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Gulf of Guinea and Maritime (In)Security: Musings on Some Implications of Applicable Legal Instruments

Edwin E. Egede

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GULF OF GUINEA AND MARITIME (IN)SECURITY: MUSINGS ON SOME IMPLICATIONS OF APPLICABLE LEGAL INSTRUMENTS

*Edwin E. Egede**

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INTRODUCTION

The Gulf of Guinea (GoG) is an enormous and diverse region consisting of approximately 6,000 km of coastline extending from Senegal to Angola.¹ It is a maritime area of strategic importance because it is rich in a variety of resources, including hydrocarbons and fish, and a vital maritime transit hub. Unlike certain other shipping lanes that have been identified as chokepoints, the width of the GoG renders it unsusceptible to blockades and major shipping accidents.² Previously, the maritime (in)security in the GoG had not received the same high-profile attention from the international community as the situation in the East African region because the pirates in the latter situation emanate from a failed State, Somalia.³ In recent years, however, the GoG has overtaken the East African region as one of the world's worst piracy hotspots. It has been described, at various times, as "the most

¹ See *EU Maritime Security Factsheet: The Gulf of Guinea*, EUR. UNION EXTERNAL ACTION SERV. (Jan. 25, 2021, 11:57 PM), https://eeas.europa.eu/topics/maritime-security/52490/eu-maritime-security-factsheet-gulf-guinea_en. But see Ifesinachi Okafor-Yarwood, *Illegal, Unreported, and Unregulated Fishing, and the Complexities of the Sustainable Development Goals (SDGs) for Countries in the Gulf of Guinea*, 99 MARINE POL'Y 414 (2019), where the author rightly pointed out that the definition of the Gulf of Guinea as a geographical area lacks precision, and states: "[t]he Gulf of Guinea means different things to different scholars and policy makers. As such, whatever definition is given to it largely depends on the perception of the person or group of persons trying to define it." The author, therefore, adopted, similar to the EU and certain scholars, a broad definition of the Gulf of Guinea that includes most of the countries from both West and Central Africa, namely: Angola, Benin, Cameroon, Central African Republic, Cote d'Ivoire, the Democratic Republic of Congo, Equatorial Guinea, Gabon, Gambia, Ghana, Guinea-Bissau, Liberia, Nigeria, Republic of Congo, Republic of Guinea, Sao Tome and Principe, Senegal, Sierra Leone and Togo.. See also Adeniyi Adejimi Osinowo, *Combating Piracy in the Gulf of Guinea*, 30 AFR. SEC. BRIEF 1, 1 (2015), where the author also adopted a "wider Gulf of Guinea" definition, "stretching from Cape Verde to Angola." In the present Article, this broad definition of Gulf of Guinea is adopted.

² Osinowo, *supra* note 1, at 3.

³ Mario Silva, *Somalia: State Failure, Piracy, and the Challenge to International Law*, 50 VA J. INT'L L. 553, (2010). It has been said that concerns of piratical acts in the GoG could be traced back to the 1990s. Rep. of the S.C., ¶ 5, U.N. Doc. S/2012/45 (2012).

dangerous waters in the world,”⁴ and the “new danger zone.”⁵ Due to the GoG’s increasing notoriety as a piracy hotspot and the international publicity surrounding piracy in East Africa, the United Nations Security Council (UNSC) has adopted two resolutions on the piracy and armed robbery at sea in the GoG.⁶ In contrast to piracy and armed robbery at sea in East Africa, however, which appears to be on the decline, the situation in the GoG is escalating. The International Maritime Bureau (IMB) of the International Criminal Court’s (ICC), in its *Piracy and Armed Robbery Against Ships Report* for the first quarter of 2019, stated that no incidents of such attacks in East Africa had been reported from January 1 to March 31 2019 while, for the same period, there were 22 reported incidents in the GoG.⁷ Similarly, the One Earth Future’s *State of Piracy 2018* report, which was released in June 2019, provided that:

In 2018, THE GULF OF GUINEA WAS THE AREA WORST AFFECTED by piracy and maritime robbery of vessels worldwide. The number of incidents increased by 15 percent over 2017. The number of attacks where crew

⁴ *BBC African Experts: Piracy in the Gulf of Guinea*, BBC (July 14, 2016), <https://www.bbc.co.uk/news/av/world-africa-36786501/bbc-africa-experts-piracy-in-the-gulf-of-guinea>.

⁵ See generally INT’L CRISIS GROUP, *THE GULF OF GUINEA: THE NEW DANGER ZONE* (2012), <https://d2071andvip0wj.cloudfront.net/195-the-gulf-of-guinea-the-new-danger-zone.pdf>.

⁶ See generally S.C. Res. 2018 (Oct. 31, 2011) and S.C. Res. 2039 (Feb. 29, 2012). This may be contrasted with the numerous resolutions adopted by the UNSC regarding the piracy and armed robbery at sea situation in East Africa. See generally S.C. Res. 1816 (June 2, 2008); S.C. Res. 1838 (Oct. 7, 2008); S.C. Res. 1846 (Dec. 2, 2008); S.C. Res. 1851 (Dec. 16, 2008); S.C. Res. 1897 (Nov. 30, 2009); S.C. Res. 1918 (Apr. 27, 2010); S.C. Res. 1950 (Nov. 23, 2010); S.C. Res. 1976 (Apr. 11, 2011); S.C. Res. 2015 (Oct. 24, 2011); S.C. Res. 2020 (Nov. 22, 2011); S.C. Res. 2077 (Nov. 21, 2012); S.C. Res. 2025 (Dec. 14, 2011); S.C. Res. 2316 (Nov. 9, 2016); S.C. Res. 2383 (Nov. 7, 2017); S.C. Res. 2500 (Dec. 4, 2019).

⁷ ICC INT’L MARITIME BUREAU, *PIRACY & ARMED ROBBERY AGAINST SHIPS*, 14, 16–17, 19 (2019), https://www.icc-ccs.org/reports/2019Q1_IMB_PiracyReport.pdf.

members were held for ransom on hijacked vessels or kidnapped for ransom from vessels was alarmingly high.⁸

The maritime insecurity in the GoG has, unsurprisingly, led to the enactment of several legal instruments aimed at combating the problem, ranging from UNSC resolutions,⁹ at the global level, to the Code of Conduct Concerning the Repression of Piracy, Armed Robbery against Ships, And Illicit Maritime Activity in West and Central Africa (the Yaoundé Code of Conduct) 2013, at the regional level,¹⁰ and national legislation at the domestic level.¹¹ This article aims to analyze these legal instruments to unpack certain legal issues that develop from them. Part I will engage with the UNSC resolutions adopted for the GoG. Part II will explore the Yaoundé Code of Conduct. Next, Part III will examine relevant national legislation, focusing mainly on the national legislation of Nigeria, a huge and oil-rich regional hegemon, since it is at the epicenter of most maritime insecurity incidents in the region. Finally, this Article will conclude with some closing thoughts.

I. UNITED NATIONS SECURITY COUNCIL AND MARITIME SECURITY IN THE GULF OF GUINEA

The United Nations Security Council (UNSC), in line with its primary responsibility to maintain international peace and security under Article 24 of the United Nations Charter, has adopted two resolutions related to the GoG.¹² This section will first discuss the contents of the two resolutions, which focus on the piracy and armed robbery at sea occurring in the GoG. It will

⁸ LYDELLE JOUBERT, *THE STATE OF MARITIME PIRACY 2018: ASSESSING THE HUMAN COST*, 1 (2018), https://stableseas.org/publications/maritime-terrorism/state-piracy-2018-human-cost_

⁹ *See generally* S.C. Res. 2018, *supra* note 6; S.C. Res. 2039, *supra* note 6.

¹⁰ *See generally* Code of Conduct Concerning the Repression of Piracy, Armed Robbery Against Ships, and Illicit Maritime Activity in West and Central Africa, June 25, 2013, https://wwwcdn.imo.org/localresources/en/OurWork/Security/Documents/code_of_conduct%20signed%20from%20ECOWAS%20site.pdf [hereinafter Code of Conduct]. *See also Summit of Heads of State & Government on Maritime Safety & Security in the Gulf of Guinea, Yaoundé, Cameroon, AFR. UNION* (June 24–25, 2013), <http://au.int/fr/node/27463> [hereinafter Summit of Heads of State].

¹¹ *See generally* Suppression of Piracy and Other Maritime Offences Act (2019) Cap. (HB. 1571) (Nigeria) [hereinafter 2019 Maritime Offenses Act].

¹² *See generally* S.C. Res. 2018, *supra* note 6; S.C. Res. 2039, *supra* note 6.

then concentrate on two key issues regarding these two resolutions. First, it will examine whether these resolutions are binding or merely recommendatory. Second, it will present the viewpoint that these resolutions adopt a more bi-dimensional, rather than multi-dimensional, approach,¹³ when engaging with the maritime insecurity threats in the GoG.

A. UNSC Gulf of Guinea Resolutions—Contents

In its first resolution, S/2018 of 2011 (2011 UNSC Resolution), the UNSC condemned all acts of piracy and armed robbery at sea committed off the coast of the States of the GoG.¹⁴ Additionally, the UNSC, while acknowledging and applauding the individual and cooperative efforts already taken by the States in the region in dealing with the problem of piracy and armed robbery at sea, welcomed the intention to convene a summit of GoG Heads of State to consider a comprehensive response to the maritime insecurity in the region.¹⁵ It also encouraged the States members of the Economic Community of West African States (ECOWAS), the Economic Community of Central African States (ECCAS), and the Gulf of Guinea Commission (GGC) to develop a comprehensive strategy to deal with the problem by developing relevant national legislative and

¹³ For the sake of clarity, it is important to point out that this Author uses the terms ‘bi-dimensional’ and ‘multi-dimensional’ approaches in this context as referring to the focus on the binary threats of piracy and armed robbery at sea (bi-dimensional) on the one hand, and a focus on the multiplicity of threats beyond just piracy and armed robbery at sea, the linkages between these threats and the critical connection these threats have to developmental issues in the region (multi-dimensional). See U.N. SCOR, 67th Sess., 6717th mtg. at 6, U.N. Doc. S/PV.6717 (Feb. 21, 2012) [hereinafter SC 6717]. Mr. Yuri Fedotov, Executive Director of the United Nations Office on Drugs and Crime (UNODC) stated: “West Africa is not only a cocaine transit area. The local consumption market is growing fast, and drug use is increasing across the region. There are up to 2.5 million drug users in West and Central Africa. We also need to understand the extent to which drug trafficking in the region may be linked to piracy off the coast of West Africa. However, piracy and drugs are not West Africa’s only concern. Trafficking in human beings, arms and counterfeit medicines have also been reported. The smuggling of migrants and other illegal activities are also growing. In the face of those transnational issues, UNODC’s approach has been strategic and tactical. It represents a multidimensional effort that acknowledges the multifaceted nature of those challenges.” *Id.*; see also Edwin Egede, *Maritime Security: Horn of Africa and Implementation of the 2050 AIM Strategy*, 30 HORN AFR. BULL. 7, 7 (2018).

¹⁴ S.C. Res. 2018, *supra* note 6, ¶ 1.

¹⁵ *Id.* ¶ 2.

appropriate regional frameworks, including information-sharing and operational coordination mechanisms.¹⁶ In addition, it encouraged the ECOWAS, ECCAS and GGC States to take concerted action through bilateral or regional maritime patrols consistent with relevant international law to counter piracy and armed robbery at sea in the GoG.¹⁷ The UNSC cautioned, however, that such measures should not have the effect of denying or impairing the valid exercise of the right to innocent passage in the territorial seas and the freedom of navigation on the high seas, in line with extant international law.¹⁸ Furthermore, it called upon all States, in cooperation with the shipping industry, the insurance industry and the International Maritime Organization (IMO), to issue to ships appropriate advice and guidance on various avoidance, evasion, and defensive techniques and measures to be taken in the face of a threats or attacks while sailing in the GoG.¹⁹ Moreover, the resolution called on the ECOWAS, ECCAS, and GGC States, along with flag States and States of nationality of the victims and perpetrators of acts of piracy or armed robbery at sea, to cooperate in the prosecution of alleged perpetrators, including those who facilitate or finance acts of piracy and armed robbery at sea committed off the coast of the GoG.²⁰ It stressed that such cooperation shall be in accordance with applicable international law, including human rights law.²¹ The explicit reference to human rights law is testament to the increasing importance of this area in international law of the sea, especially in relation to maritime security issues.²² Such human rights issues may arise, for instance, in relation to the detention, transfer, and manner of prosecution of captured suspected perpetrators of maritime

¹⁶ *Id.*

¹⁷ *Id.* ¶ 3.

¹⁸ *Id.* See United Nations Convention on the Law of the Sea arts. 24, 87, 89, Dec. 10, 1982, 1833 U.N.T.S. 397.

¹⁹ S.C. Res. 2018, *supra* note 6, ¶ 4.

²⁰ *Id.* ¶ 5.

²¹ See *id.*

²² See, e.g., Tullio Treves, *Human Rights and the Law of the Sea*, 28 BERKELEY J. INT'L. L., 1, 8 (2010); Brian Wilson, *Human Rights and Maritime Law Enforcement* 52 STAN. J. INT'L. L. 243, 243 (2016).

crimes.²³ It may also arise in relation to victims of such maritime crimes.²⁴ Various international courts and tribunals have engaged with cases raising human rights issues in relation to the sea.²⁵ For instance, the European Court of Human Rights (ECHR) has decided several cases dealing with human rights issues at sea.²⁶ In contrast, to this author's knowledge no African regional human rights court has specifically decided a case on human rights at sea.²⁷ Given the growing maritime insecurity in the GoG, it is anticipated that in the near future, the relevant African regional courts with the mandate to engage with human rights are likely to engage with human rights cases

²³ See generally Douglas Guilfoyle, *Counter-Piracy Law Enforcement and Human Rights*, 59 INT'L. COMP. Q. 141, 141 (2010); Wilson, *supra* note 22, at 318.

