MONEY LAUNDERING AND PIRACY: THE LEGAL NEXUS

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DECLARATION

I, Constance V. W. Gikonyo, declare that this thesis is my own unaided work. It is submitted in fulfilment of the requirements of the degree of Doctor of Philosophy (PhD) in the Faculty of Commerce, Law and Management at the University of the Witwatersrand, Johannesburg. It has not been submitted before for any degree or examination in this or any other university.

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ABSTRACT

Money laundering is the process by which 'dirty' money is transmitted through a financial system to 'clean' and legitimise it. The intention is to conceal the proceeds of crime from any asset forfeiture laws. The result is negative effects including: apparently inexplicable changes in money supply and demand; increased prudential risks to the safety and soundness of the banking sector; contaminating effects on legal financial transactions, and increased volatility of international capital flows and exchange rates.

Maritime piracy is also a major crime. It is defined as any illegal act(s) of violence, detention or depredation, committed for private ends on the high seas against another ship or aircraft, and likewise has unfavourable effects. These include posing a threat to the shipping industry, negative impacts on both international trade and global security. Since the end of the Golden Age of piracy, in the eighteenth century, the crime had not attracted worldwide scrutiny. However, attention has been drawn back to it due to increased piracy incidents worldwide. Furthermore it is now considered to be contributing to money laundering

This study considers how to tackle piracy, specifically piracy for ransoms, from an anti-money laundering perspective. A review of how the current piracy laws have hindered holding pirates accountable, necessitates and leads to consideration of an alternative approach. Hence, by focusing on the funds that are generated through the payment of ransoms, a theoretical link between piracy and money laundering is established. This further justifies the utilisation of anti-money laundering laws to confiscate piracy benefits. This removes incentives for piracy, thus indirectly dissuading pirates from engaging in the crime. To address the issue practically, it is examined if Kenya has an adequate and effective anti-money laundering regime to facilitate monitoring, reporting, investigation and prosecution of those implicated of dealing in proceeds of Somalian piracy. Ultimately, the research offers a workable anti-money laundering mechanism that can be implemented to deal with piracy for ransoms. In addition to pointing out weakness and possible solutions in the Kenyan anti-money laundering regime in general.

In memory of

Richard Macharia & Veronica Nyakonyu

My beloved grandparents; what you taught others and I holds strong.

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'But I do not count my life of any value to myself, if only I may finish my course and the ministry that I received from the Lord Jesus, to testify to the good news of God's grace.' (Acts 20:24).

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LIST OF ABBREVIATIONS

AG - Attorney General

AMLAB - Anti-Money Laundering Advisory Board

CDD - Customer Due Diligence

DNFBPs - Designated Non-Financial Businesses and Professionals

DPP - Director of Public Prosecutions

ECOLEF - Economic and Legal Effectiveness of Anti-Money Laundering and Combating Terrorist Financing Policy (JLS/2009/ISEC/CFP/AG/)

EEZ - Exclusive Economic Zone

ESAAMLG - Eastern and Southern Africa Anti Money Laundering Group

EUROPOL – European Police Office

FATF - Financial Action Task Force on Money Laundering

FGS - Federal Government of Somalia

FICA - Financial Intelligence Centre Act, South Africa

FIU – Financial Intelligence Unit

FSD – Financial Sector Deepening

GA – General Assembly

HMRC - Her Majesty's Revenue and Customs

HVD - High Value Dealers

ICC - International Chamber of Commerce

ICC - International Criminal Court

ILC - International Law Commission

IMB - International Maritime Bureau

IMF – International Monetary Fund

ITLOS - International Tribunal for the Law of the Sea

IRTC – Internationally Recommended Transit Corridor

IVTS - Informal Value Transfer Systems

KYC - Know Your Customer

MLA - Mutual Legal Assistance

NCA - National Crime Agency

NDPP - National Director of Public Prosecutions

PEP - Politically Exposed Persons

PFR – Piracy for Ransoms

POCAMLA - Proceeds of Crime and Anti-Money Laundering Act

POCAMLR - Proceeds of Crime and Anti-Money Laundering Regulations

RAIF - Recovered Assets Incentivisation Fund

ReCAPP - Regional Cooperation Agreement on Combating Piracy and Armed Robbery against Ships in Asia

SMEG - Somalia and Eritrea Monitoring Group

SOCA – Serious Organised Crime Agency

STR - Suspicious Transaction Reporting

SUA - Convention for Suppression of Unlawful Acts against the Safety of Maritime Navigation

TFG – Transnational Federal Government of Somalia

UK – United Kingdom

UN – United Nations

UNCLOS - United Nations Convention on the Law of the Sea

UNCLOS I – First United Nations Conference on the Law of the Sea

UNCLOS II – Second United Nations Conference on the Law of the Sea

UNCLOS III – Third United Nations Conference on the Law of the Sea

UNDP - United Nations Development Programme

UNEP – United Nations Environmental Programme

UNHCR – United Nations High Commissioner for Refugees

UNODC - United Nations Office on Drugs and Crime

UNSC – United Nations Security Council

USC – United States Code

1 MONEY LAUNDERING AND PIRACY

1.1 Introduction and background to the study

The term 'money laundering' is said to have originated as a result of the mafia activities in the 1970s in the United States of America. To disguise their ill-gotten wealth the mafia invested in 'launderettes' through which they could mix their illegitimate with the legitimate earnings from; drugs, prostitution and gambling.[1] This, 'cleansing' was considered a process of laundering.

Money laundering has been marked by dynamism in its practice and manifestation. Equally the definition of the term has evolved over time and has been defined differently in various conventions,[2] by organisations[3] and by various authors.[4] Nonetheless, generally it is acknowledged that, money laundering is the disguising or concealing of the illegal origin(s) of the proceeds of crime or the illegal application of funds.[5]

The process of disguising or concealing the illegal origin(s) of the funds is undertaken in three traceable stages namely placement, layering and integration.[6] Research has shown that there are various sources of funds used in money laundering such as drug trafficking, human trafficking, armed robbery, corruption, real estate, currency speculation, commercial crime and fraud and

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[1] Unger 'Introduction' in Unger & Van der Linde (eds) *Research Handbook on Money Laundering* (2013) at 3. The Eurasian Group on combating money laundering and financing of terrorism *EAG FAQ's* available at *http://www.eurasiangroup.org/guestbook.php* accessed 28/2/13. In certain instances the mafia actually opened launderettes or used those they already owned and through these launderettes the funds from their illicit activities were mixed with the revenues generated from the launderettes so as to 'cleanse' the illicit funds.

[2] See for example the United Nations Convention against Transnational Organised Crime (Palermo Convention) 15 November 2001 2225 *UNTS* 209; The United Nations Convention on the Suppression of Funding of Terrorism 9 December 1999 2178 *UNTS* 197; Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds From Crime and on the Financing of Terrorism 16 May 2005 *ETS* No 198 May 2005.

[3] See for example Financial Action Task Force on Money Laundering (FATF), International Monetary Fund (IMF) and World Bank. See also Ferwerda 'Definitions of money laundering in practice' in Unger *et al The Economic and Legal Effectiveness of the European Union's Anti-Money Laundering Policy* (2014) at 87-96.

[4] Unger & Siegel *et al* Report for the Ministry of Finance*The Amount and Effects of Money Laundering* (2006) at 29.

[5] See the UN Convention against Transnational Organised Crime where a definition is found in article 6(1)(a): '(i)The conversion or transfer of property, knowing that such property is the proceeds of crime, for the purpose of concealing or disguising the illicit origin of the property or of helping any person who is involved in the commission of the predicate offence to evade the legal consequences of his or her action.

(ii)The concealment or disguise of the true nature, source, location, disposition, movement or ownership of or rights with respect to property, knowing that such property is the proceeds of crime.' See also GA Resolution A/RES/55/25 10 November 2000 that led to the adoption of the UN Convention against Transnational Organised Crime.

[6] i)The placement stage, where the illegitimately acquired funds or assets are placed in the financial system e.g. in a bank. ii) The layering stage where numerous transactions are carried out to move the funds from various banks so as to hide the link between the funds and the illicit transactions/sources. iii) The integration stage where the funds are again integrated into the legitimate economy and thus placed at the disposal of the criminal or prospective criminal. See further discussion in chapter 3 section 3.2.3.

evasion of tax and duty.[7] The fight against money laundering has been changing to rein in the devising of intricate schemes and, more importantly to mitigate its negative and global effects.

The economic effects of money laundering include undermining of the legitimate private sector; undermining the integrity of financial markets; loss of control of economic policy; economic distortion and instability; loss of revenue; risks to privatization efforts; reputational risks and social costs.[8] Statistics indicate that money laundering ranges, between US$590 billion and US$1.5 trillion globally.[9]

Money laundering as a crime started attracting great attention in the 1980s,[10] but primarily from the context of drug trafficking as it became clear to authorities in the Western world that huge profits were being generated from this activity. The illicit funds so generated were then incorporated into the legitimate financial system. This was done through simplistic methods; such as smuggling cash out of a country and depositing it in a bank account in a tax haven. It was also done by simply depositing the money in domestic banks in the United States of America.[11] Thus, it became necessary to enact legislation aimed at depriving and preventing the traffickers from utilising their ill-gotten wealth.

With the passage of time, it has become apparent that the predicate crimes[12] of money laundering are constantly evolving. Whereas initially it was mainly through the acts of drug trafficking,

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[7] See Moshi *Fighting Money Laundering the Challenges in Africa* (2007) ISS Paper 152 at 1-12. See also Akopyan 'Money laundering' (2010) 47 *ACLR* at 822; Purkey 'The art of money laundering' (2010) 22 *FJIL* 111.

[8] Yallwe & Buscemi *Money Laundering and Financial Development* (2011) MPRA Paper No 32458 at 3-4 available at *http://mpra.ub.uni-muenchen.de/32458/* accessed 1/3/13. See also Ferwerda 'The effects of money laundering' in Unger & Van der Linde (eds) *Research Handbook on Money Laundering* (2013) at 35-46; Unger & Siegel *et al* (n 4) at 82; Bartlett *The Negative Effects of Money Laundering on Economic Development* (2002) Asian Development Bank, Project No 5967.

[9] This figure is arrived at using 1998 statistics. FATF *Money Laundering FAQ* available at *http://www.fatf-gafi.org/faq/moneylaundering/#d.en.11223* accessed 15/2/16. See also UNODC Report *Estimating Illicit Financial Flows Resulting from Drug Trafficking and Other Transnational Organised Crime* (2011) at 15-19 available at *https://www.unodc.org/documents/data-and-analysis/Studies/Illicit_financial_flows_2011_web.pdf* accessed *15/2/16*. Nonetheless, it is acknowledged that the figure should be treated with caution since it is impossible to come up with an accurate figure of the amount laundered each year. This is due to the illegal and hidden nature of the transactions. See Reuter 'Are estimates of the volume of money laundering either feasible or useful' in Unger & Van der Linde (eds) *Research Handbook on Money Laundering* (2013) at 224-230.

[10] Ryder Money Laundering – An Endless Cycle? (2012) at 2; Nguyen 'The international anti-money laundering regime and its adoption by Vietnam' (2014) 4(1) *AJIL* 197 at 200.

[11] Zill & Bergman 'The black peso money laundering system' *Public Broadcasting Service Frontline* [date unknown] available at *http://www.pbs.org/wgbh/pages/frontline/shows/drugs/special/blackpeso.html* accessed 28/5/13; Grosse 'Mexico: The black market in foreign exchange and its relationship with narcotics money laundering' (1999) 3(1) *JMLC* 67.

[12] An offence as a result of which proceeds are acquired that may become the subject of laundering.

gambling and human trafficking; today there are new activities falling into the category of criminal activities that give rise to illicit funds that need to be laundered.[13] Examples include: the illegal sale of weapons, fraud, corruption, child pornography and terrorism.

As indicated above, there are various activities that facilitate the acquiring of funds to be laundered with piracy, specifically piracy for ransoms, being one such activity.[14] Piracy is defined as any illegal act(s) of violence, detention or depredation, committed for private ends on the high seas against another ship or aircraft.[15] In the recent past, there has been an increase in piracy incidences around the world[16] and especially Somalia along the Gulf of Aden during the period 2008-2011.[17]

Broadly, political instability and statelessness since the fall of Siad Barre's regime in 1991 is the antecedent of Somalia piracy. In turn, lack of political stability and failure to uphold the rule of law[18] led to illegal fishing and dumping of toxic waste triggering Somali fishermen to protect

[13] Bell 'Abolishing the concept of "predicate offence"' (2002) 6(2) *JMLC* 137 at 137. Unger & Hertog 'Water always finds its way: Identifying new forms of money laundering' (2012) *CLSC* 287.

[14] UNODC Report *Estimating Illicit Financial Flows Resulting From Drug Trafficking and Other Transnational Organised Crime* (2011) (n 9) at 47.

[15] United Nations Convention on Law of the Sea (UNCLOS) article 101; 1833 *UNTS* 397 10 December 1982.

[16] Hallwood & Miceli *Maritime Piracy and its Control: An Economic Analysis* (2015) at 14. Worldwide Incidents actual and attempted in 2015 totalled 246. Source: ICC International Maritime Bureau *Piracy and Armed Robbery Against Ships- Report for the period 1 January to 31 December 2015* (2016) at 5 available at *http://www.hellenicshippingnews.com/wp-content/uploads/2016/02/2015-Annual-IMB-Piracy-Report-ABRIDGED.pdf* accessed 16/2/16. See also Ghoshal & Pierce 'The changing nature of contemporary maritime piracy' (2014) 54(4) *BJC* 1.

[17] World Bank *Pirate Trails Tracking the Illicit Financial Flows From Pirate Activities off the Horn of Africa* (2013) at 41-42 available at *https://openknowledge.worldbank.org/handle/10986/16196* accessed 31/3/14. Despite the decline in piracy occasioned by the naval patrols in the Gulf of Aden, the International Maritime Bureau (IMB) has given words of caution that the Somalian pirates still have the capability and capacity to carry out attacks. See ICC & IMB report (n 16) at 19. The same message has been reiterated by: Oceans Beyond Piracy *Will Illegal Fishing Ignite a Preventable Resurgence of Somalia Piracy?* (2015) OBP Issue Paper available at *http://oceansbeyondpiracy.org/sites/default/files/attachments/OBP%20Issue%20Paper%20-%20Fishing%20Boat%20Hijackings%20off%20Somalia.pd*f accessed 17/9/15. UNSC *Report of the Secretary-General on the Situation With Respect to Piracy and Armed Robbery at Sea off the Coast of Somalia Pursuant to Resolution 2184(2014)* (2015) para 4-7 & 57 available at *http://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/s_2015_776.pdf* accessed 16/2/16; UN Doc S/2015/776 12 October 2015. Maresca 'Fighting piracy along the money trails' in Tardy (ed) *Fighting Piracy off the Coast of Somalia: Lessons Learned From the Contact Group* (2014) at 57 available at *http://www.iss.europa.eu/uploads/media/Report_20_Piracy_off_the_coast_of_Somalia.pdf* accessed 13/9/15.

[18] See Bueger 'Learning from piracy: Future challenges of maritime security governance' (2015) 1(1) *GA* 33. See also Silva 'Somalia: State failure, piracy and the challenge to international law' (2010) 50 *VJIL* 553 at 554-565; Guilfoyle 'Somali pirates as agents of change in international law–making and organisation' (2012) 1(3) *CJICL* 81 at 82-84; Diaz & Dubner 'On the evolution of the law of international sea piracy: How property trumped human rights, the environment and sovereign rights of states in the creation and enforcement of jurisdiction' (2009) 13 *BLR* 175 at 177-179; Sugiki 'International legal cooperation against Somali piracy: Piracy in a failed state: How state building can stabilize the situation off the Somali coast' (2012) 5 *JEAIL* 61.

themselves[19] especially from large trawlers from other countries. This then grew with time to become a lucrative source of income, in other words piracy for ransoms.

After various initiatives to negotiate peace, the Transnational Federal Government (TFG) emerged as the 'legitimate central government of Somalia.'[20] However, there is still no effective central government despite the formation of the TFG and later the Federal Government of Somalia (FGS). This is because neither the TFG nor the FGS have exercised control over most regions of Somalia[21]which consequently translates into Somalia lacking the rule of law and sporadic fighting still continuing in parts of the country. The lack of a stable government translates to issues of nonexistence and non-deployment or deployment of insufficient coast guards to police the coastal areas hence, the pirates are free to carry out their activities.[22]

Just as with any illegal act, piracy has a number of negative effects. These include 'an increase in insurance costs, costs for the payment of ransoms, costs of hiring additional personnel and security teams, decrease in regional trade, increased end cost of goods and reduced foreign revenue.'[23]

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[19] Anderson 'It's a pirate's life for some: The development of an illegal industry in response to an unjust global power dynamic' (2010) 17 *IJGLS* 319; Bueger (n 18) at 34-36; Hansen 'Debunking the piracy myth how illegal fishing really interacts with piracy in East Africa' (2011) 156(6) *RUSI Journal* 26. See also Westberg 'Bloodshed and breaking wave: The first outbreak of Somali piracy' (2015) 43(2) *SAJMS* 1. The author offers a rethink of the origins of Somali piracy for ransom and attributes it to the Indian Ocean tsunami on 26 December 2004 and the establishment of the South Mudug piracy model in 2005.

[20] Sugiki (n 18) at 62. See also Kasaija 'The UN-led Djibouti peace process for Somalia 2008-2009: Results and problems' (2010) 28(3) *JCAS* 261; Barnes & Hassan 'The rise and fall of Mogadishu's Islamic courts' (2007) 1(2) *JEAS* 151; Hammond 'Somalia rising: Things are starting to change for the world's longest failed state' (2013) 7(1) *JEAS* 183.

[21] Sugiki (n 18) at 68-75. UNSC *Report of the Secretary-General on Somalia Pursuant to Resolution 2232(2015)* (2016) para 2-17 available at *http://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/s_2016_27.pdf* accessed 16/2/16; UN Doc S/2015/27 8 January 2016. The Federal Government of Somalia was established in September 2012, following the end of the interim mandate of the Transitional Federal Government. See Bryden *Somalia Redux? Assessing the New Somalia Federal Government* (2013) at 3 available at *http://csis.org/files/publication/130819_Bryden_SomaliaRedux_WEB.pdf* accessed 8/9/15.

[22] UNSC Report of the Secretary-General on Somalia (2016) (n 21) para 36.

[23] Vespe *et al* 'The declining impact of piracy on maritime transport in the Indian ocean: Statistical analysis of 5-year vessel tracking data' (2015) 59 *MP* 9 at 9; Bowden *et al The Economic Cost of Maritime Piracy* (2010) Working Paper One Earth Future Foundation at 6 available at *http://oceansbeyondpiracy.org/sites/default/files/documents_old/The_Economic_Cost_of_Piracy_Full_Report.pdf* accessed 3/3/13. See also Bowden & Basnet *The Economic Cost of Somali Piracy 2011* (2012) Working Paper One Earth Future Foundation available at *http://oceansbeyondpiracy.org/sites/default/files/economic_cost_of_piracy_2011.pdf* accessed 28/2/13. With specific regards to Somalia see Bellof 'How piracy is affecting economic development in Puntland, Somalia' (2013) 6(1) *JSS* 47; Odeke 'Somali piracy – Effects on ocean borne commerce and regional security and challenges to international law and order' (2011) 25 *ANZMLJ* 134.

Research has shown that one of the main aims of piracy especially along the coast of Somalia is economic gain.[24] The pirates' interest is with the ransoms rather than acquisition of objects that may be on board the vessels.[25] This type of piracy is referred to as piracy for ransoms (PFR). Further, it is acknowledged that the negotiated ransom is divided up amongst various parties involved in a piracy incident.

The benefits of piracy flow to a network of private actors at the local level. The UN reported in 2008[26] that, there are differing accounts on exactly how the distribution of ransoms is done but; generally distribution of the ransoms paid is along the lines of thirty percent maritime militia, ten percent ground militia, ten percent local community, twenty or thirty percent financier/sponsor.[27] Maritime militia refers to the pirates who undertake the actual hijacking of the vessel. This group shares thirty percent of the total ransom which is distributed equally amongst them with the first pirate to board the vessel receiving a double share or a vehicle in addition. Ten percent is divided amongst the ground militia, that is, those who keep watch on shore. The local community which shares another ten percent of the ransom includes elders, local officials who provide hospitality for guests and associates of the pirates. The financiers and sponsors who are usually prominent business and political figures with assets in the fishing industry provide the investment capital as well as resources and equipment needed for a pirate venture.[28]

Although there is no consensus, it is believed that of the total amounts of ransoms paid out, forty to sixty percent[29] does not leave Somalia. The question then is what happens to the remaining sixty

[24] Gjelsvik & Bjorgo 'Ex-pirates in Somalia: Processes of engagement, disengagement, and reintegration' (2012) 13(2) *JSSCCP* 94 at 99-101; Roach 'Agora: Piracy prosecution: Countering piracy off Somalia: International law and international institutions' (2010) 104 *AJIL* 397; UNSC *Report of the Monitoring Group on Somalia Pursuant to Security Council Resolution 1811 (2008)* (2008) available at *http://www.refworld.org/docid/494900240.html* accessed 30/4/13; UN Doc S/2008/769 10 December 2008. FATF *Organised Maritime Piracy and Related Kidnapping for Ransom* (2011) available at *http://www.fatfgafi.org/document/51/0,3746,en_32250379_32237202_48426547_1_1_1_1,00.html* accessed 3/3/13*;* Geoplicity *The Economics of Piracy: Pirate Ransoms and Livelihoods off the Coast of Somalia* (2011) at 13 available at *http://www.geopolicity.com/upload/content/pub_1305229189_regular.pdf* accessed 9/4/13.

[25] ICC & IMB report (n 16) at 17. As at 31 December 2015 Somalian pirates continued to hold 29 crew members for ransom. See also Dutton & Bellish 'Refusing to negotiate: Analysing the legality and practicality of a piracy ransom ban' (2014) 47(2) *CILJ* 299 at 305-307.

[26] UN Security Council *Report of the Monitoring Group on Somalia Pursuant to Security Council Resolution 1811 (2008)* (n 24) at 31.

[27] Ibid. See also FATF Report (n 24) at 18; Geopolicty Report (n 24) at 6; Dubner & Penn 'On selecting a judicial system(s) to try sea pirates–An interesting/necessary exercise but is it enough to deter the attacks/hijacking?' (2011) 42 *JMLC* 569 at 573-574.

[28] Geoplicity Report (n 24) at 8.

[29] FATF Report (n 24) at 18.

to forty percent of the ransoms that are not utilised within Somalia? It has been said that some of these proceeds find their way across the border into neighbouring countries such as Kenya where they are used to invest in real estate or other ventures.[30]

Hence, studies acknowledge the financial aspect of piracy along the Somali coast in terms of paid ransoms.[31] A study by One Earth Future Foundation estimates that US$31.75 million in ransoms were paid to Somalian pirates in 2012.[32] The FATF Report issued in 2011, found that piracy had become a financially lucrative criminal activity.[33] Its financial impact had grown as the number of piracy for ransom-related incidents spread globally. Further, it pointed out the escalation in ransom demands and payments for the release of vessels and hostages, created a definite link to money flows related to both those who are financing piracy and the proceeds of this criminal activity.[34]

Moreover, according to the report, a nexus has been established between piracy off the coast of Somalia and certain jurisdictions as sites for the receipt, transit, and possible depositing of ransom payments.[35] However, despite establishment of this connection the FATF Report identified a challenge in that 'the global response to and dialogue on piracy for ransom remains focused on maritime and naval operations rather than on the financial flows related to piracy.'[36]

Later studies conducted by World Bank confirmed the findings of the FATF report referred to above.[37] The World Bank also proceeded to undertake an in-depth analysis of the use, transfer and effect(s) of the proceeds of piracy in Somalia and other jurisdictions. However, they did not focus on how the problem may be tackled by following these financial flows.

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[30] Ibid at 19. See also Dubner & Penn (n 27) at 575; World Bank *Illicit Financial Flows Report* (n 17) at 71-75; Ngigi 'CBK demands report on suspect cash deals' *Business Daily* 2 October 2012 available at *http://www.businessdailyafrica.com/CBK-demands-report-on-suspect-cash-deals/-/539552/1523346/-/vd62hu/-/index.html* accessed 1/5/13.

[31] Geoplicity Report (n 24) at 12; FATF Report (n 24) at 20-21; Bellish *The Economic Cost of Somali Piracy 2012* Working Paper One Earth Future Foundation (2013) at 10-12.

[32] Bellish (n 31) at 3. See also World Bank *Illicit Financial Flows Report* (n 17) at 41-42. The year 2012 is considered the height of the Somalian piracy problem.

[33] FATF Report (n 24) at 20-21. See also Elmi *et al* 'Piracy in the Horn of Africa waters: Definitions, history, and modern causes' (2015) 8(3) *AS* 147 at 156-158.

[34] Ibid. The UN Security Council reiterated this in its S/RES/2246(2015) 10 November 2015 at 3.

[35] FATF Report (n 24) at 21. World Bank *Illicit Financial Flows Report* (n 17) at 51-57.

[36] FATF Report (n 24) at 22.

[37] World Bank *The Pirates of Somalia Ending the Threat Rebuilding a Nation* (2013) available at *http://siteresources.worldbank.org/INTAFRICA/Resources/pirates-of-somalia-main-report-web.pdf* accessed 15/4/14. World Bank *Pirate Trails Tracking the Illicit Financial Flows From Pirate Activities off the Horn of Africa* (n 17).

Since the Somalian piracy problem is generated by land-based problems, principally lack of governance, most of the measures effected to deal with the problem or espoused by scholars concentrate on creating an effective government, prosecution of pirates and naval intervention.[38] However, Geopolicity[39] in its report on the economics of piracy in Somalia states 'a key focus of future research must be on (i) the payment and laundering of ransom payments (ii) asset tracing and (iii) where relevant, informal money transfer systems'.[40] This definitely calls for a change in how the Somalian piracy problem is considered and addressed.

In responding to the challenge of finding alternative ways other than naval operations to deal with Somalian piracy, some scholars have offered new perspectives. Percy & Shortland[41] argue that providing only a land-based solution to deal with piracy is misguided because 'piracy is not a conventional international security problem, but represents a blurring of the division between international security and domestic crime'.[42]

Their contention is that piracy should be understood and dealt with as an organised crime problem.[43] They do so by considering various aspects of this crime. These include the hierarchy of the perpetrators and the code of conduct employed by the actors; the existence of a stock market that allows outsiders to invest in piracy ventures; and the structure of how the ransoms are shared. In addition, ransom money is the primary motive of the pirates given that they do not kill hostages but use them as leverage for ransom-taking.

By considering Somalian piracy as an organised crime problem, Percy & Shortland argue that just as in the case of other types of organised crimes, stability on land does not necessarily translate to

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[38] See Bueger 'Drops in the bucket? A review of on-shore responses to Somali piracy' (2012) 11 *JMA* 15; Guilfoyle (n 18) at 90-103; See also Kraska & Wilson 'The pirates of the Gulf of Aden: Coalition is the strategy' (2009) 45 *SJIL* 243; Shortland & Varese 'The protector's choice an application of protection theory to Somali piracy' (2014) 54 *BJC* 741.

[39] Geopolicity is an international management consulting firm with an international reputation for excellence in the area of national economic growth, emerging markets, public sector management and services. They undertake 'macro analysis, such as regional trade studies or country economic diagnostic work, as well as micro level analysis including sector specific industry reports and market studies.' Source Geopolicity website available at *http://www.geopolicity.com/main/aboutus.html* accessed 8/10/15.

[40] Geoplicity Report (n 24) at 13. See also Huggins & Hartnett 'Somali piracy- Are we at the end game?' (2013) 46 *CWRJIL* 355 at 373-374 advocating that more long term and sustainable measures such as decreasing the recruiting pool, disbanding pirate groups and reducing/removing the financiers ability to fund piracy ventures are needed to address the piracy problem.

[41] Percy & Shortland 'The business of piracy in Somalia' (2013) *JSS* 1.

[42] Ibid at 2.

[43] Ibid. See further discussion in chapter three section 3.5.4.

an end in piracy, rather it could actually lead to an increase. Their research results 'contradict the common assertion that pirates thrive on domestic chaos;'[44] and 'suggest that pirates benefit from improvements in the business environment.'[45] They conclude that further research needs to be done on how to tackle piracy by viewing it as an organised crime problem. This can be done by examining how other organised crime groups have been dealt with.[46]

Credence to the observations of Percy & Shortland[47] is provided by the research and findings of Groot, Rablen & Shortland[48] They theoretically and empirically demonstrate that for crimes such as piracy, total disorder in a society is not the best operating environment. They conclude that for piracy to flourish some form of law and order is required whether formal or informal. In the case of Somalia this implies the establishment of the rule of law.

This research indicates that, first, the land-based solutions most commonly put forward on dealing with Somalian piracy, may not provide the ultimate solution to the problem. Establishing a stable government may not lead to cessation in piracy activities. Thus, if stability could lead to continuity in piracy, additional to naval solutions other land–based solutions need to be incorporated. This necessitates identifying other ways to deal with piracy in Somalia.

Secondly, the argument that piracy is not just an opportunistic crime but an organised crime problem is of importance.[49] The proposal therefore is that, some of the solutions that have been used to deal with other organised crimes be adapted to deal with piracy. One of the commonly used methods to deal with organised crime is anti-money laundering laws and policies. By tackling piracy from this angle, its financing and utilisation of the illegal proceeds may be curtailed. This will limit the flow of financing needed by the pirates to carry out and sustain their illegal activities. In addition, following the movement of ransoms - how and where the funds are transferred and

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[44] Percy & Shortland (n 41) at 11.
[45] Ibid. In support of these assertions see also Hastings & Philips 'Maritime piracy business networks and institutions in Africa' (2015) 114 (457) *AA* 555.
[46] Percy & Shortland (n 41) at 26.
[47] Percy & Shortland (n 41).
[48] Groot, Rablen & Shortland *Gov-aargh-nance: "Even criminals need law and order"* (2011) Economics of Security Working Paper 46. See also Shortland & Varese (n 38) and Hastings 'Geographies of state failure and sophistication in maritime piracy hijacking' (2009) 28(4) *PG* 213 both researches reiterates that some form of law and order enable the operation of piracy in Somalia.
[49] Percy & Shortland (n 41) at 1. See also Hastings & Philips (n 45).

used,[50] - will provide an alternative crime for trying the pirates. Consequently, the crime of money laundering becomes relevant and applicable.

Nance & Jakobi[51] are more direct in advocating the use of anti-money laundering tactics to aid in counter-piracy efforts. They argue that there are two main reasons why anti-money laundering tactics have not been used to assist in dealing with piracy.

> 'First, until very recently no "norm entrepreneur"[52] has attempted to make anti money laundering tactics a core tool; proposals for sea-based solutions are more common. Second, we still know very little about the organizational and financial aspects of maritime piracy'.[53]

The authors also discuss the challenges of cooperation in trying to use anti-money laundering as a tool to fight piracy. First, they point to the adaptive nature of money launderers as they seek evasion. This implies that even if parties were to cooperate in using anti-money laundering tactics, they would not know exactly which anti-money laundering regulations to use. This is due to the behavioural adaptation of the money launderers in the face of new threats to their activities such as legislation.

Second, effective counter piracy and anti-money laundering tactics need to acknowledge that trying to deal with piracy in one region may force the financiers to look for funding opportunities elsewhere. Thus, it is necessary to identify if the financing is extra-regional. This would facilitate formulation and implementation of anti-money laundering tactics that take this aspect into consideration. Third, for cooperation to be effective, the different and diverging interests need to be reconciled. This is with regard to the different domestic regulatory systems in the different countries and 'regional variations in the patterns of piracy and the interests of the relevant actors.'[54]

Fourth, states may be reluctant to cooperate because of the differing interests in pursuing money launderers. For example in a corruption-prone country, government officials may not be keen to deal with money laundering; indeed the states may themselves be aiding piracy. Fifth, 'one size

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[50] See consideration of this in chapter three section 3.4.

[51] Nance & Jakobi 'Laundering pirates? The potential role of anti-money laundering in countering maritime piracy' (2012) 10(4) *JICJ* 857. See also Shane & Magnuson 'Successful and unsuccessful pirate attacks worldwide: A situational analysis' (2016) 33(4) *JQ* 682 at 701; Liss & Sharman 'Global corporate crime fighters: Private transnational responses to piracy and money laundering' (2015) 22(4) *RIPE* 693, who also support the need for further research into the tools and techniques that pirates use to further their crime and convert their proceeds. These tools and techniques identified include money laundering and other anonymous underground actions.

[52] Ibid at 859 as quoted from Finnemore & Sikkink 'International norm dynamics and political change' (1998) 52(2) *International Organisation* 887 at 896-901.

[53] Nance & Jakobi (n 51) at 858.

[54] Ibid at 860.

fits all' approach raises resistance to regulatory cooperation. This is due to the various issues identified above and so far, if cooperation does occur, it takes place on an ad hoc basis.

Accordingly, if anti-money laundering tactics are to be considered as tools to fight piracy, Nance & Jakobi contend that it is not a readymade tool that can be applied easily to any new crime of concern to the international community.[55] Their further discussion on this point shows that, for anti-money laundering tactics to be effective, need for an in-depth understanding of the causes, effects and solutions of the piracy situation in Somalia is needed. For example, authors have underscored that the *modus operandi* of piracy varies from region to region. While politics is the motive in some regions, the primary motive in Somalia is mainly ransoms.[56] Thus in using anti-money laundering tactics as a tool against piracy, such factors need to be taken into consideration.[57]

Nance & Jakobi observe that 'controlling maritime piracy is in the broader international community's interests, not just the regions,'[58] that is the Gulf of Aden. An analysis of the likely benefits and challenges of using anti-money laundering tactics to deal with piracy is laid down. They point out that there have been few existing efforts to follow the trail of money in maritime piracy. They also consider how anti-money laundering tactics may be helpful in dealing with piracy and more particularly what role the FATF can play in countering piracy. The scholars conclude that there is need to have 'an expanding knowledge base regarding the causes, effects and solutions of piracy.'[59] This is because the 'responses may be based on core norms, but will likely need to be tailored to regional realities.'[60]

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[55] Ibid at 859.

[56] See Hastings 'Understanding maritime piracy syndicate operations' (2012) 21(4) *SS* 683 at 716; Parmar 'Somali piracy: A form of economic terrorism' (2012) 36(2) *SA* 290 at 297; Hodgkinson 'The incorporation of international law to define piracy crimes, national laws, and the definition of piracy' in Scharf *et al* (eds) *Prosecuting Maritime Piracy Domestic Solutions to International Crimes* (2015) at 33-34.

[57] See further consideration of this in chapter three sections 3.5.1 to 3.5.3.

[58] Nance & Jakobi (n 51) at 866. This has been reiterated by the United Nations Security Council in various resolutions for example S/RES/2246(2015) 10 November 2015 para 5.

[59] Nance & Jakobi (n 51) at 871.

[60] Ibid at 877. In support of this view see also Jeong *Diverse Piracy Patterns and Different Control Mechanisms* (2015) Paper presented at the ISA Global South Caucus Conference available at *http://web.isanet.org/Web/Conferences/GSCIS%20Singapore%202015/Archive/e6fad450-03e9-4946-9d3a-ee793d30de5b.pdf* accessed 11/6/16; Ghoshal 'Contemporary piracy research in criminology: A review essay with directions for future research' (2014) 38(3) *IJCACJ* 281 at 291. See also further consideration of this in chapter three sections 3.5.1 to 3.5.3 with specific regards to Somalian piracy for ransoms.

Dubner & Raturi[61] and Maresca[62] reiterate the position of Nance & Jakobi[63] that piracy may be dealt with by concentrating on the payment of ransoms, laundering of the ransom payments, tracking of assets and analysing the informal money transfer system. Moreover, with regards to Somalian piracy, a Kenyan scholar has specifically stated that Kenyan anti-money laundering legislation, is one of the preventative statutory provisions that can be used against Somailan pirates.[64] This is in terms of using the relevant national legislation to target taking away the illegal proceeds of piracy; the ransoms. This is in line with the urging of the United Nations Security Council that 'all states take appropriate actions under their existing domestic law to prevent the illicit financing of acts of piracy and the laundering of its proceeds'.[65] Similarly, the Financial Action Task Force (FATF) has advocated for the application of asset forfeiture laws as one of the possible ways to deal with piracy for ransoms.[66]

Ultimately, from the writings of the various scholars discussed above it is evident that piracy may be tackled from another angle, that of anti-money laundering. The downside to this so far, is that not much research has been undertaken as to how this can actually be done. Nonetheless, it is also acknowledged that the application of anti-money laundering tactics will have to be unique to a particular region and the type of piracy for it to be effective. Consequently, it is necessary to consider the utilisation of anti-money laundering tactics to deal with piracy.[67]

Further justification for using anti-money laundering tactics to tackle the piracy problem may be expanded by considering the definition of piracy. There appears to be consensus on the fact that the definition of piracy given under the United Nations Convention on the Law of the Sea

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[61] Dubner & Raturi 'The economics of international sea piracy–A case of history repeating itself' (2012) 20 *MSUJIL* 745.
[62] Maresca (n 17) at 61.
[63] Nance & Jakobi (n 51).
[64] Wambua 'Prosecution of maritime piracy cases in Kenya: Testing the SUA convention model on piracy prosecutions' (2014) S*pecial Edition no 1 AC* 76 at 83-84.
[65] S/RES/2246(2015) 10 November 2015 para 22. The resolution was specifically addressing the piracy situation in Somalia.
[66] FATF *Organised Maritime Piracy and Related Kidnapping for Ransom* (2011) (n 24) at 36.
[67] It is acknowledged that there have been debate on the link between piracy and maritime terrorism and there are similarities between the two. Nonetheless the factor of motivation helps to differentiate between the two; whereas maritime terrorism is undertaken for political purposes, piracy's motivating factor is economic gain. Nelson 'Maritime terrorism and piracy: Existing and potential threats' (2012) 3(1) *GSS* 15 at 16-18. See also Singh & Bedi *'War on Piracy': The Conflation of Somali piracy with Terrorism in Discourse, Tactic and Law* (2012) ISS Working paper 543; Hong & Ng 'The international legal instruments in addressing piracy and maritime terrorism: A critical Review' (2010) 27 *RTE* 51. The focus of this study is piracy and specifically piracy for ransom and hence there will not be any attempt to link piracy and maritime terrorism as it is beyond the scope of this thesis.

(UNCLOS) renders its application narrow.[68] It is argued that the definition provided by UNCLOS limits the commission of the acts of piracy to those taking place only on the high seas[69] and it involves acts committed by the crew of a private ship against another ship.[70]

This narrow definition of piracy has led to difficulties in the prosecution of pirates.[71] However, by considering alternatives to utilising piracy laws, it may be possible to bring to justice those involved. In the case of piracy for ransom, trying the pirates for the offences linked to the ransoms paid may be a way around the problem.[72] If it can be established that a pirate has been involved in the laundering of the ransom money, is tried for the offense and found guilty, it may be an indirect way of dealing with piracy.

In conclusion, the UN Security Council has recognised that piracy is a 'threat to international peace and security in the region.'[73] Further, it is considered that there is need to acknowledge that piracy leads to the payment of ransoms. The ransoms are probably being laundered and this poses a threat to the fight against money laundering. Scholars have concentrated on discussing how to combat piracy through naval operations and other ways. However, a gap does exist as regards the link

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[68] See further discussion in chapter 2 section 2.7.

[69] This is with the exception of Somalia where S/RES/1816 (2008) 2 June 2008 para 10 allows the international force patrolling the Gulf of Aden to enter the territorial waters of Somalia for the purpose of repressing acts of piracy. This resolution has been extended by other UNSC resolutions namely: S/RES/1851(2008) 16 December 2008; S/RES/1897(2009) 30 November 2009; S/RES/1950(2010) 23 November 2010; S/RES/2020(2011) 22 November 2011; S/RES/2077(2012) 21 November 2012; S/RES/2125(2013) 18 November 2013; S/RES/2184(2014) 12 November 2014 and; S/RES/2246(2015) 10 November 2015.

[70] See for example Dubner 'The definition of the crime of sea piracy revisited: Customary vs. treaty law and the jurisdictional implications thereof' (2011) 42 *JMLC* 71; Diaz & Dubner (n 18); Dubner & Fredrickson 'The legal issues regarding the prosecution of sea pirates (including human rights): A case of history repeating itself' (2012) 26 *TICLJ* 233; Gagin 'Current development: neglected waters: Territorial maritime piracy and developing states: Somalia, Nigeria, and Indonesia' (2010) 16 *NEJICL* 169; Isanga 'Countering persistent contemporary sea piracy: Expanding jurisdictional regimes' (2010) 59 *AULR* 1267; Sterio 'Fighting piracy in Somalia' (2010) 33(2) *FILJ* 372.

[71] Bento 'Towards an international law of piracy sui generis: How the dual nature of maritime piracy law enables piracy to flourish' (2011) 29 *BJIL* 399; Dutton 'Maritime piracy and the impunity gap: Insufficient national laws or a lack of political will?' (2012) 86 *TLR* 1111.

[72] Since 2005 to date only two individuals considered middle level in the piracy business have been arrested. There have been no prosecutions of higher or top level pirate leaders, financiers or facilitators. Scott 'Prosecuting pirates: Lessons learned and continuing challenges' (2014) at 14-19 available at *http://oceansbeyondpiracy.org/sites/default/files/attachments/ProsecutingPiratesReportDigital_2.pdf accessed 17/9/15*. Further despite the decline in piracy, it may lead to impunity for those who made the most profit from and bear the greatest responsibility for piracy; the pirate leaders, financiers, negotiators, facilitators, support networks and beneficiaries. UNSC *Report of the Monitoring Group on Somalia and Eritrea Pursuant to Security Council Resolution 2060(2012)* (2013) at 22 available at *http://www.un.org/ga/search/view_doc.asp?symbol=S/2013/413* accessed 19/9/15; UN Doc S/2013/413 12 July 2013.

[73] S/RES/1816(2008) 2 June 2008 at 2 last preambular paragraphs. This has been reiterated in S/RES/2246(2015) 10 November 2015 para 5. See also Varfolomeev *Piracy as a Threat to International Peace and Security* (2015) National Research University Higher School of Economics working paper BRP 14/IR/2015.

between piracy and money laundering that is, if and how the ransoms paid, are laundered. By investigating the link between pirate ransoms and money laundering, it may be possible to tackle piracy from a money laundering perspective. This is primarily because by application of anti-money laundering tactics will aim at taking away the benefit gained from the crime. Hence this may act as a disincentive for current and would be offenders.[74]

It is acknowledged that piracy for ransoms is occurring in Somalia and that there are many probable destinations for these funds.[75] However, this study aims to focus only on Kenya as one of the destinations for the Somalian piracy ransoms. The reason for this is that Kenya is an immediate neighbour of Somalia and there are language and cultural links between the two countries.[76] Additionally, among the countries in the Eastern African region, in which Somalia is located, Kenya is considered to be a more developed financial centre and economy.[77] These factors make Kenya an easily accessible destination and potentially increase the threat of laundering of Somalian piracy proceeds in Kenya. Furthermore these are factors identified by the ECOLEF[78] money laundering threat assessment methodology, as making a country more threatened by money launderers seeking to launder illegal proceeds.[79] Accordingly, it is apt to focus on Kenya as it potentially faces a real threat from the laundering of Somalian piracy ransoms and it also provides a pragmatic approach to addressing the issue.

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[74] Kamola 'Capitalism at sea: Piracy and "state failure" in the Gulf of Aden' in Smith & Verdeja (eds) *Globalisation, Social Movements and Peace Building* (2012) at 135. See also Gjelsvik & Bjorgo (n 24) at 106-111.

[75] *Report of the Monitoring Group on Somalia Pursuant to Security Council Resolution 1811 (2008)* (n 24); FATF Report (n 24); Geoplicity Report (n 24).

[76] Somalia and Kenya share a border on the eastern side of Kenya for approximately 682Km. Source: *E.A Living Encyclopedia* African Studies Centre, University of Pennsylvania available at *http://www.africa.upenn.edu/NEH/kgeography.htm* accessed on 5/3/13; See appendix A, map of Somalia and its neghibouring states. Further evidence of the proximity is that the refugees from Somalia flee to the Daadab camp located within the Kenyan borders. Source: UNHCR *The 2015 Country Operations Profile – Kenya* available at *http://www.unhcr.org/pages/49e483a16.html* accessed 4/4/16.

[77] US Department of State *International Narcotics Control Strategy Report Vol II Money Laundering and Financial Crimes* (2016) at 156 available at *http://www.state.gov/documents/organization/253983.pdf* accessed 28/3/16.

[78] 'ECOLEF' stands for The Economic and Legal Effectiveness of the European Union's Anti-Money Laundering Policy Project.

[79] Unger & Ferwerda 'Threat of money laundering' in Unger *et al The Economic and Legal Effectiveness of the European Union's Anti-Money Laundering Policy* (2014) at 13. See also *Unger et al Project "ECOLEF" The Economic and Legal Effectiveness of Anti-Money Laundering and Combating Terrorist Financing Policy* (2013) at 34-57 available at *http://www2.econ.uu.nl/users/unger/ecolef_files/Final%20ECOLEF%20report%20(digital%20version).pd*f accessed 15/2/16. See further discussion in chapter 3 section 3.4.2 on the shared language and cultural characteristics between Kenya and Somalia.

As per the ECOLEF assessment methodology Kenya potentially faces a real threat from the laundering of Somalian piracy ransoms. Moreover, the World Bank in its report on the illicit financial flows from Somalia's piracy, has categorically identified Kenya as a jurisdiction that is affected by the inflow of piracy proceeds. Consequently, this infers that it would eventually suffer from the effects of money laundering. These mainly negative effects include changes in money demand; increased prudential risks to the safety and soundness of the banking sector; having a contaminating effect on legal financial transactions and increased volatility of international capital flows and exchange rates. In view of these negative effects, if Kenya can identify the inflows of piracy ransoms into its jurisdiction, this would motivate it to apply anti-money laundering measures against the pirates. This therefore, also informs the choice of Kenya, as the jurisdiction to be considered in this study. Further discussion on this aspect is done in section 3.5.5 where money laundering is considered as a transnational offence.

As stated earlier the United Nations Security Council has specifically urged states to utilise their existing domestic law to prevent the illicit financing of piracy and the laundering of its proceeds. To achieve this states have to utilise their anti-money laundering laws. In this regard, in order to conduct comprehensive research it is best to concentrate on one jurisdiction; this has further informed the choice of Somalia piracy for ransoms and Kenya. This enables an in depth consideration of the various legal mechanisms aimed at monitoring, reporting, investigating, and prosecution in relation to the ransom funds paid to pirates vis a vis the anti-money laundering regime of a specific jurisdiction. Hence, in this study focus is on the Somalia piracy ransoms and how Kenyan law can be utilised to address it. Besides, the issues that arise in Kenya may be replicated in other jurisdictions. Therefore, the study may aid in providing proposals on how to deal with the issue of piracy and generally the laundering of proceeds of crime in other jurisdictions.[80]

Legally to qualify as piracy, the piratical acts have to be undertaken for the primary purpose of attaining economic gain. The economic gain obtained can take different forms such as seizing

[80] Reports indicate that there has been an increase in piracy for ransoms in the Gulf of Guinea i.e. areas off the Niger Delta. Oceans Beyond Piracy *Kidnap for Ransom Piracy Trending Higher in Gulf of Guinea* (2016) available at *http://oceansbeyondpiracy.org/sites/default/files/attachments/2016%20GOG%20Trends.pdf* accessed 14/3/16. Consequently lessons learnt from Somalian piracy for ransoms and possible laundering of the proceeds in Kenya may assist in dealing with the threat in the Gulf of Guinea. See also Bueger (n 18) at 38-39; Bizioura 'Piracy, state capacity and root causes: Lessons from the Somali experience and policy choice in the Gulf of Guinea' (2013) 22(3) *ASR* 111.

cargo. Hence, the limitations flowing from the focus of the study is that, by concentrating on Somalian piracy, which is piracy for ransoms, the study will not be dealing with piracy undertaken for attaining other types of economic gain. Additional to addressing Somalian piracy, the primary reason for focussing on Somalia and Kenya is for purposes of providing a pragmatic analysis of whether anti-money laundering laws can be utilised to provide an alternative method of dealing with piracy for ransom. Another limitation of the study is that its scope does not extend to evaluating the effectiveness or lack thereof, of other measures implemented to deal with Somalian piracy.[81]

Ultimately, just as piracy laws developed at the international level, are domesticated by states and applied at the national level to deal with piracy. Likewise, anti-money laundering laws developed at the international level have been domesticated by states; consequently can states at the national level then, utilise them to deal with piracy. Hence, by doing so provide an alternative legal way to deal with the crime.

1.2 Statement of the problem, research questions and methodology

Generally, in light of the threat posed by maritime piracy cases and difficulty in holding pirates accountable. Further, with specific regards to piracy for ransoms, and more so the high ransoms paid to pirates which somehow, have to be filtered into the formal financial system. This renders it necessary to consider how the proceeds of this crime are used with emphasis on the possible laundering of the ransom payments. In so doing a different approach to dealing with piracy could perhaps be developed, namely the use anti-money laundering tactics and strategies to curb instances of piracy.

The central problem identified above is multifaceted, and hence to effectively address it requires disaggregating it, into its constituent parts. These constituent parts of the problem are embodied by the following questions.

I) Why are current laws on piracy proving inadequate and what are the difficulties encountered in their utilisation in addressing the problem?

[81] For further consideration of these measures see: Roach (n 24); Bueger *et al* 'Pirates, fishermen and peacebuilding: Options for counter-piracy strategy in Somalia' (2011) 32(2) *CSP* 356; Homan & Kamerling 'Operational challenges to counter piracy operations off the coast of Somalia' in Van Ginkel & Van der Putten (eds) *The International Response to Somalia Piracy: Challenges and Opportunities* (2010); Kaunert & Zwolski 'Somalia versus Captain "Hook": Assessing the EU's security actorness in countering piracy off the Horn of Africa' (2014) 27(3) *CRIA* 593.

II) Can anti-money laundering legal mechanisms be used as an alternative method of dealing with piracy and is there justification for doing so?

III) What anti-money laundering legal mechanisms are in place to facilitate monitoring, detection, investigation and prosecution of those implicated of dealing in proceeds of piracy?

IV) Can these legal mechanisms if applied provide a satisfactory alternative means of addressing /tackling piracy?

Accordingly, these questions underpin the research and are explored in various chapters of the thesis. In investigating the questions identified above, the study bases its analysis on the relevant available literature. The research reviews documented facts on the subject and thus draws on primary sources, such as, international law instruments, resolutions, declarations, reports, and case law emanating from international and domestic jurisdictions. Additionally, secondary sources are consulted including books by pre-eminent scholars in the field, journal articles and other electronic sources.

1.3 Significance of the study

The significance of the study lies in its aim to show piracy as one of the predicate offences for the crime of money laundering. Hence, enable the use of anti-money laundering tactics as an alternative way of tackling piracy. Concentrating on the region of Somalia and Kenya, makes it possible to practically consider this, by looking into how the proceeds of ransom payments are laundered into Kenya. Additionally it also aids in identifying if generally and specifically Kenya's anti-money laundering regime is robust to facilitate monitoring, detection, investigation and prosecuting those implicated of dealing in piracy proceeds specifically and also other proceeds of crime. Accordingly, by establishing if it is possible to utilise anti-money laundering laws to deal with piracy, the research will add to existing knowledge on the subject.

Additionally, an analysis of the Kenyan anti-money laundering regime in dealing with the financial proceeds of piracy aids in identifying the strengths and weakness inherent in it. By doing so, solutions or alternatives to deal with the weaknesses and how to ensure that the strengths are maintained are given. This is beneficial to the monitoring agencies, government or governmental bodies involved in the fight against laundering of piracy proceeds from Somalia specifically and also laundering of proceeds of crime generally.

Besides the issues indicated above may be replicated in other jurisdictions, consequently the research may be influential in assisting other jurisdictions utilise anti-money laundering laws to deal with piracy. Equally it may also assist other countries in identifying the strengths and weaknesses in their anti-money laundering regimes. Furthermore, the study points to the possibility of employing anti-money laundering laws to deal with other crimes in other jurisdictions as well.

Ultimately, in a nutshell, the thesis aims at establishing if anti-money laundering laws can be utilised to provide an alternative method of dealing with piracy. It is hoped that by undertaking this investigation, a contribution will be made to the debate on how to tackle piracy and possibly motivate states to utilise such laws in dealing with the crime. As result, the objectives of this research are to examine the inadequacy of the current laws on piracy in addressing the problem; to examine whether anti-money laundering legal mechanisms be used as an alternative method of dealing with piracy and; to identify which anti-money laundering legal mechanisms are in place to facilitate monitoring, detection, investigation and prosecution of those implicated of dealing in proceeds of piracy.

1.4 Outline of the thesis

The examination of the identified issues commences in chapter two. The main aim of the chapter is to show the flaws in the law of maritime piracy which lead to adjudication problems as well as impunity of the pirates. Of importance to note is that, this issue is considered generally and not specifically with regards to Somalian piracy. This is primarily because, the central aim is to investigate overall, why piracy laws are proving inadequate at holding pirates accountable. Hence these inadequacies in the law point to the need to find an alternative way of ensuring accountability of offenders. Furthermore the challenge of utilising the current piracy laws is a recurring issue in various jurisdictions and is not unique to Somalian piracy.[82]

Investigation of this issue begins with consideration of the historical perceptions of piracy and its development as a crime under international law. This discussion will help in showing the diverse views held on the definition and treatment of piracy at the municipal level. The effects of these

[82] See Davenport 'Legal measures to combat piracy and armed robbery in the Horn of Africa and in Southeast Asia: A comparison' (2012) 35(7-8) *SCT* 570; Amarilla 'Problems of the investigation and prosecution in case of piracy at sea' (2015) 49 *ZR* 361; Dubner & Greene 'On the creation of a new legal regime to try sea pirates' (2010) 14(3) *JMLC* 439.

divergent views are pervasive as evident throughout the process of seeking to develop consensus on an internationally acceptable definition of piracy. Accordingly, to achieve consensus certain issues were left 'unclear' in the present day law of piracy which is elaborated in the relevant sections. The chapter also addresses how these flaws, unwillingness of states to cooperate, or utilise universal jurisdiction, and lack of an international piracy tribunal have all contributed to problems in piracy adjudication. Consequently, this sets out the need to consider an alternative way of holding pirates accountable.

Subsequently, the third chapter's overarching purpose is to theoretically show the link between piracy for ransoms and money laundering, additional to justifying the use of the anti-money laundering regime to deal with piracy. This necessitates an analysis of the elements of money laundering that will then aid in the development of a working definition to be applied in the thesis. Application of the working definition will assist in ensuring uniformity and consensus for the subsequent discussions on the following issues: application in establishing the link between piracy and money laundering; and determining whether the Somalian pirates are engaging in laundering proceeds from piracy or not. This will be in addition to showing how anti-money laundering measures can be utilised to deal with piracy. Justification for using anti-money laundering measures to deal with piracy will be established by considering the causes of Somalian piracy from a criminology perspective further to considering it as an organised and transnational crime.

Chapter four primarily aims to consider the practical application of the anti-money laundering regime to deal with piracy proceeds. This is achieved by applying Kenya's anti-money laundering regime to Somalian piracy proceeds. This entails an analysis of how the regime facilitates monitoring, detection, investigation and prosecution of those implicated in dealing with piracy proceeds. This is in addition to considering the laws applicable to enable depriving pirates of their illegal proceeds. The chapter also addresses factors that hinder the effective implementation of Kenya's anti-money laundering regime in dealing with piracy proceeds. Additionally, a consideration of other issues including human rights, which arise consequent to the application of this regime is done.

Chapter five concludes the study with the key findings of the research as pertains to tackling piracy from a money laundering perspective. Precisely that, with regards to piracy for ransoms it is possible to utilise anti-money laundering laws as an alternative means to hold pirates accountable.

With regards to application to other forms of piracy and crimes it may be possible as long as it can be proved that a criminal benefit has been gained as a result of committing piracy or other crime. Hence, if it is possible to establish a link between the individual involved and the property gained, anti-money laundering laws can be utilised to hold the individual accountable and/or take away the benefit gained.

The chapter also provides recommendations that will aid in making Kenya's anti-money laundering regime more effective in dealing with piracy proceeds and proceeds of crime by and large. Generally, with regards to applying anti-money laundering laws to deal with piracy, the recommendations given point to measures that if implemented can make a country's regime more effective. More so if the country is faced by challenges similar to those identified in Kenya.

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2 THE CRIME OF PIRACY

2.1 Introduction

Piracy has plagued humanity for as long as there have been sailors sailing the oceans. Hammurabi (1948-1905BC) included law on piracy in his famous Hammurabic code.[1] The nation of Crete was the first to develop an army and it was in part motivated by the need to suppress piracy.[2] The main purpose of the pirates from ancient times has been to plunder and thus acquire wealth. Due to the nature of their actions the pirates are considered *'pirata est hostis generis humani'*; the common enemy of mankind. This is because their actions 'threaten the trade, travel, commerce, and safety of every nation that utilises the high seas'.[3]

The first major intergovernmental attempt at dealing with piracy came by way of the Declaration of Paris which was signed and entered into force on 16 April 1856. The Declaration ended the Crimean War (1853-1856) and was signed by the major imperial powers.[4] According to the provisions of the treaty the parties agreed that they would not seize enemy goods on neutral vessels or neutral goods on enemy vessels. The belligerents[5] furthermore proclaimed that they would not issue letters of marquee,[6] also known as letters of commission or commissions. The implication of agreeing not to issue letters of marquee is that it outlawed privateering.

After the signing of the Declaration of Paris the crime of piracy did not capture the attention of the international community until the 1924 assembly of the League of Nations. This resulted in the convening of meetings in 1925 and 1926 to consider and prepare a provisional list of international

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[1] King *The Code of Hammurabi* The Avalon Project Yale Law School available at *avalon.law.yale.edu/ancient/hamframe.asp* accessed 15/2/14.

[2] Wombwell *The Long War Against Piracy: Historical Trends* (2010) Combat Studies Institute Occasional Papers 32 at 1; Kraska *Contemporary Maritime Piracy International Law, Strategy and Diplomacy at Sea* (2011) at 11.

[3] Smith 'Piratical jurisdiction: The plundering of due process in the case of Lei Shi' (2009) 23 *EILR* 693 at 694. See also Hallwood & Miceli *Maritime Piracy and its Control: An Economic Analysis* (2015) at 11-14. See also Pattison '*Justa Piratica*: The ethics of piracy' (2014) 40(4) *RIS* 631 who argues that piracy can be morally permissible in certain instances.

[4] The signatories were United Kingdom, France, Austria-Hungary, Prussia, Russia, Sardinia and the Ottoman Empire excluding the United States of America. Other countries later acceded to the treaty Japan (1886), Spain (1908) and Mexico (1909); Anderson 'A sea of change reforming the international regime to prevent, suppress and prosecute sea piracy' (2013) 44 *JMLC* 47 at 51. See also Stockton 'The Declaration of Paris' (1920) 14(3) *AJIL* 356; Hutchins 'Structuring a sustainable letters of marque regime: How commissioning privateers can defeat the Somali pirates' (2011) 99 *CLR* 819 at 854-856.

[5] In this context belligerent refers to the nations engaged in armed conflict.

[6] Stockton (n 4). Further consideration of letters of marquee and privateering is done in section 2.2. The Declaration of Paris was relevant to piracy in that by outlawing privateering it may have contributed in indirectly reducing incidences of piracy; because, as will be discussed in section 2.2, piracy was condoned under the guise of privateering as long as one had a lawful commission.

law topics which could be considered for regulation by international agreement.[7] Though included in 1925, the 1926 meeting excluded piracy from this list. Further evidence of this attitude of apathy towards piracy is shown in the preparatory works leading to the drafting of the 1958 Geneva Convention dealing with the law of the sea, the Harvard draft and the 1982 United Nations Convention on the Law of the Sea (UNCLOS).[8]

Nonetheless, in recent times piracy has captured the attention of the international community as it has become an 'epidemic'.[9] There has not only been an upsurge in the number of piracy incidents around the world[10] but also new piracy trends have transpired. In Somalia the pirates are not interested in the cargo on the vessels but rather capture the crew and use them to claim for ransom in exchange for their release.[11] In other instances they use their acts to make political statements.[12] The methods and means used in funding, launching and carrying out attacks have become

[7] See 'United Nations documents on the development and codification of international law' (1947) 41(4) *AJIL* sup at 67-69 available at *http://legal.un.org/ilc/documentation/english/ASIL_1947_study.pdf* accessed 15/5/14.

[8] Proof of this is shown by the diversity of opinions on fundamental matters such as the definition of piracy and the motive of piratical acts as understood by the law of nations. See Hallwood & Miceli (n 3) at 82; Dubner 'On the definition of the crime of sea piracy revisited: customary vs treaty law and the jurisdictional implications thereof' (2011) 42(1) *JML* 71 at 73; Diaz & Dubner 'Foreign fishing piracy vs Somalia piracy - does wrong equal wrong' (2010) 14 *BLR* 73 at 75-77; Nordquist, Nandan & Rosenne (eds) *United Nations Convention on the Law of the Sea 1982 A Commentary* Vol 3 (1995); Rubin 'Revising the law of "piracy" ' (1990) 21 *CWILJ* 129 and Bingham *et al* 'Harvard research in international law: Draft convention on piracy' (1932) 26 *AJILS* 739 at 769-780.

[9] Kontorovich 'A Guantanamo at sea: The difficulty of prosecuting pirates and terrorists' (2010) 98 *CLR* 243 at 243. See also Daxecker & Prins 'The new barbary wars: Forecasting maritime piracy' (2015) 11(1) *FPA* 23 at 24-26.

[10] For the period January to December of 2011-2015 see ICC-IMB *Piracy and Armed Robbery against Ships- Report for the period 1 January to 31 December 2015* (2016) at 5 available at *http://www.hellenicshippingnews.com/wp-content/uploads/2016/02/2015-Annual-IMB-Piracy-Report-ABRIDGED.pdf* accessed 16/2/16. See also ICC-IMB *Piracy and Armed Robbery against Ships Report for the Period 1 January-31 December 2012* (2013) at 5 for the period January to December of 2008-2012. See also Coggins 'Global patterns of maritime piracy, 2000-09: Introducing a new data set' (2012) 49 *JPR* 605.

[11] ICC-IMB 2015 Report (n 10) at 17. As at 31 March 2016 Somalian pirates continued to hold 29 crew members for ransom. See ICC-IMB *Piracy and Armed Robbery Against Ships- Report for the period 1 January to 31 March 2016* (2016) at 16 available at *http://www.hellenicshippingnews.com/wp-content/uploads/2016/04/2016-Q1-IMB-Piracy-Report-ABRIDGED.pdf* accessed 14/6/16. See also Sterio 'Fighting piracy in Somali (and elsewhere): Why more is needed' (2009) 33(2) *FILR* 372 at 381-385. Hodgkinson 'The incorporation of international law to define piracy crimes, national laws, and the definition of piracy' in Scharf *et al* (eds) *Prosecuting Maritime Piracy Domestic Solutions to International Crimes* (2015) at 33-34.

[12] See Constantinople 'Towards a new definition of piracy: The *Achille Lauro* incident' (1985-1986) 26 *VJIL* 723; Huang 'Who are sea cut throats? A typological analysis of pirates' (2010) 53(3) *CLSC* 277; Asal & Hastings 'When terrorism goes to sea: Terrorist organisations and the move to maritime targets' (2015) 27(4) *TPV* 722; Otto 'Maritime crime in Nigeria and waters beyond analysis the period 2009 to 2013' (2015) 45 *AI* 15; Shane & Magnuson 'Successful and unsuccessful pirate attacks worldwide: A situational analysis' (2016) 33(4) *JQ* 682; Liss *Assessing Contemporary Maritime Piracy in Southeast Asia: Trends, Hotspots and Responses* (2014) Peace Research Institute Frankfurt Report 125.

sophisticated.[13] Hence there is need to revisit the existing legal regimes dealing with piracy in order to ascertain their effectiveness.

The aim of this chapter is to elucidate the flaws inherent in the law dealing with piracy; for the reason that it leads to adjudication problems and the fact that ultimately suspects are not held accountable. This is done by first considering the historical perceptions of piracy and its development as a crime under international law in sections 2.2 and 2.3. Throughout this development it is evident that there have been diverse views on the definition and treatment of piracy in various jurisdictions. This diversity can also be seen in the next section 2.5, discussing the various issues raised during negotiations on the elements of piracy. All through the various processes that attempted to develop a uniform international law on piracy the diversity of views on what exactly the crime of piracy entails are evident. Despite the development of a uniform international law on piracy, its inadequacies necessitated the advancement of a new convention to deal with maritime offences instead of piracy. This is considered in section 2.6.

In my view, the debates indicating the lack of consensus on various aspects of piracy point to the fact that the current provisions on piracy in UNCLOS cannot be considered a codification of the international law on piracy that existed. Owing to the fact that had the process been entirely one of codification, there should not have been such a great lack of consensus on various aspects of piracy. It appears to have been more a process of developing an international law on piracy acceptable by many states. To achieve this a political compromise had to be agreed upon by the delegates in order to establish an international definition of piracy. In a bid to compromise and come up with an acceptable definition of piracy, certain issues were not adequately addressed and this can be discerned in the 'unclear' issues that are apparent in the UNCLOS definition of piracy. These issues are considered under section 2.7 analysing the present law on piracy. Finally the adjudication of piracy is elaborated and the implication of flaws in the law and adjudication process is considered in sections 2.8 to 2.10.

[13] For example Somalian pirates are known to be armed with automatic weapons and rocket propelled grenade (RPG); ICC-IMB 2015 Report (n 10) at 19. See also Otto (n 12); Liss (n 12); Hastings & Philips 'Maritime piracy business networks and institutions in Africa' (2015) 114 (457) *AA* 555.

2.2 Historical perceptions of piracy

The term piracy is derived from the Greek and Latin terms 'peirato' and 'pirata' respectively, meaning pirate.[14] In his authoritative book *Law of Piracy* Rubin identifies different uses of the term piracy that exist and have existed.[15] From his writings it is clear that the term piracy did not have the meaning that is ascribed to it presently.[16] During the reign of the Greek and Roman empires they used the term 'piracy' to distinguish between robbers who were thieves under the law of the Romans and communities called 'piratical'. These 'piratical communities' were societies of the Eastern Mediterranean which undertook the activities of seizing goods and persons from strangers without carrying out the religious and formal ceremonies the Romans felt were legally and religiously necessary to begin a war.[17] Thus the 'war against the pirates' adopted by the Roman senate against these piratical communities simply meant a permanent war with these communities that were pursuing violent tax collections at sea or basing part of their economy on goods seized from their neighbours.[18]

In this instance pirate did not refer to an individual but to particular communities that engaged in acts of war and plunder against their neighbours and strangers without undertaking the formal legal and religious ceremonies to declare war as prescribed under Roman law. Their acts interfered with trade and were a threat to peace. For these reasons the Romans considered their acts of war and plunder piratical and declared the communities piratical communities. To stop these communities from continuing their acts of war and plunder the Romans declared war against them.

The Norse Raiders of the 9th to 11th centuries AD also engaged in acts of war and plunder against various communities. Their activities were similar to those of the 'piratical communities' but they

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[14] Kraska (n 2) at 6; Middelburg *Piracy in a Legal Context: Prosecution of Pirates Operating off the Somali Coast* (2011) at 5.

[15] Rubin *Law of Piracy* (1988) at 1. In his book Rubin refers to a variety of sources such as Polybius *The Histories* (W R Paton transl.) LCL 1954 IV; 10 *Diodorus Siculus* (R M Green transl.) LCL 1954 XX; Aristotle *The Politics* (E Barker transl.) 20 1975 ed I; 5 Plutarch *Parallel Lives of Greeks and Romans* (C B Perrin transl.) LCL 1917 XXIV; Grotius *De Jure Belliac Pacis* (1625, 1646) photographic reproduction 1925 (F W Kelsey transl.); Gentili *De Iure Belli Libri Tries* (1612) (J C Rolfe transl.) CECIL 1933; 3 *Grotius on the Law of War and Peace* (1925 CECIL); and Bronstead *The Vikings* (1965) Penguin, Harmondsworth.

[16] At present it is generally accepted that the term piracy is ascribed the meaning contained in article 101 of the United Nations Convention on the Law of the Sea. Hodgkinson 'The governing law on maritime piracy' in Scharf *et al* (eds) *Prosecuting Maritime Piracy Domestic Solutions to International Crimes* (2015) at 17.

[17] Rubin (n 15) at 12; See also Kraska (n 2) at 10-14.

[18] Rubin (n 15) at 6-7 as quoted from 5 Plutarch *Parallel Lives of Greeks and Romans* (C.B. Perrin transl.) (LCL 1917).

were not referred to as pirates, but by the names they gave themselves 'Danes' or 'Vikings'.[19] Thus it is apparent that during these times the term piracy did not imply criminality under the Law of Nations, as attributed to it in the present day, but simply to define the acts of communities that engaged in waging war and plunder. Further, evidence of this, as cited by Rubin, is shown by looking at the Oxford English dictionary in the 15th century which shows no legal connotation to the term piracy as it was used then.[20]

Another major metamorphosis in the use of the term 'piracy' occurred in the 17th century. During this time the major imperial powers where engaged in acts of privateering in the Mediterranean, North Atlantic including as far as the Barbary communities of Tunis, Tripoli, Algiers and Salee.[21] Privateering involved the use of privately owned and crewed vessels that were granted permission through letters of marque by a government to attack and capture enemy vessels; this was referred to as being granted a commission to cruise. They would then seize the shipping assets belonging to the citizens of enemy states and sell the 'prizes' at auction.[22] Privateering was advantageous to a nation as it helped in acquiring wealth and increasing the nation's naval power, by assisting the official navy of the country in conducting warfare.[23]

Internationally privateering was considered lawful and the privateers were governed by the laws of the state that gave them the commission to cruise. For example, privateers were expected to give security,[24] they were not to act against the law of the nations or the commission given and they were not to convert their prizes for their own use until they were adjudged lawful by the admiral. If privateers wilfully committed acts of depredation, injury on the ships of friendly nations or over goods of their country's subjects they were to be punished by death, forfeiture or any other suitable punishment.[25] Individuals to whom letters of marquee were issued committed acts of piracy, if they exceeded their commission by wilfully engaging in war and plunder against the

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[19] Rubin (n 15) at 13; See also Kraska (n 2) at 14-16.
[20] Rubin (n 15) at 13.
[21] Grotius *A Treatise on the Law of War* (1810) (C V Bynkershoek transl.) at 131.
[22] Anderson & Gifford 'Privateering and the private production of naval power' (1991) 11(1) *CJ* 99 at 99.
[23] Ibid at 100.
[24] According to Dutch law 30,000 florins and under British law for a ship with less than 150 men £1500 or 15500 Guilders security was paid; for a ship with more than 150 men £3000 or 33000 Guilders security was paid under British law. Grotius (n 21) at 147; See also Molloy *A Treatise of Affairs Maritime and of Commerce* 7ed (1722) at 49.
[25] See Grotius (n 21) at 139-148; Molloy (n 24) at 49-52. Grotius (n 21) writes from an international as well as the Dutch perspective, while Molly (n 24) gives mainly the British perspective on privateering.

ships of nations in amity.[26] Thus, during this period the term 'piracy' was used to refer to uncommissioned privateering,[27] which was abhorred and a criminal offence punishable by death and forfeiture of the prizes. The constitutive acts for both were the same, waging war and committing plunder. However, piracy was condoned albeit under the guise of privateering as long as one had a lawful commission, for that is what distinguished between piracy and privateering.

A new era in the evolution on the use of the term 'piracy' occurred in the late 16th and 17th century. The term piracy was then considered from a scholarly perspective. The first notable eminent scholar to do this was Alberico Gentili.[28] In his writings he advocated for freedom of the seas and that just war could be waged against pirates as they were the enemies of mankind. According to Gentili whether an act constituted piracy or just warfare depended on whether the acts were committed on behalf of a government that was recognised at international law. His definition of piracy meant acts of brigandage and robbery committed against foreign nationals on land or at sea without any authorisation from a sovereign.[29]

Another notable contribution came from the Dutch scholar Hugo Grotius whose writings were influenced by Gentili. In his writings he extensively deals with the issue of pirates and privateers[30] in comparison to Gentili. According to Grotius the term 'pirates' applied to individuals who without the authorisation of any sovereign to make captures, committed depredations at sea or

[26] Grotius (n 21) at 135; Molloy (n 24) at 43 & 56.
[27] Gradually countries outlawed privateering as they realised the need to maintain a standing army, which they were in full control of. See DeWittee 'Let privateers marquee terrorism: A proposal for a reawakening' (2007) 82(1) *ILJ* 131 at 135; See also generally Arlyck 'Plaintiffs v privateers: Litigation and foreign affairs in the federal courts 1816-1822' (2012) 30(1) *LHR* 245.
[28] Born in Italy in 1552 but forced by the inquisition to leave and settle in England. In 1581 he became a professor of civil law at Oxford University. His most famous works in relation to the law of nations are *De Legationibus* (1585), *De Jure Belli Commentatio Prima* (First Commentary on the Law of War) in 1588. A complete revised edition appeared in 1598 as *De Jure Belli Libri Tres* (*Three Books on the Law of War).* See Gentili *De Jure Belli Libri Tres* (1933) (J C Rolfe transl.). See also Wagner 'Lessons of imperialism and of the law of nations: Alberico Gentili's early modern appeal to Roman law' (2012) 23(3) *EJIL* 873 for a discussion on Gentili's works.
[29] Van der Molen *Alberico Gentili and the Development of International Law His Life Work and Times* (1937) PhD thesis Vrije University Amsterdam at 168; See also Kempe 'Even in the remotest corners of the world: Globalised piracy and international law, 1500-1900' (2010) 5(3) *JGH* 353 at 355-356; Kraska (n 2) at 7. Grotius differed with Gentili on the issue that African nations that were considered barbarians such as Algerians, Tunisians, Tripolitans and Salee were to be considered pirates. According to Grotius they were not pirates but regularly organized societies with fixed territory and had an established government and thus were to be accorded the same rights as other independent states. Grotius (n 21) at 131.
[30] In *De Jure Belli ac Pacis (On the Law of War and Peace)* published in 1625. In relation to privateers he holds that they are private individuals who having armed vessels are given permission to cruise and make captures against enemies and whose inducement are the prizes they capture.

shore.[31] He further elaborated that there were individuals who cannot properly be considered pirates but on account of how atrocious their actions were they were deemed as such. Examples of such included those who committed frauds in matters of insurance, those who cut nets spread out for herring fishing and hostile ships which come too near the shores of Netherlands in violation of a prohibition given by a sovereign.[32]

In addition he distinguishes piracy under the law of nations and municipal law. Piracy under the two regimes was distinguished by the fact that piracy under the law of nations was devoid of the technical elements that were included in defining piracy under municipal law. This distinction is elaborated by considering that under the common law piracy consisted of committing acts of robbery and depredation on the high seas which if committed at land amounted to a felony. Thus, the municipal law definition of piracy is infused with the requirement that the acts committed should be equal to a felony had they been committed on land;[33] whereas, piracy under the law of nations only required the commission of acts of depredation on the seas.

Both scholars immensely contributed to the evolution of the law of the sea. They solidified various concepts under the law of the sea such as, freedom of the seas, that nations were free to navigate the oceans; the distinction between piracy under the law of nations and under municipal law and; that persons who committed piracy had committed an offence and being the enemies of all mankind they could be punished by any sovereign into whose dominion they were brought. This eventually developed into the doctrine of universal jurisdiction exercisable over pirates.

Apart from the writings of scholars such as Gentili and Grotius who dealt mainly with developing the law of nations on various topics such as law of the sea, a consideration of literature on piracy shows that the evolution in the use of the term and legal provisions occurred mainly at the municipal/national level. Countries enacted domestic legislation to deal with piracy and others enacted sea codes.[34] During the 'classical piracy'[35] period the term 'piracy' was a 'catch all way of including domestic crimes of murder, plunder, robbery and kidnapping'.[36] It is evident that the

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31 Grotius (n 21) at 135; Molloy (n 24) at 127.
32 Grotius (n 21) at 135; Molloy (n 24) at 131.
33 Grotius (n 21) at 135; Molloy (n 24) at 128.
34 See generally Wright 'The high seas and the church in the middle ages part I' (1967) 53(1) *MM* 3; Wright 'The high seas and the church in the middle ages part II' (1967) 53(2) *MM* 115; Lewis 'Responsibility for piracy in the middle ages' (1937) 19(1) *JCLIL* 77.
35 Dubner 'Piracy in contemporary national and international law' (1990) 21 *CWILJ* 139 at 141.
36 Ibid. See also Wedgwood 'The revolutionary martyrdom of Jonathan Robins' (1990) 100(2) *YLJ* 229 at 243.

term did not connote the legal meaning attached to it nowadays. The offence of 'piracy' was synonymous with armed robbery committed at sea in most municipal jurisdictions.[37] Accordingly, during the period 17th to 19th century there was a weak attempt at distinguishing between piracy and armed robbery and they were considered one and the same.

Rules did exist at the municipal level and pirates were held responsible under criminal law. However, different jurisdictions treated piracy differently[38] and it is also evident that different legal concepts of 'piracy were repeatedly adjusted by Europeans to suit their immediate aims, such as legitimising imperial politics'.[39] For example Britain attempted an international definition of piracy but this only lasted as long as the empire was in control of the seas.[40] Despite the development in the law on piracy being varied, the consensus that did exist was that pirates were the enemy of all mankind and they had to face criminal sanctions for their actions.

