

Maritime piracy and the law

ONE OF the difficulties that has arisen in regard to maritime piracy relates to the question of which court has jurisdiction to try suspected pirates once they have been captured on the high seas.

The UN Convention on the Law of the Sea (UNCLOS) defines piracy, inter alia, as follows:

“Any legal acts of violence or detention, or any act of depredation, committed for private ends by the crew or passengers of a private ship... and directed... on the high seas, against another ship... or against persons or property on

board such ship...”

The reference to the “high seas” is a reference to that area of the sea falling beyond the territorial waters or exclusive economic zone (EEZ) of a state. Thus, by virtue of the UNCLOS definition, an act of maritime piracy occurs outside of the territorial waters of a state and hence beyond the ordinary jurisdiction of its courts.

The issue that courts are faced with is whether, notwithstanding that an act of piracy has occurred on the high seas, the court of the state in which the alleged pirate is



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detained after capture by the authorities, has jurisdiction to try and convict that person of the crime of piracy.

This issue came before the Kenyan High Court in the recent case of *In re Mohamud Mohamed Dashi and 8 Others* in which the judge in the court of first instance came to the view that the court lacked jurisdiction to try the pirates in question. However this decision was overturned by the Kenyan Appeal Court which relied, inter alia, on the concept of universal jurisdic-

tion. By this is meant the discretionary power of a court to exercise jurisdiction over suspected pirates in circumstances where the act of piracy has taken place on the high seas, on the basis of customary international law and a broader interpretation of inherent jurisdiction.

A similar situation has not yet occurred in South Africa and, were it to occur, it would be interesting to see how a South African court would deal with the matter. South Africa's constitution is the supreme law of the country and any law or conduct inconsistent with it is invalid. The constitution also provides that customary international law is recognised law in the republic unless it is inconsistent with the constitution or an act of Parliament.

Given that the South African Defence Act already encompasses materially the same definition of piracy as is defined in UNCLOS, and

further provides that any person accused of piracy may be tried in a South African court and may be sentenced to a fine or imprisonment, it is submitted that it would be in accordance with international law, international customary law and South African law for a South African court to follow a similar approach to the Kenyan courts and to exercise a discretion to adopt universal jurisdiction to try suspected pirates even where the act of maritime piracy has occurred on the high seas.

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