya has played a major role in the stabilization process intended to bring about political reconciliation, which led to the formation of the Transitional Federal Government in Somalia, which was hoped would bring the much desired stability to Somalia.¹⁰

Yet these efforts, which have taken the form of advocacy and naval deployment, have not yet adequately addressed the threat of piracy and piracy attacks, both in territorial and non-territorial

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8. Nancy Karigithu, Presentation at the Ninth Meeting of the U.N. Consultative Process on Oceans and the Law of the Sea on Overview of Threats to Maritime Security, Their Impacts and Responses Thereto, with a Focus on Piracy and Armed Robbery Against Ships (June 23, 2008), *available at* www.un.org/Depts/los/consultative_process/documents/9_nancykarigithuabstract.pdf.
 9. THE WORLD BANK, THE PIRATES OF SOMALIA: ENDING THE THREAT, REBUILDING A NATION, at xxv, 162 (2013), *available at* <http://siteresources.worldbank.org/INTAFRICA/Resources/pirates-of-somalia-main-report-web.pdf>.
 10. Stephanie Hanson & Eben Kaplan, *Somalia's Transitional Government*, COUNCIL ON FOREIGN RELATIONS, <http://www.cfr.org/somalia/somalias-transitional-government/p12475> (last updated May 12, 2008) (stating that the Transitional Federal Government was governed from Kenya until 2005 while Somalia was in its fourteenth attempt to create a functioning government).

waters. Due to the security lapse in the Gulf of Aden, combined naval operations have proliferated, seeking to combat piracy by ensuring the safe passage of vessels and maintaining availability to respond to distress calls and possible attacks.¹¹

International consensus appears to be shifting towards a preference for shipping companies to use private security. Such security has been effective at deterring pirate attacks, does not require costly military involvement, and does not require mariners to take up arms on their own. For this reason, private shipping companies have strongly demanded armed security personnel from private security companies, as private sea travelers have also done, to ensure safe passage and security of their vessels, crew, and cargo.¹² The international community also constructed a hands-on approach where relevant personnel in regional countries are being trained to develop their own capacity to combat piracy activities and attacks.¹³

B. Advocacy

Efforts to counter piracy have largely been characterized by advocacy at the international level and combined foreign naval deployment,¹⁴ while bilateral arrangements and regional organizations

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11. In 2008, the European Union established the Maritime Security Centre – Horn of Africa (MSC-HOA) which provides 24-hour manned monitoring of vessels transiting through the Gulf of Aden. The MSC-HOA coordinates military escort for transit vessels through high risk waters and also works particularly with vulnerable vessels and coordinates appropriate protection arrangements with naval forces in the area. *See Efforts to Combat Piracy*, *supra* note 1, at 4.
 12. *Id.* at 6.
 13. *See, e.g., NATO Counter-Piracy Warship Trains with Seychelles Coast Guard*, MAR. COMMAND NATO (Mar. 25, 2014), <http://www.mc.nato.int/PressReleases/Pages/NATO-Counter-Piracy-Warship-Trains-With-Seychelles-Coast-Guard.aspx> (stating that training is part of the regional capacity building efforts to combat piracy in the long-term). The training initiative is chiefly a policy of Operation Open Shield, which is NATO's contribution to the anti-piracy campaign off the Horn of Africa. Naval operations began on August, 17, 2009, after the approval of the North Atlantic Council. Operation Open Shield focuses on the protection of ships ferrying relief supplies. The initiative also helps regional states in countering piracy in the Indian Ocean. *See Counter-Piracy Operations*, NATO (June 17, 2013), http://www.nato.int/cps/ar/natolive/topics_48815.htm.
 14. *See Efforts to Combat Piracy*, *supra* note 1, at 2 (stating that in December 2008, the U.S. National Security Council issued its "Countering Piracy off the Horn of Africa: Partnership and Action Plan," outlining strategies to mitigate piracy which included: (1) preventing pirate attacks by reducing vulnerabilities by calling upon international naval forces to patrol waters off the Horn of Africa and sharing intelligence on pirate activities; establishing a contact group of countries willing to work together to coordinate responses to piracy;

have played a smaller role in such efforts.¹⁵ The International Maritime Organization (IMO)¹⁶ has been instrumental in putting the piracy problem on the international platform. In the spirit of advocacy, the IMO convened seventeen nation states, among them Kenya, in Djibouti to help address the issue of piracy and armed robbery at sea in the Western Indian Ocean, the Gulf of Aden, and the Red Sea regions.¹⁷

The U.N. Security Council, through Chapter VII of the U.N. Charter, calls on member states to become actively involved in counter-piracy efforts by encouraging regional cooperation and the promotion of legal avenues in an effort to curb piracy.¹⁸ Through these calls for advocacy, the international legal framework is responding to the weaknesses in the current piracy legal regime to bolster an internationally legitimized response to a formidable level that has potential for further warfare against piracy.

adopting best management practices to avoid pirate attacks; (2) calling for action to interdict pirate vessels and intervene in pirate attacks; and (3) establishing agreements with African and other nations to prosecute captured pirates).

