Maritime Piracy Law of Kenya - Gaps and Remedy

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Abstract-
A major maritime security problem in Africa is widespread proliferation of incidents of piracy attacks. One reason cited is the lack of adequate domestic legislation and regional agreements to support and facilitate the apprehension and prosecution of suspected pirates. In order to effectively address the threats from legislative perspective, this work analyses the piracy law of Kenya to ascertain how Kenya has attempted to incorporate their international obligations into their domestic laws. The study shows the gaps in the Kenya piracy law and provide solutions for those gaps.

Keyword: Analyses of piracy law; gaps and solutions in maritime piracy law; maritime piracy; Kenyan piracy law.

1. Introduction

Africa serve not only as a means of transportation, but also as a source of food and employment. There are rich deposits of minerals, mineral oils and natural gas on the seabed and in the subsoil of the sea. This wealth attracts the attention of many actors which include pirates. These pirates are armed with sophisticated weapons such as general-purpose machine guns and sometimes use Rocket-propelled grenades (RPGs) to launch attacks against ships. The pirates regularly and indiscriminately attack crew, passengers and merchant ships of every nation without making any distinction. The pirates mostly target oil drilling platforms and ships, with the intention of robbing the crew who are sometimes kidnapped for ransom, assaulted, injured, killed and in many cases go missing. More recently, specifically in January 2021 gunmen fired on a vessel and killed one Azerbaijain citizen, kidnapping 15 Turkish sailors. The spokesman of the ship owner confirmed that talks to free the sailors had been handled by a team based in Hamburg, Germany and two weeks later the sailors were all freed. The International Maritime Organization (IMO) reports that in 2020 there were 195 attempted and successful piracy and armed robbery attacks, compared to 162 in 2019. In Africa the incidence of piratical attacks has significantly affected various nations, governments, companies and those who either use or travel by sea. In 2019 and 2020, no piratical attacks off the coast of Somalia and Gulf of

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1 International Maritime Bureau (IMB), Piracy and Armed Robbery Against Ships Annual Report (2017) 23.
Aden were reported, due to the increased and aggressive patrol of the international navies, which use to be the hallmark of piracy.\(^5\) Though, that water remain vulnerable to destabilizing actors, including pirates and armed robbers, maritime terrorists, and illicit traders.\(^6\) Somalian pirates ‘still retain the capability and capacity to carry out attacks’.\(^7\) In terms of other sub-region in Africa it was reported that incidents of piracy in the Gulf of Guinea and off Nigeria in particular dominated the global statistics, both in terms of numbers and severity.\(^8\) Off the coast of Nigeria pirates kidnapped 3 seafarers, injured 2 personnel on board and killed a Nigerian Naval Officer after a deadly exchange of gunfire.\(^9\) This is a discouraging trend because over the last decade Africa as well as the international community encouraged warships to patrol these areas. These warships thwarted some attacks and captured several pirates, but many of the suspected pirates were not tried for piracy. One reason cited is the lack of adequate domestic legislation.\(^10\) In most cases the ‘elements of piracy’ have led to various interpretations among scholars and stakeholders, including judges. Even the courts have demonstrated the disadvantages and difficulties that may occur if specific interpretations are not given to the elements of piracy. In order to effectively address the threat of piracy, this work points out the lacunae in the Kenyan piracy provisions and also fill the vacuum created. This paper confines itself only to the piracy laws of Kenya, however refers to piracy elsewhere in passing to show clarity. The purpose of this paper is to fill the vacuum created in the Kenyan Merchant Shipping Act in order for Kenya to utilize the experience.

2. Definition of Piracy in the Kenya

The Merchant Shipping Act No. 4 of 2009 (MSA) state that piracy means

\[(a) \text{ any act of violence or detention, or any act of depredation, committed for private ends by the}
\text{crew or the passengers of a private ship or a aircraft, and directed-}
\text{(i) against another ship or aircraft, or against persons or property, on board such ship or}
\text{aircraft; or}
\text{(ii) against a ship, aircraft, person or property in a place outside the jurisdiction of any State;}
\]

\(^7\) IMB 2020 (n 5) at 19.
\(^8\) ibid at 25 read with page 6. Globally, 135 crew were kidnapped from their vessels in 2020, with the Gulf of Guinea topping the list with over 95% of crew kidnapped.
(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 intentionally facilitating an act described in paragraph (a) or (b).