²⁴ For instance, the unfortunate death of a crew member during the course of rescue by government enforcement agents or issues relating to torture of hostages by perpetrators of a maritime crime. Wilson, *supra* note 22, at 270 (quoting the narrative of a victim held for 238 days and their horrific experience, including torture).

²⁵ See *id.* at 317. See generally Efthymios Papastavridis, *European Convention on Human Rights and the Law of the Sea: The Strasbourg Court in Unchartered Waters?* in THE INTERPRETATION AND APPLICATION OF THE EUROPEAN CONVENTION OF HUM. RTS.: LEGAL AND PRACTICAL IMPLICATIONS 117 (Malgosia Fitzmaurice & Panos Merkouris eds., 2012).

²⁶ See generally *Women on Waves and others v. Portugal*, App. No. 31276/05, Eur. Ct. H.R. 1, 3 (2009); *Mangouras v. Spain*, App. No. 12050/04, Eur. Ct. H.R. 1, 1 (2010); *Medvedyev v. France*, App. No. 3394/03, Eur. Ct. H.R. 1, 1 (2010); *Hirsi Jamaa and Others v. Italy*, App. No. 27765/09, Eur. Ct. H.R. 1, 1 (2012).

²⁷ From a review of the cases of the Africa Court on Human and Peoples' Rights, the main judicial body in Africa having jurisdiction over cases and disputes regarding the interpretation and application of the African Charter on Human and Peoples' Rights, there are so far no human rights at sea decisions. See generally African Charter on Human and Peoples' Rights, June 27, 1981, OAU Doc. CAB/LEG/67/3Rev.5, reprinted in 21 I.L.M. 58 (1982). This Court was established under a Protocol to the Banjul Charter, which entered into force in 2004, came into operation in 2006 and sits at Arusha, Tanzania. For the decisions of this Court see generally AFRICAN COURT CASES, <https://www.african-court.org/cpmt/all> (last visited Mar. 22, 2021). See generally COMMUNITY COURT OF JUSTICE, <http://prod.courtecowas.org/decisions-3/> (last visited Mar. 22, 2021), which was established by Protocol A/P1/7/91 adopted and entering into force in 1991. The ECOWAS Court was eventually constituted in December 2000 and started functioning in January 2001 with its human rights competence introduced by a 2005 Protocol A/SP.1/01/05, which came into force in January 2005. The ECOWAS Court sits in Abuja, Nigeria. Again, a review of the cases of the Court does not reflect that any decision has dealt with human rights at sea.

arising from the sea, especially those regarding maritime security law enforcement.²⁸

The 2011 UNSC Resolution also encouraged the international community, upon request by the States in the GoG, the ECOWAS, ECCAS, GGC, or other relevant organizations and agencies, to assist the latter in their efforts at countering piracy and armed robbery at sea in the region.²⁹ This provision would appear to imply that members of the international community may not assist on their own accord but may only do so at the request of either individual relevant States, organizations, and agencies in the GoG. It is not clear if these “other relevant organizations and agencies” must necessarily be based in the region. There is no clear reason why an organization or agency outside the region, for instance, the IMO, which has a mandate to deal with relevant issues to maritime security, or ones that have a tangible interest in the issues in the GoG, such as shipping companies, cannot request such assistance. Finally, the resolution welcomed the United Nations Secretary-General’s (UNSG) indication that he intended to deploy an assessment mission to examine the threat of piracy and armed robbery at sea in the GoG and explore options concerning the best way to address this scourge.³⁰ The UNSC signified it would await the report and recommendations of the mission on the matter.³¹

The second resolution, S/2039 of 2012 (2012 UNSC Resolution), welcomed the report of the UNSG’s assessment mission in the GoG and encouraged the national authorities, regional and international partners to consider implementing the recommendations resulting from the UNSG’s assessment mission, as appropriate.³² It also stressed that the primary responsibility to counter piracy and robbery at sea in the GoG

²⁸ On the extent of the human rights jurisdiction of the African Court of Human and Peoples Rights and ECOWAS Court, see Adamantia Rachovitsa, *On New ‘Judicial Animals’: The Curious Case of an African Court with Material Jurisdiction of a Global Scope*, 19 HUM. RTS. L. REV. 255, 255 (2019); Karen J. Alter, Laurence R. Helfer, & Jacqueline R. McAllister, *A New International Human Rights Court for West Africa: The ECOWAS Community Court of Justice*, 107 AM. J. INT’L. L., 737, 737–38 (2013); Solomon Ebobrah, *Critical Issues in the Human Rights Mandate of the ECOWAS Court of Justice*, 54 J. AFR. L. 1, 1 (2010).

²⁹ See S.C. Res. 2018, *supra* note 6, ¶ 6.

³⁰ *Id.* ¶ 7.

³¹ *Id.*

³² See S.C. Res. 2039, *supra* note 6, ¶¶ 1, 2.

lay with States in the region, urging them, under the auspices of ECCAS, ECOWAS and the GGC, to work towards convening a joint summit of the GoG States to develop a regional anti-piracy strategy, in cooperation with the African Union(AU).³³ Additionally, the resolution referenced the 2011 UNSC Resolution and requested the UNSG, through the UN Office of West Africa (UNOWA) and UN Office of Central Africa (UNOCA), to support States and sub-regional organizations in the GoG in convening the joint summit.³⁴ The 2012 UNSC Resolution also urged the States in the GoG to take prompt action at both the national and regional levels, with the support of the international community where possible, and by mutual agreement, to develop and implement national maritime security strategies, including establishing an appropriate legal framework to deal with piracy and armed robbery at sea.³⁵ Furthermore, the resolution encouraged Benin and Nigeria, specifically, to extend the patrols they were already conducting in the region and all the States in the region to build their capacities to independently secure their coastlines in the GoG.³⁶ It further encouraged international partners to consider providing support as and when needed regarding securing coastlines, and suggested they provided support in conducting regional patrols, establishing and maintaining joint coordination centers and information-sharing centers, and to effectively implementing the regional strategy.³⁷ Furthermore, States in the GoG, ECOWAS, ECCAS and the GGC were encouraged to develop and implement transnational and transregional maritime security coordination centers covering the whole of the GoG by building on IMO existing initiatives.³⁸ In addition, the resolution requested that the UNSG support all

³³ *Id.* ¶ 3. See the following Maritime Strategies that have been adopted so far: ECOWAS INTEGRATED MARITIME STRATEGY ¶¶ 42–43 (2014), <https://www.ecowas.int/wp-content/uploads/2019/05/EIMS-English-final.pdf>; The Protocol Relating to the Strategy to Secure ECCAS' Gulf of Guinea Vital Interests in Seas, Oct. 24, 2009 (translation by author); Memorandum of Understanding on Maritime Safety and Security in Central and West Africa, ECCAS, ECOWAS-GGC, pmb., June 25, 2013.

³⁴ See S.C. Res. 2039, *supra* note 6, ¶ 4.

³⁵ *Id.* ¶ 5.

³⁶ *Id.* ¶ 6.

³⁷ *Id.* ¶¶ 6, 8.

³⁸ *Id.* ¶ 7.

efforts towards mobilizing resources following the adoption of a relevant regional strategy, to assist with national and regional capacity-building, and to do so in close consultation with the GOG States, regional and extra-regional organizations.³⁹ The UNSG was also required to keep the UNSC regularly informed through UNOWA and UNOCA as to the situation regarding piracy and armed robbery at sea in the GoG, particularly in reference to the progress in convening the joint summit to develop a comprehensive strategy.⁴⁰

B. Gulf of Guinea UNSC Resolutions—Binding or Exhortatory?

An interesting legal issue concerning the GoG UNSC resolutions is whether such resolutions are binding or exhortatory as regards the member States of the UN.⁴¹ UNSC resolutions may be categorized as recommendations,” which are non-binding and merely exhortatory. On the other hand, they may be “decisions” that have binding force.⁴² In seeking to determine whether a Security Council resolution is binding or recommendatory, the International Court of Justice (ICJ) in *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (Namibia Advisory Opinion)* stated that:

The language of a resolution of the Security Council should be carefully analysed before a conclusion can be made as to its binding effect. In view of the nature of the powers under Article 25[of the UN Charter], the question whether they have been in fact exercised is to be determined in each case, having regard to the terms of the resolution to be interpreted, the discussions leading to it, the Charter provisions invoked and, in general, all

³⁹ *Id.* ¶ 9.

⁴⁰ *Id.* ¶ 10.

⁴¹ See generally Marko Divac Oberg, *The Legal Effects of Resolutions of the UN Security Council and General Assembly in the Jurisprudence of the ICJ*, 16 *EUR. J. INT'L L.* 879, 879–81 (2005).

⁴² *Id.* at 884-885. See also U.N. Charter art. 39 (indicates that once the UNSC determines the existence of any threat to the peace, breach of the peace, or act of aggression it shall either make recommendations or decisions.).

circumstances that might assist in determining the legal consequences of the resolution of the Security Council.⁴³

Thus, in seeking to determine whether the UNSC intended the GoG resolutions to be binding or recommendatory, one must analyze the language of these resolutions, examine discussions in the public domain leading to the resolutions, inquire if any UN Charter provisions were specifically invoked in these resolutions and look at other circumstances.⁴⁴

1. Language of the Gulf of Guinea Resolutions

Concerning the language of the GoG resolutions, it is interesting to note that both resolutions on maritime insecurity in the GoG do not include the chapeau—"Acting under Chapter VII."⁴⁵ This is in contrast with the various UNSC resolutions directed at piracy and armed robbery in East Africa, which explicitly included said chapeau language.⁴⁶ Does this suggest that the UNSC GoG resolutions, unlike those for East Africa, are meant to be recommendatory rather than binding? From all indications, when a UNSC resolution explicitly includes the Chapter VII chapeau, it is binding.⁴⁷ However, although the ICJ

⁴³ Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, 1971 I.C.J. 16, ¶ 114 (June 21). *See also* Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion, 2010 I.C.J. 403 (July 22) [hereinafter Kosovo Advisory Opinion]. Citing the Namibia Advisory Opinion and seeking to determine the binding nature of the relevant UNSC resolution, stated: "There is no indication, in the text of Security Council resolution 1244 (1999), that the Security Council intended to impose, beyond that, a specific obligation to act or a prohibition from acting, addressed to such other actors." *Id.* ¶ 115. *See also*: "When interpreting Security Council resolutions, the Court must establish, on a case-by-case basis, considering all relevant circumstances, for whom the Security Council intended to create binding legal obligations. The language used by the resolution may serve as an important indicator in this regard. The approach taken by the Court with regard to the binding effect of Security Council resolutions in general is, *mutatis mutandis*, also relevant here." *Id.* ¶ 117.

⁴⁴ *See* Kosovo Advisory Opinion, *supra* note 43.

⁴⁵ U.N. Charter, *supra* note 42, art. 39.

⁴⁶ *See generally* the various resolutions for the maritime (in)security threats in East Africa.

⁴⁷ Judge Koroma in his dissenting opinion in the Kosovo Advisory Opinion, while citing the test of the Namibia Advisory opinion on determining whether

in the *Namibia Advisory Opinion* alluded to the possibility for non-binding resolutions,⁴⁸ it was emphatic that not including the Chapter VII chapeau was insufficient alone to render a resolution non-binding.⁴⁹ The Court pointed to Article 25 of the UN Charter as providing the legal basis for the binding nature of resolutions of this principal UN organ.⁵⁰ It disagreed that the binding nature of decisions of the UNSC under Article 25 of the UN Charter is limited only to enforcement measures under Chapter VII, stating that:

[i]t has been contended that Article 25 of the Charter applies only to enforcement measures adopted under Chapter VII of the Charter. It is not possible to find in the Charter any support for this view. Article 25 is not confined to decisions in regard to enforcement action but applies to “the decisions of the Security Council” adopted in accordance with the Charter. Moreover, that Article is placed, not in Chapter VII, but immediately after Article 24 in that part of the Charter which deals with the functions and powers of the Security Council. If Article 25 had reference solely to decisions of the Security Council concerning enforcement action under Articles 41 and 42 of the Charter, that is to say, if it were only such decisions which had binding effect, then Article 25 would be superfluous, since this effect is secured by Articles 48 and 49 of the Charter.⁵¹

Thus, although the two UNSC resolutions on the GoG do not specifically mention Chapter VII, this, as such, does not necessarily render them non-binding. First, historically, early

a UNSC resolution is binding, pointed out as follows: “That resolution [UNSC resolution 1244(2009)] was adopted by the Security Council pursuant to Chapter VII of the Charter of the United Nations and is thus binding pursuant to Article 25 of the Charter.” See *Kosovo Advisory Opinion*, *supra* note 43, ¶ 10 (dissenting opinion by Koroma, J.). See also Judge Keith’s separate opinion in the same advisory opinion, where he said: “The resolution, adopted under Chapter VII of the Charter and having binding force ...” *Id.* ¶ 14 (separate opinion by Keith, J.).

⁴⁸ *Namibia Advisory Opinion supra note 43* at 52-53 paras.113-114

⁴⁹ *Id.* at para.113.

⁵⁰ *Id.*

⁵¹ *Id.*

UNSC resolutions did not expressly invoke Chapter VII.⁵² Second, it is possible the phrase “acting under Chapter VII” was omitted for political reasons and not because it was intended to be non-binding.⁵³ Third, it is possible for a UNSC resolution not to explicitly mention Chapter VII, but still include other Chapter VII language, such as “all necessary means,” which is considered a euphemism for the authorization of Chapter VII action.⁵⁴ Such language, however, is nowhere to be found in either of UNSC’s GoG resolutions.⁵⁵

Concerning the language of the GoG resolutions, whilst recognizing piracy and armed robbery at sea in the GoG as a threat, the operative parts use exhortatory words in relation to States, such as “welcomes,” “encourages,” “urges,” and “calls upon.”⁵⁶ For instance, the 2012 UNSC Resolution states that it

encourages Benin and Nigeria to extend their joint patrols beyond March 2012, while the countries of the Gulf of Guinea continue to work towards building their

⁵² The first explicit reference to Chapter VII was from UNSC resolution 253(1968) on measures against the Ian Smith regime in the then Southern Rhodesia. See Rep. of the S.C., at 3, U.N. Doc. No. 1 (2008).