15. OTTO, *supra* note 6, at 3.
16. In 2005, the IMO adopted a resolution that brought to the attention of the U.N. Secretary-General the issue of the threat posed by piracy to international security. The issue was then brought to the U.N. Security Council (UNSC), and between 2005 and 2007 pressure mounted for the crime, with the UNSC particularly calling for recognition and response to Somali piracy. In 2008, a meeting was held by the UNSC to discuss the measures that could be put in place to address the growing problem of piracy in order to restore international peace and security. This resulted in the adoption of a series of resolutions under Chapter VII of the U.N. Charter, including UNSC Resolution 1851, which sought to encourage regional cooperation and promote the use of legal avenues of resolution. *See id.* at 3; S.C. Res. 1851, U.N. Doc. S/RES/1851 (Dec. 16, 2008).
17. This meeting formulated the Djibouti Code of Conduct Concerning the Repression of Piracy and Armed Robbery Against Ships in the Western Indian Ocean and the Gulf of Aden, which led to the signing of a multilateral treaty between Kenya, Somali, Djibouti, Ethiopia, Madagascar, Maldives, Seychelles, Tanzania and Yemen, among others, in January 2009. *See High-Level Meeting in Djibouti Adopts a Code of Conduct to Repress Acts of Piracy and Armed Robbery Against Ships*, IMO (Jan. 30, 2009), www.imo.org/blast/mainframe.asp?topic_id=1773&doc_id=10933; Int'l Maritime Org. [IMO], *Code of Conduct Concerning the Repression of Piracy and Armed Robbery Against Ships in the Western Indian Ocean and the Gulf of Aden*, Djibouti Meeting Res. 1 (Jan. 29, 2009), available at <http://www.imo.org/OurWork/Security/PIU/Documents/DCoC%20English.pdf>.
18. OTTO, *supra* note 6, at 3.

C. *Harmonization of Legislation*

The highly controversial decision in the Kenyan case *Mohamud Mohamed Hashi et al.*,¹⁹ (in terms of inconsistencies with the provisions of the law), in which the High Court addressed two competing statutory provisions on the Court's jurisdiction, was perhaps a wake-up call for the need for harmonization of laws related to piracy in Kenya.²⁰ An effort has since been made towards harmonization of the two conflicting provisions of the Penal Code, as one of the provisions, Section 69, was repealed by the passage of the Merchant Shipping Act (MSA).²¹ In addition to the adoption of a more detailed and clear definition of what amounted to piracy, the MSA, as read together with the Constitution²² of Kenya, grants the

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19. Republic v. Chief Magistrate Ct., Mombasa, *ex parte* Mohamud Mohamed Hashi & Eight Others, [2010] eKLR (H.C.K.) (Kenya).
 20. Section 5, Chapter 63 of the Penal Code of the Laws of Kenya provides that “[t]he jurisdiction of the courts of Kenya for the purposes of this Code extends to every place within Kenya, including territorial waters.” The Penal Code, THE LAWS OF KENYA, REVISED EDITION (2010) Cap. 63 § 5 [hereinafter The Penal Code]. Section 69(1) (repealed by the Merchant Shipping Act in 2009) of the same Code provided that every “person who in territorial waters or upon the high seas, commits any act of piracy *jure gentium* is guilty of the offence of Piracy.” *Hashi*, [2010] eKLR at 9 (citing to section 69 of the Penal Code). The High Court held in *Hashi* that these two sections were inconsistent because Section 5 limited the courts’ jurisdiction to territorial jurisdiction whereas Section 69 expanded the courts’ jurisdiction to the high seas. *Id.* at 12–13. The court found Section 5 to be more juridically paramount as a defining provision with regard to jurisdiction of the Kenyan courts as far as the Penal Code was concerned. *Id.* at 16, 18, 21 (holding that in light of the repeal of section 69, the definition of piracy therein cannot be sustained).
 21. Merchant Shipping Act, No. 4 (2009), THE LAWS OF KENYA, REVISED EDITION (2012) Cap. 389 § 454 [hereinafter MSA] (repealing section 69 of the Penal Code).
 22. *Id.* § 369. Section 369(1) broadly defines piracy as:
 - (a) any act of violence or detention, or any act of depredation, committed for private ends by the crew or the passengers of a private ship or a private aircraft, and directed
 - (i) against another ship or aircraft, or against persons or property on board such ship or aircraft; or
 - (ii) against a ship, aircraft, persons or property in a place outside the jurisdiction of any state;
 - (b) any voluntary act of participation in the operation of a ship or 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).