The provision appear to be same with the definition of piracy in the United Nations Convention on the Law of the Sea (UNCLOS), but not entirely as such. The drafters of the piracy law does not also incorporate piracy legal framework of UNCLOS, which has been reaffirmed by the United Nations to be the effective ‘legal framework applicable to combating piracy’.

3 Evaluation of piracy provisions in the MSA

(i) Any act of violence

One requirement for piracy in the MSA is that there must be an act of violence which follows UNCLOS except for certain textual differences. The MSA does not state what the phrase act of violence entail, but for the purposes of hijacking and destroying of ships the term means “any act done […] in Kenya which constitutes the offence of murder, attempted murder, manslaughter, or assault; or […] outside Kenya which, if done in Kenya would constitute such an offence as is mentioned in paragraph (a)”. The provision is perceived to be same definition in terms of piracy, if correct, an act amounting to existing offence such as assault or attempted murder committed in asserting a claim of right amount to piracy in Kenya. It is important to exclude certain cases of violence committed in asserting a claim of right, even if it amounts to existing crime. For example, a mere quarrel followed by acts of violence occurring between fishermen at sea ought not to be regarded as an act of piracy, since such acts do not constitute a menace or threats to maritime security.

(ii) Detention
The other requirement for piracy in the MSA is any *act of detention* which is consistent with UNCLOS.\(^1\) The MSA does not define the detention or indicate the criteria by which the term is to be considered to be defined as piracy and neither has any Kenyan legislation defined the meaning or commented on the term. The questions therefore are what ‘act of detention’ can be defined as piracy, or does every act of detention amount to piracy in the MSA? This is yet to be defined, however the term may be regarded as kidnapping. For example, in *Mohamed’s* case, the court convicted the accused for unlawfully detaining the crew as the court held as follows:

> I am convinced beyond doubt that upon boarding the [vessel] the accused harassed and assaulted the crew, shouted and threatened them with guns until they were subdued. They instilled fear in the crew, took complete control of the [vessel] and commandeered it. There is ample evidence to show that during the four days only the accused determined the direction and destination of the [vessel], when to let the crew walk around the vessel, have meals, go to the bathroom and when to lock them up in the sleeping quarters. All this was against the witnesses’ will. They were not free men at all. Not even the [captain] Stephan Barbe who was manoeuvring the [vessel].\(^1\)

In *Republic v. Mohamed Aweys Sayid and Eight Others*, the court held that the accused committed an illegal act of detention as the crew were forced to travel towards Somalia against their will and that the crew did not invite the accused on board nor agreed to convey them to Somalia.\(^1\) The Kenyan Penal Code (Penal Code),\(^2\) defines *kidnapping* as “[a]ny person who conveys any person beyond the limits of Kenya without the consent of that person, or of some person legally authorized to consent on behalf of that person, is said to kidnap from Kenya”.\(^3\) The Code state further:

> [a]ny person who takes or entices any minor under fourteen years of age if a male, or under sixteen years of age if a female, or any person of unsound mind, out of the keeping of a lawful guardian of the minor or person of unsound mind, without the consent of the guardian, is said to kidnap the minor or person from lawful guardianship.\(^4\)

Where a person is kidnap “from Kenya or from lawful guardianship is guilty of a felony and is liable to imprisonment for seven years”.\(^5\) Nevertheless, it is not certain what length of time of deprivation of movement would amount to detention. For example, in a South African case

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\(^1\) art. 101(a) UNCLOS.
\(^4\) Cap 63 of 2014.
\(^5\) Penal Code, s 254.
of *S v Jackson*, the court held that detention for the duration of the night is a very short period of time,\(^{24}\) but in another South African case of *S v. Blanche*,\(^{25}\) the court held deprivation of movement for eight hours to be immaterial.\(^ {26}\) The reason in Jackson’s case is that the complainants approached a spot where a Chinyau dance was about to be held and where preparations for this dance were in hand. The presence of strangers at such a dance is resented and the accused appear to have approached the complainant in order to punish them for their unwarranted presence. The complainants were assaulted by the accused and eventually in the late afternoon or evening were taken by force to a hut in the compound of which the accused was one of the occupants. He was detained forcibly there until the next morning when he was released. The court held ‘[i]t is obvious from the above outline of the facts that there was no intention to deprive the complainant of his liberty for anything but a very brief period and that this was done by way of punishment for his infringement of the rights, or imaginary rights, of the persons conducting the dance’.\(^ {27}\) In the two cases the length of time of deprivation is unnecessary, but the intention of the accused remains key element to the offence, as it is the accused’s state of mind at the time of the act which is the determining factor and even if the accused thereafter feels remorse and frees his captive it is no defence.