From the exposition above it is evident that the development of the law on piracy at the international level had not been consistent. The various European countries could not come to a consensus on the legal rules dealing with the definition of piracy.[41] Notwithstanding that at the national level pirates were being tried and convicted under their national laws. In time it became apparent that there was need to adopt a consensus on the international law on piracy.

2.3 Development of piracy as a crime under international law

2.3.1 The Harvard draft

The next notable international developments in relation to piracy occurred in the 20th century. This period saw increased interest in attempts to codify rules of international law on various topics.

[37] Shnider 'Universal jurisdiction over "operation of a pirate ship": The legality of the evolving definition in regional prosecutions' (2013) *NCJILCR* 473 at 494; Kraska (n 2) at 12 & 28; Wedgwood (n 36) at 239; See also the discussion in *Re Piracy Jure Gentium* (1934) AC 586 (26 July 1934).
[38] See Rubin (n 15) at 122-259; Wedgwood (n 36) at 242-248; Nutting 'Madagascar connection: Parliament and piracy 1690-1701' (1978) 22 *AJLH* 202.
[39] Rubin (n 15) at 343.
[40] Puchala 'Of pirates and terrorists: What experience and history teach' (2005) 26(1) *CSP* 1 at 11. See also Hanna *Pirate Nests and the Rise of the British Empire; 1570-1740* (2015).
[41] Ibid at 12. For an overview of the development of piracy as an international crime, from the codification process right through to the third United Nations Conference on the law of the sea, see Harrison *Making the Law of the Sea: A Study in the Development of International Law* (2011) at 27-61.

This was meant to aid in developing international law and promoting its clarity, which in turn would foster maintenance of international peace and security.[42]

The first intergovernmental attempt at codification of international law was initiated on 22 September 1924 at the Assembly of the League of Nations. At this meeting the Assembly of the League of Nations requested the Council of the League to convene a committee of experts to prepare a provisional list of subjects of international law 'ripe for regulation by international agreement'.[43] Piracy was one of the subjects that were included.

A sub-committee consisting of M. Matsuda of Japan as rapporteur and M. Wang Chung-Hui of China delivered its report to the Committee in January 1926.[44] The report was further amended by Mr. Matsuda after committee deliberations. The report contained eight articles of the 'Draft Provisions for the Suppression of Piracy'. It was circulated to Governments for their comments on 29 January 1926.[45] In their responses historical and juristic issues were raised relating to piracy. However, 'the Committee and its rapporteur seemed unwilling to try to resolve, or unable to resolve various issues in the light of the strong jurisprudential assertions and policy positions of many states,'[46] the end result being, piracy was dropped from the agenda of the proposed conference.[47]

Nonetheless, the activities of the League of Nations prompted the faculty of the Harvard Law School to independently undertake its own research on the international law of piracy with the intention of contributing to the codification conference that was to be held.[48] The scholars

[42] Rosenne 'Codification revisited after 50 years' in *Max Planck Yearbook of United Nations Law* (1998) at 2 available at *http://www.mpil.de/files/pdf2/mpunyb_rosenne_2.pdf* accessed 2/5/14; Rosenne *Committee of Experts for the Progressive Codification of International Law 1925-1928 vol II* (1972) at xxix.
[43] Hudson 'The progressive codification of international law' (1926) 20 *AJIL* 655 at 662.
[44] Ibid at 665.
[45] Ibid at 667. For the complete report see League of Nations *Committee of Experts for the Progressive Codification of International Law Questionnaire no. 6* (1926) available at *http://www.fortunes-de-mer.com/documents%20pdf/legislation/Internationale/Piraterie/SDN%201926%20C.48.M.25.1926%28C.D.P.I.58%29_Piracy.pdf* accessed 22/5/14.
[46] Rubin (n 15) at 307.
[47] League of Nations publications V Legal l927 V 28 reproduced in 'Third session of the committee of experts for the progressive codification of international law' special supplement (1928) 22 *AJIL* 345 at 346; Resolution adopted by the Assembly of the League of Nations on 27 September 1927. Source: *'United Nations documents on the development and codification of international law'* (1947) (n 7) at 106; Dhokalia *The Codification of Public International Law* (1970) at 119.
[48] Rubin (n 15) at 308. See also Bingham *et al* (n 8).

developed a draft convention on the law of the sea containing 19 articles. This provided a 'legislative proposal'[49] that was relied upon during later attempts at developing the law of the sea.

The Harvard Draft 1932,[50] Article 3 provides:

> 'Piracy is any of the following acts, committed in a place not within the territorial jurisdiction of any state:
>
> (1) Any act of violence or of depredation committed with intent to rob, rape, wound, enslave, imprison or kill a person or with intent to steal or destroy property, for private ends without a bona fide purpose of asserting a claim of right, provided that the act is connected with an attack on or from the sea or in or from the air. If the act is connected with an attack which starts from on board ship, either that ship or another ship which is involved must be a pirate ship or a ship without national character.
>
> (2) Any act of voluntary participation in the operation of a ship with knowledge of facts which make it a pirate ship.
>
> (3) Any act of instigation or of intentional facilitation of an act described in paragraph 1 or paragraph 2 of this article.'

In developing the draft the scholars considered the definition of piracy under various municipal laws.[51] Having considered the various definitions they acknowledged that distinctions existed in piracy definitions under municipal law and under the law of nations. In particular there was a distinction as to the acts that constituted piracy and the place of occurrence of the crime. Some states defined these elements in a broad manner and others in a restricted manner.[52] They also acknowledged the common jurisdiction of all states to prosecute pirates.

The scholars underscored that due to the controversies on various aspects of the offence varying conclusions may be reached. The draft convention was designed to facilitate amendments in detail, taking into account the differing opinions in order to come up with provisions that fitted into the general scheme.[53] This implies that the drafters did not consider their work as a codification of the international law on piracy, but more as a proposal for the development of new law whose provisions where agreed upon by parties as the international law on piracy.

As acknowledged by the drafters, the Harvard Draft is considered primarily a 'legislative proposal and cannot be supported as a reflection of a scholarly analysis on precedent'.[54] Despite these

[49] Rubin (n 15) at 313. See also Bingham *et al* (n 8).
[50] See Bingham *et al* (n 8) at 769-780.
[51] Morrison 'A collection of piracy laws of various countries' (1932) 26 *AJIL* Supp. 887.
[52] Bingham *et al* (n 8) at 749-751.
[53] Ibid at 764.
[54] Rubin (n 15) at 313.

shortcomings it cannot be overemphasised that the primary importance of the Harvard Draft in the development of the law of piracy, is that it provided a stepping stone upon which discussions on the topic could be based during the UN General Assembly 209th meeting on 12 May 1955. It is from this draft that members of the General Assembly were able to prepare a working draft upon which further deliberations were conducted.

2.3.2 United Nations Convention on the Law of the Sea Conference I and the Geneva Convention 1958.

The next international step towards the development of piracy under international law begun with the creation of the International Law Commission (ILC) set up by the UN General Assembly in 1948.[55] The ILC is composed of thirty-four independent experts on international law appointed by the General Assembly. Its aim was 'promotion of the progressive development of international law and its codification.'[56] During its sixth session in 1954 the UN General Assembly asked the ILC to prepare a text that would form the basis for an international agreement on the law of the sea. Of importance to note is that the report for the high seas (hereinafter referred to as the J. P. A. Francois draft)[57] prepared for discussion contained a translation of some of the articles in the Harvard draft.

The product of the ILC drafting committee was presented to the UN General Assembly at the close of the 7th Session and at its 8th session[58] a final draft on the law of the sea containing seventy-three

[55] The formation of the International Law Commission was supposed to provide a sustained and conscious move by governments at working towards furthering the development and codification of various topics in International law. See Rosenne 'The International Law Commission 1949-1959' (1960) 36 *BYBIL* 104; Rosenne 'Role of the International Law Commission' (1970) 64(4) *AJIL* 24.

[56] UN GA Resolution A/RES/174 (II) 21 November 1947. See International Law Commission *Survey of International Law in Relation to the Work of Codification of the International Law Commission: Preparatory work within the purview of article 18, paragraph 1, of the of the International Law Commission* (1949) available at *http://legal.un.org/ilc/documentation/english/a_cn4_1_rev1.pdf* accessed 22/5/14. The report documents the International Law Commission's findings on preparatory work necessary to enable the commission begin its work as mandated by article 18 of the Commission's Statute. Article 18 mandates the Commission to survey the whole field of international law with a view to selecting topics for codification and where the Commission considers that the codification of a particular topic is necessary or desirable it is to submit its recommendations to the General Assembly. Therefore the report was relevant as it provides the Commission's findings on which topics of international law were ready for codification.

[57] The ILC rapporteur, J. P. A. Francois's report for the high seas contained a translation of articles 3, 4(1), 5, 6, 10 and 12 as contained in the Harvard draft. This underscores the importance of the Harvard Draft as providing a stepping stone from which discussions on piracy could begin. UN Doc A/CN.4/79 27 January 1956 Sixth Report on the Regime of the High Seas by Mr. J. P. A. François, Special Rapporteur, Extract from the Yearbook of the International Law Commission: - 1954 vol II available at *http://legal.un.org/ilc/publications/yearbooks/english/ilc_1956_v2.pdf* accessed 30/11/13.

[58] The International Law Commission held its eighth session in Geneva, Switzerland from 23 April to 4 July 1956.

articles and commentaries thereto was adopted.[59] This draft not only dealt with piracy under international law but included other issues pertaining to the law of the sea.

This led to the General Assembly adopting resolution 1105(XI), which called for the convening of the United Nations Convention on the Law of the Sea in Geneva in 1958[60] in order to deal with the ILC draft. Thus the Geneva Conference of 1958 (hereinafter referred to as UNCLOS I) was convened to:

> 'examine the law of the sea, taking account not only of the legal but also of the technical, biological, economic and political aspects of the problem, and to embody the results of its work in one or more international conventions or such other instruments that the conference may deem appropriate.'[61]

UNCLOS I failed to produce a comprehensive treaty but had four agreements adopted, nine resolutions and an optional protocol on dispute settlement were adopted.[62] Although the draft articles that had been prepared by the ILC was a single and coherent text, the four substantive treaties that were the result of UNCLOS I, were not linked in any way, so that a state could choose which instruments it would accept. Thus, the balance of rights and obligations crafted by the Commission was weakened at UNCLOS I.[63] This is because a state could decide which treaty to sign and leave out the others yet the four treaties were supposed to provide an interlinked, unified and comprehensive set of rules for the regulation of maritime issues. Thus, by signing one convention and leaving another provided a gap in this integrated set of rules.

In relation to piracy UNCLOS I was a key conference as it led to the adoption of the Geneva Convention on the High Seas (hereinafter Geneva Convention) concerning the law of the sea within which were articles dealing specifically with piracy including its definition. The Geneva Convention on the High Seas 1958,[64] article 15 provides that:

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[59] UN Documents A/CN.4/97, A/CN.4/99 & A/CN.4/100. See Yearbook of the International Law Commission 1956 vol II at 13-37 for a compilation of the comments from governments and inter-governmental organisations. Available at *http://legal.un.org/ilc/publications/yearbooks/Ybkvolumes%28e%29/ILC_1956_v2_e.pdf* accessed 22/5/14.
[60] GA Resolution 1105(XI) 21 February 1957 at its 658th plenary session.
[61] Ibid para 2.
[62] The four Geneva Conventions of 29 April 1958 are: Convention on the Territorial Sea and the Contiguous Zone 516 *UNTS* 205; Convention on the High Seas 450 *UNTS* 82; Convention on the Continental Shelf 499 *UNTS* 311; and Convention on Fishing and Conservation of Living Resources of the High Seas 559 *UNTS* 285. The convention on the High Seas did provide for the treatment of piracy under international law.
[63] Harrison 'The evolution of the law of the sea: developments in law-making in the wake of the 1982 Law of the Sea Convention' (2008) PhD Thesis The University of Edinburg at 24; See also Dean 'The Geneva conference on the law of the sea: What was accomplished' (1958) 52(4) *AJIL* 607.
[64] 29 April 1958 450 *UNTS* 82.

‘Piracy consists of any of the following acts:

> (1) Any illegal acts of violence, 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:
>
> (a) On the high seas, against another ship or aircraft, or against persons or property on board such ship or aircraft;
>
> (b) Against a ship, aircraft, persons or property in a place outside the jurisdiction of any State;
>
> (2) 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;
>
> (3) Any act of inciting or of intentionally facilitating an act described in sub-paragraph 1 or sub-paragraph 2 of this article.’

Bearing in mind the findings of the Harvard scholars that there was no settled definition under international law on piracy, due to the various controversies on the subject; the definition contained in the Geneva Convention was a major step forward at attaining a singular accepted definition. Since the drafting of the Matsuda draft it was the next major international development in relation to piracy. Its importance is underscored by the fact that despite the existence of controversies on the matter, states where able to thrash out these issues and negotiate an acceptable definition of piracy contained in an international convention.

The text of the Geneva Convention on piracy provided the draft upon which further considerations on the subject could begin during the subsequent United Nations conferences on the law of the sea. Ultimately this text on piracy was adopted as the UNCLOS definition on piracy. Further, the commentary on the Geneva Convention acts as an aid in the interpretation of ambiguous provisions of later definitions of piracy. More so, the commentary assists in interpreting UNCLOS provisions which are identical to those in the Geneva Convention save for some stylistic differences.[65]

2.3.3 United Nations Law of the Sea Conferences II, III and the United Nations Convention on the Law of the Sea 1982

The success of UNCLOS I was marred by the failure to solve some small, yet highly significant issues.[66] A second international conference was convened in 1960 (hereinafter referred to as UNCLOS II).[67] The mandate of UNCLOS II was to fill in the gaps in the legal framework left by

[65] Constantinople (n 12) at 732.
[66] These issues related to the width of the territorial sea and that of fishing rights.
[67] Records of the United Nations Conference on the Law of the Sea vol 2 at 145 available at *http://legal.un.org/diplomaticconferences/lawofthesea-1958/vol/english/Plenary_Mtgs_vol_II_e.pdf* accessed 28/2/14. UNCLOS II was convened pursuant to the passing of GA Resolution 1307 (XIII) 10 December 1958.

the first conference.[68] However, the eighty-eight states which attended UNCLOS II were also not able to agree on how to deal with the issues that had not been agreed upon during UNCLOS I.[69] In relation to piracy UNCLOS II was not of any significance as the issues canvassed mainly related to the width of the territorial sea and the exclusive economic zone.

The creation of the legal regime on the law of the sea came a step closer to fruition after the address of Malta's ambassador to the United Nations, Arvid Pardo on 1 November 1967. He asked the Assembly to take action towards the creation of 'an effective international regime over the seabed and the ocean floor.'[70] This led to the convening of the third international conference (hereinafter referred to as UNCLOS III) which lasted for nine years, saw the participation of 160 nations, and concluded in 1982 with the adoption of the United Nations Convention on the Law of the Sea 1982 (hereinafter UNCLOS 1982).[71]

UNCLOS III acted as a consolidation process of what had already been agreed upon during UNCLOS I and II and it provided 'an opportunity to resolve long standing differences of opinion so as to clear up ambiguities and errors contained in the 1958 conventions on the law of the sea.'[72] Eventually, on the various contentious issues a political compromise had to be agreed upon by the delegates so as to facilitate the adoption of an effective international regime on the law of the sea. In relation to piracy UNCLOS 1982 adopted verbatim the definition contained in the Geneva Convention 1958 with only stylistic changes.

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[68] GA Resolution 1307 (XIII) 10 December 1958 para 1.

[69] UNCLOS II failed by one vote to adopt a compromise formula providing for a six mile territorial sea and a six mile fisheries zone. See Clingan 'An overview of second committee negotiations in the law of the sea conference' (1984) 63 *OLR* 53; Dean 'The second Geneva conference on the law of the sea: The fight for freedom of the seas' (1960) *AJIL* 751 at 752 & 772-777.

[70] See proceedings of the American Society of International Law at its Annual Meeting (1921-1969) Vol 62 (25-27 April 1968) at 216-229. The General Assembly heeded his call and passed resolution 2467 A (XXIII) 21 December 1968 and resolution 2750 C (XXV) 17 December 1970, which created the Committee on the Peaceful Uses of the Sea-Bed and the Ocean Floor beyond the Limits of National Jurisdiction and called for the convening of a third Law of the Sea meeting to be held in 1973. The conference held eleven sessions from 1973-1982. See United Nations 'UN Convention on the law of the sea' (2008) at 1. UN audiovisual library of international law available at *http://legal.un.org/avl/pdf/ha/uncls/uncls_ph_e.pdf* accessed 30/11/13.

[71] For an overview of what transpired during UNCLOS III see Rosenne 'The third United Nations Conference on the law of the sea' (1976) 11 *ILR* 1; Stevenson & Oxman 'The third United Nations conference on the law of the sea: The 1975 Geneva session' (1975) 69(4) *AJIL* 763; Stevenson & Oxman 'The preparations for the law of the sea conference' (1974) 68(1) *AJIL* 1; Stevenson & Oxman 'Third United Nations conference on the law of the sea: The 1974 Caracas Session' (1975) 69 *AJIL* 1; Oxman 'The third United Nations conference on the law of the sea: The 1977 New York session' (1978) 72(1) *AJIL* 57; McWhinney 'The codifying conference as an instrument of international law making: From the "old" law of the sea to the "new"' (1975) 3 *SJILC* 301.

[72] Crockett 'Towards a revision of the international law of piracy' (1976-1977) 26 *DPLR* 78 at 78.

2.4 Definition of piracy under the United Nations Convention on the Law of the Sea 1982

The accepted, present day, definition of piracy *jure gentium*[73] is contained in the 1982 United Nations Convention on the Law of the Sea (UNCLOS).[74] Articles 101-111 provide the primary international legal regime on the law of piracy. These provisions of UNCLOS relating to piracy are generally accepted as a codification of customary international law.[75] Article 101 provides: Piracy consists of any of the following acts:

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

Most of the articles contained in the Harvard Draft were later included in the 1958 Geneva Convention and subsequently in UNCLOS.[76] Articles 101-104 provide the elements that constitute the crime of piracy. Article 105 allows for universal jurisdiction to be exercised over the crime of piracy. States have a duty to cooperate in the repression of piracy as per article 100. To assist in the repression of piracy 'warships or military aircrafts' or any other vessel 'clearly marked and identifiable as being on government service and authorised to that effect,'[77] are the only vessels authorised to exercise the right of hot pursuit against pirate ships.[78] However, states are liable to pay compensation if they undertake the seizure of a ship without adequate grounds.[79]

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[73] Piracy *jure gentium* piracy according to the customary law of nations i.e. piracy occurring in the high seas and not within the territorial waters of a state. See Dickinson 'Is the crime of piracy obsolete' (1925) 38 *HLR* 334 and *United States v Mohammed Modin & 4 Others* CR2:10 cr56/2010 *(USS Nicholas case)* (29 October 2010) at 6-14 for a discussion on the distinction between municipal law piracy and piracy *jure gentium.*

[74] 10 December 1982; 1833 *UNTS* 397 also referred to as the Montego Bay Convention as it was signed in Montego Bay Jamaica in 1982.

[75] Hodgkinson (n 16) at 31. See also the discussion in *United States v Mohammed Modin & 4 Others* (n 73) at 75-79. See also Menefee ' "Yo heave ho!" : Updating America's piracy laws' (1990) 21 *CWILJ* 151 at 161-162. Rubin (n 15) at 337 disagrees with this because of the debates that occurred during the negotiation process, that indicate the lack of consensus on what the definition of piracy entailed.

[76] See Dubner (n 35); See also Dubner 'Human rights and environmental disaster-two problems that defy the "norms" of the international law of sea piracy' (1997) 23 *SJILC* 1; Diaz & Dubner 'On the evolution of the law of international sea piracy: How property trumped human rights, the environment and the sovereign rights of states in the areas of the creation and enforcement of jurisdiction' (2009) 13 *BLR* 175.

[77] UNCLOS article 107.

[78] UNCLOS article 111.

[79] UNCLOS article 106.

2.5 Negotiations on piracy provisions from the Assembly of the League of Nations to UNCLOS III

The exposition above gives a historical account of how the present international law on piracy developed. Through the negotiation process much of the contention on piracy issues was witnessed during discussions on the J. P. A. Francois draft (ILC report) and the Geneva Convention on the High Seas draft. By the time the negotiations at UNCLOS I to UNCLOS III occurred it is evident, from analysing the discussion reports, that the provisions on piracy were not as contentious as other provisions. Further evidence of this is found in that the piracy provisions in UNCLOS 1982 remained much the same as they were in the Geneva Convention with only minor stylistic changes.[80] By the conclusion of UNCLOS I the provisions on piracy were fairly settled. A review of the reports of UNCLOS II and UNCLOS III reveals that the highly contentious issues considered during these conferences pertained to the Exclusive Economic Zone, the width of the territorial Sea, fishing rights and matters on the deep sea.[81]

As regards piracy, the entire process on the development of these laws was linked by the consensus that pirates are the enemies of all mankind, their acts are not authorised by any state and are committed beyond the jurisdiction of any state. This is evident all the way from the first draft submitted by Matsuda to the League of Nations, right through to the Geneva Convention deliberations and UNCLOS conferences. However, despite this consensus, on the finer points of what should be included in the definition of piracy there was disagreement. The contentious issues related to whether piracy could be committed for public motives; if acts of mutiny by the crew or passengers on a vessel amounted to piracy; whether an attack by an aircraft on a vessel on the high seas was piracy; whether the right of hot pursuit could be undertaken in territorial waters; whether warships could commit acts of piracy and; which vessels could be engaged in the capture of pirates. These contentious issues were mainly considered during deliberations on the Geneva Convention and the J.P.A. Francois draft and are discussed in turn.

[80] *United States v Mohamed Modin Hasan & 4 Others* (n 73) at 45.

[81] These issues will not be considered here as they are beyond the scope of this work for further discussion see Koh 'Negotiating a new world order for the sea' (1983-1984) 24 *VJIL* 761; Bowett 'The second United Nations conference on the law of the sea' (1960) 9 *ILCLQ* 415.

2.5.1 Public or private motive

The motive element in piracy was contentious as there was a divide whether piratical acts could be committed for private as well as public motives; an act committed for political purpose(s) was considered within the contemplation of a public motive. There were those of the opinion that political intentions should be included. Those in favour of including political purposes advanced the argument that it was definitely possible for a pirate to undertake piratical acts for a political purpose for example if an insurgent vessel committed piratical acts against a state. Those against argued that if political intentions were included it would be possible for international crimes of violence and depredation committed at the instigation or under the express authority of a public authority or country to be recognised as lawful. This would justify such acts on the basis of acts committed under superior orders.[82] Further, it would be difficult to hold such individuals accountable for piracy as it would be assumed they were acting under the lawful orders of a public authority or country.

The other arguments given, hinged on whether the acts of insurgents[83] could be considered acts of piracy.[84] Those in favour contended that since they had not received recognition as belligerents from their home government or any other government; that their actions were not authorised by any state then their acts of violence and depredation in the high seas amounted to piracy. Thus, the acts of insurgents directed at third states not involved in the conflict would be piracy. Those against argued that insurgents fighting for independence from their governments were acting for a public and not private motive. Further, since they posed a threat only to the government they sought to overthrow not all nations (as pirates' acts are directed against all nations), then their actions were not piracy.[85]

From these arguments it is evident that the contentious issue was whether piracy could be committed for a private or public motive. In this case private meaning 'private acts' not authorised

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[82] See summary report of 293rd meeting; Doc A/CN.4/SR.293 at 55.

[83] Insurgent is a person who for political purposes engages in armed hostilities against an established government and a belligerent is an individual in the armed forces of a country involved in an armed conflict. Under the Law of war, belligerents are considered lawful combatants whereas insurgents are unlawful combatants. See Constantinople (n 12) at 738-743. See also Gupta '*Recognition of insurgents and belligerent organisations in international law'* (2014) available at *http://ssrn.com/abstract=2457749* accessed 21/7/16; Corn & Jenks 'Two sides of the combat coin: Untangling direct participation in hostilities from belligerent status in non-international armed conflicts' (2011) 33(2) *UPJIL* 313.

[84] For a consideration of this discussion see summary report of the 293rd meeting; Doc A/CN.4/SR.293 at 56-57.

[85] Ibid.

by a state and public acts being those authorised by a state. This discussion aimed primarily at excluding the acts of insurgents not yet recognised as belligerents and acts of state vessels that were authorised by a state. In this regard it was felt necessary to indicate that the acts of insurgents could not be equated with piracy. To effectively capture this, the words 'for private ends' were included.[86]

Thus, from a consideration of the Harvard draft commentary and discussions on the J.P.A. Francois draft the element 'private ends' was intended to denote differences between public acts authorised by a state and private acts not authorised by a state that is acts committed by a private individual. Further proof of this is deduced by reading article 101 and 102 of UNCLOS together. These articles directly follow each other and while article 101 defines piracy, article 102 provides that the acts of a warship or government ship that has mutinied will be treated as those of a private ship. This is an indication that the definition of piracy under article 101 is to be ascribed only to vessels under the control of private individuals but if warships or government ships mutiny and commit acts of piracy they lose their governmental character and are deemed private vessels. Therefore, strengthening the proposition that 'private ends' refers to acts committed for a private economic gain.

Nonetheless, a consideration of the interpretation 'private ends' as applied in piracy cases shows that the term is not limited to acts pursued for economic gain but encompasses acts committed for a personal, moral or philosophical grounds but excludes acts committed for a political motive.[87]

2.5.2 Acts of mutiny

The two ship requirement embodied in the UNCLOS definition was considered under the discussion if acts of mutiny by the crew or passengers on a vessel amounted to piracy. It was argued by some that revolt by the crew or passengers on a vessel who then convert the vessel and her goods to their own use, committed piracy. However, others argued that simple acts of violence such as murder, or mutiny did not amount to piracy. The underlying element was to show that the

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[86] The vote to retain the words 'for private ends' was decided by 11 votes to 2. See summary report of the 293rd meeting; Doc A/CN.4/SR.293 at 57.

[87] *Institute of Cetacean Research & Others v Sea Shepherd Conservation Society* no. 12-35266 (9th Circ. 24/5/2013); 43 ELR 20114 *(Sea Shepherd case)* available at *http://elr.info/litigation/43/20114/institute-cetacean-research-v-sea-shepherd-conservation-society* accessed 12/10/14. *R v Mohammed Ali Said* Cr2:10 cr57/2010 (17 August 2010) *(USS Ashland case)*. *Castle John v N V Mabeco* [1986] 77 ILR 537 (19 December 1986). For further discussion on 'private ends' see section 2.7.2.

acts of revolt were directed towards another vessel. Thus mutinies were not acts of piracy unless committed against other vessels.[88] Therefore, the words 'and directed ... on the high seas, against another ship or aircraft' were included in article 101 UNCLOS, to exclude acts of mutiny.

Linked to this issue was that of whether warships could commit acts of piracy. It was argued that acts of a piratical character committed by warships on superior orders amounted to no more than mere acts of breach of peace. They in effect constituted acts of aggression or war, and the flag state that gave the orders for such acts carried the responsibility for the acts.[89] Thus, the acts could not be ascribed to the individuals involved but were ascribed to the state. Further, by attempting to assign acts committed by warships it would have grave consequences as it would be prejudicial to the interests of a country and to the international community.[90] Eventually those arguing that warships under government service could commit piracy superseded, and article 102 UNCLOS was included in its current form.[91]

When exactly an act of mutiny converts to an act of piracy is provided in article 103. For a mutiny to turn into piracy the persons in dominant control must intend to use the vessel to commit piratical acts and the vessel must remain under their control during the commission of the acts.[92]

2.5.3 Power of arrest and hot pursuit

The issue of who could arrest pirates was one of the more hotly contested amongst the issues dealt with in relation to piracy. There were those of the view that arrest should be restricted to warships only and on the other hand those who argued that the arrest be done by warships and other state vessels such as police and customs vessels. It was considered that arrest should be restricted to warships for practical purposes as extending the right to other vessels may lead to abuse.[93] This

[88] Summary report of the 292th meeting; Doc. A/CN.4/SR.292 at 53.
[89] Summary report of the 293rd meeting; Doc A/CN.4/SR.293 at 56.
[90] *Yearbook of the International Law Commission vol. II* (1956) at 282 available at *http://legal.un.org/ilc/texts/instruments/english/commentaries/8_1_8_2_1956.pdf* accessed 10/5/14.
[91] Article 102 provides: 'The acts of piracy, as defined in article 101, committed by a warship, government ship or government aircraft whose crew has mutinied and taken control of the ship or aircraft are assimilated to acts committed by a private ship or aircraft.'
[92] Article 103 provides: 'A ship or aircraft is considered a pirate ship or aircraft if it is intended by the persons in dominant control to be used for the purpose of committing one of the acts referred to in article 101. The same applies if the ship or aircraft has been used to commit any such act, so long as it remains under the control of the persons guilty of that act.'
[93] Summary report of the 292 meeting; Doc A/CN.4/SR.292 at 54.

may lead to instances of friction arising between states. These views were reiterated both at the Geneva and UNCLOS discussions.[94]

The later view that in addition to warships other ships in governmental service be allowed to undertake arrests carried the day. This is evidenced by the wording of article 107 UNCLOS which provides that 'warships or military aircraft, or other ships or aircraft clearly marked and identifiable as being on government service', may undertake arrest of pirates. However, as per the commentaries on the Geneva Convention a merchant vessel which has repulsed an attack by a pirate ship and arrests the pirates; such a vessel would rightfully be exercising its right of self-defence. Strictly, this is not considered an 'arrest' within the meaning of article 107 UNCLOS for it is taken to be an action in the exercise of the right to self-defence.[95]

The right of hot pursuit allows pirates to be pursued in order to be arrested. The contentious issue was to which extent this right could be exercised. On the one hand some considered that pursuit should be allowed right into another state's territorial waters. While others felt that this should not be allowed as an individual state has authority within its territorial waters. Allowing hot pursuit into a state's territorial waters would therefore be a violation of this authority. The latter view survived as indicated by article 111 UNCLOS; hot pursuit 'may only be continued outside the territorial sea or the contiguous zone' and is only exercisable by warships or ships in government service. The use of the word 'may' in article 111 also indicates that it is not mandatory for a warship or ship in government service to exercise this right.

In conclusion, the exposition above on the negotiation process of the international law of the sea is relevant for various reasons. First, the difference in how the crime of piracy was treated by various nations is discernible from the issues raised during the negotiation process for the Geneva and UNCLOS conventions.[96] Second, the differences in the scope of municipal definitions of

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[94] At the UNCLOS discussions a vote on the matter was passed in the affirmative. See summary report of the 293rd meeting; Doc A/CN.4/SR.293 at 54-55.

[95] International Law Commission *Geneva Convention on the Law of the Sea Commentaries* (1956) at 283 available at *http://legal.un.org/ilc/texts/instruments/english/commentaries/8_1_8_2_1956.pdf* accessed 10/5/14.

[96] From the beginning and throughout the discussions over the J. P. A. Francois draft it was evident that 'the word "piracy" had such an overlay of emotion and conflicting meaning'. Each commissioner had his own conception of 'piracy' and felt his was correct to the exclusion of the others. In addition, discussions on the draft were based on policy and political considerations and not on a legal basis; as no citations to accepted rules or cases was made. Most definitely if consensus was to be arrived at then many political compromises had to be made. See Rubin (n 15) at 333 & 344. For an overview of these views see summary record of the meetings Doc A/CN.4/SR291; Doc A/CN.4/SR.292; Doc A/CN.4/SR.293. See also Rubin 'Is piracy illegal' (1976) 70(1) *AJIL* 92, Dubner & Greene 'On the creation of a new legal regime to try sea pirates' (2010) 14(3) *JMLC* 439 at 440.

piracy, as evident from the varying views expressed by delegates, led to confusion in the definition of piracy and a political compromise that was acceptable to all states had to be adopted. This meant avoiding re-opening old controversies and accepting what the parties had agreed upon at the various negotiation conferences in order to come up with an international definition.[97] This lead to some issues being left 'unclear' and not defined in the UNCLOS 1982 definition. These issues continue to provide ambiguity in the definition and application of piracy provisions.[98]

2.6 Other definitions of piracy

2.6.1 Convention for Suppression of Unlawful Acts against the Safety of Maritime Navigation (SUA)

A second definition was formulated to deal with the limitations of UNCLOS that were noted as a result of the *Achille Lauro* incident. These limitations were the motive requirement, two ship requirement and piracy committed in territorial waters. On 7 October 1985, four men members of the Palestinian Liberation Front, a faction of the Palestinian Liberation Organisation, while posing as passengers boarded the Italian flagged, cruise ship *Achille Lauro* at Genoa. They then proceeded to hijack the ship as it was sailing within Egyptian territorial waters on its way from Alexandria to Port Said. Their acts were aimed at pressuring the government of Israel to release fifty Palestinians held in their jails.[99]

The flaws of UNCLOS were evidenced by the hijackers' motive being political as they were not interested in monetary gains. There was no second ship involved as they had posed as cruise passengers and did not launch an attack from another ship. The incident occurred within the territorial waters of Egypt as the ship was hijacked while sailing from Alexandria to Port Said. Therefore, the charge of piracy could not be sustained under international law when applying UNCLOS.

[97] Dubner & Greene ibid; Birnie 'Piracy past, present and future' (1987) 11(3) *MP* 163 at 170.

[98] Discussion on this is done in section 2.7.

[99] They murdered one passenger and after being denied entry into Cyprus they sailed back to Port Said, Egypt on 9 October where the hijackers surrendered after securing a safe conduct agreement from Egypt, Germany and Italy and released the hostages. Later they were brought under the jurisdiction of the United States and charged. The accused were charged with conspiracy, hostage taking as per 18 U.S.C. § 1203 (Supp. 1986) and piracy as defined by the law of nations per 18 U.S.C. § 1651 (1982). See Constantinople (n 12) at 747-748.

The acts committed by the Palestinians amounted to acts of terrorism.[100] The international community realised there was need to draft a new convention, to address these flaws. The Convention for Suppression of Unlawful Acts against the Safety of Maritime Navigation was drafted to provide an updated definition of maritime offences and provide for maritime acts of terrorism.

The Convention for Suppression of Unlawful Acts against the Safety of Maritime Navigation (SUA) was adopted in Rome, Italy on 10 March 1988 and came into force on 1 March 1992. Article 3 of SUA provides as follows:

> '1. Any person commits an offence if that person unlawfully and intentionally:
>
> (a) Seizes or exercises control over a ship by force or threat thereof or any other form of intimidation; or
>
> (b) Performs an act of violence against a person on board a ship if that act is likely to endanger the safe navigation of that ship; or
>
> (c) Destroys a ship or causes damage to a ship or to its cargo which is likely to endanger the safe navigation of that ship; or
>
> (d) Places or causes to be placed on a ship, by any means whatsoever, a device or substance which is likely to destroy that ship, or cause damage to that ship or its cargo which endangers or is likely to endanger the safe navigation of that ship; or
>
> (e) Destroys or seriously damages maritime navigational facilities or seriously interferes with their operation, if any such act is likely to endanger the safe navigation of a ship; or
>
> (f) Communicates information which he knows to be false, thereby endangering the safe navigation of a ship; or
>
> (g) Injures or kills any person, in connection with the commission or the attempted commission of any of the offences set forth in subparagraphs (a) to (f).'

From the reading of article 3 SUA it is evident that SUA does not expressly outlaw 'piracy' but captures maritime offences.[101] In that unlike UNCLOS which provides that 'piracy consists of the following acts' SUA provides that 'any person commits an offence if that person unlawfully and intentionally...' undertakes the prohibited acts listed thereafter. Nevertheless, some elements of the

[100] There is no consensus on the definition of terrorism but it is generally considered to be any action that is intended to cause death or serious bodily harm to civilians or non-combatants, when the purpose of such act, by its nature or context, is to intimidate a population, or to compel a government or an international organization to do or to abstain from doing any act. In this particular case terrorism involved the hijacking and detaining the nationals of various states in order to coerce the state of Israel to release prisoners. See Safdari *et al* 'Social impact of money laundering' (2015) 5(8) *AJRSSH* 173 at 177. See also Young 'Defining terrorism: The evolution of terrorism as a legal concept in international law and its influence on definitions in domestic legislation' (2006) 29(1) *BCICLR* 23.

[101] Totten & Bernal 'Somali piracy: Jurisdictional issues, enforcement problems and potential solutions' (2010) 41 *GJIL* 377 at 397; Hodgkinson (n 16) at 25.

crime of piracy or acts constituting piracy under UNCLOS are also offences under SUA such as performing an act of violence against a person on board a ship, seizing or exercising control over a ship by force and injuring or killing persons.

2.6.2 Regional Cooperation Agreement on Combating Piracy and Armed Robbery against Ships in Asia (ReCAPP) and International Maritime Bureau (IMB)

Also considered amongst the definitions of piracy are the Regional Cooperation Agreement on Combating Piracy and Armed Robbery against Ships in Asia (ReCAPP)[102] and International Maritime Bureau (IMB)[103] definitions which create the offence of armed robbery against ships. The piratical acts that constitute these offences are similar to the acts that constitute piracy under the UNCLOS definition. The distinguishing aspect is that armed robbery against ships is meant to deal with piratical incidents occurring within a state party's jurisdiction, which is within a state's territorial waters; whereas the UNCLOS definition applies to piratical incidents in the high seas. Thus strictly speaking the ReCAPP and IMB definitions do not define piracy but define the offence of armed robbery. These definitions are given mainly for statistical purposes as the definition takes into account actual or attempted attacks that occur in internal waters, territorial waters or the high seas.[104] So they are relevant for organisations such as IMB when collecting data on incidents occurring in both territorial waters and the high seas.

Notwithstanding the various definitions of piracy elucidated above the discussion hereunder will concentrate on the UNCLOS and SUA definitions for various reasons. First, the number of countries that have ratified[105] UNCLOS now 'provides strong support to the view that the conventions provisions are representative of the customary international law of the sea and

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[102] The Regional Cooperation Agreement on Combating Piracy and Armed Robbery against Ships in Asia (ReCAPP) is a multilateral treaty aimed at aiding in the anti-piracy efforts in the Southeast Asian region. The Agreement was adopted on 11 November 2004 and entered into force on 4 September 2006.

[103] The International Maritime Bureau (IMB) is a specialised division of the International Chamber of Commerce (ICC). The IMB is a non-profit making organisation, established in 1981 to act as a focal point in the fight against all types of maritime crime and malpractice. IMO resolution A922(22) of 29 November 2001 adopting the code of practice for the investigation of the crimes of piracy and armed robbery against ships. See Middelburg (n 14) at 11-12 & Harrison (n 41) at 154-199 for an overview on the IMB.

[104] Dubner (n 8) at 77.

[105] There are 168 signatory countries as at 23 June 2016; United Nations Division for Ocean Affairs and the Law of the Sea available at *https://www.un.org/depts/los/reference_files/chronological_lists_of_ratifications.htm* accessed 10/8/16.

definition of piracy.'[106] Second, SUA is the next widely accepted treaty dealing with maritime offences after UNCLOS.[107]

2.7 Analysis of the present law on piracy

The provisions on piracy in UNCLOS are generally considered to be representative of customary international law. Customary international law is those principles of international law that first, have formed a constant and uniform practice. Second, the principles apply *opinion juris sive necessitates,* a conviction that the existing law renders the practice obligatory.[108] Both UNCLOS and SUA embody international law, thus any state that has ratified these treaties is bound to follow them. However, since UNCLOS provisions on piracy are considered customary international law, non-signatory states are bound by these customary law principles on piracy.[109] Whereas, for SUA the obligations contained therein are only owed to state parties to the convention. Thus it is correct to infer that UNCLOS provisions have a more extensive reach than SUA.

The UNCLOS definition identifies the four main elements of the crime of piracy as: (i) an illegal act involving violence, detention or depredation; (ii) committed for private ends; (iii) involving two ships and; (iv) occurring on the high seas. The definition does not contain numerous lists of acts that can qualify as an act of piracy for the purposes of delineation. To qualify as piracy the illegal acts should involve violence, detention or depredation. Additionally, such illegal acts must satisfy the further requirements of being committed for private purposes; by the crew or passengers of a private vessel against another vessel or against such persons or property aboard another private vessel and; such acts should be committed in the high seas or in a place outside the jurisdiction of any state. These elements are all mutually inclusive, that is they must all occur for piracy to be committed.

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[106] Campbell 'A modern history of the international legal definition of piracy' in Ellerman *et al* (eds) *Piracy Maritime Crime: Historical and Modern Case Studies* (2010) at 28. See also Boas *Public International Law: Contemporary Principles and Perspectives* (2012) at 123.
[107] There were 166 signatories to the convention as at 2 August 2016. Source International Maritime Organisation available at *http://www.imo.org/en/About/Conventions/StatusOfConventions/Pages/Default.aspx* accessed 2/8/16.
[108] Crawford *Brownlie's Principles of Public International Law* (2012) at 24-27; See also *North Sea Continental Shelf Cases (Federal Republic of Germany v Denmark; Federal Republic of Germany v Netherlands)* (1969) ICJ Reports 3 (20 February 1969) para 70-85.
[109] See *United States v Mohammed Modin Hasan* (n 73) at 70-75; *Re Piracy Jure Gentium* (n 37). However, the discussion in section 2.8.2 will show that despite the piracy provisions in UNCLOS being customary international law most states are only willing to apply them after they are domesticated in their national laws.

From the reading of article 3 SUA it is evident that SUA does not expressly outlaw 'piracy' but captures maritime offences.[110] First SUA expands the types of unlawful acts that would amount to offences.[111] Unlike UNCLOS, SUA provides a list of the unlawful acts that would constitute offences under the convention. Second, article two specifically provides that the actual, attempted, abetted, or threatened commission of the acts identified in article one also amount to maritime offences.[112] Third, just as in UNCLOS, SUA indicates that maritime offences occur in the high seas and also provides for those within the territorial sea, albeit in a flowery phrase, and makes no mention of maritime offences occurring in areas *res nullius* (unclaimed territory).[113] Four, the SUA definition contains no requirement for a motive to commit maritime offences or the involvement of two ships; but like UNCLOS imputes that these maritime offences should involve some element of violence. Hereunder an in-depth analysis of the other distinctions and shortcomings between UNCLOS and SUA in defining the crime of piracy and maritime offences will be discussed.

2.7.1 Piracy as an illegal act involving violence, detention or depredation

Article 101 UNCLOS provides that piracy consists of 'any illegal acts of violence or detention, or any act of depredation'. This suggests a number of possibilities. The pirates may use violence in their attack for example in the case of Somalian pirates who attack the targeted vessels using weapons. On the other hand it is possible that an attack is non-violent. In the case of Southeast Asian piracy, the pirates may undertake clandestine thefts; where they steal the goods without the knowledge of the crew.[114] The implication being that such non-violent attacks are still considered acts of piracy as they fall within the scope of article 101, which allows for inclusion of acts such as 'detaining, robbing, looting, hijacking, commandeering or violently attacking a ship'.[115]

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[110] Totten & Bernal (n 101) at 397.

[111] These acts include: seizes or exercises control over a ship by force or threat or intimidation; performing acts of violence, destroying or damaging a ship, placing a device or substance likely to destroy or interfere with the safe navigation of a ship; destroying or interfering with maritime navigational facilities; communicating false information thereby endangering the safe navigation of a ship and killing or injuring of a person committed in the process of undertaking the acts mentioned.

[112] Anderson (n 4) at 55.

[113] Article 4 SUA provides: 'This Convention applies if the ship is navigating of is scheduled to navigate into, through or from waters beyond the outer limit of the territorial sea of a single State, or the lateral limits of its territorial sea with adjacent States.'

[114] Collins & Hassan 'Applications and shortcomings of the law of the sea in combating piracy: A South East Asia perspective' (2009) 40 (1) *JMLC* 89 at 96; Liss 'New actors and the state: Addressing maritime security threats in Southeast Asia' (2013) 35(2) *CSEA* 141 at 146.

[115] Hodgkinson (n 16) at 18.

However, these acts have to be illegal in nature so as to qualify as piracy.[116] A consideration of the commentary to the Geneva Convention and UNCLOS does not provide guidance on what constitute illegal acts. However, practical application of this provision in piracy cases indicates that what amounts to 'illegal acts' is to be determined by the courts of the state that seizes a pirate ship.[117] To be able to capture all these types of attacks a broad interpretation of 'act of violence' to include actual use of force and attempted use of force situations has been employed. From the reading of court decisions it is indicated that since the acts of violence - attacking a vessel and its crew, boarding a vessel without authorisation, detaining persons against their will or plundering - are forbidden by law makes them illegal acts.[118] For example in the *Happy Bird* case[119] the ship while on the high seas was approached by two first moving skiffs that surrounded the *Happy Bird* on either side and started firing at it. Thus the court interpreted the acts of firing at the *Happy Bird* as illegal acts as they were contrary to the laws of Seychelles.

SUA provides that a 'person commits an offence if that person unlawfully and intentionally' undertakes any of the listed unlawful acts. Just like UNCLOS it requires the element that the acts committed are unlawful. The difference is a matter of synonyms as UNCLOS uses the term 'illegal' and SUA refers to 'unlawful'.[120] Additionally, SUA provides for the mental element of the accused that they should have intended to commit the unlawful acts. This is evidenced by the use of the word 'intentionally'. This implies that one was aware that their acts are illegal as they are not authorised by any legal and recognised authority.

SUA also provides that for actions to constitute piratical acts they should involve the use of 'force or threat thereof or any other form of intimidation'. This imputes the use of violence or intimidation in committing these unlawful acts. Further, SUA expands the unlawful acts to include the actual, attempted, abetted, or threatened[121] commission of the unlawful acts. Considering the similarity in

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[116] Ibid.
[117] Nordquist, Nandan & Rosenne (n 8) at 201.
[118] *Black's Law Dictionary* 9th ed defines illegal as 'forbidden by law; unlawful at 815. Hodgkinson (n 16) at 18.
[119] *R v Liban Mohamed Dahir & 12 Others* CR 7/2012 (31 July 2012) (*Happy Bird Case*). For similar interpretation see also *R v Houssein Mohamed Osman & 10 Others* CR 19/2011 (12 October 2011) *(Draco case)*; *Institute of Cetacean Research v Sea Shepherd Society* (n 87).
[120] *Black's Law Dictionary* 9th ed defines illegal as 'forbidden by law; illegal at 815 and defines unlawful as 'not authorized by law; illegal' at 1678.
[121] Anderson (n 4) at 55.

this element between SUA and UNCLOS then it would be right to presume that a similar interpretation and application as under UNCLOS should follow.

2.7.2 The motive requirement

The provisions of UNCLOS require that piracy be committed for 'private ends'. This is interpreted to mean that the piratical acts should be committed for a personal monetary/material benefit.[122] This has been specifically stated in the commentary to the Geneva Convention and the UNCLOS commentary.[123] In certain instances this motive is clearly identifiable. For example in the case of Somalian pirates it has been established that their motive is monetary gain.[124] This requirement precludes instances where piracy is committed for a political, terrorist or public motive.

The interpretation of the term 'private ends' has elicited controversy. Some scholars agree with the view expressed above that piracy can only be committed for a monetary benefit.[125] However, other scholars are of the view that the distinction is between a private versus political motive, yet others view it as implying a private versus public motive.[126]

The private versus political motive holds that, piracy cannot be committed for political motives only for the material gain of the offender. This is in line with the current interpretation of 'private ends' under UNCLOS referred to above. Therefore, since a political motive is normally related to terrorism, such actions will not amount to piracy.[127] The other point of view holds that the distinction is between a private sanctioned piratical act(s) which amounts to piracy, and public

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[122] Nordquist, Nandan & Rosenne (n 8) at 205. Hodgkinson (n 16) at 18.

[123] Geneva Convention commentaries (n 95) at 282; Nordquist, Nandan & Rosenne (n 8) at 205.

[124] Roach 'Agora: Piracy prosecution: Countering piracy off Somalia: International law and international institutions' (2010) 104 *AJIL* 397; UN Security Council *Report of the Monitoring Group on Somalia Pursuant to Security Council Resolution 1811 (2008)* 10 December 2008; UN Doc S/2008/769 available at *http://www.refworld.org/docid/494900240.html* accessed 30/04/13; FATF *Organised Maritime Piracy and Related Kidnapping for Ransom* (2011) available at *http://www.fatf-gafi.org/document/51/0,3746,en_32250379_32237202_48426547_1_1_1_1,00.html* accessed 3/3/13; Geoplicity *The Economics of Piracy: Pirate Ransoms and Livelihoods off the Coast of Somalia* (2011) at 13 available at *http://www.geopolicity.com/upload/content/pub_1305229189_regular.pdf* accessed 9/4/13.

[125] See Paradiso 'Come all ye faithful: How the international community has addressed the effects of Somali piracy but fails to remedy its cause' (2010) 29 *PSILR* 187; Harrelson 'Black-beard meets blackwater: An analysis of international conventions that address piracy and the use of private security companies to protect the shipping industry' (2010) 25 *AUILR* 283.

[126] House of Commons Foreign Affairs Committee *Piracy off the Coast of Somalia Tenth Report of Session 2010-2012* (2012) written evidence 88 para 11 available at *http://www.publications.parliament.uk/pa/cm201012/cmselect/cmfaff/1318/1318.pdf* accessed 19/2/14. See also Halberstam 'Terrorism on the high seas: The Achille Lauro, piracy & the IMO convention on maritime safety' (1988) 82 *AJIL* 269 at 274-276; Constantinople (n 12) at 737-743.

[127] House of Commons Foreign Affairs Committee Report (n 126) written evidence 88 para 11. See also Power 'Maritime terrorism: A new challenge for national and international security' (2008) 10 *BLR* 111.

acts, that is government sanctioned acts that do not amount to piracy.[128] Thus acts not authorised by the state amount to piracy while public acts (authorised by the state) do not.[129] Implying that a government vessels undertaking government authorised acts (public acts) cannot be deemed to commit piracy, unless the government vessel is converted into a private vessel and thus will be deemed to be committing private acts.

The interpretation that 'private ends' infers a distinction between private and public acts is further supported by considering the literal interpretation of the term 'private'. According to *Black's Law Dictionary* 'private' means 'relating or belonging to an individual, as opposed to the public or government'.[130] Thus, private acts are those not taken on behalf of a state; even if the perpetrator believes they are serving the public good, it does not render their ends public as they are not committed on the authority of a government.[131] A consideration of piracy cases indicates that the private versus political motive has carried the day; that is piracy can only be committed for the desire of personal gain, economic or otherwise and not for a political motive.

The difficulty of establishing the element of motive under UNCLOS can be considered by applying UNCLOS provisions to the case of *United States v Shi.*[132] In 2002 Mr. Lei Shi was a cook aboard the *Full Means No. 2* (a Taiwanese owned, Seychelles flagged vessel), the captain was Taiwanese and the other twenty-nine crew plus Shi were mainland Chinese. The captain and first mate constantly harassed Shi and beat him up. On the material day they demoted Shi from the position of cook to hand deck, in addition to administering a severe beating. Shi responded by taking two knives and on the deck of the ship fatally stabbed the captain and first mate. He then commandeered the vessel to set sail for China, en route he was overpowered by the crew and handed over to FBI agents in Hawaii.[133] Shi was prosecuted by the United States in terms of

[128] Bahar 'Attaining optimal deterrence at sea' (2007) 40 *VJTL* 1 at 32. See also discussion in section 2.5.1.
[129] Halberstam (n 126) at 282; See also Crockett (n 72) at 87-96.
[130] *Black's Law Dictionary* 9th ed at 1315.
[131] *Institute of Cetacean Research v Sea Shepherd Society* (n 87) at 8.
[132] 525 F.3d 709 (9th Cir. 2008) (24 April 2008).
[133] He then ordered the other crew to throw overboard the captain's body and for the second mate to drive the ship. Shi was in control of the ship for two days during which time he set course for China. He was later overpowered by the other crew and imprisoned in a storage compartment on the ship. The crew claimed they could not operate the radio thus they could not contact the ship owners and therefore sailed for Hawaii. In Hawaii, Shi was arrested by FBI agents. The Seychelles government waivered jurisdiction and thus he was prosecuted by the USA.

municipal legislation domesticating the SUA convention.[134]A jury found Shi guilty and he was sentenced to thirty-six years imprisonment.

From this case four issues of importance in discussing the crime of piracy arise. 1) the motive requirement; 2) the application of universal jurisdiction; 3) the two ship requirement and; 4) whether the vessel become a pirate ship. Of importance to our present discussion are the elements of motive, two ships and whether the ship was converted to a pirate ship, the issue of universal jurisdiction will be dealt with when considering the application of universal jurisdiction to the crime of piracy.[135] The illegal acts attributable to Shi are the murder of the captain and the first mate and the taking over of a ship and commandeering it to China.

This case was adjudicated upon by applying the SUA convention. This is because the United States is not a signatory to UNCLOS but is a signatory to SUA. The motives for undertaking a piratical act are not relevant in proving piratical acts under SUA. These acts can be committed for monetary, political or public motives.[136] Since there is no need under SUA to establish motive this issue did not arise during the trial.

However, the outcome would have been different if UNCLOS was applied.[137] Per UNCLOS definition of piracy three elements are relevant in determining if Shi committed piracy: what was his motive; were two ships involved; and did the vessel become a pirate ship. As regards the second element Shi was a crew member on the ship and had the duties of a cook. Due to the beatings and humiliation he was subjected to he merely mutinied, committed murder and commandeered the ship towards China. All these events occurred on the same ship, there was no involvement of a

[134] Shi was charged with one count of seizing control over a ship by force in violation of 18 U.S.C. §2280(9a)(1)(A) '[a] person who unlawfully and intentionally seizes or exercises control over a ship by force or threat thereof or any other form of intimidation' and two counts of performing an act of violence likely to endanger the safety of a ship in violation of 18 U.S.C. §2280(a)(1)(B) (2006) stating that offenses include '[a] person who unlawfully and intentionally performs an act of violence against a person on board a ship if that act is likely to endanger the safe navigation of that ship.' These provisions domesticate SUA provisions within the United States law.

[135] See section 2.8.1.

[136] House of Commons Foreign Affairs Committee Report (n 126) written evidence 94 para 29. Hodgkinson (n 16) at 28.

[137] It would have been possible to indirectly apply UNCLOS provisions to the case if Mr Shi had been charged under 18 U.S.C. §1651 (2006) which provides: 'Whoever, on the high seas, commits the crime of piracy as defined by the law of nations, and is afterwards brought into or found in the United States, shall be imprisoned for life.' The courts have considered the issue of S 18 U.S.C §1651 domesticating under United States law the offence of piracy according to customary international law (law of nations) and that article 101 UNCLOS reflects the customary international law definition of piracy. As authoritatively canvassed in *United States v Mohammed Modin Hasan & 4 Others* (n 73) at 70-75.

second ship. Piracy under UNCLOS requires two ships for the act of piracy to occur; this was not fulfilled in Shi's case.

As per the third element piratical acts are committed by pirate ships. A ship is considered a pirate ship or aircraft if it is intended by the persons in dominant control to be used for the purpose of committing illegal acts of violence or detention, or any act of depredation so long as it remains under the control of the persons guilty of these acts.[138] The *Full Means II* was a vessel used for fishing purposes. Thus, before Shi's actions it was not a pirate ship. After the killings Shi was in dominant control of the ship and commandeered it to returning to China. The ship was not used to commit illegal acts of violence, detention or depredation. Therefore, the ship was never converted into a pirate ship as per section 103 of UNCLOS.

With regard to the requirement of motive under UNCLOS, literally, Mr. Shi's act was for a private end because he wanted to benefit as a private individual by going back home. However, according to the guidance given by the commentary on the law of the sea,[139] we are to consider the monetary gain that an individual will achieve from a piratical act. Shi's act did not in any way help him attain a monetary benefit. His intention was to return to China, thus the ship was not converted into a pirate ship, and he merely attempted to commandeer it to China. [140] His motive was not for a monetary benefit but one of self-defence and revenge.[141] Considering the earlier discussion on private ends as being a distinction between private and public acts, it is possible to consider Mr. Shi's acts as satisfying the private ends element as his actions were pursued for personal grounds. However, if it is to be considered in terms of the economic benefit that Mr. Shi attained, satisfying the private ends element under UNCLOS fails as he attained no economic gain.

From the discussion above and application of the motive requirement to the *Lei Shi* case it is clear that it is necessary to establish motive under UNCLOS; this motive has to be the acquiring of a personal benefit and not a political one and the difficulties that may arise in determining motive. Whereas, under SUA this difficulty is eliminated as it is not necessary to prove any type of motive. It is thus clear that had UNCLOS provisions been applied to Mr. Shi's case and he was tried for

[138] UNCLOS article 103.
[139] Nordquist, Nandan & Rosenne (n 8) at 205.
[140] Anderson (n 4) at 79-80. See Collins & Hassan (n 114) at 99 for discussion of similar incidents involving the *USS Cole*, an American battle ship and the *Limberg*, a French super tanker both vessels it is believed were attacked by Al-Qaeda militants for terrorist purposes.
[141] Smith (n 3) at 718.

the crime of piracy, he would not have been found guilty. However, he was tried for different maritime offences under SUA, which does not require the establishment of motive, and was found guilty.

2.7.3 The two ship requirement

Article 101(a)(i) UNCLOS provides that for piracy to occur an attack must be directed on the 'high seas against another ship or aircraft'. Reading this provision together with the preceding provision article 101(a) infers that the acts of depredation, violence or detention should be directed at a different vessel from the one the pirates are using. This can be deduced from the words 'against another ship' that are used. This interpretation is further supported by article 103 which defines a pirate ship. The provision clearly provides that a ship will be considered a pirate ship if 'it is intended by the persons in dominant control to be used for the purpose of committing the acts of detention, depredation or violence and it remains under the control of the persons guilty of these acts.' This lends credence to the practical aspect that the pirates are in one ship that they have devoted to committing the acts of violence and depredation from, different from the vessel that they commit the acts against.

However, the reading of article 103 may also lead us to the interpretation that a ship that was not a pirate ship may be converted into one. The wording of the article[142] implies that a private ship may be converted into a pirate ship if it is seized and remains under the dominant control of person(s) intending to or do commit the acts forbidden in article 101.

The requirement that there must be two ships involved brings forth a number of issues. First, the ships involved must be private ships. Governmental ships are not included or cannot commit a pirate attack. This is because they are acting under the lawful authority of a state thus their lawful acts cannot amount to piracy. However, this can lead to a dilemma in certain situations. Illustration of this is given by the 1975 incident involving the *SS Mayaguez* a US merchant ship, carrying general cargo.[143]

[142] Article 103 UNCLOS provides: 'A ship or aircraft is considered a pirate ship or aircraft if it is intended by the persons in dominant control to be used for the purpose of committing one of the acts referred to in article 101. The same applies if the ship or aircraft has been used to commit any such act, so long as it remains under the control of the persons guilty of that act.'

[143] Anderson (n 4) at 53-54. See also Zutz 'The Recapture of the SS Mayaguez failure of the consultation clause of the war powers resolution' (1975) 8 *NYUJILP* 457; Behuniak 'The seizure and recovery of the SS Mayaguez: A legal analysis of the United States claims' 82 *MLR* 41.

The merchant ship was captured by a Cambodian ship that was controlled by Cambodian forces. The US government did not recognise the Khmer Rouge regime and thus considered the Cambodian ship a private ship. Diplomatic means were used to try and secure the release of the vessel but after two and a half days there was no change. The US government therefore launched a military rescue operation. US marines boarded the ship and recaptured it. The crew were released unharmed.[144]

The implication was that according to the US government the capture of the vessel was an incident of piracy. However, the Chinese government considered the recapture of the *SS Mayaguez* an act of piracy. This is a case of politics coming to the fore as the conundrum in this situation being whether, the Cambodian ship was a government vessel or a private vessel. This was hinged on a political issue as the US government did not recognise the Khmer Rouge as a legitimate authority while the Chinese government accorded them such recognition. Thus the answer to the question on the classification of the incident as an act of piracy or not depended on whether the Khmer Rouge was recognised as a legitimate authority in power and if it was, then the ship it was using would have been a vessel in government service. Being a government vessel it was not a private vessel and thus did not fulfil the UNCLOS two ship requirement and therefore not a pirate ship that had committed an act of piracy.

Second, the attack must involve two ships one belonging to the pirates and the other belonging to the victims. This clearly illustrates the traditional notion of piracy. The implication of this is that acts of mutiny do not fulfil the two ship element as only one ship is involved. A consideration of current piracy cases confirms this traditional notion of piracy.[145] In these cases the pirates have been in two or three different vessels from which they carried out their attacks on the targeted vessel.

In contrast to this the SUA regime does away with the ‘two ship’ requirement. This change can be ascribed to the fact that the convention was created to address broader issues of maritime safety and thus provides for various maritime offences. These maritime offences can occur on one vessel there is no need for the involvement of two vessels. This consideration can be unearthed from

[144] Behuniak (n 143) at 45.
[145] See for example *United States v Mohamed Ali Said* (n 87); *R v Houssein Mohamed Osman & 10 Others* (n 119); *R v Musa Abdullahi & 23 Others* CR1184/2009 (6 September 2010) *(Spessart case)*; *R v Liban Ahmed Ali & 10 Others* CR1374/2009 (29 September 2010) *(Safmarine Asia case).*

interpreting the wording of article three which continually refers to the unlawful acts being committed on ‘a ship’ and which endanger the safe navigation of ‘that ship’.

However, this is not to be interpreted that mutinies would amount to maritime offences under SUA. This is because the preamble to the convention is very clear that mutinies do not fall within the scope of the convention.[146] By providing that one ship only may be involved in maritime offences; it is intended to capture incidences such as the *Achille Lauro* where the perpetrators did not utilise another ship to launch their attack. This makes it possible for more unlawful acts to be considered as maritime offences as per the convention.

2.7.4 Piracy in the high seas

The primary definition of piracy *jure gentium* as contained in UNCLOS article 101 prescribes the geographical limits within which piracy can occur and that is exclusively in the high seas. Article 86 of UNCLOS defines the high seas as ‘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.’[147] Attacks that occur in the territorial or internal waters of a state do not qualify as acts of piracy. The reasoning being that within territorial and internal waters sovereign states have jurisdiction and thus have the power to control and deal with what happens in these waters. Pirates captured committing piracy within this area can be tried by the arresting state.[148]

Evidence gathered from the drafting history of this provision in UNCLOS, is very clear that it was intended for piracy as prescribed and regulated by the law of nations to apply only to acts occurring in the high seas where no specific state had authority and not acts occurring within territorial waters. Piratical acts occurring in territorial waters are to be dealt with under the municipal law of a particular country. Past and present decided cases have continued to emphasise and apply this element of piracy.[149] For purposes of ensuring that piracy under international law is clearly defined and understood it is best to leave this requirement in place. As it makes it clear when a state that

[146] The preamble provides: ‘acts of the crew which are subject to normal shipboard discipline are outside the purview of this Convention’.
[147] These are waters more than two hundred nautical miles from shore (baseline).
[148] See the dissenting opinion of Judge Moore in *SS Lotus Case (France v Turkey)* (1927) PCIJ Series A no 10 (7 September 1927) at 70.
[149] See *Re Piracy Jure Gentium* (n 37); *United States v Smith* 18 US 153 (1820) (25 February 1820); *United States v Mohamed Modin Hasan & 4 Others* (n 73).

has no nexus to the crime can exercise jurisdiction; and it does not interfere with the right of a state exercising jurisdiction to piratical acts occurring within its territorial waters.

A similar scope of application is imposed by SUA for the convention 'applies if the ship is navigating to, is scheduled to navigate into, through or from waters beyond the outer limit of the territorial sea of a single State, or the lateral limits of its territorial sea with adjacent States';[150] permitting for the occurrence of maritime offences in the high seas. Hence, under UNCLOS and SUA it is very clear that piracy and maritime offences occurring within the high seas can be dealt with under the conventions.

2.7.5 Piracy in territorial waters

Piracy occurring within the territorial waters of a state does not qualify as piracy under the UNCLOS definition. The limiting aspect of this provision is that in many instances piracy does occur within the territorial waters of states.[151] This problem is amplified when one looks at many instances of piracy attacks in the Malacca and Singapore straits where the majority of this waterway is under the territorial control of the coastal states due to the natural formation of the straits.[152] Essentially, this natural phenomenon is what encourages the prevalence of piracy within territorial waters in the region.

However, in the case of Somalia it is different as the problem of piracy within territorial waters is exacerbated because the government is unable to effectively control its territorial waters. The pirates have taken advantage of this by launching attacks beyond the territorial waters and then retreating into Somalia territorial waters to evade capture.[153] This is problematic because if the pirates are captured in the high seas UNCLOS can apply, but if captured within the territorial waters UNCLOS is not applicable, as the acts are to be governed by the municipal law of the state having authority over the said territorial waters.

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[150] SUA article 4.

[151] ICC-IMB Report 2012 (n 10) at 9-10. ICC-IMB Report 2015 (n 10) at 8-9.

[152] Collins & Hassan (n 114) at 96-97; Kraska (n 2) at 41.

[153] To deal with this situation the UNSC passed S/RES/1816 (2008) 2 June 2008 para 10 which allows the international force patrolling the Gulf of Aden to enter the territorial waters of Somalia for the purpose of repressing acts of piracy. This resolution has been extended by other UNSC resolutions namely: S/RES/1851(2008) 16 December 2008; S/RES/1897(2009) 30 November 2009; S/RES/1950(2010) 23 November 2010; S/RES/2020(2011) 22 November 2011; S/RES/2077(2012) 21 November 2012; S/RES/2125(2013) 18 November 2013; S/RES/2184(2014) 12 November 2014 and; S/RES/2246(2015) 10 November 2015. See Blank 'The use of force against pirates' in Scharf *et al* (eds) *Prosecuting Maritime Piracy Domestic Solutions to International Crimes* (2015) at 110-111.

The advantage created by the SUA convention is that these types of acts do fall within its application if they occur within the territorial sea as set out in article 4. Accordingly maritime offences under the convention can be committed both in the high seas and the territorial sea. Consequently, more acts are captured as maritime offences due to the broadened geographical limits and this expands the *ratione personae* jurisdiction of the convention than under the UNCLOS regime.[154] Thus more individuals can be arrested for committing maritime offences and are legally brought before the jurisdiction of competent courts.

However, there is a qualification in the application of article 4.[155] The acts are to occur as the vessel is navigating from the high seas into territorial waters or as it exits the territorial waters into the high seas. The implication is that, SUA cannot apply if the maritime offences specified occur solely within the territorial waters of a state.[156] Therefore, there is no real solution to instances where piracy or maritime offences occur solely within the territorial waters of a state. For it is not very clear if municipal law provisions dealing with piracy apply or other municipal criminal acts will apply.

2.7.6 Piracy occurring in the exclusive economic zone

The exclusive economic zone (EEZ) is an area beyond and adjacent to the territorial sea not extending beyond 200 nautical miles from the baseline from which the breadth of the territorial sea is measured.[157] The literal reading of article 86 indicates that the piracy provisions in UNCLOS are not to be applied within the EEZ, territorial sea, internal waters and archipelagic waters of an archipelagic state. Therefore the literal reading of article 86 indicates that the EEZ is not part of the high seas and read together with article 101a(i) piracy needs to occur in the high sea so as to constitute the crime of piracy.

However, a reading of article 58(2) UNCLOS indicates that the piracy provisions are applicable to the EEZ. The article states that 'articles 88 to 115 and other pertinent rules of international law apply to the exclusive economic zone in so far as they are not incompatible with this Part.' Thus

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[154] Collins & Hassan (n 114) at 107; Hodgkinson (n 16)) at 27.
[155] Article 4 of the convention provides 'Convention applies if the ship is navigating or is scheduled to navigate into, through or from waters beyond the outer limit of the territorial sea of a single State'.
[156] House of Commons Foreign Affairs Committee Report (n 126) written evidence 94 para 30.
[157] UNCLOS articles 55 & 57. The EEZ was accepted as a maritime zone after negotiations of the UNCLOS I & II. Within this zone a state has rights of exploration and use of the marine resources. See Bailey III 'The exclusive economic zone: Its development and future in international and domestic law' (1985) 45 *LLR* 1269.

since the piracy articles fall within the range specified in article 58(2), the conclusion is that the piracy provisions can be applied to piratical acts occurring in the EEZ as long as the application of these provisions does not conflict with the provisions on the EEZ.[158] In addition, this interpretation is sound because a consideration of the various maritime zones provided for under UNCLOS clearly shows that the EEZ is not part of the territorial sea to which municipal law on piracy applies and considering that the provisions on piracy do not conflict with those on the EEZ then the piracy provisions should apply within the EEZ as provided for in article 58(2).[159]

Article 4 of SUA provides the 'Convention applies if the ship is navigating or is scheduled to navigate into, through or from waters *beyond the outer limit of the territorial sea of a single State'* (emphasis added). The interpretation being that the convention applies beyond the territorial sea of a state and the next maritime zone beyond the territorial sea is the EEZ. Therefore, the provisions of SUA on maritime offences are applicable to the EEZ, as are piracy provisions under UNCLOS applicable to the EEZ.

2.7.7 Reverse hot pursuit

The starting point to discussing reverse hot pursuit is to first consider the related right of hot pursuit. The right of hot pursuit is an established principle of customary international law that is an exception to the general rule that on the high seas a ship is subject only to the jurisdiction of the state flag it flies.[160] This right allows any state to pursue a non-national ship into the high seas if it is suspected of having committed an offence within the states jurisdictional maritime zones.[161]

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[158] Nordquist, Nandan & Rosenne (n 8) at 202 supports this interpretation. See also Collins & Hassan (n 114) at 96-97; Anderson (n 4) at 80; Guilfoyle 'Piracy off Somalia: UN Security Council resolution 1816 & IMO regional counter piracy efforts' (2008) 57(3) *ICLQ* 690 at 694; Kraska (n 2) at 137.

[159] Hodgkinson (n 16) at 19. The United Nations Division for Ocean Affairs and the Law of the Sea has categorically approved this interpretation by stating on its website as follows 'These provisions should be read together with article 58(2) of UNCLOS, which makes it clear that the above-mentioned articles and other pertinent rules of international law apply to the exclusive economic zone in so far as they are not incompatible with the provision of UNCLOS relating to the exclusive economic zone.' Available at *http://www.un.org/depts/los/piracy/piracy_legal_framework.htm* accessed 13/10/14. National courts too have stamped their mark of approval on the interpretation that the EEZ is part of the high seas. See *R v Abdukar Ahmed & 5 Others* CR21/2011 (14 July 2011) *(Gloria case)* at 16. See also the discussion in *Kingdom of Netherlands v Russian Federation (Arctic Sunrise Case)* (2013) ITLOS Case no 22 (22 November 2013) available at *http://www.itlos.org/index.php?id=264* accessed 14/10/14. Though the case was more about the rights that a state can exercise in the EEZ, from the discussion in the case it is clear that piracy can occur in the EEZ.

[160] Reuland 'The customary right of hot pursuit onto the high seas: Annotations to article 111 of the Law of the Sea Convention' (1993) 33 *VJIL* 557 at 557.

[161] Ibid.

This right facilitates undertaking pursuit and arrest of would be offenders so that they can be brought to justice.

Article 111 UNCLOS provides for the right of hot pursuit when 'authorities of the coastal state have good reason to believe that the ship has violated the laws and regulations of that state.'[162] Hot pursuit is to be carried out into the high seas and 'ceases as soon as the ship pursued enters the territorial sea of its own state or of a third state.'[163] This means that states cannot exercise reverse hot pursuit where they pursue a ship from the high seas into the territorial waters of a state.

The lack of a provision allowing for reverse hot pursuit has negative implications and causes the territorial waters of many states to become pirate sanctuaries.[164] In the Malacca and Singapore straits pirates easily escape into the territorial waters of other states as the territorial seas of the coastal states are extremely close to one another.[165] Similarly in Somalia the pirates are exploiting this loophole by capturing ships in the high seas and then retreating into the territorial waters for safety. Since Somalia is unable to police its territorial waters, the UN Security Council passed resolution 1816(2008) which permits reverse hot pursuit into Somalia territorial waters. However, the UN was categorical in the wording that the resolution shall not be considered as establishing customary international law.[166]

SUA does not specifically provide for hot pursuit within the main convention or in the protocols to the convention. However, based on the fact that the right of hot pursuit is a principle of customary international law it is applicable under SUA. Further, from the reading of article 8 which allows 'The master of a ship of a State Party may deliver to the authorities of any other State Party any person who he has reasonable grounds to believe has committed one of the offences set forth in Article 3.' It is implied that the right of hot pursuit is permissible. It may be necessary to undertake hot pursuit if one suspects a vessel of being involved in piratical acts in order to apprehend the suspects. Nonetheless, just as with UNCLOS no provision is made for reverse hot pursuit.

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[162] UNCLOS article 111(1).
[163] UNCLOS article 111(3).
[164] Murphy 'Piracy and UNCLOS: Does International Law Help Regional States Combat Piracy?' in Lehr (ed) *Violence at Sea: Piracy in the Age of Terrorism* (2007) at 163.
[165] Collins & Hassan (n 114) at 103.
[166] S/RES/1816(2008) 2 June 2008 para 9. On 27 February 2008 the Somalia TFG asked the Security Council to help in controlling the piracy problem and in response the UNSC passed resolution S/RES/1816(2008) 2 June 2008. See also Guilfoyle (n 158).

However, there are scholars who are of the view that reverse hot pursuit is permissible.[167] The thrust of their argument is based on the fact that a state may permit another state to police its territorial waters. In so doing the state will have granted permission to another state to enter its territorial waters and thus may pursue pirates therein. As the situation stands most states are protective over their right to exercise sovereignty over their territorial waters and will not just allow other states to infringe on this. Thus the territorial waters of states continue to provide 'safe havens'[168] for pirates. The lack of reverse hot pursuit makes the arrest of suspected pirates difficult as they cannot be pursued to the logical conclusion of being arrested. If they cannot be arrested they cannot be prosecuted. Nonetheless, allowing reverse hot pursuit may lead to misuse of this right which may lead to situations of political impasse and disagreement arising between countries thus it is preferable not to allow for reverse hot pursuit.

2.7.8 Inciting or facilitating acts of violence, detention or depredation

The definition of piracy in UNCLOS extends to acts that would be interpreted as piracy to include those of inciting or intentionally facilitating others to commit piracy. Inciting and facilitation are treated as two separate offences as the conjunction 'or' is used meaning an individual may be charged with committing one or the other. Thus, an individual who knowingly incites or facilitates others by providing some form of assistance to advance the commission of the acts will have committed piracy. This takes care of situations where an individual may make it easier for the occurrence of acts of violence, detention or depredation but is not actually involved in committing the *actus reus*. In the case of facilitation there is a *mens rea* requirement of intention.[169] In criminal law terms at the national level, the act of inciting or intentionally facilitating the commission of an offence is referred to as aiding or abetting; this is what article 101(c) provides for.

These acts of aiding and abetting need not be committed in the high seas. Section 101(c) gives this indication as it is an independent provision and only links with 'a' and 'b' in defining the acts that one can aid or abet their commission. Thus, the other specific requirements provided for under 'a'

[167] See Treves 'Piracy, law of the sea, and use of force: Developments off the coast of Somalia' (2009) 20(2) *EJIL* 399 at 407; See Dubner (n 76) at 39-40 where he advances the argument that reverse hot pursuit should be allowed for purposes of preventing human suffering and environmental disaster.
[168] See Collins & Hassan (n 114) at 104; See Doby 'Piracy jure gentium: The jurisdictional conflict of the high seas and territorial waters' (2010) 41(4) *JMLC* 561 at 577-579 where he discusses the modification of the right of hot pursuit. Blank (n 153) at 110.
[169] Nanda 'Maritime piracy: How can international law and policy address this growing global menace?' (2011) 39(2) *DJILP* 177 at 181.

and ‘b’, specifically that of the acts occurring on the high seas or a place outside the jurisdiction of any state, do not attach to section ‘c’. This interpretation of article 101(c) has been judicially endorsed in the case of *United States v Ali Mohamed Ali*[170] where the accused was charged and convicted of aiding and abetting piracy.

Of importance to this discussion, is that the court found Ali guilty of aiding and abetting piracy through his acts of acting as an interpreter and negotiator.[171] Further, it reinforced the interpretation that these acts unlike piracy itself do not have to be committed in the high seas. Mr. Ali’s acts were mainly confined within the territorial waters of Somalia as the vessel was in anchor there. This interpretation and application of article 101(c) is advantageous as it helps deal with the planners, organisers and negotiators of piracy who are not involved in committing the actual piratical acts in the high seas.

UNCLOS does not expressly include acts of attempted piracy. This leads to the interpretation that navies of sovereign countries that are given the right to capture pirates can only do so if they catch the pirates ‘in the act’ of committing piracy. However, according to the commentary on UNCLOS [172] ‘attempts’ at piratical acts ‘could be assimilated to piracy’.[173] This can be facilitated through article 101(b) which states that ‘any act of voluntary participation in the operation of a ship or of an aircraft with knowledge of facts making it a pirate ship’. Therefore individuals, who voluntarily participate in the operation of a ship knowing it to be a pirate ship,[174] will be held accountable even though no actual piratical act has been committed.