⁵³ MICHAEL WOOD, *THE INTERPRETATION OF SECURITY COUNCIL RESOLUTIONS* 90 (J.A. Frowein & R. Wolfrum eds., 1998).

⁵⁴ Michael Wood, *The Interpretation of Security Council Resolutions, Revisited* in MAX PLANCK YEARBOOK OF UNITED NATIONS LAW ONLINE VOL 20(1), 1,17-18(Frauke Lachenmann and Rüdiger Wolfrum eds, 2017) who points out that though UNSC resolution 2249 does not explicitly mention that it was acting under Chapter VII, it nonetheless uses ‘Chapter VII language.’ Also see Nigel D. White, *Self-defence, Security Council authority and Iraq* in INTERNATIONAL CONFLICT AND SECURITY: ESSAYS IN MEMORY OF HILAIRE MCCOUBREY, 242 (Richard Burchill, Nigel D. White and Justin Morris eds.,2005)

⁵⁵ See, e.g., S.C. Res. 1851, *supra* note 6, ¶ 6 on the East African piracy which states that the UNSC: “[d]ecides that for a period of twelve months from the date of adoption of resolution 1846, states and regional organizations cooperating in the fight against piracy and armed robbery at sea off the coast of Somalia for which advance notification has been provided by the TFG to the Secretary-General *may undertake all necessary measures that are appropriate in Somalia*, for the purpose of suppressing acts of piracy and armed robbery at sea, pursuant to the request of the TFG, provided, however, that any measures undertaken pursuant to the authority of this paragraph shall be undertaken consistent with applicable international humanitarian and human rights law.” (italics included for emphasis). Contrast the language here with S.C. Res. 2018, *supra* note 6, ¶ 5.

⁵⁶ See generally S.C. Res. 2018, *supra* note 6; S.C. Res. 2039 *supra* note 6.

capacities to independently secure their coastlines and also encourages international partners to consider providing support, as needed, in that regard and to the extent feasible.⁵⁷

This may be contrasted with UNSC resolutions in relation to East African piracy that, though they sometimes employ exhortatory language,⁵⁸ utilize stronger language, such as “decides,” “affirms,” and “reaffirms,” and explicitly invoke the Chapter VII chapeau, which imply the binding nature of these resolutions.⁵⁹ The merely exhortatory language of the GoG UNSC resolutions thus identify these resolutions as not binding, but merely recommendatory.

2. Discussions in the Public Domain Leading to these Resolutions

In the various discussions available in the public domain leading up to the issuance UNSC GoG resolutions, there was no indication of an inclination towards a binding, Chapter VII-approach regarding maritime insecurity.⁶⁰ Rather, the discussions appeared to focus on a non-binding cooperative approach, which recognized that the insecurity should primarily be dealt with through cooperative efforts of the States and regional institutions within the region, with international actors encouraged to provide voluntary assistance to these regional players.⁶¹ For instance, in his address to the UNSC 2011 public debate on piracy in the GoG, the ECOWAS representative indicated that what was required was merely “a political

⁵⁷ S.C. Res. 2039 *supra* note 6, ¶ 6.

⁵⁸ See Tullio Treves, *Piracy, Law of the Sea, and Use of Force: Developments off the Coast of Somalia*, 20 EUR. J. INT'L L. 399, 409–10 (2009).

⁵⁹ See the various UNSC resolutions on East African piracy, *supra* note 6.

⁶⁰ See *generally* Press Release, Security Council, Piracy, Maritime Armed Robbery in Gulf of Guinea, U.N. Press Release SC/10372-AFR/2236 (Aug. 30, 2011); *October 2011 Monthly Forecast: Piracy in the Gulf of Guinea*, SEC. COUNCIL REP., https://www.securitycouncilreport.org/monthly-forecast/2011-10/lookup_c_glkwlemtisg_b_7751803.php; U.N. SCOR, 66th Sess., 6633rd mtg., U.N. Doc. S/PV.6633 (Oct. 19, 2011) [hereinafter SC 6633]; See *generally* Rep. of the S.C., *supra* note 3; U.N. SCOR, 67th Sess., 6865 mtg., U.N. Doc. S/PV.6865 (Nov. 19, 2012).

⁶¹ *Id.*

umbrella resolution of the United Nations to support . . .” the efforts of the regional players in addressing maritime insecurity in the GoG.⁶² In addition, UNSC members’ speeches, including those of the Permanent Five members,⁶³ during the debates also pointed a general understanding that the resolutions were merely intended to provide a political framework and not intended to be legally binding.⁶⁴ This was apparently done so that the GoG regional players could take the lead in dealing with the maritime insecurity in the region with the voluntary, non-obligatory support from UN member States and other international partners.⁶⁵ For instance, the representative of France at the 2011 open debate, while stressing that the situation in the GoG was distinct from that off the Somalia coast, stated:

Thus, the guiding principle of our policy should be that the Gulf of Guinea States bear the primary responsibility for ensuring security in the maritime areas under their jurisdiction. We should operate in a framework of cooperation among the States and organizations of the region and on the basis of capacity-building for its stakeholders . . . We believe that . . . [the] international initiatives to support local capacities and regional coordination represent a coherent approach to preventing and effectively suppressing acts of piracy in the Gulf of Guinea. These actions should be based on the sovereignty of the States of the region, national ownership of the responses to piracy and, finally, respect for the law of the sea and freedom of navigation. We are, of course, prepared to give close and favourable consideration to a draft resolution on that basis.⁶⁶

It is, however, interesting to note that the Benin’s representative in the 2011 debate appeared to be the only

⁶² SC 6633, *supra* note 60, at 5.

⁶³ The permanent members of the UNSC are China, France, Russia, United Kingdom and the United States of America. *See* U.N. Charter, *supra* note 42, art. 23, ¶ 1.

⁶⁴ SC 6633, *supra* note 60, at 7–8, 9–10, 12, 14–15, 17–18.

⁶⁵ *See generally id.*

⁶⁶ *Id.* at 8.

representative that made specific reference to UN Charter Chapter VIII, the provision that references powers dealing with regional arrangements.⁶⁷ The representative stated:

Benin very much hopes that, through the adoption of a resolution on this issue under Chapter VIII of the Charter, the Security Council will establish a clear mandate for a determined commitment by the international community to support the efforts being made by countries in the region in order to establish coordinated and coherent efforts to combat organized transborder crime.⁶⁸

Unfortunately, the representative did not reference specific sections of Chapter VIII, which would have provided some clarity on how Benin, at least, believed Chapter VIII was applicable to maritime security in the GoG. It must, however, be recalled that Article 53 paragraph 1 of the United Nations Charter, a provision contained in Chapter VIII, states that when the Security Council utilizes regional arrangements or agencies for enforcement action under its authority, such enforcement action shall not be taken by them without obtaining specific authorization of the UNSC.⁶⁹ The representative of Benin was probably alluding to the UNSC delegating its enforcement powers to the relevant regional bodies in the GoG to take enforcement action under Chapter VIII. Nevertheless, neither UNSC resolution unequivocally indicates that the UNSC was acting under Chapter VIII.

3. Any Specific Charter Provisions Mentioned

As discussed in the section above, the GoG UNSC resolutions do not explicitly mention any Charter provisions.

⁶⁷ *Id.* at 21–23.

⁶⁸ *Id.* at 23.

⁶⁹ For an analysis of enforcement action under chapter VIII see ADEMOLA ABASS, REGIONAL ORGANISATIONS AND THE DEVELOPMENT OF COLLECTIVE SECURITY 42-64(2004).

4. Other Circumstances

It could be argued that the particular circumstances of the GoG piracy, in contrast to situation in East African, would point to the UNSC regarding the GoG circumstances as requiring resolutions that are exhortatory and not binding. For example, unlike the East African situation, which implicates a failed state, Somalia,⁷⁰ the GoG situation does not involve failed States. According to the Executive Secretary of the Gulf of Guinea Commission at a recent UNSC debate:

While an international naval intervention from outside the Gulf of Aden has succeeded in reducing such incidents in that region, that may not be feasible in West and Central Africa, the main reason being that no country in West or Central Africa is a failed State, as was the case with Somalia. Also, the States of the region have taken and are taking measures to patrol their waters.⁷¹

For instance, the 2012 UNSC Resolution recognizing that none of the GoG States were failed States emphasized that these States were to have a “leadership role” and the “primary responsibility” to counter the piracy and armed robbery at sea—thus implying the UNSC was meant to play a subsidiary role.⁷²

It is important to note that no other UNSC resolution has been adopted since the 2012 UNSC Resolution despite several public debates by the UNSC on this issue,⁷³ which would seem to suggest that the UNSC is satisfied with the steps taken by the regional parties in the GoG and, thus, does not feel it is necessary to adopt a binding resolution on GoG maritime

⁷⁰ See generally Silva, *supra* note 3.

⁷¹ See U.N. SCOR, 74th Sess., 8457th mtg., at 4, U.N. Doc. S/PV.8457 (Feb. 5, 2019) [hereinafter, SC 8457].

⁷² Preambular paras 13 and 16 and Operative para.3. See note 66 above on the statement of France in the 2011 public debate that preceded the first GoG UNSC resolution on this as a guiding principle of the resolution. See also S.C. Pres. Statement 2013/13 (Aug.14, 2013); S.C. Pres. Statement 2016/44 (Apr. 25, 2016).

⁷³ For instance, the UNSC had public debates on maritime security issues in the GoG in 2016 and 2019. See U.N. SCOR, 71st Sess., 7675th mtg., at 2, U.N. Doc. S/PV.7675 (Apr. 25, 2016) [hereinafter SC 7675]. See generally SC 8457, *supra* note 71.

security. The UNSC remains inactive even though the situation, especially regarding piracy and armed robbery, has escalated since it issued its last resolution.⁷⁴ In one of the UNSC public debates on the GoG after the adoption of the two UNSC resolutions, the Assistant Secretary-General of the UN for Political Affairs seemed to affirm the non-binding nature of these two UNSC resolutions:

The Council may recall that, following an upsurge in incidents of piracy, armed robbery at sea and other illicit activities in the Gulf of Guinea, its resolutions 2018 (2011) and 2039 (2012) *encouraged* the Economic Community of West African States (ECOWAS), the Economic Community of Central African States (ECCAS) and the Gulf of Guinea Commission (GGC) to develop a comprehensive regional anti-piracy strategy for the Gulf with United Nations support.⁷⁵

It must, however, be stressed that though this Article argues the UNSC resolutions on the GoG are not binding and thus do not provide a basis for the exercise of enforcement powers under Chapter VII of the UN Charter. Nonetheless, the States within the region, either individually or cooperatively, may take enforcement action against perpetrators of criminal activities in the GoG to the extent permitted by International Law and the relevant national legislation domesticating international law. For instance, under the United Nations Convention on the Law of the Sea 1982 (UNCLOS 82), there is universal jurisdiction over piracy that enables every State to take enforcement actions to seize pirate vessels or vessels that have been taken by pirates.⁷⁶ They may also arrest perpetrators of piratical acts and prosecute them before their courts.⁷⁷ They may also take

⁷⁴ For UNSC resolutions on piracy, see *UN Documents for Piracy: Security Council Resolutions*, UN Documents for Piracy: Security Council Resolutions (securitycouncilreport.org)

⁷⁵ See SC 7675, *supra* note 73, at 2 (emphasis added).

⁷⁶ See United Nations Convention on the Law of the Sea, *supra* note 18, art. 105.

⁷⁷ *Id.* See also Eugene Kontorovich & Steven Art, *An Empirical Examination of Universal Jurisdiction for Piracy*, 104 AM. J. INT'L L. 436 (2010). See generally PROSECUTING MARITIME PIRACY: DOMESTIC SOLUTIONS TO

enforcement action and prosecute perpetrators of non-piratical maritime crimes, including armed robbery at sea, committed within their maritime zones to the extent permitted by international law.⁷⁸

C. Gulf of Guinea UNSC Resolutions—Bidimensional and Not Multidimensional Approach

A recent report by the Danish Institute for International Affairs unequivocally pointed out that the GoG maritime insecurity is not necessarily always synonymous with piracy and armed robbery at sea and rightly states: “[w]hile maritime crime in the Gulf of Guinea is often referred to as ‘piracy’, this is not the correct designation for it [T]he Gulf of Guinea faces much broader challenges in the maritime domain than piracy alone.”⁷⁹ Nonetheless, the 2011 UNSC Resolution focused solely on piracy and armed robbery at sea, and not on other maritime crimes committed in the region.⁸⁰ The 2012 UNSC Resolution on the GoG,⁸¹ adopted after receiving the Secretary General’s assessment of the situation, appeared to indicate an interest not only in piracy and armed robbery at sea but also in other maritime security crimes—at least in the preamble.⁸² However, in the body of the latter resolution, the UNSC reverted to concentrating on piracy and armed robbery at sea.⁸³ It is

INTERNATIONAL CRIMES (Michael P. Scharf, Michael A. Newton, & Milena Sterio eds., 1st ed. 2015).

⁷⁸ United Nations Convention on the Law of the Sea, *supra* note 18, arts. 27, 73. See Convention for the Suppression on Unlawful Acts against the Safety of Maritime Navigation, arts. 6–7, Oct. 14, 2005, 1678 U.N.T.S. 201. See also James Kraska, *Effective Implementation of the 2005 Convention on the Suppression of Unlawful Acts Against the Safety of Maritime Navigation*, 70 NAVAL WAR C. REV. 11, 18–20 (2017).

⁷⁹ JESSICA LARSEN & CHRISTINE NISSEN, RECONCILING INTERNATIONAL PRIORITIES WITH LOCAL NEEDS: DENMARK AS A NEW SECURITY ACTOR IN THE GULF OF GUINEA 12 (2018).

⁸⁰ See S.C. Res. 2018, *supra* note 6, ¶¶ 1, 2.