(iii) Depredation

The other element for piracy in the MSA is *act of depredation* and which is also not defined. An act of depredation may be regarded as unlawful when amounting to existing crime such as robbery. This is because in *Republic v. Nur Mohamed Aden and Nine Others*, the accused threatened the crew members and ‘forcefully took various items (money, ipod, watches, cigarettes and phones) from the Seychellois crew which were later found and recovered’.\(^ {28}\) The court held their act to be depredation.\(^ {29}\) Likewise, in *Sayid’s* case the accused threatened and robbed the crew of a ship of their property and the court held their conduct to be depredation.\(^ {30}\)

In the Penal Code a person who steals anything, and, at or immediately before or immediately after the time of stealing it, uses or threatens to use actual violence to any person or property in order to

\(^{24}\) 1957 4 SA 636 (R) 637. See also *S v. Mnawango* 1955 1 PH H2; *S v. Mabrida* 1959 1 R and N 186. The court also held detention for 24 hours to be too short.

\(^{25}\) 1969(2) SA 359 (W) at 360D.

\(^{26}\) *S v. Long* 1970 2 SA 153 (RA) 161; *S v. Dimuri* 1999 1SACR 79 (ZH) 84.

\(^{27}\) Page 316 of [1957] 4 All SA 314 (SR).

\(^{28}\) (2011) SLR 30.

\(^{29}\) Ibid.

\(^{30}\) *Republic vs Mohamed Aweys Sayid* op cit note 41 at paragraph 49.
obtain the thing stolen or to prevent or overcome resistance to its being stolen or retained, is guilty of the felony termed robbery.31

(iv) Private ends

In the MSA for an act to amount to piracy, the act of violence, detention or depredation must be committed for private ends. The MSA does not define the phrase private ends. Notably, there is no legislation in Kenya that defines the phrase. The phrase has led to various interpretations among contemporary scholars and stakeholders, including judges. Some argue that private ends must be for financial gain and that the phrase excludes acts that are wholly political or religious.32 Similarly, others argue that UNCLOS and the 1958 Convention on High Sea (HSC),33 exclude acts that are purely politically motivated.34 The view also claims that maritime terrorism, such as hijacking of ships with environmental attacks do not fall within the definition of piracy in UNCLOS or the HSC.35 It is further asserted that the interpretation of the phrase will rely primarily on the subjective appreciation of the offender,36 and that the phrase ‘should be examined by taking various factors into account, such as motives, ends, specific acts of offenders, the relationship between the offender and the victims, the relationship between the offenders and the legitimate government’.37

Several authors challenging the above view contend that the phrase must be interpreted to encompass actions that lack State sanction.38 This view further asserts that the essential requirement of piracy’s definition is not the actor’s intent, but rather whether any State can be held liable for the actor’s action.39 Others concur with the latter and further take the view that the latter interpretation is more persuasive, and the absence of State authority determines

31 Penal Code, s 295.
35 ibid.
37 ibid 380.
whether or not acts can be classed as piracy, not the actor’s motivation.\(^{40}\) In these circumstances ‘[w]ho defines the ends – the judge, the victim, or the perpetrator? Can an end be both private and political in nature? There is a tremendous amount of ambiguity in the term’.\(^{41}\) The diverse view on *private ends* is an indication that the phrase is too obscure. Even the Seychelles courts have demonstrated the disadvantages and difficulties that may occur if meanings are not given to the elements of piracy. In one case, the court lamented that in the ‘circumstances we cannot and will not extend the meaning of [private ends] contained in section 65 of the Penal Code beyond international norms in cases where the offence of piracy was committed outside the jurisdiction of Seychelles’.\(^{42}\) The court further held that ‘we are therefore guided but also limited both by our domestic laws and international norms in construing the meaning of [private ends]’.\(^ {43}\) Likewise, a United States District Court decision illustrates some difficulties that may arise if States do not specifically define the elements of piracy.\(^{44}\)

To this writer, in view of the confusion and the fact that neither UNCLOS nor HSC define the expression *private ends* or indicate the criteria by which an act is to be considered to be committed for private ends, one must consider the preparatory work of the phrase in order to confirm the meaning. This position is supported by Article 32 of the 1969 Vienna Convention on the Law of Treaties (Vienna Convention),\(^{45}\) which says that:

Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:
(a) Leaves the meaning ambiguous or obscure; or
(b) Leads to a result which is manifestly absurd or unreasonable.