Kenyan courts jurisdiction²³ over piracy offenses, regardless of whether the ship in question was in Kenya or elsewhere, and irrespective of the nationality of the accused. It is therefore correct to assert that Kenya has in fact made a fair contribution to counter-piracy efforts.

However, more can be done by addressing conflicting statutory provisions through the implementation of long-term strategies involving the formulation of sound maritime policies at the continental, national, and regional levels. There should also be express amendments to existing conflicting law or interpretation by a court of competent jurisdiction to cure the inconsistencies.

III. CHALLENGES FACING THE FIGHT AGAINST PIRACY

Though much effort has been put forth to fight piracy on both the regional and international levels, such effort has not proceeded without a challenge. The challenges range from issues of jurisdiction, funding, and human rights, to the inexperience of state organs, to mention but a few.

A. *Jurisdiction*

The existence of jurisdiction is problematic due to discrepancies between international and domestic law, as well as the jurisdictional question that arises on the capture of pirates within the various ocean zones delineated within the law.²⁴ In Kenya, inconsistent court rulings in the Court of Appeals have illustrated many of these problems.²⁵ In a bid to bring consistency in the handling of cases of international law, the judiciary has started to set up an International Crimes

See CONSTITUTION, art. 165(3) (2010) (Kenya) (stipulating that the High Court shall have unlimited original jurisdiction over civil and criminal matters).

23. *See supra* note 22 and accompanying text. *See also* MSA § 430. Section 430(1) of MSA stipulates that for the purpose of conferring jurisdiction, any offence under MSA shall be deemed to have been committed in any place in Kenya where the offender may be for the time being. Section 430(3) states that such jurisdiction is “in addition to, and not in derogation of, any jurisdiction or power of the Court under any other law.”
24. OTTO, *supra* note 6, at 4.
25. *See, e.g.,* Hassan M. Ahmed v. Republic, [2009] eKLR (H.C.K.) (Kenya) (holding that the lower court should have applied the international UNCLOS definition of piracy); Republic v. Chief Magistrate Ct., Mombasa, *ex parte* Mohamud Mohamed Hashi & Eight Others, [2010] eKLR (H.C.K.) (Kenya) (holding that the definition of piracy under the Kenyan Penal Code, which is different from the international definition, is controlling).

Division of the High Court.²⁶ While announcing the creation of this special division on November 26, 2012, Chief Justice Willy Mutunga stated that the need to set up the division arose because Kenya's economy was "mortally threatened" by international-scale crimes.²⁷ He clarified that the remit of the new institution will include a range of international and transnational offences, such as crimes against humanity, piracy, cybercrimes, terrorism, money-laundering, narcotics, and human and body parts trafficking.²⁸ It is proposed that the structure of the division be modelled on the standards of the International Criminal Court, with the same rules, practices, and procedures. This is still in the planning stage and it is anticipated to be actualized within two years.²⁹

The jurisdictional challenges go hand in hand with those relating to evidentiary requirements. For instance, Kenyan jurisdiction does not expressly recognise evidence that is photographic or video-based.³⁰ As a result of this, accused pirates are often released due to technicalities or provisions of evidence rules falling outside the existing laws (or rather, due to a lack of sufficient laws).

Coupled with the challenges above is the issue of defective charges brought in by the police. A stark example is cases involving minors. The law in Kenya states that when a minor commits an offence together with an adult, the minor faces charges as an adult.³¹ This, however, does not exempt the police from the requirement that they must indicate on the charge sheet whether the person charged is a minor.³² Based on the information on the charge sheet, the court

26. See Simon Jennings & Thomas Bwire, *Kenyan Chief Justice Announces Special Court*, INST. FOR WAR & PEACE REPORTING (Dec. 10, 2012), <http://iwpr.net/report-news/kenyan-chief-justice-announces-special-court>.

27. *Id.*

28. *Id.*

29. *Id.*; see also Nzau Musau, *Mutunga to Establish ICC Model Court in Kenya*, THE STAR (Feb. 26, 2013), <http://www.the-star.co.ke/news/article-109337/mutunga-establish-icc-model-court-kenya>.