⁸¹ See generally S.C. Res. 2039, *supra* note 6.

⁸² *Id.* See the part of the preamble that states: ‘Expressing its concern about the serious threats to international peace and stability in different regions of the world, in particular in West Africa and the Sahel Region, posed by transnational organized crime, including illicit weapons and drug trafficking, piracy and armed robbery at sea.’

⁸³ *Id.* ¶¶ 3, 5, 8, 10.

interesting that this resolution's main provisions did not seriously pick up on the developing multidimensional perspective of maritime security in the GoG.⁸⁴ It is even more notable since the Secretary-General's assessment had shown some of the States in the region were keen that the actions dealing with maritime insecurity should cover not just piracy and armed robbery at sea but other maritime crimes, as well.⁸⁵ The report had pointed out there was an appetite in the region that the assistance required should not only cover piracy and armed robbery at sea, but also other maritime crimes. For instance, the report pointed out that:

All interlocutors ... stressed that any comprehensive maritime security strategy should go beyond addressing piracy and should encompass policies to combat the threats of other acts of transnational organized crime, including drug trafficking, illicit fishing, illicit dumping of toxic waste, and illegal or clandestine immigration or migration.⁸⁶

It is confounding why UNSC chose to focus only on piracy and armed robbery at sea, despite the consistent and insistent position of the regional players and stakeholders that the maritime insecurity in the GoG was not just about piracy and armed robbery at sea, but also involved a wider range of criminal activities.⁸⁷ The limited scope of the resolutions is even more

⁸⁴ *Id.*

⁸⁵ Such as drug trafficking, child trafficking, oil bunkering, "illicit fishing, illicit dumping of toxic waste, and illegal or clandestine immigration or migration". See Rep. of the S.C., *supra* note 3, ¶¶ 1, 10, 23–31, 53.

⁸⁶ *Id.* ¶ 53.

⁸⁷ See, for instance, the address of Touré Mahamane, commissioner in charge of political affairs at the Commission of the Economic Community of West African States (ECOWAS) at the UNSC 2011 open debate, who called upon the UNSC to adopt a resolution to cover not only piracy but also other related criminal acts. U.N. SCOR, 66th Sess., 6633rd mtg., at 3, U.N. Doc. S/PV.6633 (Oct. 19, 2011). He indicated that "...all other criminal acts need to be included [in the UNSC resolution]: transnational organized criminality, all types of trafficking — in drugs, in human beings — illegal migration, terrorist acts, illegal fishing and bunkering, and toxic waste dumping, to cite just a few." *Id.* at 5. For the P-5 members of the UNSC, it is interesting to note, as follows in the 2011 debate: The representatives of France and the USA recognized that there were insecurity threats beyond just piracy, but focused more on the need for the UNSC to deal with the issue of piracy and armed robbery at sea in the

confounding given that some of the members of the UNSC, including the Permanent Members, appeared to articulate an appreciation the issue of maritime insecurity in the GoG was not limited to piracy and armed robbery at sea.⁸⁸ For instance, the UK explicitly stated:

The year 2011 showed a significant increase in the volume and impact of armed robbery and piracy incidents in the Gulf of Guinea linked to illegal fishing, oil bunkering and trafficking of narcotics, people and weapons Such incidents threaten the security and the economic and social stability of countries in the region. It is therefore in all of our interests to work together to address the threats to maritime security to prevent further destabilization⁸⁹

It is not clear why the UNSC resolutions, especially the 2012 UNSC Resolution, did not adopt a comprehensive multi-dimensional approach in engaging with the maritime insecurity issues in the GoG, especially since a number of actors in the region made it clear during the Secretary-General's assessment.⁹⁰ Perhaps the UNSC sidestepped a multidimensional approach because they were more contented with the binary, less complex, approach of focusing on just two maritime crimes.

Various regional actors in the GoG highlighted how essential such a multidimensional approach was in the GoG.⁹¹ The importance of this approach was captured by the Senegalese

GoG. *Id.* at 7–8, 17–18. On the other hand, the representative of Russia (pp.9-10), China (p.12), the UK (pp.14-15) and the USA focused solely on piracy and armed robbery at sea, without in any way acknowledging other maritime criminal acts in the GoG. *Id.* at 9–10, 12, 14–15. It also important to note that some of the key African states in the Gulf of Guinea, such as Nigeria and the Republic of Benin (speaking on behalf of the Gulf of Guinea States and on behalf of Benin, similarly focused more on piracy and armed robbery at sea and did not stress the need for a UNSC resolution that covered not only these maritime threats, but others identified by the ECOWAS and GGC representatives. *Id.* at 20–23.

⁸⁸ See SC 6717, *supra* note 13, at 7–9, 13, 16.

⁸⁹ S/PV.6633, *Id.*

⁹⁰ See generally Rep. of the S.C., *supra* note 3.

⁹¹ See SC 6633, *supra* note 60, at 23.

contribution to a 2016 UNSC open debate on maritime security in the GoG:

[W]e consider it essential to stress the links between piracy and transnational organized crime, given that this scourge is one of the major challenges that threaten the stability of countries in the region... we should consider seriously the possibility of the existence of connections between piracy in the Gulf of Guinea and the financing of the activities of terrorist groups operating in the region. It is also essential to consider other issues related to maritime safety and security, including the management and control of marine resources...the African approach must take into account, over and above security, the environmental, touristic and economic dimensions.⁹²

Given the failures of the UNSC's approach, it is not surprising the Yaoundé Code of Conduct, adopted in 2013, incorporated a multidimensional approach to maritime security as an integral part,⁹³ an approach that appears to now pervade various maritime strategies in Africa.⁹⁴ This Article will now turn to an analysis of that agreement.

⁹² See also SC 7675, *supra* note 73, at 4–6; Ginger Denton and Jonathan Harris, *The Impact of Illegal Fishing on Maritime Piracy: Evidence from West Africa*, STUDIES IN CONFLICT & TERRORISM 1-20 (2019)(points out the linkage between IUU fishing and increase in piracy and armed robbery at sea); Kate Eshelby, *Pirate Politics*, ECOLOGIST (Feb. 1, 2007), <https://theecologist.org/2007/feb/01/pirate-politics> (points to the linkage between IUU fishing and the transporting of illegal immigrants to Europe by erstwhile fishermen). See generally TOMAS F. HUSTED, CONG. RES. SERV., IF 11117, GULF OF GUINEA: RECENT TRENDS IN PIRACY AND ARMED ROBBERY (2019) (points to the linkage between piracy and armed robbery at sea and crude oil theft, so-called 'petro-piracy'). See also S.C. Pres. Statement 2016/44, *supra* note 72 (stating “The Security Council notes the link between piracy and armed robbery at sea and transnational organized crime in the Gulf of Guinea and expresses its concern about the fact that pirates benefit from it.”).

⁹³ See Code of Conduct, *supra* note 10, art. 1, ¶ 5 (stating that transnational organized crime in the Gulf of Guinea “includes but is not limited to any of the following acts when committed at sea . . . piracy, armed robbery at sea . . . money laundering . . . illegal arms and drug trafficking . . . illegal oil bunkering . . . crude oil theft . . . human trafficking . . . human smuggling . . . maritime pollution . . . IUU fishing . . . illegal dumping of toxic waste . . . maritime terrorism and hostage taking . . . [and] the vandalism [*sic*] of offshore oil infrastructure.”).

⁹⁴ See ECOWAS INTEGRATED MARITIME STRATEGY, *supra* note 33; African Charter on Maritime Security and Safety and Development in Africa, art. 32,

II. MARITIME SECURITY AND THE YAOUNDE CODE OF CONDUCT

Following the two UNSC resolutions on the GoG, the ECOWAS, ECCAS and GGC member States convened a joint ministerial conference in Cotonou and, later, a Summit of Heads of State and Government on Maritime Security and Safety in the GoG, both in 2013.⁹⁵ The summit produced the Yaoundé Code of Conduct 2013.⁹⁶

The Yaoundé Code was largely inspired by the initial version of the Code of Conduct concerning the Repression of Piracy and Armed Robbery against Ships in the Western Indian Ocean and the Gulf of Aden (the Djibouti Code of Conduct) 2009, though it has a wider scope.⁹⁷ The Djibouti Code of Conduct was limited to dealing with piracy and armed robbery against ships, while the Yaoundé Code not only covers piracy and armed robbery against ships, but adopts a multidimensional approach to maritime security by covering a wide range of transnational organized crime committed in the maritime domain.⁹⁸

Oct. 15, 2016; Revised Code of Conduct Concerning the Repression of Piracy, Armed Robbery Against Ships, and Illicit Maritime Activity in the Western Indian Ocean and the Gulf of Aden Area, art. 1, ¶ 4, Jan. 12, 2017, <https://www.imo.org/en/OurWork/Security/Pages/DCoC.aspx> [hereinafter Revised Code Western Indian Ocean and the Gulf of Aden Area].

⁹⁵ See Summit of Heads of State, *supra* note 10.

⁹⁶ *Id.* This section will focus on the Yaounde Code of Conduct, which is a more substantive normative instrument, though there were other ancillary documents, including the Declaration of the Heads of State and Government of Central and West African States on Maritime Safety and Security in their Common Maritime Domain and a Memorandum of Understanding among the ECCAS, ECOWAS and GGC on Maritime Safety and Security in Central and West Africa.

⁹⁷ See Int'l Maritime Org. [IMO], C 102/14, Res. 1, *Code of Conduct Concerning the Repression of Piracy and Armed Robbery Against Ships in the Western Indian Ocean and the Gulf of Aden*, (Apr. 3, 2009), <https://wwwcdn.imo.org/localresources/en/OurWork/Security/Documents/DCoC%20English.pdf> [hereinafter, Djibouti Code of Conduct].

⁹⁸ See Code of Conduct, *supra* note 10, art. 1, ¶ 5. The Maritime Crimes in the Yaoundé Code apart from piracy and armed robbery at sea, include money laundering, illegal arms and drug trafficking, illegal oil bunkering, crude oil theft, human trafficking, human smuggling, maritime pollution, illegal unreported and unregulated (IUU) fishing, the illegal dumping of toxic waste, maritime terrorism and hostage-taking, and the vandalizing of offshore oil infrastructure. The Djibouti Code of Conduct has since been amended to take an "African" approach and now embraces a multidimensional approach to dealing with maritime security. See generally Revised Code Western Indian Ocean and the Gulf of Aden Area, *supra* note 94.

It is unclear whether the Yaoundé Code is a legally binding treaty or merely a political instrument. It consists of twenty-one articles that are couched in legal language and form.⁹⁹ For instance, it is structured similarly to a treaty with the division of the different provisions into articles and also the reference to a depositary—i.e. the African Union Commission¹⁰⁰—and that a threshold number of Parties must support it for the Code to come into force.¹⁰¹ Further, unlike the Djibouti Code, the Parties to the Yaoundé Code are referred to as “the Signatories,” an almost legal-like terminology.¹⁰² Lassa Oppenheim points out that a key factor in determining whether an international instrument is actually a treaty is “whether it is intended to create legal rights and obligations between the parties.”¹⁰³ Further, the Vienna Convention on the Law of Treaties 1969 (VCLT) defines a treaty as: “an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation.”¹⁰⁴ The

⁹⁹ See generally Code of Conduct, *supra* note 10.

¹⁰⁰ Art.20 para.4 of Yaounde Code of Conduct published by the African Union states: ‘The AUC shall be depositary and shall transmit the signed copy to the IMO and to any other organizations agreed upon by the Signatories.’ See https://au.int/sites/default/files/newsevents/workingdocuments/27463-wd-code_of_conduct.pdf However, for reasons that are unclear, the signed copy deposited with the IMO did not retain this paragraph See https://www.wcdn.imo.org/localresources/en/OurWork/Security/Documents/code_of_conduct%20signed%20from%20ECOWAS%20site.pdf The depositary of the Yaounde Code of Conduct is different from that of the Djibouti Code of Conduct. The depositary of the latter is the Secretary-General of the International Maritime Organisation. See art.1 para.5 and art.21 para.2 of Revised Code Western Indian Ocean and the Gulf of Aden Area, *supra* note 94. This is probably because the Djibouti Code of Conduct includes non-African States Parties such as Jordan, Oman, Saudi Arabia, and the United Arab Emirates.

¹⁰¹ See Code of Conduct, *supra* note 10, art. 20. See also Vienna Convention of the Law of Treaties, 1155 U.N.T.S. 331, chap. VII (hereinafter, VCLT)

¹⁰² See Code of Conduct, *supra* note 10, art. 1. In contrast, see for instance Djibouti Code of Conduct, art. 16, which refers to the parties as ‘the Participants.’ See generally Revised Code Western Indian Ocean and the Gulf of Aden Area, *supra* note 94.

¹⁰³ LASSA OPPENHEIM, INTERNATIONAL LAW: A TREATISE 899–900 (H. Lauterpacht ed., 8th ed. 1955).

¹⁰⁴ VCLT, *supra* note 101, art. 2(1)(a).

VCLT also requires for such treaties to be binding and carried out in good faith by the Parties.¹⁰⁵ Although the Yaoundé Code is an international agreement in writing concluded between the GoG states, it would appear, as will be developed below, that the Parties did not really intend it to be a binding treaty as defined by the VCLT.¹⁰⁶ Instruments, such as the Yaoundé Code, have been identified by Baxter as “international agreements” or “political treaties.”¹⁰⁷ Others have described such types of instruments as “gentlemen’s agreements,” “non-binding agreements,” “de facto agreements,” and “non-legal agreements.”¹⁰⁸ Anthony Aust, an expert in international law and treaties, prefers the phrase “informal international instruments” to describe such agreements, defining them as “an instrument which is not a treaty because the parties to it do not intend it to be really binding.”¹⁰⁹ Hartmut Hillgenberg, acknowledging the growing use of such non-treaty international agreements, argues they exemplify a type of soft law.¹¹⁰ He provides a number of rationales for why states would prefer to adopt non-treaty agreements rather than a formal treaty:

a general need for mutual confidence-building; the need to stimulate developments still in progress; the creation of a preliminary, flexible regime possibly providing for its development in stages; impetus for coordinated national legislation; concern that international relations will be overburdened by a ‘hard’ treaty, with the risk of failure and a deterioration in relations; simpler procedures, thereby facilitating more rapid finalization (e.g. consensus rather than a treaty conference); avoidance of cumbersome domestic approval procedures in case of

¹⁰⁵ VCLT, *supra* note 101, art. 26.