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\(^{43}\) ibid.


The 1932 Harvard Research in International Law,\textsuperscript{46} which had been in existence 50 years before the modern piracy legal framework of UNCLOS, whose report greatly assisted the original drafters of the framework, indicates the circumstance when an act should amount to private ends. This affirms that an act by unrecognised revolutionaries are pirates in the sense of international law.\textsuperscript{47} The acts in the definition of piracy committed by a revolutionary organization which has not been recognized as a belligerent entity amounts to piracy only in respect of the offended State.\textsuperscript{48} The Harvard Research further clarified the preceding in the following terms:

\begin{quote}
[i]t is the better view, however, that these are not cases falling under the common jurisdiction of all States as piracy by the traditional law, but are special cases of offences for which the perpetrators may be punished by an offended State as it sees fit. This is the view reflected [in the draft convention]. It leaves unaffected the right of an offended State to seize and punish the offenders in accordance with the precedents cited (and, of course, this may, at the option of the prosecuting State, include conviction and punishment for piracy under its municipal law); but it does not concede jurisdiction on the ground of piracy in the international sense to States not offended or threatened.\textsuperscript{49}
\end{quote}

The Harvard Research further states an act by insurgents inspired by a motive of private plunder is for private ends under the definition.\textsuperscript{50} The act committed from purely political motives is not regarded as an act of piracy.\textsuperscript{51} Thus an act cannot be piratical if it is done under the authority of a State or even of an insurgent community whose belligerency has been recognized.\textsuperscript{52} A ‘mere quarrel followed by acts of violence [...] occurring between fishermen on the high seas ought not to be regarded as an act of piracy, since such acts do not constitute a menace to the international maritime commerce’.\textsuperscript{53} The Harvard Research amplified that it is ‘important to exclude thus specifically cases of violence committed in asserting a claim of right, which should not be assimilated by common consent of all States. Perhaps, quarrels of fishermen of different nationalities will cause most cases of this type’.\textsuperscript{54}

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47 Harvard Research at 857.

48 ibid.

49 ibid.

50 Harvard Research (n 49) at 798 and LEAGUE OF NATIONS 142-145.

51 LEAGUE OF NATIONS 143. Harvard Research (n 49) at 791.

52 Cited in Harvard Research at 750; 771 and 798.

53 LEAGUE OF NATIONS 143.

54 Harvard Research 809.
\end{flushright}
Commission (ILC) holds that an act prompted by feelings of hatred or revenge is piracy. The ILC further acknowledged:

In its work on the articles concerning piracy, the Commission was greatly assisted by the research carried out at the Harvard Law School, which culminated in a draft convention of nineteen articles with commentary, prepared in 1932 under the direction of Professor Joseph Bingham. In general, the Commission was able to endorse the findings of that research.

The ILC delivered its final draft to the United Nations General Assembly (UNGA) which was adopted in the 1958 Convention on the High Seas. In turn, Article 15 and other articles of the HSC became the piracy legal framework of UNCLOS. For this writer the following are logical conclusions to the belief that the Harvard Research is the preparatory work: (1) the acknowledgement of ILC that the Commission was greatly assisted by the research carried out at Harvard; (2) the endorsement of the findings of that research; and (3) the final draft which was adopted in the 1958 Convention on the High Seas, (4) in turn that became the legal framework for piracy in UNCLOS. These strongly confirm that the Harvard Research and the 1920s report on piracy in the League of Nations which Harvard Research heavily relied upon as seen above are the key preparatory work of the piracy legal framework of UNCLOS. By this judgement one may conclude as follow:

(a) Act of violence, detention or depredation committed for gain amounts to piracy;
(b) An act prompted by feelings of hatred or revenge is piracy;
(c) An act committed by an insurgent is piracy, except the act is politically motivated;
(d) Act committed with a purely political object is not regarded as piracy;
(e) An act committed by a revolutionary organization not recognized as belligerent by the offended State amounts to piracy only to the offended State;
(f) An act committed in asserting a claim of right is not piracy, as it does not constitute a menace to the international maritime commerce;
(g) An act committed under the authority of a State is not piracy.