[170] 885 Supp 2d 17 United States District Court, District of Columbia, (13 July 2012). He was charged with Count one conspiracy to commit piracy under the law of nations, in violation of 18 U.S.C. § 371. Count Two charged Ali with committing piracy under the law of nations, in violation of 18 U.S.C. § 1651. Counts Three and Four analogously charged Ali with conspiracy to commit hostage taking and aiding and abetting hostage taking, in violation of 18 U.S.C. §§ 1203 and 2. See also *Institute of Cetacean Research v Sea Shepherd Society* (n 87).

[171] On 7 November 2008 the *CE Future* was captured, Ali was not involved in the actual chase, attack and capture of the vessel. He only boarded the vessel on 9 November 2008 at Point Ras Binna, off the coast of Somalia and assumed the role of interpreter and negotiator. The vessel then proceeded to Eyl, a Somalia port where it remained at anchor until it was ransomed. So Ali was not involved in committing the actual piracy as defined by article 101(a) UNCLOS, as his role was that of interpreter and negotiator for the ransom. See White ‘Landlubbers as pirates: The lack of “high seas” requirement for the incitement and intentional facilitation of piracy’ (2013) 27 *EILR* 705; Youngs ‘Piracy in Somalia: A legal analysis concerning the prosecution of pirate negotiators and pirate facilitators under the current US and international framework’ (2014) 24(3) *IICLR* 809.

[172] Nordquist, Nandan & Rosenne (n 8) at 201.

[173] Ibid at 202. However, some authors hold the view that ‘voluntary participation’ and ‘inciting’ though prohibited are not to be assimilated into attempted acts of piracy. See Hodgkinson (n 16) at 22-23.

[174] Collins & Hassan (n 114) at 101.

The key element to prove in article 101(b) is a mental one; that is the individual was aware that a vessel he is on is intended to commit certain acts and knowing so voluntarily participates in its operation. Since a ship is rendered a pirate ship by virtue of the fact that the person(s) in its dominant control *intend* to use it to commit illegal acts of violence, detention or depredation,[175] actual acts of violence, detention or depredation occur is not necessary in order to find an accused guilty under this provision. This implies that even attempted acts fall within the scope of article 101(b) as long as the mental element of knowing is established. This would be an advantageous interpretation as even attempts at committing piracy are treated as a separate offence from that of committing piracy and those who have attempted acts of piracy but failed would be held accountable.

Courts have held that piracy as defined under the law of nations does not require the actual taking of property but should be dealt with in a broader manner by including any illegal acts of armed assault or violence committed in the high seas constitute piracy including any attempts to commit such acts.[176] SUA on the other hand specifically extends its definition to include attempts to commit maritime offences and anyone who aids or abets the commission of the offence.[177]

Nonetheless, it is contended that specific inclusion of provisions referring to 'inchoate offences' would help to bolster the application and interpretation of the articles 101 (b) and (c) and 3(2) UNCLOS and SUA respectively. These would include the acts of preparing or seeking to commit a crime; attempting, soliciting, conspiracy and facilitation. To be able to establish the intent to commit these inchoate offences inference can be drawn from the circumstances surrounding the offence. This would be in the form of 'equipment articles'.[178] The presumption of criminal intent to commit piracy can be drawn if pirates are found possessing certain equipment - such as ladders, ropes, guns - that would aid in the commission of the offence. Justification for the inclusion of

[175] UNCLOS article 103. [Emphasis added].
[176] See *Re Piracy Jure Gentium* (n 37), *United States v Mohamed Ali Said* (n 87). In *Re Piracy Jure Gentium* at 588 the court categorically stated 'actual robbery is not an essential element in the crime of piracy *jure gentium*. Thus a frustrated attempt to commit piratical robbery is equally piracy *jure gentium*.'
[177] SUA article 2(a) and 2(b).
[178] Kontorovich *Equipment Articles for the Prosecution of Maritime Piracy* Discussion Paper One Earth Future (2010); See also Shnider (n 37) at 544-549; Lorenz & Paradis 'Evidentiary issues in piracy prosecutions' in Scharf *et al* (eds) *Prosecuting Maritime Piracy Domestic Solutions to International Crimes* (2015) at 227. See also Sterio 'Piracy off the coast of Somalia the argument for pirate prosecution in the national courts of Kenya, the Seychelles, and Mauritius' (2012) 4(2) *ALF* 104 at 115-117 discussing how the 'equipment articles' have been incorporated in the Seychelles penal code and how they are applied in prosecution of pirates.

specific provisions dealing with inchoate offences is that it would assist in the prosecution of pirates for they would be charged with the straight forward offence of attempting to commit piracy; and the spectrum of individuals that would be held liable for piracy would extend to those who finance and organise not just those who commit the actual piratical acts and maritime offences.

From the discussion above it is evident that both UNCLOS and SUA have their limitations with regards to providing for the crime of piracy and maritime offences. On the one hand the customary international law definition of piracy as embodied in UNCLOS is restrictive due to the elements that must be proved for piratical acts to constitute piracy. On the other hand SUA was meant to address these problems and; these issues were partly tackled by SUA providing for maritime offences and not piracy in particular. However, the provisions of SUA are not full proof and have their shortcomings. Effectively both UNCLOS and SUA provide challenges when it comes to the application of their provisions in relation to piracy or maritime offence cases. Therefore, having established the law dealing with piracy and maritime offences the next step is to consider the adjudication of both piracy and maritime offences, which is done in the next section.

2.8 Adjudication of piracy

The process of adjudication for any crime requires the proper criminalisation of the offence, arrest of the offender, prosecution and finally administering the appropriate penalties. Criminalisation of the offence requires ensuring that the elements of the said offence are provided for under the laws of a particular state. This facilitates arrest of the offender which can only occur if the person is caught committing or suspected of committing the said offence; for the arrest to be legal it has to be undertaken by the person(s) authorised by law to do so. Prosecution can only occur if the state/authority/court undertaking the prosecution has the requisite jurisdiction to do so. This enables the authority to conduct the trial and finally to administer the relevant penalties if the offender is found guilty.

In relation to piracy the discussion above has considered the criminalisation of piracy and maritime offences under international law through UNCLOS and SUA conventions respectively. This next section will consider the next steps in the process of adjudication of the crime. This begins by considering the application of the principle of universal jurisdiction over piracy. Elaboration on the issue will be done ultimately showing that despite the opportunity to apply universal jurisdiction over piracy, states have not been very receptive of this idea. Instead states have sought to domesticate the international definition of piracy and maritime offences, under UNCLOS and SUA, in their national/municipal law. This provides for the crime of piracy and maritime offences at the national level, making them prosecutable offences that the courts/tribunals in these countries have the authority to deal with.

However, the domestication of the international definition of piracy has resulted in a muddle over the treatment of this offence at the national level. Thereafter, a consideration of the law providing for the arrest of pirates and the courts/tribunals that have the authority to prosecute pirates will be done. This section will culminate in a discussion on the duty imposed on states to cooperate in the repression of piracy and maritime offences which will feed into the concluding discussion on the implications of the shortcomings in the law dealing with piracy.

2.8.1 Universal jurisdiction

International law recognises five principles of jurisdiction by which a state may prosecute an individual for conduct committed outside its territory: (1) the objective territorial principle; (2) the protective principle; (3) the nationality principle; (4) the passive personality principle and; (5) the universality principle.[179] Of these five the universality principle is the only one that allows a state to prosecute despite a lack of nexus between the defendant and the prosecuting state.

Piracy is considered the original international crime to which the concept of universal jurisdiction has been applied.[180] The rationale for allowing universal jurisdiction over piracy first, is based on the fact that pirates are considered *hostis humani generis* (enemy of all mankind). This is because their actions 'threatens the trade, travel, commerce, and safety of every nation that utilizes the high seas'.[181] Thus piratical acts done on the high seas, which are outside a state's jurisdiction, allows

[179] Territorial principle: where the acts committed has a substantial territorial effect on a state; protective principle: where there is a connection between the act and national security of a state; nationality principle: acts involved have been committed by the nationals of the state; passive personality principle: where the victim is a national of the state asserting jurisdiction and; universality principle: any state may assert jurisdiction over specific delineated crimes such as piracy, slavery, genocide, crimes against humanity and war crimes. See Estey 'The five bases of extraterritorial jurisdiction and the failure of the presumption against extraterritoriality' (1997) 21 *HICLR* 177; Boas (n 106) at 250-259; Crawford (n 108) at 457-462.

[180] Bassiouni 'Universal jurisdiction for international crimes: Historical perspectives and contemporary practice' (2001) 42(1) *VJIL* 81 at 108; Randall 'Universal jurisdiction under international law' (1987-1988) 66 *TLR* 785 at 791; Lett 'The meaningless existence of universal jurisdiction' (2015) 23 *MSILR* 545 at 548.

[181] Smith (n 3) at 694.

any state to prosecute pirates even when the pirates or victims are not their nationals, and the offence has no connection to the prosecuting state.[182]

Second, universal jurisdiction over piracy is explained from the writings of Grotius,[183] a Dutch scholar; based on the principle of *mare liberum* (freedom on the high seas). Every state has an equal right of navigation over the high seas, and in patrolling it has the right to arrest pirates without infringing on any state's territorial sovereignty.[184] Because *mare liberum* was applicable universally, the act of piracy infringed on this right and therefore could be universally punished.[185] According to Grotius 'ships on the high seas were an extension of the flag state's territoriality. Thus, the flag state could exercise its jurisdiction over non-national ships and persons for acts of piracy.'[186] Piracy therefore is considered a crime *jure gentium* (an offense against the law of nations)[187] warranting the application of universal jurisdiction.

The principle of universal jurisdiction has been considered a positive element in dealing with piracy as it allows for any state that has no link to the offence to arrest and prosecute the pirates. Article 105 UNCLOS states '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 arrest the persons and seize the property on board.' The arresting state is also given the right to 'decide upon the penalties to be imposed' and 'determine the action to be taken with regard to the ship, aircraft or property.'[188] The arresting state is empowered to carry out these actions by the application of the doctrine of universal jurisdiction.

According to the preparatory documents for the drafting of article 105 it is clear that the drafters intended to preclude the arresting state from transferring the pirates to a third country for trial.[189] However, the wording of the said article does not expressly prohibit this from happening.[190]

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[182] See *R v Mohammed Modin Hassan & 4 Others* (n 73) at 26; Karim 'Is there an international obligation to prosecute pirates?' (2011) 58(3) *NILR* 387. See also Middelburg (n 14) at 29-46 with specific regards to application of universal jurisdiction over Somalian pirates.
[183] Grotius *Mare Liberum* (Magoffin R V D transl.) (1916).
[184] Grotius (n 183) at 22 & 27-28; Randall (n 180) at 792.
[185] Grotius (n 183) at 10; Fantauzzi 'Rascals, scoundrels, villains, and knaves: The evolution of the law of piracy from ancient times to the present' (2012) 39(3) *IJLI* 346 at 359.
[186] Bassiouni (n 180) at 109.
[187] Randall (n 180) at 796. Nanda 'Exercising universal jurisdiction over piracy' in Scharf *et al* (eds) *Prosecuting Maritime Piracy Domestic Solutions to International Crimes* (2015) at 54. See also Chicca 'Universal jurisdiction as obligation to prosecute or extradite' (2012) 11 *WMUJMA* 83.
[188] UNCLOS article 105. [Emphasis added].
[189] Kontorovich (n 9) at 270; House of Commons Foreign Affairs Committee Report (n 126) evidence 82 para 3.4.
[190] Kontorovich (n 9) at 271.

Though this appears to be a clear and straight forward article, the reality is that provisions of article 105 have not been adequately implemented by states despite the leeway to apply universal jurisdiction. In addition, the wording of the article provides that the arresting state has the power to decide which penalties to impose. The interpretation of this is that most arresting states will prosecute pirates under their domestic law.[191]

The implication of this is varied. First, the arresting state may not have any specific anti-piracy legislation, meaning they cannot prosecute the pirates and they escape unpunished. Second, different states will have different provisions on piracy under their domestic law. Thus, there is no uniformity in the domestic law[192] used to prosecute and penalties imposed on pirates.[193] Third, the use of the word 'may' indicates that it is not a mandatory requirement for states to arrest and prosecute pirates. It is at their discretion to do so or not.

Despite the doctrine of universal jurisdiction allowing states to prosecute pirates, studies[194] have shown that few states are willing or have applied this doctrine. According to the findings of Kontorovich & Art, the rate of prosecution of pirates using universal jurisdiction for the period 1998-2009 was very low despite the high rate of arrest of pirates.[195] The reasons attributed to this include states being apprehensive of arresting and trying foreign pirates, evidentiary issues, and the cost of prosecution and detention of pirates.[196] The piracy provisions in UNCLOS being customary international law can be utilised by both signatory states and non-signatory states. However, it is clear states are not willing to utilise universal jurisdiction to try pirates, unless they

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[191] Collins & Hassan (n 114) at 102. See also Gardener 'Piracy prosecutions in national courts' (2012) 10(4) *JICJ* 797.

[192] See Shnider (n 37) at 560-565 for tabulation showing how states apply piracy laws domestically and their incorporation of universal jurisdiction. See also Dutton 'Maritime piracy and the impunity gap: Insufficient national laws or a lack of political will?' (2012) 86 *TLR* 1111 at 1139-1159. See the discussion on national laws in section 2.8.2.

[193] Kontorovich 'The problems of pirate punishment' in Scharf *et al* (eds) *Prosecuting Maritime Piracy Domestic Solutions to International Crimes* (2015) at 299. See also Guisado 'Searching for answers: Reprisals, reckoning, and recourse for maritime pirates' (2012/2013) 25 *USFMLJ* 121 at 139-151 discussing issues arising in trying pirates. See also Geneva Academy of International Humanitarian Law & Human Rights *Counter Piracy under International Law* Academy Briefing no 1 (2012) at 41-46 available at *http://www.geneva-academy.ch/docs/academyLecture/Counterpiracy.pdf* accessed 9/10/13.

[194] Kontorovich & Art 'AGORA: Piracy prosecution: An empirical examination of universal jurisdiction for piracy' (2010) 104 *AJIL* 436; See also Warner *The Prosecution of Pirates in National Courts* (2013) Emirates Lecture Series 109 The Emirates Centre for Strategic Studies and Research available at *http://ro.uow.edu.au/lhapapers/1053/* accessed 1/6/14.

[195] Kontorovich & Art (n 194) at 445-446; See also Kontorovich 'Public international law and economics: The inefficiency of universal jurisdiction' (2008) *UILR* 389 for a discussion on situations where it is better not to exercise universal jurisdiction.

[196] Kontorovich & Art (n 194) at 450.

have domesticated international piracy laws into their national laws and/or one of the grounds of exercising jurisdiction - territorial, protective, nationality or passive nationality - is established.[197]

The SUA convention does not expressly provide for the application of universal jurisdiction over the offences covered by it. Instead the convention sets specific instances when a state may be able to exercise jurisdiction. Accordingly, a state can exercise jurisdiction if the offence(s) is committed:[198]

> '(a) Against or on board a ship flying the flag of the State at the time the offence is committed; or
> (b) In the territory of that State, including its territorial sea: or
> (c) By a national of that State, or
> (a) It is committed by a stateless person whose habitual residence is in that State; or
> (b) During its commission a national of that State is seized, threatened, injured or killed; or
> (c) It is committed in an attempt to compel that state to do or abstain from doing any act.'

This narrows the instances in which member states have jurisdiction to prosecute offenders as the member state has to show upon which of the listed grounds it is basing its right of jurisdiction. Nevertheless, it has been argued that SUA provisions do permit the application of a 'quasi universal jurisdiction' to enable a state to prosecute,[199] which arises when a state fails to extradite a suspect.

1.1.1.1 Practical application of universal jurisdiction under UNCLOS and SUA

A discussion on the application of universal jurisdiction can be undertaken by considering the case of Lei Shi. Mr Shi was a cook aboard the *Full Means No. II* (a Taiwanese owned, Seychelles flagged, and Chinese crewed vessel) undertook a mutiny over the ship and even killed the captain. He was overpowered by the crew and arrested by the FBI in Hawaii and prosecuted.[200] Other relevant facts in analysing Shi's case are that he was a Chinese national as was the first mate, while

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[197] Middelburg (n 14) at 55-56. For example in the Netherlands in criminal case LJN:BM8116, Rotterdam District Court, no 10/600012-09 (17 June 2010) (*Cygnus case*) it is clearly stated in the judgment at page 3 that the Netherlands prosecuted the case because the ship attacked was carrying the flag of the Netherlands Antilles, a part of the kingdom of Netherlands. Further, that if there was no reasonable interest in a case for Netherlands it is likely that a piracy case would be deemed inadmissible as being contrary to the principles of good rules of procedure under the country's laws. See also Manasuma 'Prosecuting pirates in the Netherlands: The case of the *Ms Samanyolu*' (2010) 49(1-2) *MLLWR* 142; Gathii J 'Jurisdiction to prosecute non-national pirates captured by third states under Kenyan international law' (2009) 31 *LLAICLR* 363; Dubner & Greene (n 96) at 448-451; Jacobs 'Combating maritime piracy: A regional framework for prosecution' (2014) *AC* 1 Special Edition 92.

[198] SUA article 6.

[199] See the discussion on the *Lei Shi* case under section 2.8.1.1 on this 'quasi universal jurisdiction'.

[200] For the complete facts of the case see section 2.6.2.

the captain was a Taiwanese national. The offence occurred on the high seas and at the time there were no American citizens on board. Shi's actions were not directed towards the United States or any other nation.

Under UNCLOS the United States would have had the authority to apply universal jurisdiction as per article 105; as the act was committed on the high seas. However as stated earlier the United States is not a signatory to UNCLOS but it is to SUA which, was applied in adjudicating the case. Nevertheless the courts invoked universal jurisdiction and as a result there are differing views on whether under SUA the United States was justified in invoking the principle.[201] From the charges levied against Shi it is evident that he was not charged with the offence of piracy as provided under section 18 U.S.C. §1651;[202] but was charged with seizing control of a ship by force and performing an act of violence likely to endanger the safety of a ship as per section 18 U.S.C. §2280 which domesticates United States obligations under SUA.[203]

This provision is very different from piracy as per §1651 that deals with piracy as defined by the law of nations. The case of *United States v Mohammed Modin Hasan* authoritatively canvassed this issue and concluded that piracy as defined by the law of nations is embodied in the definition of piracy provided under the Geneva Convention and article 101 UNCLOS.[204] Further, that the definition under §2280 (the section under which Shi was charged) dealt with maritime offences as defined in the SUA convention.[205]

Treaties create obligations only to the state parties, unless the treaty obligation is a custom of international law.[206] The SUA convention's provisions on maritime offences are not customary international law but an agreement by state parties. In addition, unlike UNCLOS that allows for the application of universal jurisdiction, article 6 of SUA specifically provides for instances when

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[201] See Kontorovich 'United States v Shi' (2009) 103 *AJIL* 734 and Smith (n 3) who argue that it was erroneous to invoke universal jurisdiction. Guifoyle in House of Commons Foreign Affairs Committee Report (n 126) written evidence 95 para 33-41 argues that it was possible and right to invoke universal jurisdiction.

[202] This section provides for the offence of piracy according to the law of nations i.e. the offence of piracy under customary international law. 18 U.S.C. §1651 (2006) provides: 'Whoever, on the high seas, commits the crime of piracy as defined by the law of nations, and is afterwards brought into or found in the United States, shall be imprisoned for life.'

[203] *United States v Lei Shi* (n 132) at 720.

[204] *United States v Mohammed Modin Hasan & 4 Others* (n 73) at 87.

[205] *United States v Lei Shi* (n 132) at 720.

[206] Smith (n 3) at 700.

a state party may exercise jurisdiction. Based on this the court strictly could not apply universal jurisdiction to try Shi.

On the face of it as per the provisions of article 6 the court did not have the authority to exercise jurisdiction over Shi under SUA because the acts he committed, were not against a United States flagged vessel, it was Seychelles flagged; the acts were not committed within the United States territory, they were committed on Seychelles territory;[207] were not committed by a United States national or a stateless person habitually residing in the United States, Shi was a Chinese national; the persons injured in the attack were not United States nationals, the captain was Taiwanese and the first mate was Chinese and; the acts were not done to compel the United States to do or abstain from doing something, Shi wanted to exert revenge and commandeer the vessel back to China.

However, a critical examination of article 6 sub articles 4 and 5[208] indicates that the United States did have the jurisdiction to prosecute. These provisions allow the court to have a 'quasi universal jurisdiction' to enable it prosecute.[209] This 'quasi universal jurisdiction' is established from the interpretation of article 6(4) of SUA. Under this article if the alleged offender is within a state, they are obliged to extradite him to any other state party that has established jurisdiction over him. However, if this does not happen the host state is obliged to submit the suspect to its authorities for the purpose of prosecution. It is on the basis of this obligation that a 'quasi universal jurisdiction' is established to prosecute the offender. In Shi's case the Seychelles expressly waivered jurisdiction, China and Taiwan too kept quiet and since Shi was handed over to FBI agents in Hawaii and thus under United States custody. They had an obligation to extradite or prosecute.

In addition article (6)5 provides that SUA does not exclude any criminal jurisdiction exercised in accordance with national law. This implies that any state that does not extradite an offender is

[207] Article 92 UNCLOS provides: 'Ships shall sail under the flag of one State only and, save in exceptional cases expressly provided for in international treaties or in this Convention, shall be subject to its exclusive jurisdiction on the high seas.' See also *SS Lotus Case* (n 148) at 25 where it states that 'vessels on the high seas are subject to no authority except that of the state whose flag they fly.'

[208] Article 6(4) and (5) provides: 4). Each State Party shall take such measures as may be necessary to establish its jurisdiction over the offences set forth in Article 3 in cases where the alleged offender is present in its territory and it does not extradite him to any of the States Parties which have established their jurisdiction in accordance with paragraphs I and 2 of this Article. 5). This Convention does not exclude any criminal jurisdiction exercised in accordance with national law.

[209] House of Commons Foreign Affairs Committee Report (n 126) written evidence 95 para 34. See also Kontorovitch (n 201).

permitted to take any measures as may be necessary to establish its jurisdiction, over the offences committed by the offender as stipulated by the convention, and in so doing the state may rely on its national laws to establish criminal jurisdiction. Therefore, it can be said that sub-article 5 is used to bolster sub-article 4, in that if a state does not extradite an offender it is allowed to apply its national criminal laws in order to establish jurisdiction and prosecute an offender. Thus in Shi's case since he was not extradited, the United States was permitted under SUA to apply its national criminal laws in exercising jurisdiction over him. This was possible because under its domestic laws the United States did have the relevant laws to enable it prosecute Mr. Shi's actions.

Nonetheless the court did not critically examine the application of articles 6(4) and (5) to confer jurisdiction on it. The court proceeded to rationalise the application of universal jurisdiction to grant it authority to prosecute. In justifying the application of universal jurisdiction over Shi they described his crime as piracy under international law because he committed robbery or forcible depredations upon the sea.[210] This enabled the court to overcome the argument that due process was not satisfied.[211] This is because by stating that Shi's actions amounted to the international crime of piracy (to which universal jurisdiction applies) the court did not have to satisfy the nexus requirement to ensure that due process was satisfied. Clearly this is a case where the court is considered to have stretched the conventional definition of piracy beyond its limits to obtain universal jurisdiction and fit it within SUA's provisions.[212]

This case illustrates the problems that may arise in the application of universal jurisdiction and how the domestic laws of a state may assist or interfere with its application. Apart from utilising universal jurisdiction to try pirates it is possible for states to do so if they have domesticated the international law on piracy. Discussion on this is now undertaken.

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[210] *United States v Lei Shi* (n 132) at 721-724. The issue of S 18 U.S.C §1651 domesticating under United States law the offence of piracy according to customary international law has been authoritatively canvassed in *United States v Mohammed Modin Hasan & 4 Others* (n 73).

[211] The due process clause requires, a defendant prosecuted in the United States should reasonably anticipate that by the commission of a particular offence he will be tried in the United States. See *United States v Moreno-Morillo* 334 F.3d 819 (9th Circuit 2003) (25 June 2003) at 827 for a discussion on due process. Thus by considering Shi's actions as piracy the requirement of due process was not relevant. This is because universal condemnation of the crime of piracy puts the offender on notice that his acts will be prosecuted by any state where he is found. Thus the same nexus as required in other offences is negated in piracy. See *United States v Caicedo* 47 F.3d 370 (9th Circuit 1995) (7 February 1995) at 372.

[212] See *United States v Mohammed Modin Hasan & 4 Others* (n 73) at 21 where the learned judges discuss and disapprove the interpretation of the law in Shi's case. See also Kontorovich (n 202) and Smith 'Piratical jurisdiction: The plundering of due process in the case of Lei Shi' (2009) 23 *EILR* 693.

2.8.2 Domestication of the international law on piracy in national laws

State practice does not support the view that international law obliges states to exercise this universal jurisdiction.[213] While the jurisdiction is permitted, enforcement is very much another matter. As discussed above despite countries having the authority to apply universal jurisdiction to prosecute pirates; evidence indicates that states are more inclined to prosecute pirates if they have undertaken the domestication of UNCLOS and/or SUA provisions into their domestic laws.[214] Criminalising the offence in domestic legislation facilitates making it a prosecutable offence that the courts/tribunals in these countries have the authority to deal with.

On the issue of implementation of international law into national law the relevant doctrines that provide guidance are the doctrine of incorporation and doctrine of transformation. The incorporation doctrine holds that 'in the absence of conflicting domestic legislation international law should automatically become part of a state's law without need for a specific act to transform the international law into national law'.[215] This doctrine is the dominant one in relation to the implementation of customary international law into national law. The doctrine of transformation holds that 'the state must implement legislation to 'transform' or implement international law into national law'[216] Transformation is the dominant approach utilised by states in the implementation of treaty law into national law.[217]

In relation to the law of piracy under UNCLOS different approaches have been adopted by various countries when domesticating these provisions. Some have applied the incorporation doctrine and adopted the definition of piracy verbatim as provided under UNCLOS. Whereas others despite following the incorporation doctrine, have modified the definition of piracy under their national laws. This is permissible as it is allowed to alter the 'pure' concept of incorporation and a state may modify international law within its context[218] when domesticating international law.

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[213] Boas (n 106) at 259. Hodgkinson (n 16) at 16.

[214] Dutton (n 192). For an overview of legal piracy definitions under municipal law see United Nations Division for Oceans and Law of the Sea *National Legislation on Piracy* website available at *http://www.un.org/depts/los/piracy/piracy_national_legislation.htm* accessed 30/5/14.

[215] Boas (n 106) at 137; Crawford (n 108) at 67-68.

[216] Boas (n 106) at 136.

[217] Ibid at 137.

[218] Ibid.

A study conducted by Dutton[219] shows the different approaches countries have taken in implementing the UNCLOS piracy provisions. Some states directly incorporate UNCLOS provisions into their domestic law for example Bulgaria and Poland. Both states being monist[220] do not need to enact domestic legislation since 'international agreements constitute a part of the domestic legal order that may be applied directly'.[221] In relation to dualist states there is no uniform approach that states have used to domesticate piracy law provisions.

Some states for example the USA simply define piracy according to the law of nations and allow for the application of universal jurisdiction but they do not set out the specific elements of the crime.[222] Singapore[223] and Malaysia[224] also define piracy according to the law of nations but they do not provide for the exercise of universal jurisdiction over the offence.[225] Another group of states have domestic laws that partially implement UNCLOS while including their own modifications. For example both Kenya and Tanzania have substituted the phrase 'on the high seas' with 'outside the jurisdiction of any state'.[226] There are states such as Thailand[227] that define piracy without following the UNCLOS definition. Instead they have enacted their own elements and acts that constitute the offence of piracy. Another group of states do not have a specific offence known as 'piracy'. Instead the offence is contained within the general category of other offences such as robbery, assault and murder.[228] For each of the different categories of states discussed above, not

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219 Dutton (n 192); See also Shnider (n 37); Lavarisha 'Pirates.ye be warned: A comparative analysis of national piracy laws' (2010-2011) 42 *UTLR* 255; Sterio 'Incorporating international law to establish jurisdiction over piracy offences a comparative examination of the laws of the Netherlands, South Korea, Tanzania, India, and Kenya' Scharf *et al* (eds) *Prosecuting Maritime Piracy Domestic Solutions to International* (2015) at 75-100; Hodgkinson (n 11) at 32-53; Petrig (ed) *Sea Piracy Law Selected National Legal Frameworks and Regional Legislative Approaches* (2010). All considering how various countries have domesticated the international law on piracy.

220 The monist theory subscribes that there is a relationship between national and international law with international law being supreme. Whereas, the dualist theory holds that, international law and national law are two different regimes that exist independent of the other. See Boas (n 106) at 120-121; Crawford (n 108) at 31-33; Aust *Modern Treaty Law and Practice* (2007) at 183-195.

221 Dutton (n 192) at 1143.

222 18 U.S.C §1651 (2006) provides: 'Whoever, on the high seas, commits the crime of piracy as defined by the law of nations, and is afterwards brought into or found in the United States, shall be imprisoned for life.'

223 S 130B of the Penal Code Cap 224, Chapter VIA. '(1) A person commits piracy who does any act that, by the law of nations, is piracy. (2) Whoever commits piracy shall be punished with imprisonment for life and with caning with not less than 12 strokes, but if while committing or attempting to commit piracy he murders or attempts to murder another person or does any act that is likely to endanger the life of another person he shall be punished with death.'

224 Courts of Judicature Act 1964, Laws Of Malaysia Act 91; § 22(1)(a)(4) gives the High Court jurisdiction to try offenses committed 'by any person on the high seas where the offense is piracy by the law of nations.'

225 Dutton (n 192) at 1141.

226 S 369 The Merchant Shipping Act 2009 Cap 16 (Kenya). S 341 The Merchant Shipping Act 2003 no 21 (Tanzania).

227 Article 4 Act on Prevention and Suppression of Piracy B E 2534 29 December 1991.

228 States such as Norway, Brazil, UAE and Azerbaijan. Norway S 151a of the General Civil Penal Code provides: 'Any person who on board a ship or aircraft by violence, threats or otherwise unlawfully and forcibly takes control of

all states have allowed the application of universal jurisdiction in prosecuting pirates. Some states still require a nexus to be established in order to prosecute.[229]

Various issues arise as a result of this uncoordinated implementation of piracy laws domestically. First, the arresting states may not have specific anti-piracy laws as defined under UNCLOS. Second, it is very apparent that different states have different provisions dealing with piracy under their domestic law. This is because they each provide different elements for the offence[230] and the penalties imposed are different.[231] So in some states the offence of piracy is treated less severely compared to other states.[232] Ultimately the jurisprudence emerging in relation to the offence of piracy is varied.

2.8.3 Arrest of pirates

It is specifically provided in article 107 UNCLOS that 'a seizure on account of piracy may be carried out only by warships or military aircraft, or other ships or aircraft clearly marked and identifiable as being on government service and authorized to that effect.' The term 'arrest' as used means the formal arrest of pirates as per the laws of a state and not merely the act of incapacitation

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the vessel or aircraft or otherwise interferes with its sailing or flying shall be liable to imprisonment for a term of not less than two years and not exceeding 21 years. The same penalty shall apply to any person who by similar means unlawfully and forcibly takes control of any installation or construction on the continental shelf. Under especially extenuating circumstances the penalty may be reduced below the prescribed minimum.'

'Any person who aids and abets such an offence shall be liable to the same penalty. An attempt may be subject to the same penalty as a completed felony.'

UAE Commercial Maritime Law Act no 26 of 1981: S 208 'Any person involved in or conspired against the safety of the ship master of his freedom or his authority shall be liable to provisional imprisonment'; S 209 'Any person who sinks or burn or inflicts a life threatening damage to the ship or made or took an action leading to it, shall be imprisoned for life.' S 201 'He who confiscates or tries to take possession of a ship in an illegal way shall be punished with provisional imprisonment.'

229 For example USA, Canada, Singapore, Poland and France apply universal jurisdiction. Denmark, Russia and Turkey do not apply universal jurisdiction. Dutton (n 211) at 1141.

230 For an overview of legal piracy definitions under municipal law see United Nations Oceans and Law of the Sea 'National Legislation on Piracy' website available at *http://www.un.org/depts/los/piracy/piracy_national_legislation.htm* accessed 7/8/13.

231 See Kontorovich (n 193) at 299-317 for an overview of the variance in sentencing of pirates by various jurisdictions. See also Kontorovich *The Penalties for Piracy: An Empirical Study of National Prosecution for International Crime* (2012) Northwestern Public Law Research Paper at 12-16 available at *http://scholarlycommons.law.northwestern.edu/cgi/viewcontent.cgi?article=1210&context=facultyworkingpapers* accessed 14/2/14.

232 Shnider (n 37) at 522-524. See also Bo 'The interplay between international law and national law in the first Italian prosecution of piracy: The *M/V Montecristo* case' (2015) 24(1) *IYIL* 289. The articles discusses the *M/V Montecristo* case dealing with the prosecution in Italian courts of Somali pirates arrested for hijacking an Italian flagged bulk carrier in international waters in the Indian Ocean. It analyses the relationship between international and national law in the prosecution of piracy. Although this is done from an Italian perspective it is indicative of similar challenges that states face in piracy prosecutions.

for example, by restraining the pirates.[233] Further, the literal interpretation of this article is that only sovereign states can make arrests. Justification for this being that there is no international police force to police the high seas; it would be impracticable for the arrest of pirates to occur. Thus, allowing warships of any state to undertake pirate arrests helps seal this gap. In addition, consideration of the negotiation process of this clause indicates that the aim of restricting arrest to government warships was in a bid to prevent private abuse of this right. The language used in this provision also indicates that it is at the discretion of any state to arrest and try pirates as they are the enemy of all mankind and that they commit their acts in the high seas where no state can exercise territorial sovereignty.[234]

As indicated a literal reading of article 107 provides a very restrictive interpretation of the scope of application. However, a deeper legal interpretation and practical application of the provision indicate that this is not the case. First, article 107 should be read together with article 29. The article provides 'warship' means a ship belonging to the armed forces of a State bearing the external marks distinguishing such ships of its nationality'. Thus other vessels in government service, not only warships, may be used for purposes of arresting pirates; because the term 'armed forces' includes an integration of the different branches of the disciplined forces in a country. In some countries a coastguard could constitute a separate unit of the armed forces of the state[235] and may thus be involved in arresting pirates if they have a vessel clearly marked as being in governmental service.

A second, viable interpretation is that a 'citizen's arrest' is permissible. This would occur where a private ship is able to repulse a pirate attack and in the process is able to incapacitate the pirates by restraining them. Subsequently, they would hand over the pirates to a 'warship' or the authorities of a coastal state. In arresting the pirates, the individuals would be rightfully exercising their right of self-defence and therefore undertaking a 'citizen's arrest'. Strictly speaking this 'citizen's arrest' is not an 'arrest' per article 107, as this section envisages a 'formal arrest'. This

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[233] *Black's Law Dictionary* 9th ed at 124 defines arrest as 'The taking or keeping of a person in custody by legal authority; the apprehension of someone for the purpose of securing the administration of law especially of bringing that person before a court'.

[234] Article 105 UNCLOS '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.' Beyond the jurisdiction of any state referring to territories that are *res nullius* (unclaimed territory).

[235] See Oxman 'The regime of warships under the United Nations convention on the law of the sea' (1983-1984) 24 *VJIL* 809.

occurs when the pirates are formally handed over to a warship or authorities of a coastal state who have the legal authority to take an individual into custody. Practically this is a suitable application for it caters for situations where private vessels are attacked by pirates out in the high seas and there are no warships nearby to make the formal arrests. This has already happened in the case of Somalia where the citizens arrested pirates and presented them to the authorities.[236]

A further justification for using citizen's arrest may be found in a country's domestic laws. If the national laws of a country that has domesticated the law of nations on piracy make provision for a 'citizen's arrest', this renders it possible for citizens to arrest pirates caught in the act and present them to the authorities. This is supported by the application of both the incorporation of and the direct application of international law into national law.[237] In addition, states have a duty to cooperate in the repression of piracy and this includes the duty to ensure the adoption of the relevant national laws.[238] Thus, if the national laws permit citizens' to arrest pirates and hand them over to the authorities then that state would be fulfilling its duty of cooperating in the repression of piracy under international law.

SUA does not expressly indicate who may undertake the capture of an offender. It merely alludes to it in article 8 where the term 'may' is used. It provides:

> 'The master of a ship of a State Party (the "flag State") may deliver to the authorities of any other State Party (the "receiving State") any person who he has reasonable grounds to believe has committed one of the offences set forth in Article 3.'

Thus, it may be inferred the master of a ship is the person authorised to undertake the capture of a pirate. With regard to permitting a 'citizen's arrest', a similar interpretation as ascribed to UNCLOS as discussed above, would be applicable.

In conclusion, without a doubt any state is allowed to arrest a pirate, being enemies of all mankind and universal jurisdiction allows any state to prosecute a pirate. However, state practice point to the fact that most states are unwilling to apply universal jurisdiction and seek to establish some nexus in order to prosecute. Further despite the provisions of UNCLOS on piracy being customary international law states are willing to apply them only if they are domesticated in their national

[236] Langfitt 'Catching pirates with a kind of neighbourhood watch' 14 April 2011 available at *www.npr.org* accessed 23/11/13. The use of citizen's arrest is also evident from the reading of the various piracy cases so far decided in Kenya and Seychelles. See for example *R v Hussein Mohammed Osman & 10 Others* (n 119)*; R v Abdukar Ahmed & 5 Others* (n 159); *R v Liban Mohamed Dahir & 12 Others* (n 119).

[237] See section 2.8.2 for the discussion on these doctrines.

[238] See UNCLOS article 100 and SUA article 10.

laws. This has led states in taking different approaches in implementing UNCLOS provisions on piracy. Ultimately the uncoordinated implementation of piracy provisions domestically has meant that elements providing for the offence and the penalties imposed vary from state to state. This dilemma is aggravated by the fact that there is no international tribunal where pirate trials can be conducted and thus are mainly conducted in national courts. The next section will consider the tribunals for conducting pirate trials.

2.8.4 Tribunals for conducting pirate trials

There is no international tribunal for conducting pirate trials, domestic courts presently, are the only available forum for such trials. A general discussion hereunder will consider other possible forums and ultimately seek to suggest a possible solution internationally in addition to the domestic courts.

The International Tribunal for the Law of the Sea (ITLOS) is one of the tribunals that member states may use for purposes of dispute settlement under UNCLOS. [239] Generally ITLOS hears civil disputes between member states.[240] The tribunal was not created to deal with international crimes;[241] thus the jurisdiction of ITLOS would have to be expanded in order to allow it to have jurisdiction over pirates as violators of international law.[242] Unless a strengthened dispute resolution mechanism is created under ITLOS, no adjudication of pirates can take place and aid in the development of a 'coherent body of jurisprudence.'[243] The development of such jurisprudence would help provide definitive interpretations on various UNCLOS provisions that are unclear.[244]

[239] The four dispute settlement mechanisms available under UNCLOS are: 1) International Tribunal for the Law of the Sea 2) The International Court of Justice 3) an arbitral tribunal constituted under Annex VII of the Convention 4) a special arbitral tribunal constituted under Annex VIII (art 287, only for the specified disputes). See Yoshifumi *The International Law of the Sea* (2012) at 390-402. See also Song 'Survey of declarations or statements made by parties to the Law of the Sea Convention: 30 years after adoption' (2013) 28 *IJMCL* 5 for a compilation of the dispute settlement mechanisms that UNCLOS signatory states have chosen.

[240] It is only in limited situations where it may entertain a case brought by a private individual. For this to happen the private individual must be a national of a member state and the individual be party to an agreement or contract that makes ITLOS jurisdiction mandatory. See Thedwall 'Choosing the right yardarm: Establishing an international court for piracy' (2010) 41 *GJIL* 501 at 516; Noyes 'Law of the sea dispute settlement: Past, present, & future' (1998-1999) 5 ILSA *JICL* 301 at 305-306.

[241] Kelly 'UNCLOS, but no cigars: Overcoming obstacles to the prosecution of maritime piracy' (2011) 95 *MLR* 2285 at 2298.

[242] Thedwall (n 240) at 518. See also Pemberton *The International Tribunal for the Law of the Sea as a High Court of Piracy* (2010) One Earth Future Foundation Working Paper 5.

[243] Bento 'Towards an international law of piracy sui generis: How the dual nature of maritime piracy law enables piracy to flourish' (2011) 29 *BJIL* 399 at 423.

[244] See the discussions in section 2.7 and Pemberton (n 242).

In addition, if ITLOS could prosecute pirates it would assist in dealing with the problem of states that are unwilling or unable to prosecute piracy.

Further, the problems surrounding universal jurisdiction may be improved by strengthening ITLOS. Prosecution of pirates by an international tribunal eliminates the inefficiencies inherent when different states exercise universal jurisdiction.[245] In addition, a common tribunal to deal with pirates would help ensure that pirates do not escape unpenalised due to the 'confusion over nations overlapping universal jurisdiction.'[246]

Despite these potential positive elements in the adjudication of piracy, ITLOS would still be faced by challenges. First, is the issue of enforcement of judgements, would states by willing to enforce judgments given; whether in relation to their nationals or non-nationals; or would the tribunal amount to a toothless bulldog for its inability to ensure that its decisions are adhered to and enforced. The tribunal would be completely reliant on the full, effective and timely cooperation of states in the enforcement of judgments.[247]

Second, since the court does not have penitentiary facilities, where would the detention of convicted persons take place? This would necessitate entering into agreements with countries willing to incarcerate convicted persons. Another issue that may arise in relation to this is, having to establish if the prison facilities of the host country are according to international standards in particular human rights standards.[248] States may be willing to assist but if their facilities are adjudged not up to international standards, they cannot be used, thus, reducing the facilities available to the tribunal for detention purposes. In addition, by providing detention facilities it is assumed that the said state would have to shoulder the financial burden of imprisoning the prisoner. The question is how many states would be willing and/or in a position to do so and will attain the expected international standards.

Moreover, the dispute resolution mechanisms under UNCLOS are not mandatory as states are free to choose which will apply to them. This means that even a piracy court established under this

[245] Thedwall (n 240) at 522.
[246] Ibid at 521. See also Dubner & Greene (n 96) at 448.
[247] Gormley 'The status of the awards of international tribunals: Possible avoidance versus legal enforcement (part I decisions & sanctions)' (1964) 10 *HLJ* 33. See also Fry 'Towards an international piracy tribunal: Curing the legal limbo of captured pirates' (2014) 22 *AJICL* 341 at 360-361.
[248] See Abels *Prisoners of the International Community the Legal Position of Persons Detained at International Criminal Tribunals* (2012).

regime may not be acceptable to all state parties. In view of these challenges and how long it took to negotiate for the current dispute resolution mechanism under UNCLOS, it is realistic to say, the prosecution of pirates under ITLOS is not about to occur in the near future.

Another possible forum for conducting pirate trials is the International Criminal Court (ICC). Proponents point to the fact that the preamble to the Rome Statute provides that the Court has jurisdiction over the 'most serious crimes of concern to the international community' and 'that such grave crimes threaten the peace, security and well-being of the world'.[249] By analogy pirates are considered the enemy of all mankind and their activities are a great concern to the international community as they threaten the peace, security and trade of the world. By drafting an optional protocol the crime of piracy can be brought within the jurisdiction of the court.

According to the Rome Statute the jurisdiction of the court shall be complementary to national criminal jurisdictions.[250] The implication of this is that the Court will give leeway to a country to bring to justice those accused of crimes under the statute before it will take up such cases. Thus in the case of piracy the states will be granted the original opportunity to exercise jurisdiction over the crime. However, if they are 'unwilling or unable genuinely to carry out the investigation or prosecution', then the ICC would take up prosecution.[251] This would definitely be a positive move considering that many states are unwilling to apply universal jurisdiction to prosecute pirates.[252]

Article 12(3) of the Rome Statute provides that:

> '...a State which is not a Party to this Statute ... that State may, by declaration lodged with the Registrar, accept the exercise of jurisdiction by the Court with respect to the crime in question. The accepting State shall cooperate with the Court without any delay or exception in accordance with Part 9.'

This provision allows a country that is not a signatory to the statute to accept the jurisdiction of the court in prosecuting a crime that is within the jurisdiction of the court. Thus, if the crime of piracy is brought within the jurisdiction of the court, even the countries that are not signatories will be able to refer such cases to the ICC. Furthermore, the ICC is already established and running

[249] 2187 *UNTS* 90 17 July 1998. See Dutton 'Bringing Pirates to Justice: a Case for including piracy within the Jurisdiction of the International Criminal Court' (2010) 11(1) *CJIL* 197. See also Hallwood & Miceli (n 3) at 93-94 and Hallwood & Miceli 'An examination of some problems with international law governing maritime piracy' (2013) 40 *MPM* 65 at 73-74 also in support of using the ICC.
[250] Rome Statute preamble article 1.
[251] Article 17.
[252] See Dutton (n 249) at 216-220 and discussion in section 2.8.1.

thus, since the infrastructure is already there it would not take long for the court to be operational in dealing with piracy cases. With the resources and expertise already in place this would aid in dealing with cases expeditiously. However, during the lengthy negotiations leading to the acceptance of the Rome Statute, piracy was not included as one of the 'core crimes' under the jurisdiction of the court.[253] It may thus be a farfetched conception to think that that they will agree to include piracy at this stage.

Additionally, although piracy and the crimes prosecuted under the Rome Statute are linked by the fact that universal jurisdiction or (quasi-universal jurisdiction under the Rome statute)[254] is applicable to all, the gravity of the offences is different. In comparison to war crimes, crimes against humanity and genocide, piracy pales in its grievousness when set against these crimes. The difference in gravity is made evident by considering what acts are envisaged in committing these crimes.[255] It is evident that the crimes under the Rome Statute involve commission of heinous acts such as trying to exterminate a population, inflicting conditions that lead to the physical destruction of a particular group, carrying out scientific research on human beings, forced pregnancy or sterilisation and forms of sexual violence.[256] These acts are despicable in comparison to pirates who are merely seeking to commit acts of depredation and violence. Therefore, it might be erroneous to include piracy together with these complex and more serious offences.[257] Accordingly, the ICC might not be the ideal tribunal to deal with piracy and should perhaps be left to concentrate on these unique crimes that threaten the existence of the human race.

Another possible forum that has been considered is the use of regional tribunals to prosecute pirates.[258] The main benefit of using regional tribunals is that it would facilitate the prompt trial of

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[253] Ibid at 237-238. See also Boister 'International tribunals for transnational crimes: Towards a transnational criminal court?' (2012) 23 *CLF* 295 at 296-299.

[254] Dimitrakos 'The principle of universal jurisdiction and the International Criminal Court' (2014) at 27-30 available at *http://ssrn.com/abstract=2383587* accessed 19/8/14. Dimitrakos's argument is based on the facts that 'the Statute provides that the Court may assert jurisdiction even when the offender is not a national of one of the state parties, or when the offense was committed in the territory of a non-party state (whether or not the offender is a national of a state-party), provided the required conditions are met. This is an extremely significant exception because it can allow the Court to assert jurisdiction in cases which could only be justified by universal jurisdiction in its most genuine form.'

[255] See articles 6, 7 & 8 Rome statute.

[256] Ibid.

[257] Fry (n 247) at 359-360.

[258] This possibility was considered in the case of setting up a regional East African tribunal to try Somalia pirates but after consideration was shelved. For these considerations see UN Secretary General, letter dated 24 January 2011 from the Secretary General addressed to the president of the Security Council (Somalia- Report of the Special Adviser to the Secretary-General on the legal issues related to piracy off the coast of Somalia) UN Doc S/2011/30 (25 January

pirates as the tribunals would be in close proximity to where the offences are occurring thus facilitating the transfer of suspects due to proximity of suspects arrested by patrolling naval states.[259] However, this alternative would encounter various problems such as lack of adequate set up and running finances, lack of manpower and problems in judgement enforcement.[260] A variation of this has been tried in prosecuting Somalian pirates where the European Union, United Kingdom and United States of America have entered into agreements with Kenya, Seychelles and Mauritius.[261] These agreements have assisted in prosecuting pirates but have run into problems and at present can be said not to be working effectively.[262] Further these regional tribunals are likely to be utilising national piracy laws, as is the case with the prosecution agreements with Kenya, Seychelles and Mauritius. Thus, they cannot strictly be said to be operating at an international level, yet an international tribunal would be a most favourable solution to dealing with pirates. This is because it would provide uniformity in dealing with piracy and assist where states are unable or unwilling to prosecute.

2011) (Jack Lang Report) available at *http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N11/206/21/PDF/N1120621.pdf?OpenElement* accessed 14/7/14; UN Security Council *Report of the Secretary-General on the Modalities for the Establishment of Specialized Somali Anti-Piracy Courts* (2011); UN Doc S/ 2011/360 (15 June 2011) available at *http://unpos.unmissions.org/Portals/UNPOS/Repository%20UNPOS/S-2011-360%20%2815Jun2011%29%20Piracy.pdf* accessed 22/8/14. See also Hodgkinson 'Establishment of a special anti-piracy tribunal: prospective and reality. The challenges associated with prosecuting Somali pirates in a special anti-piracy tribunal' (2012) 19 (2) ILSA *JICL* 305.

259 Burke 'Regionalisation of international criminal law enforcement: A preliminary exploration' (2003) 38 *TILJ* 729 at 735-743; Middelburg (n 14) at 65-74; Piquet 'Changing tides: An adaptable prosecution approach to piracy's shifting problem' (2013) 52 *CJTL* 238 at 253-257.

260 Ibid at 755-758. See also Dubner & Greene (n 96) at 452-455; Arbour 'Progress and challenges in international criminal justice' (1997-1998) 21 *FILJ* 531 at 538; Scharf 'Conclusion: Is there a case for an international piracy court' in Scharf *et al* (eds) *Prosecuting Maritime Piracy Domestic Solutions to International Crimes* (2015) at 353-354.

261 See Memorandum of Understanding Concerning the Conditions of Transfer of Suspected Pirates and Armed Robbers and Seized Property in the Western Indian Ocean, the Gulf of Aden, and the Red Sea, U.S.-Kenya (16 January 2009); Memorandum of Understanding on the Conditions of Transfer of Suspected Pirates and the Armed Robbers and Seized Property To The Republic of Kenya, U.K.-Kenya (11 December 2008); Exchange of Letters Between the European Union and the Republic of Seychelles on the Conditions and Modalities for the Transfer of Suspected Pirates and Armed Robbers from EUNAVFOR to the Republic of Seychelles and for Their Treatment After Such Transfer, EU-Seychelles (21 August 2009); Agreement Between the European Union and the Republic of Mauritius on the Conditions of Transfer of Suspected Pirates and Associated Seized Property from the European Union-led Naval Force to the Republic of Mauritius and on the Conditions of Suspected Pirates After Transfer (14 July 2011). See also Middelburg (n 14) at 65-68; Dubner & Greene (n 96) at 451-452.

262 Some of the problems encountered in implementing these agreements include challenge to the legality of the agreements, witness attendance problems, evidence production problems, and allegations of torture, mistreatment and denial of bail by the offenders. See Sterio (n 178); Gathii 'The use of force, freedom of commerce, and double standards in prosecuting pirates in Kenya' (2009) 59 *AULR* 1321; Hodgkinson 'International law in crisis, seeking the best prosecution model for Somali pirates' (2011) 44 *CWRJIL* 303.

In conclusion, it is evident that at the international level the ITLOS tribunal would be the most favourable venue for conducting pirate trials in comparison to regional tribunals or the ICC. Even so, it would be faced by challenges as relates to the enforcement of its judgements. In addition, considering the current setup of the dispute resolution mechanism under UNCLOS it is unlikely that an amendment to UNCLOS will happen anytime soon to facilitate the court conducting criminal trials over pirates. In this regard, presently the most practicable forum(s) to continue being utilised to prosecute pirates are the national courts.[263] Nonetheless, it is suggested that ultimately the prosecution of pirates by ITLOS, an international tribunal, would be the best solution.

Linked to the issue of tribunals to conduct pirate trials is the duty imposed on states to cooperate in the repression of piracy; for states that arrest pirates have the obligation to prosecute them. This duty includes states assisting each other in facilitating criminal proceedings for example, in obtaining evidence against pirates. Further consideration of this duty is done hereunder.

2.9 Duty of states to cooperate in the repression of piracy

States are expected to cooperate in seeking to deal with piracy. The signatories to UNCLOS are required to cooperate in anti-piracy measures over piratical acts occurring in the high seas.[264] This duty has been watered down in its application by the drafting of article 100. The provision appears to impose a mandatory duty upon states to cooperate by use of the phrase 'all states shall cooperate' in the repression of piracy. However, this duty is watered down by the phrase that follows after, stating that states are to cooperate to 'the fullest extent possible'. What may be 'the fullest extent possible' of cooperation between states possibly will vary in its application from one state to another.

Further, the duty to cooperate does not extend to dealing with piracy within territorial waters, as it only provides for cooperation in relation to piracy occurring in the high seas or places outside the jurisdiction of any state. Yet, it is now a common phenomenon that piracy is increasingly occurring within the territorial waters of states. In addition, UNCLOS does not impose any penalty on a state for failing to discharge its duties to repress piracy even in the high seas. This definitely has

[263] See Karim 'Prosecution of maritime pirates: The national court is dead-long live the national court' (2014) 32 *WILJ* 37; Govern 'National solutions to an international scourge: Prosecuting piracy domestically as a viable alternative to international tribunals' (2014) 19 *UMICLR* 1.

[264] Article 100 UNCLOS 'All States shall cooperate to the fullest possible extent in the repression of piracy on the high seas or in any other place outside the jurisdiction of any State.'

contributed to the lacklustre attitude of states in dealing with piracy; as it is left to the signatories to decide how they wish to deal with piracy.[265]

Unlike UNCLOS, SUA clearly provides for how the obligation of state cooperation in the repression of piracy is to be done. It expressly provides that a member state has the duty to prosecute or extradite an offender. Article 10 provides:

> 'The State Party in the territory of which the offender or the alleged offender is found shall... if it does not extradite him, be obliged, without exception whatsoever and whether or not the offence was committed in its territory, to submit the case without delay to its competent authorities for the purpose of prosecution... .'
>
> Article 11 states: 'The offences set forth in Article 3 shall be deemed to be included as extraditable offences in any extradition treaty existing between any of the States Parties...'

State parties are also obliged to cooperate in the prevention of the offences and the convention gives several specific examples of how states can cooperate.[266] Furthermore, state parties are expected to assist each other in facilitating criminal proceedings in various ways including 'assistance in obtaining evidence at their disposal necessary for the proceedings.'[267]

The implication of these provisions is that under the SUA regime jurisdiction to prosecute offenders is narrower but more stringent than under UNCLOS.[268] This is because states can only exercise jurisdiction in specific instances, they are obliged to enact the relevant laws domestically to criminalise maritime offences and they have an obligation to either prosecute or extradite the offender. SUA provisions are not customary international law thus the obligations contained therein are only owed to state parties to the convention.

Though SUA has helped deal with some of the problems evident under the UNCLOS regime it too is plagued with its own shortcomings. First, if a signatory state with the nexus to a crime sufficient to establish jurisdiction does not prosecute, or if states with nexus to the crime are not signatories to the convention the offenders will go unpunished despite the increased territorial jurisdiction of the SUA convention.[269] Additionally, since only state parties that are signatories can exercise the jurisdiction to prosecute this limits the number of nations that can prosecute an offender. Second,

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[265] See the discussion on the application of universal jurisdiction in dealing with piracy in section 2.8.1.
[266] SUA article 13; See also SUA article 14 & 15 further providing for the duty of states to share information to states than prosecute an offender if they are unable and the duty to provide information to the secretary-general respectively.
[267] SUA article 12.
[268] Collins & Hassan (n 114) at 108.
[269] Dutton (n 192) at 1127.

despite providing for stringent provisions requiring enactment of domestic laws criminalising piracy and the duty to prosecute and impose penal sanctions, the state parties are free to decide how to do this. This leads to a lack of uniformity in the prosecution and penal sanctions imposed for the maritime offences.

Third, despite a state having the jurisdiction to prosecute, they have the discretion to decide if they will prosecute and penalise the offender.[270] Though the wording of the convention seems more stringent on prosecution of offenders than UNCLOS, state parties are under no compulsion from the treaty provisions to prosecute. Thus if state parties lack the political will to prosecute, offenders will go unpunished.[271] Therefore, it is evident from the discussion above that both UNCLOS and SUA are hampered when it comes to imposing the duty on states to cooperate in the repression of piracy.

2.10 Implications of the shortcomings in the law and adjudication of piracy

The discussion above on the shortcomings of the law on piracy, the application of universal jurisdiction to piracy, the domestication of international piracy laws, the arrest and adjudication of pirates and the duty of states to cooperate in the repression of piracy has brought to light a number of problems that are likely to arise in ultimately holding pirates accountable.

From the point of arrest there are problems arising, as pirates have to be caught in the act of committing piracy. In most instances this does not happen yet the law does not specifically allow for the suspects to be arrested and charged for inchoate crimes. Moreover where a trial is conducted, proving the various elements of piracy could prove a challenge and hence lead to prosecution not discharging its burden of proof beyond a reasonable doubt. Consequently, the accused persons are acquitted.

Besides, if pirates are arrested the arresting states are not willing to exercise universal jurisdiction to prosecute, and the law on piracy does not oblige states to capture and prosecute. In instances where the states are willing there is the problem of lack of uniformity in the domestication of the international law of piracy. This has a bearing on piracy trials because a criminal trial has to be

[270] Collins & Hassan (n 114) at 108.
[271] Ibid. Middelburg (n 14) at 55.

governed by the law of the territory where the trial takes place.[272] Ultimately there lacks uniformity in the treatment of piracy by various states.

Further, despite imposing the duty on states to cooperate in the repression of piracy, there are some loopholes in its application as provided under UNCLOS and SUA. This may lead to problems in proving the offence in court. For example, states may refuse to effectively cooperate in assisting another state gather evidence.[273] If it is possible to acquire evidence utilisation of the evidence may be hampered by the domestic laws of the prosecuting state. In certain instances the evidentiary laws of the trial state do not allow for the production of certain types of evidence. For example in Kenya pirate trials were hindered by the fact that the country's laws did not allow for the use of video evidence in court.[274] Thus cooperation may have occurred in the acquiring of evidence but it cannot be utilised. Yet nothing can be done because pirate trials have to be conducted in accordance with the laws of the prosecuting state. This may lead to insufficient evidence being adduced to prove piracy against the pirates, who ultimately may not be held accountable.

States may be willing to cooperate in the repression of piracy as regards facilitating the acquiring of evidence however; conducting trials may be hampered due to the unavailability of witnesses. Since it is only warships that are authorised to undertake pirate arrests, the military personnel involved may have been deployed to other duties thus difficulty arises in re-calling them to give evidence during trials.[275] These problems lead to high costs in the prosecution of pirates.

These costs are usually entirely borne by the prosecuting state, yet the apprehending and prosecuting state may not have a direct link with the offender. Thus when a country considers the cost-benefit analysis of conducting these trials it may avoid undertaking piracy trials as the costs outweigh the benefit.[276] Therefore, even though a state may apply universal jurisdiction to

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[272] Lorenz & Paradis (n 178) at 214. With specific regards to challenges in prosecuting Somalian pirates see Mutoka 'Assessing current trends and efforts to combat piracy: A case study on Kenya' (2013) 46 *CWRJIL* 125; Middelburg (n 14) at 85-86; Wambua 'The legal framework for adjudication of piracy cases in Kenya: Review of the jurisdictional and procedural challenges and the institutional capacity' in Petrig (ed) *Sea Piracy Law Selected National Legal Frameworks and Regional Legislative Approaches* (2010).

[273] Lorenz & Paradis (n 178) at 210-216. See also Boister (n 253) at 301 on why states generally are unwilling to cooperate in dealing with transnational crimes.

[274] See Gathii (n 262); Gathii 'Kenya's piracy prosecutions' (2010) 104(3) *AJIL* 416. This position has since changed and the High Court has held that video evidence is admissible. See *Livingstone Maina Ngare v Republic* [2011] eKLR; criminal revision no 88 of 2011 (28 July 2011).

[275] Hallwood & Miceli 'The economics of international cooperation in the apprehension and prosecution of maritime pirates' (2012) 43(2) *ODIL* 188 at 193. Lorenz & Paradis (n 178) at 216-217.

[276] Hallwood & Miceli (n 275) at 195; Kontorovich (n 9); Hodgkinson (n 11) at 53.

prosecute it may prefer to do so if a nexus is established. Additionally, due to the different approaches adopted by states in the domestication of piracy laws; at the conclusion of the trial there is also the problem of variability in the nature and severity of the punishment,[277] as states prescribe different punishments.

Moreover, the adjudication of pirates under the current piracy law is problematic as it concentrates on the prosecution of the foot soldiers and not the top-tier individuals these being the financiers involved. This is because the law prescribes for the pirates to be caught committing the act for an arrest to be undertaken. The financiers are never involved in committing the actual piratical act yet they take the lion's share of the proceeds.[278] Thus arresting and prosecuting the foot soldiers is not a very effective method in dealing with piracy as it does not destroy the key infrastructure that facilitates piracy from the root.[279]

The problem of prosecuting pirates is worsened by the unwillingness of states to prosecute and there being no international tribunal that has the power to prosecute pirates. This would aid in dealing with situations where states are unwilling or unable to prosecute. As well as clarifying the unclear issues in the definition of piracy and developing a uniform body of jurisprudence on the offence. The problems indicated above all culminate in making it difficult or impossible to hold pirates accountable by utilising piracy laws.

Therefore, considering the loopholes in the law on piracy that lead to problems in the adjudication of piracy as discussed above, is it not time to consider a different approach in tackling the problem. The other possible path could be by following the money/property trail. Studies by Dubner & Raturi[280] and Nance & Jakobi[281] suggest that piracy may be dealt with by concentrating on the payment of ransoms, laundering of the ransom payments, tracking of assets and analysing the informal money transfer system.

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[277] Kontorovich (n 193) at 300; Hallwood & Miceli *Modern Maritime Piracy* (2014) University of Connecticut Dept of Economics Working paper 2014-01 at 10.
[278] UN Security Council Report (n 124) at 32; FATF Report (n 124) at 18*;* Geoplicity Report (n 124) at 6.
[279] Thorpe 'Preventing and prosecuting piracy at sea: legal issues' (2012) House of Commons Standard Note 6237 at 14; Scharf (n 259) at 355.
[280] See Dubner & Raturi 'The economics of international sea piracy–A case of history repeating itself' (2012) 20(3) *MSUJIL* 745; Shane & Magnuson (n 12).
[281] Nance & Jakobi 'Laundering pirates? The potential role of anti-money laundering in countering maritime piracy' (2012) 10(4) *JICJ* 857. See also FATF (n 124) at 36.

By engaging in piratical acts the pirates are involved in criminal conduct that is proscribed as an offence. Therefore, any 'property' that they acquire as a result of this criminal conduct can be termed as 'criminal property'. These illegally acquired ransoms or properties are probably being laundered and this poses a threat to the fight against money laundering. By investigating the link between pirate ransoms which is a criminal benefit and money laundering it may be possible to tackle piracy from a money laundering perspective.

Consequently, additional to or as an alternative to prosecuting pirates for the offence of piracy they can be prosecuted for the benefit they acquire from their criminal conduct. Various offences that they can be tried for include being in possession, concealing, disguising, converting, transferring or moving the 'criminal property'. To prove that the property is 'criminal property' it is proposed that the prosecutor provide sufficient circumstantial evidence to draw the inference that the property in question has a criminal origin linked to a piratical act. The advantage of dealing with piracy from this perspective is that it would aid in eliminating 'the fundamental motivations of the crime by removing the economic incentive to commit piracy.'[282] Further it would be possible to bring pirates to justice for inchoate offences.

Moreover, utilising piracy laws only facilitates removing the foot soldiers of piracy these are the actual pirates undertaking the piratical acts. Thus even if they are prosecuted under piracy laws and held accountable this will not halt piracy, primarily because the pirate organisation and its financing remain intact.[283] Considering that there is a limitless supply of young, desperate Somalian men willing to join the pirate networks, this coupled with continued financing will ensure that pirate operations remain uninterrupted.[284] Ultimately, it is necessary to also destroy the pirate networks by targeting their highest levels such as the financiers. In this regard piracy laws are not adequate but anti-money laundering laws possibly will facilitate this.

2.11 Chapter conclusion

In as much as pirates have always been considered the enemy of all mankind, at some point in history piracy was condoned albeit under the guise of privateering as it was undertaken with the consent of the sovereign and was primarily for the benefit of the state. Prior to the conclusion of the 1958 Law of the Sea Convention there was no internationally acceptable definition of piracy,

[282] Bento (n 243) at 443.
[283] Scharf (n 259) at 354.
[284] Ibid at 355.

though at the domestic level countries did develop laws on piracy. Eventually after a series of international conferences the present day definition of piracy (UNCLOS 1982) was agreed upon by the state parties. Since this treaty was concluded, the only considerable change in the law occurred with the drafting of the SUA convention. The nature of the crime has evolved. Yet, despite these changes the law of nations and treaty law dealing with piracy has remained largely unchanged.

The flaws in these laws hamper the adjudication of pirates and have led to instances of pirates not being held accountable for their acts. Considering the long and protracted process involved in negotiating and drafting the current international law on piracy; it would be logical to assume that reforms aimed at dealing with the flaws in the law of piracy are unlikely to be undertaken in the near future. Whereas, the United Nations Security Council has recognised that piracy is a 'threat to international peace and security,'[285] the crime continues unabated. There is need therefore, to try and identify alternative ways of tackling the problem, for example the utilisation of anti-money laundering laws. These would facilitate the process of identifying and seizing the criminal property that pirates acquire from their illegal activity. Since the primary motive for engaging in piracy is economic gain, if pirates are relieved of their criminal earnings they may consider that no benefit exists, and thus altogether abandon piracy. Hence, theoretical examination of this issue is undertaken in the next chapter.

[285] S/RES/1816(2008) 2 June 2008 at 2 last preambular paragraphs. This has been reiterated in S/RES/2246(2015) 10 November 2015 para 5.

3 THE LINK BETWEEN MONEY LAUNDERING AND PIRACY

3.1 Introduction

At first glance money laundering and piracy appear to be as divergent as chalk and cheese. On one hand, money laundering is the process by which 'dirty' money is put through the financial system to render it 'clean'; on the other hand, piracy is any illegal act(s) of violence, detention or depredation, committed for private ends against a ship or aircraft on the high seas. One may say piracy is a maritime offence as it is committed in the high seas whereas money laundering is a terrestrial offence committed mainly by persons on dry land. At the very least, the characteristic link that connects them is that both are criminal offences. However, deeper consideration of the two offences brings to light their symbiotic relationship. This interdependence lies in the potential for piracy to facilitate money laundering; thus, one offence leads to the other.

The main aim of a launderer is to ensure that proceeds from the crime(s) they commit can be utilised in a legitimate economy without trace as to their illegal origin. In the same vain pirates want to utilise their economic gain for example ransoms in a legitimate economy, while obviating the illegal origin of the funds and thus may engage in money laundering to achieve this. Therefore, piracy may lead to money laundering to enable the pirate to benefit from their illegal proceeds without it being possible to trace it back to piracy.

In the previous chapter the flaws of the law on piracy that consequentially leads to adjudication problems were identified, particularly with regards to pirates evading accountability. However, by using money laundering laws which deal with the illegal proceeds which pirates receive by way of ransoms, the offence of piracy may indirectly be tackled even if it is only to ensure that pirates do not benefit from their crime.

Therefore, the main aim of this chapter is to show the link between piracy, specifically piracy for ransom,[1] and money laundering and using this as the basis for the justification of using the offence of money laundering to address piracy. The elements of money laundering will be analysed in

[1]Piracy may be committed for different intentions for example, political reasons or for economic reasons such as capturing cargo on board a vessel. This research specifically refers to piracy committed with the aim of kidnapping hostages who are then used as human bargaining chips to solicit for ransom, hence the term piracy for ransom. This type of piracy is undertaken by the Somalian and Gulf of Guinea pirates. Therefore, reference to 'piracy' in this chapter will be referring specifically to 'piracy for ransoms'. See Nelson 'Maritime terrorism and piracy: Existing and potential threats' (2012) 3(1) *GSS* 15 at 16-18; Ghoshal 'Contemporary piracy research in criminology: A review essay with directions for future research' (2014) 38(3) *IJCACJ* 281 at 288-291; Pérouse de Montclos 'Maritime piracy in Nigeria: Old wine in new bottles?' (2012) 35(7-8) *SCT* 531.

section 3.2. This analysis will then be used in section 3.3 to develop a working definition of money laundering to be applied in this thesis.

An interrogation of what money laundering entails is necessary as it will facilitate a better appreciation of the link and role that anti-money laundering measures can play in dealing with piracy. This is in addition to helping solidify the link between money laundering and piracy. More specifically, by applying the working definition to the Somalia situation, it will be possible to ascertain whether indeed the pirates are engaged in money laundering or not as considered in section 3.4. This will set the stage for utilising anti-money laundering laws to deal with piracy. Further to establishing the link between the two offences, justification for using anti-money laundering measures to deal with piracy will be addressed. This is achieved by considering the causes of piracy from a criminology perspective and by regarding piracy as both an organised and transnational crime as undertaken in section 3.5.

3.2 Defining money laundering

The origin of the term money laundering is anecdotal and a number of versions exist.[2] The commonly held version holds that the origin of the term is linked to the mafia activities in the 1970s, in the United States of America. In a bid to disguise their ill-gotten wealth the mafia invested in 'launderettes' through which they mixed their legitimate earnings with the illegitimate earnings from, drugs, prostitution and gambling.[3] Thus, the process of mixing the legitimate funds with the 'illegitimate funds' so as to 'cleanse' them was considered a process of laundering. Another cited origin is during the Watergate Scandal when the print media used the term 'money laundering' when reporting on the matter.[4]

The earliest reported use of the term in a judicial context was in the case of *US v $4,225,625.39*[5] in 1982. In this case the court used the term but did not specifically define its meaning. Money laundering was not defined as a crime under the laws of any jurisdiction until 1986. Then the

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[2] See Serio 'Fuelling global crime: The mechanics of money laundering' (2004) 18(3) *IRLCT* 435 at 442-443; Durrieu *Rethinking Money Laundering & Financing of Terrorism in International Law Towards a New Global Legal Order* (2013) at 14.

[3] Unger 'Money Laundering regulation: From Al Capone to Al Qaeda' in Unger & Van der Linde (eds) *Research Handbook on Money Laundering* (2013) at 19; The Eurasian Group on combating money laundering and financing of terrorism *EAG FAQ's* available at *http://www.eurasiangroup.org/guestbook.php* accessed 28/2/13.

[4] Unger 'Introduction' in Unger & Van der Linde (eds) *Research Handbook on Money Laundering* (2013) at 3.

[5] [1982] 551 F. Supp. 314 (10 November 1982) specific reference to the term made at 322 and 325. Unger (n 3) at 3; Durrieu (n 2) at 14.

United States and the United Kingdom became the first countries in the world to introduce legislation classifying money laundering as an offence in their domestic jurisdictions.[6]

Though the United Kingdom legislation dealt only with the offence of laundering proceeds from drug trafficking, the United States legislation applied it to the laundering of proceeds from any unlawful activity. Both definitions were similar in that they criminalised the acts of knowingly using, disguising the nature, location, source, ownership or control of proceeds from the offence of drug trafficking or any other unlawful activity.[7] The acts encompassed in these two statutes have continued to dominate current definitions of the offence. Presently there are a number of definitions of the term as provided in conventions,[8] by organisations[9] and by various authors.[10] These various definitions will be elucidated hereunder and followed by a discussion on the unifying elements that underpin money laundering, notwithstanding their linguistic variations.

The first convention to define money laundering was the United Nations Convention against Illicit Traffic in Narcotic Drugs & Psychotropic Substances.[11] The convention defines money laundering as occurring when a person(s) converts or transfers property for the purpose of concealing or disguising the illicit origin of the property; or the act of concealing or disguising the true nature, source, location, disposition, movement, rights with respect to or ownership of property knowing of the illicit origin of the property.[12] The convention also provides that money laundering is the acquisition, possession or use of property, knowing at the time of receipt that such property was derived from the crime of drug trafficking.[13] The unique aspect of this convention is that money

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[6] Durrieu (n 2) at 101.
[7] The United States Money Laundering Control Act 1986; 18 USC 1956-1957 and S 24 United Kingdom Drug Trafficking Offences Act 1986.
[8] See for example the United Nations Convention against Transnational Organised Crime (Palermo Convention) 15 November 2001 2225 *UNTS* 209; The United Nations Convention on the Suppression of Funding of Terrorism 9 December 1999 2178 *UNTS* 197; Council of Europe Convention on Laundering, Search, seizure and Confiscation of the Proceeds From Crime and on the Financing of Terrorism 16 May 2005 *ETS* no 198.
[9] See for example Financial Action Task Force on Money Laundering (FATF), International Monetary Fund (IMF) and World Bank discussed in section 3.2.
[10] Unger & Siegel *et al* Report for the Dutch Ministry of Finance *The Amounts and Effects of Money Laundering* (2006) at 29 available at *http://www.maurizioturco.it/_Media/2006_02_16_report_for_the_m.pdf* accessed 1/3/13.
[11] United Nations Convention against Illicit Traffic in Narcotic Drugs & Psychotropic Substances 28 *ILM* 493; 1582 *UNTS* 95. Also referred to as the Vienna Convention as it was concluded in Vienna, Austria on 20 December 1988. It has three protocols: i) Protocol to Prevent, Suppress and Punish Trafficking in Persons; ii) Protocol to Prevent the Smuggling of Migrants by Land, Sea and Air; iii) Protocol against the Illicit Manufacturing and Trafficking in Firearms, Their Parts, and Components and Ammunition.
[12] Article 3 (1)(a).
[13] Article 3(1)(c)(i).

laundering is defined in relation to the predicate offence[14] of drug trafficking. According to the convention, property that is subject to conversion, transfer, concealment or disguising should have been obtained from the production, manufacture, extraction; preparation, offering, offering for sale, distribution, sale, delivery of narcotic drugs.

Another convention defining money laundering is the Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime; which defines the offence as 'the conversion or transfer of property, knowing that such property is proceeds from a predicate offence, for the purpose of concealing or disguising the illicit origin of the property'.[15] The United Nations Convention against Transnational Organised Crime[16] is another key convention that defines money laundering. Article six defines money laundering as the conversion or transfer of property, knowing that such property is the proceeds of crime, for the purpose of concealing or disguising the illicit origin of the property or 'the concealment or disguise of the true nature, source, location, disposition, movement or ownership of or rights with respect to property, knowing that such property is the proceeds of crime.' Article 6(b)(i) further criminalises the acquisition, possession or use of property, knowing, at the time of receipt, that such property is the proceeds of crime. A similar definition is adopted in article nine of the Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism.[17]

Scholars too have contributed to the numerous definitions of money laundering. Unger defines it as 'the process of disguising the unlawful source of criminally derived proceeds to make them appear legal.'[18] Using economics terminology, Masciandaro states that 'money laundering is an autonomous criminal economic activity whose essential function lies in the transformation of liquidity of illicit origin, or potential purchasing power, into purchasing power usable for

[14] Predicate offence refers to an offence that leads to the generation of funds to be laundered. See definition in Article 2(h) of the United Nations Convention against Transnational Organised Crime.
[15] Article 6; *ETS* no 141. Also referred to as the Strasbourg convention as it opened for signature in Strasbourg, France on 8 November 1990.
[16] 2225 *UNTS* 209. Also referred to as the Palermo convention as it opened for signature in Palermo, Italy on 12-15 December 2000.
[17] *CETS* no 198. Also referred to as the Warsaw convention as it opened for signature in Warsaw, Poland on 16 May 2005.
[18] Unger 'Can money laundering decrease?' (2013) 41 *PFR* 658 at 659.

consumption, saving, investment or reinvestment'.[19] Durrieu defines it as the 'autonomous process of making money or any other economic value that comes from a criminal source A, look like money or any other economic value coming from a legitimate source B'.[20] According to Alldrige 'it is the process of transforming the proceeds of illegal activities into legitimate capital.'[21]

Organisations that have defined money laundering include the Financial Action Task Force on Money Laundering (FATF)[22] which frames money laundering as 'the processing of criminal proceeds to disguise their illegal origin'.[23] The United Nations Office on Drugs and Crime (UNODC) and the International Monetary Fund (IMF) jointly adopted a similar definition to the FATF. They describe money laundering as 'the process by which a person conceals or disguises the identity or the origin of illegally obtained proceeds so that they appear to have originated from legitimate sources'.[24] From these definitions, key unifying elements that constitute recurring features for the offence of money laundering can be delineated as; to undertake it, one needs to be in possession of property derived from an illegal activity, possess the relevant *men rea* and undertakes the *actus reus* with the ultimate aim of obviating the illegal origin and facilitate utilising the illegal proceeds. These elements point to money laundering being a process and an autonomous offence. These will be discussed hereunder and subsequently a working definition of money laundering for use in the thesis will be developed.