30. See Paul Musili Wambua, *A Critique of the Ruling of the High Court at Mombasa*, MUSYOKA, WAMBUA & KATIKU ADVOCATES (Mar. 23, 2011), <http://www.musyokawambua.co.ke/node/6> (calling for convictions of pirates only when there is strong evidence).

31. Children Act (2010), THE LAWS OF KENYA, REVISED EDITION (2012) Cap. 141 § 73(b) (stipulating that the Children's Court does not have jurisdiction when a child is charged together with a person over eighteen years of age).

32. YODON THONDEN, HUMAN RIGHTS WATCH, JUVENILE INJUSTICE: POLICE ABUSE AND DETENTION OF STREET CHILDREN IN KENYA 71 (Lois Whitman & Binaifer Nowrojee eds., 1997) (stating that "[p]olice have

would then have to apply bail provisions to protect the minor, as provided by the law.³³ In my experience on the bench, this has not been the practice, and whether the rights of minors are enforced is dependent on the sensitivity and/or experience of the individual official dealing with cases involving minors.³⁴ Further, there is a disconnect between the Children Act and efforts made regarding its enforcement. The Act itself, an act of Parliament that provides for the rights of children and seeks to enhance their welfare in Kenya,³⁵ stipulates that these rights are to be protected with the “best interest principle,” and contains elaborate provisions on how children in violation of the law should be dealt with. However, in my experience, the Children’s department has made little to no concerted effort to ensure that the fundamental rights of the minors charged with piracy are upheld.³⁶

B. Training

Also stemming from the challenge of jurisdiction is the fact that judicial officers receive inadequate or no training on the complexities of domestic and international maritime law. To date, judicial officers who try piracy cases have only attended ad hoc training programmes and are woefully unexposed to international law and conventions.³⁷

huge discretion in deciding what court you go to” because they write the charge sheet that takes a person to court).

- 33. Children Act, Cap. 141 § 5.
- 34. Republic v. Abdiaziz Abdullahi & Twenty-Three Others, (2011) Crim. Case No. 2006 of 2011 (Chief Magistrate Ct.) (Kenya). In this case, the seventh and eighteenth accused persons who appeared as minors to me when I took the plea, were taken for medical age assessment and indeed, the seventh accused was confirmed to be a minor aged seventeen. Nonetheless, he has not been accorded the rights accruing to him as a minor during the trial. The case is pending hearing.
- 35. Children Act, Cap. 141.
- 36. In tandem with international children’s rights, the new Constitution establishes in Kenyan law internationally acclaimed principles on the rights of children, such as best interests of the child which is now to be paramount in every matter concerning children. It further recognises age as a ground for discrimination, which is critical to the application of the rest of the rights recognised in the Bill of Rights to children. The new constitutional framework creates room for strategic litigation affording an opportunity to enhance jurisprudence on children’s matters. Building on the seemingly narrow scope covered by Article 53 of the Constitution, it is possible to develop extensive jurisprudence for children as has happened in other progressive jurisdictions. Hence, the new law is a sound foundation for streamlining the rights of children in Kenyan law both now and in the future. CONSTITUTION, art. 53 (Kenya).
- 37. See Yvonne M. Dutton, *Bringing Pirates to Justice: A Case for Including Piracy Within the Jurisdiction of the International Criminal*

In addition, Kenya has no working system in place to counter piracy, and its efforts to try pirates can be said to emanate more from the willingness to be pleasant to the international community as opposed to the call for international responsibility.

The jurisdictional differences caused by different geographical spaces represents a great challenge in the war against piracy. With the absence of a well-defined jurisdiction and legal framework in place, in addition to an already over-burdened judiciary, it is hard to blame the policymakers for trying to make the best out of a completely inadequate international and domestic legal framework. Establishing a national coordinator on piracy would go a long way in ensuring a harmonized approach to dealing with challenges faced by the different agencies.

C. Sovereignty of States and the Place of International Conventions

The issue of sovereignty raises the question of how far a state can extend its borders before inevitably encroaching upon the sovereignty of other nations. In customary international law, comity requires a state do unto a foreign state as it would have the foreign state do unto it.³⁸ Though armed with unlimited jurisdiction, the principle of comity demands that Kenya pay reciprocal respect to the sovereignty of other states. This is quite a challenge, considering that Kenya has entered into bilateral agreements³⁹ with a number of states for the prosecution of pirates, a trend that many have termed “dumping.”⁴⁰ This could be interpreted to mean that states simply do not want to deal with the mammoth legal, logistical, and human rights issues that accompany the possession of alleged pirates in their domestic legal systems. Accordingly, there is a need to consider the question of comity when interpreting the validity of arbitrary extensions on extraterritorial jurisdiction.