Notably, those that have been punished for piracy in Kenya are convicted under paragraph (a) above, and no record of paragraphs b-g and one is not certain what would have been the position of the court in the circumstance.

56 art. 38(1) ILC Commentary.
(v) Commission by the crew or passenger of a private ship or private aircraft

In MSA, an act amounts to piracy if committed by the crew or passenger of a private ship or aircraft. The term ‘crew agreement’ has the “meaning given to it in section 119”. In turn, section 119 refers to ‘crew agreement’ as ‘seafarer’, which, includes “every person (except a master, pilot or apprentice duly contracted or indentured and registered) employed or engaged in any capacity on board a ship”. The term passenger ‘any person carried on a ship except-

(a) a person employed or engaged in any capacity on the business of the ship;
(b) a person on board the ship, either in pursuance of the obligation laid upon the master to carry shipwrecked, distressed or other person, or by reason of any circumstance that neither the master nor the owner nor the charterer, if any, could have prevented forestalled.

An act of piracy committed by persons in the paragraph (b) or an apprentice-officer including stowaway, hirer of a ship may not amount to piracy in Kenya as these persons are neither included in the definitions of crew nor passengers and by the MSA, piracy must be committed by crew or passenger. In order not to create gaps and to repress piracy to the fullest possible extent the term crew should include persons having lawful command of a ship and any other person employed or engaged in the services of a ship and while passenger should be anyone on board, other than crew. These proposals encompass these gaps, for example, the definition of crew covers everyone that is not a passenger and passenger is anyone on board other than crew.

(vi) Against another ship, persons or property on board such ship

In the MSA, piracy is committed by a private ship against another ship, persons or property on board. That means an illegal act of violence, detention or depredation committed for private ends by a crew or the passengers against their fellow crew member does not amount to piracy. The act only amounts to piracy if the attack involves more than one ship. The MSA notes that private ship means ship “that is not owned by the Government or held by a person on behalf of, or for the benefit of, the Government”. An act of piracy “committed by a warship,
government ship or government aircraft whose crew has mutinied and taken control of the ship or aircraft is assimilated to piracy committed by a private ship or aircraft”. 63

(vii) Place of commission of piracy

To constitute piracy in MSA, an act that meets the preceding conditions must be directed in the ‘in a place outside the jurisdiction of any State’. The MSA does not expressly include the exclusive economic zone (EEZ) as a place of the commission of piracy and an act in the definition of piracy committed in the EEZ may not amount to piracy. This is a gap which an accused may utilise and it is not to be assumed the MSA includes the EEZ as the place of commission of piracy. For this writer, one cannot read what is not written in the MSA. If the intention of the drafters is to include the EEZ as a place of the commission of piracy, then, MSA should urgently be amend to reflect EEZ. For example, UNCLOS includes EEZ as the place of commission of piracy, 64 therefore, an act that meets the preceding condition which occurs in the EEZ should also amounts to piracy in the Kenyan law.

The MSA expressly declares acts that take place in the territorial sea does not amount to piracy, but armed robbery against ships, which armed robbery against ships means ‘any unlawful act of violence or detention or any act of depredation, or threat thereof, other than an act of piracy, directed against persons or property on board such a ship, within territorial waters or waters under Kenya’s jurisdiction’. 65 The provision does not permit every State to repress the offender even when the attack involves murder or robbery. In order to enhance the effectiveness of maritime security, the national framework should allow State Party to arrest any ship that threatens maritime security. For example, the 1995 Council of European Agreement on Illicit Traffic by Sea, Implementing Article 17 of the UN Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, allows all State Party to board, search and arrest without the prior consent of the flag State or coastal State.

(viii) Piracy as defined in paragraph (b) of MSA

The MSA provide that piracy includes ‘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’. 66

63 MSA, s 369(2).
64 art. 58(2) UNCLOS. The United Nations also confirm so, see UN Doc. A/63/63, Oceans and the Law of the Sea, Report of the Secretary-General, Mar. 10, 2008 para 57.
65 MSA, s 369(1).
66 Ibid.
The term *voluntary participation* is a decision to carry out an act of piracy and ‘knowledge’ is the awareness or explicit information that a ship or aircraft is a pirate ship or aircraft. For example, in *Republic vs. Houssein Mohammed Osman and Ten Others* the accused attempted to unlawfully board a vessel but were deterred by the firing of flares by the crew which eventually caused them to retreat. The court held ‘they were not only in dominant control of the said vessels but had also full knowledge of the fact that they were “pirate ships”’.67 That means a person who joins a ship to the place of the commission for piracy, with awareness and without being forced, knowing that the ship is intended to be used to commit any of those acts in the definition of piracy is a pirate. The term *pirate ship* means ‘a ship or aircraft under the dominant control of persons who […] intend to use such ship or aircraft for piracy; or […] have used such ship or aircraft for piracy, so long as it remains under the control of those persons’.68 However, a ship without a flag is not a pirate ship,69 and does not lose its nationality for committing piracy.70 A person who unlawfully takes over a ship or exercises command over crew or passenger is considered to be in dominant control and the ship automatically becomes a pirate ship as soon as the ship enters the place of commission of piracy.