3.2.1 Property derived from an illegal source

The property put through the laundering process has to be derived from an illegal source and the launderer must be aware of the property's illegal nature. This is indicated by the use of phrases such as 'illegal activities', 'criminal economic activity', 'unlawful source' and 'illegal source' in

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[19] Masciandaro *Economics of Money Laundering: A Primer* (2007) Paolo Baffi Research Centre Working Paper 171 available at *http://www2.econ.uu.nl/users/unger/papers/Masciandaro.pdf* accessed 22/6/14 at 2.
[20] Durrieu (n 2) at 20.
[21] Alldrige *Money Laundering Law Forfeiture, Confiscation, Civil Recovery, Criminal Laundering and Taxation of the Proceeds of Crime* (2003) at 2.
[22] The Financial Action Task Force (FATF) an inter-governmental organisation established in 1989 by the G7 with the aim of better and effectively dealing with anti-money laundering initiatives world over. See also Beekarry 'The international anti money laundering and combating the financing of terrorisms regulatory strategy: A critical analysis of compliance determinants in international law' (2011) 31 *NJILB* 137.
[23] FATF Money laundering FAQ 'What is money laundering?' available at *http://www.fatf-gafi.org/pages/faq/moneylaundering/* accessed 9/4/14.
[24] UNODC & IMF *Model Legislation on Money Laundering and Terrorism Financing* (2005) at 1 available at *http://www.unodc.org/documents/money-laundering/2005%20UNODC%20and%20IMF%20Model%20Legislation.pdf* accessed 15/4/14.

the various definitions listed above. This further implies that the predicate offences that are the source of funds to be laundered have to be criminal offences.[25]

Over and above the Vienna Convention which provides that the funds to be laundered have to be derived from the crime of drug trafficking, all the other definitions impute that the funds to be laundered can be acquired from various sources granted that the source of the funds is illegal. The advantage of having such a broad imputation is that it widens the scope of application for funds that can be subject to the laundering process.

Further, the definitions use 'property' in a broad context to include not just money, monetary instruments, corporeal or incorporeal property, real or personal property but also instruments evidencing a right, title or interest. This covers any type of asset or object whether tangible or intangible, movable or immovable. It is necessary to have such a catch-all definition because the process of laundering involves several and successive stages covering different types of property that can assume different forms. Therefore, the broad term 'property' allows for all possible forms and conditions of proceeds involved in the money laundering process to be captured.[26] For example, the proceeds to be laundered may initially be in the form of cash which is then transformed into e-cash and ultimately used to purchase real estate.

3.2.2 The *mens rea* and *acti rei* elements of money laundering

Once in possession of property derived from an illegal activity, there is need to have the relevant mental element; that of knowing the proceeds were derived from an illegal activity and the specific intention to conceal or disguise the illegal origin of the proceeds and this motivates undertaking the relevant *acti rei*.

Money laundering may encompass three distinct, but alternative *acti rei*: (i) the conversion or transfer of funds knowing that such property is the proceeds of crime; (ii) the concealment or disguise of the true nature, source, location, disposition, movement or ownership of or rights with respect to property, knowing that such property is the proceeds of crime; and (iii) the acquisition,

[25] See FATF *International Standards on Combating Money Laundering and the Financing of Terrorism & Proliferation the FATF Recommendation* (2012) at 113-114 for a list of possible predicate offences. Available at *http://www.fatf-gafi.org/media/fatf/documents/recommendations/pdfs/FATF_Recommendations.pdf* accessed 29/9/14.

[26] Durrieu (n 2) at 264-265.

possession or use of property, knowing, at the time of receipt, that such property is the proceeds of crime.[27]

For one to engage in money laundering, they have to undertake all, some or only one of the acts mentioned above. Conversion entails changing property from one form to another[28] and usually happens in the first and second stage of the laundering process. This may be in the form of converting money from smaller denomination bills to larger bills or placing cash-money into a bank account. Transfer involves the process of changing the possession or control of the property.[29] The acts of conversion and transfer can be done simultaneously for example, converting cash into larger denominations and moving it from one jurisdiction to another whether physically or electronically.

By undertaking the act of concealment the offender himself (person who commits the predicate offence) intends to prevent the discovery of the true origin of the funds or that he is the owner of the money.[30] Disguising involves a third party who did not participate in the predicate offence acting in a manner to prevent the discovery of the criminal origin or nature of the money.[31] A launderer may also engage in acquisition which involves gaining possession or ownership of property. Possession is the exercise of control, actual or passive over property and ownership entails having the legal right to have ultimate control and use over property.[32] 'To use' necessitates utilising the proceeds of crime. These acts can be achieved through the purchasing of goods or property, because purchasing allows one to gain control over certain property. Ultimately these acts facilitate the concealment of the illegal source of the funds allowing the launderer to enjoy the illegal proceeds.[33] Undertaking these *acti rei* is done as a process.

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[27] Durrieu (n 2) at 242-262. See also United Nations Convention against Illicit Traffic in Narcotic Drugs & Psychotropic Substances article 3b & c; The United Nations Convention against Transnational Organised Crime article 6(1).
[28] *Black's Law Dictionary* 8th ed (2004) at 356.
[29] *Black's Law Dictionary* 8th ed (2004) at 1536.
[30] Durrieu (n 2) at 246.
[31] Ibid.
[32] See Clarke & Kohler *Property Law Commentary and Materials* (2005) at 180-258 & 259-270 discussing the concepts of ownership and possession.
[33] See Durrieu (n 2) at 240-262 for a discussion on these elements. See also Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism article 1 d & g; UN Convention against Transnational Organised Crime article 2 f & g; UN Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances article 1 f & i.

3.2.3 Money laundering as a process

Money laundering is seen as a process (the money laundering cycle) and takes place in three main stages (placement, layering and re-integration). However, depending on the creativity and skill of the launderer it can have many more phases.[34]

The process as a rule starts with placement that is, the pre-washing, placement or concealment stage. At this stage the funds are separated from their illegal origin[35] by placing them in the financial system inter alia by directly depositing the funds at a financial institution.[36] In addition to banks, foreign exchange bureaus, insurance agents and credit unions may be used. Where a large amount of funds are to be placed, the launderer may avoid detection by employing a 'smurfing' technique. This involves dividing the large amount into smaller amounts and depositing these smaller amounts in a financial institution.[37]

Hereafter, follows the layering, conversion or decanting stage. The funds are further disassociated from their illegal origin and in so doing any trail of evidence that might have led an investigator back to the real origin or destination of the money is obliterated.[38] This is achieved by transferring the funds from one financial institution to another or even to other jurisdictions. This may involve layers of transactions done through business entities specifically created for this purpose such as shell companies[39] and trusts.[40]

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[34] Leong 'Chasing dirty money: Domestic and international measures against money laundering' (2007) 10(2) *JMLC* 140 at 140-141. See Irwin, Choo & Liu 'An analysis of money laundering and financing of terrorism typologies' (2012) 15(1) *JMLC* 85 as they analyse different money laundering typologies utilised during the different money laundering phases. See Van Koningsveld 'Money laundering – "you don't see it, until you understand it": Rethinking the stages of the money laundering process to make enforcement more effective' in Unger & Van de Linde (eds) *Research Handbook on Money Laundering* (2013) at 435-451 where the four phase money laundering process is discussed. See also Schneider & Windischbauer 'Money laundering: Some facts' (2008) 26(3) *EJLE* 387 at 394-396; Durrieu (n 2) at 30-36.

[35] Durrieu (n 2) at 32.

[36] Schneider *Money Laundering and Financial Means of Organized Crime: Some Preliminary Empirical Findings* (2010) Economics of Security Working Paper 26 at 16.

[37] Quirk 'Macroeconomic implications of money laundering' (1997) 2(3) *TOC* 10 at 11; Welling 'Smurfs, money laundering and the federal criminal law: The crime of structuring transactions' (1989) 41 *FLR* 287. See also Irwin *et al* 'Money Laundering and terrorism financing in virtual environments: A feasibility study' (2014) *JMLC* 17(1) 50 for an illustration of how smurfing is done.

[38] Durrieu (n 2) at 33.

[39] He 'A typological study on money laundering' (2010) 13(1) *JMLC* 15 at 24-25; Durrieu (n 2) at 33.

[40] Simser 'Money laundering and asset cloaking techniques' (2008) 11(1) *JMLC* 15 at 17-18 discusses the use of trusts.

These business entities are set up in what are referred to as tax haven jurisdictions[41] or secrecy territories[42] because they have weak or inadequate anti-money laundering laws and regulations which often permit financial institutions to readily conceal the identity of controlling bank accounts and corporations used by launderers. Secrecy is crucial; it protects the launderer/ultimate beneficial owner from being discovered as being in possession of illegally acquired funds and thus ensuring that no successful prosecution will take place.[43] Apart from the movement of the funds through financial institutions, the funds may be converted into financial instruments such as money orders which are then also used to conceal the illegal origin of the funds.[44]

Once this has been done, and the funds are considered clean, the third stage ensues in terms of which the funds are then integrated into or reinvested in a legitimate economy. Seemingly legitimate business entities such as companies are incorporated to enable the running of restaurants, hotels, jewellery stores, factories, etc. 'Front-men'[45] are often used to ensure anonymity and that no linkage can be seen between the illegal funds (now 'cleaned') and the actual owner/beneficial owner. These funds are also often consumed by purchasing high value assets such as cars, real estate and art work and sometimes redirected into the initial illegal activity that generated the funds or in other illegal activities.[46]

These three stages often take place in different jurisdictions.[47] The placement stage is likely to take place in the jurisdiction where the predicate offence generating the illegal proceeds occurred. The

[41] Durrieu (n 2) at 33. Generally these are locations with very low tax rates and other tax attributes designed to appeal to foreign investors. See Tromp *et al* 'Is the Netherlands a tax h(e)aven? in Unger & Van der Linde (eds) *Research Handbook on Money Laundering* (2013) at 295-301 for a discussion on the available definitions of tax havens in academic literature, international organisations and other organisations. See also Dharmapala & Hines Jr 'Which countries become tax havens?' (2009) 93(9) *JPE* 1058.
[42] Durrieu (n 2) at 33. Generally these are states/territories in which the identity of the controlling bank accounts or corporations is readily concealed. See Christensen 'The looting continues: Tax havens and corruption' (2011) 7(2) *CPIB* 177 at 183; Kurdle 'Did blacklisting hurt the tax havens?' (2009) 12(1) *JMLC* 33 at 34-37.
[43] Alldrige 'The moral limits of the crime of money laundering' (2001) 5(1) *BCLR* 279 at 280. According to the FATF beneficial owner refers to the natural person(s) who ultimately owns or controls a customer, and/or the natural person on whose behalf a transaction is being conducted. It also includes those person(s) who exercise ultimate effective control over a legal person or arrangement. FATF *International Standards on Combating Money Laundering and the Financing of Terrorism & Proliferation the FATF Recommendation* (n 25) at 110.
[44] Durrieu (n 2) at 34.
[45] Schneider & Windischbauer (n 34) at 395-396; Durrieu (n 2) at 34.
[46] Masciandaro & Barone *Worldwide Anti-Money Laundering Regulation: Estimating Costs and Benefits* (2008) Paolo Baffi Research Centre paper Series No. 2008-12; Masciandaro *Economics of Money Laundering: A Primer* (2007) Paolo Baffi Research Centre Working Paper 171; Levi 'Money for crime and money from crime: Financing crime and laundering crime proceeds' (2015) 21(2) *EJCPR* 275.
[47] For a comprehensive discussion on what factors influence launderers in choosing a particular jurisdiction during the laundering process see Durrieu (n 2) at 49-66.

funds may then either be introduced into the financial system or they may be moved physically to another jurisdiction where placement into the financial system is then effected.[48] The layering stage is likely to take place in a tax haven jurisdiction as indicated.[49] The integration or investment phase is likely to occur in jurisdictions far from where the predicate offence occurred to allow the launderers to invest, enjoy or save their 'cleaned' funds in a profitable, stable, and legitimate business.[50] These qualities are often to be found in a jurisdiction with a rich, well developed economy and healthy financial markets.[51]

3.2.4 Ultimate outcome of money laundering

Through the process of conversion, transfer, concealment or disguising, the aim of the launderer is to hide the illegal origin of the funds and make them appear to be from a legitimate source. Thus, in case of prosecution, this would 'render it almost impossible for evidence to be obtained which allows a court to establish the derivation of the money'.[52] In so doing the launderers are able to consume, invest or save their illegally obtained funds in the legal economy.[53] Ultimately, the purpose of a successful money laundering process is to allow a criminal to enjoy the illegal proceeds by consumption, investing or re-investing in a legal economy. In the words of Masciandaro and Alldrige the aim is to convert the illegal proceeds into 'useable purchasing power' or 'legitimate capital' respectively; underscoring that the cleaned money can be used for consumption or investment. Alldrige succinctly summarises this rationale as follows:

> 'Clean money is worth more than dirty money. Clean money — money untainted by criminal association — can be invested in profitable activities or spent on consumption, more or less conspicuous, without risk of recrimination. Dirty money, generally speaking, can only be invested or spent less profitably, less visibly, and at a risk of punishment. It also carries the risk of being used as evidence of the initial crime'.[54]

On the other hand, the focus of anti-money laundering laws is to prevent the offender from enjoying their illegal proceeds.

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[48] He (n 39) at 15-16; See also EUROPOL 'Why is cash still king? A strategic report on the use of cash by criminal groups as a facilitator for money laundering' (2015) 18(4) *TOC* 355.
[49] See Christensen (n 42) at 179-185.
[50] Durrieu (n 2) at 65.
[51] Ibid at 19.
[52] Rider 'Fei ch'ien laundries: The pursuit of flying money (part I)' (1992) 1(2) *JIP* 77 as quoted in Young 'The exploitation of off-shore financial centers banking confidentiality and money laundering' (2013) 16(3) *JMLC* 198 at 200.
[53] Levi & Reuter 'Money laundering' (2006) 34(1) *CJ* 298 at 289; Durrieu (n 2) at 26-28.
[54] Alldrige (n 21) at 279.

From the discussion above a tenable conclusion is that, money laundering is a process undertaken in order to conceal or disguise the illegal origin of the funds gained after committing a predicate offence; the ultimate goal being to facilitate the utilisation of the funds in the legitimate economy. Thus, it may be considered that money laundering is a continuation of the predicate offence; however, this is not so, it is a distinct offence.

3.2.5 Money laundering is a distinct and autonomous offence

Money laundering is at times considered a continuation of the predicate offence. Since the subsequent act of laundering is necessitated by the prior behaviour of committing the predicate offence.[55] It is this presumption that establishes an undeniable link between the predicate offence and money laundering; as the predicate offence generates the illegal proceeds that require laundering. Nonetheless, despite this link, money laundering should be considered an entirely separate and autonomous offence distinct from the predicate offence.

The legal justification for money laundering as an autonomous offence is evidenced by considering the criminalised acts that constitute the offence. The acts (*acti rei*) that form the elements of money laundering are distinct from those of the predicate offence.[56] The criminalised acts for money laundering include concealing, transferring, disguising, and conversion. These are different from those of a predicate offence such as drug trafficking which include supplying and manufacturing and potentially piracy which include illegal acts involving violence, detention or depredation.

In addition to the legal argument discussed above, the sociological justification that money laundering is an autonomous crime rests on the claim that it safeguards social values and interests different from the predicate offence. A crime is considered an autonomous criminal offence i.e. a different or other crime if it safeguards social values or interests that are different from those protected by another crime.[57] By criminalising money laundering, independent autonomous social values those of socio-economic order and fair competition are provided additional protection.[58] Through the laundering process, the criminals are able to construct and consolidate their economic power by concealing and investing the illegal proceeds in a legitimate economy. In addition they

55 Durrieu (n 2) at 228. See also Alldrige (n 43) at 288-289.
56 See *De Vries v The State* [2011] ZASCA 162; [2012] 1 ALL SA 13 (SCA) (28 September 2011) para 48.
57 Durrieu (n 2) at 231.
58 Durrieu (n 2) at 230. See Durrieu (n 2) at 191-238 for a comprehensive discussion on the social values protected by criminalizing money laundering. See also Safdari *et al* 'Social impact of money laundering' (2015) 5(8) *AJRSSH* 173.

harm free and fair competition processes in a specific legal market. In doing so, they cause direct and irreversible harm to the socio-economic system.[59]

Thus, money laundering should be considered an autonomous criminal offence as its criminalisation, protects the values of social–economic order and fair competition in society over and above those values protected by criminalising the predicate offence. Moreover, by considering money laundering an autonomous offence it is possible to prosecute without having to prove the commission of the predicate offence that generated the funds. Thereby eliminating the difficulties or problems that may arise in proving the predicate offence and hence increasing the probability of conviction for the money laundering offence.

Nevertheless, it should be noted that it is possible for criminalisation of money laundering to protect the same social value(s) protected by criminalisation of the predicate offence. This is evident in the fact that at the end of the laundering process, the offenders may use and invest the cleaned funds into the same criminal offence that generated the funds in the first instance. In doing this, they continue damaging the social value(s) protected by the predicate offence.[60] For example, the offence of drug trafficking as specified under the Vienna Convention intends to help in the protection of health values in society as drugs pose a serious threat to the health and welfare of human beings.[61] Hence, by undertaking money laundering and re-investing the proceeds into the drug trade, the criminalising of money laundering and drug trafficking both aim to protect the same social value, that of health.

Therefore, yes there is a link between the predicate offence and money laundering, for it is the commission of the predicate offence that leads to the generation of illegal proceeds that are subjected to the process of money laundering.[62] However, legally, the two are separate offences

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[59] Durrieu (n 2) at 231; See also Masciandaro 'Money laundering: The economics of regulation' (1999) 7(3) *EJLE* 225 at 225 & Pinto & Chevalier *Money Laundering as an Autonomous Offence: Analysis of the Consequences of the Autonomy of Money Laundering Offence* (2006) Inter-American Drug Control Commission available at *www.cicad.oas.org/Lavado_Activos/eng/Documents/EnglishVersionACrime.doc* accessed 22/8/14 for a discussion on money laundering as an autonomous offence.

[60] Durrieu (n 2) at 230.

[61] See the preamble to the UN Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances.

[62] See discussion in chapter 4 section 4.8 & 4.13. The element of causality is relevant in forfeiture cases involving the proceeds of crime or instrumentalities (property used to commit crime). In seeking to take away the benefit gained or instrumentality of an offence there is need to establish a reasonably direct link between the crime committed and the proceeds/benefit gained or the property and the crime committed. See *NDPP v (1) Cook Properties (Pty) Ltd; (2) 37 Gillespie Street Durban (Pty) Ltd & Another; (3) Seevnarayan* [2004] (2) SACR 208 (SCA); [2004] 2 ALL SA 491 (SCA) (13 May 2004). See also Amrani *The Development of Anti Money Laundering Regime: Challenging Issues to Sovereignty, Jurisdiction, Law Enforcement, and Their Implications on the Effectiveness in Countering Money*

because one needs to prove different elements to establish that the two crimes have been committed. Additionally, criminalising the acts of the predicate offence and money laundering protect different social values. Accordingly, money laundering should not be viewed as a continuation or a 'derivative-offence' of the actions involved in the predicate offence.[63]

3.3 Establishing a working definition and linking piracy to money laundering

The exposition above demonstrates the lack of a singular unifying definition of money laundering notwithstanding agreement on the elements that constitute the offence. The elements identified above are: being in possession of property derived from an illegal activity; having the required *mens rea,* as to the illegal origin of the property, which in turn motivates undertaking the *actus reus,* to obviate the origin with the ultimate aim of utilising these funds. This lays the basis for the autonomous process of money laundering.

Having established the elements of money laundering it is necessary to identify a working definition of money laundering. This working definition is necessary for ensuring uniformity and consensus for the ensuing discussion on the following issues: application in establishing the link between piracy and money laundering; and determining whether the Somalian pirates are engaging in laundering proceeds from piracy or not.

For purposes of further discussion, money laundering is defined as an 'independent crime which consists of an autonomous process of "cleaning" illegally acquired funds with the ultimate goal of rendering the funds useable in a legitimate economy for purposes of consumption, investment or saving.' In what follows, the above definitional elements of money laundering will be applied to piracy for ransom to enable the establishment of a link between piracy and money laundering.

As discussed before, piracy is an illegal activity, a criminal offence as proscribed under international and national laws.[64] The commission of piracy, often linked to a claim for ransom, is a source of illegal (dirty) funds. To enable utilisation of these illegally acquired funds, pirates may engage in the process of money laundering with the specific intention of concealing, disguising,

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Laundering (2012) at 22-26 PhD thesis Erasmus University Rotterdam available at *http://repub.eur.nl/pub/37747/* accessed 14/5/15.

[63] For discussion on money laundering as a derivative offence see Abrams 'The new ancillary offences' (1989) 1(1) *CLF* 1; Shams 'Fight against extra territorial corruption and the use of money laundering control' (2001) 7 *LBRA* 85.

[64] See the discussion in chapter 2 sections 2.4, 2.6 and 2.8.2 identifying piracy as an international criminal offence as per the United Nations Convention on the Law of the Sea, the SUA convention and at the national level, various countries have included the crime of piracy in their penal laws respectively.

transferring or converting the illegally acquired proceeds.[65] Therefore, piracy for ransom can be considered a predicate offence.[66] As the focus of the thesis is on piracy for ransoms, it is necessary to establish whether or not the Somalian pirates are engaging in money laundering in order to determine whether the application of anti-money laundering measures might be potentially useful.

3.4 Somalian pirates and money laundering

When one looks at the situation in Somalia, it seems as if the pirates might be engaging in the autonomous process of money laundering. This can be said because it is clear that the Somalian pirates acquire funds illegally by engaging in piracy and kidnappings for ransoms which produce the funds at their disposal. These proceeds are then moved to other jurisdictions to conceal its illegal origin[67] and thereafter these laundered proceeds are consumed and invested. These issues will now be addressed in turn.

3.4.1 The process of acquiring illegal funds

The crime of piracy is carefully planned, a suitable target is identified, pursued and captured and the crew and vessel held captive until a ransom amount is agreed upon[68] and paid.[69] The illegal proceeds of the crime of piracy are then distributed[70] amongst all who participated in the crime, either directly or indirectly, and they are now in possession of 'dirty money'. In order to be able to utilise these funds in a legitimate economy, it is necessary to engage in the autonomous process of 'cleaning' these illegally acquired funds.

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[65] In relation to Somalia, pirates are engaging in piracy for ransoms. The issue of their engaging in money laundering will be considered hereinafter in section 3.4.

[66] According to the FATF, piracy, kidnapping and hostage taking are listed as predicate offences. See FATF standards (n 25) at 113.

[67] Thus complying with the requirement of undertaking the acts of concealing, disguising, transferring or converting through the processes of placement, layering and reintegration.

[68] For further discussion on the factors determining a pirate hijacking attempt and its success see World Bank *The Pirates of Somalia Ending the Threat Rebuilding a Nation* (2013) at 85-105 available at *http://siteresources.worldbank.org/INTAFRICA/Resources/pirates-of-somalia-main-report-web.pdf* accessed 15/4/14.

[69] The ransoms are usually paid in cash, which is dropped by helicopter on the vessel, but at times wire transfers are done. The *MV Pompei* was hijacked on 18 April 2009 and after investigations Belgian authorities identified bank accounts in the United Arab Emirates. In the *MV CEC Future* hijacked on 7 November 2008 US$ 75,000 was wire transferred to a pirate negotiator. World Bank *Pirate Trails Tracking the Illicit Financial Flows From Pirate Activities off the Horn of Africa* (2013) at 55 available at *https://openknowledge.worldbank.org/handle/10986/16196* accessed 31/3/14.

[70] For an understanding on the distribution of ransoms see chapter 1 section 1.1. For further discussion and consideration of the factors taken into consideration in their distribution see World Bank *Pirates of Somalia Report* (n 68) at 111-118. See also Kraska 'Freakonomics of maritime piracy' (2010) 16(2) *BJWA* 109 at 114-116.

3.4.2 The transfer of the proceeds of piracy to other jurisdictions

It is apparent that in this process of 'cleansing', the funds are moved from Somalia to other jurisdictions for example, Kenya. This transfer is important and necessary as it facilitates the processes of placement, layering and integration. The movement of these funds takes place through the following main methods: cross-border cash smuggling, the use of money value transfer systems, trade activities and wire transfers.[71] These methods will be discussed hereunder and in relation to Kenya as it is our primary jurisdiction of interest. Moreover identification of these transfer methods will be relevant when analysing the robustness of Kenya's anti-money laundering regime in detecting the inflow of piracy funds.[72]

3.4.2.1 **Cross-border cash-smuggling**

The ransoms are often paid in cash, thus making the physical movement of the money easily possible. The cash is often moved to Kenya (i.e. cross-border cash smuggling), which as an immediate neighbour, is in close proximity to Somalia.[73] This geographical proximity makes Kenya an easily accessible destination for the cross-border transportation of ransom funds. The border points are porous and not adequately manned making movement relatively easy.[74] Second, the ease of crossing into Kenya from Somalia without detection is aided by the fact that one cannot differentiate between a Kenyan Somali and a Somalia Somali. They share the same physical characteristics, culture and speak the same language.[75] These language and cultural links facilitates blending within the Kenyan population and eases movement.

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[71] World Bank *Illicit Financial Flows Report* (n 69) at 51-57.

[72] See discussion in chapter 4 section 4.3.

[73] Somalia and Kenya share a border on the eastern side of Kenya for approximately 682Km. Source: *E.A Living Encyclopedia* African Studies Centre, University of Pennsylvania available at *http://www.africa.upenn.edu/NEH/kgeography.htm* accessed 5/3/13. Further evidence of the proximity is that the refugees from Somalia flock into the Daadab and Alinjugur refugee camps located within the Kenyan borders. Source: UNHCR *The 2013 UNHCR Country Operations Profile* available at *www.unhcr.org/pages/49e483a16.html* accessed 2/3/13.

[74] This is evidenced by the incursion of Al-Shabab fighters into the Kenyan region of Mandera in 2014, the kidnapping of aid workers in the United Nations refugee camp of Daadab in 2011 and the transportation of explosives from Somalia into Kenya by road in 2012. BBC Africa 'Kenya bus killings claimed by Somali group al-shabab' 22/11/14 available at *http://www.bbc.com/news/world-africa-30157581* accessed 11/3/15; BBC Africa 'Al-shabab massacres non-muslims at Kenya quarry' 2/12/14 available at *http://www.bbc.com/news/world-africa-30288137* accessed 11/3/15; World Bank *Illicit Financial Flows Report* (n 69) at 56; Mukinda '60 passengers held over explosives' Daily Nation 30 September 2012.

[75] Kirui & Mwaruvie 'The dilemma of hosting refugees: A focus on the insecurity in North Eastern Kenya' (2012) 3(8) *IJBSS* 161 at 168. See generally also Chau 'The fourth point: An examination of the influence of Kenyan Somalis in Somalia' (2010) 28(3) *JCAS* 297; Lewis *The Modern History of Somaliland from Nation to State* (1965).

Another cross-border method of smuggling cash into Kenya is through the use of aircrafts. Small aircrafts are constantly plying the Kenya-Somalia air routes especially in transporting khat (Catha edulis) a stimulant plant traded in the region.[76] Thus it is very easy for the piracy ransoms to be smuggled out of Somalia in the aircrafts carrying the khat or the cash being used to pay directly for the khat.[77] The ease of movement is further expedited by the fact that Kenya has few and inadequate cash disclosure requirements at points of entry or departure.[78]

3.4.2.2 Informal value transfer systems

Somalia's descent into statelessness in 1991 touched off a collapse of formal financial institutions. The *hawala* form of informal value transfer systems (IVTS) has helped fill this gap and has been used by Somalians and aid agencies to facilitate the remittance of funds into and out of the country.[79] The *hawala* system also provides another method of transferring the piracy ransoms.

IVTS is defined as 'any system or network of people facilitating, on a full-time or part-time basis, the transfer of value domestically or internationally outside the conventional, regulated financial institutional systems.'[80] Examples include *hawala*, *hundi*, and *fei chien*.[81] *Hawala* involves the transfer of money from one person to another without the physical transfer of the funds taking place. A client in country 'A' goes to a *hawaladar* (*hawala* broker), gives him or her the money

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[76] World Bank *Illicit Financial Flows Report* (n 69) at 56 & 71-72; US Department of State 'International Narcotics Control Strategy Report Vol. II Money Laundering and Financial Crimes' (2011) at 311 available at *http://www.state.gov/j/inl/rls/nrcrpt/2011/database/164078.htm#Somalia* accessed 2/7/14. Khat (Catha edulis) also commonly referred to as *qat, qaad, gat, jaad, tchat and miraa* is an evergreen shrub whose leaves are ingested for its euphoric and stimulatory effects. It is enjoyed among communities in the Horn of Africa, the Arabian Peninsula, and in particular Somalia. The chewing of khat is a social custom dating back many thousands of years. The khat trade in this region is worth hundreds of millions of dollars a year. See World Bank *Illicit Financial Flows Report* (n 69) at 13. See also Nyongesa & Onyango 'Khat: A boon or bane to humanity' (2010) 28 *RPMP* 187.

[77] World Bank *Illicit Financial Flows Report* (n 69) at 56 & 72.

[78] S 8(1) Proceeds of Crime and Anti-Money Laundering Rules requires individuals to declare if they are carrying in cash, amounts equivalent to or exceeding USD$10,000 at any Kenyan port of entry. Though the law is in place enforcement is the problem. For further discussion on this see chapter 4 section 4.3.1.

[79] West 'The money laundering regulatory challenge facing Somalia remittance companies' in Maimbo (ed) *Remittances and Economic Development in Somalia: An overview* (2006); Lindley 'Between "dirty money" and "development capital": Somali money transfer infrastructure under global scrutiny' (2009) 108(443) *AA* 519.

[80] Passas 'Informal value transfer systems and criminal organisations: A study into so-called underground banking systems' (1999) at 1 available at *http://ssrn.com/abstract=1327756* accessed 19/5/15; See also Passas 'Informal value transfer systems, terrorism and money laundering' (2003) at 13-16 available at *http://ssrn.com/abstract=1327839* accessed 19/5/15 for a discussion on the distinction between Informal value transfer systems (IVTS) also referred to as informal funds transfer systems (IFTS) and Informal value transfer methods (IVTM); Maimbo & Passas 'The regulation and supervision of Informal funds transfer systems' in Maimbo & Ratha (eds) *Remittances: Development Impact and Future Prospects* (2005) at 211-215. See also Thompson 'An introduction to the concept and origins of hawala' (2008) 10 *JHIL* 83 for a discussion on the origins of *hawala*.

[81] See Harihan 'Hawala's charm: What banks can learn from informal funds transfer systems' (2012) 3 *WMBLR* 273 at 278-281 for a detailed discussion. *Hundi* is applied in India and *fei chien* utilised in China.

he or she intends to send to a recipient in country 'B'. The *hawaladar* then contacts another *hawaladar* in country 'B' and issues him the instructions to dispense an equal amount to the recipient or acquaintance. The client pays a fee for this service. The two *hawaladars* will then settle their accounts amongst themselves. However, there are much more complex *hawala* transactions which may involve many *hawala* networks.[82] Considering how the *hawala* system works it is important to note that its effectiveness is pegged on trust between the various actors.

The attractiveness of using *hawala* to transfer money is premised on factors such as its none regulation under a formal system, affordability, the absence of formal sector alternatives, cultural context and sensitivity, familiarity, accessibility, efficiency and speed, anonymity and having a predominantly cash based society.[83] Despite *hawala* being used for legitimate purposes it may also be used for illegitimate ones, thus the distinction between black and white *hawala*.[84]

Some of the characteristics identified that make *hawala* a desirable money transfer method are the same ones that also make it a favourable method for moving proceeds of crime. These characteristics include the anonymity involved, adaptability, lack of evidence and its cultural context. The *hawala* system is based on trust thus a client does not need to produce any identification documents to facilitate the transfer of funds unlike in a formal financial institution.[85] Money is thus transferred between the client and *hawala* broker and often no records of these transactions are kept. Where records are kept, they are in a coded language. This makes it difficult when conducting investigations as there is no paper trail to follow and if there are records they are in a coded language that is difficult for the investigators to decipher.[86] These aspects facilitate secrecy, anonymity and distancing oneself from the illegal origin of the funds.

[82] See Pathak 'The obstacles to regulating the hawala: A cultural norm or a terrorist hotbed?' (2003-2004) 27 *FILJ* 2007 at 2012-2015 for an illustration of a complex hawala transaction.
[83] See Harihan (n 81); Rosenbaum 'A paper chase in a paperless world: Regulating informal value transfer systems' (2012) 50 *CJTL* 169.
[84] Lindley (n 79) at 530. Black *hawala* entails the use of this IVTS for illegitimate purposes such as money laundering.
[85] In the case of Somalia ascertaining clan lineage is considered a more reliable and effective identity check considering the Somali people do not have identity cards. Lindley (n 79) at 533.
[86] Passas 'Informal value transfer systems, terrorism and money laundering' (n 80) at 72-74. He discusses how linguistic issues, cultural differences and 'benami accounts' hinder the effective investigation of money laundering by *hawala* brokers. 'Benami accounts' are false accounts or accounts held under nominees where the true beneficiary of the transaction is not the person under whose name the transaction takes place. This makes it difficult to conclusively identify the owner of the illegal proceeds. This creates a problem because unlike formal financial systems where it is possible to identify the developer of a particular system thus facilitating investigation, the same is not true for *hawala*.

In addition, unlike the formal banking systems that are regulated and where the Know Your Customer (KYC) principle plays an important role, this is not the same with the informal systems. By dint of being an IVTS, *hawala* is unregulated or though regulated lacks proper implementation in most countries; this being the case with Somalian and Kenyan *hawala* respectively.[87] The fact that it is unregulated under the formal financial system or lack of effective implementation permits its misuse.[88] Therefore, additional to ransoms mainly being paid in cash and Kenya being a predominantly cash based society;[89] the anonymity maintained in *hawala* transactions, its reliability, affordability, the absence of regulation in Somalia, lack of effective implementation of legislation in Kenya, and prevalence in both countries makes *hawala* a very convenient and ideal means for the transfer of piracy ransoms.

3.4.2.3 Trade activities and wire transfers as a means of transfer

Trade activities and wire transfers is yet another means of transfer and is especially noticeable with Somalian businessmen who engage in livestock trade with the Gulf States and who have based their activities in Dubai. There is also an informal livestock trade between Kenya and Somalia. Additionally, it has been reported that most pirates are also venturing into trade activities.[90] Accordingly, these trade-activities including livestock trade can be used to transfer piracy proceeds out of Somalia. This would necessitate the use of wire transfers to facilitate the trade. The wire transfers would provide a direct and immediate method of placing the proceeds of piracy into the financial system, thus fulfilling the placement stage of money laundering.

However, the drawback for pirates is that wire transfers make the probability of detection very possible as there is a paper trail and a financial institution involved which might be under an

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87 Zagaris 'Problems applying traditional anti-money laundering procedures to non-financial transactions, "parallel banking systems" and Islamic financial systems' (2007) 10(2) *JMLC* 157 at 164; Ngugi 'Kenya' in Mohapatra & Ratha (eds) *Remittance Markets in Africa* (2011) at 165-166. IVTS in Kenya are regulated under the Proceeds of Crime and Anti Money Laundering Act as they are included in the ambit of the statute by virtue of categorisation as financial institutions. Additionally the Money Remittance Regulations 2013; Legal Notice no 66 *Special Issue Kenya Gazette Supplement no. 56* of 19 April 2013 provide for regulation of IVTS by the Central Bank of Kenya. Therefore IVTS systems in Kenya are regulated, however implementation of the law is the problem.

88 FATF *The Role of Hawala and Other Similar Service Providers in Money Laundering and Financing of Terrorism* (2013) at 25-26 available at *http://www.fatf-gafi.org/media/fatf/documents/reports/Role-of-hawala-and-similar-in-ml-tf.pdf* accessed 26/6/15.

89 See Central Bank of Kenya, Kenya National Bureau of Statistics & FSD Kenya *2016 FinAccess Household Survey* (2016) available at *http://fsdkenya.org/publication/finaccess2016/* accessed 24/2/16.

90 World Bank *Illicit Financial Flows Report* (n 69) at 59-66. Little *et al* 'Formal or informal, legal or illegal: The ambiguous nature of cross-border livestock trade in the Horn of Africa' (2015) 30(3) *JBS* 405 at 408-410; Carrier & Lochery 'Missing states? Somali trade networks and the Eastleigh transformation' (2013) 7(2) *JEAS* 334 at 342-345.

obligation to report certain activities. Nonetheless, it is highly likely that to avoid detection, nominee accounts are used. However, due to the informal livestock trade between Kenya and Somalia, as well as the formalities involved, the complexity and possibility of detection when using this method, it is unlikely to be predominant in relation to transferring piracy ransoms to Kenya but it is nevertheless a useable and possible method.

Utilisation of the transfer methods discussed above facilitates the progression in 'cleaning' of the funds. It is possible that Kenya is only a conduit of first instance in advance of the proceeds being transferred to another jurisdiction thus muddying the trail as to the origins of the funds.[91] It also aids the process of layering and eventually the re-integration of the funds in a legitimate economy, through the consumption or investment of the funds.

3.4.3 The process of consumption and investment

The ultimate aim of a money launderer is to be able to utilise the funds either through consumption, investment or saving, it is no different if the launderer is a pirate. Within the ranks of the pirates, the so called foot soldiers mostly consume a large portion of their proceeds.[92] The financiers of piracy are the people who benefit most and they invest the proceeds of piracy activities both inside and outside Somalia. They are said to build schools, mosques, purchase real estate, and engage in other business ventures.[93] In terms of business activities they invest in both legitimate and illegitimate ones. Additionally, in Somalia, piracy proceeds are also being used to invest in building political influence and developing militia in order to gain a political foothold in the country which in turn fuels the destabilisation of an already fragile state. [94]

[91] For example the pirate may use cash smuggling to move the funds into Kenya from Somalia; thereafter through the use of *hawala* the funds may be transferred to another destination outside Kenya. In addition, most *hawala* operators run other business activities and therefore have bank accounts which, enables the mixing of illegitimate and legitimate funds into the financial system. See Harihan (n 81) at 283; FATF *The Role of Hawala and Other Similar Service Providers in Money Laundering and Financing of Terrorism* (n 88).

[92] This is mainly done through sex workers, khat, expensive cars, homes and lavish lifestyles. World Bank *Illicit Financial Flows Report* (n 69) at 45; Report by the International Expert Group on piracy off the Somali coast *Piracy off the Somali Coast* Workshop commissioned by the Special Representative to the Secretary General of the UN to Somalia Ambassador Ahmedou Quid- Abdallah 10-21 November 2008 at 20 available at *http://www.imcsnet.org/imes/docs/somali_piracy_intl_experts_report_consolidated.pdf* accessed 28/3/13.

[93] Shortland "*Robin Hook": The Developmental Effects of Somali Piracy* (2011) German Institute for Economic Research DIW Berlin Discussion Papers No 1155 at 22-23; Hansen *Piracy in the Greater Gulf of Eden Myths, Misconceptions and Remedies* (2009) at 34 available at *http://www.hioa.no/extension/hioa/design/hioa/images/nibr/files/2009-29-ny.pdf* accessed 28/4/14; See also Shortland *Treasure Mapped: Using Satellite Imagery to Track the Developmental Effects of Somali Piracy* (2012) Chatham House 01 Africa. World Bank *Illicit Financial Flows Report* (n 69) at 71-75.

[94] World Bank *Illicit Financial Flows Report* (n 69) at 64-66.

In conclusion, Kenya is a viable destination for the proceeds of piracy due to its geographical proximity to Somalia, the existence of a Somali community in both countries, the existence of a thriving khat trade and the inadequate enforcement of Kenya's anti-money laundering regime.[95] Considering the various facets contained in the money laundering definition, it can be deduced that Somalian pirates are engaging in money laundering. Thus it is clear that if one could tighten money laundering laws and regulations and its enforcement that may play a role in curbing piracy. If a pirate could be arrested for money laundering, be tried and if found guilty given a harsh sentence or have the benefit confiscated, it may lead to another avenue through which piracy could be curtailed.

In what follows, theories of criminology relating to crime causation and prevention and the concept of piracy as a form of organised transnational crime will be used to identify the causes of piracy as a so called predicate crime and to show how the use of anti-money laundering laws could be justified as an appropriate method of crime prevention especially in relation to Somalian pirates.

3.5 Justification for using anti-money laundering laws to deal with piracy

Criminology is the scientific study of causation, correction and prevention of crime.[96] The various theories espoused in criminology aid in determining and explaining the causes of criminal behaviour in society. Moreover, criminology assists in identifying means and ways of dealing with crime. At issue is: why is it appropriate to use the anti-money laundering regime to deal with piracy? To effectively address this question, it is necessary to begin by considering the causes of piracy in Somalia, an endeavour in which the criminology theories of crime causation will be applied.

Having identified the causes, it will be possible to pinpoint a suitable theory of crime prevention to utilise in arriving at a targeted method of crime prevention. The theories of rational choice[97] and routine activities[98] are here considered useful in explaining the causes of Somalian piracy. In turn, they will lead to the application of the situational crime prevention theory and therefore offer pathways in tackling the problem. More importantly these theories are relevant as they will assist in eventually arguing the case for the utilisation of anti-money laundering laws as an appropriate

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[95] See discussion in chapter 4 sections 4.3 & 4.4.
[96] Siegel *Criminology* (2009) at 4-5.
[97] Clarke & Cornish 'Modeling offenders: A framework for research and policy' (1985) 6 *CJ* 147; Cornish & Clarke 'Understanding crime displacement: An application of rational choice theory' (1987) 25(4) *Criminology* 933.
[98] Cohen & Felson 'Social Change and crime rate trends: A routine activity approach' (1979) 44(4) *ASR* 588.

method of crime prevention as supported by the situational crime prevention theory. This discussion will be undertaken by elucidating the particular criminology theory and considering its practical application in the Somalia situation.

3.5.1 Rational choice theory

Rational choice theory[99] states that the commission of a crime is influenced by its costs and benefits. It is considered that man is a rational being who undertakes a rational calculation of the cost (pain/punishment) and benefits (pleasure/gain) involved in undertaking a criminal activity.[100] In this regard, the decision to engage in piracy versus deciding to engage in another activity can be as a result of making a rational choice after calculating the effort, risks and benefits involved.

The main motive for engaging in piracy is for personal enrichment/economic gain and this seems to be the position in relation to Somalian pirates. The pirates are more interested in the ransom that is paid rather than concerned about acquiring other objects that may be on board the vessels hijacked.[101] The ransoms paid are usually in form of cash, a convenient and ready to use means of exchange unlike goods which would need to be converted to another form of value before being usable. In considering whether or not to engage in piracy, individuals would have to weigh the risks involved such as the initial capital needed for a piracy venture, the probability of arrest and prosecution and alternative economic opportunities versus the benefits of being paid ransoms.

The people who engage in piracy in Somalia are from the lower economic classes and often unemployed. The pirates are usually former fishermen with prior experience in offshore operations and thus have the necessary skills to undertake the task. By engaging in a piracy venture, a pirate may earn an impressive profit of US$15,000.[102] From these earnings, the pirates are able to build

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[99] See Clarke & Cornish (n 96). This theory was explained from an economics perspective by Gary Becker. See Becker 'Crime & punishment: An economic approach' in Becker & Landes (eds) *Essays in the Economics of Crime and Punishment* (1974).

[100] Shane & Lieberman 'Criminological theories and the problems of modern piracy' in Haberfeld & Hassell (eds) *Maritime Piracy and Maritime Terrorism: The Challenge of Piracy for the 21st Century* (2009) at 11. See Townsley & Olivieira 'Space-time dynamics of maritime piracy (2015) *SJ* 28 (3) 217 for application of the rational choice theory to piracy around the Horn of Africa. See also Dua & Menkhaus 'The context of contemporary piracy the case of Somalia' (2012) 10(4) *JICJ* 749 arguing that Somalian piracy is considered a low risk business venture because the accruing benefits outweigh the risks involved.

[101] World Bank *Pirates of Somalia Report* (n 68) at 92. Hallwood & Miceli *Maritime Piracy and its Control: An Economic Analysis* (2015) at 21-29.

[102] Gilpin *Counting the Costs of Somali Piracy* United States Institute of Peace Working Paper (2009) at 11; See also Bahadur *The Pirates of Somalia Inside Their Hidden World* (2011) at 225-227.

homes, buy luxury goods such as cars and afford and sustain the habit of chewing khat.[103] For individuals who are unemployed and considering the paucity of employment opportunities in the country, these benefits make piracy worth the risk.[104]

While the foot soldiers face risks, they however do not necessarily have to provide capital for a piracy venture as this is the responsibility of the financiers. Their role is simply to provide the manpower. Thus, in financial terms the risk involved is minimal for the young men who provide physical manpower. On the other hand, the risk involved is significant for the financiers considering the possibility of a piracy venture to turn out unsuccessful; however in instances when a venture is successful the benefit received outweighs this risk.[105]

In addition, the initial capital or equipment needed for a venture is low. To launch a venture, the pirate group needs at minimum a boat to scout the sea, a fast skiff with a ladder to attack and board the target as well as engines, fuel, and food to sustain several weeks of operations at sea.[106] To achieve this, pirates utilise the vessels that they have at their disposal considering that piracy occurs near coastal towns where there is availability of vessels to use. The ladders and weapons needed are also readily available.[107] Subsequently, they will re-invest their ransom earnings to fund new ventures, for example, by using the mother ships they have captured to launch new attacks. Thus, the initial capital outlay is kept at a minimum.

In terms of risk, the probability of arrest does exist. There are international forces patrolling Somalian waters and those adjacent.[108] The pirates are at times arrested although there generally appears to be a 'catch and release' policy that has been adopted by these international patrols.[109]

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[103] Report by the International Expert Group on piracy off the Somali coast (n 92) at 20. See also World Bank *Illicit Financial Flows Report* (n 69) at 13.

[104] Percy & Shortland 'Contemporary maritime piracy: Five obstacles to ending Somali piracy (2013) 4(1) *GP* 65 at 66-67; Hallwood & Miceli (n 101) at 17.

[105] In the distribution criteria of the ransom funds the financiers receive the highest percentage usually 30 percent or more of the total ransom. See World Bank *Illicit Financial Flows Report* (n 69) at 47. See also Dua & Menkhaus (n 100) at 756.

[106] World Bank *Pirates of Somalia Report* (n 68) at 89.

[107] Ibid.

[108] There are three naval operations patrolling the Somalia waters. NATO has operation Ocean Shield, European Union Navel Force (NavFor) has operation 'Atalanta' and Task Force 151 a multinational force. See *http://www.nato.int/cps/en/natolive/topics_48815.htm*; *http://eunavfor.eu/; http://combinedmaritimeforces.com/ctf-151-counter-piracy/* all accessed 23/4/14. See also Gebhard & Smith 'The two faces of EU-NATO cooperation: Counter-piracy operations off the Somali coast' (2015) 50 *CC* 107 at 113-114.

[109] UNSC *Report of the Secretary-General on the Situation With Respect to Piracy and Armed Robbery at Sea off the Coast of Somalia Pursuant to Resolution 2184(2014)* (2015) para 59 available at

At the height of Somailan piracy and to-date, cases where pirates were arrested and prosecuted are insignificant in comparison to those where the pirates have been captured and released or not captured at all.[110] The probability of arrest is further reduced by the fact that piracy activity involves the community; elders and local officials who provide hospitality for guests, captured individuals and associates of the pirates. As payment for their services, they are given a ten percent share of the ransom.[111] Thus, they are reluctant to give away information on pirates to the authorities, this therefore being a form of protection from arrest for the pirates. Taken together with weak governance, this then creates a sense of cultural acceptability of piracy.[112]

In addition, presently the formal court system in Somalia is unable to effectively handle the prosecution of all piracy cases and has to rely on assistance from Kenya, Seychelles and Mauritius.[113] Prior to this prosecution assistance, according to the 2011 'Report of the Special Adviser to the UN Secretary-General on Legal Issues Related to Piracy off the Coast of Somalia',[114] more than 90 percent of the pirates apprehended, by local and international law enforcement agencies, off the coast of Somalia were released without being prosecuted. Weakened state structures lead to issues of under-staffing and under-paid law enforcers such as the police. In certain instances, the law enforcement structures may be non-existent in the first place. This leads to non-enforcement or un-coordinated enforcement of laws and primarily Somalia has to rely on

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http://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/s_2015_776.pdf accessed 16/2/16; UN Doc S/2015/776 12 October 2015.

[110] Report of the Special Adviser to the Secretary-General on the legal issues related to piracy off the coast of Somalia) UN Doc S2011/30 25 January 2011 (Jack Lang Report) at 28 available at *https://www.cimicweb.org/cmo/Piracy/Documents/Justice/Report%20of%20the%20Sec-Gen%20to%20the%20President%20of%20the%20Security%20Council.pdf* accessed 28/4/14. Additionally, since 2005 to date, only two individuals considered middle level in the piracy business have been arrested. There have been no prosecutions of higher or top level pirate leaders, financiers or facilitators. Scott 'Prosecuting pirates: Lessons learned and continuing challenges' (2014) at 14-19 available at *http://oceansbeyondpiracy.org/sites/default/files/attachments/ProsecutingPiratesReportDigital_2.pdf accessed 17/9/15*. Kontorovich 'The problem of pirate punishment' in Scharf *et al* (eds) *Prosecuting Maritime Piracy Domestic Solutions to International Crimes* (2015) at 302.

[111] FATF *Organised Maritime Piracy and Related Kidnapping for Ransom* (2011) at 18 available at *http://www.fatf-gafi.org/document/51/0,3746,en_32250379_32237202_48426547_1_1_1_1,00.html* accessed 3/3/13*; Geoplicity The Economics of Piracy: Pirate Ransoms and Livelihoods off the Coast of Somalia* (2011) at 6 available at *http://www.geopolicity.com/upload/content/pub_1305229189_regular.pdf* accessed 9/4/13; Shortland & Varese 'The protector's choice an application of protection theory to Somali piracy' (2014) 54(5) *BJC* 741 at 743-745.

[112] Dua & Menkhaus (n 100) at 759-760; Shortland & Varese 'State-building, informal governance and organised crime: The case of Somalia piracy' (2015) *PS* 1 at 6-11.

[113] Middelburg *Piracy in a Legal Context: Prosecution of Pirates Operating off the Somali Coast* (2011) at 49-50; UN resolution 1918(2010) 27 April 2010 para 2 calling on states in the region to assist in the prosecution of Somalian pirates. See also Somalia piracy prosecution statistics from Kenya, Seychelles and Mauritius as at October 2014 available at *https://www.unodc.org/unodc/en/piracy/indian-ocean-division.html* accessed 22/2/16.

[114] Jack Lang Report (n 110) at 28.

prosecution assistance from other states.[115] This greatly reduces the probability of arrest or prosecution even when arrests are made.

In sum, piracy is made more lucrative considering factors such as: the cultural acceptability which lowers the possibility of arrest; the pirates' possession of relevant skills and the geographical location of Somalia which is proximate to major shipping routes. In addition to these considerations, the condition of Somalia as a weak state renders the prosecution of pirates almost non-existent and ineffective. These factors combined with the lack of employment opportunities and economic hardships stimulate piracy by lowering its opportunity cost. Therefore, based on the rational choice theory and from an economic perspective, it is a rational and positive economic decision to engage in piracy, as one will gain employment and the probability of earning an income[116] yet the risks involved are comparably low.

3.5.2 Routine activities theory

The routine activities theory asserts that 'the probability that a violation will occur at any specific time and place might be taken as a function of the convergence of likely offenders and suitable targets in the absence of capable guardianship'.[117] The theory holds that crime is likely to occur when three conditions are satisfied. First, there is the presence of a motivated offender. Second the presence of a suitable target. For a target to be suitable it should have four attributes;[118] value, inertia, visibility and access. The target should have economic value. Inertia refers to the portability of the chosen target. Thus an object which is weighty is likely to be a less attractive target as it would be more difficult to carry and dispose of. Visibility refers to the targets sightlines, that is, the ease with which a target can be spotted or for the offender to be spotted while accessing the

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[115] As at October 2015 naval forces had detained a total of 323 suspects, of these 164 were tried in Kenya, 147 in Seychelles and 12 in Mauritius; UNSC *Report of the Secretary-General on the Situation With Respect to Piracy and Armed Robbery at Sea off the Coast of Somalia pursuant to resolution 2184(2014)* (2015) (n 109) para 36. See also Hansen (n 93) at 17; Hansen 'The dynamics of Somali piracy' (2012) 35(7-8) *SCT* 523; Kraska & Wilson 'Fighting pirates: The pen and the sword' (2009) 25 *WPJ* 42; Bahadur (n 102) at 111; Jack Lang Report (n 110) at 26-28.

[116] Kisiangani 'Somali pirates: Villains or victims?' (2010) 17(3) SAJIA 361 at 371. See also Jablonski & Oliver 'The political economy of plunder economic opportunity and modern piracy' (2013) 57(4) *JCR* 682; Ratisukpimol 'A theory and some empirics on modern maritime piracy' (2011) PhD thesis University of Colorado at Boulder. These authors use empirical data and apply the rational choice theory to show the cost and benefit considerations of pirates in deciding to engage in piracy.

[117] Cohen & Felson (n 98); See also Osgood *et al* 'Routine activities and the individual deviant behaviour' (1996) 61(4) *ASR* 635. For specific application of the theory to Somalian piracy see Townsley *et al* 'How super controllers prevent crimes: Learning from modern maritime piracy' (2015) *BJC* 1.

[118] Felson & Clarke *Opportunity Makes the Thief Practical Theory for Crime Prevention* (1998) Police Research Paper Series Paper 98 at 4-5.

target. The absence of capable guardians infers that the lack of control whether formal or informal over the target is likely to encourage crime. The guardians include police patrols, security guards, neighbourhood watch schemes, vigilante staff and surveillance cameras.

Considering the theory from the Somalian perspective, many years of conflict have led to poor economic development. Somalia's economy is largely controlled by the informal sector, as the majority of the population lives at a subsistence level and is engaged in small-scale businesses.[119] Additionally, according to 2014 United Nations Development Programme (UNDP) statistics, 60% and 95% of the population in urban and rural households respectively live in severe poverty.[120] Further a report of the UN Secretary General states that there is a high rate of youth unemployment.[121] Both these problems are aggravated by the social strife in the country.

Since the fall of Siad Barre's regime in 1991, there has been no effective government in Somalia. Despite the Federal Government of Somalia (FGS) being considered the legitimate central government of Somalia;[122] it still has no effective central government because the FGS does not exercise control over most regions of Somalia which consequently translates into Somalia lacking the rule of law. Sporadic fighting still continues in parts of the country.[123] Thus, the lack of employment opportunities and political strife makes Somalian pirates' motivated offenders.

The geographical location of Somalia, along a major shipping lane is an influencing factor. The Gulf of Aden 'is as narrow as 100 nautical miles ... mean[ing] that all traffic must pass within striking distance of the Somalia coast.'[124] This proximity makes the availability of possible targets easy and the value of these targets is easily convertible into cash. Once a vessel is captured and

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[119] African Development Bank *Somalia Country Brief 2013-2015* (2013) at 2 available at *http://www.afdb.org/fileadmin/uploads/afdb/Documents/Project-and-Operations/2013-2015%20-%20Somalia%20-%20Country%20Brief.pdf* accessed 26/6/13.

[120] UNDP *Sustaining Human Progress Reducing Vulnerabilities and Building Resilience* (2014) at 72 available at *http://hdr.undp.org/sites/default/files/hdr14-report-en-1.pdf* accessed 18/2/16. Panjabi 'The pirates of Somalia: Opportunistic predators or environmental prey?' (2010) 34(2) *WMELPR* 377 at 391.

[121] UNSC *Report of the Secretary-General on the Situation With Respect to Piracy and Armed Robbery at Sea off the Coast of Somalia Pursuant to Resolution 2184(2014)* (n 109) para 56. See also Kamola 'Capitalism at sea: Piracy and "state failure" in the Gulf of Aden' in Smith & Verdeja (eds) *Globalisation, Social Movements and Peace Building* (2012) at 169-174.

[122] Sugiki 'International legal cooperation against Somali piracy: Piracy in a failed state: How state building can stabilise the situation off the Somali coast' (2012) 5 *JEAIL* 61 at 62. UNSC Report of the Secretary-General on Somalia (2016) para 2-5 & 22-23 available at *http://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/s_2016_27.pdf* accessed 16/2/16; UN Doc S/2016/27 8 January 2016.

[123] Sugiki (n 122) at 68-75; UNSC Report of the Secretary-General on Somalia (2016) (n 122) para 6-17 & 29-34.

[124] Beri 'Piracy in Somalia: Addressing the root causes' (2011) 35(3) *SA* 452 at 455.

ransom is successfully negotiated, it is paid in cash; a form that the pirates can effortlessly move and use. The aspect of inertia is dealt with effectively as the pirates can simply move their targets; they can manoeuvre the vessels easily to safety and security within Somalia waters. In addition, as they are not interested in disposing the vessels in exchange for money, thus the pirates are not faced with the problem of disposing off the target.

The targets are definitely visible as they are large vessels making it easy to locate. To find a target a team of two skiffs patrols an area. Once a target is spotted - these are usually slow moving vessels with low freeboards - an attack is launched. One skiff covers the ship while the other tries to scale it.[125] This makes it easy and possible to access the target.

Finally, there is a lack of capable guardians. As discussed above, the community benefits from piracy ventures thus they are not keen to prevent its occurrence, even though they could act as informal guardians. Since the collapse of the Siad Barre regime, there has been no effective coast guard to police Somalia waters. At present, there is some formal government coast guard in place though it is understaffed and under-equipped making it an ineffective force.[126] These problems are exacerbated by the fact that the central government is not in complete control of the Somalia territory. This makes policing difficult and creates a situation where there is lack of a capable guardian to prevent piracy. Consequently in the Somalia case, the three conditions established by the routine activities theory are satisfied thereby creating a conducive environment for piracy to occur.

In conclusion, according to the routine activity theory, crime occurs as a result of convergence of likely offenders and suitable targets in the absence of capable guardianship. On the other hand and in relation to the rational choice theory, crime is likely to occur if the benefits outweigh the costs. Both theories have the common characteristic that crime is influenced by the convergence in time and space of three factors/situational elements: a motivated offender; a suitable target; and the

[125] Report by the International Expert Group on piracy (n 92) at 18. See also Meija, Cariou & Wolff *Is Maritime Piracy Random* (2009) 16(9) *AEL* 891 and Kiourktsoglou & Coutroubis 'Is Somalia piracy a random phenomenon?' (2012) 11*WMUJMA* 51. Both articles discuss generally the factors influencing choice of the vessel targeted by pirates.

[126] Bridger 'Searching for a Somali coastguard' 13 October 2013 available at *http://cimsec.org/searching-somali-coastguard/* accessed 22/4/14. UNSC *Report of the Secretary-General on the Situation With Respect to Piracy and Armed Robbery at Sea off the Coast of Somalia Pursuant to Resolution 2184(2014)* (n 109) para 55.

absence of persons in a position to intervene, directly or indirectly, in a criminal event in a manner that increases the costs and effort and reduces the benefit.[127]

Therefore, if these situational elements were in any way influenced or manipulated, crime would reduce. This is by increasing the efforts and risks for committing a particular crime in addition to reduction of the rewards would serve as deterrence. Since the offender is considered a rational being, a cost-benefit assessment would show that the costs outweigh the benefits, thus dissuading one from engaging in an offence. The approach of manipulating the situational elements so as to increase the efforts and risks while reducing the reward is embodied in the situational crime prevention theory,[128] which will be dealt with below.

3.5.3 Situational crime prevention theory

Both routine activities theory and rational choice theory helped influence the situational crime prevention theory.[129] This theory advocates three approaches in its application to crime prevention. First, increase the efforts of engaging in a particular crime. Second, increase the risks by heightening the possibility for an arrest. Third, reduce the reward received by the offender for example by denying the criminal the possibility to enjoy the benefits of the ill acquired wealth. Thus, by changing the situational circumstances in a way that the costs of crime increase, and the benefits from crime decrease, it is possible, to influence the criminal decision-making process and to prevent crime.[130]

In the Somalia situation various law enforcement initiatives and socio-economic interventions[131] have been implemented to address the problem. These include stepping up naval operations at sea, creation of an Internationally Recommended Transit Corridor (IRTC), use of armed guards on vessels and other law enforcement strategies. These have helped reduce but not eliminate the threat

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127 Cohen & Felson (n 98) at 589.

128 Clarke 'Situational Crime Prevention: Its Theoretical Basis and Practical Scope' 4 *CJ* (1983) 225; Clarke 'Situational crime prevention' (1995) 19 *CJ* 91.

129 Clarke 'Situational crime prevention' (n 128) at 101.

130 Ibid at 125. See Shane *et al* 'Situational crime prevention and worldwide piracy: A cross continent analysis' (2015) 4(21) *CS* 1 and Shane & Magnuson 'Successful and unsuccessful pirate attacks worldwide: A situational analysis' (2016) 33(4) *JQ* 682 discussing the applicability of the situational crime prevention theory in dealing with maritime piracy. See also Rengelink 'Tackling Somali piracy' (2012) 15 *TOC* 180 discussing the applicability of the situational crime prevention theory in dealing with Somalian piracy.

131 See World Bank Report *Pirates of Somalia Report* (n 68) at 158-162 and Collins 'A lust for treasure and a love of gold … or desperation? Global facilitation of piracy, neoliberal policies and the control of the Somali pirate' (2014) 22(3) *CC* 433 at 438-442 for a comprehensive discussion of these measures. See also Affi *et al* 'Avoiding Somalia: What prevents onshore solutions to piracy' (2015) 1(3) *GA* 305.

and occurrence of piracy. These initiated measures work towards increasing the efforts needed to undertake an act of piracy and increase the risk of the offenders being caught. They fulfil the elements of increasing the efforts and increasing the risks of engaging in a particular crime as prescribed under situational crime theory.

However, the third approach applicable under the theory has been neglected. This is the element of reducing the reward the offender receives. In the present situation nothing significant has been done to deny the pirates the possibility of enjoying the benefits of their ill acquired wealth. Corroboration of this is shown by research reports that are now advocating for the need to follow the money trail,[132] for, until now the pirates have been able to freely enjoy the proceeds of their crime.

By dealing with the ransom paid to pirates in cash as the proceeds of crime,[133] it is possible to utilise anti-money laundering laws to deny pirates the enjoyment of the benefit of the proceeds.[134] A consideration of the various soft law and hard law instruments dealing with money laundering on the definition of 'proceeds of crime' and 'property' shows a general consensus. This is because proceeds of crime are identified as property derived from or obtained directly or indirectly from a criminal activity, the predicate offence and; property is defined broadly enough to include any object or asset of any kind, money or property, right, among other corporeal or incorporeal objects. Therefore, by applying anti-money laundering law to the ransom proceeds, the third approach in situational crime prevention theory – reducing the reward received by the offender – can be fulfilled. Through the application of anti-money laundering laws, enforcement agencies are enabled to enforce forfeiture, confiscation or seizure of property acquired from piracy ransoms. This is a way of reducing the reward to the pirates by denying them the opportunity of enjoying the benefits of their ill-acquired gains.

Accordingly by reducing the rewards of piracy, pirates may opt to look for alternative means of earning a living based on the rational choice theory as the rewards reduce, risks increase and efforts

[132] See Nance & Jakobi 'Laundering pirates? The potential role of anti-money laundering in countering maritime piracy' (2012) 10(4) *JICJ* 857; Dubner & Raturi 'The economics of international sea piracy-A case of history repeating itself' (2012) 20 *MSUJIL* 745; FATF *Organised Maritime Piracy and Related Kidnapping for Ransom* (n 111); Geoplicity *The Economics of Piracy: Pirate Ransoms and Livelihoods off the Coast of Somalia* (n 111); World Bank *Pirates of Somalia Report* (n 68).

[133] Sorenson *State Failure on the High Seas – Reviewing the Somalia Piracy* (2008) Report 3 FOI Somalia papers at 21; Hansen (n 93) at 39; Bahadur (n 102) at 219.

[134] See further discussion on this in chapter 4.

increase. From an economic perspective 'anti-money laundering provisions lead to higher production and transaction costs of the predicate crime.'[135] This should, therefore, influence the predicate offender not to engage in the offence.

In conclusion, by applying the rational choice theory in explaining the cause of piracy in Somalia it was determined that would-be pirates engage in a cost-benefit analysis in deciding whether to engage in piracy or not (whether it be consciously or unconsciously). A consideration of these factors shows that the prospect of receiving the benefit of a ransom paid outweighs the likely costs involved. In addition, the attractiveness and ease of committing piracy is bolstered by the routine activities theory. The theory helped in ascertaining that piracy is an attractive crime to engage in as there is a convergence of offenders (pirates), the presence of suitable targets (ships) and the absence of capable guardianship.

The situational crime prevention theory as discussed, advocates the curbing of crime by reducing benefits while increasing the costs. In the case of Somalia, the benefit envisaged by the pirates is the ransom paid; crime prevention should therefore target averting the enjoyment of the expected benefit. This can be achieved by using effective anti-money laundering laws to deprive the pirates of the illegal benefit(s) received. Also of importance to note is that these theories can be applied in relation to piracy in other regions.

The following section will consider if piracy is a form of organised crime and transnational offence; as this would provide further justification for the utilisation of anti-money laundering laws.

3.5.4 Piracy as organised crime

Organised criminal groups exist in order to perpetuate criminal activities. To achieve this they engage in legitimate and illegitimate activities; as a result of which they acquire tainted proceeds. The primary convention dealing with organised crime, the United Nations Convention against Transnational Organised Crime, advocates; that once categorised as an organised criminal group, the group should be denied the enjoyment of benefits from their criminal activities. To achieve this it prescribes the utilisation of anti-money laundering laws; to take away the benefits.[136] Thus

[135] Geiger & Wuensh 'The Fight against money laundering: An economic analysis of a cost-benefit paradoxon' (2007) 10(1) *JMLC* 91 at 94.
[136] Article 6 United Nations Convention against Transnational Organised Crime.

by establishing if the Somalian pirates are a form of organised criminal group, it will be possible to justify using anti-money laundering laws to deal with them.

To establish if a group of criminals can be considered an organised criminal group recourse is made to the United Nations Convention against Transnational Organised Crime. Article 2a provides the definition of an organised criminal group as:

> 'a structured group of three or more persons, existing for a period of time and acting in concert with the aim of committing one or more serious crimes or offences established in accordance with this Convention, in order to obtain, directly or indirectly, a financial or other material benefit.'

The key elements of an organised criminal group as elucidated by the definition are: the group has to have some form of structure and consist of more than three individuals; exist for a considerable period of time; engage in serious crimes and; have a goal of obtaining a form of benefit. The question then is: Can Somalian pirates be considered a form of organised criminal group on the basis of these elements?

The Somalian pirates satisfy the element of being a structured group on account of the different categories of people involved in a piracy venture. These include financiers, commanders, foot soldiers and translators.[137] The financiers provide the initial capital outlay for purchase of the equipment or physically provide the equipment needed while not participating in the actual operations. After the acquisition of the equipment a commander is deployed and tasked with gathering a crew to undertake the venture. The commander has to be an influential person as this assists in ensuring protection and problem solving,[138] both within the crew and with the local community.

The crew are divided into two teams: an attack team and a holding team. The attack team patrols an area looking for prey and are involved in launching an attack and securing the vessel. The holding team is responsible for guarding the vessel, its crew and cargo after capture. Different amounts of the ransom payments are given to the individuals involved for their performance of assigned tasks.[139]

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[137] World Bank *Pirates of Somalia Report* (n 68) at 108-114.

[138] To solve disputes amongst pirate group members the *Xeer* (Somali customary law) is used. Hansen (n 93) at 26.

[139] World Bank *Illicit Financial Flows Report* (n 69) at 445-47.

Further structure in the group is evidenced by the code of conduct the pirates are expected to adhere to.[140] For example mistreating the crew attracts a USD$ 5,000 fine and dismissal, refusal to follow an order attracts a USD$ 10,000 fine and dismissal and falling asleep on post attracts a USD$ 5,000 fine.[141] The fine is subtracted from the portion of ransom paid to the individual pirate.

Structure in Somalian pirate groups is also evidenced by how carefully a pirate crew is assembled.[142] When recruiting a pirate group, clan considerations[143] inform the decision on who to choose. Majority of the pirate groups are dominated by members from the same clan. The underlying reasons for preferring a homogenous pirate group are that first, hiring from the same clan helps to eliminate clan conflicts. Second, it may assist the pirates to receive protection from their clan.[144] However, pirate groups may comprise members from other clans but are generally dominated by members of the clan where the attack is launched or where the hijacked ship is kept.[145] Having members of other clan(s) in a pirate group assists the pirates to access resources or to acquire experienced pirates and to operate in new areas.[146] Indeed with such considerations being brought to the fore in choosing a pirate crew it is a clear that it is a well-planned venture with random recruitment of crew eschewed.

The phrase 'existing for a period of time' has been interpreted as requiring the element of durability in an organised criminal group.[147] Durability can be ascertained by establishing first, the patience required of pirates; second, the ability of pirates to innovate; third, the reinvestment of profits back into the pirate business, and fourth, the use of foreign investment in piracy.[148] Somalian pirates are very patient in terms of lying in wait for a suitable target and during the process of ransom

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[140] UNODC 'Study on Illicit Financial Flows Linked to Piracy off the Coast of Somalia' (2011). Background document developed for the first *UNODC Conference on Illicit Financial Flows Linked to Piracy off the Coast of Somali* held in Nairobi 17-19 May, 2011 as quoted in World Bank *Illicit Financial Flows Report* (n 69) at 46.
[141] Ibid.
[142] United Nations Convention against Transnational Organised Crime article 2c provides: '"Structured group" shall mean a group that is not randomly formed for the immediate commission of an offence'.
[143] Hansen (n 93) at 25. See also Report by the International Expert Group on piracy off the Somali coast (n 92) at 17 for information on the groups involved in piracy and their clan affiliations.
[144] Hansen (n 93) at 25-27; Shortland & Varese (n 112) at 6-11. In Somalia clan links are very strong and allegiance to ones clan is of paramount importance see Laitin & Samatar *Somalia Nation in Search of a State* (1987) at 29-34.
[145] Hansen (n 93) at 27.
[146] Ibid.
[147] Percy & Shortland 'The business of piracy in Somalia' (2013) 36(4) *JSS* 1 at 554.
[148] Ibid. Dua & Menkhaus (n 100) at 759-762.

negotiations. It takes up to three months for preparation, three months waiting for a suitable target and an average of six months for ransom negotiations.[149]

Further proof of the pirate groups having existed for a substantial period of time is shown by the innovation and development that has occurred in their attack methodology. Proof of this is shown by the increase in piracy cases further away from the shores; the use of hijacked vessels as mother ships from which to launch attacks and nautical expertise of the crew; and their ability to channelise the flow of ransom money.[150] In addition there has been a 'change in tactics, weaponry and use of sophisticated gadgetry.'[151] It is also considered that, at present, the pirates have 'think tanks' whose role is to assess the situation as it changes and develop new strategies to counter the changes.[152] In terms of investment from the ransoms paid, the pirates are known to re-invest the money in other piracy ventures. Foreign investment in Somalian piracy is in the form of funds provided through financial exchange channels from the Somali diaspora as far away as other parts of Africa, Asia and Europe.[153]

These innovations are a far cry from the initial methodology of the 'defensive pirates'[154] and clearly demonstrates the ability of the pirates to be dynamic, reinvest their profits into piracy and utilise foreign investment. The transformations in the piracy ventures cannot happen overnight or over a very short duration as they require investment in time. This lends credence to the claim that Somalian piracy has indeed existed for a period of time.

A group also qualifies as an organised criminal group if it has 'commit[ed] one or more serious crimes' in the pursuit of a financial or other material benefit. In the process of committing piracy

[149] World Bank *Pirates of Somalia Report* (n 68) at 116.
[150] Bahadur (n 102) at 33-34. Dua & Menkhaus (n 100) at 760.
[151] Parmar 'Somali piracy: A form of economic terrorism' (2012) 36(2) *SA* 290 at 292. See also Sorenson & Widen 'Irregular warfare and tactical changes: The case of Somali piracy' (2014) 26(3) *TPV* 399 at 404-414 for a discussion on the various tactical changes in Somalian piracy.
[152] Ibid at 293.
[153] World Bank *Illicit Financial Flows Report* (n 69) at 49. Oliveira ' "New wars" at sea: A critical transformative approach to the political economy of Somalia piracy' (2013) 44 *SD* 3 at 8; Dua & Menkhaus (n 100) at 759.
[154] Defensive pirates were the local fishermen who were feeling disenfranchised as a result of the overfishing in their waters and the attacks they faced from foreign trawlers fishing their waters, decided to take the law into their own hands and declared themselves 'coastguards' ready to defend their waters. This evolution from defensive pirates to the business minded pirates of today did not happen overnight but was a gradual process occurring over many years. Various different dates ranging from 1989 to 1991 have been given as the beginning of piracy in Somalia to the present day. See Hansen (n 93) at 19. See also Samatar *et al* 'The dialetics of piracy in Somalia: The rich versus the poor' (2010) 31(8) *TWQ* 1377 at 1387; Elmi *et al* 'Piracy in the Horn of Africa waters: Definitions, history, and modern causes' (2015) 8(3) *AS* 147 at 151-158.

the pirates commit other serious offences. These include the initial kidnapping of crew, holding victims captive, charging and receiving ransoms and threat of or use of actual violence.[155] The other offences are committed in the process of hijacking the vessel, with crew and cargo, in order to negotiate a ransom[156] and if successful to be paid ransom. The upshot is that by their actions, the pirates and their accomplices end up committing other serious offences. Further Somalian pirate groups are also involved in other organised criminal activities such as human trafficking and drug trade.[157]

In view of the considerations discussed above, Somalian piracy can be said to meet the characteristic traits of organised crime provided under article 2a of the UN convention on organised crime. To the extent that the Somalian pirates are an organised criminal group engaging in the criminal activity of piracy for ransoms; then in line with the UN convention on organised crime, piracy for ransoms is a predicate offence meaning 'any offence as a result of which proceeds have been generated that may become the subject of an offence as defined in article six' of the convention.[158]

Therefore, to take away these tainted benefits article six requires state parties at the domestic level to enact legislative and other measures to criminalise the laundering of proceeds of organised crime. Consequently, by considering Somalian pirates as a form of organised criminal group engaging in the criminal activity of piracy for ransoms that leads to the generation of illegal proceeds. Then it is possible to apply anti-money laundering laws as provided in the UN convention on organised crime to aid in dealing with the offence of piracy.

3.5.5 Money laundering is a transnational crime and surrogate offence

Following from the discussion that piracy is a form of organised crime; it is possible to further justify the use of the anti-money laundering laws to deal with piracy based on the fact that money laundering is a transnational crime.[159] The money generated from a predicate offence committed

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[155] Percy & Shortland (n 144) at 557.

[156] World Bank *Pirates of Somalia Report* (n 68) at 92.

[157] UNSC *Report of the Secretary-General on the Situation With Respect to Piracy and Armed Robbery at Sea off the Coast of Somalia Pursuant to Resolution 2184(2014)* (n 107) para 63.

[158] Article 6 criminalises the laundering of the proceeds of crime. See also Simser 'Money laundering: Emerging threats and trends' (2013) 16(1) *JMLC* 41 at 47-49 the author discusses piracy as a new predicate offence. The view of piracy being an organised crime problem is not unique to Somalian piracy but also applies to other regions. See chapter two (n 12).

[159] Arnone & Borlini 'International anti-money laundering programs empirical assessment and issues in criminal regulation' (2010) 13(3) *JMLC* 226 at 228. Per article 3(2) UN Convention on Organised Crime an offence is

in one jurisdiction causes substantial effects in another jurisdiction where it is laundered. In the case of Somalia, UNODC[160] suggested that most of the proceeds are spent inside Somalia, the rest being either moved to countries vulnerable to money laundering or sent to accomplices or relatives in the Somali diaspora. FATF[161] noted that a significant amount of proceeds probably enter the international financial system, and Somalia and Eritrea Monitoring Group (SEMG) obtained evidence of transfer of ransom money between pirates and individuals in the Somali diaspora.[162] The pirates are also investing in business ventures such as khat trade outside Somalia.[163]

These findings are an indication that the laundering of ransom proceeds to other jurisdictions is occurring. These laundered funds are having various effects in these jurisdictions including: changes in money demand; increased prudential risks to the safety and soundness of the banking sector; having a contaminating effect on legal financial transactions and increased volatility of international capital flows and exchange rates.[164] Considering these negative effects, any country that can identify the inflows of piracy ransoms into its jurisdiction should be ready and willing to apply anti-money laundering measures against the pirates. Depriving pirates the enjoyment of their ill-acquired property, will provide a disincentive for individuals to engage in piracy.

Another argument in favour of applying anti-money laundering law to deal with piracy relates to the scope of individuals that can fall within the ambit of piracy laws versus money laundering laws. Applying only the law of piracy to deal with the pirates makes it is possible for the foot soldiers alone to face the law. This is because they are the ones likely to be arrested committing

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transnational in nature if: *(a)* It is committed in more than one State; *(b)* It is committed in one State but a substantial part of its preparation, planning, direction or control takes place in another State; *(c)* It is committed in one State but involves an organized criminal group that engages in criminal activities in more than one State; or *(d)* It is committed in one State but has substantial effects in another State.

160 UNODC 'Study on Illicit Financial Flows Linked to Piracy off the Coast of Somalia' (2011) Background document for the first UNODC conference on illicit financial flows linked to piracy off the coast of Somalia, Nairobi, 17–19 May 2011 [unpublished] as quoted in World Bank Report *Pirates of Somalia Report* (n 69) at 96.

161 FATF *Organised Maritime Piracy and Related Kidnapping for Ransom* (n 111).

162 UNSC *Report of the Monitoring Group on Somalia and Eritrea Pursuant to Security Council Resolution 2111(2013)* (2014) para 61 & 156-215. Available at *http://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/S_2014_726.pdf* accessed 22/2/16; UN Doc S/2014/726 13 October 2014.