Interpreting statutes and, more importantly, determining the place of international conventions and treaties is a challenge that

Court, 11 CHI. J. INT’L L. 197, 225 n.153 (2010) (noting that “regional enforcement mechanisms for piracy . . . requires funds and training to improve the legal capacity of its . . . courts”).

38. See BLACK’S LAW DICTIONARY 303–04 (9th ed. 2009).

39. In December 2008, the U.K. and Kenya signed a Memorandum of Understanding to allow for the transfer of suspected pirates to face trial in Kenya. See Eugene Kontorovich, *International Legal Responses to Piracy off the Coast of Somalia*, 13 INSIGHTS (Am. Soc’y of Int’l Law, Washington, D.C.), Feb. 2009, <http://www.asil.org/insights/volume/13/issue/2/international-legal-responses-piracy-coast-somalia>.

40. See *Pirate Law 101: A Short History of Kenya’s Pirate Prosecutions*, SOMAL. REPORT (Dec. 10, 2011), <http://www.somaliareport.com/index.php/post/2263> (discussing how Kenya has become “the world’s foremost pirate dumping ground”).

needs to be addressed. In the case of *Hassan M. Ahmed & Nine Others*,⁴¹ the court argued that irrespective of the inconsistencies in the substantive provisions,⁴² piracy was an international crime and, as a result, the court of any and all nations had automatic universal jurisdiction. However, counsel for the applicants argued that such argument infringed on the accused person's rights, as an accused ought to know his specific charges so as to adequately prepare a defence.⁴³ They further argue that a court cannot simply quote international conventions when drawing up charges. Though an argument can maintain that the court effectively sought to paper over a hole in the Kenya Penal Code, it is evident that a more long-term solution was required. After the *Ahmed* case, the solution was reached by the passage of the MSA.

D. Failure to Address the Root Cause

Piracy is a relatively new and threatening trend in East Africa, particularly off the coast of Kenya. Though much emphasis is placed on prosecuting alleged pirates, the prosecution of pirate foot soldiers merely amounts to pointless retribution. In an attempt to extract money from commercial and private ships in the Indian Ocean and the Gulf of Aden, pirate bosses in Kenya and Somalia often recruit young, mostly uneducated adults, who are generally wallowing in poverty.⁴⁴ The dire economic situation in Somalia makes the large sums of money paid as ransom to successful pirates an attractive option. Mohamed Abdi Hassan, considered by the U.N. to be one of the most notorious Somali pirate chiefs,⁴⁵ once terrorised vast

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41. *Hassan M. Ahmed v. Republic*, [2009] eKLR (H.C.K.) (Kenya).
 42. *Id.* at 5–6 (holding that the international definition is appropriate when the laws are inconsistent, but that regardless, the international definition should apply because Kenya is “bound to apply international norms and instruments since Kenya is a member of the civilized world”).
 43. By the time of the trial, Kenya had not passed the MSA and relied on the provisions of the Penal Code Chapter 63, Laws of Kenya, which did not define which acts amounted to piracy. *See id.* at 5.
 44. S. WHITMAN, H. WILLIAMSON, M. SLOAN & L. FANNING, DALHOUSIE MARINE PIRACY PROJECT: CHILDREN AND YOUTH IN MARINE PIRACY – CAUSES, CONSEQUENCES AND THE WAY FORWARD (MARINE AFFAIRS PROGRAM TECHNICAL REPORT #5) 7 (2012), *available at* http://www.dal.ca/content/dam/dalhousie/images/faculty/science/marine-affairs-program/Technical_series/MAP%20Technical%20Report%20%235.pdf (stating that children are vulnerable to recruitment due to many socio-economic factors, including extreme poverty).
 45. *See* U.N. Chair of the S.C. Comm. Pursuant to Res. 751 (1992) & 1907 (2009), Letter dated July 11, 2012 from the Chair of the Security Council Committee Pursuant to Resolutions 751 (1992) & 1907 (2009) Concerning Somalia and Eritrea addressed to the President of the

stretches of the Indian Ocean with his men, generating millions of dollars in ransoms from seized ships. Hassan has since claimed to have renounced piracy, but he asserts that he has no way of knowing whether the individuals under his command, who are now jobless onshore, have given up attacks for good. According to ex-pirate captain Abdullahi Abdi, “There are hundreds of young men wanting a future . . . and a young hungry man can do anything.”⁴⁶ Due to such sentiments, there is and will always be a steady supply of individuals who will undertake pirate operations despite quick trials, harsh penalties, or even loss of life. To these individuals, piracy is simply a source of livelihood. Current efforts in place address the end point of the piracy supply chain, as opposed to its root causes. Unless the socio-economic root cause of the problem is addressed, real progress against organized crime groups will stall. Further, the financiers, negotiators, and recruiters of piracy will continue to exploit these conditions, and thus must be held liable for their roles in the promotion of piracy.