(ix) Piracy as defined in paragraph (c) of MSA

In the MSA, the definition of piracy includes ‘any act of inciting or intentionally facilitating an act described in paragraph (a) or (b).’71 The aforementioned provision does not show when an act constitutes those offences, however stirring up feelings in others to commit an act described in those paragraphs, especially by making a person angry or motivated to commit those acts amounts to inciting. Similarly, conduct that makes an act described in those paragraphs easier to commit amounts to facilitating. Most importantly, the MSA does not define the area where the preliminary offences will occur to amount to piracy, whether inciting or facilitating from land or from the territorial sea amounts to piracy. This is unlike those offences in paragraph (a) that must be committed in a place outside the jurisdiction of any State.

Most contemporary scholars contend that there is no geographical limitation on where the preliminary offences may be committed.72 From time immemorial history teaches that piracy

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67 (2011) SLR 345.
68 MSA, s 369(1).
69 art. 41 ILC Commentary.
70 arts. 104 UNCLOS and 42 ILC Commentary.
71 MSA, s 369(1).
is, and always has been, a crime that must not be committed anywhere other than the high seas or in a place outside the jurisdiction of any State. Therefore, inciting or facilitating the act described in the definition of piracy is not piracy, except committed in the place of commission of piracy. However, States including Kenya should criminalise those inchoate offences, as piracy cannot be repressed if those acts are not criminalised. Moreover, the United Nations have called upon States to ‘investigate and prosecute not only suspects captured at sea, but also anyone who incites or intentionally facilitates piracy operations, including key figures of criminal networks involved in piracy who illicitly plan, organize, facilitate, or finance and profit from such attacks’. The United Nations further urge States to cooperate in the repression of piracy consistent with applicable international law. Most importantly, MSA does not provide for cooperation, coordination and collaboration among relevant national departments involve in the fight against piracy as well as cooperation among States as required in Article 100 UNCLOS, which are key measures to counteract maritime security threats.

(x) Penalty for piracy in the MSA

In the MSA, a person who commits an act of piracy “shall be liable, upon conviction, to imprisonment for life”. The word shall does not entail that courts must impose life imprisonment to convict. The word does not eliminate the court’s discretion in imposing any year of sentence in respect of convicted pirate. In Republic vs Abdi Ali and Ten Others, the prosecution had asked for enhancement of sentence on the grounds that section 371(a) of the MSA provides that, “[a]ny person who commits any act of piracy [...] shall be liable upon conviction to imprisonment for life”. In reply, the court held that the term:

shall be liable’ does not mean that its mandatory to Sentence to life imprisonment all those found guilty of the offence of piracy [...] the Sentence of twenty (20) years imprisonment is

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73 art. 39 ILC Commentary.
74 Harvard Research at 822.
77 Section 371 Kenyan MSA.
78 For convicted pirates serving jail terms ranging between 7 and 20 years, see Paul Musili Wambua, ‘The jurisdictional challenges to the prosecution of piracy cases in Kenya: mixed fortunes for a perfect model in the global war against piracy’ 2012 11 World Maritime University Journal 95 101.
hereby altered and or reduced to six (6) years. The upshot is that the appellants will serve six years imprisonment from the time of Conviction.80

The provision allows the court to use its discretion to impose a penalty in as much the court does not exceed the maximum penalties. It may be argued the discretion poses a threat to maritime security as a court may impose three years or less to pirates as seen above decision.