163 World Bank *Illicit Financial Flows Report* (n 69) at 71-72.

164 See Unger *et al* Report for the Dutch Ministry of Finance (n 10); Unger & Busuioc *The Scale and Impacts of Money Laundering* (2007); Tanzi *Money Laundering and the International System* (1996) International Monetary Fund Working Paper 96/55; Ferwerda 'The Effects of money laundering' in Unger & Van der Linde (eds) *Research Handbook on Money Laundering* (2013) at 35-46; Masciandaro 'The illegal sector, money laundering and the legal economy: A macroeconomic analysis' (2000) 8(2) *JFC 103;* Bartlett *The Negative Effects of Money Laundering on Economic Development* (2002) For the Asian Development Bank, Regional Technical Assistance Project no 5967 *Countering Money Laundering in The Asian and Pacific Region.*

the *actus reus*. This has no significant effect in the anti-piracy efforts because the arrest of a group of foot soldiers means the financiers can organise the financing and assembling of a new group of foot soldiers.[165] Therefore, additional to funding further piracy ventures, the financiers who receive the greatest benefit from a piracy venture are likely to continue enjoying their illicitly acquired property.[166]

This claim is substantiated by a UN Report,[167] which acknowledges that the distribution of ransoms is along the lines of thirty percent maritime militia, ten percent ground militia, ten percent local community, twenty percent financier or thirty percent sponsor.[168] Thus the greatest beneficiaries of piracy for ransom are unlikely to be punished if only piracy laws are applied.[169] However, by applying anti-money laundering laws it will be possible to go after the financiers, as they are likely to engage in acquiring, possessing, conversion, transfer and use of the proceeds of crime so as to hide its illegal origin and enable them to consume and invest in a legitimate economy. Consequently, applying anti-money laundering laws will help ensure that those who bear the greater responsibility for piracy, because but for their funding piracy ventures would not be possible, are denied the benefit of enjoying their illegal proceeds.

Further, it has been suggested that the offence of money laundering can be used as a surrogate charge[170] for the predicate offence when the predicate offence cannot be proved.[171] In this case as discussed before there are challenges in holding pirates accountable for the crime of piracy.[172] Thus, the pirates can be held accountable indirectly through anti-money laundering laws.[173] However it should be noted that the predicate offence that leads to the creation of illegal funds that

[165] Scharf 'Conclusion: Is there a case for an international piracy court' in Scharf *et al* (eds) *Prosecuting Maritime Piracy Domestic Solutions to International Crimes* (2015) at 354-355; Murphy 'Somali piracy' (2012) 156(6) *RUSI Journal* 4 at 10.
[166] Alldridge (n 21) at 290-291 where he advances the argument that money laundering legislation helps bring to justice the 'real criminals' and not just the foot soldiers.
[167] UN Security Council *Report of the Monitoring Group on Somalia Pursuant to Security Council Resolution 1811 (2008)* ; UN Doc S/2008/769 10 December 2008 available at *http://www.refworld.org/docid/494900240.html* accessed 30/04/13.
[168] FATF *Organised Maritime Piracy and Related Kidnapping for Ransom* (n 111) at 18; Geopolicty *The Economics of Piracy: Pirate Ransoms and Livelihoods off the Coast of Somalia* (n 111) at 6; Dubner & Penn 'On selecting a judicial system(s) to try sea pirates–An interesting/necessary exercise but is it enough to deter the attacks/hijacking?' (2011) 42(4) *JMLC* 569 at 573-574.
[169] Scharf (n 165) at 355.
[170] Abrams (n 63) at 2.
[171] Ibid at 3. This is possible by utilising the civil forfeiture proceedings. See discussion in chapter 4 section 4.14.1.
[172] See chapter 2 on piracy.
[173] Alldridge (n 21) at 286-288 discusses the argument that punishing laundering removes the incentive to commit predicate offences.

need to be laundered is a separate offence from the offence of money laundering. Thus money laundering is not a continuation of the predicate offence. Piracy is the predicate offence, separate from the offence of laundering the ransoms received. In our case holding the pirates accountable for the illegal funds they receive from piracy will aid in indirectly dealing with the offence of piracy.[174] Anti-money laundering laws will aid in depriving the pirates of the gains of their crime and in so doing create a disincentive for engaging in piracy. Therefore anti-money laundering laws and piracy laws can complement each other, since anti-money laundering laws can be utilised independently or jointly with piracy laws in dealing with Somalian piracy.

3.6 Chapter conclusion

Money laundering has been identified as the autonomous process of 'cleaning' illegally acquired money in a bid to distance it from its criminal source and make it appear to be from a legitimate source with the ultimate goal of utilising the funds in a legitimate economy. Money laundering laws are aimed at denying the launderers the benefit of enjoying their ill acquired gains. It has been established that the link between money laundering and piracy exists. This follows on the discussion applying criminology theories to the Somalia situation. Consequently the use of effective money laundering laws seem to be ideal as it would assist in denying everyone involved in the act of piracy the enjoyment of their illegal proceeds. This is also bolstered by the moral argument that crime should not pay which therefore, justifies the application of money laundering as a strategic means for depriving the pirates' enjoyment of their illegal proceeds.

Apart from identifying the applicability of anti-money laundering laws to Somailan piracy ransoms, the theoretical discussion in this chapter also points to the potential of generally using anti-money laundering laws to deal with other crimes. In principle this may be possible for any crime for which a profit is gained and thereafter laundering is undertaken so as to 'cleanse' the profit and facilitate its consumption or re-investment. As a result, since anti-money laundering laws aim to prevent an offender from enjoying the illegal proceeds; the regime can be employed to take away such proceeds. In relation to crime prevention this would be advantageous, since it increases the measures available to target a particular offence. This is because the anti-money laundering laws can be used individually or in conjunction with laws dealing with the particular offence. This would essentially reinforce the crime prevention aimed at a particular offence.

[174] Boister *An Introduction to Transnational Criminal Law* (2012) at 101.

Notwithstanding establishing the theoretical link between money laundering and piracy there is the practical aspect relating to actual utilisation of anti-money laundering laws to deal with piracy ransoms. Issues related to this include detecting and investigating the offence, identifying the offenders, proving the existence of the crime, establishing the guilt of the offenders, undertaking the forfeiture process and enforcement of the outcome. To effectively address these practical aspects, the next chapter, will consider these issues in light of the Somalian piracy ransoms and the Kenyan anti-money laundering laws.

4 THE KENYAN ANTI-MONEY LAUNDERING REGIME VIS À VIS SOMALIAN PIRACY RANSOMS

4.1 Introduction

In the previous chapter, the theoretical link between money laundering and piracy was established. Primarily this is because piracy leads to illegal funds acquisition via ransoms and pirates may subsequently undertake money laundering to enjoy the illegal proceeds. Further, the chapter provided justification for using the offence of money laundering to address piracy. It also established the use of Kenya by Somalian pirates as a money laundering base and channel. Hence, having confirmed the piracy inflows into the country, the current chapter proceeds to seek answers on the practical application of anti-money laundering laws to deal with the problem. This will be achieved by examining the Kenyan anti-money laundering regime[1] in relation to Somalian piracy ransoms.

It is acknowledged that there are other countries with functioning anti-money laundering mechanisms that also have links with Somalia and providing possible avenues for laundering Somalian piracy proceeds. However, the focus in this thesis is on Kenya due to its proximity to Somalia, the shared language and cultural links, and Kenya having a more developed economy and financial system in the East African region. These factors make Kenya an easily accessible destination for the piracy proceeds. Consequently, this increases the threat of laundering the proceeds in or through Kenya.[2] Moreover, as the issues that arise in Kenya may be replicated in other jurisdictions, the study may aid in providing guidelines on how to deal with piracy and money laundering in other jurisdictions.

Section 4.2 commences the analysis by establishing the applicability of the Proceeds of Crime and Anti-Money Laundering Act to Somalian pirates and the ransoms they collect. Section 4.3 provides an overview of how the Act may facilitate the detection of suspect piracy ransoms transactions; while section 4.4 focusses on the gaps evident in the detection mechanisms. Section 4.5 considers the authorities granted investigative powers together with the powers granted to aid information gathering and investigation. Section 4.6 focuses on barriers likely to be encountered during the investigation process. Sections 4.7 and 4.8 review two related issues: prosecutorial and trial

[1] These are the laws and measures/strategies developed to deal with money laundering collectively known as the anti-money laundering regime (AML).
[2] See chapter 1 section 1.1.

process elements that are relevant at these stages. Sections 4.10 to 4.19 examine the asset forfeiture laws which facilitate depriving pirates, financiers and accomplices of the proceeds of their crime. Finally, section 4.20 probes human rights issues arising subsequent to the application of the various provisions indicated above.

Before proceeding with the analysis on the application of Kenya's anti-money laundering regime in dealing with Somalian piracy proceeds, it is essential to point out a key issue. Despite having legislation inforce which deals with proceeds of crime since 2010, to date there is still very limited if any jurisprudence dealing with its application.[3] Consequently we can only speculate on possible challenges or problems that may arise as a result of its application. Thus, throughout this chapter, court decisions from England and South Africa will be used to enrich the discussion. This will not be done for comparative purposes but will be used as tools to assist in the examination of the Kenyan provisions as reference and benchmarking points. This is primarily because the three jurisdictions have similar legislations, having based their anti-money laundering laws on international conventions and Financial Action Taskforce Recommendations.[4] This therefore confirms the validity of the decision to make use of these two jurisdictions case law.

Moreover, both jurisdictions have advanced greatly in terms of investigative and functional capabilities, of the investigative authorities and the courts in dealing with anti-money laundering matters. This is in terms of having specialized institutions to undertake the investigations, as well as having staff with the requisite techniques and strategies for the investigation and prosecution of

[3] Five years since commencement of the legislation, as at March 2015, nine money laundering cases were forwarded to the Office of the Director of Public Prosecutions, four of which were closed and five of which are still pending in 2015. Notably, the first prosecution was in 2014. See US Department of State *International Narcotics Control Strategy Report Vol II Money Laundering and Financial Crimes* (2015) at 153-155 available at *http://www.state.gov/documents/organization/239561.pdf* accessed 28/7/15. In 2015 there were 2 criminal prosecutions and POCAMLA was used for the first time to freeze suspected proceeds of crime. Moreover there is still no conviction under the Act as at March 2016. See US Department of State *International Narcotics Control Strategy Report Vol II Money Laundering and Financial Crimes* (2016) at 158-160 available at *http://www.state.gov/documents/organization/253983.pdf* accessed 28/3/16.

[4] 1988 Vienna Convention against Illicit Traffic in Narcotic Drugs and Psychotropic substances, 28 *ILM* 493 (1989) (Vienna Convention); United Nations Convention against Transnational Organised Crime 2000, 2225 *UNTS* 209 (Palermo convention) as well as the FATF Recommendations. Both UK and South Africa are FATF members. See Tuba 'Prosecuting money laundering the FATF way: An analysis of gaps and challenges in South African legislation from a comparative perspective' (2012) special edition no 2 *AC* 103 at 109; Ryder 'To confiscate or not to confiscate? A comparative analysis of the confiscation of the proceeds of crime legislation in the United States and the United Kingdom' (2013) 8 *JBL* 767. Kenya too has ratified the UN conventions stated above and although it is not a member of FATF it is a member of Eastern and Southern Africa Anti-Money Laundering Group (ESAAMLG) which is a body tasked with assisting in implementing the FATF recommendations in the region. South Africa is also a member of ESAAMLG. See *http://www.esaamlg.org/* accessed 25/3/16.

money laundering cases. The judges are also trained and well resourced. This ensures they have the competences to handle simple and complex money laundering matters. As a result, aspects of investigative and functional capabilities are evidenced by the vast judicial decisions that are available from these jurisdictions.

Additionally, Kenyan and English legislations are comparable because of historical links between the two jurisdictions. Kenya having been a British colony adopted the English Common Law system that is applicable to date.[5] With regards to human rights issues, Kenya and South Africa, have similar bill of rights[6] and since application of legislation dealing with proceeds of crime will affect human rights, it is possible to justifiably seek guidance from South African jurisprudence. Therefore, case law from England and South Africa will be persuasive authority and provide guidance on how similar issues, consequent to the application of the proceeds of crime legislation, can be addressed by the Kenyan courts.

4.2 Scope of application

The development of Kenya's anti-money laundering regime was triggered by the recognition at the international level of the ill effects of money laundering on economies. This led to the evolution of prohibitory and preventative strategies to deal with the problem.[7] In this regard, conventions have been negotiated and organisations created in order to target money laundering.[8] Kenya has ratified the relevant conventions[9] and subsequently enacted the Proceeds of Crime and Anti-Money Laundering Act (hereinafter POCAMLA)[10] and supplemented with the Proceeds of Crime

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[5] S 3(1) Judicature Act Cap 8. See also Joireman 'The evolution of the common law: Legal development in Kenya and India' (2006) 44(2) *CCP* 190. In keeping with this tradition Kenyan courts still refer to English decisions as persuasive jurisprudence in dealing with matters before the courts.

[6] Glinz 'Kenya's new constitution: A transforming document or less than meets the eye?' (2011) 44(1) *LPAALA* 66 at 68-69. See also, generally, Orago 'Limitation of socio-economic rights in the 2010 Kenya constitution: A proposal for the adoption of a proportionality approach in the judicial adjudication of socio-economic rights disputes' (2013) 16(5) *PELJ* 172.

[7] Prohibitory measures are the criminalisation of money laundering by identifying and categorising predicate offences from whence laundered funds are sourced. Preventative measures aim to ensure the following: customer due diligence (CDD); reporting of suspicious transactions (STR); regulation and supervision and; sanctions against organisations that fail to operate appropriate systems. See Vettori 'Evaluating anti-money laundering policies: Where are we?' in Unger & Van de Linde (eds) *Research Handbook on Money Laundering* (2013) at 474-485.

[8] See n 4 above; See also discussion in chapter 3 section 2.2.

[9] Kenya ratified the Vienna and Palermo conventions on 19 October 1992 and 16 June 2004 respectively.

[10] Act no 9 of 2009; Cap 59B. The Act's date of commencement was 28 June 2010. Prior to the passing of this Act the government had published two bills on money laundering in 2007 and 2008 but none was ever passed into law. See Kenya National Assembly Official Record (Hansard) of 8 May 2008 at 945 available at *https://books.google.co.ke/books?id=43OUzHZFCZgC&source=gbs_all_issues_r&cad=1* accessed 18/8/15.

and Anti-Money Laundering Regulations 2013 (hereinafter POCAMLR).[11] The statute and the regulations aim at providing a comprehensive legislative and administrative framework for the offence of money laundering. It also seeks to facilitate the identification, tracing, freezing, seizure and confiscation of the proceeds of crime.

POCAMLA is the main statute dealing with money laundering and proceeds of crime.[12] An analysis of its efficiency and effectiveness in addressing Somalian piracy proceeds is therefore worthwhile.[13] In this regard, the first important issue to address is whether Somalian pirates and the ransoms can appropriately be targeted using the provisions of POCAMLA? The discussion will indicate that the answer is affirmative, albeit subject to certain limitations, as evidenced hereunder.

4.2.1 Proceeds of crime

POCAMLA seeks to combat the offence of money laundering and 'to provide for the identification, tracing, freezing, seizure and confiscation of the proceeds of crime, and for connected purposes.' [14] This permits its broader application in locating and confiscating the proceeds of various crimes, and not just money laundering offences. The key concept is thus 'offence' which under the Act is defined as any act that is an offence under Kenyan law.[15] This is broad enough to cover the crime of piracy which is declared an offence in section 369 of the Merchant Shipping Act 2009.

The next question would be to determine whether the proceeds of piracy committed in another country, such as Somalia, would be subject to the provisions of POCAMLA if they enter Kenyan jurisdiction. The dual criminality requirement found in section 127 of POCAMLA provides that proceeds of foreign crimes in Kenya would be considered proceeds of crime, as long as the criminal conduct occurring in the foreign state would have amounted to a crime under Kenyan law.

[11] Special Issue *Kenya Gazette Supplement no 52 (Legislative Supplement no 21)* of 28 March 2013.
[12] The other statutes are Prevention of Organised Crime Cap 59; Prevention of Terrorism Act no 30 of 2012 and; Anti-Corruption and Economic Crimes Act Cap 65.
[13] Throughout the chapter reference to piracy proceeds will be a collective term encompassing the actual ransoms paid to pirates or any other property and assets they have been converted into, as well as its instrumentalities.
[14] POCAMLA preamble.
[15] S 2 POCAMLA 'offence' in this Act, means 'an offence against a provision of any law in Kenya, or an offence against a provision of any law in a foreign state for conduct which, if it occurred in Kenya, would constitute an offence against a provision of any law in Kenya.'

It therefore means that if piracy is considered a crime in Somalia, the proceeds of such crime will also fall under the provisions of POCAMLA since it is also a crime in Kenya. In particular, piracy is considered an offence under both Kenyan and Somalia laws.[16] However, it is important to note that for civil forfeiture purposes under the Act, it is not necessary to prove commission of the predicate offence, such as piracy in this case. What is required is to show a direct cause and effect connection between the crime and property.[17]

Additionally, proceeds of crime as defined encompass different types of property and not only the original criminal proceeds. It also targets later benefits or property derived from or into which the initial criminal proceeds are successively converted, transformed or intermingled with legitimate property. This infers that the proceeds of crime or economic advantage originally derived and later laundered, as well as the benefits or property derived from the investment of the proceeds of crime are captured.

With specific regard to Somalian pirates, this ensures that assets which the ransoms have been converted into, whether situate in Kenya or elsewhere, are netted, and not only the original ransoms paid. However, the Act only applies to proceeds of crime gained or retained after its commencement on 28 June 2010.[18]

Although 'instrumentalities' are also governed by the Act, no further clarification is given in terms of explicitly offering a definition. However, the South African decision in *National Director of Public Prosecutions v Cook Properties*, where the court had to deal with a similar provision, it was held that the term instrumentalities covers not only the means by which an offence is committed but also the property concerned in the offence.[19] Thus, if this definition is applied in the Kenyan piracy context, property such as skiffs, mother boats or weapons used or intended for use in committing the crime could potentially be targeted.

[16] S 369 Kenyan Merchant Shipping Act no 4 of 2009; Article 2 Somalia Law on Combating Piracy Law no 52 of 2012.
[17] See further discussion in section 4.14.1.
[18] S 62(1) POCAMLA explicitly provides that criminal forfeiture applies to proceeds of crime received, retained or derived after the commencement of the Act. However, with regards to civil forfeiture the Act is silent. Nevertheless, the principle of law *nullum crimen sine iure;* only the law can define a crime and prescribe a penalty is instructive. Accordingly, it is correct to infer that similarly POCAMLA provisions on civil forfeiture will not apply retrospectively.
[19] *NDPP v (1) Cook Properties (Pty) Ltd; (2) 37 Gillespie Street Durban (Pty) Ltd & Another; (3) Seevnarayan* [2004] (2) SACR 208 (SCA); [2004] 2 ALL SA 491 (SCA) (13 May 2004) para 13-14. (Hereinafter *NDPP v Cook Properties*).

4.2.2 The offender

The Act applies to proceeds of crime 'irrespective of the identity of the offender'.[20] The meaning of this statement has not been addressed in any case law as yet. Nonetheless it would seem that the identity of the offender is not in issue as the Act encompasses either a natural or legal person involved[21] in self or third party laundering.[22] With regards to piracy it would thus apply to foot soldiers, financiers and others involved in the laundering of piracy ransoms.

Likewise interpretation of the phrase above could infer that the nationality of the offender is not of importance for purposes of granting Kenya jurisdiction over an individual. This is because though the predicate offence generating the funds to be laundered can be committed in any jurisdiction, Kenya can have jurisdiction over an individual as long as they undertook the laundering within Kenya. Additionally jurisdiction can also be established if the proceeds of crime are within the jurisdiction.[23] This lends credence to the fact that of importance is establishing the aspect of territoriality and not nationality. Hence the Act can apply 'irrespective of the identity of the offender' in terms of nationality as long as the offender is a natural or legal person and territoriality for the commission of laundering is ascertained.

Furthermore, the lack of distinction between natural and legal persons as offenders is extended. This is because certain officers such as directors, managers, secretary or officer(s) of a body corporate[24] can be held liable on behalf of the legal person. The English courts have recently, in a prosecution based on legislation with similar content, held the company director liable for money laundering arising from his position.[25] Thus a body corporate or its officers who facilitate the concealing, disguising, converting, transferring or the acquisition, retention, use of piracy proceeds could potentially be prosecuted. This affirms the logic that the Act applies 'irrespective of the identity of the offender' in terms of distinguishing between a body corporate and its officers since they can be held liable for money laundering committed in their official capacity.

[20] S 2 POCAMLA 'proceeds of crime' means any property or economic advantage derived or realized, directly or indirectly, as a result of or in connection with an offence *irrespective of the identity of the offender…'* [Emphasis mine].
[21] S 2 POCAMLA 'person' means any natural or legal person.
[22] Self and third party laundering refers to concealment and disguising respectively. See chapter 3 section 3.2.2.
[23] See discussion in section 4.2.3 on place where the crime was committed.
[24] S 2 and S 16(6) POCAMLA.
[25] *R v Lonnie Augustus Smith* [2015] EWCA Crim 333 (4 February 2015).

4.2.3 Place where the crime was committed

There is no requirement that the predicate offence be committed only in Kenya. For Kenya to have the requisite jurisdiction the proceeds of crime should still be within the country or have been laundered through it. This is based on the principle of territoriality as the money laundering offence has been committed within Kenya's territory. [26]

In conclusion, the relevance of POCAMLA is therefore evident considering its applicability. The Act has a wide scope in terms of the proceeds of crime and offenders that can be targeted. This not only assists in prosecuting those involved in laundering proceeds of piracy, but also facilitates taking away the benefit gained by the perpetrators of piracy.[27] Additionally, allowing confiscation of piracy instrumentalities may help prevent the offence since the means of committing the crime are removed.[28] Nevertheless, the main hindrance to achieving this could potentially be the fulfilment of the dual criminality element. This is because failure to establish dual criminality means application of the Act cannot be triggered.

In the following sections 4.3 to 4.8, the provisions of POCAMLA that facilitate detection, investigation, charging and prosecution of offenders in relation to laundering proceeds and instrumentalities of piracy will be considered. Further on, in sections 4.10 to 4.18, the discussion on asset forfeiture will focus on freezing, seizure and taking away the piracy proceeds and instrumentalities.

4.3 Detecting suspect transactions that might involve piracy proceeds

The application of POCAMLA would be triggered by the presence of identified proceeds of crime in Kenya. Thus detection of such funds is the first important step. This could be done during any of the money laundering stages – placement, layering and integration[29] – though it is easiest during

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[26] Countries may exercise jurisdiction over money laundering offences in the following instances: 1) the offence is committed in its territory or aboard vessels flying their flag or aircraft registered under their laws as per article 4(1) Vienna convention and article 15(1) Palermo convention. 2) The offence is committed against one of their nationals as per article 15(2)(a) Palermo convention. 3) The offence is committed by one of their nationals or stateless habitual resident in their territory as per article 4(1)(b)(i) Vienna convention and article 15(b) Palermo convention. 4) The offence is linked to money laundering planned to be committed in their territory as per article 4(1)(b)(iii) Vienna convention and article 15(2)(c) Palermo convention. For further discussion see Durrieu *Rethinking Money Laundering and Financing of Terrorism in International Law Towards a New Global Legal Order* (2013) at 395-415.

[27] This is in line with the situational crime prevention theory. The theory advocates that by changing the situational circumstances so as to increase the costs of crime and decrease the benefits received; this will influence the criminal decision making process and thus aid in preventing crime. See discussion in chapter 3 section 3.5.3.

[28] This was also found in South Africa under a similar statute as stated in *NDPP v Cook Properties* (n 19) para 18.

[29] For further discussion on these stages see chapter 3 section 3.2.3.

the placement stage.[30] As discussed earlier, the various methods of transferring piracy ransoms into Kenya facilitate any of these three stages.[31] POCAMLA requires filing of cash declarations, cash transactions and suspicious transaction reporting (STR), all of which enable detection of suspect piracy proceeds and will be discussed in turn.

4.3.1 Cash declarations

POCAMLA regulations require that cash declarations be made at any port of entry for any amounts equivalent to or exceeding US$ 10,000.[32] Failure to do so, or if a custom official suspects that an individual has not made such a declaration, permits the officer to conduct a search and seize any amount found.[33] Upon seizure, disclosure and surrender of the said amount is to be made to the Director of Assets Recovery Agency within five days.[34]

This provision would aid in specifically targeting the detection of cross-border movement of cash between Kenya and Somalia. This is of importance due to the porous nature of Kenya's borders with Somalia which may permit cross-border movement of piracy proceeds.[35] However, this fact would also make implementation of this regulation difficult. Additionally, the regulation itself contains some loopholes.

The custom official is only obliged to disclose of the seizure to the Assets Recovery Agency and not to the Financial Reporting Centre, which is mandated to receive and analyse reports of unusual or suspicious transactions. This implies that the Centre would have to await a report from the Agency whose primary functions is not to analyse STRs but to undertake forfeiture of criminal proceeds under the Act.[36] Inadvertently, this is likely to lead to delays in the Centre initiating timely investigations into suspected proceeds of piracy. Essentially this is an ineffective

[30] Madinger *Money Laundering: A Guide for Criminal Investigators* (2012) at 5. See also chapter 3 section 3.2.3.
[31] See chapter 3 section 3.4.2.
[32] S 8(1) POCAMLR.
[33] S 8(3) POCAMLR; 'Where the customs officer has reason to suspect that the person has not made a true declaration or has failed to declare the monetary instruments referred to in sub regulation (1), the customs officer shall require that person to produce and show to the customs officer all the monetary instruments in his possession.'
[34] S 8(6) POCAMLR; 'Where the customs officer has made a seizure pursuant to these Regulations, he shall in accordance with sections 12 (5) & (6) immediately but not later than five days, report the details of the seizure and surrender the seized monetary instruments to the Agency Director.'
[35] See chapter 3 section 3.4.2.1.
[36] See discussion in sections 4.5.1 & 4.5.2.

information flow system which could potentially lead to information decay.[37] The solution would be to require double reporting to the Centre and Agency at the time of seizure.

Further, the provision only provides for what is to happen at the port of entry as the cash is seized. No guidance is provided on what should follow after the seizure and surrender to the Assets Recovery Agency.[38] For example, no indication is given regarding how long the Agency can keep the cash, where it should be deposited and if there is need to seek a court order to allow continued detention of the cash as investigations are conducted. The lack of explicit follow up provisions could lead to unnecessary litigation or impeding of the rights of the person whose cash is seized. For example, if the cash is held for an inordinately long period, can the affected individual apply to court for an order seeking release of the cash or compensation? Similarly if an individual can account for a portion of the seized cash can they apply to court for its release? Hence, considering these possibilities it would be preferable that post seizure follow-up provisions are included in the regulations. This would assist in pre-empting and dealing with circumstances that may arise. Nonetheless, development of a code of practice for the customs officers would also ensure that they are fully aware of their obligations under the regulations and hence implement their obligations properly.

Furthermore, the duration of five days within which disclosure and surrender of the seized amount is to be done by the customs officer, I consider it too long. This is because it may likely lead to delay in beginning of investigations, not to mention the possibility of the cash disappearing through corruption.[39] Interestingly, despite the importance of cash declarations in assisting to detect suspect piracy proceeds, failure to make a cash declaration as required is not explicitly indicated to be a criminal offence. The implication of this is that failure to make a cash declaration can be assumed to have no serious legal implications and consequently of no great importance. Over all, although

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[37] See Unger *et al Project "ECOLEF" The Economic and Legal Effectiveness of Anti-Money Laundering and Combating Terrorist Financing Policy* (2013) at 164-220 available at *http://www2.econ.uu.nl/users/unger/ecolef_files/Final%20ECOLEF%20report%20(digital%20version).pdf* accessed 15/2/16. See also Deleanu 'Information flows and repressive enforcement' in Unger *et al The Economic and Legal Effectiveness of Anti-Money Laundering and Combating Terrorist Financing Policy* (2014) at 125-146. For a discussion on the importance of effective information systems in assisting with money laundering and terrorist financing convictions and prosecutions. Though the discussion is in relation to European Union countries the discussion is indicative of situations in other jurisdictions including Kenya.

[38] See discussion in section 4.5.2 on the Asset Recovery Agency.

[39] See discussion in section 4.6.4. In view of the high levels of corruption in Kenya. It is not unfathomable to conceive a customs officer being corrupted so as to facilitate 'disappearance' of seized cash.

the cash declaration requirement is a clear way to identify suspect piracy proceeds coming into Kenya, the gaps in the provision could reduce its effectiveness. Hence to increase its efficacy the issues need to be addressed as indicated.

4.3.2 Cash transactions and suspicious transactions reporting

Financial institutions and designated non-financial businesses and professionals (DNFBPs) are collectively defined as reporting institutions under the Act, and have various reporting obligations imposed on them.[40] These duties include: monitoring and reporting suspected money laundering activity;[41] ensuring customer due diligence (CDD) which encompasses verifying customer identity also known as 'know your customer' (KYC)[42] and establishing and maintaining customer records;[43] establishing and maintaining internal reporting procedures;[44] cash transaction reporting;[45] keeping the required information on wire transfers;[46] and establishing measures to deal with specific customers referred to as 'politically exposed persons'(PEPs).[47]

Specifically the obligation to monitor and report suspected money laundering activity to the Financial Reporting Centre is of importance in aiding the detection of probable transactions involving piracy proceeds.[48] In this regard financial institutions have a duty to report any suspicious transactions or cash transactions equivalent to or exceeding US$10,000[49] and failure to abide by the rule is a criminal offence.[50] Upon submission of these reports the Financial Reporting

[40] S 2 POCAMLA. Additionally, 'financial institutions' are broadly defined under POCAMLA to include banks, insurance companies, companies dealing in securities or commodities futures trading, investment and portfolio management companies, bureau de change and institutions involved in formal or informal transfer of funds or value. These institutions as per S 47A POCAMLA & S 4(1) POCAMLR are required to register with the Financial Reporting Centre and have reporting obligations imposed on them.
[41] S 44 POCAMLA.
[42] S 45 POCAMLA.
[43] S 46 POCAMLA.
[44] S 47 POCAMLA.
[45] S 34 POCAMLR.
[46] S 27 POCAMLR.
[47] S 22 POCAMLR. For a comprehensive discussion on these measures with specific reference to Kenya see Cox *Handbook on Anti Money Laundering* (2014) at 516-528. Politically exposed persons are individuals who are or have been entrusted with prominent public functions for examples heads of state, government officials, senior politicians, senior government, judicial or military officials, senior executives of state owned corporations and important political party officials.
[48] S 21 POCAMLA & S 50 Finance Act 2015 in special issue *Kenya Gazette supplement no 155 (acts no 14)* of 15 September 2015. See discussion in section 4.5.1 on the Asset Recovery Agency.
[49] S 32(1) & S 34(1) POCAMLR respectively.
[50] S 42 POCAMLR.

Centre scrutinises them in a bid to detect suspicious transactions that may involve proceeds of crime or money laundering.[51]

Consequently, since it has been shown that Somalian pirates may utilise wire transfers and '*hawala*',[52] it is possible that these transactions undertaken through banks or '*hawaladars*'[53] may be detected through these measures. The same is possible if any of the other reporting institutions were to be used by the pirates in their money laundering activities.

A detection challenge using this method is that reporting institutions may opt for defensive reporting, in which anything and everything is reported, as has been experienced in other jurisdictions such as the United Kingdom.[54] This is likely to be the case in Kenya as well, considering that in addition to filing reports on suspicious transactions, reporting institutions are also expected to file reports on 'all cash transactions equivalent to or exceeding US$ 10,000 or its equivalent in any other currency carried out by it, whether or not the transaction appears to be suspicious.'[55] Resultantly, the Financial Reporting Centre would be inundated with information and though some suspicious activities would be identified many others would more likely fall through the cracks.[56]

A further challenge in utilising STRs to detect suspect piracy proceeds is in relation to the *hawala* system. As identified, in the previous chapter, this system facilitates the transfer of funds into Kenya from where they can be transferred to other jurisdictions or through the use of mobile money transfers placed into the Kenyan financial system.[57] Both methods have been identified as a money

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[51] The Financial Reporting Centre upon detecting a suspicious transaction is to forward the matter for proper investigation to the appropriate law enforcement authorities as per S 24(b) POCAMLA and 50 (d) Finance Act 2015 in Special Issue *Kenya Gazette supplement no 155 (acts no 14)* of 15 September 2015.

[52] See chapter 3 Section 3.4.2.2. See also *Report of the Monitoring Group on Somalia and Eritrea Pursuant to Security Council Resolution 2111(2013)* available at 26 & 95-199 *http://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/S_2014_726.pdf* accessed 26/8/15.

[53] Soudjin 'Hawala and money laundering: Potential use of red flags for persons offering hawala services' (2015) 21(2) *EJCPR* 257. See also Crumbley *et al Forensic and Investigative Accounting* (2013) at 7091.

[54] Leong 'Chasing dirty money: Domestic and international measures against money laundering' (2007) 10(2) *JMLC* 140 at 142; Ryder *Money Laundering – An Endless Cycle? A Comparative Analysis of the Anti-Money Laundering Policies in the United States of America, the United Kingdom, Australia and Canada* (2012) at 180.

[55] S 44(3) POCAMLA & S 34(1) POCAMLR provides: '…a reporting institution shall report all suspicious transactions, including attempted transactions to the Centre.' In addition to filing suspicious transactions, threshold reporting requirements are imposed and institutions are expected to file reports on all cash transactions equivalent to or exceeding US$ 10,000 or its equivalent in any other currency carried out by it, whether or not the transaction appears to be suspicious.'

[56] See Takatas 'A theory of "crying wolf": The economics of money laundering enforcement' (2011) 27(1) *JLEO* 32.

[57] Department of State Narcotics Report (2015) (n 3) at 154.

laundering threat in Kenya,[58] and have been placed within the ambit of POCAMLA, since they are categorised as financial institutions subject to reporting requirements.[59] The problem with the practical implementation of these measures lies in the fact that *hawaladars* are under no central authority, though they are required to be licensed and registered. Further, their method of conducting business makes monitoring difficult.[60] Mobile money transfers on the other hand though undertaken by registered agents but are under weak controls.[61] This makes it difficult to monitor and ensure compliance.[62]

In conclusion, utilising cash declarations made at points of entry, cash and suspicious transaction reporting can definitely aid in identifying suspect piracy proceeds transactions. Nonetheless it is evident that these measures are not robust enough. This is evident from the shortcomings identified above. Moreover they are not sufficient as the only methods that can assist in identifying suspect transactions and thus other worthwhile and viable approaches that could assist in this endeavour are considered hereunder.

4.4 Loopholes and omissions in detecting suspect piracy proceeds transactions

Laundering of piracy proceeds can be done through purchasing high value assets such as cars, artwork, real estate and jewellery. To undertake these activities, the use of designated non-financial businesses and professions (DNFBPs) is necessary.[63] Therefore, these businesses may knowingly or otherwise facilitate money laundering and for this reason anti-money laundering regimes impose reporting obligations.[64] Kenya is no exception and has done so under POCAMLA, but the list is not comprehensive as loopholes and omissions are evident. For example though accountants

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[58] Department of State International Narcotics Control Strategy Report Volume II: Money Laundering and Financial Crimes (2014) at 147 available at *http://www.state.gov/documents/organization/222880.pdf* accessed 23/3/15.
[59] S 2 POCAMLA under definition of 'financial institution'.
[60] See chapter 3 section 3.4.2.2.
[61] Department of State Narcotics Report (2016) (n 3) at 159. Mwega *Financial Regulation in Kenya: Balancing Inclusive Growth with Financial Stability* (2014) Overseas Development Institute Working Paper 407 at 17 available at *http://www.odi.org/sites/odi.org.uk/files/odi-assets/publications-opinion-files/9279.pdf* accessed 9/2/16.
[62] See Zagaris 'Problems applying traditional anti money laundering procedures to non-financial transactions, "parallel banking systems" and Islamic financial system' (2007) 10(2) *JMLC* 157.
[63] According to the Financial Action Task Force (FATF) Recommendation 22; designated non-financial businesses and professions (DNFBPs) are identified as casinos, real estate agents, dealers in precious metals and stones, lawyers, notaries, other independent legal professionals, accountants, trusts and company service providers. FATF *International Standards on Combating Money Laundering and the Financing of Terrorism & Proliferation the FATF Recommendation* (2012) available at *http://www.fatf-gafi.org/topics/fatfrecommendations/documents/fatf-recommendations.html* accessed 5/10/14.
[64] FATF Standards (n 63); Recommendations 22 and 23.

are included, the rules pertaining to them are not exhaustive and legal professionals are excluded altogether. In this regard, these and other gaps are considered hereunder.

4.4.1 Accountants

The only professionals that have reporting obligations imposed under POCAMLA are accountants, and this is only when undertaking specific transactions. They must report any suspicious activities or transactions which indicate possible laundering to the Financial Reporting Centre.[65] This is additional to reporting all transactions paid in cash up to or exceeding US$10,000 or its equivalent.[66] Despite having these rules, there are fundamental issues arising.

First, in addition to the above mentioned transactions, accountants may also engage in organising contributions for the creation, operation or management of legal arrangements. These include, helping to raise funds for a business entity, asset financing and financial restructuring. However, no reporting duties are imposed in relation to these transactions.[67] Second, the professional accountancy body, as the supervisory body has a crucial role to play to ensure effective implementation of the law. This is by assisting the Financial Reporting Centre in ensuring compliance with the prescribed regulations.[68] Bearing this in mind begs some questions. Does their supervisory body have the capacity to monitor and ensure enforcement of these rules?[69] Furthermore are its members informed and trained on these obligations if they are to comply?[70] If these questions are not properly addressed it would hamper the effectiveness of the reporting obligations imposed on accountants as a means of detecting and dealing with potential laundering of piracy proceeds. Hence, it is suggested that that developing best practice guidelines, set in place by the professional accountancy body, would be useful in this regard. Primarily, because the guidelines would assist the accountants in understanding their obligations and how to best fulfil

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[65] S 48 POCAMLA; 'The reporting obligations under this Part shall apply to accountants when preparing or carrying out transactions for their clients in the following situations (*a*) buying and selling of real estate; (*b*) managing of client money, securities or other assets; (*c*) management of bank, savings or securities accounts; (*d*) organisation of contributions for the creation, operation or management of companies; (*e*) creation, operation or management of buying and selling of business entities.'
[66] S 34(1) POCAMLR.
[67] FATF Standards (n 63) at 20. See also Crumbley *et al* (n 53) at 7141-7161.
[68] S 39(3 & 4), S 41 POCAMLR; S 50(b) Finance Act 2015 in Special Issue *Kenya Gazette supplement no 155 (acts no 14)* of 15 September 2015.
[69] The **I**nstitute of Certified Public Accountants of Kenya (ICPAK) is the professional body that regulates the activities of all Certified Public Accountants in Kenya. It was established in 1978 under the Accountants Act Cap 531. This act was replaced by the Accountants Act no 15 of 2008. See *http://www.icpak.com/* accessed 28/8/15.
[70] S 5 POCAMLR.

them as required under POCAMLA. Overall, this would likely increase the effectiveness of the profession as a means of detecting and dealing with potential piracy proceeds and proceeds of crime generally.

4.4.2 Precious stone dealers and metal dealers

Precious stone and metal dealers are categorised as DNFBPs and thus have reporting obligations imposed under POCAMLA. However, unlike financial institutions that are under a supervisory body, precious stone and metal dealers are under no such umbrella authority[71] and this poses a compliance challenge. This is because having no oversight authority begs the assumption that compliance supervision over them would consequently be under the Financial Reporting Centre. This may prove a challenge as it may stretch resources available to the Centre. Whereas if these businesses where under a central uniting authority compliance monitoring would be more efficient and effective. This is because the supervisory authority would undertake the operational oversight over the numerous/fragmented precious stone and metals dealers and this would reduce involvement of the Centre to dealing with this central authority.

4.4.3 Car dealers

Car dealers too have the potential of being misused for laundering piracy proceeds but are not within POCAMLA's reach.[72] They may be utilised in the purchase of high value motor vehicles using the proceeds of piracy.[73] In so doing, they facilitate the consumption motive in money laundering. Thus, this puts car dealers in a prime position to assist in detection of potential laundering of piracy proceeds. Accordingly what is necessary would be to amend the legislation to impose requirements on car dealers to report any suspicious transactions or transactions paid in cash up to or exceeding a given amount as is the case in England and South Africa.

[71] As per S 2 POCAMLA 'supervisory body' means a functionary or institution specified in the First Schedule, or such other functionary or institution as may be prescribed by the Minister. Under the First Schedule: The following institutions are the supervisory bodies as stated in the first schedule (*a*) Central Bank of Kenya; (*b*) Insurance Regulatory Authority; (*c*) Betting & Licensing Control Board; (*d*) Capital Markets Authority; (*e*) Institute of Certified Public Accountants of Kenya; (*f*) Estate Agents Registration Board; (*g*) Non-Governmental Organizations Co-ordination Board; (*h*) Retirement Benefits Authority.

[72] Warutere 'Detecting and investigating money laundering in Kenya' in Goredema (ed) *A Survey of Money Laundering Experiences* Institute of Securities Studies Monograph no 124 at 63. See also Eastern and Southern Africa Anti Money Laundering Group Report *Typologies Report on Money Laundering Related to Illicit Dealings in and Smuggling of Motor Vehicles in the ESAAMLG Region* (2012) available at *http://www.esaamlg.org/userfiles/Illicit%20Dealings%20in%20and%20Smuggling%20of%20Motor%20Vehicles%20Report.pdf* accessed 18/8/2015.

[73] See chapter 3 section 3.4.3.

In England car dealers are considered High Value Dealers (HVD) under the Money Laundering Regulations 2007.[74] HVD are defined as any firm or sole trader which accepts cash payments of €15,000 or more (or equivalent in any currency), whether the payment is made in one instalment or several instalments which are linked.[75] Such businesses are required to register with Her Majesty's Revenue Customs (HMRC) for supervision under the Money Laundering Regulations.[76] Further, one is required to adopt anti-money laundering procedures as well as filling STRs with the National Crime Agency.[77] In South Africa car dealers are specifically listed under Schedule three of the Financial Intelligence Centre Act (FICA)[78]as a reporting institution.[79] By virtue of which they are required to report suspicious and unusual transactions and cash transactions equivalent to or above R 25,000 to the Financial Intelligence Centre.[80] Therefore, if amendments were made to POCAMLA to include provisions similar to England or South Africa car dealers would be brought within the ambit of the Act and have reporting obligations imposed. This would increase the avenues through which detection of potential laundering of piracy proceeds can occur.

4.4.4 Legal professionals

The Financial Action Task Force and various countries have categorised lawyers as DNFBPs.[81] However, under POCAMLA lawyers are omitted with the result that they are under no obligation to report suspicious transactions.[82] This is notwithstanding the potential misuse of their role(s) and hence constitutes a major hurdle for detecting potential laundering of piracy proceeds.

Misuse of lawyers' role(s) is possible by facilitating consumption through the purchase of real estate or using the client's account to undertake the placement of piracy proceeds in the financial

[74] 2007 no 2157. See Her Majesty Revenue and Customs *Money Laundering Regulations: High Value Dealer Registration* (2013) available at *https://www.gov.uk/guidance/money-laundering-regulations-high-value-dealer-registration* accessed 6/2/16.
[75] Regulation 3(12).
[76] Regulation 26(1).
[77] Regulation 7 & 20.
[78] Act no 38 of 2001.
[79] Schedule 3 FICA 2001.
[80] S 28 & 29 FICA 2001.
[81] FATF Standards (n 63) Rule 23 at 20. For example in the United Kingdom S 330 Proceeds of Crime Act 2002 read with schedule IX imposes reporting requirements on solicitors as they are in the 'regulated sector'. In South Africa the Financial Intelligence Centre Act 38 of 2001, chapter three imposes compliance obligations on 'accountable institutions' these include reporting suspicious transactions. Accordingly as per schedule 1 of the Act, advocates are categorised among others as accountable institutions.
[82] The only mention made of lawyers is in S 18 in relation to the legal professional privilege.

system.[83] This is a probable happening in Kenya considering it has been established that Somalian pirates are undertaking consumption of their proceeds in Kenya.[84] Hence failure to specifically include lawyers will militate against the aims of POCAMLA, primarily because, knowingly or otherwise, the potential of abuse for laundering piracy proceeds exists in undertaking their professional duties.[85]

While it is acknowledged that imposing reporting requirements on lawyers may interfere with the legal professional privilege,[86] nevertheless it is important that they are categorised as DNFBPs with reporting requirements. In this regard a possibility is to obligate lawyers to report suspicious transactions or any transactions paid in cash above a specified minimum.[87] Consequently doing so may ultimately increase the instances of detecting potential piracy proceeds.

In conclusion, over all, despite the omissions and loopholes evident in POCAMLA, it is feasible to utilise its provisions to assist in detecting potential piracy proceeds. This can be done through cash declarations, STRs, cash transaction reports and DNFBPs. However, in order to make the Act more effective at discovering possible piracy earnings there is need to fill the gaps as discussed above. Nonetheless, in circumstances where the provisions have been successful at facilitating detection, the next stage in the process is triggered, undertaking an investigation.

4.5 Investigation into possible laundering of piracy proceeds

To achieve POCAMLA's aim of prosecuting for laundering the proceeds of crime, detection alone does not achieve much, it has to be followed up to the logical conclusion of a trial being conducted. To achieve this investigations are necessary, primarily because they facilitate gathering further

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[83] Facilitating consumption by purchasing real estate should be considered holistically since it is a process involving various steps. These include assisting in negotiations and undertaking the entire conveyancing procedure.
[84] See chapter 3 section 3.4.3.
[85] The transactions that may be abused include: buying and selling of real estate; managing client money, securities or other assets; management of bank, savings or securities accounts; organisation of contributions for the creation, operation or management of companies; creation, operation or management of legal persons or arrangements and; buying and selling of business entities. These transactions have been identified by the FATF Standards (n 63) at 20. See also the discussion in *National Crime Agency v Amir Azam & Others* [2014] EWHC 2722 (QB) (31 July 2014) para 80-85; Middelton & Levi 'Let sleeping lawyers lie: Organised crime, lawyers and the regulation of legal services' (2015) *BJC* 1. All these writings above, identify how legal professionals may be misused for money laundering purposes.
[86] See discussion on legal professional privilege in section 4.6.1. The discussion will show that interference with this duty is lawful, where it is established the duty does not exist in a particular situation. On the other hand if established that the duty exists it is protected and cannot be interfered with.
[87] See Cogman *et al Anti-Money Laundering Compliance for Law Firms* (2013). Although the book is written from the United Kingdom perspective it can provide guidance to Kenyan law firms in helping ensure that lawyers understand their obligations under the anti-money laundering regulations and are compliant with them.

evidence to enable prosecution. In this regard for effective investigations to be conducted the relevant authorities need to have the requisite information-gathering and investigatory powers.[88] In undertaking investigations it is acknowledged that there are a variety of tools/methods that can be employed. For example, electronic/cyber technology, covert surveillance, judicial mechanisms and interviews.[89] However, the focus of the discussion will be on judicial means provided under POCAMLA.[90] Accordingly, the investigations into possible laundering of piracy proceeds will be done by the authorities granted investigatory powers and using the judicial investigatory tools available. At the same time these authorities are likely to encounter barriers during investigations. These issues will be considered in turn.

4.5.1 Financial Reporting Centre[91]

The Financial Reporting Centre (hereinafter the Centre) has been in operation since 2012. It is an independent body corporate whose principle objective is to assist in the identification of the proceeds of crime and the combating of money laundering. To achieve this, the Centre has been granted a wide array of powers ranging from receiving and analysing STRs to issuing of guidelines or rules to reporting institutions.[92]

An examination of its functions indicates that it has mainly an administrative role to play in co-ordinating the collection and exchange of information from other institutions both locally and internationally. This is in a bid to ensure compliance with international measures on anti-money laundering. Nevertheless, the Centre plays a crucial role at the point of detecting potential suspect

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[88] Kennedy 'Winning the information wars collecting, sharing and analysing information in asset recovery investigations' (2007) 14(2) *JFC* 372 at 378-392.

[89] Palmer 'Evidence identification and collection' in McDermott (ed) *Investigation and Prosecution of Financial Crime International Readings* (2014) at 310-341.

[90] The primary reason being that consideration of the other tools would be beyond the scope of this work that seeks to consider mainly the legal aspects of dealing with piracy proceeds using money laundering laws.

[91] This is Kenya's form of a financial intelligence unit (FIU). These are national agencies tasked with the receipt and analysis of: (a) suspicious transaction reports; and (b) other information relevant to money laundering, associated predicate offences and financing of terrorism, and for the dissemination of the results of that analysis. Kenya has adopted the administrative model of FIU which primarily is associated with being a 'centralized, independent, administrative authority, which receives and processes information from the financial sector and transmits disclosures to judicial or law enforcement authorities for prosecution. It functions as a "buffer" between the financial and the law enforcement communities.' The Egmont Group *Financial Intelligence Units* available at *http://www.egmontgroup.org/about/financial-intelligence-units-fius* accessed 28/5/15.

[92] S 24 & 24A POCAMLA. See also S 50 Finance Act 2015 in Special Issue *Kenya Gazette supplement no 155 (acts no 14)* of 15 September 2015.

transactions involving piracy proceeds. This is based on the fact that reporting institutions are required to forward reports to the Centre on certain cash or suspicious transactions.[93]

The Centre is expected to scrutinise these reports and identify ones that indicate the occurrence of money laundering and that need to be investigated further.[94] To facilitate this the Centre has been granted partial investigative powers as it can apply to court for search and seizure warrants or monitoring and tracking orders.[95] However, it can only exercise these powers against reporting institutions, their officers or employees.[96] Hence, by undertaking this partial investigation the Centre plays a pivotal role as it is able to pin point instances that warrant further investigation.

Upon carrying out a partial investigation if it establishes reasonable grounds to suspect that a transaction involves the proceeds of crime or money laundering, the Centre is to forward the matter for full investigation to the appropriate law enforcement authorities or intelligence agency.[97] This backs the conclusion that the Centre has only partial investigative powers,[98] since it has no authority to conduct a full investigation. Nonetheless the Centre's limited investigatory role is essential as it provides the starting point to conducting a full money laundering investigation. The downside to this is it leads to the Centre's initial involvement at the beginning of an investigation but prevents participation to the logical conclusion. Yet its involvement may be beneficial throughout the investigation process.

There are other issues that could hamper the Centre's effectiveness in achieving its mandates. First, although according to the Act the Centre is an independent body corporate, its budget comes from appropriations from the consolidated fund and government grants.[99] Having to rely on government funds may hamper its functioning should sufficient funds not be allocated to it, to meet costs such as hiring enough staff. Another issue that may hamper its functioning is political interference. This may arise by way of the appointment of its director and deputy director, who head the institution per advice from the Anti-Money Laundering Advisory Board (hereinafter AMLAB).[100] Both

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[93] See discussion in section 4.3.2.
[94] S 50(a) Finance Act 2015 in Special Issue *Kenya Gazette supplement no 155 (acts no 14)* of 15 September 2015.
[95] See discussion in section 4.5.4.
[96] S 37 POCAMLA.
[97] S 50(b) Finance Act 2015 in Special Issue *Kenya Gazette supplement no 155 (acts no 14)* of 15 September 2015.
[98] S 24(d) POCAMLA.
[99] S 40 POCAMLA.
[100] S 49 POCAMLA.

individuals are recommended by the Board but can only take up their positions after endorsement by parliament. This can potentially drag the Centre into parliamentary politics.[101]

Additionally, though the appointment of some AMLAB members is automatic by virtue of the positions they hold, issues would likely arise in relation to the two individuals appointed from the private sector.[102] Their appointment is likely to be contested and politicised as is already evidenced.[103] Further, while the Centre, through its director, is given powers to appoint its own staff, this has to be done in consultation with and approval of the cabinet secretary and the State Corporations Advisory Committee.[104] This may contribute to unwarranted interference and delays in appointing staff. Cumulatively, the issues considered above indicate that while the Centre is said to be an independent body, this doesn't seem to be the case entirely. This could possibly hinder it from effectively implementing its mandate.

4.5.2 The Office of the Director of Public Prosecutions

The Director of Public Prosecutions (hereinafter DPP) has no authority to conduct any investigation and thus *strictu sensu* cannot be considered an investigatory authority under POCAMLA. However, the Office of the Director of Public Prosecutions Act[105] gives the DPP powers to direct the Inspector-General of the National Police Service to investigate any information or allegation of criminal conduct.[106] Hence, it is right to conclude that despite not

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[101] S 25 POCAMLA. The Kenyan parliament is notorious for intrigues when it comes to the appointment of individuals to key positions and where its approval is needed. At times political considerations and not expertise take center stage. See for example Okello 'Ensure equity in public appointments' *The Standard* 22 January 2015. See also Kenya National Assembly Official Record (Hansard) for 10 May 2012 at 28 to 52; Kenya National Assembly Official Record (Hansard) for 1 February 2011 at 24 to 54. These parliamentary debates related to parliament's approval of individuals to the positions of Attorney General and Director of the Ethics and Anti-Corruption Commission. The records clearly indicate that parliament is not removed from political considerations and affiliations in their decisions instead of concentrating on qualifications and expertise. This being the case may mean the persons appointed to the board may not be because of their expertise but due to political considerations.

[102] The AMLAB consists of the Permanent Secretary in the Ministry for the time being responsible for finance; the Attorney-General; the Governor of the Central Bank of Kenya; the Commissioner of Police; the Chairman, Kenya Bankers' Association; the Chief Executive Officer, Institute of Certified Public Accountants of Kenya; two other persons appointed by the Minister from the private sector who shall have knowledge and expertise in matters relating to money laundering.

[103] Anyanzwa 'Trouble brews at Kenya's financial intelligence unit' *The East African* 13 December 2014. The Board has been in operation for less than five years yet the reappointment of the current two members is already causing a storm and there is talk of amending the statute so as to reconstitute the Board.

[104] S 31 POCAMLA. S 27 of the State Corporations Act Cap 446.

[105] Act no 2 of 2013.

[106] S 5(1) Act no 2 of 2013. The authority having the primary powers to investigate all types of crimes in the country is the Kenya Police Service as per S 24(e) of the National Police Service Act Cap 84.

being an investigatory authority, the DPP is important as he has the powers to instigate investigation into criminal proceeds linked to piracy.

Interestingly, section 122 POCAMLA permits the Attorney General (hereinafter AG) to direct for a specific investigation where there is reason to believe an individual has information relevant to the commission of an offence under the Act.[107] Nonetheless, it is argued that the DPP and not only the AG, has the power to order an investigation of an offence under POCAMLA. This is premised on the AG having primarily an advisory role,[108] while the DPP has powers to undertake prosecutions on behalf of the government and to direct for an investigation to be carried out.[109] Therefore, as regards investigations into suspected piracy proceeds, the DPPs key role is that he may direct for an investigation to be done. However, ultimately it is the Kenyan Police Service that will undertake an investigation as per the DPP's request, as the authority empowered to do so under Kenyan laws.[110]

4.5.3 The Assets Recovery Agency

One of the most important authorities involved in the investigation of money laundering is the Assets Recovery Agency (hereinafter the Agency), which is a semi-autonomous body under the AG's Office.[111] The Agency's mandate is to implement POCAMLA provisions on civil and criminal forfeiture.[112] It has been granted all powers necessary and expedient for the performance

[107] 'Whenever the Attorney-General has reason to believe that any person may be in possession of information relevant to the commission or intended commission of an alleged offence in terms of this Act, or any person or enterprise may be in possession, custody or control of any documentary material relevant to such alleged offence, the Attorney-General may, prior to the institution of any civil or criminal proceeding, under written authority direct a specific investigation.'

[108] As per S 156(4-5) of the Constitution the powers of the Attorney General are enumerated as: (*a*) is the principal legal adviser to the Government; (*b*) shall represent the national government in court or in any other legal proceedings to which the national government is a party, other than criminal proceedings; and (*c*) shall perform any other functions conferred on the office by an Act of Parliament or by the President. (5) The Attorney-General shall have authority, with the leave of the court, to appear as a friend of the court in any civil proceedings to which the Government is not a party.

[109] S 157(6) (a) & 157(10) Constitution. The DPP institutes and undertakes criminal proceedings against any persons apart from proceedings before a court martial. Additionally S 18 of Act no 2 of 2013 provides: 'Where the Office has conducted criminal proceedings under any law in force and as a result of the proceedings a person becomes liable to pay an amount to the Government or property is forfeited to the Government under a court order, the Office shall take any further proceedings or steps that may be required to recover the amount or enforce the recovery, forfeiture order.' This gives the DPP powers to undertake forfeiture proceedings.

[110] S 243(1) Constitution. The National Police Service consists of the Kenya Police Service and Administration Police Service. However, it is only the Kenya Police Service that is given the powers to investigate crimes as per S 24(e) of the National Police Service Act Cap 84.

[111] S 53(1) POCAMLA.

[112] S 54(1) POCAMLA.

of this mandate.[113] To this end, the Agency is given both investigative and prosecutorial powers. As regards its investigatory capacity, the Agency is to cooperate with other authorities that also have investigative and prosecutorial powers.[114]

In addition to cooperating with other authorities, section 53(4) gives the AG power to second staff to the Agency to undertake investigations and prosecutions. This is desirable as the Agency may not have sufficient staff with all the relevant skills. Furthermore, considering that under Kenyan law, the Kenyan Police Service has the general powers to investigate all types of crimes in the country,[115] cooperation between the Agency and other authorities is necessary. This collaboration will facilitate timely and effective information sharing, which in turn will ensure comprehensive investigations are undertaken and completed.

As stated above the Agency is semi-autonomous as it is under the AG's Office. This means that the Agency has no independent budget but is reliant on that of the AG's Office. Additionally to increase its manpower the Centre is also to depend on secondment of staff from the said Office. Therefore, this points to the Centre not being in total independent control over its resources. This may lead to interference with the Agency in performing its mandate; whereas research indicates that the success of a body such as the Agency is dependent on the availability of resources in terms of manpower and funds.[116] Consequently, it is contended that for Kenya's Agency to effectively carry out its mandate, it should be an autonomous authority. This would primarily enable the Agency have control over its own budget, resource allocation and performance of its duties without interference.

Further, granting the Agency the *locus standi* to undertake asset forfeiture may mislead one into thinking that the Agency can work autonomously on such cases. This is because working independently for the Agency may be difficult since it cannot call for any investigation as only the DDP or AG is authorised to do so as discussed earlier.[117] Furthermore, the Agency is a semi-autonomous body under the AG's office, implying that it is to an extent subject to the AG.

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[113] S 54(2) POCAMLA.
[114] S 55 & S 123 POCAMLA. These include the Director of Public Prosecution's Office and the Kenya Police Service.
[115] National Police Service Act Cap 84.
[116] Deleanu 'FIU's in the European Union – facts and figures, functions and facilities' in Unger *et al* (eds) *The Economic and Legal Effectiveness of the European Union's Anti-Money Laundering Policy* (2014) at 97-124.
[117] See sections 4.5.2.

Considering the earlier discussion on the functions and powers of the DPP[118] it would be preferable that, the Agency be a semi-autonomous agency under the DPP's office, instead of the AG. This is a viable compromise or alternative to the Agency having full autonomy and justification for this is as substantiated hereunder.

Bearing in mind the functions and powers of the DPP and the Agency point to the possibility of a more effective working relationship. This is in relation to undertaking the identification, tracing, freezing, seizure and confiscation of proceeds or instrumentalities of crime. The AG under Kenyan law has more of an advisory role or representing the government in prosecutions involving it.[119] On the other hand, the DPP has the general powers of prosecution and can instruct the National Police to begin investigations. Accordingly, in a bid to carry out its mandate the Agency would need to work more closely with the DPP. Simply, closer cooperation between the DPP and the Agency would prove to be more effective than between the AG and the Agency.

Cooperation between the DPP and the Agency is necessary from the point of pursuing investigations to filing suit as well as deciding whether to lay charges for laundering piracy proceeds offences or commence forfeiture proceedings. This integrated approach would promote effective utilisation of available resources, cohesion throughout the process and avoid duplication thereby increasing the chances of success in prosecutions and promoting attainment of POCAMLA's aim. For example, after forwarding a case to the National Police Service for investigation, the DPP may discover that the evidence available is not sufficient to pursue criminal charges. Nevertheless consider that in the circumstances civil forfeiture is favourable, yet *locus standi* in relation to civil forfeiture lies entirely with the Agency. Therefore, in such a case, cooperation between the Agency and DPP from the beginning would be beneficial as it would facilitate efficiency and speed in decision making.

In concluding this section, it is apparent that though POCAMLA provisions call for sharing of information and cooperating with investigations, it is evident that different authorities may separately undertake or trigger investigations. The implication of not having a central investigatory agency dealing specifically with offences under the Act is twofold. It could lead to buck-passing and a wait-and-see attitude between the relevant authorities or agencies. Furthermore, it could lead

[118] Ibid.
[119] S 156(4) Constitution.

to conflicts of interest, such as determining the lead agency in a particular investigation which could jeopardise investigations.[120] It is highly unlikely that a central investigatory agency will be established anytime soon considering the legal hurdles, bureaucracy and costs involved.[121] Thus, in the interim the authorities discussed above will have to foster effective information sharing approaches amongst themselves and this can be achieved by signing of memoranda of understanding.

Further, investigations may be hampered as authorities may not have the requisite resources and manpower to effectively undertake investigations that can be technical in nature. Ultimately, these limitations would have an impact on the investigation of suspected piracy proceeds. Time may be wasted in the process facilitating further distancing of piracy proceeds, and preventing tracing and eventual confiscation. A short term solution to facilitating effective investigation would require agencies to efficiently and timely share information and staff and cooperate in investigations. This can be achieved by entering into memoranda of understanding to establish official partnerships on how information sharing and operations are to be conducted amongst themselves.

4.5.4 Judicial evidence gathering tools granted to investigatory authorities

Despite the fragmented investigatory approach, as identified above, the authorities granted the right are bestowed with the requisite evidence gathering powers under part ten of POCAMLA. These consist of production orders; property tracking and monitoring orders; customer information orders; search and seizure warrants; and monitoring orders. The authorities may file, in court, applications seeking such orders. If granted, the orders permit them to access the required information from individuals or corporate bodies.

Gathering of this evidence is necessary as it helps in establishing if it is proper to proceed with prosecution and is also needed for adducing during trial. The discussion hereunder will highlight the different orders investigatory authorities can apply for in court to assist in evidence collection, in relation to piracy proceeds. This is motivated by the fact that some of the orders are unique to money laundering investigations and will feature in other discussions in the chapter, hence the

[120] See Rider 'Intelligent investigations: The use and misuse of intelligence- a personal perspective' (2013) 20(3) *JFC* 293 for a discussion on the need for having a specialised intelligence unit in money laundering and financial crime investigations and proper utilisation of evidence gathered.

[121] Establishment of such an agency will require approval of parliament, which is likely to be a protracted process and there are also cost implications.

need to be aware of them. Additionally, some of these orders can lead to interference with an individual's human rights and thus are a component of the later discussion in section 4.20.

The purpose of a production order is to require the person(s), against whom it is made to provide the relevant documents that will facilitate the identification, locating or quantifying tainted property.[122] A search warrant differs from a production order in that the former should be issued when the document(s) sought cannot be identified with sufficient particularity to enable the request and granting of a production order.[123]

The property tracking and monitoring order, though similar to the production order can only be applied for by the Financial Reporting Centre against a reporting institution.[124] Such an application is made to the high court and seeks to enforce the delivery of any document relevant to the identification, locating or quantifying property that is the proceeds of crime.

A customer information order is similar to a property tracking and monitoring order as it is directed at a reporting institution but differs in two ways. First, it can be applied for by a number of individuals referred to as authorised officers.[125] Second, the order directs a reporting institution to disclose information obtained by it regarding transactions in relation to a particular customer's account. Section 125(1-4) gives guidance on what the court should consider when issuing such an order, and what the order when made should specify.[126] Overall, this order seeks to override the duty of confidentiality that a bank has towards its customer.[127]

[122] S 2 POCAMLA 'tainted property' in relation to an offence means (*a*) any property used in, or in connection with, the commission of the offence; (*b*) any proceeds of the offence; or (*c*) any property in Kenya which is the proceeds of a foreign offence in respect of which an order may be registered, and when used without reference to a particular offence means tainted property in relation to an arrestable offence.'

[123] S 107(d) POCAMLA.

[124] S 38 POCAMLA.

[125] S 2 POCAMLA 'authorised officer' means (*a*) a police officer; (*b*) an officer of the department of the Kenya Revenue Authority for the time being responsible for matters relating to customs; (*c*) Agency Director; or (*d*) any person or class of persons designated by the Minister as an authorised officer to perform any function under this Act.

[126] S 125(3) 'A monitoring order shall not be issued unless the court is satisfied that there are reasonable grounds for suspecting that the person in respect of whose account the order is sought has (*a*) committed or was involved in the commission, or is about to commit or be involved in the commission of, a serious offence; or (*b*) benefited directly or indirectly, or is about to benefit directly or indirectly from the commission of a serious offence. (4) A monitoring order shall specify (*a*) the name or names in which the account is held or believed to be held; and (*b*) the information that the institution is required to give.'

[127] See discussion in section 4.6.2 and 4.6.3.

However, unlike the search and seizure warrant to which strict guidelines are required as regards application and content of the final order,[128] for the production order, monitoring and customer order, no guidelines are provided to guide the court in its decision making. Similarly, after granting of an order, the timeframe within which the documents should be produced is not given. This implies that it is at the discretion of the court to ensure prescription of a reasonable time within which the order should be complied with. Consequently, if no duration is indicated, the order may not be fulfilled within a reasonable time. This may render it redundant in facilitating identification, locating, quantifying piracy proceeds or facilitating access to relevant evidence. This could eventually be prejudicial to gathering sufficient evidence needed to prove laundering of piracy proceeds as well as the identification and preservation of property that is the proceeds of piracy.

Though the use of the various orders espoused above is necessary in facilitating investigations into possible laundering of piracy proceeds, their utilisation may lead to interference in an individual's right to privacy. This necessitates balancing the rights of the individual against those of justice. Further discussion on this human rights aspect will be done later.[129] For now, it suffices to state that balance can be achieved by providing guiding principles that the court should consider when granting such orders. This is to ensure that orders are granted on justifiable grounds and their execution is done in a manner that seeks to minimise intrusion into an individual's rights.

In conclusion, utilisation of the various orders discussed above will definitely assist investigatory authorities not only gather evidence but also in tracing proceeds of piracy and the perpetrators involved. The downside to this being that the tools are applicable within Kenya only. Yet, considering that money laundering is a transnational offence and piracy proceeds may be located in other jurisdictions, investigatory authorities may be forced to seek evidence to be found in other jurisdictions. Thus to facilitate this it is necessary to ensure reciprocity in information gathering and investigations conducted by Kenyan agencies abroad or vice versa. This is provided for under the mutual legal assistance provisions considered hereunder.

[128] S 107(3) POCAMLA; 'A court *shall not* issue a warrant under subsection (2) *unless it is satisfied* (*a*) a production order has been given in respect of the document and has not been complied with; or (*b*) a production order in respect of the document would be unlikely to be effective; or (*c*) the investigation for the purposes of which the search warrant is being sought might be seriously prejudiced if the police officer does not gain immediate access to the document without any notice to any person; or (*d*) the document involved cannot be identified or described with sufficient particularity to enable a production order to be obtained.' [Emphasis mine].

[129] See further discussion on this in section 4.20.

4.5.5 Mutual legal assistance[130]

Piracy proceeds or evidence targeted by investigations may be located within or outside Kenya's jurisdiction. To enable access to such information, an effective investigation strategy should facilitate the sharing of information between various agencies locally and internationally. Specifically, in money laundering investigations, when seeking relevant information available outside the jurisdiction, such assistance is provided through what is termed as mutual legal assistance (hereinafter MLA).[131] Under POCAMLA, this is facilitated through the Financial Reporting Centre and the AG's Office.

The powers of the Financial Reporting Centre in this regard are limited compared to those of the AG. The Centre can only share information it already has with other financial reporting centres.[132] The AG has wider powers and is the central authority in facilitating MLA as provided under sections 114-119 POCAMLA and the Mutual Legal Assistance Act.[133] Both acts grant the AG numerous powers in this regard.[134] Thus, requests for MLA from Kenyan investigatory agencies have to be channelled through the AG or the Financial Reporting Centre.

Utilisation of these provisions by the investigatory agencies will facilitate access to information that is relevant to their investigations on laundering or forfeiture of piracy proceeds. Nonetheless, an issue of concern that may arise is the timeliness with which the requests for information or other

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[130] Mutual legal assistance (MLA) 'is the provision of assistance by one state to another in the investigation and prosecution of crime.' MLA is broader than just extradition which is a facet of it. The globalisation of crime especially serious crimes such as organised crime, terrorism and trans-national crime necessitates states to work together in combating these criminal activities. Nicholls *et al Nicholls, Montgomery, and Knowles on The Law of Extradition and Mutual Assistance* (2013) at 311.

[131] See article 7(1) United Nations Convention against Illicit Traffic in Narcotic Drugs & Psychotropic Substances 28 *ILM* 493 (1989); article 18 United Nations Convention against Transnational Organised Crime 2225 *UNTS* 209; FATF *International Standards on Combating Money Laundering and the Financing of Terrorism & Proliferation the FATF Recommendation* (n 63) Recommendation 37. All encourage countries to have in place treaties, arrangements or other mechanisms to enhance mutual legal assistance in relation to money laundering related investigations, prosecutions and related proceedings.

[132] S 24(1) POCAMLA.

[133] S 5 Mutual Legal Assistance Act no 36 of 2011, Cap 75A. See Stephenson *et al Barriers to Asset Recovery an Analysis of the key Barriers and Recommendations for Action* (2011) at 79-80 available at *https://www.unodc.org/documents/corruption/Publications/StAR/StAR_Publication_-_Barriers_to_Asset_Recovery.pdf* accessed 20/8/15. For a discussion on the importance of having a central authority to handle mutual legal assistance matters.

[134] These include the powers to authorise the obtaining and transferring of evidence relating to an investigation. This is by way of authorising the transfer of persons to assist with an investigation to another country, applying for and executing search and seizure warrants on behalf of another country and processing of enforcement orders through the Kenyan courts.

assistance will be handled.[135] There is a possibility that response to a request for MLA in relation to piracy proceeds may not be dealt with expeditiously.

Consequently, this may delay investigations or prove redundant when fulfilled for example where the targeted assets have already been dissipated or the evidence has grown stale.[136] Additionally, despite having these provisions, it may not be helpful in seeking information if the property is held in a secrecy jurisdiction,[137] considering that the authorities in such jurisdiction may not be willing to provide the information sought. For example, financial institutions in secrecy jurisdictions are known to actively protect the identity of their clients and information on their accounts.[138]

Further, despite Kenyan law providing a mechanism for honouring MLA requests a potential weakness does arise in its utilisation. This challenge may occur if countries to which Kenya sends its requests for MLA and which do not have in place legislation to facilitate the process. This is a potential barrier in accessing information relevant to investigations and prosecutions into proceeds of crime that are undertaken. With specific reference to Somailan piracy proceeds it is not currently possible to ascertain if Kenya has entered into agreements with specific countries in a bid to facilitate investigation and prosecutions involving these proceeds. Presently, a viable starting point is the ratification by both countries of the Intergovernmental Authority on Development (IGAD) Convention on Mutual Legal Assistance in Criminal Matters, to which they are participating member states. On the other hand, it would be appropriate for Kenya to enter into agreements with other countries where piracy proceeds are being laundered to, as this will make easier the honouring of Kenya's MLA requests. Additionally, in order to facilitate easier handling of MLA requests it is suggested that the AG develop guidelines and forms. These would help in gathering the relevant information that is required for such requests to be fulfilled and provide instruction on how each request is handled.

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[135] Stephenson *et al* (n 129) at 90-91 on the challenges caused by unreasonable delays in mutual legal assistance responses.

[136] Ibid at 90.

[137] Generally these are states/territories in which the identity of the controlling bank accounts or corporations is readily concealed. See Christensen 'The looting continues: Tax havens and corruption' (2011) 7(2) *CPIB* 177 at 183; Kurdle 'Did blacklisting hurt the tax havens?' (2009) 12(1) *JMLC* 33 at 34-37.

[138] McDermott 'Investigation and recovery of proceeds of crime in "offshore" jurisdictions: A case study of the Cayman Islands' in McDermott (ed) *Investigation and Prosecution of Financial Crime International Readings* (2014) at 148.

In conclusion, successful prosecution for laundering piracy proceeds or forfeiture is partly determined by the quality of evidence gathered. Thus, relevant authorities need to conduct fruitful investigations that yield relevant evidence which would assist in proving laundering or establishing the existence of piracy proceeds in a form capable of being recovered.[139] This would necessitate development of an investigation strategy, anticipating what type of evidence is likely to exist and utilising appropriate resources and tools to obtain the information/intelligence.[140] Such tools include electronic technology, judicial tools, covert surveillance, interviews and mutual legal assistance from other jurisdictions.[141]

Utilising these tools would facilitate the identification and harvesting of good information/intelligence, after which it should be probed, understood and contextualised.[142] It is preferable that the investigation remains confidential as long as possible to avoid tipping off the target and potentially having the property concealed farther.[143] However, it is unlikely that an investigation will be smooth-sailing from inception to completion. The probability is that various barriers will be encountered in the process. The discussion hereunder will consider these barriers.

4.6 Barriers to investigations involving piracy proceeds

Barriers are in essence impediments to investigative authorities accessing information that assists in establishing and proving laundering or identifying and tracing proceeds of piracy as well as the perpetrators involved. The main barriers that may be encountered include: legal professional privilege, banking secrecy, contractual obligations, corruption, transparency, data protection laws[144] and human rights issues.[145] The first five issues will be addressed in turn. However, as

[139] Palmer 'Developing a case theory' in McDermott (ed) *Investigation and Prosecution of Financial Crime International Readings* (2014) at 283-297.

[140] FATF *Operational Issues Financial Investigations Guidance* (2012) at 8 available at *http://www.fatf-gafi.org/media/fatf/documents/reports/Operational%20Issues_Financial%20investigations%20Guidance.pdf* accessed 26/8/15; Edwards 'The management of high-profile cases by following major case protocol' in McDermott (ed) *Investigation and Prosecution of Financial Crime International Readings* (2014) at 261-281.

[141] FATF *Operational Issues Financial Investigations Guidance* (n 140) at 10-11, 17-19 & 25-27; Bell 'Discretion and decision making in money laundering prosecution' (2001) 5(1) *JMLC* 42 at 42 Kennedy (n 87) at 394.

[142] Kennedy (n 87) at 372-373 & 394. Palmer 'Evidence identification and collection' in McDermott (ed) *Investigation and Prosecution of Financial Crime International Readings* (2014) at 310-341.

[143] Cox (n 47) at 261.

[144] The aspect of data protection laws will not be pursued for the following reasons: At present Kenya has a Data Protection Bill 2013 that is pending in parliament. If passed into law it may provide a challenge to investigations as affected individuals may seek to invoke provisions of the law. For example, there are provisions relating to providing information held by banks which is relevant for investigations under POCAMLA. However, it is contended that in the Kenyan context the bill is not a serious threat to application of POCAMLA provisions. This is premised on the provisions permitting exemptions in application of the law such as the proposed S 6 & 9.

[145] Kennedy (n 87) at 373.

human rights have an overarching bearing on the operation of POCAMLA, an independent discussion will be focused on separately at the very end of the chapter.[146]

As stated earlier the Kenyan courts have not yet given the Kenyan interpretation on various issues in relation to application of POCAMLA. Thus to enrich the discussion hereunder, the position of the law and judicial interpretation in England, on the relevant issues, will be laid down and thereafter consideration of the Kenyan law will follow. It is intended that the case law from England can fruitfully be used by the Kenyan courts as having persuasive value and assist in interpretation and application of POCAMLA's provisions.

4.6.1 Legal professional privilege (client-advocate relationship)[147]

Further to the discussion under section 4.4.4, advocating for the inclusion of advocates as reporting agents under POCAMLA, the legal profession can be of further assistance to investigatory agencies. This is in terms of providing relevant information, including confidential information, to investigators that they are aware of as a result of the client-advocate relationship.[148] In this regard, section 17 POCAMLA overrides any obligation as to secrecy or other restriction on disclosure of information whether imposed by law or otherwise. Generally, this suggests that advocates can be obliged to disclose confidential information that they are aware of as a result of the client-advocate relationship. Accordingly, consideration of legal professional privilege as a potential barrier to piracy proceeds investigations is necessary. This is because some situations will rightfully be covered by this protection however, there is also the probability that the converse is possible. Thus the challenge in relation to Kenya will be the potential number of litigations. Mainly, as advocates contend that various information sought by investigatory authorities, falls under the protection of legal professional privilege. Consequently, the potential of such claims interfering with

[146] See section 4.20.

[147] POCAMLA specifically refers to client-advocate relationship. This is based on the fact that under the Kenyan judicial system and legal profession, the term used is advocate to refer to an individual competent under law to represent a client in legal proceedings. There is no two tire system of barristers and solicitors as in the United Kingdom. See S 9 Advocates Act Cap 16.