In addition to addressing the root cause of the piracy problem, proactive money laundering laws should be put in place. Such laws would require a governing body to follow and seize the assets of funds suspected to be associated with piracy. The consequences of money laundered as proceeds of piracy in Kenya have grave implications on the economy. A recent report by the U.S. State Department on money laundering started with the following short and simple sentence: “Kenya is developing into a major money laundering country.”⁴⁷ The report claims that Kenya’s financial system may be laundering more than \$100 million each year, including an undetermined amount of narcotics proceeds and Somali piracy-related funds.⁴⁸ Other reports estimate that \$100 million in just drug money is laundered through Kenya’s financial system every year.⁴⁹

Security Council, ¶ 50, U.N. Doc. S/2012/544 (July 13, 2012) (stating that Hassan was reportedly given a diplomatic passport by Somalia’s then president, Sheikh Sharif Ahmed, as an inducement to dismantle his pirate network).

46. *Somalia: Jobs Wanted: Somali Ex-Pirates Seek Employment*, HORSEED MEDIA (May 3, 2013), <http://horseedmedia.net/2013/05/03/somalia-jobs-wanted-somali-ex-pirates-seek-employment/>.
47. BUREAU FOR INT’L NARCOTICS & LAW ENFORCEMENT AFFAIRS, U.S. DEP’T. OF STATE, INTERNATIONAL NARCOTICS CONTROL STRATEGY REPORT, VOL. II: MONEY LAUNDERING AND FINANCIAL CRIMES 148 (2010), available at <http://www.state.gov/documents/organization/137429.pdf>.
48. *Id.* Other estimates are lower. Anthony Gitonga, head of risk and compliance at Kenya’s I&M Bank, estimates that in the past two decades, “about US\$91.25 million (Kshs 7.3 billion) has been laundered into Kenya.” But he conceded that “there is lot of stuff that is hidden.” Ben Omondi, *Kenya: New Law to Guard Against Money Laundering*,

In 2010, a staggering \$2.1 billion found its way into the Kenyan economy without the government being able to explain its source.⁵⁰ Debates about the extent to which this amount might consist of laundered ransom money from piracy, remittances, drug money, or other proceeds of crime remain unresolved.⁵¹

E. Lack of Funding

Apart from the serious security problem posed on the East African borders and on international shipping, pirate assaults have a serious economic impact, as they negatively affect all stakeholders in maritime merchant transport. Consequently, such assaults damage interests of states with a crucial role in the world's mercantile shipping industry. Therefore, piracy being an international problem, it is only prudent to have an international resource geared towards efforts to aid legal processes and infrastructure. There is a need for political goodwill and resource mobilization so as to ensure the effective coordination of states on all levels in the fight against piracy.

IV. WHAT IS THE WAY FORWARD?

While perhaps the effective prosecution of accused pirates will be a deterrent to some, it is unlikely that any single solution will bring an end to this problem. And with Kenya being strategically placed from both a geo-strategic and interest-based perspective, with consolidated support, she can rely on the existence of a relatively stable government to be a key actor in the fight against piracy.

A. Monetary Assistance and Oversight

Combating maritime insecurity is a complex and expensive exercise that requires sophisticated equipment, human and monetary resources, and dedication. With a coastline of close to 536 kilometres and a highly ineffective navy, it is simply not feasible for Kenya to

NEWS FROM AFR. (Oct. 4, 2010), http://www.newsfromafrica.org/newsfromafrica/articles/art_11997.html.

49. *Pirate Booty Causes Kenya Property Prices to Skyrocket*, VOICE OF AM., www.voanews.com/english/news/a-13-2009-03-18-voa40-68798557.html?moddate=2009-03-18 (last updated Nov. 2, 2009).
50. Jaiindi Kisero, *Kenya: Mystery of Sh164 Billion Smuggled into Country*, ALL AFR. (May 20, 2010), <http://allafrica.com/stories/201005200888.html>.
51. See Peter Gastrow, *TERMITES AT WORK: A REPORT ON TRANSNATIONAL ORGANIZED CRIME AND STATE EROSION IN KENYA* 99–101 (2011), available at http://ipinst.org/media/pdf/publications/ipi_epub_kenyacomprehensivefindings.pdf.

tackle the problem of maritime piracy on its own.⁵² Monetary assistance and international oversight can go a long way in curtailing maritime piracy off the coast to a considerable extent. For instance, Kenya is in a position to address the piracy problem indirectly by seeking a domestic response to the masterminds who manage operations at a distance from within its territory. This is a practical approach where piracy money flow is disrupted, thus reducing the opportunities available for the growth of organized crime. However, this cannot be done without proper mechanisms in place, which require adequate funding and international oversight.