¹⁰⁶ See Anthony Aust, *The Theory and Practice of Informal International Agreements*, (1986) 35 INT’L COMP. L. Q. 787, 794–96(1986) where the author has an interesting exploration of the distinction between treaties and informal international agreements.

¹⁰⁷ R. R. Baxter, *International Law in ‘Her Infinite Variety’* 29 INT’L COMP. L. Q., 549, 550–51 (1980).

¹⁰⁸ Aust, *supra* note 106, at 787.

¹⁰⁹ *Id.*

¹¹⁰ See generally Hartmut Hillgenberg, *A Fresh Look at Soft Law*. 10(3) EUR. J. INT’L L., 499 (1999).

amendments; greater confidentiality . . . ; agreements can be made with parties which do not have the power to conclude treaties under international law . . . ; agreements can be made with parties that other parties to the agreement are not willing to recognize.¹¹¹

Article 19(a) of the Yaoundé Code, which is essentially a copy of Article 15(a) of the Djibouti Code, states that nothing in the Code is intended to “create or establish a binding agreement, except as noted in Article 13.”¹¹² Article 13 in the two instruments are different,¹¹³ resulting, if one looks at this literally, in rather interesting legal implications for the Yaoundé Code. The Djibouti Code’s Article 13 emphasizes the non-binding nature of the instrument by pointing out that the “Participants” to the Code may consult with each other, and with the assistance of the IMO, for the purpose of arriving at a binding agreement.¹¹⁴ On the other hand, Article 13 of the Yaoundé Code deals only with the issue of assistance among Signatory States through cooperation.¹¹⁵ Article 13 of the Yaoundé Code provides that a Signatory State may request any other Signatory State(s) to cooperate, through the centers or directly,¹¹⁶ in identifying certain persons who have either committed or are reasonably

¹¹¹ *Id.* at 501.

¹¹² Code of Conduct, *supra* note 10, art. 19(a). Now art.19(a) of Revised Code Western Indian Ocean and the Gulf of Aden Area, *supra* note 94.

¹¹³ See note 97 for the Djibouti Code of Conduct.

¹¹⁴ Djibouti Code of Conduct, *supra* note 97, art. 13. *See also* Inter Regional Coordination Center [ICC], *Declaration of the Heads of State and Government of Central and West African States on Maritime Safety and Security in their Common Maritime Domain*, ¶ 1.9, <https://icc-gog.org/wp-content/uploads/2018/03/DeclarationofHofS-EN.pdf> (issued at the Summit that adopted the Code, encouraged the “the implementation of a transitional Code of Conduct in view of facilitating the adoption of a binding multilateral agreement aimed at eradicating illegal activities off the coast of West and Central Africa.”).

¹¹⁵ Code of Conduct, *supra* note 10, art. 13.

¹¹⁶ The Centers are to help with coordinating the efforts to curb maritime insecurity in the GoG and to encourage information sharing. They include the Interregional Coordination Centre(ICC), the Regional Maritime Security Centre for Central Africa (CRESMAC) and the Regional Maritime Security Centre for West Africa (CRESMAO). *Yaoundé Architect*, GULF OF GUINEA INTER-REG'L NETWORK (GOGIN), <https://www.gogin.eu/en/about/yaounde-architecture/>.

suspected of having committed illegal activities at sea, such as transnational organized crime in the maritime domain, maritime terrorism or IUU fishing.¹¹⁷ Signatory States may also be active: (1) in detecting pirate ships, where there are reasonable grounds to suspect that such ships are engaged in piracy; (2) in detecting other ships or aircraft, where there are reasonable grounds to suspect that such ships or aircraft are engaged in transnational organized crime in the maritime domain, such as maritime terrorism, IUU fishing or other illegal activities at sea; and (3) in detecting ships or persons who have been subjected to piracy or armed robbery against ships.¹¹⁸ Under this Article, a Signatory State may also request any other Signatory States, either through the centers or directly, to take effective measures in response to reported transnational organized crime in the maritime domain, maritime terrorism, IUU fishing, or other illegal activities at sea.¹¹⁹ Further, Article 13 deals with cooperative arrangements that may be undertaken by the Signatory States in joint exercises and capacity building.¹²⁰ Taken together, the implication of Article 19(a) is that it appears to create an interesting dual regime; Article 13 appears to be binding and creates legal obligations under international law within the meaning of the relevant provisions of the VCLT, while all other provisions of the Code appear to be non-binding.¹²¹

Another possible scenario is to regard Article 19(a) as merely evidencing sloppy draftsmanship involving “copying and pasting” certain provisions of the Djibouti Code without closely checking the cross-referenced article.

Although it can be argued that the Yaoundé Code, on the whole, was not intended to be a treaty within the meaning of the VCLT, there is no doubt that, as an international agreement, it is not inappropriate to fall back on the rules for the interpretation of treaties under the VCLT to seek to determine

¹¹⁷ Code of Conduct, *supra* note 10, art 13(1).

¹¹⁸ *Id.*

¹¹⁹ *Id.* art. 13(2).

¹²⁰ *Id.* art. 13(3) and (4).

¹²¹ *Id.* arts. 19(a), 13.

the intention of its Signatories. Aust subscribes to the view that in the “interpretation and application . . .” of so-called informal international agreements, it would be “convenient and reasonable . . .” to apply the rules of interpretation of treaties under the VCLT so long as there are no inconsistencies with the non-binding nature of such instruments.¹²² Articles 31–33 of the VCLT provide different ways of interpreting treaty provisions, such as literal interpretation, systematic or contextual interpretation, and teleological or purposive and historic interpretation.¹²³ A literal interpretation would lead to rather ambiguous or manifestly absurd results, as will be explored below. Since the Yaoundé Code is largely inspired by the Djibouti Code, which is wholly non-binding,¹²⁴ this would appear to suggest that the former instrument is non-legal and similarly non-binding international agreement, but rather a framework for voluntary cooperation. The non-binding nature of the Yaoundé Code of Conduct is affirmed by Article 17(a), which states that within three years of the Code coming into force, the Signatories could enter into negotiations with a view to transforming the Code into a binding multilateral treaty.¹²⁵ This indicates that the intention is for the Code to be non-binding until it was subsequently converted into a binding treaty. The then Secretary-General of the United Nations, Ban Ki-moon, affirmed this view, as he identified the Yaoundé Code as a non-binding, transitional code, which was a prelude to a binding multilateral treaty.¹²⁶ In which case, there may be a need for the Signatories to take appropriate steps to amend Article 19(a) to correct this anomaly to reflect their actual intentions.

If the dual regime outlined above is the proper interpretation, it would create an ambiguous and absurd situation regarding the domestic implementation of the Code in some of the

¹²² See Aust, *supra* note 106, at 793

¹²³ VCLT, *supra* note 101, arts. 31–33.

¹²⁴ See Djibouti Code of Conduct, *supra* note 97, arts. 13, 15(a).

¹²⁵ Code of Conduct, *supra* note 10, art. 17(a).

¹²⁶ See *Ban welcomes anti-piracy strategy adopted by leaders from West, Central Africa*, UN NEWS (June 27, 2013), <http://www.un.org/apps/news/story.asp?NewsID=45281&Cr=piracy&Cr1=#.U2eMKsVwbrc>.

Signatory States. The domestic implementation of the Yaoundé Code would be straightforward under the constitutional arrangement of the Signatory States that operate a monist system,¹²⁷ in which all treaties apply automatically in the domestic system without the need for specific national legislation to implement them.¹²⁸ Virtually all the francophone and lusophone signatory States to the Code adopt the monist approach.¹²⁹ Generally, under these States' constitutions, once the treaty or international agreement has been ratified by the appropriate person and subsequently published at the domestic level, it immediately becomes part and parcel of the law of the land.¹³⁰ In these States, it does not matter whether certain provisions of the Code are binding or not, as all international

¹²⁷ Ndjodi Ndeunyema, *The Namibian Constitution, International Law and the Courts: A Critique*, 9 GLOBAL J. COMPAR. L. 271, 273 (2020) explains monism as follows: "Monism captures unitary conceptions of law wherein international law and municipal law are viewed as a single, unified system. A monist approach gives international law primacy over municipal law in both international and municipal decisions. International law has direct effect and automatically forms part of the municipal legal order without further need of incorporation or transformation within the State, for example through domesticating legislation." For more on monism and dualism, as well as the relations between international and national law (or domestic law), see JAMES CRAWFORD, *BROWNIE'S PRINCIPLES OF PUBLIC INTERNATIONAL LAW*, 45–102 (9th ed. 2019) and Joseph Starke, *Monism and Dualism in the Theory of International Law*, 17 BRIT. Y.B. INT'L L., 66, 66–81(1936).

¹²⁸ See Edwin Egede, *The New Territorial Waters (Amendment) Act 1998 – Comments on the Impact of International Law on Nigerian Law*, 12 AFR. J. INT'L COMP. L. 84, 99–102 (2000).

¹²⁹ For francophone States see, e.g., REP. BENIN CONSTITUTION, Dec. 11, 1990, art. 292; BURK. FASO CONSTITUTION, June 2, 1991, art. 151; BURUNDI CONSTITUTION, Feb. 28, 2005, art. 292; CONSTITUTION REP. OF CAMEROON, Jan. 18, 1996, art. 45; CENT. AFR. REP. CONSTITUTION, Dec. 15, 2015, art. 72; CONSTITUTION REP. CHAD, Mar. 31, 1996, art. 222; CONGO CONSTITUTION, arts. 176, 215; CÔTE D'IVOIRE CONSTITUTION, Oct. 31, 1960, art. 87; DEM. REP. CONGO CONSTITUTION, Feb. 18, 2006, art. 215; GABON CONSTITUTION, Mar. 26, 1991, art. 114; MALI CONSTITUTION, Feb. 25, 1992, art. 116; NIGER CONSTITUTION, Oct. 31, 2010, art. 171; SENEGAL CONSTITUTION, Jan. 7, 2001, art. 98; TOGO CONSTITUTION, Oct. 14, 1992, art. 140 For lusophone States, see, e.g., ANGL. CONSTITUTION, Jan. 21, 2010, art. 13(2); CAPE VERDE CONSTITUTION, Sept. 28, 1992, art. 11; GUINEA-BISSAU CONSTITUTION, May 6, 1984, art. 29; CONSTITUTION SÃO TOMÉ AND PRÍNCIPE, Nov. 5, 1975, art. 13(3). Equatorial Guinea is both Lusophone and Francophone. Its 1991 Constitution, as amended to January 17, 1995, though not clear on this, would appear to suggest in Article 8 that it is a monist Constitution. See EQ. GUINEA CONSTITUTION, Nov. 16, 1991, art. 8.

¹³⁰ *Id.*

agreements to which these States are Parties would automatically apply domestically.

On the other hand, it becomes rather problematic for signatory States that operate a dualist system.¹³¹ These States require their legislature to enact legislation to domesticate a treaty before it can be implemented and enforced domestically.¹³² Therefore, these States sometimes enter into international agreements which do not meet the qualifications to be binding treaties deliberately so as to avoid the necessary, complex process involved in the domestication of treaties.¹³³ Such domestication usually involves a long, drawn-out process whereby the national legislature is required to enact appropriate domestic legislation in order to provide the legislative framework for the implementation of the treaty.¹³⁴ Nigeria, for example, a key signatory to the Yaoundé Code of Conduct and the source of the majority of piracy in the Gulf of Guinea,¹³⁵ operates under a dualist system in which the executive arm of the government has the authority to enter into treaties and other international agreements.¹³⁶ The National Assembly, however, as the legislative arm, would need to enact legislation for treaties to be enforced and implemented domestically.¹³⁷

¹³¹ See, e.g., GHANA CONSTITUTION, Apr. 28, 1992, § 75; LIBERIA CONSTITUTION, July 3, 1984, art. 34(f); CONSTITUTION OF NIGERIA, May 29, 1999, § 12(1); SIERRA LEONE CONSTITUTION, Oct. 1, 1991, § 40.

¹³² *Id.*

¹³³ See Alan E. Boyle, *Some Reflections on the Relationship of Treaties and Soft Law*, 48 INT'L & COMP L. Q. 901, 903 (1999).

¹³⁴ *Id.*

¹³⁵ See Alexander Holmgren, *Piracy's Persistence in the Gulf of Guinea*, AFR. DEF. REV. (Jan. 13, 2014), <http://www.africandefence.net/piracys-persistence-in-the-gulf-of-guinea/>; Daud Hassan & Sayed Hasan, *Effectiveness of the Current Regimes to Combat Piracy in the Gulf of Guinea: An Evaluation*, 10 AFR. J. L. STUD. 35, 47 (2017).

¹³⁶ See Edwin E. Egede, *Bringing Human Rights Home: An Examination of the Domestication of Human Rights Treaties in Nigeria*, 51 J. AFR. L., 249, 250 (2007); see also A.O. Enabulele, *Implementation of Treaties in Nigeria and the Status Question: Whither Nigerian Courts?*, 17 AFR. J. INT'L & COMP. L. 326, 328 (2009).