[148] See FATF *Money Laundering and Counter Terrorist Financing Vulnerabilities of Legal Professionals* (2013) at 21-22 available *at http://www.fatf-gafi.org/media/fatf/documents/reports/ML%20and%20TF%20vulnerabilities%20legal%20professionals.pdf* accessed 28/1/16.

investigations necessitates consideration of the matter in seeking to establish how it should be properly addressed by the courts.[149]

1.1.1.1 Legal professional privilege under English Law

Legal professional privilege is a rule relating to the confidentiality of legal communications. It is a derogation from the general rule that all evidence is both admissible and compellable before a court.[150] It applies to both the advocate and his client, meaning that though both are competent and compellable witnesses to give oral or documentary evidence, certain communications though admissible are not compellable from them.[151] The rationale for this privilege is to promote frank communication between an advocate and client. So as to enable the client obtain skilled advice about the law, without fear that any communications made by him can later be disclosed and used to his prejudice.[152]

Professional privilege is categorised into two: legal advice and litigation privileges. Legal advice privilege covers communications between legal professionals and clients seeking or giving advice relating to the client's legal rights and obligations.[153] As laid down in *Balabel v Air India*[154] advising the client includes explaining the law and informing them what should prudently and sensibly be done in the relevant legal context.[155] It also covers communication that does not contain advice on matters of law or construction, provided that they are directly related to the performance of the advocate's professional duty as a legal adviser as also enunciated in *Minister v Priest*[156] and reiterated in *Three Rivers District Council & Others v Governor & Company of the Bank of England* (hereinafter *Three Rivers No 6 HL*).[157] Litigation privilege covers communications at the stage when litigation is in progress, pending or in contemplation. The communication must have

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[149] See ibid at 19-22 where the report highlights the impact of legal professional privilege on money laundering investigations.
[150] Auburn *Legal Professional Privilege law and Theory* (2000) at 1; Thanki (ed) *The Law of Privilege* (2011) at 2.
[151] Auburn (n 146) at 1.
[152] Thanki (n 146) at 4; Auburn (n 146) at 65-75; *Balabel v Air India* [1988] Ch 317 (16 March 1988) at 507.
[153] See Thanki (n 146) at 41- 126 for a comprehensive discussion on legal advice privilege. See also *Three Rivers District Council & Others v Governor & Company of the Bank of England* [2004] UKHL 48 (11 November 2004) para 10. The case is also referred to as *Three Rivers No 6 HL* and extensively addresses issues on professional legal privilege.
[154] [1988] Ch 317 (16 March 1988) (n 148).
[155] *Balabel v Air India* [1988] (n 148) at 330.
[156] [1930] AC 558 (20 March 1930).
[157] *Minister v Priest* [1930] (n 152); *Three Rivers No 6 HL* (n 149) para 111; Thanki (n 146) at 63-103.

been made for the sole or dominant purpose of conducting litigation and the litigation must be adversarial, not investigative or inquisitorial.[158]

The court in *Three Rivers No 6 HL* cautioned that the privilege would not attach in a situation where though a client-advocate relationship is formed, there is no relevant legal context to justify privilege attaching.[159] Examples of this include where the relationship is established for purposes of advising the client on extra-legal matters relating to investment policy, finance policy and other business.[160]

1.1.1.2 Pleading and establishing legal professional privilege under English law

The established principle of law is that who claims privilege - legal advice or litigation - has to establish this right.[161] The privilege belongs to the client not his advocate and therefore only the client can invoke it, unless the advocate is acting on behalf of the client.[162] Consequently, the client or the advocate acting on his behalf has to plead legal professional privilege.

To determine if privilege applies the court has to apply an objective test as highlighted in *Three Rivers No 6 HL*.[163] This entails considering the 'occasion on which the communication takes place and the purpose for which it takes place';[164] consequently, it should make it reasonable to expect privilege to apply.[165] Case law points to the fact that if it is established that privilege applies in a particular circumstance, document(s) or communication relating to that context qualify for legal privilege, the privilege is absolute.[166] That is, once it attaches it remains and cannot be overridden by any greater public interest, the only exception is if waived by the client to whom it belongs or overridden by statute.[167]

1.1.1.3 Legal professional privilege under Kenyan law

The Kenyan legal position concerning legal professional privilege is based on English law vide section 3(1) Judicature Act that permits application of English Common Law in Kenya and has

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[158] *Three Rivers No 6 HL* para 102; Thanki (n 146) at 144- 161.
[159] *Three Rivers No 6 HL* (n 149) para 38.
[160] *Three Rivers No 6 HL* (n 149) para 38.
[161] *Waugh v British Railways Board* [1980] 2 ALL ER 1169 (12 July 1979) at 1176.
[162] *Three Rivers No 6 HL* (n 149) para 25; Thanki (ed) *The Law of Privilege* (2011) at 17.
[163] *Three Rivers No 6 HL* (n 149) para 38.
[164] *Three Rivers No 6 HL* (n 149) para 38; Thanki (n 146) at 121-125 & 152-160.
[165] *Three Rivers No 6 HL* (n 149) para 38.
[166] *R (Morgan Grenefell Ltd) v Special Commissioner of Income Tax* [2002] UKHL 21 (16 May 2002); Thanki (n 146) at 14-15.
[167] Thanki (n 146) at 14 & 32-33; *Three Rivers No 6 HL* (n 149) para 25.

been upheld by Kenyan courts.[168] Legal professional privilege is also safeguarded under section 134(1) Evidence Act. In relation to this principle, POCAMLA contemplates a situation where an advocate is required to disclose information available to him in respect of any transaction or dealing. This relates to a matter under investigation under the Act, pursuant to an application made to a judge of the High Court. Just as under English law, the application of privilege is restricted to communication in two instances: i) communication intended for giving advice in the course and for purposes of the professional employment of the advocate; and ii) communication for the purpose of any legal proceedings on behalf of the client, that is the legal advice and litigation privilege.[169] Similarly under POCAMLA, once this privilege is granted, it is absolute. The Act is categorical in stating that client advocate privilege cannot be overridden if it exists.[170] Under such circumstances, an advocate is under no obligation to comply with such an order and can lawfully decline to disclose information protected by this privilege.

As stated earlier, the dilemma is potentially to be in situations where the privilege is pleaded and it is not openly clear that it exists. The courts will therefore be called upon to establish the existence of the privilege or otherwise. Predictably Kenyan courts would be in the delicate position in terms of balancing and protecting legal privilege, while at the same time giving life to the aims of POCAMLA. Bearing in mind, that advocates are placed in a prime position which allows them to be aware of matters relating to laundering of piracy proceeds.[171] Hence in dealing with these situations the Kenyan courts may take guidance from the persuasive decisions of the English courts.

However, it is important to note that though section 18(4) POCAMLA provides that legal professional privilege cannot be overridden this protection applies strictly only to privileged information and does not extend to all confidential communications between advocate and client. This is primarily because confidentiality is a wider concept than privilege which is more restricted.[172] Confidentiality relates to communication made in confidence, while legal

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[168] *King Woolen Mills & Another v Kaplan & Stratton Advocates* civil appeal no 55 of 1993; [1993] KLR 273; [1993] eKLR (16 December 1993); *Glencore Energy UK Ltd v Kenya Pipeline Company Ltd* civil case no 244 of 2009 [2010] eKLR (28 October 2010).

[169] S 18(2) POCAMLA. Legal professional privilege also protected under S 134(1) Evidence Act Cap 80. See also *King Woolen Mills & Another v Kaplan & Stratton Advocates* [1993] (n 164); *Glencore Energy UK Ltd v Kenya Pipeline Company Ltd* [2010] (n 164).

[170] S 18(4) POCAMLA.

[171] See discussion in section 4.4.4.

[172] See Aurban (n 146) at 57-64; Thanki (n 146) at 1.

professional privilege attaches only if the communication is made for purposes of obtaining legal advice or for litigation purposes.[173] Therefore, communication between a client and an advocate may be made in confidence making it confidential but, this does not necessarily make it privilege if its main purpose was not obtaining legal advice or for litigation purposes. Accordingly, advocates would be expected to cooperate with investigatory agencies and give confidential information, and can only lawfully decline to give legally privileged information.

4.6.2 Banking secrecy (banker's duty of confidentiality)

As noted in the previous discussion, section 17 POCAMLA overrides any secrecy or other restrictions on disclosure of information imposed by any law, common law or any agreement. Therefore, strictly under the Act, the duty of confidentiality that a bank owes to its customer is overridden and does not apply. This implies that no liability for breach of the duty can arise pertaining to disclosure of any information in compliance with any obligations under the Act. Nonetheless, the reporting obligations imposed on financial institutions will interfere with the duty of confidentiality and the right to privacy. This can potentially arise due to the lack of guidance and moratorium provisions for banks to rely on after filing STRs and provides the possibility for litigation. The litigation may arise in terms of the bank being accused of not honouring its duty of secrecy and contractual obligations. These issues will be considered in turn.

4.6.2.1 The bank's duty of secrecy under English law

The banker's duty of confidentiality has its origins in English Common Law in the case of *Tournier v National Provincial and Union Bank of England*[174] and confirmed in *Lipkin Gorman v Karpnale Ltd.*[175] In these cases the court held that bank secrecy was a legal duty that is limited and arising out of the contract between the customer and the bank.[176] The duty applies to all customers of a bank and commences upon the opening of an account and does not cease immediately upon closure of the account, as the information gained while the account was operational remains confidential.[177] Hence the banker cannot divulge to third parties, either the state of the customer's account, or any of his transactions with the bank or any information relating to the customer and

[173] Millard & Vergano 'Hung out to dry? Attorney-client confidentiality and the reporting duties imposed by the Financial Intelligence Centre Act 38 of 2001' (2013) *Obiter* 389 at 404 – 406; Thanki (n 146) at 6.
[174] [1924] 1 KB 461 (17 December 1923).
[175] [1989] 1 WLR 1340 (19 May 1989).
[176] *Tournier v. National Provincial and Union Bank of England* [1924] (n 170) at 472.
[177] *Tournier v. National Provincial and Union Bank of England* [1924] (n 170) at 473. Ellinger *et al Ellinger's Modern Banking Law* (2011) at 176-179.

his affairs.[178] This is information acquired through the keeping of his account as well as from other sources.[179] However, if disclosure is to be done it would require the customer's express or implied consent. The case further laid down instances when this duty can be qualified if, i) disclosure is required under the compulsion of law; ii) a duty for disclosure to the public exists; iii) disclosure is in the bank's interests and; iv) the customer expressly or impliedly consents to the disclosure.[180]

Bearing this in mind, application of the requirements imposed under the Proceeds of Crime Act 2002 may lead to interference with this duty of secrecy. Section 330 of the Proceeds of Crime Act 2002 requires banks to disclose known or suspected information on possible money laundering. The disclosure is done to the National Crime Agency.[181] The essence of these provisions as stated in *Squirrell Ltd v National Westminster Bank PLC*[182] is to put pressure on a bank such that it provides information to the National Crime Agency to enable it determine possible criminal activity. This would increase the prospects of freezing the proceeds of crime in addition to preventing the prejudicing of any investigations.[183] Nevertheless this rationale is to the detriment of the customer, who would suffer prejudice and financial loss for inability to operate his account as clearly stated in case law.[184]

Given that justification for interference with this duty is pegged on the potential for financial institutions to be misused for laundering. Therefore, the duty of confidentiality may be set aside, by law, if it is deemed appropriate that the contractual relationship between the bank and its client can be interfered with in a bid to prevent money laundering in the public interest. *Strictu sensu* application of the duty requires that, to avoid breaching it, the bank should ideally seek express consent from the customer before forwarding a STR. The catch is that by doing so, the bank may find itself liable for the offence of tipping off.[185]

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[178] *Tournier v. National Provincial and Union Bank of England* [1924] (n 170) at 480.
[179] *Tournier v. National Provincial and Union Bank of England* [1924] (n 170) at 473 & 485. Ellinger (n 173) at 178.
[180] *Tournier v. National Provincial and Union Bank of England* [1924] (n170) at 473.
[181] The National Crime Agency replaced the Serious Organised Crimes Office (SOCA) as the United Kingdom's financial intelligence unit on 7 October 2013 vide Ss 1 & 15 Crime and Courts Act 2013.
[182] [2005] EWHC 664 (Ch) (22 April 2005).
[183] *Squirrell Ltd v National Westminster Bank PLC* [2005] (n 178) para 1 & 2.
[184] *Shah & Another v HSBC Private Bank (UK) Ltd* [2012] EWHC 1283 (QB) (16 May 2012) para 38; *K Limited v National Westminster Bank Plc & Others* [2006] EWCA Civ 1039 (19 July 2006) para 22. See also Cogman 'Protected disclosures – a limit on civil liability for suspicion' (2015) 221 *MLB* 7.
[185] S 333A Proceeds of Crime Act 2002. Mugarura 'The jeopardy of the bank in enforcement of normative anti-money laundering and countering financing of terrorist regimes' (2015) 18(3) *JMLC* 352 at 355-356.

However, essentially the bank cannot be in breach of its duty since it is acting under a compulsion of law, one of the qualifications stated in *Tournier's* case. Moreover, failing to file or informing the customer before filing a STR means the bank is acting against the law and can therefore be held criminally liable.

In providing further guidance on the matter, the courts have stated that the central requirement in order to file a STR is that the bank has suspicion. This is based on a subjective fact as enunciated in *K Limited v National Westminster Bank Plc & Others*.[186] The bank official[187] must base his decision on relevant facts, beyond fancy, as vague intuition of unease would not suffice as pointed out in *K Limited v National Westminster Bank Plc & Others*.[188] Yet, as stated in *Shah & Another v HSBC Bank (UK) Ltd,* caveats on establishing suspicion do not impose on the bank the need for reasonable grounds for the suspicion.[189] The suspicion needs only to be based on possible facts while at the same time the sufficiency of those possible facts is not necessary.[190] Suspicion does not have to be based on reasonable or rational grounds since imposition of the requirement of reasonableness would put the bank in a precarious position as justified in *Shah & Another v HSBC Bank (UK) Ltd.* The low threshold on establishing suspicion is because the law has not imposed on banks the responsibility to investigate. In addition to the fact that they lack investigative capacity and expertise. Against these considerations, requiring them to establish reasonableness of suspicion would impose such a duty on them.[191]

Further justification for this position, as provided by courts, is based on the fact that when the bank submits the STRs, they are not certain if indeed they are proceeds of crime, what investigations would yield, let alone if the matter would proceed to prosecution.[192] Investigations to ascertain all this is left to the relevant authorities. It is for this reason that the imposition of the requirement to rely only on suspicion seeks to protect the bank.

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186 *K Limited v National Westminster Bank Plc & Others* [2006] (n 180) para 21.
187 Referred to as the nominated officer S 336 Proceeds of Crime Act 2002.
188 *K Limited v National Westminster Bank Plc & Others* [2006] (n 180) para 21; *R v Da Silva* [2007] 1 WLR 303 (11 July 2006) para 303. Godfrey & Elcock 'England' in Godfrey (ed) *Neate and Godfrey: Bank Confidentiality* (2015) at 311.
189 [2009] EWHC 79 (QB) (26 January 2009) para 45. Godfrey & Elcock (n 184) at 311.
190 *Shah & Another v HSBC Bank (UK) Ltd* [2009] (n 185) para 45.
191 *Shah & Another v HSBC Bank (UK) Ltd* [2009] (n 185) para 52.
192 *Shah & Another v HSBC Bank (UK) Ltd* [2009] (n 185) para 66; *Shah & Another v HSBC Bank (UK) Ltd* [2012] (n 180) para 201.

Therefore in filing a STR though the bank is seemingly acting against its duty of confidentiality with the customer, it is doing so legally. This is because it is principally acting under a compulsion of the law. Further the courts have shown that the requirements of the statutory provision seek to protect the bank as the obligation imposed is not onerous.

4.6.2.2 The bank's duty of secrecy under Kenyan law

Kenya follows the Common Law doctrine as enunciated in *Tournier's case*.[193] The doctrine has also been given statutory recognition under section 31(2) of the Banking Act[194] and through the right to privacy under the constitution.[195] When filing a STR section 32(2) POCAMLR requires the bank to indicate the nature and reason for the suspicion. The implication of these provision is that banks are placed in an onerous position since it requires the banks to justify the reasons for having suspicion. This is unlike what the English courts have been trying to avoid. Further implication of this is that banks are unlikely to file STRs even when there is some element of suspicion simply because they have no concrete grounds to justify their suspicion.

Nevertheless, as stated previously, under POCAMLA, banking secrecy is overridden and this is justified as it is one of the exceptions permitted under the *Tournier case.* Therefore, a bank cannot rely on it as a defence for failing to give relevant information as regards investigations under the Act, in this regard piracy investigations. This is bolstered by the fact that a bank cannot seek express consent, as required under the secrecy duty, from the customer before forwarding a STR to the Financial Reporting Centre. This is because doing so may find the bank liable for the offence of tipping off.[196] Furthermore Banks risk criminal prosecution if they do not report any suspicion to the Financial Reporting Centre.[197]

Ultimately banks operating in Kenya cannot invoke banking secrecy as a defence to avoid giving relevant information to investigatory authorities though only in relation to investigations under the

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[193] Pursuant to application of the English Common Law vide S 3(1) of the Judicature Act.

[194] Cap 488.

[195] S 31 Constitution. See Ismail 'Legislative erosion of the banker-client confidentiality relationship' (2008) 48(2) *Codicillus* 3 at 3-4 where he discusses the constitutional link between the right to privacy and the banker's duty of confidentiality, though in relation to the South African constitution.

[196] S 8 POCAMLA. S 32(1) POCAMLR provides: 'If a reporting institution becomes aware of suspicious activities or transactions which indicate possible money laundering activities, the reporting institution shall ensure that it is reported to the Centre immediately and within seven days of the date of the transaction or occurrence of the activity that is considered suspicious. Additionally, S 35 POCAMLR provides: 'a reporting institution which obtains information which is suspicious or indicates possible money laundering activity shall not disclose such information to an unauthorised person but shall report it to the Centre as required by these Regulations'.

[197] S 11(1) POCAMLA.

Act. The main challenge is that no guidance on what the banks should consider when filing a STR is given. In this regards, the decision of the English courts on the matter is considered sound and Kenyan courts may be persuaded to follow the same.

Nonetheless further potential for conflict does exist since banks risk criminal prosecution if they do not report any suspicion to the Financial Reporting Centre.[198] Yet, by reporting suspicion, the bank may potentially end up in breach of its contractual duty to the customer. This would arise because no moratorium provisions are given to provide guidance on what should happen after filing the STR as discussed hereunder.[199]

4.6.3 Contractual obligations (duty to obey the customer's mandate)

4.6.3.1 Contractual obligations between the bank and customer under English law

The banker-customer relationship is a *sui generis* contract incorporating 'elements of a number of specific, well-defined contracts'.[200] The agent-principal is one of them, with the customer as principal and the bank as agent. Arising from this relationship is the requirement that the bank is to strictly obey the customer's mandate(s). These include payment instructions or performance of other incidental banking services.[201] Consequently, possible interference with this duty would arise where the bank fails to abide by its customer's instructions after filling a STR and freezing the account.[202]

As regards fulfilment of a customer's instructions, the English courts have indicated that the bank would indeed not be liable if it does not obey the customer after filing a STR and for the duration the account is frozen.[203] This is because during such period, the contract (between banker and customer) is temporarily suspended and no legal rights exist.[204] Furthermore requiring the bank to abide by the customer's instructions would be tantamount to expecting the bank to undertake a criminal act as it would be doing what is forbidden by law. Essentially performance of the

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[198] S 11(1) POCAMLA. See Mugarura (n181) at 355-358 for a discussion on the various ways a bank may find itself liable for not filing a suspicious transaction report or informing the customer of the filing of such a report. Although it is written from the United Kingdom's perspective, the same is a possible scenario for Kenya.

[199] Godfrey & Elcock (n 184) at 26.

[200] Ellinger *et al* (n 173) at 124. These include the debtor-creditor and agent-principal. For further discussion on this see Ellinger *et al* (n 173) at 115-169.

[201] Ibid at 126.

[202] Mugarura (n 181) at 361-363.

[203] Godfrey & Elcock (n 184) at 25-26; Ellinger *et al* (n 173) at 477-479.

[204] *K Limited v National Westminster Bank Plc & Others* [2006] (n 180) para 11. Godfrey & Elcock (n 184) at 312.

instructions would render the bank criminally liable.[205] Therefore, *strictu sensu* the bank would not be guilty of breaching the contract as its actions are in accordance with a mandatory legislative provision.

Despite this positive pronouncement the court in *Shah & Another v HSBC Bank (UK) Ltd* proceeded to caution banks as they could potentially find themselves liable. A case in point is if after filing a STR, the bank is thereafter given consent by the relevant authority to proceed with the customer's instructions but unreasonably delays carrying out the instructions.[206]

Under English law in providing additional guidance, S 335 Proceeds of Crime Act 2002 specifically provides for moratorium provisions to direct banks on what should happen after filling a STR. Justification and the usefulness of having such provisions was succinctly stated in *K Ltd V National Westminster Bank Plc* as follows:

> 'It is, of course, true that to intervene between a banker and his customer in the performance of the contract of mandate is a serious interference with the free flow of trade. But Parliament has considered that a limited interference is to be tolerated in preference to allowing the undoubted evil of money-laundering to run rife in the commercial community. The fact that the interference lasts only for 7 working days in what we were told were the majority of cases and a further 31 days only, unless the relevant authority goes to the length of applying to the court for a Restraint Order when all cards will have to be on the table in any event, shows that the interference with freedom of trade is limited. Many people would think that a reasonable balance has been struck.'[207]

Therefore, provision of a moratorium period not only provides guidance to the banks on what happens after filing a STR. It also helps strike a balance between interference in the banker-customer contractual relationship and facilitation of investigations into criminal proceeds, in this case piracy proceeds.

4.6.3.2 Contractual obligations between the bank and customer under Kenyan law

With regards to contractual obligations arising from the banker-customer relationship Kenya follows the Common Law doctrine enunciated in England and has been upheld by the courts.[208]

The probable scenario in the Kenyan context is that a bank may potentially find itself in breach of contractual obligations primarily because POCAMLA does not provide guidance on what a bank

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[205] *K Limited V National Westminster Bank Plc* [2006] (n 180) para10-12; Ellinger *et al* (n 173) at 479.
[206] *Shah & Another v HSBC Bank (UK) Ltd* [2009] (n 185) para 58.
[207] *K Limited V National Westminster Bank Plc* [2006] (n 180) para. 22.
[208] S 3 Judicature Act. See *Intercom Services Ltd & 4 Others v Standard Chartered Bank* civil case no 761 of 1988 [2002] eKLR (18 November 2002).

should do after filing a STR.[209] The Act only obliges a bank to file a STR within seven days of the transaction. In the interim, it does not state whether a bank should proceed to honour the customer's instructions, or to await directives from the Financial Reporting Centre. In addition to this ambiguity, the Act and its regulations do not have moratorium provisions that banks can rely on.[210]

As discussed above strictly the bank would not be in breach of its contractual obligations as it was acting in accordance with a legal provision. Nevertheless the lack of explicit guidelines on the post-STR filing operations places the banks in a dilemma, to abide by the law in order to avoid criminal liability or to risk civil liability by dishonouring customer contractual obligations. At the same time it may be prejudicial to piracy proceeds investigations as affected persons may file applications in court challenging the bank's actions. This would definitely interfere and delay investigations into laundering of piracy proceeds. Undeniably, this is an issue that needs to be addressed by including moratorium provisions in POCAMLA. Overall, especially considering that POCAMLA does not provide moratorium provision to direct the actions of banks after filing a STR; the lessons learnt from the English legal position may provide guidance on possible amendments to the Kenyan legislation as is considered in the last chapter.[211]

4.6.4 Corruption

Corruption 'takes many forms, from large bribes paid through agents, to the abuse of influence to sell favours, to making use of authority to commit theft.'[212] Similarly, Kenyan law defines corruption in broad terms and captures a number of acts.[213] With regards to investigations into the possible laundering of piracy proceeds, the vice of corruption can compromise investigations in

[209] See *Standard Chartered Bank Kenya Ltd v Intercom Services Ltd & 4 Others* Court of Appeal application no 37 of 2003 [2004] eKLR (19 November 2004) for an illustration of such a situation, although the matter was not dealt with under POCAMLA as the statute had not been enacted.

[210] For example the United Kingdom provides for a moratorium period after the filling of a suspicious transaction report under S 335 Proceeds of Crime Act 2002 and is referred to as appropriate consent. In a nutshell the section provides that when a bank files a suspicious transaction report, the National Crime Agency has 14 days within which to give a bank the authorisation to proceed or not with a particular transaction. Failure to respond within 14 days is deemed an automatic authorisation to proceed. If the authorization is not given the National Crime Agency has 31 days to undertake investigations and apply for a restraint order.

[211] See chapter 5 section 5.4.

[212] Boister *An introduction to Transnational Criminal Law* (2012) at 88.

[213] S 2 Anti-Corruption and Economic Crime Act Cap 65; 'corruption' means (a) an offence under any of the provisions of sections 39 to 44, 46 and 47; (b) bribery; (c) fraud; (d) embezzlement or misappropriation of public funds; (e) abuse of office; (f) breach of trust; or (g) an offence involving dishonesty (i) in connection with any tax, rate or impost levied under any Act; or (ii) under any written law relating to the elections of persons to public office.

various ways, for example, through bribery it is possible to facilitate tipping off.[214] This applies to individuals targeted by investigations or individuals whose property is targeted and who may engage in bribing the relevant officials to give them information on any contemplated or initiated investigations into their affairs. This would facilitate tipping off, and once tipped off, an individual may proceed to destroy or farther hide relevant information or property. Likewise the use of bribery may encourage giving of false information by individuals or institutions.[215]

In the Kenyan context, this possibility is not assumed but real considering that the country's institutions and individuals are ranked as some of the most corrupt in the world.[216] The rampant corruption is exacerbated by lack of political will to effectively address the matter.[217] The absence of political will is evidenced by the lack of action taken in terms of prosecuting, despite investigations having been conducted, certain high profile financial crimes that have occurred.[218] This is notwithstanding the elapsing of a substantial duration since their occurrence and conclusion of investigations. Similarly since the government has shown lethargy and lack of will to tackle these financial crimes, the same is likely to be true of laundering piracy proceeds.

4.6.5 Lack of transparency in identifying beneficial owners

POCAMLA obliges reporting institutions such as banks to establish the ultimate beneficial ownership of corporate bodies as one of the customer due diligence requirements.[219] Establishing the ultimate beneficial ownership is necessary in investigations for tracing piracy proceeds because shell corporations, may be used to hide the ultimate beneficial owner(s), and are an avenue for

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[214] S 8 POCAMLA; 'tipping off' where a person knows or ought reasonably to know that a report on a customer's transactions is being prepared or is about to be sent by a reporting institution to the Financial Reporting Centre and discloses such information to the customer.

[215] See Bell 'An introductory, who's who for money laundering investigators' (2002) 5(4) *JMLC* 287. See also Williams & Pressly 'Maritime piracy: A sustainable global solution' (2013) 46 *CWRJIL* 177 at 201 where the authors argue that corruption and vulnerable law enforcement pose a serious threat to the use of any mechanism that targets pirate finance this includes anti-money laundering measures.

[216] The country is ranked 139 out of 167 countries in the Transparency International *Corruption Perception Index 2015* available at *http://www.transparency.org/cpi2015#results-table* accessed 28/3/16.

[217] Stephenson *et al* (n 129) at 24.

[218] This refers to the Anglo-leasing scandal, the Goldenburg scandal and the Charter House bank scandal. For details on these scandals see Warutere (n 72) at 57-61.

[219] S 12(1)(b) POCAMLR. Beneficial owner refers to the natural person(s) who ultimately owns or controls a customer, and/or the natural person on whose behalf a transaction is being conducted. It also includes those persons who exercise ultimate effective control over a legal person or arrangement. See FATF Recommendations 2012 at 110.

facilitating money laundering.[220] Therefore, they can be used to hide piracy proceeds.[221] Interestingly, research indicates that it is very easy to set up shell corporations in Kenya.[222] Nonetheless practical identification of beneficial owners in Kenya is hindered because of gaps in the legal and regulatory framework. This is primarily because there is no legal requirement to maintain a public register of such owners.[223] Consequently, though reporting institutions are required to undertake customer due diligence they are hindered from doing so effectively and efficiently. Maintaining such registers would facilitate reporting institutions and investigatory agencies to easily access full identification data as regards beneficial owners. Moreover, this is an important tool that would assist in identifying those who ultimately benefit from piracy proceeds, hence making their prosecution possible.

In conclusion, one or more or all the barriers to investigation may be encountered by the investigating authorities in a particular investigation. However, as indicated, addressing some of the issues raised will make the investigatory process more effective by reducing or eliminating these hindrances. Where an investigation is successful the next appropriate step is to decide whether to prosecute or not.

4.7 Deciding to prosecute for laundering of piracy proceeds

Completion of investigations will yield different types of evidence including, testimony from accomplice(s), forensic, accounting and circumstantial evidence. The prosecuting authority, will have to evaluate the evidence and determine the offences it discloses, who can be prosecuted and consequently decide whether to prosecute or not.[224]

The decision will have to be made in line with POCAMLA as the enabling and guiding statute. In doing so, the prosecuting authority will have to consider a number of factors such as, who to

[220] See Naheem 'Money laundering using investment companies' (2015) 18(4) *JMLC* 438.
[221] Stephenson *et al* (n 129) at 92-93. See also Subashi 'The beneficiary ownership and joint stock companies' *JFAM* (2014) 1. See also discussion in chapter 2 section 2.2.3 on the use of shell corporations in the second stage of the money laundering process.
[222] Findley *et al Global Shell Games Experiments in Transnational Relations, Crime and Terrorism* (2014) at 76 & 153; Findley *et al Global Shell Games: Testing Money Launderers and Terrorist Financiers Access to Shell Companies* (2012) at 21 Griffith University Centre for Governance and public Policy available at *http://www.gfintegrity.org/wp-content/uploads/2014/05/Global-Shell-Games-2012.pdf* accessed 19/8/15.
[223] FATF Recommendation 24 encourages countries to create public corporate registers that provide full identification data on beneficial owners.
[224] Bell 'Discretion and decision making in money laundering prosecution' (2001) 5(1) *JMLC* 42 at 42; Corns & Tudor 'Prosecution and committal proceedings' in McDermott (ed) *Investigation and Prosecution of Financial Crime International Readings* (2014) at 410.

prosecute and the appropriate charges to lay, which authority has *locus standi* and the court with appropriate jurisdiction. These issues are considered in turn below. This discussion will focus on the considerations to be made when deciding to prosecute for laundering of piracy proceeds. Considerations to be made in deciding if forfeiture is desirable will be done separately in section 4.11.

4.7.1 Potential defendant(s) and the appropriate charges that can be laid for laundering piracy proceeds

The principal money laundering offences are set out in sections 3, 4 and 7 of POCAMLA.[225] For one to commit these offences they should be in possession of proceeds of crime and have the relevant *mens rea,* that is, an individual knew or ought reasonably to have known that the property or part of it is the proceeds of crime and, therefore seek to conceal or disguise the illegal origin of the proceeds by undertaking the relevant *actus reus*.

The *acti rei* encompasses a number of distinct and alternative acts: i) entering into any agreement or engaging in any transaction or engaging in any arrangement or performing any act in relation to the property with the intention of concealing the nature, source, location, disposition or movement of the said property or the ownership thereof or any interest which anyone may have in respect of the property;[226] ii) entering into any agreement or engaging in any transaction or engaging in any arrangement or performing any act in connection with such property with the aim of enabling or assisting anyone to avoid prosecution;[227] iii) entering into any agreement or engaging in any transaction or engaging in any arrangement or; performing any act in relation to the proceeds of crime with the intention of removing or diminishing any property acquired directly or indirectly as a result of commission of an offence;[228] iv) acquiring proceeds of crime;[229] v) using proceeds of crime;[230] vi) having possession of proceeds of crime[231] and; vii) transporting, transmitting, transferring or receiving a monetary instrument or anything of value.[232] For one to

[225] See appendix B for an excerpt of Ss 3, 4, & 7 on definitions of money laundering offences as contained in POCAMLA.
[226] S 3(a)(b)(i) POCAMLA.
[227] S 3(a)(b)(ii) POCAMLA.
[228] S 3(a)(b)(iii) POCAMLA.
[229] S 4(a) POCAMLA.
[230] S 4(b) POCAMLA.
[231] S 4 (c) POCAMLA.
[232] S 7 POCAMLA. S 2 'monetary instruments' means (a) coins and paper currency designated as legal tender of Kenya or of a foreign country and which is customarily used and accepted as a medium of exchange in Kenya or the

engage in laundering piracy proceeds they have to undertake all, some or one of the acts mentioned above.

Appropriately, it will be the duty of the prosecuting authority to carefully consider the available evidence and on the basis of the offences disclosed by this evidence determine the correct charge(s) to lay. Therefore, an individual having the relevant *mens rea* and undertakes all, some or one of the *acti rei* as pointed out above, can have any of the following charges laid against them by the prosecution:

i. Entering into an agreement with the aim of concealing, disguising.[233]
ii. Entering into an agreement to enable or assist a person avoid prosecution.[234]
iii. Entering into an agreement with the aim of removing or diminishing property.[235]
iv. Performing an act with the aim of concealing, disguising.[236]
v. Performing an act to enable or assist a person avoid prosecution.[237]
vi. Performing an act with the aim of removing or diminishing property.[238]
vii. Engaging in any transaction with the aim of concealing, disguising.[239]
viii. Engaging in any transaction to enable or assist a person avoid prosecution.[240]
ix. Engaging in any transaction with the aim of removing or diminishing property.[241]
x. Acquisition of proceeds of crime.[242]
xi. Using proceeds of crime.[243]

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country of issue; (b) travellers' cheques, personal cheques, bank cheques, money orders or securities; (c) any other negotiable instrument which is in bearer form, or other form through which title passes upon delivery.

[233] S 3(a)(i) POCAMLA.
[234] S 3(a)(ii) POCAMLA.
[235] S 3(a)(iii) POCAMLA.
[236] S 3(b)(i) POCAMLA.
[237] S 3(b)(ii) POCAMLA.
[238] S 3(b)(iii) POCAMLA.
[239] S 3(a)(i) POCAMLA.
[240] S 3(a)(ii) POCAMLA.
[241] S 3(a)(iii) POCAMLA.
[242] S 4(a) POCAMLA.
[243] S 4(b) POCAMLA.

xii. Having possession of proceeds of crime.[244]

xiii. Transporting, transmitting, transferring or receiving.[245]

xiv. Conspiracies to: facilitate the acquisition or retention; use or control; enable or assist a person avoid prosecution; remove or diminish property; conceal or disguise.[246]

xv. Attempts to commit i-xiii[247]

Having set out the possible charges that can be laid, next an exposition of those who potentially can be charged is undertaken, with specific reference to piracy. By undertaking any of the acts with the aim of concealment, the offender himself, the person who commits piracy, the predicate offence, intends to prevent the discovery of the true origin of the funds or that he is the owner of the money.[248] This would capture the foot soldiers who actually commit piracy. Disguising involves a third party who did not participate in the actual piracy but acts in a manner to prevent the discovery of the criminal origin or nature of the money.[249] This aims at a wide group of persons from pirate financiers to those who facilitate laundering of the proceeds.

Entering or engaging in any agreement or performing any act in relation to proceeds of piracy contemplates individuals involved in handling criminal property belonging to others. For example pirate financiers, a banker or a bank or a legal professional who handles proceeds of piracy on behalf of a client or any other end user of the piracy proceeds. Generally, this offence covers individuals involved usually at the layering and integration stages.

'Engaging in any arrangement' targets individuals involved in conspiracies to commit any piracy proceeds offences listed from i-xiii.[250] This can target anyone who enters into an agreement(s) with the intention to commit any of the stated illegal acts.[251] This would capture the pirates themselves

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[244] S 4(c) POCAMLA.
[245] S 7 POCAMLA.
[246] S 3a POCAMLA. For persuasive guidance see *R v GH* [2015] UKSC 24 (22 April 2015) where the United Kingdom Supreme Court authoritatively considered in detail the elements needed to prove this offence under its anti-money laundering statute.
[247] Ss 388, 389, 391, 393, 394 & 396 Penal Code Cap 63 Laws of Kenya.
[248] Durrieu (n 26) at 246.
[249] Ibid.
[250] S 3(a) POCAMLA. See *R v Saik* [2006] UKHL 18 (3 May 2006) for persuasive guidance on the elements required to prove conspiracy in money laundering offences under English law.
[251] Ormerod *Smith and Hogan's Criminal Law* (2011) at 423.

as well as those who are involved in disguising the proceeds of piracy. For example, a legal professional, an accountant and bank officials or banks.

As regards attempts, it is only the offence of transporting, transmitting, transferring or receiving monetary instruments that specifically mentions that any attempts to undertake any of the acts amounts to an offence. By contrast, the other sections providing for the other primary money laundering offences do not. Nonetheless, it may be inferred that by applying provisions of the penal code dealing with attempts, conspiracies and accessories to commit offences is appropriate and lawful.[252] Therefore, ancillary offences relating to laundering piracy proceeds would be punishable.

With regards to specific acts, acquiring involves gaining possession or control of property whereas to use entails utilising the proceeds of crime. Possession involves exercising some form of control, be it actual or constructive. Ultimately these acts facilitate the hiding of the illegal source of the proceeds of piracy. Generally, acquiring or possessing or using proceeds of piracy can be done by numerous and varied individuals involved in actual piracy or laundering of the proceeds. These include the pirates, financiers, persons involved in the laundering process and persons who receive gifts from piracy proceeds. Hence charges linked to these acts can capture an extensive range of individuals.

An individual may participate in removing or diminishing proceeds of piracy through the transfer or physical movement of property from one location or position to another. Transfer may also include the conveying or changing over the possession or control of property from one person to another by either selling or gifting the property. These acts can be done by the pirates, the financiers and other third parties.

Enabling and assisting specifically deals with doing something that makes it possible for someone to evade prosecution. This would target financiers, legal professionals and other individuals who act in the proscribed manner. The offence of transporting, transmitting, transferring or receiving a monetary instrument or anything of value would specifically target the couriers or individuals who undertake the cross-border movement of the piracy proceeds.

[252] S 388, 389, 391, 393, 394 & 396 Penal Code Cap 63 Laws of Kenya.

Apart from the laundering of piracy proceeds offences, the Act provides for offences connected to assisting the attainment of the statutes' purposes. These offences include tipping off;[253] failing to file a suspicious activity report;[254] misrepresentation of facts or documents to a reporting institution, or a supervisory body or the Financial Reporting Centre,[255] and failure of an institution to comply with provisions of the Act.[256] These offences may be used to lay charges against individuals or institutions who act in a manner prejudicial to the investigation, tracing, confiscation or forfeiture of piracy proceeds. For example, tipping off an individual of a pending or contemplated investigation. These offences could also capture individuals and institutions that fail to provide the required information or provide false information as per the Act.

In conclusion, it is important to note that, in addition to charging for piracy proceeds offences, the prosecution can seek criminal or civil forfeiture. These proceedings will be considered in section 4.10. Having identified the appropriate charges to lay, the next logical step is to proceed to trial. In this regard the matter has to be instituted by the authority having *locus standi* and in a court with the requisite jurisdiction.

4.7.2 Establishing *locus standi* and court jurisdiction for laundering piracy proceeds

Having established the appropriate charges to lay against a particular individual it is important to ensure that the case is instituted by the authority with the power to do so and in a court having the relevant jurisdiction to hear the case. Failure to make sure of this would have adverse effects on any prosecutions that are initiated. Furthermore, it is important to note that *locus standi* and court jurisdiction will be different in relation to asset forfeiture proceedings and is elucidated further in section 4.11.4.

Locus standi refers to the person having the right or capacity to bring legal proceedings and if one has no *locus standi* they lack the legal standing to be heard in court.[257] Under Kenyan law the general powers of prosecution are granted to the DPP.[258] The DPP institutes and undertakes

[253] S 8 POCOMLA.
[254] S 5 POCAMLA.
[255] S 9 & 10 POCAMLA.
[256] S 11 & 39 POCAMLA.
[257] *Teresia Waithira Njuguna v John Nyandew & Another* ELC civil case no 1254 of 2013 [2015] eKLR (20 February 2015) at 2.
[258] S 157(6)a Constitution; 'The Director of Public Prosecutions shall exercise State powers of prosecution and may institute and undertake criminal proceedings against any person before any court (other than a court martial) in respect of any offence alleged to have been committed.'

criminal proceedings against any persons apart from proceedings before a court martial.[259]Accordingly, the right to lay charges for offences in relation to laundering proceeds of piracy lies with the DPP.

For the various laundering of piracy proceeds offences that one can be charged with,[260] authority to adjudicate lies with any court having requisite jurisdiction. Under Kenyan law jurisdiction emanates from statute or the constitution or both.[261] Having the relevant jurisdiction permits a court to deal with a matter brought before it; that is without jurisdiction a court would have no basis or power to proceed with a matter and finally give its judgement.[262] Kenyan law provides that offences under other statutes, other than the Penal Code,[263] shall be tried by the court stated in the particular act. If no court is stated the offence can be tried by the High Court or a subordinate court as shown in the Criminal Procedure Code.[264] For the money laundering offences neither POCAMLA nor the First Schedule of the Criminal Procedure Code specifies the court with jurisdiction.

The implication of this is that, to determine the appropriate court it will be necessary to take into account the fine or sentence a court can impose. Since this will ensure that the chosen court has the power to impose a particular fine or sentence as prescribed by statute. A more appropriate option would be to grant the High Court jurisdiction in relation to all money laundering cases; this includes laundering piracy proceeds matters. This is apt because the court has been granted the general powers to hear cases if no specific court is stipulated in the Penal Code, Criminal Procedure Code or the specific statute. Preferably in this case it would be the Anti-Corruption and Economic Crimes division of the High Court of Kenya. The benefit arising would be, consolidating the handling of money laundering cases which would in turn promote the development of judicial expertise and coherent jurisprudence in such matters.

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[259] S 157(6) (a) & 157(10) Constitution.
[260] See section 4.7.2 on laundering piracy proceeds offences.
[261] Ouma *A Commentary on the Civil Procedure Act* (2013) at 15. *Football Federation v Kenya Premier League Ltd & 4 Others* civil suit no 69 of 2015 [2015] eKLR (16 March 2015) at 21.
[262] Ouma (n 257) at 15. *Football Federation v Kenya Premier League Ltd & 4 Others* [2015] (n 257) at 19.
[263] Cap 63.
[264] S 5 and First Schedule Criminal Procedure Code Cap 75.

4.8 Proving *acti rei* and *mens rea* for laundering piracy proceeds offences

In prosecuting piracy proceeds offences certain elements will have to be proved in order to establish the guilt of the offender. This is in terms of the *acti rei* and *mens rea* requirements of the charges. The prosecution has to show the accused committed or attempted to commit the relevant act of concealing, disguising, converting; acquisition, use and possession; transporting, transmitting, transferring or receiving; enabling or assisting a person avoid prosecution; removing or diminishing property. Having established that the accused undertook the relevant *acti rei,* it is also necessary to prove that the accused knows or suspects the criminal origin of the property.

The *mens rea* element is imputed from the use of the words 'knows'[265] or 'knowingly'[266] in defining the offences. Both terms imply awareness of the illegal origin of the proceeds. An individual will also be considered to have the relevant mental element if they 'ought reasonably to have known'[267] of the illegal origin of the proceeds. This implies application of an objective test. That is, considering the circumstances at hand, a reasonable man placed in a similar situation would have deduced the property as the proceeds of crime, specifically proceeds of piracy.

However, in England in *R v Saik* in considering similar provisions on conspiracy charges in laundering offences, the court held that it has to be proved conclusively that the accused knew of the criminal origin of the property[268]; this is in relation to the *mens rea* element. Similarly in *Martin Edward Pace & Another v Crown*[269] the court clarified that in offences of attempts to launder proof only of the mental element of suspicion is not sufficient. It has to be proved that the accused knew that the proceeds of crime were involved when he agreed to undertake the particular conduct. Likewise, considering the similarity between the English and Kenyan provisions on conspiracies and attempts to launder, it would be prudent for Kenyan courts to consider the English decisions.

As in any other criminal matter, in piracy proceeds offences the burden of proof lies with the prosecution and the standard required is beyond reasonable doubt. In terms of the rules of evidence, the court is primarily to be guided by the criminal rules of evidence as per the Evidence Act.[270]

[265] S 3 & 4 POCAMLA. See also discussion in chapter 2 section 2.2.2 for a general discussion on the *mens rea* and *acti rei* elements of money laundering.
[266] S 7 POCAMLA.
[267] S 3 & 4 POCAMLA.
[268] *R v Saik* [2006] (n 246) the case clearly indicated that in a conspiracy case you cannot have a suspicion, you either know or you do not that the property is criminal property.
[269] [2014] EWCA Crim 186 (18 February 2014).
[270] S 56(2) & S 81(2) POCAMLA.

However, to facilitate admissibility of particular evidence, certain provisions under the Evidence Act have been altered in terms of their application to matters instituted under POCAMLA. The alterations made, permit easier admission of electronic evidence[271] and allow the use of hearsay evidence.[272]

This is beneficial because applying the strict rules on admissibility of such evidence would make it difficult and costly to utilise.[273] For example, it would require the physical attendance of the document creator in court for it to be admissible. Therefore, limiting the strict application of the Evidence Act in POCAMLA proceedings is favourable as it allows for the use of evidence that would otherwise be unusable but crucial in proving laundering proceeds of piracy offences.

4.9 Conclusion to sections 4.1 to 4.8

The entire discussion above points to the fact that POCAMLA has a wide enough scope of application in terms of capturing the proceeds of piracy, targeted offenders and geographical application. The Act captures not only the original ransoms but also subsequent property into which it is converted. The offenders envisaged cover the entire piracy network. Neither does it matter where piracy is committed as long as the dual criminality element is fulfilled. Despite the omissions and loopholes evident in detecting suspect transactions involving piracy proceeds, the Act does have provisions that enable detection.

Upon detection of suspect piracy proceeds, investigations into their possible laundering may begin. This is undertaken by the institutions given authority to do so. These institutions have been granted evidence gathering powers which include local court orders and mutual legal assistance measures

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[271] S 128 POCAMLA permits the admission of electronic evidence. In this regard, POCAMLA alters the onerous provisions provided under the Evidence Act; relating to the admissibility of such evidence. S 106A – 106D Evidence Act Cap 80.

[272] S 129 allows admission of statements or documents made by persons who are dead, cannot be traced or their attendance would lead to delay or unreasonable expense. The Evidence Act does not provide the definition of the term hearsay. Definition of the term has to be deduced from considering Section 63 of the Act. Thus it can be said to be evidence given by a person who was not privy to the direct communication. S 63(2) Evidence Act provides: 'For the purposes of subsection (1) of this section, "direct evidence" means (a) with reference to a fact which could be seen, the evidence of a witness who says he saw it; (b) with reference to a fact which could be heard, the evidence of a witness who says he heard it; (c) with reference to a fact which could be perceived by any other sense or in any other manner, the evidence of a witness who says he perceived it by that sense or in that manner; (d) with reference to an opinion or to the grounds on which that opinion is held, the evidence of the person who holds that opinion or, as the case maybe, who holds it on those grounds'.

[273] Similarly other jurisdictions such as the United Kingdom and South Africa have permitted the use of hearsay evidence in certain instances in criminal and civil forfeiture proceedings. See Rees *et al Blackstone's Guide to the Proceeds of Crime Act 2002* (2011) at 21; Kruger *Organised Crime and Proceeds of Crime Law in South Africa* (2013) at 37-38.

that can be utilised in foreign jurisdictions. Even with the fragmented investigatory approach cooperation between the various investigating authorities may help overcome the inherent challenges. Nevertheless, to increase effectiveness of the investigation process, the various barriers identified need to be addressed.

Once investigations are completed, evaluation of the evidence gathered will assist in determining whether to proceed with prosecution or not. If it is decided to prosecute the appropriate charges have to be laid against the right individual. This is undertaken by the authority having *locus standi* and in the court with proper jurisdiction. Whereupon the prosecution has to prove both the relevant *actus reus* and *mens rea*. If the court is convinced beyond reasonable doubt, the defendant will be convicted and sentencing follows.

Nonetheless as stated in the preamble of POCAMLA, the statute not only provides for money laundering offences but also the tracing, freezing, seizure and confiscation of the proceeds of crime. Consequently, in addition to laying charges for laundering piracy proceeds, authorities may also seek to take away any benefit gained from piracy. They may target the actual ransoms or any property into which they have been converted. To undertake this, asset forfeiture proceedings are employed. The discussion hereunder will elucidate on this.

4.10 Asset forfeiture proceedings involving piracy proceeds[274]

Asset forfeiture is a crime control strategy developed to deal with proceeds of crime, primarily by seeking to deprive criminals of their illegal profits.[275] It encompasses the utilisation of two main mechanisms, criminal and civil forfeiture.[276] The strategy is not entirely new[277] but its current form traces its legislative history to the 1988 Vienna Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances and United Nations Convention against Transnational Organised Crime.[278] Through these conventions it was primarily intended to deal with profits from drug

[274] Confiscation is a penalty administered after completion of criminal or civil proceedings, seeking to permanently deprive one of finances or other resources. Forfeiture of proceeds of crime is part of the confiscation regime. Forfeiture leads to the relinquishing of property or rights linked with a criminal offence without compensation to the defendant/individual. Essentially forfeiture is a subset of confiscation. See Ryder (n 4) at 768-769.
[275] Gallant *Money Laundering and the Proceeds of Crime* (2005) at 1; Ryder (n 4) 767-768; Kruger (n 269) at 6-7.
[276] Gallant (n 271) at 1; See section 4.10.1 for further discussion on criminal and civil forfeiture.
[277] See Van Jaarsveld 'The history of in-rem forfeiture – a penology legacy of the past' (2006) *Fundamina* 137; Kroeker 'The pursuit of illicit proceeds: From historical origins to modern applications' (2014) 17(3) *JMLC* 269.
[278] Boister (n 208) at 235-235. See also FATF Standards (n 63) at 12

trafficking and organised crime respectively.[279] However, the concept has grown and is now applicable to an ever expanding list of crimes.[280]

In *National Director of Public Prosecutions v Meir Elran,*[281] a matter dealing with the asset forfeiture laws in South Africa, the constitutional court considered the rationale why the international community was impelled to enact asset forfeiture laws. Accordingly the court stated that, first, the fact that serious crime(s) offenders will gladly serve their jail terms knowing that upon release their proceeds from crime would be awaiting them. As such, the deterrent effects of the conventional criminal laws have not been sufficient to the extent that offenders would eventually enjoy these illegal proceeds.[282]

Second, the use of the internet, electronic means of communication and a sophisticated international banking system has enabled criminals to distance themselves from the face of the crime. This effectively disguises their proceeds of crime thereby outsmarting even the smartest of law enforcement systems.[283] Therefore, generally, it can be said that the aim of asset forfeiture is to take away the criminal benefit and consequently act as a deterrence to would be offenders. Additionally, it also aids in reducing the profits available to fund further criminal activities.[284] Similar rationale has also been expressed by the English courts.[285] Likewise, the Kenyan parliament in supporting these positions, has ratified the relevant conventions and domesticated them by enacting POCAMLA.[286]

Therefore, the subsequent sections hereunder seek to consider how Kenya's asset forfeiture laws under POCAMLA, can be applied in taking away piracy proceeds. This will involve an

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279 Tuba (n 4) at 103-108.
280 FATF Standards (n 63) at 12
281 (CCT 56/12) [2013] ZACC 2; 2013 (1) SACR 429 (CC) (19 February 2013). See also Gallant (n 271) at 3-20.
282 *National Director of Public Prosecutions v Meir Elran* [2013] (n 277) para 66. Hendry & King 'How far is too far? Theorising non-conviction – based asset forfeiture (2015) 11(4) *IJLC* 398 at 398-399.
283 *National Director of Public Prosecutions v Meir Elran* [2013] (n 277) para 67. The same point had been identified in *Director of Assets Recovery Agency & Others v Green & Others* [2005] EWHC 3168 (Admin) (16 December 2005) para 4. See also Smellie 'Prosecutorial challenges in freezing and forfeiting proceeds of transnational crime and the use of international asset sharing to promote international cooperation' (2004) 8(2) *JMLC* 104 at 105; Hendry & King (n 278) at 401; Broude & Teichman 'Outsourcing and in sourcing crime: The political economy of globalised crime' (2010) 62 (3) *VLR* 795.
284 McCaw 'Asset forfeiture as a form of punishment: A case for integrating asset forfeiture into criminal sentencing' (2011) 38(2) *AJCL* 181 at 198.
285 See *R v Rezvi* [2002] UKHL 1 (24 January 2002), *R v Benjafield* [2002] UKHL 2 (24 January 2002).
286 See parliamentary debates on the POCAMLA bill in Kenya National Assembly Official Report (Hansard) of 8 May 2008 as per the words of Dr Shaban and Mr Wamalwa at 946 and 951 respectively.

examination of the process and relevant provisions prescribed by the statute. The primary aim of doing so, is to establish how criminal and civil forfeiture can assist in removing or reducing the incentive for the perpetrators. This is through taking away the benefit received by way of ransoms. This should apply to those who directly or indirectly benefit from piracy. Taking away this benefit would ensure that one does not profit from criminal acts and the withdrawal of capital that may be re-invested to fund other piracy ventures. Furthermore, depriving an offender of the benefit may act as a disincentive for current and would be offenders.[287]

Asset forfeiture laws would also facilitate taking away the instrumentalities of piracy, these include the skiffs and mother boats. This may have a direct impact on piracy as the means of committing the crimes would be targeted, taken away and consequently, possibly have a deterrent effect. Ultimately, this would aid Kenya in the fight against piracy, albeit an indirect way of tackling the problem. Additionally, the examination will assist in identifying how persons whose interests' are affected by asset forfeiture are protected under POCAMLA; for instance third parties who have a proprietary interest in targeted property.

Before proceeding with the discussion on asset forfeiture it is essential to point out two issues. First, as in some previous sections, the discussion will refer to decisions from English and South African courts. The asset forfeiture laws in these jurisdictions are similar to those of Kenya by virtue of having similar origins and are thus comparable.[288] By looking at the jurisprudence in these jurisdictions, valuable lessons can be drawn for the Kenyan position where very limited if any jurisprudence is available on the application of asset forfeiture laws.[289] The jurisprudence from these jurisdictions could therefore be of persuasive value and guide the interpretation and application of the Kenyan law. Subsequently, the legal position in England and South Africa will be laid down and thereafter consideration of the Kenyan position will follow.[290]

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[287] This is in line with the Situational Crime Prevention theory. See discussion in chapter 3 section 3.5.3.

[288] See n 3 above.

[289] A position that has been endorsed by the Kenyan courts in *Kenya Anti-Corruption Commission v L Z Engineering Construction Ltd & 5 Others* civil miscellaneous application 599 of 2004 [2004] eKLR (10 December 2004) at 8. As per the words of P Kariuki J. Although speaking in reference to the Anti-Corruption and Economic Crimes Act 2003 he stated that when dealing with new and untested legislation in order to develop jurisprudence 'collaboration and exchange of ideas on the lessons learnt from the experiences of others in the implementation of similar legislation in other jurisdictions' was vital.

[290] Asset forfeiture proceedings are under the Proceeds of Crime Act 2002 Cap 29 in the United Kingdom and the Prevention of Organised Crime Act 121 of 1998 in South Africa.

Second, undeniably utilising forfeiture proceedings to take away the benefit gained from not only piracy but other crimes generally, can potentially infringe an individual's human rights. At this juncture, possible infringement of these rights by undertaking forfeiture is acknowledged and discussion on this will be done in section 4.20.

4.10.1 The nature of asset forfeiture proceedings generally

Criminal forfeiture proceedings are *in personam* proceedings and are undertaken as part of the sentencing process.[291] This imputes that an accused person should have committed an offence and a trial conducted to prove his guilt or innocence. If convicted, the accused is deprived of the benefit he received from the offence.[292] Thus, upon completion of the criminal trial separate but linked forfeiture proceedings are begun. These proceedings aim at determining the amount of benefit the defendant received from the commission of the offence convicted of and thereafter stipulate the amount the defendant is to forfeit to the state. However, it may be permitted to take away the defendant's property of equal value to the benefit received.[293]

Important to note is that, criminal forfeiture does not function as the imposition of a fine.[294] This is because the aim is to take away the benefit the defendant gained from committing the offence convicted of; whereas imposition of a fine aims at punishing the offender.[295] Further, criminal forfeiture targets only the property of the defendant and not third parties since it aims to deprive the benefit he personally gained from committing the offence.[296]

To effectively prove a claim for criminal forfeiture, there is need to show a direct cause and effect connection between the offence and the benefit sought to be forfeited.[297] That is, it should be proven that the property is derived directly or indirectly as a benefit of the offence the defendant is convicted for.[298] Criminal forfeiture proceedings are civil in nature. This indicates that the rules

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[291] See discussion in *R v Rezvi* [2002] (n 281) para 1-13; S 18(1) Proceeds of Crime Act 2002 and S 13(1) Prevention of Organised Crime Act 1998.
[292] Boister (n 208) at 238.
[293] Ibid at 239.
[294] *Crown Prosecution Service v Jennings* [2008] UKHL 29 (14 May 2008) para 13, *NDPP v Rautenbach & Another* (146/2003) [2004] ZASCA 102; [2005] 1 All SA 412 (SCA) (22 November 2004) para 61.
[295] Ormerod (n 247) at 37.
[296] Boister (n 208) at 238.
[297] Ibid.
[298] See discussion in section 4.13.1.

on the nature of evidence and its production, as well as the burden of proof applicable are on a balance of probabilities

Civil forfeiture is also referred to as non-conviction based forfeiture. This is because the proceedings are not criminal in nature and do not depend on a criminal conviction. Hence it is an action *in rem,* that is, against the 'thing' itself. However, it must be shown that the property is 'tainted', that is, it was obtained in whole or part from unlawful activity.[299] Even if the proceeds of crime have been broken up and dispersed, any part can be pursued if it can be proved to be 'tainted'.[300] Further, civil forfeiture may be used to not only target proceeds of crime but also its instrumentalities. That is property used or intended for use to commit crime and it is this association that causes the property to be 'tainted'.

Accordingly, since civil forfeiture aims to take away this 'tainted' property, culpability, that is guilt or innocence, of the owners or possessors of the property is not relevant.[301] This is so because the primary focus is not on the wrongdoers but on the property. However, since it has to be shown that the property is the proceeds or instrumentalities of crime, concern in relation to the offence is solely for purposes of identification. That is, to show it is more likely than not, the property is the proceeds of a particular crime. With regards to instrumentalities close attention is on the role the property plays in the commission of a particular crime.[302] Consequently, civil forfeiture can target property held by third parties who did or did not commit the predicate offence; or those who may or may not be aware of the property's link to proceeds or instrumentalities of crime.

In civil forfeiture proceedings the state, through the authority given the mandate, appears as the plaintiff against the 'tainted' property itself in order to claim title over it.[303] However, individuals with interest in the property are given an opportunity to object the state's claim.[304] Similar to criminal forfeiture, civil forfeiture proceedings are civil in nature. Therefore, the rules on the nature

[299] Kruger (n 269) at 8-9 & 114; Rees *et al* (n 269) at 160; Boister (n 208) at 240.
[300] Boister (n 208) at 240.
[301] *NDPP v Cook Properties* [2004] (n 19); *Director of Assets Recovery Agency v Green* [2005] (n 279). Kruger (n 269) at 131-132, Rees *et al* (n 269) at 160.
[302] *NDPP v Cook Properties* [2004] (n 19) para 19-21; *Director of Assets Recovery Agency v Green* [2005] (n 279) para 8.
[303] Boister (n 208) at 240.
[304] Ibid.

of evidence and its production as well as the burden of proof applicable are on a balance of probabilities.[305]

4.10.2 The nature of asset forfeiture proceedings in Kenya

With regards to Kenya, through POCAMLA both criminal and civil forfeiture strategies have been adopted and have the elements discussed above. Under the Act criminal forfeiture is generally done in three stages but in certain instances the first stage may be skipped. These stages are: (1) restraint;[306] (2) confiscation;[307] and (3) realisation.[308] The restraint stage seeks to avoid dissipation of targeted property that is likely to be the subject of a confiscation order. The confiscation stage entails the court making an inquiry and determination of the benefit the defendant gained from a particular criminal conduct. The realisation stage involves enforcement of the confiscation order given. This is done by seeking a court order to direct any person holding realisable property to surrender it to a management receiver. This is not carried out always but only where necessary, for example if the fulfilment of the confiscation order can only be done taking over of realisable property.

Civil forfeiture is done in two stages (1) preservation[309] and; (2) forfeiture.[310] Similarly the preservation stage aims at preventing the wasting or disappearance of property that may be the subject of a forfeiture order. The forfeiture stage seeks to establish if the targeted property is indeed the proceeds or instrumentality of a criminal activity. If proved in the affirmative, a forfeiture order is issued. During these stages parties having interest in the targeted property are given an opportunity to be heard and oppose the applications.

In Kenya, for both criminal and civil forfeiture, all these stages are effected through court proceedings where the relevant orders are given. Likewise both types of proceedings are civil in nature thus civil rules of evidence and procedure apply in court, as well as having the civil standard of proof; on a balance of probabilities.[311] Finally, an assessment of the relevant statutes in England,

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305 Ibid. See also S 13 & 37 Prevention of Organised Crime Act 1998 with respect to South Africa and S 6 & 241(3) Proceeds of Crime Act 2002 with respect to England.
306 See Ss 68-74 POCAMLA all dealing with the restraint stage.
307 See Ss 61-67 POCAMLA all dealing with the confiscation stage.
308 See Ss 75-80 POCAMLA all dealing with the realisation stage.
309 See Ss 81-89 POCAMLA all dealing with the preservation stage.
310 See Ss 90-99 POCAMLA all dealing with the forfeiture stage.
311 S 56(2) & S 81(2) POCAMLA.

South Africa[312] and Kenya draws one to the conclusion that the salient features of criminal and civil forfeiture provisions in all three jurisdictions are essentially similar. This is in terms of the key underlying principles of the two forfeiture methods as discussed above and both methods are effected through similar stages to those in Kenya.

4.11 Factors influencing the decision to initiate forfeiture proceedings

In principle not all cases instituted for laundering piracy proceeds[313] can also have asset forfeiture initiated. Based on the evidence available, it will be possible to pinpoint cases suitable for forfeiture.[314] This decision-making process will be done by the Assets Recovery Agency and the DPP. However, no clear guidance is given in the Act or elsewhere to facilitate the making of this decision.[315] Having such guidance would help hasten and ensure uniformity in decision making. Accordingly, it is recommended that such guidelines are necessary and should be developed by the Agency director and the DPP. At present, it will be upon these relevant authorities to analyse a particular case and make a determination.

First and foremost, determination of the favourable asset forfeiture method between criminal and civil, has to be made. Additionally, other factors will need to be considered. These include limitations of actions, value of the targeted property, *locus standi*, court jurisdiction and preservation of the targeted property before trial. The discussion hereunder will consider these factors in turn, so as to establish their importance and influence in the decision making process.

4.11.1 Criminal versus civil forfeiture

Criminal forfeiture proceedings are instituted as part of the sentencing process to take away the benefit gained from the offence one has been convicted of.[316] The benefit is taken away, by calculating in monetary terms what the defendant acquired or gained from committing the offence

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[312] For an overview of the forfeiture process in the United Kingdom see *Perry v SOCA* [2012] UKSC 35 (25 July 2012) para 31-56. For South Africa see Basedo 'The legal challenges of criminal and civil asset forfeiture in South Africa: A comparative analysis' (2013) 21(3) *AJICL* 303.
[313] See discussion in section 4.7.1 on the possible charges that can be laid for laundering piracy proceeds.
[314] Corns & Tudor (n 220) at 410. See also Crown Prosecution Service *DPPs Guidance for Prosecutors on the Discretion to Instigate Confiscation Proceedings* (2009) at 2 available at *https://www.cps.gov.uk/news/assets/uploads/files/prosecutors_discretion_280509.pdf* accessed 18/4/15.
[315] Cassella 'An overview of asset forfeiture in the United States' in Young (ed) *Civil Forfeiture of Criminal Property Legal Measures for Targeting the Proceeds of Crime* (2009) at 43-50 which addresses the tactical issues to consider in deciding between criminal or civil forfeiture. Though the source deals with the USA, it is indicative of the general considerations that have to be made even in other jurisdictions when deciding between criminal and civil forfeiture.
[316] S 61(1) POCAMLA.

he/she has been convicted of and requiring payment of the said amount. Thus, in relation to pirates, a piracy trial should have been conducted and the guilt of the accused established, so as to trigger instigation of criminal forfeiture proceedings. Whereupon calculation of the benefit gained would be undertaken and the benefit would be in terms of the ransom received.

On the other hand in undertaking civil forfeiture it is not necessary that a piracy trial be conducted and concluded. The proceedings can be instituted to target any property linked to the proceeds of piracy. A reading of the civil forfeiture provisions indicates that there is no need to prove the predicate offence, although no specific guidelines are given to assist the court in determining what is or is not an instrumentality or proceeds of crime. Therefore, it is suggested that application of the principles given by the English and South African courts as discussed in section 4.14, would appropriately provide guidance. Simply, the discussion points that what is required is evidence that the property is the proceeds of the identifiable offence, in this case piracy, by showing a direct cause and effect connection between the crime and the property.

Therefore, having elucidated the nature of both asset forfeiture methods and taking them into consideration, points to civil forfeiture being the preferable method in taking away Somalian piracy proceeds as is substantiated hereunder.[317] Unlike criminal forfeiture that targets only the property of the accused, civil forfeiture can target property held by third parties who may have known or not known of the property's connection to the proceeds or instrumentalities of piracy.[318] This is based on the fact that the property itself or other property that it represents is tainted, since it is the proceeds of crime, has been used or intended to be used to commit crime.

Consequently, it is possible to target not only piracy ransoms but also property it may have been converted into and which is held by third parties. Furthermore, unlike criminal forfeiture that targets property derived directly or indirectly as a benefit of the piracy offence, civil forfeiture makes it possible to target instrumentalities of piracy such as skiffs, mother boats and guns used to commit the offence.

[317] See European Union *Impact Study on Civil Forfeiture* (2013) at 13 available at *http://www.coe.int/t/dghl/cooperation/economiccrime/corruption/Publications/CAR/Impact%20Study%20on%20Civil%20Forfeiture_EN.pdf* accessed 21/8/15. The study points out that increasingly expert opinion globally is holding the view that civil forfeiture is most effective at countering many forms of corruption, economic crime, and other transnational organised crimes. As earlier discussed in chapter 3 section 3.5.4 Somalian piracy can be considered a form of transnational organised crime.

[318] S 92(1) POCAMLA.

For criminal forfeiture to be instituted one has to be convicted for the offence the benefit accrued from. This implies that conviction for the offence of piracy is mandatory. Thus application of criminal forfeiture would be limited considering the probability of conviction for piracy is low due to evidential and other problems.[319] More so, only foot soldiers can be convicted for piracy and thus criminal forfeiture would appropriately be applicable only as against them. This leaves out the other key beneficiaries such as the financiers and others involved in laundering piracy proceeds.

On the other hand, in civil forfeiture the need to prove the commission of the offence of piracy does not exist. All that is required is evidence that the property was obtained by or in return for the identifiable crime of piracy. This makes it possible through civil forfeiture to target those in the higher echelons of the piracy network, for example the financiers.[320] Additionally, civil forfeiture is preferable due to the following circumstances that may arise: the wrongdoer is unknown or there is insufficient evidence to pursue piracy criminal charges; the interests of justice do not require a criminal conviction;[321] the wrongdoer is a fugitive. Besides, the pirate may be prosecuted in another country but the piracy ransoms or the property it has been converted into is in another country.[322] All these are possible scenarios in relation to Somalian pirates and their accomplices.

Nevertheless, it must be noted that especially in relation to civil forfeiture where no crime needs to be proven, that this may violate the right to property of the person whose asset(s) are seized. The implication of this as well as the possible justification will be addressed in section 4.20.

4.11.2 Limitations of actions

POCAMLA came into effect on 28 June 2010 and only applies to crimes committed after this date in accordance with the *nullum crimen sine iure* principle.[323] Thus only money laundering offences

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[319] See chapter 2 section 2.10.

[320] King 'Using civil processes in pursuit of criminal law objectives: A case study of non-conviction based asset forfeiture' (2012) 16(4) *IJEP* 337 at 342.

[321] See Bell (n 220) at 44 where he explains the possible public interest considerations. These include: Seriousness of the offence, importance of protecting the national economy, importance of protecting the integrity of the financial institutions, importance of deterring potential launders, importance of making it difficult for criminals to legitimate their ill-gotten gains, importance of demonstrating the moral basis that it is wrong to handle the proceeds of crime. See also Corns & Tudor (n 220) at 410.

[322] Cassella 'The case for civil forfeiture, why in rem proceedings are an essential tool for recovering the proceeds of crime' (2008) 11 *JMLC* 8 at 10-14. In discussing situations where civil forfeiture is preferable Casella discusses real situations that have arisen, and though in the context of the USA the same are replicable in other jurisdictions.

[323] A key principle of criminal law meaning only the law can define a crime and prescribe a penalty. Ashworth *Principles of Criminal Law* (2009) at 64.

committed and/or proceeds or instrumentalities of crime gained or retained after this date will be affected. In this regard, it is necessary and may sometimes be difficult to determine the date of commission of piracy or retention of the piracy proceeds that is, the date of accrual.

Establishing the date of accrual is very important as it is linked to the limitation of actions, that is, the period beyond which proceedings may not be instituted. This will be relevant where instituting forfeiture proceedings are contemplated.[324] In relation to criminal forfeiture, the statute of limitations does not apply. This is because a criminal trial can be instituted at any time and since the forfeiture proceedings are part of the sentencing process, limitation of time does not apply. This is not the case with civil forfeiture.

POCAMLA does not provide the limitation period applicable in relation to civil forfeiture. Thus, since the proceedings are civil in nature recourse in sealing this gap is to be found in the Limitations of Actions Act.[325] Section 4(5) of the Act provides:

> 'an action to recover any penalty or forfeiture or sum by way of penalty or forfeiture recoverable by virtue of a written law may not be brought after the end of two years on which the cause of action accrued.'

The possible interpretation of this provision is that the Assets Recovery Agency Director can institute civil forfeiture proceedings within two years of the cause of action accruing. The question then is: when is a cause of action deemed to have accrued? There are two possible answers: when the violation complained of occurred or when it was discovered or ought reasonably to have been discovered.[326]

The favoured application in this instance would be when the violation was discovered. This is because the main aim of money laundering is to hide the illegal source of property therefore it may not be easy to know the existence of piracy proceeds or instrumentalities immediately when the violation occurs. However, application of this interpretation does not eliminate the problem created by applying section 4(5) to civil forfeiture.

This is because application of this provision means that the Assets Recovery Agency Director has to institute civil forfeiture proceedings within two years of the discovery of the proceeds or instrumentalities of piracy. It is contended that two years is a very short period of time considering

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324 Stephenson *et al* (n 129) at 74-75.
325 Cap 22 Laws of Kenya.
326 This is inferred from the reading of Ss 4, 26 & 27 Limitations of Actions Act Cap 22.

the complexity and long duration that it may take to conduct and conclude investigations.[327] In addition, application of this provision as it is may lead to rendering redundant the aims of POCAMLA. This is because all an individual would have to do is to hide the proceeds or instrumentalities for two years. Thereafter as the limitation period would have set in, one would be free to enjoy the property. Ultimately this would defeat the purpose of depriving individuals of the proceeds of piracy.

The contrary and extreme possibility is also not good in the sense that, lack of a limitation period is tantamount to indefinitely entertaining the possibility of a claim being instituted against the property and therefore to an extent limiting its enjoyment. This would be unfair and unjust especially considering that civil forfeiture actions are civil in nature for which a limitation period applies. In this regard, a plausible solution is to have an amendment in POCAMLA provisions providing for a reasonable limitation period. The suggested period being twenty years.

Justification for this duration is that under Kenyan law, the longest limitation period provided in relation to claims involving real property is twelve years.[328] In pursuing property that is the proceeds and instrumentalities of crime, the widest definition of the term 'property' is given under the Act.[329] It encompasses not only real property but other forms of property such as intangible property which can be effectively disguised and hidden through laundering. Thus because of the hidden nature of laundering, detection of the illegal piracy property may not be easy and hence the duration of twelve years may not be sufficient for investigations seeking to gather evidence, identify the property and the ultimate beneficiary for prosecution purposes. Therefore, consideration of the position in England supports the claim for twenty years. This is primarily because England has extensive experience in undertaking civil forfeiture investigations and prosecutions,[330] and the identical limitation period of twenty years is applied.[331] Additionally, taking into account the hidden nature of offences relating to criminal proceeds, the longest possible

[327] Generally see McDermott (ed) *Investigation and Prosecution of Financial Crime International Readings* (2014). A reading of the various chapters clearly points to the complexity and lengthy process of conducting investigations of financial crime. See also Pasco *Criminal Financial Investigations: The Use of Forensic Accounting Techniques and Indirect Methods of Proof* (2013) at 57-62.
[328] S 7 Limitations of Actions Act Cap 22.
[329] S 2 POCAMLA.
[330] Ryder (n 4) at 784-787 & 791-793.
[331] S 288 Proceeds of Crime Act 2002 read together with S 27A Limitations of Actions Act 1980 Cap 58.

duration that can be granted is deemed reasonable since it would give ample duration for investigation and institution of proceedings.

4.11.3 Value of targeted property

POCAMLA does not set the lower limit of the value of property that may be targeted for forfeiture. This would be particularly suitable for civil forfeiture and would assist in the decision making process. It would ensure that the resources employed are proportional to the expected value of the property to be recovered thereby justifying the utilisation of civil forfeiture. Moreover, a jurisdiction such as England with more experience in handling civil forfeiture have found it necessary to impose such threshold requirements.[332] Currently such a decision is at the discretion of the DPP and Assets Recovery Agency who are required to carefully consider the civil forfeiture suitability of each case. Remedying the situation can be done by setting guidelines that direct the relevant authorities in the decision making process and hence promote legal certainty. Guidelines setting the lower value for targeted property in civil forfeiture can help achieve legal certainty, for instance in determining the court with appropriate jurisdiction to handle forfeiture as elucidated in section 4.11.4.

4.11.4 *Locus standi* and court jurisdiction

As indicated in the discussion in section 4.7.2 there is a difference in relation to *locus standi* and court jurisdiction in laundering of piracy proceeds offences proceedings and forfeiture proceedings. It was noted that the general powers of prosecution under Kenyan laws are granted to the DPP[333] and to facilitate exercise of this right, the DPP may request the National Police to commence investigations.[334] Additionally, the DPP is granted powers to undertake the recovery of assets which become liable to forfeiture after the conclusion of proceedings conducted by the Office.[335] Simultaneously, the Assets Recovery Agency, a semi-autonomous body within the AG's

[332] For example in England S 287 of Proceeds of Crime Act 2002 provides that a lower limit of the recoverable amount should be set by the secretary of state. Currently the Proceeds of Crime Act 2002 (Financial Threshold for Civil Recovery) Order 2003; SI 2003/175 has set the limit at £10,000.

[333] S 157(6) Constitution; 'The Director of Public Prosecutions shall exercise State powers of prosecution and may institute and undertake criminal proceedings against any person before any court (other than a court martial) in respect of any offence alleged to have been committed.'

[334] S 157(4) Constitution.

[335] S 18 Office of the Director of Public Prosecution Act provides: 'Where the Office has conducted criminal proceedings under any law in force and as a result of the proceedings a person becomes liable to pay an amount to the Government or property is forfeited to the Government under a court order, the Office shall take any further proceedings or steps that may be required to recover the amount or enforce the recovery, forfeiture or order.'

Office, also has the mandate to implement POCAMLA provisions on civil and criminal forfeiture.[336]

Reflection on these provisions leads to the inference that, generally as regards undertaking criminal forfeiture the DPP can institute proceedings, since the DPP will have been a party to the criminal proceedings after which criminal forfeiture is pursued as part of sentencing. This is as provided in section 18 of the Office of the Director of Public Prosecutions Act. On the other hand the DPP may delegate to the Agency as it has also been given the mandate to handle criminal forfeiture under POCAMLA. POCAMLA's provisions support this view to the extent that section 68 permits the Agency director to apply for a restraint order in criminal forfeiture. Further section 61 authorises either the AG[337] or Agency Director or the court of its own motion to seek for an inquiry into any benefit the defendant derived. This is in a bid to initiate criminal forfeiture. However, in terms of civil forfeiture the mandate sits squarely with the Agency. This is because sections 82(1) and 90(1) provide that, application for preservation or a forfeiture orders respectively can only be done by the Agency director.

Regarding court jurisdiction, certain factors have to be taken into account. In criminal forfeiture, it will be the court that dealt with the piracy case since forfeiture is part of the sentencing process.[338] In civil forfeiture, jurisdiction in dealing with the granting of preservation orders is not explicitly stated. This is because section 82 only refers to application of a preservation order being made *ex parte* 'to the court'. The implication of this is that magistrates' courts as well as the High Court could exercise jurisdiction in granting preservation orders. This is because jurisdiction will be determined in relation to the value of the targeted property.[339] Whereas, in the granting of a

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336 S 54(1) POCAMLA.