Also, as an oversight measure, international and regional actors should share information on the best management practices, laws governing shipboard security measures, and instances of actual or attempted piracy. More importantly, cooperation should be fostered at the regional level by actively engaging in maritime security strategies, as it is abundantly clear that single-handedly, a sea-based approach will not suffice. Instead, a multi-pronged strategy is needed to address piracy on land as well as on sea. The East African community would be a good place to start regional engagement, as the small number of states in the region would allow for a greater chance of garnering consensus in order to create a good will coalition based on similar goals.

B. Strengthening of International Maritime Law

With respect to international treaties, Kenya had a dualist legal system prior to the promulgation of its 2010 Constitution, as it pertains to domesticating the treaties it ratified.⁵³ Article 2(6) of the 2010 Constitution promulgated on August 27, 2010 now incorporates into Kenyan law all treaties ratified by Kenya.⁵⁴ Articles 2(5) and 2(6)

52. See Samuel L. Aronson, *Crime and Development in Kenya: Emerging Trends and the Transnational Implications of Political, Economic, and Social Instability*, 2 STUDENT PULSE 1–2 (2010), available at <http://www.studentpulse.com/articles/278/2/crime-and-development-in-kenya-emerging-trends-and-the-transnational-implications-of-political-economic-and-social-instability>.

53. 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), available at http://www2.ohchr.org/english/bodies/hrc/docs/ngos/KNCHR_Kenya_HRC105.pdf.

54. Article 2(5) of the 2010 Kenyan Constitution states that the general rules of international law shall form part of the law in Kenya. This means that international law, including customary international law, shall be a source of law in Kenya. Article 2(6) then states that any treaty or convention ratified by Kenya shall form part of the law. CONSTITUTION, arts. 2(5)–(6) (Kenya).

introduce far-reaching changes in Kenya's legal system, as they open the domestic legal system to international law. The introduction of Article 2(6) also 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.⁵⁵ The courts are going to play a significant role in implementing international norms at the domestic level. The courts in this sense must take notice of the new sources of law that should govern the cases coming before them, and they will have an obligation not only to apply treaty provisions, but also to recognise and apply principles of law. Judges and magistrates must be conversant with not only the local laws, but also the international instruments that Kenya has ratified, in addition to jurisprudence arising from these instruments.

In asserting the above practices, the Court of Appeals held, while overturning the High Court decision of Justice Mohamed Ibrahim, that even if the High Court found that there was legislative misnomer, that could easily have been resolved by falling back on the provisions of the 1982 U.N. Convention on the Law of the Sea (UNCLOS), to which Kenya is signatory, and by dint of Article 2(5) of the Constitution, is part of the Kenyan law.⁵⁶

In *obiter dictum*, Justice Martha Koome⁵⁷ stated that the lower court's judgment also failed to recognize that Kenyan courts were beginning to develop jurisprudence in this area of law along the internationally recognised principles that were set back by this judgment under review. As an example, the Judge referred to the case of the U.S. District Court for the Eastern District of Virginia, *United States v. Hassan, et al.*,⁵⁸ which referenced the application of UNCLOS as part of customary international law and also made reference to a Kenyan decision (on the appeal of the first piracy conviction in Kenya in High Court Criminal Appeal 198-207 in *Hassan M. Ahmed v. Republic*). The U.S. decision stated that "courts

55. The practice varies among states. In continental Europe, most states refer to "generally recognised principles" of international law in their constitutions (for example Germany, Austria, Estonia, Greece, Portugal and the Russian Federation). Other countries (such as the Republic of South Africa) expressly mention customary international law. KENYA NAT'L COMM'N ON HUMAN RIGHTS, MAKING THE BILL OF RIGHTS OPERATIONAL: POLICY, LEGAL AND ADMINISTRATIVE PRIORITIES AND CONSIDERATIONS 11 n.15 (2011), *available at* http://www.knchr.org/Portals/0/Reports/MAKING_THE_BILL_OF_RIGHTS_Operational.pdf.

56. Attorney General v. Mohamud Mohammed Hashi and Eight Others, Civil App. 113 of 2011, [2012] eKLR ¶ 9 (Ct. App.) (Kenya).

57. *Id.* ¶ 15.