4. Risk management

(i) Enhancing and implementing the effectiveness of piracy legal framework

To enhance the effectiveness of piracy legal framework, the national framework should allow States to arrest ships that threaten maritime security. For example, the 2003 Agreement concerning Cooperation in Suppressing Illicit Maritime and Air Trafficking in Narcotic Drugs and Psychotropic Substances in the Caribbean Area, allows a State Party to board, search and arrest without the prior consent of the flag State when such an offence is committed. Secondly, investigate and prosecute not only suspects captured at sea, but anyone who incites or intentionally facilitates piracy operations, including key figures of criminal networks involved in piracy. Strengthening the implementation of piracy legal framework remains a challenge for many States. In Kenya, the challenge includes insufficient resources and capacity and lack of technical and financial assistance to adopt the measures needed to effectively implement the framework. The level of implementation reflects the level of political commitment.81 However, flag States have a major role in the implementation of maritime security measures. States should avoid registering vessels if they cannot ensure their vessels compliance to international maritime security laws.82

(ii) Strengthening capacity building and improving cooperation measures against piracy

In Kenya and most States in the continent there are already initiatives in place to strengthen capacity building but there is a need to assist developing coastal nations to take measures against piracy. Given the costs involved, the specialised knowledge needed expertise, as well as the equipment and technology required.83 The lack of expertise may be addressed through

80 Ibid.
82 This is the implication of art. 94 UNCLOS. UN Doc. A/RES/62/215 para 78; The UN has also noted that the process of vessel registration is a key component in the implementation, UN Doc. A/63/63, Oceans and the Law of the Sea, Report of the Secretary-General, Mar. 10, 2008 paras 122-123.
training or other capacity-building programmes similar to the training initiated by the United States Navy and Coast Guard. The majority of African navies could benefit from such training.\textsuperscript{84} There is also a need for specialised equipment to monitor tankers, including high-speed boats to identify, apprehend and prosecute ships suspected of contravening maritime security laws.\textsuperscript{85} An integrated approach remains an important means to strengthen State capacity. Joint military patrols or enforcement activities at sub-regional or regional levels produce more efficient measures against piracy and eliminate more than one maritime security threats, and at a reduced cost. In addition, improved coordination and cooperation at all levels is a key role in addressing piracy. At the State level, enhancing coordination among relevant government departments remains one of the most effective means to facilitate measures against piracy. Cooperation among law enforcement agencies and defence forces involved in eradicating piracy improves the efficacy of the enforcement thereof. A concerted effort is required to reinforce cooperation, coordination and collaboration among States at all levels and to ensure linkages among relevant agencies and government departments at national, regional and global levels is a major solution to piracy and other threats to maritime security.\textsuperscript{86}

(iii) Impact of eradicating piracy

Measures against piracy significantly affect many, particularly those involved in maritime-related industries, especially from economy to the environment. The measures implemented to address piracy hold both benefits and costs for stakeholders that include the maritime industry and consumers. The direct costs include investment in technology, new infrastructure, equipment, additional staffing and training required to address piracy. The indirect costs include maritime transport delays and disruptions in the supply chain following the increased transaction and transport costs.\textsuperscript{87} The aforementioned measures also have direct and indirect advantages that include increased efficiency in shipping and ports that encourage insurance industries to limit premium increase.\textsuperscript{88} Failure to address piracy has broad economic and

\textsuperscript{86} UN Doc. A/63/63, Oceans and the Law of the Sea Report of the Secretary-General, Mar. 10, 2008 para 146.
environmental consequences, such as crews being held hostage for ransom, being assaulted, injured, killed and in many cases disappearing. The price of inaction against piracy is significant because a ‘well-co-ordinated [piratical] attack could result in the shutting down of the entire maritime transport system’. 89

5. Conclusion

The study identify the strengths and weaknesses of those provisions in order for Kenya to make the most of the experience. For example, as seen earlier the definition of crew covers everyone that is not a passenger and the term passenger is anyone on board other than crew, which both definitions covers everyone found in any ship. This work defined the elements of piracy and demonstrates conduct that amount to illegal acts of violence, detention and depredation. It further clarified the ambiguity of private ends as:

(a) Act of violence, detention or depredation committed for gain amounts to piracy;
(b) An act prompted by feelings of hatred or revenge is piracy;
(c) An act committed by an insurgent is piracy, except the act is politically motivated;
(d) Act committed with a purely political object is not regarded as piracy;
(e) An act committed by a revolutionary organization not recognized as belligerent by the offended State amounts to piracy only to the offended State;
(f) An act committed in asserting a claim of right is not piracy, as it does not constitute a menace to the international maritime commerce;
(g) An act committed under the authority of a State is not piracy.

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