¹³⁷ See CONSTITUTION OF NIGERIA, May 29, 1999, § 12 (It is important to note that the Third Amendment of the Constitution in section 254(c) has slightly revised the provisions of section 12 as follows: "Notwithstanding anything to the contrary in this Constitution, the National Industrial Court shall have the

Section 12(1) of the Nigerian 1999 Constitution provides: “No treaty between the Federation and any other country shall have the force of law to the extent to which any such treaty has been enacted into law by the National Assembly.”¹³⁸ The Nigerian courts, including the Supreme Court, have endorsed the dualist nature of section 12(1) of the Constitution.¹³⁹ The Supreme Court in *Abacha v. Fawehinmi*, when referring to section 12(1), stated that

an international treaty entered into by the Government of Nigeria does not become binding until enacted into law by the National Assembly Before its enactment into law by the National Assembly, an international treaty has no such force of law as to make its provisions justiciable in [the Nigerian] courts.¹⁴⁰

What this would mean in practical terms, if one accepts the analysis of the Yaoundé Code that yields a dual-regime scenario, is that the National Assembly of Nigeria would need to enact domestic legislation to implement Article 13, but would not need to do so in respect other provisions of the Code.¹⁴¹ With the complex implications of accepting a dual regime interpretation of the Code for dualist Signatory States, it is difficult to accept that this could possibly be the intention of the Signatory States.

jurisdiction and power to deal with any matter connected with or pertaining to the application of any international convention, treaty or protocol of which Nigeria has ratified relating to labour, employment, workplace, industrial relations or matters connected therewith”). See Constitution of the Federal Republic of Nigeria (Third Alteration) Act, 2010. See also Amos Osaigbovo Enabulele & Faith Osama Osadolor, *The Status in Nigeria of Treaties Predating the 1979 Constitution: Reflections on JFS v. Brawal Line Ltd*, 12 AFR. J. L. STUD. 335, 338 (2020) (The authors point out that this amendment, which applies only to treaties on labor matters that come up before the Nigerian National Industrial Court, has only marginal effects. However, in their view, this amendment “...alters, for the first time, the absolute dualist approach to the implementation of treaties in Nigeria by introducing a monistic content into the constitution.”).

¹³⁸ See CONSTITUTION OF NIGERIA, May 29, 1999, § 12.

¹³⁹ Egede, *supra* note 136, at 250, 252.

¹⁴⁰ *Abacha v. Fawehinmi* [2000] 6 NWLR 288 (Nigeria).

¹⁴¹ See Treaties Act (1993) Cap. (T20), § 3 (Nigeria) (stating that while treaties which it designates as ‘law-making treaties’ would need to be enacted into law, agreements which merely impose financial, political and social obligations on Nigeria do not need to be enacted into law).

Even if one accepts that the Code is a wholly non-binding instrument, there remain some difficult legal issues with its implementation—especially for States such as Nigeria. Traditionally, the Nigerian navy is responsible for maritime security and coast guard functions around Nigerian coastal waters, a task it often carries out with joint naval operations alongside neighboring States.¹⁴²

In 2007, the Nigerian Maritime Administration and Safety Agency (NIMASA) was created and given the mandate, amongst others, of providing maritime security off the coast of Nigeria.¹⁴³ It operates a Regional Maritime Rescue Coordination Centre in Lagos with a remit to alert available navies when there is an attack within its waters.¹⁴⁴ In actuality, the NIMASA lacks the operational capacity to actually carry out coast guard functions, and has thus entered into memoranda of understanding with the Nigerian Navy and Air Force to assist it in its efforts to provide maritime security.¹⁴⁵ Further, NIMASA has made it clear that it would adopt a regional approach to combating the illegal activities of oil theft, sea robbery and piracy.¹⁴⁶ This agency, acting with the Nigerian Navy and Air Force, would play a frontline role in the implementation of the Yaoundé Code.¹⁴⁷ For a long period after the Yaoundé Code was agreed to,

¹⁴² See Nigerian Navy Act (1990) Cap. (288), § 1. See also JENS VESTERGAARD MADSEN, CONOR SEYLE, KELLIE BRANDT, BEN PURSER, HEATHER RANDALL & KELLIE ROY, *THE STATE OF MARITIME PIRACY* 2013, 55–56 (2014).

¹⁴³ See Maritime Administration and Safety Agency Act (2007) Cap. (224), § 1(ii), 22(D)(p) (Nigeria). See also, ADJOA ANYIMADU, *MARITIME SECURITY IN THE GULF OF GUINEA: LESSONS LEARNED FROM THE INDIAN OCEAN* 9 (2013).

¹⁴⁴ See *NIMASA: Response to Piracy and Armed Robbery*, <https://nimasa.gov.ng/services/maritime-safety-security/search-rescue-rs/>

¹⁴⁵ See Samson Echenim, *Nigeria: Sea Crimes – Navy, NIMASA to Adopt Stronger Platforms*, ALL AFRICA (Oct. 26, 2012), <https://allafrica.com/stories/201210260292.html>; see also *NIMASA, NAF sign MoU on Maritime Domain Security*, ENERGY MIX REP (Aug. 27, 2013), <https://www.energymixreport.com/nimasa-naf-sign-mou-on-maritime-domain-security/> (in 2014, the NIMASA, working with the Nigerian navy and air force, rescued a hijacked Ghanaian fishing vessel).

¹⁴⁶ *NIMASA Explains Regional Approach to Tackle Oil Theft, Piracy*, ENERGY MIX REP. (May 11, 2014), <https://www.energymixreport.com/nimasa-explains-regional-approach-to-tackle-oil-theft-piracy>.

¹⁴⁷ See Echenim, *supra* note 145; *NIMASA, NAF sign MoU on Maritime Domain Security*, *supra* note 145.

however, the NIMASA and its partners were unable to effectuate many of the Code's provisions due to inadequate domestic legislation that did not criminalise some of the illegal maritime activities contained in the Code.¹⁴⁸ Recently, though, the Nigerian legislature enacted legislation in 2019 to deal with maritime insecurity in the GoG, which will be examined in the next section.

III. MARITIME SECURITY AND NATIONAL LEGISLATION—THE NIGERIAN SITUATION

This section seeks to explore the Nigerian legislative framework, as Nigeria is the main source of maritime insecurity in the GoG.¹⁴⁹ Prior to 2019, Nigeria did not have a specific legislation, as required by Section 12 of the Constitution, that domesticated the definition of piracy as provided for by the UNCLOS 1982 or for armed robbery at sea under the 1988 Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation (SUA Convention).¹⁵⁰ The Nigerian courts did have jurisdiction, under the Nigerian Territorial Waters Act 1967, as amended in 1970 and 1998, for offences committed in the territorial waters and for acts of piracy as defined by the law of nations.¹⁵¹ Criminalizing “acts of piracy

¹⁴⁸ See John Iwori, *NIMASA Seeks Legal Backing to Fight Piracy*, SAFETY4SEA (May 25, 2012), <http://www.thisdaylive.com/articles/nimasa-seeks-legal-backing-to-fight-piracy/116536/>. However, it is important to note that there are national legislations criminalizing some of the illegal activities listed in the Code, such as illegal oil bunkering, IUU fishing and illegal dumping of toxic waste, though some of these laws would need to be updated. See Edwin Egede, *The Nigerian Territorial Waters Legislation and the 1982 Law of the Sea Convention*, 19 INT'L. J. MARINE & COASTAL L. 151, 170–172 (2004).

¹⁴⁹ See Holmgren, *supra* note 135; Hassan & Hassan, *supra* note 135 at 47.

¹⁵⁰ CONSTITUTION OF NIGERIA, May 29, 1999, § 12. Nigerian officials have indicated that the country is the first “in the West and Central African sub-region to promulgate a separate law against piracy.” *Maritime Safety: President Buhari Assents to Anti-Piracy Bill*, GULF OF GUINEA INTER-REGIONAL NETWORK (July 21, 2019), <https://www.gogin.eu/en/2019/07/21/maritime-safety-president-buhari-assents-to-anti-piracy-bill/> [hereinafter *Maritime Safety*]. This is in line with the Yaounde Code on national measures. Code of Conduct, *supra* note 10, art. 4(1).

¹⁵¹ See Territorial Waters Act (1971) Cap (428), § 2 (Nigeria); Territorial Waters (Amendment) Decree 1998 (Nigeria). Arguably § 216(h) of the Nigerian Merchant Shipping Act 2007, which domesticates the 1988 SUA Convention

as defined by the law of nations . . . ” was problematic, however, due to the human rights section of the 1999 Nigerian Constitution.¹⁵² Under the constitution, no person shall be convicted for a criminal offence “unless that offence is defined and the penalty therefor is prescribed in a written law”.¹⁵³ Thus the Nigerian security agencies had difficulties prosecuting suspected pirates before the Nigerian courts because the existing legislation did not precisely define the offence or stipulate a penalty, as required by the Constitution.¹⁵⁴ To address this vital gap in the legislation, the National Assembly, began to take steps to enact specific domestic legislation to deal with these important maritime crimes.¹⁵⁵ Various bills addressing maritime crimes were submitted to the National

and the Protocols thereto, could be said to domesticate armed robbery at sea. Merchant Shipping Act (2007) § 216(h) (Nigeria).

¹⁵² Territorial Waters Act (1971) Cap (428), § 3(3) (Nigeria). See CONSTITUTION OF NIGERIA, May 29, 1999, § 36(12).

¹⁵³ CONSTITUTION OF NIGERIA, May 29, 1999, § 36(12).

¹⁵⁴ See MATTHEW R. WALJE, JENS VESTERGAARD MADSEN, CONOR SEYLE, KELLIE BRANDT, PETER KERINS, MEGAN MATTHEWS & TYLER MAYBEE, *THE STATE OF MARITIME PIRACY 2014: ASSESSING THE ECONOMIC AND HUMAN COST* 63–64 (2014),

<https://oceansbeyondpiracy.org/sites/default/files/attachments/StateofMaritimePiracy2014.pdf> [hereinafter 2014 OCEANS BEYOND PIRACY REPORT]; MAISE PIGEON, EMINA SADIC, SEAN DUNCAN, CHUCK RIDGWAY & KELSEY SOETH, *THE STATE OF MARITIME PIRACY 2017: ASSESSING THE ECONOMIC AND HUMAN COST* 10 (2017),

https://oceansbeyondpiracy.org/sites/default/files/one_earth_future_state_of_piracy_report_2017.pdf.

¹⁵⁵ 2014 OCEANS BEYOND PIRACY REPORT, *Id.*, at 64. Under the 1999 Constitution of Nigeria, the National Assembly consists of the Senate and the House of Representatives. CONSTITUTION OF NIGERIA, MAY 29, 1999, § 47. See also CONSTITUTION OF NIGERIA, MAY 29, 1999, § 58, (Emphasizing that “the power of the National Assembly to make laws shall be exercised by bills passed by both” arms of the National Assembly and must be normally “assented to by the president” (except the latter “withholds his assent and the bill is again passed” by two-thirds majority of each arm of the National Assembly – in which case it becomes law without the assent of the president) and that such Bill, which could be one sponsored by the executive, a member of the National Assembly or privately, “may originate either in the Senate or House of Representatives.”). See POLICY AND LEGAL ADVOCACY CENTRE(PLAC) A GUIDE TO THE NIGERIAN NATIONAL ASSEMBLY 17 (2015), <https://placng.org/i/wp-content/uploads/2019/12/A-Guide-to-the-Nigerian-National-Assembly.pdf>

Assembly.¹⁵⁶ There was also a bill, sponsored by NIMASA, the Act to Provide for the Suppression of Piracy and other Maritime Offences, Give Effect to the Provisions of the United Nations Convention on the Law of the Sea (UNCLOS) 1982, the Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation (SUA) 1988 and Its Protocols and for Related Matters 2017.¹⁵⁷ The NIMASA bill, rather than the former bills, was eventually adopted by the National Assembly as legislation and named the Suppression of Piracy and other Maritime Offences Act 2019¹⁵⁸ (2019 Maritime Offences Act) and then signed into law by the president of the Federal Republic of Nigeria.¹⁵⁹ It provided that prior legislation inconsistent with the Act were either repealed or to be read in conformity with the Act.¹⁶⁰ The 2019 Maritime Offences Act, as will be argued below, is not as wide-ranging as the Yaoundé Code of Conduct in its coverage of maritime crimes.

There are two potential models for domestic legislation to deal with maritime insecurity in the GoG. The first model would be an all-embracing piece of legislation that covers the various manifestations of maritime insecurity, especially those enunciated by the Yaoundé Code of Conduct. Such a model would highlight the linkages between various maritime crimes and embrace both the letter and spirit of the Yaoundé Code of Conduct, which advocates a holistic approach to engaging with

¹⁵⁶ Notably, there was the Special Provisions for the Suppression of Piracy and to Provide for Punishment for the Offence of Piracy and for Matters Connected Therewith or Incidental Thereto 2016. Special Provisions for the Suppression of Piracy (2016) Cap. (SB. 254) (Nigeria) (a bill sponsored by Senator Nelson Effiong) [hereinafter 2016 Suppression of Piracy Bill]. There were two versions of the bills sponsored by Senator Nelson Effiong, C1299 and C2155. The two versions of the bills were substantively the same with some slight amendments in the latter replacing a reference to the Criminal Code Act in the former with the Administration of Criminal Justice Act.

¹⁵⁷ *Maritime Safety*, *supra* note 152.

¹⁵⁸ 2019 Maritime Offences Act, *supra* note 11, § 23.

¹⁵⁹ The president assented to this bill on 24 June 2019. *Maritime Safety*, *supra* note 152.

¹⁶⁰ 2019 Maritime Offences Act, *supra* note 11, § 21.

the maritime crimes in the GoG. Such legislation, however, would be detailed and complex to enact.¹⁶¹

The second model would adopt a piecemeal approach to dealing with maritime security. This type of model favors the enactment numerous, targeted pieces of legislation that would deal with specific maritime crimes. Although this approach would, regarding individual pieces of legislation, be less complex than the first scenario, it could, if not guided by an overarching strategy, lead to a fragmented method of dealing with maritime insecurity in the region. Such an approach would blur the Yaoundé Code of Conduct's emphasis that maritime crimes in the GoG are interrelated and should be combated as such.¹⁶² It may also encourage member States, to enact legislation that prioritizes certain maritime crimes over others depending on what each State believes most implicates their national interest, leading to disjointed engagement with, and cooperation in confronting, maritime crimes in the region.