337 This is possible since vide S 156(4)(b) of the constitution the Attorney General has the authority to represent the national government in any legal proceedings to which it is a party, apart from criminal proceedings. Hence criminal forfeiture proceedings are civil in nature and the government does have an interest since ultimately the benefit the defendant gained is forfeited to the state.

338 As per S 4 read together with Schedule A of the Criminal Procedure Code Cap 75 jurisdiction over piracy offences is granted to the following courts: Chief Magistrate, Senior Principal Magistrate, Principal Magistrate and Senior Resident Magistrate. The High Court also has unlimited original jurisdiction in criminal matters as per S 165(3)(a) of the Constitution and S 4 Judicature Act Cap 8 grants the High Court admiralty jurisdiction over all matters arising on the high seas, territorial waters or upon any lake or other navigable inland waters in Kenya.

339 S 7 of the Magistrates' Court Act 2015 provides: 'The Magistrates' Courts shall have and exercise jurisdiction and powers in proceedings of a civil nature in which the value of the subject matter in dispute does not exceed: Chief Magistrate Ksh 20 million; Senior Principal Magistrate Ksh 15 million; Principal Magistrate Ksh 10 million; Senior Resident Magistrate Ksh 7 million; Resident Magistrate Ksh 5 million.' The High Court has unlimited original jurisdiction in civil matters as per S 165(3)(a) Constitution.

forfeiture order section 90 explicitly states that jurisdiction lies with the High Court. Overall, interpretation of sections 82 and 90 imply that two different courts can have jurisdiction in civil forfeiture proceedings.

However, to ensure uniformity in the handling of civil forfeiture proceedings, it is suggested that the High Court be granted exclusive jurisdiction. As indicated in section 4.11.3 above, if a minimum threshold amount was put in place as a requirement to institute civil forfeiture proceedings; then it could be stipulated that all cases fulfilling this minimum threshold are handled by a particular court. The jurisdiction could possibly be given to the courts in the Anti-Corruption and Economic Crimes division of the High Court of Kenya. Such a move would help in centralising the handling of civil forfeiture proceedings which would in turn assist in developing judicial expertise and coherent jurisprudence in such matters. As well as ensuring predictability and certainty in application of the law.

4.12 Preserving targeted piracy proceeds property before trial

During the investigation and decision making process, it is necessary to prevent dissipation of property that is likely to be the subject of a confiscation or forfeiture order. Failure to do so may render the orders nugatory when granted. Therefore, a restraint or preservation order seeks to preserve the property, hence making it available for fulfilment of the final order if it is eventually granted.[340] This safeguarding is effected by making *ex parte* applications that lead to granting of a restraint or preservation order in criminal and civil forfeiture respectively.[341] If given, the order prohibits any person from dealing with the targeted property.[342] Accordingly, preservation of the targeted property is an essential part of the process when seeking to take away the proceeds and instrumentalities of piracy. How this is to be undertaken is considered hereunder.

4.12.1 English and South African law

Under English law a restraint order may be sought once an investigation or court proceedings have commenced. In granting the order the court has to be satisfied of any, of a number of conditions

[340] *R v O'Brien* [2014] UKSC 23 (2 April 2014) para 35. Kruger (n 269) at 85; Rees *et al* (n 269) at 98 & 165-166.
[341] S 40 & 246 Proceeds of Crime Act 2002 for restraint and interim orders respectively; though in the United Kingdom the term used for preservation order is interim receiving or property freezing orders. Further, the Act does not specifically refer to the applications being made *ex parte* however the general practise is that they are made so. See Rees *et al* (n 269) at 100 & 164.
[342] Kruger (n 269) at 86; Rees *et al* (n 269) at 103.

set by statute. These are: 1) a criminal investigation has started and there are 'reasonable grounds to suspect' the offender has benefitted from his criminal conduct;[343] 2) proceedings for an offence have started but not completed and there are 'reasonable grounds to suspect' the offender has benefitted from his criminal conduct;[344] 3) instances where consideration or reconsideration of a confiscation order is to be made.[345] Of importance to note is that where a restraint order is sort *ex parte* the court requires full and frank disclosure from the applicant (National Crime Agency) on everything that may affect its decision.[346] Failure to do so should lead to discharge of the order.[347] However, lack of full disclosure does not always lead to discharge of the order as the court has discretion in the matter, such that if the omission is minor the court may allow continuation or issue a new order.[348] When granting a restraint order, the courts should also focus on establishing that the risk of dissipation is real and not imaginative[349]

Under English Law, 'reasonable grounds to suspect' implies a two pronged test encompassing a subjective and an objective requirement.[350] Thus the prosecution should adduce sufficient evidence that arouses actual suspicion (subjective requirement) and that there are reasonable grounds for the suspicion (objective requirement). For example where criminal proceedings have been instituted there is no need to prove conclusively that the defendant will be convicted of a criminal offence after which granting of a confiscation order is guaranteed. All that is required is sufficient evidence that will rationally arouse the suspicion of the court as to likelihood of the offender benefitting from his criminal conduct. A restraint order can target property in another jurisdiction. However, to be effective, it must be recognised in the particular jurisdiction.[351]Additionally, restraint orders may be accompanied by a seizure order, authorising seizure of the targeted property.[352]

South African legislation permits granting of a restraint order if two elements are established: (1) if the court is satisfied that reasonable grounds exist for believing a confiscation order will be made

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343 S 40 (2) Proceeds of Crime Act 2002.
344 S 40 (3) Proceeds of Crime Act 2002.
345 S 40 (4-6) Proceeds of Crime Act 2002; Rees *et al* (n 269) at 99-101.
346 *Director of Serious Fraud Office v A* [2007] EWCA Crim 1927 (2 August 2007) para 6.
347 Ibid para 18.
348 Rees *et al* (n 269) at 99; *Director of Serious Fraud Office v A* [2007] (n 345) para 18.
349 *Jennings v Crown Prosecution Service* [2005] EWCA Civ 746 (24 June 2005) para 54 & 61; *A & A v Director of Public Prosecutions* [2016] EWCA Crim 96 (23 March 2016) para 109-117.
350 *R v Saik* [2006] (n 246) para 52-53.
351 S 74 & 447 Proceeds of Crime Act 2002; See *Blue Holding and Others v United States of America* [2014] EWCA civ 1291 (9 October 2014).
352 S 41A Proceeds of Crime Act 2002.

and;[353] 2) the targeted property is 'realisable property'.[354] The prosecution need only establish that based on the evidence adduced, it is a reasonable prospect to support a conviction and subsequently the granting of a confiscation order. However, this does not mean that it has to be factually proved that a confiscation order will be made.[355] Realisable property is any property held by a defendant as well as property held by another that the defendant has made an 'affected gift'.[356] Similar to English law if an *ex parte* application is made for a restraint order, all known material facts that might influence the court in its decision are to be disclosed and generally a restraint order can be accompanied by a seizure order.[357] Section 26(3)(a) Prevention of Organised Crime Act explicitly provides for a provisional restraint order and a rule *nisi* in the granting of a restraint order. This permits the court to grant a provisional restraint order pending a return day in court. On the return day the court is to reconsider the matter and can uphold or refute the granting of the restraint order.[358]

Restraint orders under both English and South African law can target any property held by the defendant at the time of making the order and property later transferred to him.[359] This encompasses both legitimately and illegitimately acquired property held by the defendant. However, additionally under South African Law, section 26 C read with section 14 of the Prevention of Organised Crime Act 1998 permits inclusion of legitimate property held by a third party. This is limited to property received as an affected gift from the defendant, because such property is realisable property.[360]

Under English law, with regards to preservation orders referred to as property freezing order or interim receiving orders,[361] the order may be applied for *ex parte* before or after starting forfeiture

[353] S 25 Prevention of Organised Crime Act 1998. Kruger (n 269) at 80 & 84.
[354] S 26(2) Prevention of Organised Crime Act 1998.
[355] Kruger (n 269) at 84. See *NDPP v Rautenbach* [2004] (n 290) para 27. See also *NDPP v Kyriacou* (308/2002) [2003] ZASCA 95; [2003] 4 All SA 153 (SCA) (26 September 2003) for discussion on these considerations.
[356] S 14 Prevention of Organised Crime Act 1998. S 12(1) 'affected gift' means any gift made by the defendant not more than 7 years before the fixed date; or a gift of property received by the defendant in connection with an offence committed him or her or any other person; or gift of property or any part thereof, which directly or indirectly represented in that defendants hands property received by him or her in that connection.
[357] S 26(8) Prevention of Organised Crime Act 1998; *NDPP v Kyriacou* [2003] (n 354) para 18.
[358] Kruger (n 269) at 83.
[359] S 41 Proceeds of Crime Act 2002; Rees *et al* (n 269) at 102-103. S 26(2) Prevention of Organised Crime Act 1998; Kruger (n 269) at 85.
[360] See *NDPP v Rebuzzi* (94/2000) [2001] ZASCA 127 (23 November 2001); *NDPP v Ramlutchman* (AR 161/14) [2015] ZAKZPHC 23 (20 April 2015).
[361] S 245A & S 246 Proceeds of Crime Act 2002.

proceedings.[362] When granting a preservation order, the court's focus is on establishing that the risk of dissipation is real and not imaginative[363] and sufficiency of evidence identifying and locating the asset(s),[364] as well as the applicant (National Crime Agency) showing they have an arguable case.[365] The applicant has also to show that the property is recoverable (property obtained by unlawful conduct)[366] or associated property (property that represents recoverable property).[367]

Where the property includes associated property and the identity of the person holding it has not been identified the applicant has to show that reasonable steps to do so have been undertaken.[368] Similar to restraint orders, having an 'arguable case' means a case capable of serious argument and does not require the judge to believe that the case has a better than fifty percent chance of success.[369] The court has the discretion to grant the preservation order[370] and for an aggrieved party an appeal against the order is allowed if they are dissatisfied.[371] Additionally, the court may appoint receivers over the property to which the orders apply.[372] The duty of the receivers is to ensure securing the detention, custody or preservation of the property.[373]

Under South African law, the National Director of the National Prosecuting Authority (hereinafter NDPP) may apply *ex parte* for a preservation order and is expected to prove to the court that there are 'reasonable grounds for believing'[374] that the targeted property was the proceeds or instrumentalities of crime. The implication of this is that the NDPP has to show that the grounds giving rise to the belief must be reasonable and objectively rational.[375]Interestingly, the court does

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[362] S 245 A (1&3) Proceeds of Crime Act 2002.
[363] Per Glidewell L J in *Re AJ and DJ* Court of Appeal 9 December 1992 (unreported) as quoted in *Jennings v Crown Prosecution Service* [2005] (n 348) para 54.
[364] S 245A Proceeds of Crime Act 2002.
[365] See *United States v Abacha & Others* [2014] EWHC 993 (Comm) (8 April 2014); *Director of the Assets Recovery Agency v Szepietowski* [2007] EWCA Civ 766 (24 July 2007).
[366] S 242 Proceeds of Crime Act 2002.
[367] S 245A(5) Proceeds of Crime Act 2002. See also S 245 Proceeds of Crime Act 2002 for the comprehensive definition of 'associated property'.
[368] S 245A(6) Proceeds of Crime Act 2002.
[369] *Ninemia Maritime Corporation v Trave Schiffahrtgesellschaft M B H und Co KG (The Niendersachsen)* [1983] 2 Lloyd's Rep 600 (18 & 19 July 1983) at 605. *Irish Response Ltd v Direct Beauty Products Ltd & Another* [2011] EWHC 37 (QB) (21 January 2011) para 25-27.
[370] S 245A(4) Proceeds of Crime Act 2002.
[371] S 245B Proceeds of Crime Act 2002; See also *Serious Organised Crime Agency v O'Docherty* [2013] EWCA Civ 518 (16 May 2013).
[372] S 245E & 246(7) Proceeds of Crime Act 2002.
[373] S 245F & 247 Proceeds of Crime Act 2002.
[374] S 38(2) Prevention of Organised Crime Act 1998; Kruger (n 269) at 118-119.
[375] Kruger (n 269) at 119. *NDPP v Madatt & Another* (6488/2007) [2008] ZAWCHC 5 (25 January 2008) para 8-9; *NDPP v Stander & Others* [2008] (1) SACR 116 (E) (24 April 2007) para 12-13.

not have to be satisfied of this on a balance of probabilities, all that is required is that the facts must have a rational basis and bear a relation to the relief sought.[376] A preservation order is appealable although it is an interlocutory order.[377]

South African courts in interpreting the provisions on granting a preservation order have implied a rule *nisi* and granting of a provisional order, which is not explicitly provided for in the Act.[378] Justification for doing so is based on the need to ensure that interpretation of legislation is in line with section 34 of the constitution granting the right to a fair hearing. Accordingly, granting a provisional order and implying a rule *nisi* protects this right as it ensures the rights of a person who has an interest in targeted property are protected.[379] This is because such a person is given a reasonable opportunity to state their case in court. For example, persons affected by the order are the only ones who can give information on certain matters such as their reasonable living and legal expenses and investigations into such matters must take place concurrently with the making of the preservation order. Thus granting a provisional restraint order permits the defendant an opportunity to be heard by the court in opposing the restraint order application.[380] Nevertheless, the court has also held that *ex parte* application of restraint and preservation orders does not of itself violate the *audi altarem partem* rule.[381]

South African law also provides that preservation orders may be accompanied by a seizure order, authorising seizure of the targeted property.[382] This implies that an interested party is likely to be aware of the existence of such orders contemporaneous with seizure of the property. This provision seems unfair towards an interested party. Its justification however reclines on the fact that it protects the property from dissipation which would defeat the aims of forfeiture, as definitively pointed out in *National Director of Public Prosecutions & Another v Mohamed N O & Others*.[383]

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376 Kruger (n 269) at 119; *NDPP v Madatt & Another* [2008] (n 375) para 9.
377 Kruger (n 269) at 119; *NDPP v Merensky & Others* (CIV F 01/10) [2011] ZANWHC 13 (11 March 2011) para 21-22.
378 S 38 Proceeds of Organised Crime Act 1998. *NDPP & Another v Mohamed N O & Others* (CCT44/02) [2003] ZACC 4; 2003 (4) SA 1 (CC) (3 April 2003) *(Mohamed 2)* para 49-51. It should be noted that S 26(3)(a) specifically provides for a rule *nisi* and provisional order but only in relation to restraint orders.
379 *NDPP & Another v Mohamed N O & Others* [2003] (n 377) para 36-38.
380 Kruger (n 269) at 82-83.
381 See *NDPP & Another v Mohamed N O & Others* [2003] (n 377) para 51. Ndzengu & Bone 'The duty of utmost good faith in asset forfeiture jurisprudence – some lessons to learn' (2013) 34(3) *Obiter* 377. Kruger (n 269) at 116; Burchell *Principles of Criminal Law* (2013) at 904-905.
382 S 26(8) Prevention of Organised Crime Act 1998; S 41A Proceeds of Crime Act 2002.
383 *NDPP & Another v Mohamed N O & Others* [2003] (n 377) para 52. *NDPP v Meir Elran* [2013] (n 277) para 24.

Further, the court has the discretion of including such conditions and exceptions in granting the order.[384] Moreover, application of a rule *nisi* implies that a court can grant a temporary order pending an interparty hearing, this would safeguard the interests of a person affected by the order.[385]

4.12.2 Exceptions when granting a restraint or preservation order: English and South African Law

Although asset forfeiture proceedings are supposed to be an effective tool at fighting crime by taking away its benefit, the converse is that they may occasion an erosion of fundamental rights. This is primarily because at the point of applying for a restraint or preservation order, it is sought on the basis of reasonable belief not conclusive proof that the targeted property is the proceeds or instrumentalities of crime.[386] Therefore, the granting of exceptions when making a restraint or preservation order helps to mitigate the draconian intrusion into the rights of persons affected by the orders.[387] In a nutshell, these provisions are an attempt to blunt the effect of asset forfeiture on fundamental rights.[388] For example, making provision for a defendant's legal representation or an affected party's living expenses from the restrained property would be in keeping with one's fundamental right to legal representation and right to property.[389] Further, it is reasonable that a defendant should not be prevented from carrying on his legitimate business and therefore, making provision for such will enable him to do so.[390] Consequently, in relation to forfeiture proceedings involving piracy proceeds implementation of these exceptions will promote enforcement of such rights in relation to the defendant or an affected party.

It is important to note that consideration of these exceptions is not a separate and independent process. Generally it is undertaken as part of the considerations to be made by the court in determining if to grant a restraint or a preservation order. However, this can be done as a separate process in certain instances where amendment to an already granted restraint or preservation order is sought.

[384] S 26 (1) Prevention of Organised Crime Act 1998; S 41(3) Proceeds of Crime Act 2002.
[385] A discussion on the possibility of a court giving a temporary order was given in *NDPP & Another v Mohamed N O & Others* [2003] (n 377) para 29-32.
[386] *NDPP v Meir Elran* [2013] (n 277) para 24; *Director of the Serious Fraud Office v A* [2007] (n 345) para 4.
[387] *NDPP v Meir Elran* [2013] (n 277) para 23; *Director of the Serious Fraud Office v A* [2007] (n 345) para 4.
[388] *NDPP v Meir Elran* [2013] (n 277) para 25. Eissa & Barber *Confiscation Law Handbook* (2011) at 123.
[389] Kruger (n 269) at 91; *NDPP v Meir Elran* [2013] (n 277) para 27.
[390] Rees *et al* (n 269) at 105.

In making restraint orders South African legislation permits the court to make exclusions to provide for the reasonable living and legal expenses of the defendant.[391]However, there is a limitation in that the legal expenses must be related to criminal forfeiture proceedings under the Prevention of Organised Crime Act.[392] In relation to restraint orders English law, similarly permits making exclusions for reasonable living or legal expenses.[393] In addition it permits provisions for purposes of enabling one to, carry on any trade, business, profession or occupation and for making legal aid payments.[394]

However, unlike South Africa, in England funds will not be released to cover legal expenses attributable to the investigation or proceedings to which the restraint order relates.[395] Essentially such provision can only be made for wholly unrelated criminal proceedings.[396] Additionally proof of the expenses already incurred or to be incurred has to be adduced.[397] In deciding to permit for the legal expenses English courts will also consider the desirability of the person being represented and if a respondent disregard the possibility of public funding.[398]

With regard to restraint orders both English and South African legislation give the court discretion when granting the order to make provision for reasonable living and legal expenses of the defendant. As such it is not mandatory for the court to do so.[399] However, in granting these exceptions both jurisdictions emphasise that they will be made only for reasonably incurred expenses.[400] The court is to make provision for their reasonable living expenses after they prove

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[391] S 26(6) Prevention of Organised Crime Act 1998.
[392] S 26(6)(b) Prevention of Organised Crime Act 1998.
[393] S 41(3)(a) Proceeds of Crime Act 2002.
[394] S 41(2A) & S 41(3)(b) Proceeds of Crime Act 2002.
[395] S 41(4) Proceeds of Crime Act 2002. See *S v Commissioner of HM Customs and Excise* [2004] EWCA Crim 2374 (1 October 2004); *Crown Prosecution Service v Campbell* [2009] EWCA Crim 997 (22 May 2009).
[396] Eissa & Barber (n 387) at 30.
[397] S 245C(5) Proceeds of Crime Act 2002. Eissa & Barber (n 387) at 124.
[398] S 245C(6) Proceeds of Crime Act 2002. Eissa & Barber (n 387) at 124. See *Serious Organised Crime Agency v Szepietowski* [2009] EWCA 344 (Ch) (27 February 2009).
[399] This is inferred from the use of the term 'may' in the statutes for both jurisdictions. S 41(3) & 245(c)(3) Proceeds of Crime Act 2002 and S 26(6) & 44(1) Prevention of Organised Crime Act 1998.
[400] *Serious Organised Crime Agency v Azam & Others* [2013] EWHC 1480(QB) (3 June 2013) para 53-55 & 64; S 252 (4) & S 245C (5) Proceeds of Crime Act 2002. S 26(6) & 44(1) Prevention of Organised Crime Act 1998; *NDPP v Meir Elran* [2013] (n 277) para 25.

that the order will deprive them of the means to provide for themselves therefore causing undue hardship.[401] That is the hardship outweighs the risk of the property's dissipation.

In providing guidance on application of these considerations, South African decisions are more instructive. Under South African law, such provisions can only be made if the defendant discloses all his interests in the property subject to the restraint order under oath. In addition proof that they cannot meet the expenses or carry on their trade or profession from their unrestrained property.[402] South African courts also emphasise that the applicant must disclose the full list of assets and liabilities and the interest held. This will assist the court in determining the applicant's inability to pay, their legal standing with regards to the property and whether they are entitled to have their expenses paid from the said property.[403]

South African courts categorically state both conditions above are cumulative and interlinked and the court has to be satisfied of such matters.[404] The justification for such stringent provisions is to discourage defendants from hiding their assets. If a defendant retains the alleged proceeds of crime, they remain available for his living and legal expenses.[405] Ultimately, in exercising its discretion when granting relief for an applicant's reasonable legal expenses, living expenses or expenses for carrying on business, a restraint order must seek to balance the applicant's interest against the objects of preserving the property. Additional to preventing the applicant from benefitting unduly from the property.[406] English courts likewise state that the drawing of provisions cannot continue indefinitely and must come to an end upon the making of a confiscation order, subject to the conclusion of an appeal, if any.[407]

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[401] S 26(6) Prevention of Organised Crime Act 1998; S 245C(8) Proceeds of Crime Act 2002; Kruger (n 269) at 91. See also *Naidoo & Others v NDPP* (CCT 112/10) [2011] ZACC 24; 2012 (1) SACR 358 (CC) (10 August 2011) para 29; *Serious Organised Crime Agency v Azam & Others* [2013] (n 399) para 53.
[402] S 26(10) Prevention of Organised Crime Act 1998; Kruger (n 269) at 125.
[403] *NDPP v Meir Elran* [2013] (n 277) para 31-32.
[404] *Fraser v Absa Bank Ltd (NDPP as Amicus Curia*e) (66/05) [2006] ZACC 24; 2007 (3) SA 484 (CC) (15 December 2006) para 55; *Naidoo &Others v National Director of Public Prosecutions* [2011] (n 400) para 30-31; *NDPP v Meir Elran* [2013] (n 277) para 79-82. Kruger (n 269) at 125-126.
[405] *Naidoo & Others v NDPP* [2011] (n 400) para 30-31.
[406] *NDPP v Meir Elran* [2013] (n 277) para 37; *Fraser v Absa Bank Ltd* [2006] (n 403) para 72. Ndzengu & Bonde 'Legal expenses Prevention of Organised Crime clauses: A loophole to make crime pay' (2011) 24 *SACJ* 309. Kruger (n 269) at 91.
[407] See *Revenue and Customs Prosecutions Office v Briggs-Price* [2007] EWCA civ 568 (14 June 2007); *Stogdell v Stogdell* [2009] EWCA Civ 243 (12 February 2009). Rees *et al* (n 269) at 105.

As regards preservation orders England permits making provision for reasonable expenses related to living or legal expenses and to enable one carry on a trade, occupation or business.[408] For the legal expenses the courts are only to consider those reasonably incurred or to be incurred and must specify the total amount that may be released in terms of the exclusion.[409] Further, in relation to preservation orders, English legislation give a general caution to courts when granting exclusions. That the courts are to ensure that as far as practically possible the right of the National Crime Agency to recover property obtained by unlawful conduct is not unduly prejudiced.[410]

Similarly, South African legislation permits allowing for reasonable living and legal expenses.[411] However, only legal expenses related to civil forfeiture are covered.[412] To grant the order a South African court is to establish the person's inability to meet the sought expenses out of his property which is not subject to the preservation order. The individual should have disclosed under oath all his interest in the property and submitted an affidavit testifying the same.[413]

Unlike the English legislation, the Prevention of Organised Crime Act (South Africa) also limits the court's discretion more when granting a preservation order. Further strictures are evident in the use of the words 'shall not' and 'unless satisfied that', which imply that the court is obliged not to make such provision(s) unless both conditions, being cumulative and interlinked, are proved.[414] However, as stated in *National Director of Public Prosecutions & Another v Mohamed N O & Others,* the wording of the provision also implies that at the time of making a preservation order, a court on its own volition may carry out an inquiry of all these matters and may then proceed to make such provisions.[415]

4.12.3 Preserving targeted property before trial under Kenyan law

The Asset Recovery Agency director is permitted to make *ex parte* applications in both instances whether seeking a restraint or preservation order.[416] In criminal forfeiture a restraint order can be

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[408] S 252(4) & S 245C Proceeds of Crime Act 2002.
[409] S 245C(a&b) Proceeds of Crime Act 2002.
[410] S 245C(8) Proceeds of Crime Act 2002.
[411] S 44(1) Prevention of Organised Crime Act 1998.
[412] S 44(1)(b) Prevention of Organised Crime Act 1998.
[413] S 44(2) Prevention of Organised Crime Act 1998.
[414] S 44(2) Prevention of Organised Crime Act 1998; 'A court *shall not* make provisions for any expenses under subsection (1) *unless it is satisfied that'* [emphasis mine]. See *NDPP v Meir Elran* [2013] (n 277) para 80-82. Kruger (n 269) at 126.
[415] *NDPP & Another v Mohamed N O & Others* [2003] (n 377) para 46.
[416] S 68(1) POCAMLA criminal forfeiture & S 82(1) POCAMLA civil forfeiture.

sought during the trial process, or after the conclusion of trial and conviction of a defendant. A restraint order can also be applied for at the beginning of a criminal investigation but before the institution and conclusion of criminal proceedings.[417] However, the court ought to be satisfied that he will be charged with an offence and there are 'reasonable grounds to believe' a confiscation order will be made against the individual.[418] Implying that the court should be satisfied that a criminal investigation has been started or there is reasonable cause to believe a person leads a criminal lifestyle from which he has benefitted.[419]

The 'reasonable grounds for believing' intimate that the court need only establish that based on the evidence adduced, it is reasonably believable and possible to support a conviction and subsequently the granting of a confiscation order. Thus the prosecution should not be required to factually prove that a confiscation order will be made.[420] The court is permitted to exercise its discretion in granting a restraint order,[421] meaning it is to do so when satisfied that it's necessary to issue such an order in the circumstances. It may also accompany the restraint order with a seizure order directed at the targeted property.[422]

Similar to both English and South African law, restraint orders can target any property held by the defendant at the time of making the order and property later transferred to him.[423] This comprises both legitimately and illegitimately acquired property held by the defendant. As long as the property accrued to the individual directly or indirectly as a result of the offence they are charged with, in this regards piracy.[424] Additionally section 68 read with section 57 permit inclusion of

[417] S 68(3) POCAMLA. In granting the order the court need only establish that based on the evidence adduced, it is reasonably believable and possible to support a conviction and subsequently the granting of a confiscation order. However, this does not mean that it has to be factually proved that the confiscation order will be made. For persuasive jurisprudence see the South African cases of *NDPP v Rautenbach* [2005] (n 290); *NDPP v Kyriacou* [2003] (n 354) for application of these considerations.
[418] S 69(1) POCAMLA.
[419] S 68(3) POCAMLA.
[420] Kruger (n 269) at 119.
[421] S 68(3) POCAMLA; 'A court … *may* make a temporary restraint order'.
[422] S 82(3) POCAMLA.
[423] S 68 POCAMLA.
[424] S 2 POCAMLA 'realisable property' means (a) property laundered; (b) proceeds from or instrumentalities used in, or intended to be used in money laundering or predicate offences; (c) property that is the proceeds of, or used, or intended or allocated for use in, the financing of any offence; and (d) property of corresponding value.'

legitimate property held by a third party; though limited to property received as an affected gift from the defendant, because such property is realisable property.[425]

Granting of a temporary restraint order is permitted and the courts are required to state the duration within which persons affected by the order are to receive notice of it.[426] However, if a restraint order is already in force at the time a confiscation order is made, it remains in force pending the outcome of any appeal against the confiscation order.[427] Where a restraint order has been granted before charges are laid, the court is bound to rescind the order if the individual is not charged within such period as the court considers reasonable.[428]

In civil forfeiture the preservation order is usually sought at the beginning of the forfeiture proceedings. A preservation order is to be granted if there are 'reasonable grounds to believe' the property concerned is the proceeds or instrumentalities of crime.[429] Interestingly, the wording of the statute indicates that, for a preservation order the court cannot exercise discretion; it is bound to grant the order if the considerations stated above are fulfilled.[430] Such an order is made against the targeted property only and may also be accompanied by a seizure order, authorising seizure of the targeted property.[431]

Similar to the South African legislation Kenyan legislation requires the court to establish that there are 'reasonable grounds for believing' the property is the proceeds or instrumentalities of crime, in this regards piracy. Hence, justification to follow the reasoning in South African jurisprudence that the court to be satisfied that the grounds giving rise to the belief must be reasonable and objectively rational.

Further the Act does not have an explicit provision for a rule *nisi* and granting of a provisional preservation order, however it would be appropriate for the courts to do so. Justification for doing so is that, it would ensure interpretation of section 82 of POCAMLA is in keeping with the right

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[425] S 2 POCAMLA 'affected gift' means means any gift made by the defendant at any time, if it was a gift of property (*a*) received by that defendant in connection with an offence committed by him or any other person; or (*b*) any part thereof, which, directly or indirectly represents, in that defendant's hands, the property which that person received in that connection with an offence: Provided that any such gift was made on or after the commencement of this Act.
[426] S 68(3&4) POCAMLA.
[427] S 70 POCAMLA.
[428] S 68(2)(a) POCAMLA.
[429] S 82(2) POCAMLA.
[430] For civil forfeiture S 82(2) POCAMLA 'The court *shall* make an order'. [Emphasis mine].
[431] S 68(7) POCAMLA.

to a fair hearing.[432] This is because it would ensure the defendant gets an opportunity to be heard by the court in opposing the preservation order application as stipulated by the right. Additionally since forfeiture proceedings are civil in nature, this would be in accordance with the civil procedure rules that guide such proceedings.[433]

The civil procedure rules stipulates that an *ex parte* injunction can only be granted once for not more than fourteen days and can only be extended once with the consent of parties in the matter. Meaning that the order is granted for a temporary duration and is subject to an interparty hearing. Nonetheless, a preservation order expires automatically after ninety days after its gazzetment unless there is an application for a forfeiture order over the property subject to the preservation order. In such instances, the preservation order remains in force until the proceedings against the property are concluded.[434]

Finally, although, not specifically stated in POCAMLA, the English requirement of showing that the risk of dissipation is real should be fulfilled for the granting of a restraint or preservation order.[435]

4.12.4 Exceptions when granting a restraint or preservation order under Kenyan law

Kenyan legislation is similar to both the English and South African in as far as permitting provisions for reasonable living or legal expenses of the defendant as well as for enabling carrying on of any trade, business, profession or occupation.[436] This is with regards to restraint orders exceptions. To qualify, the individual should have declared under oath all his interests in the targeted property in addition to proving inability to meet the expenses from his unrestrained property.[437]

As regards preservation orders, save for the fact that exclusion can only be made for reasonable living expenses,[438] POCAMLA's provisions are worded much the same as section 44 Prevention

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[432] S 50(1) Constitution.
[433] Order 40(4)(2) Civil Procedure Rules 2010, Legal Notice 151 of 2010.
[434] S 89(1)(b) POCAMLA.
[435] The Kenyan courts have concurred and applied the English requirements of risk of dissipation and having an arguable case in related matters concerning application for a freezing orders. See *International Air Transport Association & Another v Akarim Agencies Company Limited & 2 Others* civil case 15 of 2014 [2014] eKLR (11 March 2014).
[436] S 68(5) POCAMLA.
[437] S 68(5) POCAMLA.
[438] S 88(1) POCAMLA.

of Organised Crime Act 1998. To be eligible, the affected individual should hold an interest in the property which should be disclosed under oath besides establishing their inability to meet the sought expenses out of his property which is not subject to the preservation order.[439] Moreover, provision can only be made with respect to reasonable living expenses.[440] Consequently, the South African court decisions on the same would be useful in providing guidance.

Finally, with regards to forfeiture proceeding involving piracy proceeds, the use of restraint and preservation orders will be necessary in ensuring that targeted piracy proceeds property is not dissipated. Hence, it will be available for fulfilment of the confiscation or forfeiture order when given. On the other hand, granting the exceptions will mitigate the harsh effect of intrusion into the rights of persons affected by the orders given. This is in line with section 20(1) of the constitution stipulating that the bill of rights applies to all laws and hence it is mandatory for a court to develop any law so as to give effect to the bill of rights.

4.13 Elements to be considered and proved during trial: Criminal forfeiture

Before a confiscation order can be granted by the court, a number of factors have to be proven. Both English and South African statutes require that the following be demonstrated before a confiscation order is made: (1) Has the defendant benefited from the relevant criminal conduct convicted of or related conduct?[441] (2) What is the value the defendant has obtained as a benefit?[442] (3) For what amount should a confiscation order be made? (The recoverable/available amount).[443] Importantly, criminal forfeiture is only applicable to recover proceeds of crime since it targets taking away the benefit gained from criminal conduct. Hence, likewise, consideration and determination of these three elements is mandatory in relation to criminal forfeiture of piracy proceeds.

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[439] S 88(2) POCAMLA.
[440] S 88 (1) POCAMLA.
[441] S 18(1) Prevention of Organised Crime Act 1998; S 6(4) Proceeds of Crime Act 2002.
[442] S 19 Prevention of Organised Crime Act; S 6(5) Proceeds of Crime Act 2002.
[443] S 20 Prevention of Organised Crime Act; S 9 Proceeds of Crime Act 2002. See the following cases illustrating application of these elements: *R v May* [2008] UKHL 28 (14 May 2008) para 10-45; *NDPP v Ramlutchman* [2015] (n 359) para 14; *R v Ahmad & Another, R v Fields & Another* [2014] UKSC 36 (18 June 2014). See also Rees *et al* (n 269) at 24-54; Kruger (n 269) at 96-101. Basdeo 'The law and practise of criminal asset forfeiture in South African criminal procedure: A constitutional dilemma' (2014) 17(3) *PELJ* 1048 at 1055.

Besides the elements enumerated above, courts in both jurisdictions include the principle of proportionality analysis[444] as another element to be considered in criminal forfeiture. The purpose being to ensure a balance between advancing the aim of forfeiture and avoiding arbitrary deprivation of property.[445] The aim of criminal forfeiture being to take away the benefit gained from commission of a particular offence. Principally, the proportionality analysis aims at safeguarding infringement of property rights and ensuring the property serves the public interest. Further discussion on this aspect is undertaken in section 4.15. Accordingly in keeping with the preservation of the right to property, a proportionality enquiry is necessary when undertaking criminal forfeiture of piracy proceeds. The factors itemised above will be addressed in turn.

4.13.1 Has the defendant benefited?

4.13.1.1 English Law

According to English law, a person benefits from criminal conduct if he 'obtains property as a result of or in connection with the conduct'.[446] 'As a result of' applies to any consequence of committing an offence[447] while 'in connection with' widens the scope to cover situations where a person obtains property in anticipation of committing a crime.[448] Hence a benefit can be acquired as a consequence of having completed the commission of an offence or gained prior to actual complete commission of an offence. A defendant legally 'obtains' a benefit if they have a legal interest in particular property[449] and if the property is in the form of a chose in action the nature of the proprietorial right has to be identified and proved.[450] Moreover the term benefit is given a wide interpretation to include obtaining a pecuniary advantage. In such an instance one 'obtains' an interest only if he evades liability to which he is personally liable,[451] that is avoiding accountability for a financial obligation they were responsible for in person. English courts have also clarified

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[444] See *Mohunram & Another v NDPP & Another (Law Review Project as Amicus Curiae)* (CCT19/06) [2007] ZACC 4; 2007 (4) SA 222 (CC) (26 March 2007) para 130; *NDPP v Ramlutchman* [2015] (n 359) para 16; *Paulet v United Kingdom* [2015] 61 EHRR 39 (13 May 2014); *R v Waya* [2012] UKSC 51 (14 November 2012) para 10-35.
[445] *R v Waya* [2012] (n 443) para 21-24; *NDPP v Ramlutchman* [2015] (n 359) para 8.
[446] S 76(4) Proceeds of Crime Act 2002.
[447] See *R v Waller* [2008] EWCA Crim 2037 (18 July 2008).
[448] *R v James & Blackburn* [2011] EWCA Crim 2991 (21 December 2011) para 49; Rees *et al* (n 269) at 31-32. See application of these elements in *R v Ahmad* [2012] EWCA Crim 391 (2 March 2012).
[449] *R v May* [2008] (n 442) para 48; *R v Waya* (n 443) para 64; Rees *et al* (n 269) at 25-26.
[450] *R v GH* [2015] (n 242) para 42.
[451] *R v May* [2008] (n 442) para 48; *R v Chambers* [2008] EWCA Crim 2467 (17 October 2008) para 52; Rees *et al* (n 269) at 27-28.

that it has to be established that the defendant himself actually 'obtained' the property.[452] The fact that a defendant played a minor role in committing an offence in which property is obtained, is not sufficient to prove the defendant himself 'obtained' the property.[453] Thus for example, minor contributors to an offence rewarded by payment of a specific fee are unlikely to have 'obtained' the property since they have no interest in the property having been paid a precise amount.[454]

4.13.1.2 South African law

South African law provides that a defendant profits if he receives, retains or derives property, services, advantages, benefits or rewards in connection with the unlawful activity carried on.[455] Further, the definition of proceeds of unlawful activities for purposes of a confiscation inquiry includes benefits received directly or indirectly by the defendant.[456]

In construing the phrase 'in connection with unlawful activity' the courts have held that though it may have a very wide meaning a restrictive interpretation is to be applied.[457] To achieve a narrow interpretation requires application of the *causa causans* test; that is the proximate or adequate cause, that there should be some consequential relation between the benefit and unlawful activity.[458] The benefit in some way must represent the conclusive consequence of the unlawful activity,[459] since a definite/decisive link between the proceeds of crime and the particular offence is evident. Essentially a causal link has to be established. The advantage of a restrictive interpretation is that it helps avoid the risk of arbitrary deprivation of property because there is established a link between the benefit received and the unlawful activity the defendant committed. Therefore justifying the deprivation of the benefit.

Evidently in both England and South Africa ascertaining if a defendant has an interest in property is key in establishing if a defendant has benefitted. Applying ordinary common law principles

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[452] *Crown Prosecution Service v Jennings* [2008] (n 290) para 12-13; *R v Saeger*, *R v Blatch* [2009] EWCA Crim 1303 (26 June 2009).
[453] *Crown Prosecution Service v Jennings* [2008] (n 290) para 13.
[454] Rees *et al* (n 269) at 29-30; Crown Prosecution Service *Guidance for Prosecutors on the Discretion to Instigate Confiscation (n 310) at 3*. See also *R v Sivaraman* [2008] EWCA Crim 1736 (24 July 2008); *R v Allpress*, *R v Symeou*, *R v Casal*, *R v Morris*, *R v Martin* [2009] EWCA Crim 8 (20 January 2009).
[455] S 19(1) Prevention of Organised Crime Act 1998.
[456] S 1 Prevention of Organised Crime Act 1998.
[457] *Lipschitz NO v UDC Bank Ltd* [1979] (1) SA 789 (A) at 804 as restated in *NDPP v Cook Properties* [2004] (n 19) para 13 & 64-66.
[458] Kruger (n 269) at 102.
[459] *NDPP v Cook Properties* [2004] (n 19) para 72; Kruger (n 269) at 97.

regarding entitlement and ownership to the particular facts assist in this respect. Generally ownership is attributed individually or jointly if one has power of control or disposition over property.[460]

4.13.2 Value the defendant has obtained

In both jurisdictions this entails a factual enquiry to determine exactly how much benefit the defendant received and requires a factual historical enquiry into past transactions.[461] For both jurisdictions, in calculating the value obtained, no deductions for expenses of committing the criminal offence can be made. The court is to consider the gross value received.[462] For instance, if the defendant makes payments to an accomplice what matters is the actual benefit he initially received, not what he retains after making the payment.[463]

In cases of joint criminal enterprise under English law, the court is to consider the benefit attributable to each defendant. This is achieved by considering the capacity in which each defendant receives the proceeds of crime. Further, if received jointly by the conspirators, each is deemed to have received the proceeds equally. Therefore no apportionment is allowed. Each defendant is individually liable for the benefit received.[464] Where there is no evidence to show the proceeds were jointly received, the court is entitled to divide the proceeds by the number of conspirators.[465] Similarly, under South African law the liabilities of joint defendants is joint and several.[466]

4.13.3 The recoverable amount

A confiscation order is aimed at the benefit gained from committing a criminal offence that is the proceeds of crime only and not to its instrumentalities. This is referred to as the recoverable or

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[460] *R v May* [2008] (n 442) para 48; Burchelll (n 380) at 901. See also Ulph 'Confiscation orders, human rights, and penal measures' (2010) 126 *LQR* 251 at 254-260 where she discusses determining if one has power of control in proceeds of crime cases.

[461] Crown Prosecution Service *DPPs Guidance for Prosecutors on the Discretion to Instigate Confiscation Proceedings* (n 310) at 3; *R v May* [2008] (n 442) para 48; *NDPP v Ramlutchman* [2015] (n 359) para 25; *NDPP v Gardener & Another* (582/09) [2011] ZASCA 25; [2011] (1) SACR 612 (SCA) (18 March 2011) para 28-35.

[462] See *Shaikh & Others v The State* (248/06) [2006] ZASCA; [2007] 2 All SA 150 (SCA) (6 November 2006) para 28; *S v Shaikh & Others* (CCT 86/07) [2008] ZACC 7; 2008 (2) SACR 165 (CC) (29 May 2008); *R v Banks* [1997] 2 Cr App R (S) 110 (9 December 1996); *R v May* [2008] (n 442) para 20-34*; R v Chahal & Another* [2015] EWCA Crim 816 (21May 2015). Kruger (n 269) at 98; Rees *et al* (n 269) at 16.

[463] Kruger (n 269) at 97; Doig 'What is meant by "obtaining" property, under the Proceeds of Crime Act 2002, who obtains it, and what is the value of the interest obtained' (2014) 78 *JCL* 379.

[464] See *R v May* [2008] (n 442); *R v Green* [2008] UKHL 30 (14 May 2008); Eissa & Barber (n 387) at 6 & 85-86.

[465] *R v Gibbons* [2003] 2 Cr App R (S) 169 (11 December 2002) upheld as correct in R v May [2008] (n 442) para 32.

[466] Kruger (n 269) at 97. See also *S v Shaikh & Others* [2008] (n 461).

available amount under South African and English law respectively. To determine this amount requires an enquiry into the financial resources the defendant has at the date of determination.[467] In making the confiscation order, both English and South African courts apply similar considerations. That is an order to an amount equal to all realisable property and current values of all affected gifts held by the defendant can be made. Only sums of obligations by then held by the defendant have priority.[468]

Nonetheless, under English law if the defendant shows that the available amount is less than the benefit, the recoverable amount will be the available amount or a nominal amount set by the court.[469] Further and only attributable to English law is the fact that failure by a defendant to honour a confiscation order permits one to receive imprisonment in default.[470]

4.13.4 Criminal forfeiture considerations under Kenyan law

In Kenya, in order to obtain a confiscation order, the following are required to be proved: (1) Has the defendant benefited from the relevant criminal conduct convicted of or related conduct?[471] (2) What is the value the defendant has obtained as a benefit?[472] (3) For what amount should a confiscation order be made? (The recoverable amount).[473] These are similar to the requirements in England and South Africa.

The difference noted is, POCAMLA provides that a defendant benefits if he receives or retains or derives property, services, advantages, benefits or rewards in connection with the offence committed.[474] This is akin to the South African provision save for the use of the term 'unlawful activity' instead of offence. In interpreting 'in connection with the offence', it is suggested that a test similar to the *causa causans* test be adopted considering the similarity between the Kenyan and South African provision. The reason for this is that by applying this test the courts would ensure the benefit in some way ought to represent the consequence of the unlawful activity. This is, that specifically the benefits can be linked to the offence of piracy. In establishing a defendant's

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467 Crown Prosecution Service *DPPs Guidance for Prosecutors on the Discretion to Instigate Confiscation Proceedings* (n 310) at 6. Kruger (n 269) at 99-100.
468 S 9 Proceed of Crime Act 2002 and S 20 Prevention of Organised Crime Act 1998.
469 S 7(1&2) Proceed of Crime Act 2002. Rees *et al* (n 269) at 45.
470 S 10 Serious Crimes Act 2015. Rees *et al* (n 269) at 61.
471 S 61 POCAMLA.
472 S 62 POCAMLA.
473 S 63 POCAMLA.
474 S 62(1) POCAMLA.

interest in property, ordinary common law principles regarding entitlement and ownership need to be applied to the individual cases. Consequently considering the similarity of the requirements in Kenya, England and South Africa, in determining if the defendant has benefitted, the value of the benefit and realisable amount it is suggested that Kenyan courts be guided by the jurisprudence in the two jurisdictions.

Similar to both the English and South African legal positions a confiscation order made by the court can be to an amount equal to all realisable property and current values of all affected gifts held by the defendant.[475] Only sums of obligations by then held by the defendant have priority,[476] meaning they can be excluded when calculating the realisable property. No duration is indicated within which payment should be made, or provisions stipulating a term of imprisonment in default. Therefore the only recourse for default is to institute contempt proceedings against the defendant, since the confiscation order is a civil order. In this regard, adoption of the English measure of giving sentences in default would be desirable. This is because it would ensure that a defendant is still held accountable even if they are unable to pay the stipulated amount.

In conclusion, applying the three elements to confiscation of Somalian piracy proceeds draws one to the deduction that since confiscation proceedings can only be initiated after the termination of a piracy trial. It follows that the evidence used in the piracy trial may facilitate establishing if the defendant received any benefit from committing the offence. The benefit in this case being the ransom received. Subsequently, calculation of the exact amount received will have to be undertaken, in line with ascertaining the value the defendant has obtained.[477] Lastly, determination of the actual sum that is recoverable from the defendant has to be done. This will enable the court to set a specific figure in the confiscation order that is payable by the defendant.

4.14 Elements to be considered and proved during trial: Civil forfeiture

This method is applicable to forfeiture of proceeds and instrumentalities of crime. Although a country may choose to apply it in respect of one or both.[478] English and South African law require two main elements to be proved before a forfeiture order can be granted. 1) determine if the

[475] S 63(1) POCAMLA.
[476] S 63(4) POCAMLA.
[477] *R v Waya* [2012] (n 443) para 43-54 provides practical guidance on how to calculate the value obtained.
[478] South Africa civil forfeiture targets both proceeds and instrumentalities of crime; S 50 Prevention of Organised Crime Act 1998. In England it targets proceeds of crime and cash intended as an instrumentality of crime; S 240(1) Proceeds of Crime Act 2002.

property was acquired through criminal conduct; 2) determine and exclude certain interests such as innocent/ignorant/responsible property owner.[479] Similar to criminal forfeiture proceedings, it is necessary to also undertake a proportionality analysis as will be discussed in section 4.15. Hence, likewise, all these elements have to be considered and determined when undertaking civil forfeiture of the proceeds and instrumentalities of piracy and are considered hereunder.

4.14.1 Property acquired through criminal conduct

4.14.1.1 English law

English law provides that in determining proceeds of crime, the applicant does not have to prove or allege commission of any specific criminal offence. What is required is to specify the kind or kinds of unlawful conduct involved and in return for which the property was obtained.[480] Nonetheless, the courts require the applicant to adduce 'cogent evidence' to show that it is more probable than not that the property represents the proceeds of unlawful conduct.[481] That is the evidence adduced should be sufficient enough to enable the court decide whether the conduct described was unlawful under the criminal law of the United Kingdom in addition to showing that the property too is unlawful.[482]

This requires the applicant to adduce different types of evidence. Direct evidence is stronger as it does not require an inference to be drawn to arrive at a conclusion.[483] However, considering the hidden nature of laundering, circumstantial evidence is most likely to be the available evidence.[484]

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[479] Rees *et al* (n 269) at 161-162; Kruger (n 269) at 130-133 & 146-149.

[480] S 242 Proceeds of Crime Act 2002. *National Crime Agency v Amir Azam & Others* [2014] (n 85) para 3; *Director of Assets Recovery Agency v Green* [2005] (n 279); *R v Anwoir & Others* [2008] EWCA Crim 1354 (27 June 2008). Rees *et al* (n 269) at 161-162.

[481] *R (on application of the Director of the ARA) v Jia Jin He and Dan Dan Chen* [2004] EWHC 3021 (Admin) (7 December 2004) para 66.

[482] See *Director of Assets Recovery Agency v Green* [2005] (n 279) para 16-20. See also *R v Anwar* [2013] EWCA Crim 1865 (24 April 2013).

[483] Ratliff *'Third-party money laundering: Problems of proof and prosecutorial discretion'* (1996) 7(2) *SLPR* 173 at 174.

[484] Durrieu (n 26) at 327 defines indirect/circumstantial evidence as 'the facts or circumstances from which the existence of other facts or circumstances can be deduced through a process of logical interpretation.' and proceeds to consider it relevance in money laundering prosecutions. See also Bell *'Proving the criminal origin of property in money laundering prosecutions'* (2000) 4(1) *JMLC* 12 at 13; *Dos Santos & Another v The State* [2010] ZASCA 73; [2010] 4 ALL SA 132 (SCA) (27 May 2010) para 33.

English courts have endorsed the use of circumstantial evidence from which inferences are drawn to prove the criminal origin of property.[485]

Circumstantial evidence includes accomplice evidence, admissions, expert evidence, audit trails, unlikelihood of legitimate origin, absence of commercial or domestic logic, evidence of bad character, packaging of proceeds, lies by the defendant, intrusive surveillance and interceptions of communications and false identities, addresses and documentation.[486] Ultimately, though different pieces of evidence are gathered, they should cumulatively provide a link pointing to the criminal origin of the property.

4.14.1.2 South Africa law

South African law applies civil forfeiture to proceeds and instrumentalities of crime.[487] In determining if property is the proceeds of unlawful activities the National Director of Public Prosecutions (NDPP) has to prove the respondent has committed an unlawful activity and hence the property has been derived, received, retained, directly or indirectly, as a result of or in connection with the said criminal activity.[488] Simply put, it has to be shown that the proceeds are in some way the consequence of unlawful activity.[489] On the other hand, instrumentality of an offence is defined as 'any property which is concerned in the commission or suspected commission of an offence'.[490] This implies the need to show a connection between the alleged offence and the property concerned.

To determine if property has been concerned in the commission of an offence: First, whether there is a sufficiently close link between the property and its criminal use. Second, whether the property has a close enough relationship to the actual commission of the offence to render it an instrumentality.[491] This implies that the inquiry must satisfy both a factual connection and a legal

[485] See *R v Anwoir & Others* [2008] (n 479) para 21; *Serious Organised Crime Agency v Hakki Yaman Namli & Another* [2013] EWHC 1200 (QB) (10 May 2013) para 45-49; *National Crime Agency v Amir Azam & Others* [2014] (n 85) para 26; *R v Lonnie Augustus Smith* [2015] (n 25) para 7-12.
[486] Bell 'Proving the criminal origin of property in money laundering prosecutions' (2000) 4(1) *JMLC* 12 at 13-22. Pasco (n 323) at 107-111.
[487] S 38 Prevention of Organised Crime Act 1998.
[488] S 50(1) read with S 1 definition of proceeds of crime Prevention of Organised Crime Act 1998; Kruger (n 269) at 129.
[489] *NDPP v Cook Properties* [2004] (n 19) para 72. Kruger (n 269) at 129.
[490] S1 Prevention of Organised Crime Act 1998.
[491] *NDPP v Cook Properties* [2004] (n 19) para 32 referring to *NDPP v Prophet* [2003] 8 BCLR 906 (C) (22 May 2003) para 25 per NC Erasmus J. See also *NDPP v Bailey* (19611/2013) [2015] ZAWCHC 155 (21 October 2015). Kruger (n 269) at 131-132.

causal connection that is a relationship of direct functionality between what is used and what is achieved.[492]

Further the courts have cautioned that in determining the instrumentality of an offence, focus should not be on the state of mind of the owner, rather it should be on the role the property plays in the commission of the offence.[493] The state of the owner's mind is only relevant when considering exclusion of interests.[494] This stage can only begin after it has been established the property is an instrumentality.[495] Similar to England, South African courts have endorsed the use of circumstantial evidence to prove the criminal origin of property.[496]

4.14.1.3 Kenyan law

Civil forfeiture applies to both proceeds and instrumentalities of crime.[497] Proceeds of crime is property derived, realised directly or indirectly as a result of or in connection with an offence.[498] The instrumentalities should have 'been used in or is intended for use in the commission of an offence.'[499] With regards to Somalian piracy proceeds, the applicant for the order has to prove that the property they seek to confiscate is criminal that is any property or economic advantage derived or realized, directly or indirectly from piracy. This also includes property into which, any property derived or realized directly from piracy was later successively converted, transformed or intermingled. Also included is income, capital or other economic gains or benefits derived or realized from such property from the time piracy was committed.[500]

Consequently, civil forfeiture proceedings will make it possible to target property in its widest sense both in relation to proceeds and instrumentalities of piracy. This will include not just the actual ransoms paid but also property such as mother boats and skiffs used to commit piracy. With regards to the proceeds of piracy it has to be proved, on a balance of probabilities, that it has been derived, received or retained directly or indirectly as a consequence of piracy. In terms of piracy instrumentalities a factual and a legal causal connection have to be established for the property to

[492] Burchell (n 380) at 907.
[493] *NDPP v Cook Properties* [2004] (n 19) para 21.
[494] Ibid para 22.
[495] Ibid para 21.
[496] *Lachman v The State* (432/09) [2010] ZASCA 14; 2010 (2) SACR 52 (SCA) (15 March 2010) para 40-46.
[497] S 92(1) POCAMLA.
[498] S 2 POCAMLA.
[499] S 92(1) POCAMLA.
[500] S 2 POCAMLA.

be considered an instrumentality. That is to show the cause and effect/result connection between piracy and the property. The aim of this being to establish that the targeted property is criminal property.

As it is not necessary to prove the predicate offence in civil forfeiture, the criminal nature of the property can be proved in various ways. The applicant may seek to show a link between the accused and the principle offender, the pirate.[501] This will assist in substantiating that the property was derived from the specific crime. If this is not possible, the applicant may seek to show that from the circumstances an 'irresistible inference' can be drawn that the property was derived from piracy.[502]This can be done by utilising circumstantial evidence. Therefore, if the applicant is able, on a balance of probabilities, to prove that the property is criminal a forfeiture order will be granted regardless of the property right holder's involvement or lack of in piracy.

4.14.2 Exclusion of interests analysis

As discussed in section 4.12.2, with regards to making exceptions when granting restraint or preservation orders, similar justifications are applicable in relation to the exclusion analysis conducted when making a forfeiture order. Simply, in providing for exclusions the aim is to protect the interest(s) in terms of property rights or other personal claim(s) a third party may have in relation to the targeted property, hence ensuring they are recognised and safeguarded by the court.[503] This promotes an individual's rights as it avoids arbitrary deprivation of property. In keeping with this constitutional protection individuals having rights in property targeted either as the proceeds or instrumentalities of piracy are entitled to present an exclusion of interests claim and a determination given by the court.

4.14.2.1 Exclusion analysis under English and South African law

The exclusions provided for under English law provide protection for a bona-fide purchaser for value.[504] This implies only a purchaser who buys the property in good faith and without knowledge of the properties illegal origin is protected.[505] Such an individual will have his interests excluded

[501] This is also referred to as association evidence. College of Policing Money Laundering (Criminal Property Offences) (2014) available at *https://www.app.college.police.uk/app-content/investigations/investigative-strategies/financial-investigation-2/money-laundering/* accessed 27/8/15.
[502] Bell (n 485) at 12.
[503] The term interest(s) will be used interchangeably when referring to property rights or a personal claim(s).
[504] S 308 (1) Proceeds of Crime Act 2002. See also *National Crime Agency v Amir Azam & Others* [2014] (n 85).
[505] Rees *et al* (n 269) at 162.

when a forfeiture order is made. This exclusion analysis under the English law seems uncomplicated.

In terms of section 52 of the Prevention of Organised Crime Act (South Africa) the court has a discretion to exclude certain interests from the operation of a forfeiture order. Generally this requires the court to first give an order determining the interest a person has in the property.[506] Thereafter operationalisation of the order is done by excluding these interest(s), when the property vests in the state or requires the *curator bonis* not to deposit the proceeds of the excluded interest in the Criminal Assets Recovery Account.[507] Therefore, exclusion will be ordered if the innocent/ignorant owner proves their interest in the property, further that they neither knew nor had reasonable grounds to suspect that the property was an instrumentality or proceeds of crime. For proceeds of unlawful activities that the interest was acquired legally and for consideration, the value of the consideration should not be significantly less than the value of the interest.[508]In determining interest, the widest possible interpretation is given, meaning 'any right' that one can possibly have under law, not just ownership, can be recognised.[509]

In relation to instrumentalities, the court has to undertake a two part enquiry.[510] First determine that the property is indeed an instrumentality of an offence and in making this inquiry it is not relevant for the court to consider the owner's culpability. That is guilt, innocence, ignorance or wrong doing of the owner.[511] Only at the second stage as the court considers the exclusion of certain interests does the owner's state of mind become relevant.[512] That is in order to establish if the ignorant or innocent owner's defence can stand the court has to consider the culpability of the owner. For crimes committed pre 1998, to show they took reasonable steps to prevent the property being used as an instrumentality.[513] However, for both proceeds and instrumentalities of crime, the burden of proving innocence or ignorance is placed on the owner, albeit on a balance of probabilities.[514] Thus section 52 burdens the owners of property pleading the innocent or ignorant

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[506] S 52 (2) & (2A) Prevention of Organised Crime Act 1998.
[507] S 52(4) Prevention of Organised Crime Act 1998. Succinctly explained in *Mazibuko v NDPP* (113/08) [2009] ZASCA 52; [2009] 3 All SA 548 (SCA) (26 May 2009) para 52-53. Burchell (n 380) at 910-911.
[508] S 52 Prevention of Organised Crime Act 1998.
[509] *NDPP v Cook Properties* [2004] (n 19) para 22.
[510] Ibid para 21. Kruger (n 269) at 147.
[511] *NDPP v Cook Properties* [2004] (n 19) para 21.
[512] Ibid.
[513] Ibid para 25. Prevention of Organised Crime Act 1998 commencement date 28 April 1999. Kruger (n 269) at 147.
[514] *NDPP v Cook Properties* [2004] (n 19) para 23

owner with a reverse burden of proof and if unable to discharge it, their interests will not be excluded.[515]

4.14.2.2 Exclusion analysis under Kenyan law

In terms of POCAMLA two steps are involved in determining whether certain interests may be excluded. First, making an order declaring the nature, extent and value of the person's interest under section 93. Second making an order excluding the declared interests from operation of the forfeiture order under section 94.

For both proceeds and instrumentalities of crime for a section 93 application, all what needs to be proved is that: 1) the person was in no way involved in the commission of the offence; 2) they paid sufficient consideration and; 3) they did not know or no reasonable suspicion was aroused at the time of acquiring the property that it was tainted.

Under section 94, regarding proceeds of crime, one has to prove that: 1) they acquired the interest legally; 2) for a consideration the value of which is not significantly less than the value of the interest and; 3) if the interest was acquired after commencement of the act, the person neither knew nor had reasonable grounds to suspect the property is proceeds of crime. Whereas for instrumentalities one has to prove that: 1) the interest was acquired legally and; 2) if it was acquired after commencement of the act he neither knew nor had reasonable grounds to suspect the property has been used or is intended for use in the commission of an offence or if the property was used before the commencement of the act in the commission of an offence the person has taken all reasonable steps to prevent the continued use.

Under section 93 if one is able to establish their valid interest, the court shall then make an order declaring the nature, extent and value of the person's interest. Seeking a declaration of one's interest is important for two reasons. Such interest will be taken into consideration when the final forfeiture order is made and may be excluded. The interested party is also permitted to make a claim for a portion or remainder after completion of the forfeiture process. For example, in the case of joint ownership, the declaration of the extent and value the interested party has in the property would allow them to claim for their portion after the forfeiture order is granted.

[515] Kruger (n 269) at 146.

The second step, under section 94, is undertaken during the making of a forfeiture order and can only be done after establishment of the extent and value an interested person has over property. In this step, the court makes an order excluding the interests already declared from the operation of the forfeiture order. This also makes it clear that the court cannot exclude interests that had not already been considered and a declaration made.

It is evident that section 94 is more rigorous than section 93 since it requires the court to establish payment of sufficient consideration. That is that some value that is real and can be expressed in terms of economic value was exchanged. The court need not investigate its adequacy, that is, whether the parties got equal value or if the price was fair.[516] Whereas section 94 requires one to prove that they acquired the property legally and the court has to interrogate the value of the consideration paid. The value paid should not be significantly less than the value of the interest when acquired. Thus unlike in a declaration of interest where the court considers the sufficiency of consideration here it considers the adequacy of consideration.

Consequently, consideration of section 94 indicates that though a court initially made a declaration of interest, it is not bound to uphold these interests and exclude them from the operation of the forfeiture order. The rationale is that the requirements that a party has to satisfy in both instances differ. This imputes that if at any point the interested party is unable to satisfy the court on these requirements, the court will not proceed to declare an interest or thereafter exclude the interest from operation of the forfeiture order.

In conclusion, essentially the exclusion analysis will enable persons having interest in property linked to piracy proceeds and targeted by forfeiture orders to have their interests considered. This is in a bid to have them acknowledged and exempted from operation of the order. This is in keeping with protecting ones right to property and avoiding arbitrary deprivation.

4.15 Proportionality analysis in piracy proceeds forfeiture proceedings

The principle is of German origin where it was applied in limiting the discretionary powers of the police.[517] Since then it has gradually gained acceptance worldwide and is considered a general

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[516] See *Chappell & Co Ltd v Nestle Co Ltd* [1960] AC 87 (18 June 1960) for a discussion on the difference between sufficiency and adequacy of consideration. Although, it is an English case it can be taken as persuasive guidance for the Kenyan courts.

[517] Clayton 'Regaining a sense of proportion: The Human Rights Act and the proportionality principle' (2001) 5 *EHRLR* 504 at 504. Eliya & Porat *Proportionality and Constitutional Culture* (2013) at 24-32

principle of international human rights law which is applied by various human rights bodies.[518] Proportionality *strictu sensu* requires measuring the relative intensity of interference in a right with the importance of the aim sought.[519] To achieve proportionality consideration should be given to the nature of the right, importance of the purpose of the limitation (suitability), nature and extent of the limitation (necessity) and the relation between the limitation and its purpose.[520] Ultimately application of proportionality seeks to ensure a fair balance between the interests of individuals and the community vis à vis the government's legitimate objectives pursued by the limitation of a right.[521]

In relation to asset forfeiture the principle is applicable through the right to property. The right to property entitles one to claim immunity against compulsory taking over of private property by the state.[522] Proportionality seeks to protect against arbitrary interference with private property by the state unless it is authorised by law and meets a basic standard of justification.[523] To ensure that a deprivation of property is not arbitrary it has to follow fair procedures and substantive fairness.[524] Therefore, in asset forfeiture application of the proportionality principle ensures that the implementation of the forfeiture is substantively and procedurally fair such that the deprivation does not amount to an arbitrary dispossession of property.[525]Simply put it ensures that the harm to the right is proportional to the benefit gained by the deprivation. With regards to asset forfeiture that means balancing between parliament's aim of depriving criminals of the proceeds from crime, safeguarding infringement of property rights and ensuring the property serves the public interest. Accordingly, to ensure this balancing, a proportionality analysis has to be part of the criminal or civil forfeiture process of the proceeds or instrumentalities of piracy.

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518 See Takahashi 'Proportionality' in Shelton (ed) *The Oxford Handbook of International Human Rights Law* (2013) at 449-463; Eliya & Porat (n 516) at 10-14.
519 Takahashi (n 517) at 452.
520 Reid & Visser 'Introduction' in Reid & Visser (eds) *Private Law and Human Rights Bringing Rights Home in Scotland and South Africa* (2014) at 9; Takahashi (n 517) at 450-451; Eliya & Porat (n 516) at 2.
521 Reid & Visser (n 519) at 9. Kruger (n 269) at 144.
522 Currie & De Waal *The Bill of Rights Handbook* (2013) at 533.
523 Ibid at 534.
524 Ibid at 540-547.
525 *Mohunram & Another v NDPP & Another* [2007] (n 443) para 56; *R v Waya* [2012] (n 443) para 20-22; Kruger (n 269) at 144.

4.15.1 Proportionality under English and South African law

Under English law, the principle is not explicitly stated in the Proceeds of Crime Act 2002 but its application is attained through the European Convention on Human Rights domesticated through the Human Rights Act 1998.[526] Specifically section 3 of the Act provides that 'so far as is possible to do so, primary legislation and subordinate legislation must be read and give effect in a way which is compatible with the convention.' In South Africa similarly the term does not appear in the Prevention of Organised Crime Act 1998 but it is inferred from the wording of section 36(1) in the Constitution.[527] Section 36(1) is part of the bill of rights, which 'applies to all laws and binds the legislature, the executive, the judiciary and all organs of state.'[528] Hence courts in both jurisdictions are bound to be cognisant of the principle of proportionality when interpreting any law.

Both jurisdictions have similar formulation in terms of the factors to consider when applying the proportionality principle.[529] That is, the nature of the right, importance of the purpose of the limitation, nature and extent of the limitation and the relation between the limitation and its purpose. Similarly, also in reiterating that it ensures a balance between advancing the aim of forfeiture and avoiding arbitrary deprivation of property.[530] This can be achieved by undertaking a proportionality analysis in both criminal and civil forfeiture proceedings.

Additionally, under South African law, in criminal forfeiture the courts have stated that the use of the word 'appropriate' in section 18(1) Prevention of Organised Crime Act implies the need to ensure proportionality. This is between the payment to the state and the offence that generated the criminal proceeds.[531] In civil forfeiture, the definition of a proportionality analysis was succinctly stated in *Mohunram & Another v NDPP & Another*. It requires 'weighing the severity of the

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[526] Cap 42. See also Rees *et al* (n 269) at 13-14; Foster 'Repealing the Human Rights Act – no not delay, just don't do it' (2015) 20(1) *CLJ* 9 at 11.
[527] Rautenbach 'Proportionality and the limitation clauses of the South African bill of rights' (2014) 17(6) *PER* 2229 at 2243. The said provision lays down the elements to be applied in a proportionality test/analysis.
[528] S 8(1) South African Constitution Act no 108 of 1996.
[529] Reid & Visser (n 519) at 9.
[530] *Mohunram & Another v NDPP & Another* [2007] (n 443) para 130; *Van der Burg and Another v NDPP* (CCT 75/11) [2012] ZACC 12; 2012 (2) SACR 331 (CC) (12 June 2012); *R v Waya* [2012] (n 443) para 20-22; *R v Chahal & Another* [2015] (n 461). Kruger (n 269) at 144; Rees *et al* (n 269) at 14.
[531] Burchell (n 380) at 901. *S v Shaik* [2008] (n 461) para 71 & 79.

interference with individual rights to property against the extent to which the property was used for the purposes of the commission of the offence, bearing in mind the nature of the offence.'[532]

On how to conduct a proportionality analysis the South African courts are more instructive. First the court has to determine whether they are dealing with the confiscation of the proceeds or with instrumentalities of crime. As stated in *S v Shaikh & Others;*[533] distinction has to be made because the purpose for each type of confiscation is different. Therefore, the considerations to be made are different. Targeting the proceeds of crime is aimed at ensuring that criminals are deprived of the benefit of their activities whereas targeting instrumentalities aims to prevent the continuation or occurrence of crime.[534] Subsequently, the court needs to establish the proportionate relationship between the scope of assets liable to forfeiture and the underlying criminal activity.

Thus, for instrumentalities, the court should establish that the property in a real or substantial sense facilitates or makes possible the commission of an offence. That the property is instrumental in and not merely incidental to the commission of an offence as enunciated in *Prophet v National Director of Public Prosecutions*.[535] The court in *FNB & Others v Minister of Finance*[536] further showed that the property must play a reasonably direct role in the commission of the offence. In forfeiture of proceeds of crime, the court has to establish the extent to which the property is derived directly from the criminal activities and also consider other penalties meted out on the defendant.[537] Essentially the taint of the property has to be significant. Since a mere criminal taint, for instance a modest association between the property and the crime, would not be sufficient.[538]

A granted forfeiture order that does not take these elements into consideration is likely to be arbitrary and unjust. However, the court in *Prophet v National Director of Public Prosecutions* sounded a word of caution that 'a mere sense of disproportionality should not lead to the refusal

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532 *Prophet v NDPP* (502/2004) [2005] ZASCA 94; [2006] 1 All SA 212 (SCA) (29 September 2005) para 30; *Mohunram & Another v NDPP & Another* [2007] (n 443) para 61.
533 *S v Shaikh & Others* [2008] (n 461) para 68.
534 See *NDPP v Prophet* [2003] (n 490) para 3 & 4; *S v Shaikh & Others* [2008] (n 461) para 50-52.
535 *Prophet v NDPP* [2005] (n 531) para 27.
536 *First National Bank of SA Limited t/a Wesbank v Commissioner for the South African Revenue Services and Another; First National Bank of SA Limited t/a Wesbank v Minister of Finance* (CCT19/01) [2002] ZACC 5; 2002 (4) SA 768 (16 May 2002); (hereinafter *FNB & Others v Minister of Finance*). Roux 'The "arbitrary deprivation" vortex constitutional property law after *FNB*' in Woolman & Bishop (eds) *Constitutional Conversations* (2008) at 265-281.
537 See *Prophet v NDPP* [2005] (n 531) para 36; *S v Shaikh & Others* [2008] (n 461) para 64-67.
538 *FNB & Others v Minister of Finance* [2002] (n 535) para 100; Gallant 'Retreating into doubt: Tainted finance, civil devices and the rule of law' (2012) available at *http://ssrn.com/abstract=2103785* accessed 15/04/15 at 7.

of an order.'[539] The court emphasised that for a forfeiture order to be considered arbitrary and unconstitutional, it should be significantly disproportional.[540]

4.15.2 Proportionality under Kenyan law

In depth consideration of this issue is undertaken in section 4.20.2 in discussing the link between the right to property and the principle of proportionality in seeking to avoid arbitrary deprivation of property. Generally, suffice it to note that similar to England and South Africa POCAMLA does not explicitly require the application of proportionality in forfeiture proceedings. However, section 24(1) of the Kenyan Constitution is akin to section 36(1) in the South African Constitution. This is the provision from which elements of the proportionality test can be deduced.[541] Consequently it is correct to infer that Kenyan courts may be guided by South African jurisprudence on application of proportionality in criminal and civil forfeiture proceedings. This will ensure that the application of POCAMLA is in line with the constitution and more specifically the bill of rights. Furthermore, the importance of ensuring proportionality cannot be understated considering that Kenya courts too have affirmed the need to prevent arbitrary deprivation of property.[542] Hence, despite seeking to take away the proceeds and instrumentalities of piracy, application of proportionality would promote constitutional principles by safeguarding the right to property.[543]

4.16 Burden and standard of proof in forfeiture proceedings under POCAMLA

As discussed previously in section 4.8 for offences related to laundering piracy proceeds, the burden of proof lies with the prosecution and the standard required is beyond reasonable doubt. Conversely, in asset forfeiture proceedings the level of evidence and certainty required is on a balance of probabilities primarily because both criminal and civil forfeiture proceedings are civil in nature. As regards the burden of proof, generally it rests upon the applicant (DPP or Agency director) both in criminal and civil forfeiture. Interestingly though, in criminal forfeiture, in particular instances, the burden of proof may shift to the defendant.

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[539] *Prophet v NDPP* [2005] (n 531) para 37.
[540] Ibid. See also *NDPP v Gardener & Another* [2011] (n 460).
[541] Rautenbach (n 526) at 2243.
[542] *Crywan Enterprises Ltd v Kenya Revenue Authorities* Petition no 322 of 2011 [2013] eKLR (15 April 2013) in dealing with lawful deprivation of property cited with approval *FNB & Others v Minister of Finance* [2002] (n 535) a case which enunciated what amounts to arbitrary deprivation of property.
[543] See further discussion in section 4.20.2 with regards to Kenya, right to property and proportionality analysis.

The shift arises in instances where the court is allowed to make prima facie evidentiary presumptions in determining the defendant's benefit at the confiscation stage. To trigger the application of these presumptions, the defendant should have refused to disclose information relevant to determining the value of his benefit acquired pursuant to a court order or has furnished false information or evidence he believes not to be true.[544] This also applies where it is found that at the fixed date (when the property was acquired), the defendant did not have legitimate sources of income sufficient to justify the interests he has in any property.[545]

The court may then proceed to make the following presumptions:[546] 1) that any property which the confiscation order targets forms part of the defendants benefit from the offence and is held as part of an advantage, payment, service or reward in connection with the offence or related offence; 2) that it was received at the earliest time at which he held it; 3) that any expenditure he incurred at any time before or since his conviction was made out of the advantage, payments, services or rewards and; 4) that he received the property free of any other interest. The application of these presumptions places an evidentiary burden on the defendant to rebut them and failure to dispose this burden may invite the making of a confiscation order against the targeted property.

In instances of applying these evidentiary presumptions, the burden shifts to the defendant to rebut that the property was not illegally acquired. Justification for this position was elucidated in *McIntosh v Lord Advocate.*[547] In considering provisions similar to section 65, the court pointed to the fact that the acts undertaken by the defendant are illegal and hidden, thus making it potentially impossible to get direct proof of such proceeds.

Moreover, the evidentiary presumptions relate to matters within the defendant's knowledge but which it may be difficult for the applicant of the confiscation order to prove. Conversely, for an individual who acquired the property legally, it should be relatively easy for them to prove on a balance of probabilities that the property is lawfully acquired. [548] Ultimately, in criminal and civil

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[544] S 65(2) POCAMLA.
[545] S 65(1) POCAMLA.
[546] S 65(2-5) POCAMLA.
[547] *McIntosh v Lord Advocate* [2001] Cr App R 490 (5 February 2001) para 35 & 45; See also similar interpretations in *R v Benjafield* [2002] (n 281); *Phillips v United Kingdom* [2001] ECHR 437 (5 July 2001). See also Smellie (n 279); Boister (n 208) at 238-239. Further articles 12(7) & 5(7) of the UN Convention against Transnational Organised Crime and UN Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances respectively, encourage the use of reversal of onus to prove such provisions.
[548] *McIntosh v Lord Advocate* [2001] (n 546) para 35 & 45.

forfeiture proceedings involving piracy proceeds generally the burden of proof rests on the applicant (DPP or Agency director). However, if the provisions of section 65 are triggered the burden shifts to the defendant/pirate to prove that the benefit is not the proceeds of piracy.

4.17 Judgement and enforcement in forfeiture proceedings under POCAMLA

4.17.1 Criminal forfeiture

When determining the value of proceeds of piracy in criminal forfeiture proceedings,[549] the court is to consider the current 'sum of the values of all realisable property held by and affected gifts made' by the defendant.[550] This infers that the court considers the gross benefit received by the defendant without taking into account the expenses incurred in committing the offence. Similarly in considering this issue, the English and South African courts in *Crown Prosecution Service v Jennings, R v Ahmad*[551] and *Shaikh & Others v The State*[552] held that including the cost in determining the defendant's benefit would amount to a fine. Therefore considering this as persuasive jurisprudence, the Kenyan court is to consider the gross amount of piracy ransom received without deducting expenses incurred by the pirate. In the case of gifts, the considered value is the one at the time the affected gift was received and not the current value.[553]

The only amounts the court is allowed to disregard in its computation are any sequestrated amounts in relation to a defendant's estate. Additionally amounts that have been imposed as a fine or as a result of a court order already made in the case of a natural person. With regards to a body corporate in the process of winding up, the court is allowed to disregard any amounts payable to a secured or claim by a preferential creditor against the legal entity.[554]

Once the court makes a confiscation order it has the effect of a civil judgement.[555] This is in the form of a money judgement,[556] disregard of which can lead to contempt of court. In considering this issue the South African court in *Shaikh & Others v The State* reiterated the civil aspect of a

[549] S 62 POCAMLA uses the term value of proceeds of crime as well as benefit in S 61(1).
[550] S 63(1) POCAMLA.
[551] *Crown Prosecution Service v Jennings* [2008] (n 290) para 13; *R v Ahmad & Another* [2012] (n 442) para 53; Rees *et al* (n 269) at 40
[552] *S v Shaikh & Others* [2008] (n 461) para 60; Burchell (n 380) at 900.
[553] S 63(2)(a) POCAMLA.
[554] S 63(4) POCAMLA.
[555] S 66 POCAMLA.
[556] S 61(6) POCAMLA.

confiscation order, in that a confiscation order is not for the confiscation of a specific object. Rather it is an order for the payment of an amount to the state.[557]

The next step is realisation of property[558] and it begins after the confiscation order is made and the property subject to the order becomes realisable property.[559] Realisation involves enforcing execution of the confiscation order given. It entails the court giving an order directing anyone holding realisable property to surrender it to the management receiver.[560] The management receiver then disposes of the property. This is in instances where the defendant cannot directly pay the set amount and in the alternative enforcement of the confiscation order is sort by following realisable property.