58. *Id.*; *United States v. Hasan*, 747 F. Supp. 2d 599, 618, 635 (E.D. Va. 2010).

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.”⁵⁹

Furthermore, in the spirit of strengthening international maritime law, the bilateral agreements on the prosecution of pirates between Kenya and western countries need to be revised so as to achieve their intended purpose. The strict interpretation of these agreements would amount to a clear definition of weak legislative and administrative frameworks, as many of them are vague on the sharing of burdens and responsibilities of the state parties, and they fail to include indemnity clauses in case of civil liability for wrongful prosecution.⁶⁰ These agreements are not founded on any international legal instruments, and as such, they have no basis of enforcement in the national laws of state parties. Hence, before embarking on prosecutions based on memorandums of understanding, it is important to appreciate the potential legal implications that a state may be exposed to without a proper legal framework for such agreements.⁶¹ Therefore, there is a need to formulate these agreements in a policy document for the consideration and debate on their implementation in Kenya for purposes of harmony with the existing laws, so as to leave no doubts regarding their mandate and jurisdiction.

C. Capacity Building in Somalia

The stabilization of Somalia would not only counter piracy efforts, but it would also allow for the operation of a more functional and effective state apparatus which, in turn, would drastically impact piracy. Some consider the incursion of Kenya into Somali as a part⁶² of addressing piracy, even if indirect, as the increased naval presence in the volatile upper regions of Kenya’s upper coast bordering Somalia has offered some deterrence to acts of piracy. Strictly speaking, this simply means that the eradication of piracy can only be brought on by sustained stability in Somaliland.

The international community as a whole should assist in a productive multilateral and holistic effort to rebuild the state of Somalia and reinforce stability.⁶³ As Kenya is considered an important

59. *Hasan*, 747 F. Supp. 2d at 635.

60. Paul Musili Wambua, Lecture at University of Nairobi School of Law on Inter-Agency Challenges in Maritime Security in Africa, *available at* <http://shrdocs.com/presentations/5985/index.html>.

61. *Id.*

62. OTTO, *supra* note 6, at 4.

63. *Id.* at 5.

and able player by the international community, Kenya should be involved in such efforts. Kenya's effort through incursion should be supported, as the inclusion of an African actor is an essential part of a global action seeking to eliminate maritime piracy.

Capacity building in Somalia could also be effected by putting in place working institutions for patrolling and policing generally, and for incarcerating pirates in particular. This would drastically reduce the number of pirate attacks, as there would no longer be a safe haven for them to run to in escape from the law.

V. CONCLUSION

The idea that "beyond the territorial seas lie the high seas which are free for use by all lies at the heart of the law of the sea."⁶⁴ It is through this reasoning, coupled with the notion of safety while at sea, that there has been the freedom of navigation, exploration, and industry. However, this notion of bliss on water has been stolen from sea travelers on territorial, regional, and international waters by the ugly scourge of piracy. It is this deprivation of safety that has caused uproar and forced many to call for intervention.

While bearing all the aspects of organised crime, piracy is a complex issue calling for a combined political, diplomatic, military, and legal effort, development assistance, and strong internal and inter-state coordination. Any single-handed approach will not work to eradicate piracy, and so a solution requires a holistic effort that involves all state actors in the fight against piracy. So far, there have been efforts to cure this scourge, and such efforts have proven effective to some point, as is evidenced by the decline of attacks in the year 2012.⁶⁵ However, there is room for improvement. There is a need to update the existing maritime legislations in order to achieve maritime security. It is also necessary to exchange information and ideas. Finally, every state the world over must join hands in the fight against piracy. Only then can piracy be a thing of the past and a part of history. As one Kenyan Judge observed:

[T]he world has now been reduced into a global body, with the economy of every state being intertwined with that of the other States . . . it would be dangerous for any nation to refuse [to try for criminal] acts perpetrated on the High Seas such as piracy *jure gentium* that would affect even nations within whose territorial waters such offences have not taken place. . . . [I]f Kenyan courts can feel emasculated when people charged with such offences are produced before them, then how would such heinous offences that would affect its economy as well though

64. INTERNATIONAL LAW 665 (Malcolm D. Evans ed., 3d ed. 2010).

65. Efforts to Combat Piracy, *supra* note 1, at 1.

perpetrated in the High Seas be controlled? . . . [W]hat would be the use of international conventions on such matters if signatories to them such as Kenya do not honour them in action?⁶⁶

66. Attorney General v. Mohamud Mohammed Hashi & Eight Others, Civil App. 113 of 2011, [2012] eKLR 3 (Ct. App.) (Kenya).



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