The 2019 Maritime Offences Act fits comfortably within the second model, as it was not intended to be a comprehensive piece of legislation covering all aspects of maritime crimes enunciated in the Yaoundé Code of Conduct.¹⁶³ This legislation is limited to dealing with piracy and nineteen other maritime crimes,

¹⁶¹ See Code of Conduct, *supra* note 10, art. 1(5), (providing a non-exhaustive list of twelve maritime crimes).

¹⁶² See Revised Code Western Indian Ocean and the Gulf of Aden Area, *supra* note 94. See also G.A. Res 75/238, ¶ 156, Annual Resolution on Oceans and the Law of the Sea (Dec. 31, 2020), (“... that transnational organized criminal activities are diverse and may be interrelated in some cases and that criminal organizations are adaptive and take advantage of the vulnerabilities of States, in particular coastal and small island developing States in transit areas, and calls upon States and relevant intergovernmental organizations to increase cooperation and coordination at all levels to detect and suppress the smuggling of migrants, trafficking in persons and illicit trafficking in firearms, in accordance with international law.”).

¹⁶³ See Code of Conduct, *supra* note 10, art. 1(3–5), which defines “piracy,” “armed robbery at sea,” and “transnational organized crime in the maritime domain”. Transnational organized crime in the maritime domain includes “(a) money laundering, (b) illegal arms and drug trafficking . . . (d) illegal oil bunkering, (e) crude oil theft, (f) human trafficking, (g) human smuggling, (h) maritime pollution, (i) IUU fishing, (j) illegal dumping of toxic waste, (k) maritime terrorism and hostage taking, [and the] (l) vandalising of offshore oil infrastructure.” *Id.* art 1(5).

including armed robbery at sea,¹⁶⁴ maritime terrorism, and damage or destruction of offshore fixed or floating platforms—in essence, it domesticates and fully implements the relevant provisions of UNCLOS 1982 and the SUA Convention 1988 and its Protocols.¹⁶⁵ It also criminalizes any attempt to commit piracy and any of the other maritime offences mentioned in the legislation.¹⁶⁶ It does not, however, cover certain key maritime security offences rampant in the GoG, such as illegal arms and drug trafficking, illegal oil bunkering, crude oil theft, human trafficking, human smuggling, maritime pollution, IUU fishing, and illegal dumping of toxic waste.¹⁶⁷ Regrettably, the 2019 Maritime Offences Act does not fully capture the intent and spirit of the Yaoundé Code of Conduct, which encourages a multidimensional engagement with maritime crimes in GoG.¹⁶⁸ It is conceivable that the maritime offences dealt with in the 2019 legislation merely indicate what Nigeria regards as the priority for the moment. If this were the case, though, it would be astonishing that such legislation does not specifically include

¹⁶⁴ 2019 Maritime Offenses Act, *supra* note 11, § 4. Armed robbery at sea is defined in section 22 of the Legislation as including “any illegal act of violence or detention or any act of depredation or threat thereof other than an act of piracy, directed against a ship or an aircraft or against persons or property on board such a ship or an aircraft committed within the Nigerian internal waters and territorial waters, and for the purpose of criminalization and punishment, all acts of armed robbery at sea are deemed to be included within the meaning of ‘unlawful act’ in this Act.” *Id.* § 22.

¹⁶⁵ *See generally* 2019 Maritime Offenses Act, *supra* note 11. The explanatory memorandum of the 2019 Maritime Offenses Act states that it provides “for the Suppression of Piracy and other Maritime Offences, give[s] effect to the provision of the United Nations Convention on the Law of the sea (UNCLOS), 1982, the convention for the suppression of unlawful acts against the safety of Maritime Navigation (SUA) 1988 and its Protocols.” *Id.* at Explanatory Memorandum. Furthermore, section 1 of the 2019 Maritime Offenses Act states that: “The objective of this Act is to prevent and suppress piracy, armed robbery and any other unlawful act against a ship, aircraft and any other maritime craft, however propelled, including fixed or floating platforms.” *Id.* § 1. It then goes on to define piracy in section 4 and armed robbery at sea and other unlawful acts against ship, aircraft and other maritime craft, which could include maritime terrorism and the vandalizing of offshore oil infrastructure. *Id.* § 4. (see section 4 for the detailed list of the other maritime crimes).

¹⁶⁶ *Id.* § 13(1).

¹⁶⁷ *See id.* § 3–4.

¹⁶⁸ *See generally* Revised Code Western Indian Ocean and the Gulf of Aden Area, *supra* note 94.

other maritime offences, such as illegal oil bunkering, crude oil theft, and IUU fishing, which ought to be key priority maritime offences as they result in an immense financial loss for the Nigerian government.¹⁶⁹

A possible legislative approach that may be adopted by the Nigerian government, even after the 2019 legislation, is to enact additional legislation, or amend existing legislation to fully cover the breadth of maritime offences that occur in the GoG.¹⁷⁰ In doing so, it would be helpful to adopt a strategic roadmap to progressively achieve this goal. Such a roadmap could be included in the framework of a comprehensive national maritime security strategy. Although there are indications that a national maritime security strategy is in the pipeline,¹⁷¹ so far, no maritime security strategy has been published. However, a high-level Nigerian official has indicated that NIMASA was “already implementing a comprehensive maritime strategy in collaboration with partners . . .” and “[i]n this regard, it has already established a command and control centre for enhanced situation awareness, response capability, law enforcement and regional cooperation[,]” which implies there is already some kind of domestic maritime strategy in place.¹⁷² The Nigerian official

¹⁶⁹ The Nigerian National Petroleum Corporation (NNPC), the Nigerian National Oil Company, had, in a February 2020 report, indicated that Nigeria lost US\$750 million to oil theft in 2019. Robert Egbe & Alao Abiodun, *Any Solution to Crude Oil Theft?*, THE NATION NEWSPAPER (Mar. 16, 2020), <http://thenationonlineng.net/any-solution-to-crude-oil-theft/>. It has been estimated that for IUU fishing, Nigeria loses between US\$70 million to \$800 million. See Ifesinachi Okafor-Yarwood, *The Cyclical Nature of Maritime Security Threats: Illegal, Unreported, and Unregulated Fishing as a Threat to Human and National Security in the Gulf of Guinea* 13 AFR. SEC. 1, 7 (2020).

¹⁷⁰ For instance, the Sea Fisheries Act 1992 and the regulations made thereunder could be said to be relevant to IUU Fishing. See Sea Fisheries Act (1992) Cap. (29) (Namib.). Miscellaneous Offences Act No. (20) (1984) §3(17) (Nigeria), includes the offences of oil theft and illegal oil bunkering and the Harmful Waste (Special Criminal Provisions, etc.) Act (1988) Cap. (C49) (Nigeria), which criminalizes the dumping of harmful and toxic waste not only on the land territory, but also in the Nigerian maritime zones.

¹⁷¹ See NIMASA and Industry Working Group Claim Progress on Maritime Security Efforts, SAFETY4SEA (Oct. 12, 2020), <https://safety4sea.com/nimasa-and-industry-working-group-claim-progress-on-maritime-security-efforts-2/>.

¹⁷² Chibuike Rotimi Amaechi, Minister of Transp., Fed. Republic of Nigeria, Nigeria’s Role in Responding to Maritime Insecurity in the Gulf of Guinea, Meeting Transcript from the Africa Programme Research Event (Jan. 23,

stated that the domestic maritime security strategy was compliant with the Yaoundé Code of Conduct and takes what appears to be a progressive approach to domestic legislation dealing with maritime insecurity in the GoG.¹⁷³

The 2019 Maritime Offences Act adopted a definition of “piracy” substantially the same as Article 101 of UNCLOS 82:

- a) illegal act of violence, detention or depredation committed for private ends by the crew or any passenger of a private ship or private aircraft and directed –
 - (i) in international waters against another ship or aircraft or against a person or property on board the ship or aircraft, or
 - (ii) against a ship, aircraft, person or property in a place outside the jurisdiction of any State;¹⁷⁴
- (b) 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; and

2018), in CHATHAM HOUSE: THE ROYAL INST. OF INT’L AFFAIRS 1, 3, <https://chathamhouse.soutron.net/Portal/DownloadImageFile.ashx?objectId=1269>.

¹⁷³ *Id.* at 4. He stated: “the passage of important domestic *legislations* [note that this is in the plural] is one of our priority concerns. In this regard, I am therefore pleased to inform you that [the 2019 Maritime Offences Act] is currently before the Nigerian National Assembly. I am confident that it will be passed before the end of this legislative year. That bill is an important piece of legislation whose passage will usher in necessary reforms that will lead to the improvement of the security architecture along our coastal waters with consequent positive implications on our national revenue.” *Id.* (emphasis added).

¹⁷⁴ It must be noted that neither the 2019 Nigerian legislation nor the United Nations Convention on the Law of the Sea of 1982 (UNCLOS 82) clearly identify what is meant by ‘a place outside the jurisdiction of any State.’ It has been stated that this phrase refers mainly to an island that is considered to be a *terra nullius* or the shore of an unoccupied territory or land which is not subject to the dominion of any State. This would appear to suggest that in certain limited circumstances, piracy may actually be committed on land. It has been further suggested that the reason for limiting piracy under international law to acts committed outside the jurisdiction of a State is because there is already concurrent jurisdiction by both the coastal State and the flag State to deal with such piratical acts that are committed within a State’s territorial sea. See D.W. GREIG, INTERNATIONAL LAW 332 (Butterworths, 2nd ed. 1976).

(c) act of inciting or of intentionally facilitating an act described in subparagraph (a) or (b).¹⁷⁵

Notably, one of the other bills that did not get enacted¹⁷⁶ built on the UNCLOS definition by adding “any act which is deemed piratical under the customary international law.”¹⁷⁷ It is not clear what was intended by this as the definition of piracy, as the UNCLOS 1982 definition, which is virtually a copy of the provision of the High Seas Convention 1958,¹⁷⁸ is generally regarded as codifying customary international law.¹⁷⁹ Perhaps the addition was based on the assumption that the customary international law definition of what constitutes a piratical act may change in the future.¹⁸⁰ But, even if that were the case, it would create certain complications in the context of Nigeria. Customary international law is, by nature, unwritten and thus

¹⁷⁵ 2019 Maritime Offenses Act, *supra* note 11, § 3. There are just a few minor changes. For instance, the 2019 Maritime Offenses Act in section 3(a)(i) uses “in international waters” rather than “on the high seas” as mentioned in UNCLOS 82. *Id.* § 3(a)(i). Although “international waters” is not defined in the definition section (section 22) of the 2019 Maritime Offenses Act, it can be presumed that “international waters” is intended to be synonymous with “high seas.” United Nations Convention on the Law of the Sea, *supra* note 18, art. 86. The high seas, under Article 86, is explained to be “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.” *Id.* It must, however, be noted that under Article 58(2) of the United Nations Convention on the Law of the Sea, the provisions dealing with piracy on the high seas also apply in the Exclusive Economic Zone (EEZ), so long as they are not incompatible with the part of the Convention dealing with the EEZ. *Id.* art. 58(2). See also Zou Keyuan, *Enforcing the Law of Piracy in the South China Sea*, 31 J. MAR. L. & COM. 107, 111(2000).

¹⁷⁶ The bill was sponsored by Senator Nelson Effiong, SB.254, C1299 and C2155. See 2016 Suppression of Piracy Bill, *supra* note 158.

¹⁷⁷ See Suppression of Piracy and Other Maritime Offences Act § 2(iv).

¹⁷⁸ The High Seas Convention (HSC) 1958 substantially adopted the definition of piracy in Article 3 of the Harvard Research in International Law Draft Convention on Piracy. See Joseph. W. Bingham, *Piracy*, 26 AM. J. INT'L L. SUP 739, 743 (1932).

¹⁷⁹ JAMES CRAWFORD, *BROWNIE'S PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 286–87 (Oxford Univ. Press, 9th ed. 2019). For further discussion on the complexities of the definition of piracy, see generally Douglas Guilfoyle & Rob McLaughlin, *The Crime of Piracy*, in *THE AFRICAN COURT OF JUSTICE AND HUMAN AND PEOPLES' RIGHTS IN CONTEXT: DEVELOPMENT AND CHALLENGES* 388 (Charles Jalloh, Kamari Maxine Clarke & Vincent O. Nmehielle eds., 2019).

¹⁸⁰ See Rebecca Crootof, *Change Without Consent: How Customary International Law Modifies Treaties*, 41 YALE J. INT'L L. 237, 264–288 (2016).

to seek to prosecute for an offence under customary international law would be contrary to the fundamental human rights provisions of the Nigerian 1999 Constitution.¹⁸¹ A reference to piratical acts under customary international law without elaboration by domestic legislation what precisely constitutes such an act would certainly not satisfy the strict requirements of the Constitution: that a crime must be defined by appropriate law.¹⁸²

The 2019 Maritime Offences Act acknowledges universal jurisdiction over piracy by conferring on the Federal High Court of Nigeria the authority to try the offense of piracy, against any ship or aircraft, committed on the high seas.¹⁸³ Universal jurisdiction has been acknowledged over piracy, one of the oldest international crimes, in various cases.¹⁸⁴ For instance, Viscount Sankey LC pointed out in the English case *In re Piracy Jure Gentium* that States could exercise universal jurisdiction for piracy because “a person guilty of such piracy has placed himself beyond the protection of any State. He is no longer a national, but ‘hostis humani generis’ and as such he is justiciable by any State anywhere.”¹⁸⁵ In his dissenting opinion in *The Case of the S.S. “Lotus” (France v. Turkey)*, Judge Moore put it as follows: “In the case of what is known as piracy by law of nations, there has been conceded a universal jurisdiction, under which the person charged with the offence may be tried and punished by any nation into whose jurisdiction he may come Piracy by the law of nations, in its jurisdictional aspects, is sui generis.”¹⁸⁶ More recently, in *In re Mohamud Mohammed Hashi, et al.*, the Kenyan Court of Appeal, overturning the decision of the High

¹⁸¹ See CONSTITUTION OF NIGERIA (1999), § 36(12).

¹⁸² See *id.*

¹⁸³ See 2019 Maritime Offences Act, *supra* note 11, § 5 (3)(f), 6(1), 6(2)(c), 7(1)(a), 7(2)(b)–(c), 7(3).