Before final realisation can occur, the court must ensure that a confiscation order is no longer subject to review or an appeal. It must also ensure that any third party aggrieved by the confiscation order has been given the opportunity to be heard and the matter determined.[561] In situations where a natural person is adjudged bankrupt or a body corporate has a winding up order made against it, the confiscation order takes precedence,[562] as long as it was made before the granting of the bankruptcy or winding up order.[563] Additionally, the realisable property should be under the control of a management receiver.[564]

Once realisation has been done, the proceeds or any sums of money belonging to the defendant held by the receiver shall be applied as directed by the court in satisfaction of the confiscation order. Amounts in fulfilment of the confiscation order are paid into the Criminal Recovery Assets Fund.[565] In making such payments, the government does not have a preferential claim, similar to bankruptcy proceedings.[566] After making payments as per the confiscation order, any remaining

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[557] *S v Shaikh & Others* [2008] (n 461) para 24
[558] Upon determining the defendant's criminal proceeds, the calculated proceeds are referred to as realisable property S 2 POCAMLA. This progresses to the third stage of criminal forfeiture which involves taking away these property. This is referred to as realisation of property S 75 POCAMLA.
[559] S 2 'realisable property' means (a) property laundered; (b) proceeds from or instrumentalities used in, or intended to be used in money laundering or predicate offences; (c) property that is the proceeds of, or used, or intended or allocated for use in, the financing of any offence; and (d) property of corresponding value.
[560] S 75(2) POCAMLA.
[561] S 75(4) POCAMLA.
[562] S 79(4) POCAMLA.
[563] S 79(1) POCAMLA.
[564] S 79(1); S 80(1) POCAMLA.
[565] S 110 POCAMLA.
[566] S 76(2)(a) POCAMLA. See also S 247 read with para 2, 3, or 4 of the second schedule, The Insolvency Act no 18 of 2015.

amounts shall be distributed among persons affected by the order in such proportions as is directed by the court.[567] Persons in this category include secured creditors such as a bank that had a charge against realised property.

With regards to Somalian pirates upon conclusion of the confiscation proceedings the process discussed above will be applicable. In short, the defendants will be expected to pay a set amount in fulfilment of the confiscation order failure of which they will be considered to be in contempt of court orders. In the alternative if they cannot pay the set amount, fulfilment of the confiscation order can be sort by following realisable property.

4.17.2 Civil forfeiture

In civil forfeiture use of the word 'shall' in section 92(1) leads to the inference that it is mandatory for the High Court to make a forfeiture order if it finds, on a balance of probabilities, that the property concerned is the proceeds or instrumentality of piracy. The discretion of the court is eliminated by the wording of the provision.[568] The court may only exclude the interests that had been predetermined and an order to this effect made.[569] This refers to the excluded interests as discussed in section 4.14.2.2.

The absence of a person whose interest in property may be affected by the making of a forfeiture order does not prevent the court from making such an order.[570] This provision grants the court jurisdiction to hear and make forfeiture orders where the wrongdoer is unknown, the wrongdoer is a fugitive, an interested party has died and in uncontested cases. Therefore, forfeiture orders made in such instances over piracy proceeds or instrumentalities cannot be later invalidated.

The validity of a forfeiture order is not affected by the outcome of criminal proceedings or investigations which are associated with property that is the subject of the order.[571] This applies to laundering proceedings under POCAMLA or piracy proceedings. The implication of this provision is that a forfeiture order cannot be overturned or rendered invalid based on the finding in a piracy trial relating to the same property. Essentially an acquittal in piracy proceedings in relation to

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[567] S 76(2)(b) POCAMLA.
[568] S 92(1) POCAMLA The High Court *shall, subject to section 94, make an order applied for under section 90 (1)* if it finds on a balance of probabilities that the property concerned (*a*) has been used or is intended for use in the commission of an offence; or (*b*) is proceeds of crime. [Emphasis mine].
[569] See appendix C excerpt of S 93 & S 94 POCAMLA.
[570] S 92(3) POCAMLA.
[571] S 92(4) POCAMLA.

property that is the target in civil forfeiture proceedings, does not affect or invalidate a forfeiture order given over the same property. Thus if a defendant is not convicted after a piracy trial, the findings in the trial cannot invalidate a confiscation order over property associated in both cases.

In dealing with a similar issue, the court in *Gale & Another* v *Serious Organised Crime Agency*[572] justified this position as follows: Though in the criminal trial the evidence adduced was insufficient to discharge the burden of proof, this does not demonstrate that the accused did not commit the criminal act or that the associated property was not tainted.[573] Therefore, by instituting civil forfeiture proceedings, it may be possible to use the lesser standard of proof to target the associated property. In theory this may be difficult to reconcile with the protection of property under the bill of rights.[574]

Once a forfeiture order is granted, it should be published in the *Kenya Gazette* within thirty days and it shall take effect after the period allowed for appeal has expired or an appeal has been conducted and concluded.[575] During the pendency of such an appeal, any preservation or seizure order earlier granted remains in force pending the outcome of any appeal.[576] After completion of all appeals or applications, the forfeiture order vests the property in the manager receiver who takes possession on behalf of the government.[577] Upon vesting of the property, the management receiver is to dispose of it and deposit the proceeds into the Criminal Assets Recovery Fund.[578] If the property is located outside the jurisdiction, mutual legal assistance provisions will be relied upon to facilitate enforcement.

4.18 Challenges in utilising forfeiture proceedings to target piracy proceeds

The discussion above has highlighted the applicable law and procedure that is to be followed if asset forfeiture laws are to be used to deprive pirates of their illegal proceeds. Evidently POCAMLA is capable in facilitating achievement of this. More so, they give a very wide scope as to the proceeds that can be targeted, mainly because the actual ransoms can be targeted as well as any other property they have been converted into. Notwithstanding, the applicability of these

[572] [2011] UKSC 49 (26 October 2011).
[573] Ibid para 19.
[574] See discussion on this in section 4.20.2.
[575] S 92(5&6) POCAMLA.
[576] S 97 POCAMLA.
[577] S 98 POCAMLA.
[578] S 99(1) POCAMLA.

provisions the discussion above indicates that both criminal and civil forfeiture are fraught with challenges. These will interfere the utilising of forfeiture proceedings to target piracy proceeds.

For instance the provisions providing for exceptions/exclusion of defendant's or third party interests[579] have the noble aim of seeking to ensure proportionality in taking away the property and protecting their rights. However, the same provisions could prove a hindrance. As is evident, the affected parties are given ample opportunities to bring applications to court.[580] Hearing and determination of these applications could take a considerable amount of time, not to mention the cost implications. Even if the property is eventually forfeited, a cost benefit analysis could indicate that the amount of resources used and time spent are not commensurate to the value of property recovered.[581] This is especially in instances where frivolous and vexatious applications are filled with the intention of delaying the process.

At the same time enforcement of third party rights may obstruct the efforts of the relevant agencies in trying to confiscate proceeds of piracy due to filing of numerous such applications. This would result in delays and protracted court processes. In addition, there is the potential of abusing the court process by filing numerous and unnecessary applications. This is in a bid to delay the forfeiture process. There is also the possibility of delays arising as parties seek to couch matters in a way that allows them access to the Supreme Court, in a bid to prolong the litigation process.[582] Considering the length of time it would take for a matter to progress up to the Supreme Court. It would be justified to conclude that this too would lead to delays.

Further utilisation of the court process in seeking such protection orders would be straight forward for parties situated in Kenya. However, for third parties outside the Kenyan jurisdiction, it would be difficult enforcing their rights primarily because of differences in legal traditions and systems.[583] In instances where forfeiture is finally granted getting hold of the actual property may

[579] This is in relation to the making of restraint, preservation or forfeiture orders see discussion in sections 4.12.4 and 4.14.2.

[580] Ss 67(5), 68(9), 75(3), 83(3), 89(1), 91 and 96 POCAMLA. All these provisions permit affected parties to file applications seeking to protect their interests in targeted property.

[581] Brown 'Cost-benefit analysis in criminal law' (2004) 92(2) *CLR* 323.

[582] Justice J B Ojwang of the Supreme Court of Kenya has noted that litigants are ingenious in creating situations that allow them to invoke the jurisdiction of the court even when it is not appropriate. Ojwang 'Supreme Court of Kenya: Insider's perspective on the emerging groundwork' available at *http://kenyalaw.org/kl/index.php?id=4158* accessed 4/5/15.

[583] Stephenson *et al* (n 129) at 47-49. Differences in legal traditions and systems leads to differences in terminologies used, evidentiary and admissibility requirements for enforcement and mutual legal assistance.

prove a daunting task. For example, the defendant or third party may not be cooperative in facilitating liquidation of the assets. This is regardless of whether they are within or outside the jurisdiction. Further, even where the parties are cooperating, enforcement of extra territorial forfeiture orders may not be easy. That is forfeiture orders given by Kenyan courts and to be enforced in another jurisdiction.

Enforcement in other countries may prove difficult if not impossible for two reasons. First, if the other country does not allow or recognise the concept of civil forfeiture.[584] Second, its laws do not criminalise the predicate offence from which the targeted proceeds are generated. As regards the first aspect enforcement will be difficult because the other country does not recognise the concept of civil forfeiture. For such countries the argument for doing this is that civil forfeiture does not offer the full protections accorded under criminal forfeiture. Such as ensuring that the guilt of the accused has been established and it is shown the benefit gained is as a result of the offence convicted of.[585] Therefore in such a situation enforcement will be difficult.

The second aspect requires that for proceeds to be considered criminal they must arise from an offence categorised as such by the particular country's forfeiture laws. Additionally there is the requirement of dual criminality, if the predicate offence has been committed in a different jurisdiction.[586] Thus if the offence giving rise to the assets is not covered under the domestic asset confiscation laws, enforcement will be difficult if not impossible. This is a very probable challenge in relation to piracy proceeds.

Accordingly, bearing in mind the earlier discussion,[587] lack of consensus in defining piracy at the domestic level could provide an enforcement challenge. Despite providing for the offence of piracy domestically, subtle differences in definition may mean that another country does not recognise the offence giving rise to the Somalian piracy proceeds. This is primarily because under its laws piracy is defined differently. Further, in instances where countries utilise the serious crimes list approach[588] in identifying the offences to which asset confiscation is applicable, the particular

[584] Boister (n 208) at 240-241. See also Young 'Introduction' in Young (ed) *Civil Forfeiture of Criminal Proceeds Legal Measures for Targeting the Proceeds of Crime* (2009) at 1-10.
[585] Boister (n 208) at 241-242; Gray 'The compatibility of unexplained wealth provisions and "civil" forfeiture regimes with Kable' (2012) 12(2) *QUTLJJ* 18.
[586] Durrieu (n 26) at 401-408.
[587] See chapter 2 section 2.8.2.
[588] Interpretative note to Rule 3 of the FATF Recommendations provides: 'Countries should apply the crime of money laundering to all serious offences, with a view to including the widest range of predicate offences. Predicate offences

country may not have listed piracy as one of the offences. Any of these possibilities would prevent the application of POCAMLA in dealing with piracy proceeds because the essential requirement of dual criminality is not fulfilled.

Another possible scenario is that, other countries' courts do not have the requisite jurisdiction to recognise and enforce the restraining, preservation, forfeiture or confiscation orders granted by Kenyan courts. This is primarily because the court process resulting in the orders did not occur in the particular jurisdiction where enforcement is sought.[589] Ultimately, the instances outlined above will make extra-territorial enforcement difficult if not impossible. The various factors considered could be compounded if the property is situated in a secrecy jurisdiction. Essentially, forfeiture orders for property located in such jurisdictions may not be enforceable rendering the order nugatory.[590] However, this difficulty may be addressed by bolstering the use of mutual legal assistance. This can be achieved by Kenya signing treaties, entering into arrangements or negotiating other mechanisms with other states that would make extra-territorial enforcement easier and effective.

Reflection over the forfeiture provisions in totality indicates that they are technical in nature. Therefore, it is important and necessary that the staff of the agencies tasked with investigations, prosecutions and enforcement of forfeiture cases are up to task. The police, Director of Public Prosecutions, Assets Recovery Agency and judges should all have the relevant skills and resources as failure of this would mean difficulty in enforcement of forfeiture of assets linked to piracy proceeds.[591] Hence, to ensure effectiveness it is necessary to undertake further training of such staff. Additionally centralising the handling of money laundering and forfeiture cases with the economic and financial crimes division of the High Court would be helpful in this regard. This is

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may be described by reference to all offences; or to a threshold linked either to a category of serious offences; or to the penalty of imprisonment applicable to the predicate offence (threshold approach); or to a list of predicate offences; or a combination of these approaches.' FATF *International Standards on Combating Money Laundering and the Financing of Terrorism & Proliferation the FATF Recommendation* (n 63) at 34.

[589] See Micheals 'Recognition and enforcement of foreign judgments' para 25-30 Max Planck Encyclopaedia of Public International Law (2009) available at *http://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=2699&context=faculty_scholarship* accessed 17/8/15. Where he discusses important requirements and exceptions for recognition and enforcement of foreign judgements.

[590] McDermott (n 134) at 143-159.

[591] Six years since commencement of the statute as at March 2016, there has been very few prosecutions and no conviction under the statute. This could be an indication of a number of possibilities; the lack of political will to prosecute or the lack of expertise thus making it impossible to utilise the statute. See US Department of State *International Narcotics Control Strategy Report Vol II Money Laundering and Financial Crimes* (2016) (n 3) at 158-160.

because staff expertise in dealing with such matters would be developed and a coherent body of jurisprudence would grow progressively.

Another issue is that the primary body given the mandate to undertake forfeiture lacks financial independence. For example, once enforcement of the final court order is done, the proceeds are put in the Assets Recovery Fund as administered by the Assets Recovery Agency and eventually paid into the Consolidated Fund.[592] Once in the Consolidated Fund, the proceeds are to be allocated by the cabinet secretary by way of regulations as he deems fit.[593] This implies difficulty for the authority involved in asset forfeiture to have a say in appropriation of the funds once deposited.[594] Yet if the authority did have a say in how recovered funds may be utilised, it would point out areas in need of further funds allocation so as to facilitate achieving of their mandate.

Further, it is the considered view that a portion of the recovered proceeds should be given back to authorities involved in asset forfeiture, a practise that is employed by other jurisdictions.[595] Justification for doing so has been to provide motivation for the staff involved. Retaining a portion of the proceeds recovered would increase the amount available for the authorities to budget for. This could facilitate skills improvement or cover expenses incurred.[596]

The funds can also be used to provide compensation to victims of the crimes resulting from the criminal proceeds that are recovered as evidenced by practise in certain jurisdictions.[597]

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[592] S 111 & 112 POCAMLA. S 206(1) Constitution provides: (1) There is established the Consolidated Fund into which shall be paid all money raised or received by or on behalf of the national government, except money that (a) is reasonably excluded from the Fund by an Act of Parliament and payable into another public fund established for a specific purpose; or (b) may, under an Act of Parliament, be retained by the State organ that received it for the purpose of defraying the expenses of the State organ.

[593] S 113 POCAMLA. There is also the requirement that the said regulations are laid before parliament for approvals. However, the provision does not provide for the cabinet secretary to make the regulations in consultation with any individual or agency.

[594] S 206(2) Constitution provides: 'Money may be withdrawn from the Consolidated Fund only (a) in accordance with an appropriation by an Act of Parliament; (b) in accordance with S 222 or 223; or (c) as a charge against the Fund as authorised by this Constitution or an Act of Parliament. (3) Money shall not be withdrawn from any national public fund other than the Consolidated Fund, unless the withdrawal of the money has been authorised by an Act of Parliament. (4) Money shall not be withdrawn from the Consolidated Fund unless the Controller of Budget has approved the withdrawal.'

[595] In the United Kingdom it is referred to as 'Recovered Assets Incentivisation Fund' (RAIF). Ryder (n 4) at 34-35.

[596] Levi & Osofsky *Investigating, Seizing and Confiscating the Proceeds of Crime* (1995) Detection & Prevention Series Paper 61 at 64 available at *http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.200.9675&rep=rep1&type=pdf* accessed 21/8/15.

[597] Under South African law forfeited property is sold and the proceeds deposited into the Criminal Assets Recovery Account. Such funds are then used to bolster law enforcement in general. See S 69A Prevention of Organised Crime Act 1998. See also Ndzengu & Bonde 'A critical assessment of the introduction of proportional analysis by the South African courts in civil forfeiture jurisprudence' (2011) 32(1) *Obiter* 83 at 86.

Additionally, since POCAMLA does not provide for making a compensation order in criminal or civil forfeiture in instances where the court establishes that a defendant's or affected individuals rights have been unjustifiably interfered with by forfeiture proceedings.[598] Therefore portions of recovered assets funds could be used to pay compensation as evidenced by practice in the United Kingdom.[599] Therefore, bearing in mind the discussion above and in section 4.5.2, financial independence of the Assets Recovery Agency can be attained by making it an autonomous agency, unlike its present status as semi-autonomous agency under the Attorney General's Office. This would ultimately allow the Agency carry out its mandate more effectively.

In relation to instrumentalities, the challenge may be more practical in nature considering it entails the forfeiture of objects such as mother boats, skiffs and weapons. This is because, although it may be possible to have forfeiture orders granted by the court, difficulties may arise in terms of storage and disposal of the physical objects. Cumulatively, the issues considered above are aggravated by the corruption in Kenya. The vice permeates every aspect of the Kenyan society from the police to the court system.[600] If POCAMLA is to be successfully utilised in tackling piracy proceeds the government, staff of the relevant agencies and courts are to play a key role in facilitating the forfeiture of these proceeds. However, their corruption could prove a major stumbling block in the entire process[601] and hence impede effective implementation and realisation in dealing with piracy proceeds and proceeds of crime generally.

Finally, the fact that POCAMLA provisions have not been adequately tried and tested in itself poses a challenge to the statute's utilisation to deal with piracy proceeds. Nonetheless, since theoretically there is no doubt as regards its applicability, implementation of the measures identified above would help address and promote utilisation of the statute.

4.19 Conclusion to sections 4.10 to 4.18

Upon completion of a piracy trial, it is possible to use criminal forfeiture to confiscate the benefit gained by the pirate. Even without a criminal trial, it may be possible to use civil forfeiture to

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[598] See S 72 and S 283 Proceeds of Crime Act 2002.

[599] Ryder (n 4) at 34-35; Eissa & Barber (n 387) at 124.

[600] See Concordis International and Institute for Study of African Realities Report *Corruption and its Consequences in Kenya* (2013) available at *http://concordis.international/wp-content/uploads/2013/02/Corruption-and-its-Consequences-in-Kenya-Nov-2013.pdf* accessed 20/8/15.

[601] Stephenson *et al* (n 129) at 24. See also Chaikin & Sharman *Corruption and Money Laundering a Symbiotic Relationship* (2009) at 21-24 for a discussion on the link between corruption and money laundering.

confiscate property whose acquisition is linked to piracy. With specific regards to Somalian piracy proceeds, the preferable method in most instances may be civil forfeiture. This is primarily so because no conviction for piracy is required, thus eliminating the difficulties of conducting piracy trials. However, generally, determining which asset forfeiture method to employ will be done by the Assets Recovery Agency director and Director of Public Prosecutions.

Nonetheless, the challenge of utilising civil forfeiture is the short limitation period imposed for institution of a suit. This requires the prosecution to work very fast at investigations to ensure timeliness because once the limitation period lapses the property can no longer be targeted for forfeiture. If a suit is instituted in time, the prosecution then faces the hurdle of convincing the court on a balance of probabilities that the property was acquired through the criminal conduct of piracy. In criminal forfeiture it has to be proved that the defendant benefited from piracy. Thereafter the court has to establish the value of such benefit before deciding the amount to be included in a confiscation order. Importantly, in criminal and civil forfeiture, a proportionality analysis is necessary since it will ensure a balance between taking away the benefit gained or criminal property and avoiding arbitrary deprivation of property.

Despite having forfeiture or confiscation orders granted, enforcement challenges remain. This is mainly with regards to extra-territorial enforcement of orders given by Kenyan courts for which utilisation of mutual legal assistance may be helpful. Notwithstanding the impediments, Kenyan anti-money laundering laws, specifically criminal and civil forfeiture, can assist in holding Somalian pirates and their accomplices accountable. This is by facilitating taking away the benefits of piracy.

4.20 Human rights issues

Undeniably the application of POCAMLA in dealing with laundering and forfeiture of piracy proceeds can potentially give rise to a number of human rights issues. However, the discussion hereunder will focus on human rights issues arising consequent to the application of asset forfeiture provisions. For example, a defendant (a pirate) in criminal forfeiture is entitled to his rights; yet piracy ransoms will be converted into different forms of property held by the pirate, financier or other individuals. These individuals, whether innocent of association with piracy or not, will inevitably have enforceable rights over such property. Apart from the right to property, interference with other rights will occur through the orders made by courts such as the right to privacy through the search and seizure orders. These human rights issues will now be examined. Nevertheless, it should be noted that an exhaustive consideration of the human rights issues in relation to asset forfeiture is too wide for the scope of this thesis. Thus, the main aim of the discussion hereunder is to acknowledge and highlight the matter.

Chapter four of the Kenyan constitution contains the bill of rights which applies to all laws and individuals.[602] The constitution underscores the purpose of recognising and protecting human rights and fundamental freedoms so as to ensure preservation of the dignity of individuals, promotion of social justice and realisation of the potential of all human beings.[603] In applying a provision of the bill of rights, the courts are required to develop the law to the extent that it gives effect to a right or fundamental freedom and hence adopt an interpretation that most favours its enforcement.[604] Nonetheless, limitation of a right or freedom is permitted, if done within the confines of the law and only to the extent that the limitation is reasonable and justifiable in an open and democratic society.[605]

The constitution clearly provides that it is the fundamental duty of the state and every state organ to observe, respect, protect, promote and fulfil the rights and freedoms granted.[606] As such, the courts are required to facilitate realisation of the rights guaranteed. Therefore, Kenya's anti-money laundering regime has to be developed and applied in a manner that promotes such realisation. Various POCAMLA provisions discussed above interfere, through the orders made, with the rights of an affected individual and potentially give rise to a number of human rights issues. The relevant rights related to the application of forfeiture proceedings are: right to privacy;[607] right to property;[608] and right to a fair hearing.[609] The discussion hereunder considers these rights in turn.

4.20.1 Right to privacy

Every person has the right to privacy, which includes the right not to have (1) their person, home or property searched; (2) their possessions seized; (3) information relating to their family or private

[602] S 20(1) Constitution.
[603] S 19(2) Constitution.
[604] S 20(2)(3) Constitution.
[605] S 24(1) Constitution.
[606] S 21(1) Constitution.
[607] S 31 Constitution.
[608] S 40 Constitution.
[609] S 50 Constitution.

affairs unnecessarily required or revealed; or (4) privacy of their communications infringed.[610] This right applies in situations where search and seizures are conducted as this will interfere with one's privacy. Under POCAMLA, this applies in situations of enforcing production orders and search warrants as indicated in the earlier discussion under section 4.5.4.[611]

Searches and seizures are recognised as a lawful limitation of the right to privacy as long as they are done in a lawful manner.[612] Consequently, under POCAMLA, there are inbuilt mechanisms to ensure this. Foremost is that the relevant authority or person has to apply to court for an order allowing for search or seizure. This process helps safeguard one's rights in a number of ways. First, the granting of such an order is at the discretion of the court.[613] Therefore, before it is granted, the court can assess its relevance. For example, the court has to be satisfied that an investigation might be seriously prejudiced if immediate access to the relevant documents without notice to any person is not granted or; the document involved cannot be sufficiently described or identified so as to enable granting of a production order.[614] Only if satisfied that it is justified in the circumstances, will the order be issued. Second, if and when an order is granted, it has to be specific. This is in terms of providing details as to when and where the search is to be conducted and which documents are sought.[615] This avoids search and seizure warrants that are too wide and arbitrary as they would unnecessarily interfere with one's privacy.

These requirements imposed by POCAMLA for the granting of search and seizure warrants are in line with section 24(1) of the constitution since they permit for the limitation of a right if done by law and is reasonable and justifiable.[616] In the case of search and seizure warrants, they are permitted by law if, the limitation is reasonable and justifiable and, there is no other way for the required information to be accessed unless the order is given.[617] In addition, the purpose of limiting the right is to access information that may lead to the acquisition of evidence that facilitates the forfeiture of proceeds or instrumentalities of crime. Ultimately, this aims at promoting the public

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[610] S 31(a-d) Constitution; Kiage *Essentials of Criminal Procedure in Kenya* (2014) at 24.
[611] See also S 103-105; S107-108 POCAMLA.
[612] Kiage (n 609) at 25.
[613] S 107(3) POCAMLA.
[614] S 107 (3) c & d POCAMLA.
[615] S 107 (4) POCAMLA.
[616] Furthermore S 47 of the National Police Service Act Cap 84 permits the limitation of rights and fundamental freedoms when the police are conducting searches and seizures.
[617] Kiage (n 609) at 23.

good by denying offenders enjoyment of their illegally acquired wealth or preventing the occurrence of crime.[618]

Violation of the right to privacy may also arise with respect to banks providing information on customers' account details or transactions to the Financial Reporting Centre.[619] Given that banks owe a duty of secrecy to their clients arising from the contractual obligation. However, interference would be a justified act as it is done in adherence to the law, as enunciated in the *Tournier case* and endorsed by the Kenyan courts.[620] Moreover, the limitation is specifically permitted under section 17 POCAMLA and hence in line with section 24(1) of the constitution. Privacy of communications would also be infringed on in situations where advocates are required to provide information on their clients. As discussed earlier, this is protected under section 18 POCAMLA which provides for advocate-client privilege.[621]

4.20.2 Right to property

Subsequent to the discussion in section 4.15, on application of the proportionality principle in forfeiture proceedings, further consideration of how its realisation can be facilitated through the right to property under the Kenyan Constitution is necessary and undertaken now. The bill of rights guarantees the right to property by allowing a person, individually or in association with others, to acquire and own property.[622] The state or any person is not allowed to arbitrarily deprive, limit or restrict an individual from enjoying their property.[623] However, this right does not extend to property found to have been unlawfully acquired[624] and as with other rights, it is also subject to the limitation clause in section 24(1) of the constitution.

Undoubtedly, criminal and civil forfeiture proceedings directly infringe on this right by allowing an individual's property to be forfeited to the state. Nonetheless, justification for this infringement may be grounded on section 40(6) constitution which stipulates that the right to property does not

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[618] *Issac Gathungu Wanjohi & Another v Attorney General & 6 Others* petition no 154 of 2011[2012] eKLR (30 March 2012).

[619] As was the case *in Manfred Walter Schmitt & Another v Attorney General & 3 Others* CHR petition 293 of 2013 [2014] eKLR (20 May 2014). Although the judgement dealt more with the issue of a valid search and seizure.

[620] *CFC Stanbic Bank Ltd v Danson Mwashako Mwakuwona* civil appeal no 3 of 2014 [2015] eKLR (12 February 2015) para 17. See discussion in section 1.4.2.

[621] See discussion in section 4.6.1.

[622] S 40(1) constitution.

[623] S 40(2) constitution.

[624] S 40(6) Constitution. *Evelyn College of Design Ltd v Director of Children's Department & Another* CHR petition 228 of 2013 [2013] eKLR (27 September 2013) para 15-17. *Multiple Hauliers East Africa Ltd v Attorney General & 10 Others* CHR petition 88 of 2010 [2013] eKLR (19 December 2013) para 34.

extend to property that has been found to be unlawfully acquired. Accordingly, POCAMLA seeks to deprive individuals of the proceeds or instrumentalities of piracy; a crime. Further, the deprivation, limitation or restriction of the right is not done arbitrarily but after the conclusion of a trial where affected person(s) are given an opportunity to be heard that is procedural fairness.[625] Substantive fairness is also maintained, in that upon conducting the criminal and civil forfeiture proceedings, the courts are able to establish if the property was acquired unlawfully and if so, justify forfeiture. Hence, this creates a valid exception to the protection of the right to property and ensures that the deprivation of property is not done arbitrarily.

Additionally, denial of the right to property may also be substantiated on the basis of protecting the public interest. Section 24 (1) of the constitution provides that a right may be limited by taking into account the importance of the purpose for the limitation vis à vis the right.[626] The confiscation provisions target the forfeiture of proceeds and instrumentalities of crime. Targeting these elements helps to remove the incentives for crime thereby deterring persons from using or allowing the property to be used for crime. It also eliminates or incapacitates some of the means by which crime may be committed. This cumulatively aids in advancing the ends of justice by depriving those involved in crime of the property concerned. The position espoused above has authoritatively been stated in South African court decisions in considering similar forfeiture and human rights provisions.[627] In a nutshell, the bench in *Mohunram & Another v National Director of Public Prosecutions & Others*, pointed out that by addressing the threats posed by proceeds and instrumentalities of crime, this helps advance the public good of limiting crime by removing the means by which crimes are committed. Further that the protection of the public good is greater than the individual's right to illegally acquired property. Therefore utilisation of forfeiture proceedings in limiting an individual's rights to unlawfully acquired property are justified.

Nevertheless, unless dealt with circumspectly, forfeiture orders can lead to the arbitrary and unjust deprivation of the right to property. There is need therefore, in exercising its discretion to grant forfeiture, that the court strives to strike a balance; that of protecting an individual's right to

[625] *Multiple Hauliers East Africa Ltd v Attorney General & 10 Others* [2013] (n 623) para 34.
[626] See *Issac Gathungu Wanjohi & Another v Attorney General & 6 Others* [2012] (n 617).
[627] Kenyan human rights provisions borrowed heavily from the South African ones and thus are similar if not identical in various instances. See *Mohunram & Another v NDPP & Others* [2007] (n 443) para 57-60; *Prophet v NDPP & Others* [2005] (n 531) para 30-34.

property on the one hand and protecting the public interest on the other.[628] To achieve this balance, courts have advocated for application of the principle of proportionality as discussed earlier.[629]

With regards to Kenya, application of the proportionality principle is advanced by section 24(1) of the Constitution. Through the provision the elements of the proportionality test can be inferred, since it requires courts in limiting a right to take into consideration the following elements: 1) the nature of the right; 2) the importance of the purpose of the limitation; 3) the nature and extent of the limitation; 4) to ensure that the enjoyment of rights by an individual does not prejudice the rights of others and; 5) to consider the relation between the limitation, its purpose and whether there are less restrictive means to achieve the purpose.

Invariably application of these elements by a court in asset forfeiture proceedings should most likely ensure that the confiscation or forfeiture order given is overall fair. This is because, the deprivation would be the result of a procedurally and substantively fair process. Additionally, there would be promotion of constitutional principles by ensuring a balance between safeguarding the individual's right to property, but simultaneously safeguarding the intentions of parliament and the greater public good. Therefore, despite recognising an individual's right to property, it is necessary to give life to the intentions of parliament in enacting POCAMLA, that of taking away the proceeds and instrumentalities of crime from criminals and thus promoting the public interest. Ultimately, application of the proportionality principle in forfeiture proceedings ensures there is balancing of these different interests, procedural and substantive fairness. Cumulatively this makes certain that any resulting deprivation of property is not arbitrary.

4.20.3 Right to a fair hearing

This right encompasses many elements[630] but only those relevant to the current discussion will be considered, viz the right (1) to a fair and public trial;[631] (2) to be presumed innocent until the contrary is proved;[632] (3) not to be tried for an offence in respect of an act or omission for which

[628] *Mohunram & Another v NDPP & Others* [2007] (n 443) para 57.
[629] See section 4.15. See also *R v Waya* [2012] (n 443) para 10-35.
[630] Under the Kenyan Constitution the right consists of seventeen elements. See S 50 constitution in full.
[631] S 50(1) Constitution.
[632] S 50(2)(a) Constitution.

the accused person has previously been either acquitted or convicted;[633] and (4) the right to legal representation.[634]

4.20.3.1 Right to a fair and public hearing

In line with the constitution, POCAMLA is very specific in guaranteeing the right to a public trial for laundering of piracy proceeds and generally forfeiture proceedings. This is because proceedings are to be heard in open court.[635] The only exceptions are in relation to *ex parte* applications and instances where the interests of justice require a closed hearing or to prevent harm ensuing to an individual.[636] This is in line with similar exclusions permitted under the constitution.[637] Thus as regards guaranteeing this right, it is rather straight forward. The contention is in ensuring a fair trial.[638]

In the case of criminal forfeiture proceedings, though they are civil in nature, they are part of the sentencing process which stems from a criminal trial after the guilt of the accused has been established. During the criminal trial, the prosecution has to work at adducing sufficient evidence to prove beyond reasonable doubt the guilt of the accused. Various aspects in the trial such as presumption of innocence, right not to incriminate oneself until the prosecution discharges the burden of proof, cumulatively ensure that the accused is guaranteed of the entitlement and application of a fair trial throughout the process.[639] In civil forfeiture, it may be argued that though the proceedings are *in rem,* ultimately there is a natural or juristic person having an interest in the property. Therefore, they should be granted the right to a fair trial considering they are in jeopardy of having their right to property interfered with.

A contemplation of the various provisions that allow interested parties to file applications seeking the court to adjudicate on their rights in relation to targeted property points to this.[640] Such persons

[633] S 50(2)(o) Constitution.
[634] S 50 (2) (g & h) Constitution.
[635] S 124 POCAMLA.
[636] S 124(1) & (2) POCAMLA.
[637] S 50(8) Constitution; The section does not prevent the exclusion of the press or other members of the public from any proceedings if the exclusion is necessary, in a free and democratic society, to protect witnesses or vulnerable persons, morality, public order or national security.
[638] See generally King 'Civil forfeiture and article 6 of the ECHR: Due process implications for England & Wales and Ireland' (2014) 34(3) *LS* 371; Ivory 'The right to a fair trial and international cooperation in criminal matters: Article 6 ECHR and the recovery of assets in grand corruption cases' (2013) 9(4) *ULR* 147.
[639] See *Phillips v United Kingdom* [2001] (n 546) para 34. Although written from the United Kingdom perspective the case does explain the position that criminal forfeiture does not interfere with the right to a fair trial and can be instructive to other jurisdictions. See also *Gale v Serious Organised Crime Agency* [2011] (n 571).
[640] S 68, 93 & 94 POCAMLA.

are permitted to file applications to determine and delineate their interests. Further, despite the strict time constraints in filing such applications, permission may be granted to file out of time. Eventually, the courts are bound to hear and make determination on such interests before the making and enforcement of any forfeiture orders. These work towards ensuring the right to a fair trial. This therefore is in line with the constitution and the requirement for a fair trial and works towards ensuring the right as enunciated in *Livingstone Kunini Ntutu v County Council of Narok and 2 Others*.[641] Therefore, POCAMLA does work towards the realisation of such a parties' right(s).[642]

4.20.3.2 Right to be presumed innocent until proved otherwise

As stated earlier criminal forfeiture stems from criminal proceedings which provide for the right to be presumed innocent until sufficient evidence is adduced to prove beyond reasonable doubt the guilt of the offender. Only then does criminal forfeiture follow. Consequently, the right to be presumed innocent will have existed throughout the trial until guilt is established.

However, in theory, presumption of innocence will be difficult to apply in civil forfeiture proceedings. This is because *strictu sensu* the proceedings are instituted against the targeted property and not an individual. Nonetheless, it has been argued, albeit controversial, that ultimately there is a natural or juristic person having an interest in the property whose guilt or innocence it is necessary to establish in order to determine if it is fair to take away the property.[643]

It is the nature of civil forfeiture that could provide the justification that the rights are not denied. In essence, the proceedings are not against an individual but against the 'property' itself. Therefore, no presumption of innocence will be infringed as the right is granted to natural persons and not inanimate objects.[644]Moreover in *Gale v Serious Organised Crime Agency*[645] it was reiterated that

[641] Environmental Land Court case no 1565 of 2000 [2013] eKLR (25 February 2013).
[642] Certain rights such as the right to a fair hearing apply to both human and juristic persons. See Anderson 'Juristic persons and fundamental rights' in Reid & Visser (eds) *Private Law and Human Rights Brining Rights Home in Scotland and South Africa* (2014) at 362-375; Currie & De Wall (n 521) at 35-38.
[643] Right to presumption of innocence is one of the rights that juristic persons too can enjoy. See Oliver 'Companies and their fundamental rights: A comparative perspective' (2015) 64(3) *ICLQ* 661 at 681; Currie & De Wall (n 521) at 36.
[644] S 19(3)(a) Constitution; 'The rights and fundamental freedoms in the Bill of Rights belong to each individual and are not granted by the State.' *Hussein Khalid & 16 Others v Attorney General & 2 Others* CHR petition no. 324 of 2013 [2014] eKLR (26 August 2014) para 53. Rees *et al* (n 269) at 2.
[645] *Gale v Serious Organised Crime Agency* [2011] (n 571) para 123.

civil forfeiture proceedings do not include a criminal charge and therefore presumption of innocence does not apply.

There is the possibility that civil forfeiture proceedings may be based on evidence that was used in a criminal trial for which an individual was acquitted. English courts in considering the matter have stated that this can be done and it does not interfere with the presumption of innocence. Primarily because though the same evidence proved insufficient to satisfy the criminal standard of proof it may fulfil the civil standard of proof.[646] Therefore, use of the same evidence in finding unlawful conduct as regards property does not contradict an acquittal in criminal proceedings.[647]

Nevertheless, caution has been sounded that in such cases the presumption of innocence could potentially be interfered with[648] where there is a procedural link between the criminal prosecution and the subsequent civil forfeiture proceedings.[649] A procedural link can be established if the court, in the civil proceedings, casts doubt on the correctness of the acquittal.[650] To avoid this, the court emphasised that the decision should be based on reasoning and language which goes no further than is necessary for the purpose of determining the issue before the court and without making implications of criminal liability.[651] Doing so will ensure that no procedural link is created between the criminal case and the civil forfeiture proceedings.

Bearing in mind that Kenya is still to consider interpretation of forfeiture provisions in relation to human rights, the discussion above would provide guidance to the courts. Especially on how to ensure presumption of innocence is maintained in civil forfeiture proceedings that rely on evidence used in criminal proceedings that resulted in an acquittal. By doing so ensure that the right to presumption of innocence will be upheld.

4.20.3.3 Right to representation by legal counsel

In criminal forfeiture, POCAMLA grants the court discretion to make an order allowing for the provision to pay for legal counsel to be made out of the property that is to be placed under a

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646 *Serious Organised Crime Agency v Hakki Yaman Namli & Another* [2013] (n 484) para 30-35.
647 Ibid para 41.
648 See *Gale v Serious Organised Crime Agency* [2011] (n 571) para 134-139*; Serious Organised Crime Agency v Hymans & Others* [2011] EWHC 3332 (QB) (16 December 2011) para 18.
649 *Gale v Serious Organised Crime Agency* [2011] (n 571) para 44, 60 & 115.
650 *Gale v Serious Organised Crime Agency* [2011] (n 571) para 138; *Serious Organised Crime Agency v Hymans & Others* [2011] (n 647) para 18.
651 *Gale v Serious Organised Crime Agency* [2011] (n 571) para 138; *Serious Organised Crime Agency v Hymans & Others* [2011] (n 647) para 18.

restraint order and subsequently a confiscation order. This ensures that the accused can manage to pay for legal counsel and thus enjoy the right to legal representation.[652] In civil forfeiture, this right is not infringed as the right is granted to an individual and not a 'thing'. The proceedings are against the property itself. The affected party who appears in the proceedings does so as someone having an interest in the property and not as an accused person. Furthermore under Kenyan law the right to legal counsel is only granted to accused persons in criminal proceedings only.[653]

In conclusion, by and large, POCAMLA provisions will definitely interfere with freedom of trade and rights of individuals. This is through restrictions placed on banks, the requirements placed on designated non-financial professions and businesses as well as the rights of those who will be subject to the asset forfeiture provisions. Subsequently, it is for the courts to seek a balance between realisation of these guaranteed rights and achieving the aims of POCAMLA; taking away the benefits of crime in this instance piracy.

4.21 Chapter conclusion

Overall POCAMLA is robust and can deal with the proceeds of Somalian piracy from various angles. These include facilitating detection and investigation of suspect piracy proceeds; laying charges for laundering the piracy proceeds as well as ensuring their forfeiture. Nonetheless, its effectiveness in achieving this is hindered by the loopholes and omissions identified. For example, the non-inclusion of lawyers and car dealers as reporting institutions, despite their potential for misuse to launder piracy proceeds prevents detection of suspect laundering of such proceeds.

Furthermore, lack of clear timelines and guidelines in the Act on how to proceed in certain situations such as after filing a suspicious transaction report could potentially give rise to litigation. This would eventually delay the investigation and trial process. Lack of a central investigatory agency compounded by the scarcity of sufficient capacity amongst institutions expected to implement POCAMLA is problematic too. This would definitely interfere with the effective implementation of the Act. Besides these, there are the ramifications of POCAMLA's potential intrusion into the rights of individuals. This can be a challenge to constitutional principles especially as regards enforcing the bill of rights.

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[652] S 68(5) POCAMLA.

[653] S 50(2) POCAMLA. *Paul Nduati Mwangi v Stephen Ngotho Mwangi & 9 Others* ELC petition no 210 of 2014 [2015] eKLR (6 March 2015) para 25.

Notwithstanding this, Kenya remains vulnerable to money laundering from various sources including Somalian piracy proceeds.[654] In playing their role, the courts and other stakeholders should bear in mind the threat of laundering piracy proceeds to the economy. Therefore, the courts should strive to give life to the aims parliament had when enacting POCAMLA, that of depriving criminals of the proceeds of crime while balancing the rights of individuals and public interest as granted by the constitution. Presently, this is denying individuals the enjoyment of piracy proceeds while protecting affected individuals' rights and the public from the effects of money laundering. Additionally, the exploration of English and South African jurisprudence would be of persuasive value and provide guidance on how various issues arising consequent to the application of POCAMLA may be addressed. This would be beneficial in assisting Kenya develop its jurisprudence in this area considering that presently it has limited jurisprudence.

Ultimately, despite POCAMLA's potential challenge to constitutional principles, and considering the present threat arising from laundering piracy proceeds; the courts and other stakeholders ought to recall that POCAMLA can assist in dealing with this threat. Moreover other jurisdictions have affirmed the constitutionality of similar statutory regimes. Similarly, borrowing the words of Cameron J, POCAMLA should be embraced 'as a friend of democracy, the rule of law and constitutionalism and as indispensable in a world where the institutions of state are fragile and the instruments of law sometimes struggle for their very survival against criminals who subvert them.'[655]

Therefore, since Somalian piracy remains a threat to peace and security in the East African and Gulf of Aden region it should be addressed effectively. The discussion in this chapter indicates that it is possible to do so through anti-money laundering laws. Moreover, application of such laws will assist in dealing with all echelons of those involved in piracy; from the foot soldiers to the financiers. This will ensure that not only the proceeds of piracy are taken away but also property that may be available to commit further piratical acts. In essence anti-money laundering laws may provide an effective and alternative way of tackling Somalian piracy for ransoms, separately or

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[654] Department of State *Narcotics Report* (2014) (n 58) at 146.

[655] *National Director of Public Prosecutions V Meir Elran* [2013] (n 277) para 70. A case that considered the interpretation and application of preservation orders as regards provision of reasonable living and legal expenses. S 44 Prevention of Organised Crime Act 1998.

alongside piracy laws. Likewise, it may also be an applicable and viable option for dealing with piracy for ransoms in other regions.

5 CONCLUSION AND RECOMMENDATIONS

5.1 Introduction

The overarching aim of this research is to offer an alternative way of dealing with piracy, specifically piracy for ransoms. This is primarily by applying the anti-money laundering regime. Motivation to do so is prompted by the increase in piracy cases worldwide and more so Somalian piracy occurring around the Gulf of Aden for which there was a significant escalation in the amount of ransoms paid. These piracy incidents have led to various negative consequences such as increase in transport and insurance costs, effects of decrease in trade flows, tourism and above all a threat to peace and security.

Furthermore, the various sea and land-based solutions employed to tackle the problem have not been fully effective and nonetheless the threat of resurgence in Somalian piracy remains. For this reason scholars have advocated following the money trail that is the benefit gained by way of ransoms, with the aim of taking it away. This would aid in reducing the incentive to engage in piracy for ransoms; a possibility which the scholars acknowledge has not been explored. This points to an existing gap that needed to be investigated. Principally, this approach would provide an alternative way of dealing with piracy. The research has therefore explored these issues, focussing primarily on piracy for ransoms in Somalia rather than other forms of piracy prevailing elsewhere.

This chapter highlights the main findings of the research. Section 5.2 will underscore the outcomes and problems identified in accordance with the key research questions. Section 5.3 considers the importance of these findings and, finally, section 5.4 makes recommendations that can be implemented.

5.2 Key findings

To achieve the overarching purpose stated above the research posed and investigated four questions. In answering the question on the difficulties of using the current piracy laws, the study established in chapter two that the laws are ineffective in addressing the problem. This inefficacy stems from challenges in the developmental origins of the international definition of piracy. This was occasioned mainly by the different approaches in defining piracy at the national levels. Therefore, inevitably, seeking an international definition of piracy, was more a process of pursuing consensus and not codification of existing international law on the law of the sea. This consensus was achieved under the United Nations Convention on the Law of the Sea 1982 (UNCLOS 1982).

However, inadequacies in the UNCLOS 1982 definition of piracy led to the adoption of the 1988 Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation (SUA). Strictly speaking SUA does not offer a definition of piracy but instead provides for maritime offences. Nonetheless, the UNCLOS 1982 definition is still considered the primary definition of piracy and has achieved the status of customary international law.

This consensus, at the international level, is not applied at the national levels as countries have adopted the provisions of UNCLOS 1982 differently under their municipal laws. The varied definitions have led to disparity in how piracy as a crime is dealt with at the national levels. This is in terms of definition, leading to differences in the elements needed to prove the offence, evidential complications and sentences that are administered.

Furthermore, the problem in proving elements of piracy applies to the provisions of UNCLOS 1982 and SUA, which encounter various challenges in establishing piracy or maritime offences. Difficulties in the adjudication of piracy are intensified by the refusal of states to apply the principle of universal jurisdiction to arrest and prosecute pirates; lack of cooperation amongst states in dealing with piracy and; lack of an international tribunal to prosecute the offenders. As a whole, these divergences demonstrate that piracy laws are not robust enough to effectively address the problem, therefore perpetuating pirates' evasion of accountability in many instances. With specific regard to Somalian pirates, eluding answerability permits them freedom to continue enjoying the ransom proceeds.

Chapter three considered the second question on the theoretical applicability of anti-money laundering laws in dealing with piracy for ransoms. A link between piracy and money laundering was established. This is because the ransoms paid have to be laundered to facilitate 'cleansing' and thereafter reintegration into the legitimate economy. With specific reference to Somalian piracy, application of the Rational Choice and Routine Activities criminology theories helped to probe and understand its causes. Subsequently this led to utilisation of the Situational Crime Prevention theory to assist in identifying and provide an appropriate solution.

Situational Crime Prevention theory advocates for changing of the situational elements so as to increase the costs of committing crime and reducing its benefits. Practical application of the theory to piracy for ransoms entails implementing measures that make it difficult to commit the offence. In the case of Somalia, this has been done by the creation of the Internationally Recommended Transit Corridor (IRTC) and naval patrols. Moreover, reduction of the benefit can be achieved by utilising anti-money laundering laws.

Additionally, by considering Somalian piracy a form of organised crime, further justification for employing anti-money laundering laws was established. Primarily, this is based on the fact that the United Nations Convention against Transnational Organised Crime, advocates for denying such a criminal group the enjoyment of benefits from their criminal activities. To achieve this, it pinpoints the use of anti-money laundering laws as a solution.

This research shows that the Somalian pirates fulfil all the key elements needed to classify a group as an organised criminal group. These elements are their being a structured group of more than three persons, that is durable having existed for a period of time and, with the main aim of obtaining financial benefit by committing serious crime; in this case piracy. Thus, anti-money laundering laws may justifiably and appropriately be used to take away the ransom benefit.

The theoretical discussion in chapter two, also pointed to the potential of generally applying anti-money laundering laws to deal with other crimes. In principle this may be possible for any crime for which a benefit is gained and thereafter laundering is undertaken so as to 'cleanse' the benefit and facilitate its consumption. Consequently, since anti-money laundering laws aim to prevent an offender from enjoying the illegal proceeds; the regime can be employed to take away such proceeds. In relation to crime prevention this would be beneficial, since it makes it possible to target a particular offence from different angles. This is because the anti-money laundering laws can be used separately or jointly with laws dealing with the particular crime. This would essentially bolster the crime prevention aimed at a particular offence.

Considering that the conclusions made above were mainly based on theoretical underpinnings, chapter four sought to consider the practicality aspect. This was done by applying Kenya's anti-money laundering regime to target Somalian piracy proceeds. Apart from facilitating confiscation of the ransoms; the chapter analysed whether the regime is robust enough to enable monitoring, detection, investigation and prosecution linked to laundering piracy proceeds. Thus the discussion in chapter four assisted in providing answers to the third and fourth research questions. In brief, there are anti-money laundering policies and legal mechanisms in place to facilitate monitoring, detection, investigation and prosecution of those implicated of dealing in proceeds of piracy and these policies and legal mechanisms if applied provide a satisfactory alternative means of addressing piracy for ransoms.

Specifically with regards to Somalian piracy ransoms and their laundering into Kenya, the study established that the POCAMLA does have the requisite clauses to facilitate the acts outlined above. This is made possible through the preventative provisions that alert reporting institutions regarding the likelihood of laundering occurring. On the other hand, the prohibitory provisions allow prosecution of those implicated. The enforcement of the preventative and prohibitory measures is made possible through various authorities and agencies that are granted various investigative powers under the Act.

Nevertheless, the most significant impediment to utilising POCAMLA in this case, would be the dual criminality requirement. This would be occasioned by the non-inclusion of piracy under the 'serious crimes list approach' and differing definitions of piracy in other jurisdictions. These contribute to the non-fulfilment of this requirement in order for POCAMLA provisions to be applicable in prosecution and confiscation of the proceeds of piracy.

Additionally, the Act makes it possible to target a wide spectrum of those involved such as pirates, financiers and anyone involved in handling the proceeds. Moreover, it is also possible to target forfeiture of piracy proceeds in whatever form they have been converted into, including instrumentalities. This is accomplished through criminal and civil forfeiture provisions. Furthermore, POCAMLA provisions also provide for protection of the rights of affected individuals. Comprehensiveness with regards to protection of rights is made possible at the preliminary stages, and also during the forfeiture proceedings.

In the case of Somalian piracy ransoms, civil forfeiture is the preferred method. This is mainly because criminal forfeiture requires a piracy trial to have been conducted and the defendant's guilt established; only then is it possible to apply criminal forfeiture as part of the sentencing process. On the other hand, civil forfeiture does not require a trial for the predicate offence, thus eliminating the difficulties encountered in a piracy trial. Nonetheless, apart from the short limitation period within which civil proceedings must be instituted, civil forfeiture may encounter challenges in terms of extra-territorial enforcement.

The research further established that since laundering of the piracy proceeds is a transnational offence, cooperation between states is necessary, in investigation, prosecution and enforcement. Such cooperation is facilitated through mutual legal assistance. However, due to factors such as the existence of secrecy jurisdictions, public policy considerations and lack of agreements or arrangements between Kenya and other jurisdictions, collaboration even through mutual legal assistance may prove a challenge. This would inevitably hinder investigations, prosecutions and enforcement.

The discussion in chapter four also leads to identification of various loopholes and omissions in Kenya's anti-money laundering regime. These would impede effective utilisation of the regime to tackle piracy for ransoms. This is because, principally, they provide an avenue that may permit enjoyment of the proceeds of piracy. If such a situation is allowed, then the aim of taking away the benefit as envisaged in the Situational Crime Prevention theory is not achieved and neither is the incentive to continue with piracy removed.

The omissions and loopholes identified include first and foremost, the non-inclusion of lawyers and car dealers as designated non-financial businesses and professions. This is notwithstanding the likelihood of their being misused, knowingly or unknowingly, to facilitate laundering of proceeds of piracy. Second, the fragmented investigatory approach which may lead to buck-passing and lack of co-ordination in investigations was also identified. This would eventually cause time wastage and potential for delay in handling investigations.

Challenges in handling investigations, are further compounded by the existence of barriers including advocate-client confidentiality, bank-client confidentiality and human rights issues. Though the use of some barriers is justified as it provides a balance between following the perpetrators and proceeds of piracy and protecting affected individuals, they can be misused in a bid to delay the process. Other barriers include the lack of public registers and coupled with the ease of incorporating shell companies, these prevents identification of beneficial owners. Consequently, this impedes investigations and identification of perpetrators for prosecution purposes and also facilitate farther hiding of piracy proceeds. The effect of all these barriers is augmented by factors such as; the lack of technical skills by the staff entrusted with investigative and prosecutorial powers, lack of adequate resources, corruption and lack of political will.

Cumulatively this has the effect of hampering investigations and prosecutions linked to piracy proceeds.

Additionally, the lack of time guidelines in the Act not only hinder investigations, but also puts institutions whose role is crucial to identifying and aiding investigations into proceeds of piracy in a precarious situation. This may potentially lead to conflicts of interest and hence increases the possibility for litigation. Key examples are; the lack of provisions on what a financial institution should do after filing a suspicious transaction report, lack of post seizure rules in relation to cash declarations and the lack of guidelines to aid investigative and prosecutorial agencies in their decision-making process. Ultimately, all these barriers interfere with the effective implementation of POCAMLA in dealing with piracy proceeds and proceeds of crime generally. Appropriate solutions are needed to address these issues and are provided in the recommendations section hereunder.

5.3 Importance of the findings

Generally, anti-money laundering laws make it possible to address the problem of piracy for ransoms, by taking away the benefit gained. In terms of contributing to existing literature on the topic, the findings help seal the gap identified by scholars regarding application of anti-money laundering laws to deal with piracy.

First and foremost, a 'one-size-fits-all' approach to dealing with piracy will not work due to the fact that the causes and effects of piracy are context-specific. Thus, an understanding of regional uniqueness would help identify the appropriate strategies to use. In the case of Somalian piracy, utilisation of anti-money laundering laws is specific and appropriate as it provides for the diminution of the benefit gained. Application of the same strategy may not work in situations where piracy is undertaken for other motives, such as political ones.

Second, it was reaffirmed that by considering Somalian piracy as an organised crime problem, application of anti-money laundering strategies and policies is justified. The research proceeded to further consider how this could be practically achieved. By so doing the other assertions made in relation to application of money laundering laws were also reiterated. These include the need for cooperation amongst states if anti-money laundering laws are to be effective in tackling piracy, and the fact that states may be unwilling to cooperate because of differing interests in pursuing money launderers. With regards to Somalian pirates, cooperation amongst states is needed owing to the fact that the pirates are laundering their proceeds not only in Kenya but also to other jurisdictions.

The research did not however address one of the issues pointed out. This is how the different domestic regulatory systems, regional variations in the patterns of piracy and the interests of the relevant actors may be reconciled. The reconciliation would facilitate cooperation in the use of anti-money laundering laws and thus ensure effectiveness in tackling piracy. This is definitely an area where further research needs to be undertaken. Additionally, further research is needed on how anti-money laundering laws may be used to tackle other forms of piracy.

Concentrating on Somalia and Kenya made it possible to focus on how the proceeds of ransoms are laundered into Kenya and the effectiveness of Kenya's anti-money laundering regime. This has aided identification of the strengths and weakness of the regime and calls for addressing the weaknesses. This knowledge is important to the relevant stakeholders who include policy and law makers, as well as the relevant monitoring, investigative and prosecutorial authorities.

Although, the study focused on Somalian piracy ransoms and their laundering, the findings also have significant implications for the general understanding of the effectiveness of Kenya's anti-money laundering regime in dealing with proceeds of crime. Moreover other countries with similar legislation to Kenya could benefit from seeing the weakness pinpointed in the Kenya regime and also the possible solutions offered, which they may borrow from.

Overall, the study shows that anti-money laundering laws can be applied to deal specifically with piracy for ransoms. Additionally the study also laid a theoretical basis for the possible application of anti-money laundering laws to deal with other crimes generally. Hence this lays the background for further research into such possibilities. Ultimately the research also shows that Kenya's anti-money laundering system is robust in dealing with Somalian piracy proceeds and proceeds of crime generally, albeit with certain flaws that should be addressed so as to make the system effective and efficient.

5.4 Recommendations

The discussion hereunder will focus on the recommendations aimed at providing solutions or alternatives to deal with the weaknesses identified. The recommendations have been classified into four categories as follows: 1) sealing loop holes and omissions; 2) avoidance of conflicts of interest and facilitating timeliness of actions; 3) better facilitation of investigations and information sharing; 4) institutional restructuring to facilitate effective implementation of POCAMLA.

5.4.1 Sealing loop holes and omissions

Recommendation 1

Include lawyers[1] and car dealers under the definition of designated non-financial businesses or profession considering their potential for misuse and prime position to facilitate accessing information on potential or actual money laundering activities.

Recommendation 2

Improve the cash disclosure requirements at points of entry. This entails stating clearly that failure to provide the required disclosure or making a false disclosure amounts to an offence. The maximum reporting period given to the customs officer should be amended from five days to forty-eight hours. This facilitates fostering the interests of fairness and faster investigations.

Considering the information gathering and investigative powers given to the Financial Reporting Centre, cash disclosure reporting should also be done to the Centre in addition to forwarding the monetary instruments to the Assets Recovery Agency Director. This will facilitate promptness in undertaking investigations.

To avoid conflicts of interests or prejudicing the rights of the aggrieved party. The regulations should also provide guidance on what happens after the monetary instruments are confiscated and the Financial Reporting Centre informed. A reasonable period should be indicated within which investigations should be complete and prosecution undertaken, failure to which the monetary instruments should be returned to the owner. Thus section 8 POCAMLR should be amended and expanded as follows:

8(6) where a customs officer has made a seizure pursuant to these regulations, he shall in accordance with sections 12(5) and (6) immediately, but not later than 48 hours, report the details of the seizure to the Financial Reporting Centre and surrender the seized monetary instruments to the Agency Director.

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[1] See for example Cogman *et al Anti-Money Laundering Compliance for Law Firms* (2013). Although the book is written from the United Kingdom perspective it can provide guidance to Kenyan law firms in helping ensure that lawyers understand their obligations under the anti-money laundering regulations and are compliant with them.

8(7) A person who leaves or enters Kenya with more than US$ 10,000 or its equivalent in cash or monetary instruments without having reported the fact to the customs officer shall commit an offence.

8A Detention of seized cash

8A(1) If the Financial Reporting Centre has reasonable grounds for suspecting that the seized cash to be: a) proceeds of crime; or b) has been used or is intended for use in the commission of an offence, the cash seized under section 8(6) may be detained initially for a period of 72 hours.

8A(2) If within the 72 hours the Financial Reporting Centre continues to have reasonable grounds for suspecting cash seized under section 8(6) it should apply to the court for an order authorising further detention of the cash. However, such order should not extend beyond a period of three months from the date of the order unless court proceedings in relation to the cash have been instituted.

8A(3) In granting the order the court should have reasonable grounds for suspecting that the cash is proceeds of crime or has been used or is intended for use in the commission of an offence and that either; a) its continued detention is justified while its derivation is further investigated or b) consideration is given to bringing proceedings against any person for an offence with which the cash is connected, or c) proceedings against any person for an offence with which the cash is connected have been started and have not been concluded.

8B Interest

If cash is detained under S8(6) for more than 72 hours, it is at the first opportunity to be paid into an interest earning account by the Agency director and held there; the interest accruing on it is to be added to it on its release or forfeiture.

8C Release of detained cash

On application by a person who claims that any cash detained under section 8(6), or any part of it, belongs to him, he may apply to the court for the cash or part to be released to him.

The court may direct the release of the whole or any part of the cash, if the following conditions are met: a) the applicant was deprived of the cash to which the application relates by unlawful conduct, b) the property he was deprived of was not, immediately before he was deprived of it, realisable property, and c) that the cash belongs to him; or that the conditions in section 8A(3) for the detention of the cash are no longer met.

8D Forfeiture

While cash is detained under section 8(6), an application for the forfeiture of the whole or any part of it may be made by the Agency Director to the court. The court may order the forfeiture of the cash or any part of it, if it is satisfied that the cash or part is a) proceeds of crime; or b) has been used or is intended for use in the commission of an offence.

8E Compensation

(1) If no forfeiture order is made in respect of any cash detained under section 8(6), the person to whom the cash belongs or from whom it was seized may make an application to the court for compensation.

(2) If, for any period beginning with the first opportunity to place the cash in an interest-bearing account after the initial detention of the cash for 72 hours, the cash was not held in an interest-bearing account while detained, the court may order an amount of compensation to be paid to the applicant.

(3) The amount of compensation to be paid under subsection (2) is the amount the court thinks would have been earned in interest in the period in question if the cash had been held in an interest-bearing account.

(4) If the court is satisfied that, taking account of any interest to be paid under subsection (1) or any amount to be paid under subsection (2), the applicant has suffered loss as a result of the detention of the cash and that the circumstances are exceptional, the court may order compensation (or additional compensation) to be paid to him.

(5) The amount of compensation to be paid under subsection (4) is the amount the court thinks reasonable, having regard to the loss suffered and any other relevant circumstances.

(6) The compensation is to be paid from the Assets Forfeiture Fund.

Recommendation 3

In addition to the principle money laundering offences the Act should provide specifically for inchoate offences as follows:

‘Any person who attempts or who aids, abets, counsels or procures the commission of the offences under section 3, 4, 7 or who conspires to commit the same is guilty of an offence.’

Recommendation 4

Increase the limitation period for civil forfeiture proceedings. This will require incorporating an amendment in the Limitations of Actions Act, Cap 22 as follows:

Actions for recovery of property obtained through unlawful conduct

None of the time limits given in the preceding provisions of this Act apply to any proceedings under Part viii of the Proceeds of Crime and Anti-Money Laundering Act (civil forfeiture).

Proceedings under that Part for a forfeiture order in respect of any realisable property shall not be brought after the expiration of the period of twenty years from the date on which the cause of action accrued.

In the case of forfeiture proceedings in respect of property that is the proceeds or instrumentality of crime the cause of action accrues when the property is obtained or when it is discovered, whichever is the latter.

Recommendation 5

Though there are in place comprehensive regulations issued by the Central Bank of Kenya to regulate Informal Value Transfer Systems (IVTS).[2] What is required is better practical monitoring, specifically of *hawala*.

Recommendation 6

Default sentences

Imposition of a default sentence should be a mandatory provision in POCAMLA. This will ensure that those who default in paying confiscation orders are still held accountable.

5.4.2 Avoidance of conflicts of interest and facilitating timeliness of actions

This can be done by developing and providing guidelines, with timelines included where necessary, for the relevant agencies and institutions that play a role in the implementation of

[2] The Money Remittance Regulations 2013, Legal Notice no. 66. See Special Issue *Kenya Gazette Supplement no. 56* of 19 April 2013.

POCAMLA. The guidelines will facilitate decision making, timeliness of actions, avoidance or limiting of legal battles, and promote inter-agency cooperation. This will cumulatively contribute to a more effective and efficient implementation of the Act.

Recommendation 1

The Financial Reporting Centre should jointly with the Office of the DPP, the Assets Recovery Agency and relevant industry players develop best practice guidelines. The relevant industry players are: financial institutions, insurance companies, real estate agents, casinos, accountants, investment firms, lawyers and car dealers. These are classified as reporting institutions under POCAMLA.[3]

Recommendation 2

The AG's Office to develop guidelines to assist in the handling of mutual legal assistance matters.[4]

Recommendation 3

The Office of the DPP together with the Assets Recovery Agency should develop guidelines on how to handle prosecutorial matters relating to offences under POCAMLA.[5]

Recommendation 4

The Financial Reporting Centre together with the customs officials should develop a code of practice for customs officers and other officers stationed at points of entry in connection with the

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[3] See for example Joint Money Laundering Steering Group Prevention of Money Laundering/Combating Terrorist Financing Guidance for the UK Financial Sector (2014) available at *http://www.jmlsg.org.uk/industry-guidance/article/jmlsg-guidance-current* accessed 24/2/16. Guernsey Financial Services Commission Handbook for Legal Professionals, Accountants, and estate Agents on Countering Financial Crime and terrorist Financing (2015) available at *http://www.gfsc.gg/The-Commission/Policy%20and%20Legislation/Handbook-for-Prescribed-Businesses-on-Countering-Financial-Crime-and-Terrorist-Financing-(current)-March--13.pdf* accessed 24/2/16.

[4] See for example *Home Office Requests for Mutual Legal Assistance in Criminal Matters Guidelines for Authorities outside of the United Kingdom* 12 ed (2015) available at *https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/415038/MLA_Guidelines_2015.pdf* accessed 24/2/16.

[5] See for example CPS *Crown Prosecution Policy and Guidance Legal Guidance on Proceeds of Crime Act 2002 Part 7 – Money Laundering Offences* available at *http://www.cps.gov.uk/legal/p_to_r/proceeds_of_crime_money_laundering/* accessed 24/2/16. This guidance should be read together with CPS *The Code for Crown Prosecu*tors (2013) available at *https://www.cps.gov.uk/publications/docs/code_2013_accessible_english.pdf* accessed 24/2/16.

exercise of the powers conferred by virtue of section 8 POCAMLR permitting the detection of monetary instruments not declared or under declared.[6]

Recommendation 5

In order to avoid putting reporting institutions in a precarious position, provide moratorium provisions applicable after filing of a suspicious transaction report by adding section 32A in the POCAMLR as follows:

32A (i) Upon filing a suspicious transaction report, the reporting institution is not to undertake any transactions in relation to the affected account and should await appropriate consent before proceeding with any transaction.

(ii) A person must be treated as having appropriate consent if:

a) He makes an authorised disclosure to the Financial Reporting Centre, and
b) The condition in subsection (iii) or the condition in subsection (iv) is satisfied.

(iii) Before the end of the period of seven working days starting with the first working day after the disclosure was made he receives notice from the Financial Reporting Centre that consent to the doing of act is refused, and

(iv) The moratorium period of 31 days starting with the day on which the person receives notice that consent to the doing of the act is refused has expired.

Recommendation 6

To assist the Assets Recovery Agency and Office of the DPP in deciding cases suitable for civil forfeiture include a lower financial limit. Below which forfeiture should not be undertaken.

Financial threshold

(1)The Assets Recovery Agency may not institute civil forfeiture proceedings unless the Director reasonably believes that the aggregate value of the recoverable amount which the Agency wishes to be subject to a forfeiture order is not less than the specified amount.

[6] See for example Home Office *Code of Practice Issued Under the Proceeds of Crime Act 2002 Recovery of Cash: Search Powers (England and Wales and Scotland)* (2015) available at *https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/423104/48397_Code_of_Practice_Recovery_Accessible.pdf* accessed 24/2/16.

(2)The power to set the minimum amount under subsection (1) is exercisable by the Cabinet Secretary after consultation with the Assets Recovery Agency Director.

(3)This section does not affect the continuation of proceedings for forfeiture order which had been properly started or the making or continuing effect of a forfeiture order already granted.

5.4.3 Facilitation of information sharing and investigations

Recommendation 1

Signing of memoranda of understanding between agencies. These include the Financial Reporting Centre, Office of the DPP, Assets Recovery Agency, and National Police Service. These should set out how the agencies will cooperate in sharing information amongst and between them.

This should be augmented with co-opting and secondment of staff between the relevant agencies. For example the National Police Service could second officers to the Financial Reporting Centre, Office of the DPP and Assets Recovery Agency.

Recommendation 2

Setting up of public databases by the companies' registry, under the AG's Office, that facilitate easy access to information relating to beneficial ownership of corporations.

Recommendation 3

Kenya should aim at signing treaties or agreements or entering into arrangements with other countries so as to facilitate better reciprocity in honouring Kenya's mutual legal assistance requests to other countries and vice versa. Consequently, this would be helpful in aiding investigations and prosecutions into piracy proceeds and also proceeds of crime generally.

5.4.4 Institutional restructuring to facilitate effective implementation of POCAMLA

Recommendation 1

A proposed amendment to section 53 POCAMLA to make the Assets Recovery Agency the central and autonomous body in handling investigations and prosecution of offences under POCAMLA. This would primarily enable the Agency have control over its own budget, resource allocation and performance of its mandate without interference. In the alternative, the Agency be made a part of the DPP's Office instead of the AG's Office. This will ensure better efficiency in the collaboration and cooperation required of these two authorities in implementing POCAMLA.

Recommendation 2

The newly created Anti-Corruption and Economic Crimes Division of the High Court should exclusively handle cases involving the forfeiture provisions under POCAMLA.[7] This would aid in developing the relevant staff expertise and the development of a coherent body of jurisprudence.

Recommendation 3

The central government also has to put in place measures to address the issues of corruption, porous borders between Kenya and Somalia and the lack of political will in addressing financial crime. All the relevant institutions identified above also have to ensure they develop the relevant expertise to enable them to implement POCAMLA. This entails undertaking training and raising awareness amongst their staff and the public.

Finally, the recommendations outlined above would help seal the loopholes and omissions evident in POCAMLA. Consequently this would make the Act more effective in tackling Somalian piracy ransoms and proceeds of crime generally. This is because their presence renders detection of piracy and other criminal proceeds difficult if not impossible, thereby facilitating farther hiding of the proceeds. Therefore, implementation of the suggestions would ensure the lacunae are sealed. Additionally, application of guidelines to assist with decision making, handling of investigations and reporting of suspect illegal proceeds would help in a number of ways. These include ensuring timeliness of actions, avoidance of/or limiting legal disputes and promote inter-agency cooperation. Progressively this will contribute towards more efficient and efficacious implementation of POCAMLA. Furthermore, executing proposals that aid information sharing, and institutional restructuring would make certain that more thorough investigations are conducted. This could potentially increase the likelihood of accomplishing successful investigations and prosecutions. Generally, for other jurisdictions facing similar challenges with their anti-money laundering regimes, application of the suggested recommendations would have similar positive effects.

[7] This division was created by the Chief Justice vide Gazette Notice no 9123 of 8 December 2015 in line with S 11(1) High Court (Organisation and Administration) Act. The division was to be established during the next term of the High court which begun on 15 January 2016. The division is yet to become fully operational.

5.5 Conclusion

Current piracy laws are not robust enough to effectively deal with the problem and this necessitates considering other viable alternatives. Specifically considering Somalian piracy, theoretical and practical considerations show that anti-money laundering laws can provide an alternative and potentially effective way of dealing with the crime. The anti-money laundering regime would be effective because it enables the implementation of strategies that are context-specific and appropriate. In this regard and in lieu of utilising piracy laws, applying anti-money laundering laws to deal with Somalian piracy is ideal because it facilitates taking away the ransom benefit. This is notwithstanding whatever form of property it is in. Additional to taking away the benefit, it removes the incentive and property available for undertaking further acts of piracy. Furthermore, it makes it possible to target the benefit gained by all actors involved from the foot soldiers to the financiers. Importantly this enables destroying the piracy network from top to bottom and accordingly serves as an alternative way of tackling piracy. Besides, anti-money laundering laws can be utilised independently or jointly with piracy laws in dealing with Somalian piracy. Essentially, overall, anti-money laundering laws are functional in tackling piracy specifically piracy for ransoms.

Generally, apart from dealing with piracy for ransoms, the study points to other pragmatic applications of anti-money laundering laws in assisting to deal with other crimes. This may be possible in relation to not only other forms of piracy but also other crimes generally. In principle this is possible for crimes where a criminal benefit is obtained and its laundering is undertaken to enable 'cleansing' and thereafter consumption or investment. In such circumstances where there is a benefit gained as result of a crime; the benefit in whatever form of property can be targeted. Complementarily, such a strategy is applicable to a wide range of persons, human or legal, provided there exists a link between the person and the benefit. Eventually, this would also facilitate taking away the incentive and the means to commit offences, consequently presenting another way of tackling a particular offence. By and large, the anti-money laundering laws alternative can be employed separately or in conjunction with the laws dealing with a specific offence, as a means to holding offenders accountable. Therefore, ultimately, the use of anti-money laundering laws can be generalised in its application in dealing with other forms of crime and may be replicated in other jurisdictions not only Somalian piracy.

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9 APPENDICES

9.1 Appendix A: Map of Somalia

Map no. 3690 Rev.10, December 2011.

Source: UN Department of Field Support, Cartographic Section available at *http://www.un.org/Depts/Cartographic/map/profile/somalia.pdf* accessed 26/5/16

9.2 Appendix B: Ss 3, 4 & 7 Proceeds of Crime and Anti-Money Laundering Act

3. A person who knows or who ought reasonably to have known that property is or forms part of the proceeds of crime and—

(a) enters into any agreement or engages in any arrangement or transaction with anyone in connection with that property, whether such agreement, arrangement or transaction is legally enforceable or not; or

(b) performs any other act in connection with such property, whether it is performed independently or with any other person,

whose effect is to—

(i) conceal or disguise the nature, source, location, disposition or movement of the said property or the ownership thereof or any interest which anyone may have in respect thereof; or

(ii) (ii) enable or assist any person who has committed or commits an offence, whether in Kenya or elsewhere to avoid prosecution; or

(iii) (iii) remove or diminish any property acquired directly, or indirectly, as a result of the commission of an offence, commits an offence. Acquisition, possession or use of proceeds of crime.

4. A person who—

(a) acquires;

(b) uses; or

(c) has possession of,

property and who, at the time of acquisition, use or possession of such property, knows or ought reasonably to have known that it is or forms part of the proceeds of a crime committed by another person, commits an offence.

7. A person who, knowingly transports, transmits, transfers or receives or attempts to transport, transmit, transfer or receive a monetary instrument or anything of value to another person, with intent to commit an offence, that person commits an offence.

9.3 Appendix C: Ss 93 & 94 Proceeds of Crime and Anti-Money Laundering Act

93. (1) Where an application is made for a forfeiture order against property, a person who claims an interest in the property may apply to the High Court, before the forfeiture order is made and the court, if satisfied on a balance of probabilities–

(a) that the person was not in any way involved in the commission of the offence; and

(b) where the person acquired the interest during or after the commission of the offence, that he acquired the interest—

(i) for sufficient consideration; and

(ii) without knowing, and in circumstances such as not to arouse a reasonable suspicion, that the property was, at the time he acquired it, tainted property,

the court shall make an order declaring the nature, extent and value (at the time the order was made) of the person's interest.

(2) Subject to subsection (3), where a forfeiture order has already been made directing the forfeiture of property, a person who claims an interest in the property may, before the end of the period of twelve months commencing on the day on which the forfeiture order is made, apply under this subsection to the court for an order under subsection (1).

(3) A person who—

(a) had knowledge of the application for the forfeiture order before the order was made; or

(b) appeared at the hearing of that application,

shall not be permitted to make an application under subsection (2), except with leave of the court.

(4) A person who makes an application under subsection (1) or (2) shall give not less than fourteen days written notice of the making of the application to the Agency Director who shall be a party to any proceedings in the application.

(5) An applicant or the Agency Director may in accordance with the High Court rules, appeal to the Court of Appeal against an order made under subsection (1).

(6) A person appointed by the court under this Act as a receiver or trustee shall, on application by any person who has obtained an order under subsection (1), and where the period allowed by the rules of court with respect to the making of appeals has expired and any appeal against that order has been determined—

(a) direct that the property or Part thereof to which the interest of the applicant relates, be returned to the applicant; or

(b) direct that an amount equal to the value of the interest of the applicant, as declared in the order, be paid to the applicant.

(7) The court may –

(a) before making a confiscation order, or

(b) in the case of property in respect of which a restraining order was made, where that order was served in accordance with section 68, or in the case of property in respect of which a court order has been made authorizing the seizure of the property,

Set aside any conveyance or transfer of the property that occurred after the seizure of the property or the service of the restraining order, unless the conveyance or transfer was made for value to a person acting in good faith and without notice.

94. (1) The High Court may, on application—

(a) under section 90(3); or

(b) by a person referred to in section 91(1),

and when it makes a forfeiture order, make an order excluding certain interests in property which is subject to the order, from the operation thereof.

(2) The High Court may make an order under subsection (1) in relation to the forfeiture of the proceeds of crime if it finds, on a balance of probabilities, that the applicant for the order—

(a) has acquired the interest concerned legally and for a consideration, the value of which is not significantly less than the value of that interest; and

(b) where the applicant had acquired the interest concerned after the commencement of this Act, that such person neither knew nor had reasonable grounds to suspect that the property in which the interest is held is the proceeds of crime.

(3) The High Court may make an order under subsection (1), in relation to the forfeiture of property which has been used or is intended for use in the commission of an offence, if it finds, on a balance of probabilities, that the applicant for the order had acquired the interest concerned legally and—

(a) neither knew nor had reasonable grounds to suspect that the property in which the interest is held has been used or is intended for use in the commission of an offence; or

(b) where the offence concerned had occurred before the commencement of this Act, the applicant has since the commencement of this Act taken all reasonable steps to prevent the use of the property concerned in connection with the commission of an offence.

(4) If an applicant for an order under subsection (1) adduces evidence to show that he did not know or did not have reasonable grounds to suspect that the property in which the interest is held is tainted property, the Agency Director may submit a return of the service on the applicant of a

notice issued under section 90(3) in rebuttal of that evidence in respect of the period since the date of such service.

(5) Where the Agency Director submits a return of the service on the applicant under subsection (4), the applicant shall, in addition to the facts referred to in subsections (2)(a) and (b), also prove on a balance of probabilities that, since such service, he has taken all reasonable steps to prevent the further use of the property concerned in the commission of an offence.

(6) The High Court making an order for the exclusion of an interest in property under subsection (1) may, in the interest of the administration of justice or in the public interest, make that order upon the conditions that the High Court deems appropriate, including a condition requiring the person who applied for the exclusion to take all reasonable steps, within a period that the High Court may determine, to prevent the future use of the property in connection with the commission of an offence.