¹⁸⁴ See generally Matthew Garrod, *The Emergence of “Universal Jurisdiction” in Response to Somali Piracy: An Empirically Informed Critique of International Law’s “Paradigmatic” Universal Jurisdiction Crime*, 18 CHINESE J. INT’L LAW, 551 (2019); Eugene Kontorovich & Steven Art, *supra* note 77.

¹⁸⁵ *In re Piracy Jure Gentium* [1934] AC 586 at (PC) 589 (appeal taken from H.K.),

¹⁸⁶ *The Case of the S.S. Lotus (Fr.v. Turk.)*, Judgment, 1927 P.C.I.J. (ser. A) No.10, at ¶ 248-49 (Sept. 7).

Court of Mombasa,¹⁸⁷ held that Kenya had universal jurisdiction to try piracy suspects for piratical acts committed on the high seas, irrespective of the nationalities of the perpetrators of the crime or the victims.¹⁸⁸ According to Maraga JA in this case, “[a]ll States, not necessarily those affected by [piracy], have, therefore, a right to exercise universal jurisdiction to punish the offence.”¹⁸⁹ The 2019 Nigerian legislation is clear that although universal jurisdiction applies to piracy, it does not apply to the other nineteen maritime crimes domesticated from the 1988 SUA Convention and its Protocols, including armed robbery at sea.¹⁹⁰

The 2019 legislation incorporates a raft of penalties for the various offences created under the legislation.¹⁹¹ The legislation’s penalty for piracy, armed robbery at sea, or other unlawful acts, is a term of life imprisonment and a fine of not more than 50 million naira, as well as restitution to the owner—presumably of the ship, aircraft or property against which the unlawful act was committed¹⁹²—or the forfeiture to the Federal Government of Nigeria of whatever the person convicted has obtained or gained from the commission of the crime.¹⁹³ It is important to note that the 2019 Maritime Offences Act eschewed the death penalty, which had been advocated where the convicted person caused death in the commission of piracy or an attempt thereof by one of the others bills before the senate.¹⁹⁴ A further point to note is that the prosecution of the offenses under the legislation shall be undertaken by the Attorney General of the Federation or any of his designated law officers, or by

¹⁸⁷ *In re Mohamud Mohammed Hashi & 8 Others* (2009) K.L.R. 1, 28 (H.C.K) (Kenya).

¹⁸⁸ *Attorney General v. Mohamud Mohammed Hashi & 8 Others* (2012) K.L.R. para 1, 41 (C.A.K.) (Kenya).

¹⁸⁹ *Id.* at para. 38.

¹⁹⁰ *See* 2019 Maritime Offences Act, *supra* note 11, § 5(3)(a)–(e), 6(1), 6(2)(a)–(b).

¹⁹¹ *See id.* § 12–15.

¹⁹² *See id.* § 3, 4.

¹⁹³ *Id.* § 12(1).

¹⁹⁴ *See* 2016 Suppression of Piracy Bill, *supra* note 158.

NIMASA, with the consent of the Attorney General of the Federation.¹⁹⁵

Another interesting issue that comes out of the Nigerian 2019 legislation concerns which domestic body has the authority to seize a ship or aircraft on account of piracy. Under section 7 of the Act, a member of the “relevant authority” may seize a ship or aircraft associated with an offense under the Act, including piracy and arrest the offenders involved; such a seizure may be effected not only in Nigeria but also in international waters or a place outside the jurisdiction of any country.¹⁹⁶ Although the relevant authority is not defined in the legislation, and there appears to be an open-handed approach to who the relevant authority should be, this would presumably include the bodies in Nigeria that have the authority under the other relevant legislation to effect such seizure and arrest at sea, including the Nigerian Navy, Air Force, the NIMASA, and the Nigerian Marine Police.¹⁹⁷ The 2019 Maritime Offences Act, in line with UNCLOS 82,¹⁹⁸ requires that such relevant authority would ensure that only ships or aircraft that are “clearly marked and identifiable as being on Government service and authorised to that effect”¹⁹⁹ are to be used to effect such seizure.²⁰⁰ Nigerian naval warships would obviously meet this requirement.²⁰¹ The

¹⁹⁵ 2019 Maritime Offences Act, *supra* note 11, at § 5(1). The powers of prosecution here are subject to the Constitution of Nigeria, *see* CONSTITUTION OF NIGERIA, MAY 29, 1999, § 174, and the Administration of Criminal Justice Act, Administration of Criminal Justice Act (2015), § 104–109, 111 (Nigeria), <https://placng.org/i/wp-content/uploads/2019/12/Administration-of-Criminal-Justice-Act-2015-2.pdf>.

¹⁹⁶ 2019 Maritime Offences Act, *supra* note 11, § 7(1)-(2).

¹⁹⁷ Edwin Egede, *Nigeria* in THE LAW OF THE SEA: THE AFRICAN UNION AND ITS MEMBER STATES, 506, 534–536 (Patrick Vrancken and Martin Tsamanyi eds., 2017)

¹⁹⁸ *See* United Nations Convention on the Law of the Sea, *supra* note 18, at art. 107.

¹⁹⁹ 2019 Maritime Offences Act, *supra* note 11, § 7(4)

²⁰⁰ *Id.* § 7(1).

²⁰¹ A “warship” is defined by the legislation as “a ship belonging to the Armed Forces of a State bearing the external marks distinguishing such ships of its nationality, under the command of an officer duly commissioned by the Government of the State and whose name appears in the appropriate service list or its equivalent and manned by a crew which is under regular armed forces discipline.” *Id.* § 22.

legislation, again in line with Article 105 of UNCLOS 82, emphasizes that the relevant authority may seize a pirate ship or aircraft, or a ship or aircraft taken by pirates, and property and cargo on board, as well as arrest and prosecute persons or pirates caught in international waters.²⁰² In contrast to Article 105 of UNCLOS 82, however, it does not state as the alternative “any other place outside the jurisdiction of any State[;]” rather, it states that such seizure and arrest could also be “in any other place outside the jurisdiction of Nigeria’s territorial waters. . .”²⁰³ The inference from the latter provision is that such seizure and arrest as regards to piracy may be effected in the contiguous zone²⁰⁴ and the Exclusive Economic Zone (EEZ).²⁰⁵ While it could be argued that such seizure and arrest could validly be done, in regards to piracy, in the EEZ under the UNCLOS 82, which states that “Articles 88 to 115 [of UNCLOS 82] and other pertinent rules of international law apply to the [EEZ] in so far as they are not incompatible with this Part [V].”²⁰⁶ It is difficult to see any basis under international law for such seizure and arrest in the contiguous zone.²⁰⁷

The 2019 Maritime Offences Act emphasizes that anyone arrested on reasonable suspicion of having committed any offense under the Act may be detained for a reasonable period of time from such a person’s arrest.²⁰⁸ Although this provision does

²⁰² *See id.* § 7(2)–(3).

²⁰³ *Id.* § 7(3).

²⁰⁴ United Nations Convention on the Law of the Sea, *supra* note 18, at art. 33.

²⁰⁵ *Id.* at art. 55–57.

²⁰⁶ *Id.* at art. 58(2).

²⁰⁷ *Id.* at art. 33. This is a zone within a coastal States national jurisdiction that does “not extend beyond 24 miles of the baselines” of a coastal State, where such State has limited jurisdiction over only “customs, fiscal, immigration or sanitary” matters. *See id.* at art. 33, 61. Article 105 of the UNCLOS 82 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 under the control of pirates, and arrest the persons and seize the property on board. The courts of the State which carried out the seizure may decide upon the penalties to be imposed, and may also determine the action to be taken with regard to the ships, aircraft or property, subject to the rights of third parties acting in good faith.” *Id.* at art. 105.

²⁰⁸ 2019 Maritime Offences Act, *supra* note 11, at § 8(1).

not explicitly refer to the Nigerian Constitution, it must be interpreted in line with it. The Constitution provides that a person may be deprived of their personal liberty if it is done according to procedure permitted by law, amongst other things, “upon reasonable suspicion of his having committed a criminal offence, or to such extent as may be reasonably necessary to prevent his committing a criminal offence.”²⁰⁹ The Constitution is emphatic that such an arrested person should be brought before the court within a reasonable time, which has been interpreted to mean “in the case of an arrest or detention in any place where there is a court of competent jurisdiction within a radius of forty kilometers, a period of one day; and in any other case, a period of two days or such longer period as in the circumstances may be considered by the court to be reasonable.”

²¹⁰ If such person is not tried before the court within a period of:

a. two months from the date of his arrest or detention in the case of a person who is in custody or is not entitled to bail; or

b. three months from the date of his arrest or detention in the case of a person who has been released on bail,

he shall (without prejudice to any further proceedings that may be brought against him) be released either unconditionally or upon such conditions as are reasonably necessary to ensure that he appears for trial at a later date.²¹¹

Interestingly, the 2019 legislation infers in section 8(3) that after a person has been arrested on reasonable suspicion that an offense has been committed under the Act, “a preliminary inquiry shall be made into the facts of the offence.”²¹² It is, however, not clear on the nature of the preliminary inquiry and what body precisely should conduct such an inquiry. A combination of section 8(4), which says that rights conferred in subsection 3 “shall be exercised in accordance with the

²⁰⁹ CONSTITUTION OF NIGERIA, MAY 29, 1999, § 35(1)(c).

²¹⁰ *Id.* at § 35(5)(a)–(b).

²¹¹ *Id.* at § 35(4)(a)–(b).

²¹² 2019 Maritime Offences Act, *supra* note 11, at § 8(3).

Constitution and other relevant laws[,]” and section 17(3), which declares that “law enforcement and security agencies shall be responsible for the gathering of intelligence, patrolling the waters and investigating . . .” offenses under the Act, appears to suggest that any law enforcement or security agency with the powers under the relevant domestic laws to investigate maritime offences in Nigeria may conduct such a preliminary inquiry.²¹³ Such uncertainty may create overlapping roles regarding which agency precisely should investigate offences under the Act and may lead to inter-agency rivalry, which, in turn, may cause delays in bringing offenders to the courts for trial. A better approach would be to designate a specific body as the one-stop body to investigate all offences under the Act.

Another intriguing point is that, under section 8(3) of the 2019 Maritime Offences Act, offenders or alleged offenders—presumably foreigners—would be entitled to communicate, without delay, with the “nearest appropriate representative of his country or a country which is otherwise entitled to such communication, or if he is a Stateless person, the country in which he has habitual residence[,]”²¹⁴ as well as be visited by such a representative.²¹⁵ Although this provision does not explicitly refer to Article 36 of the Vienna Convention on Consular Relations 1963 (VCCR),²¹⁶ the general tone of this provision would suggest that the aim is to comply with the Nigerian obligations under this treaty. It states as follows:

1. With a view to facilitating the exercise of consular functions relating to nationals of the sending State:

- (a) consular officers shall be free to communicate with nationals of the sending State and to have access to them. Nationals of the sending State shall have the same

²¹³ *Id.* § 8(4), 17(3).

²¹⁴ *Id.* § 8(3)(a).

²¹⁵ *Id.* § 8(3)(b).

²¹⁶ Vienna Convention on Consular Relations, Apr. 24, 1963 596 U.N.T.S. 261. There are 180 States Parties to this convention, with Nigeria becoming a party by accession on 22 January 1968.

freedom with respect to communication with and access to consular officers of the sending State;

(b) if he so requests, the competent authorities of the receiving State shall, without delay, inform the consular post of the sending State if, within its consular district, a national of that State is arrested or committed to prison or to custody pending trial or is detained in any other manner. Any communication addressed to the consular post by the person arrested, in prison, custody or detention shall be forwarded by the said authorities without delay. The said authorities shall inform the person concerned without delay of his rights under this subparagraph;

(c) consular officers shall have the right to visit a national of the sending State who is in prison, custody or detention, to converse and correspond with him and to arrange for his legal representation. They shall also have the right to visit any national of the sending State who is in prison, custody or detention in their district in pursuance of a judgement. Nevertheless, consular officers shall refrain from taking action on behalf of a national who is in prison, custody or detention if he expressly opposes such action.

2. The rights referred to in paragraph 1 of this Article shall be exercised in conformity with the laws and regulations of the receiving State, subject to the proviso, however, that the said laws and regulations must enable full effect to be given to the purposes for which the rights accorded under this article are intended.²¹⁷

This provision would require the Nigerian authorities to inform the accused foreign national of their rights under Article 36, inform the national State that Nigeria holds such a person, if the person requested such notice, and thereafter, grant consular officers access to their accused national.

The ICJ, in *LaGrand (Germany v. United States of America)*²¹⁸ and *Avena and other Mexican Nationals Case (Mexico v. United*

²¹⁷ *Id.* at art. 36.

²¹⁸ *LaGrand (Ger. v. U.S.) Judgment*, 2001 I.C.J. 466 ¶ 77 (June 27).

States of America),²¹⁹ emphasized that the VCCR creates individual rights which could be invoked by the national State of the detained person. Furthermore, in *Avena and other Mexican Nationals Case*,²²⁰ the ICJ pointed out that nothing suggests the phrase “without delay” in Article 36(1)(b),²²¹ should “be understood as “immediately upon arrest and before interrogation.””²²²

In *Jadhav (India v. Pakistan)*, the ICJ again analyzed Article 36(1)(b) and found

there is an inherent connection between the obligation of the receiving State to inform a detained person of his rights under Article 36, paragraph 1(b), and his ability to request that the consular post of the sending State be informed of his detention. Unless the receiving State has fulfilled its obligation to inform a detained person of his rights under Article 36, paragraph 1(b), he may not be aware of his rights and consequently may not be in a position to make a request that the competent authorities of the receiving State inform the sending State’s consular post of his arrest.²²³

Judge Cancado Trindade, in his separate opinion in *Jadhav*, relied heavily on two key Inter-American Court of Human Rights advisory opinions²²⁴ and was insistent that this individual right was a “humanization of consular law . . .”²²⁵ and thus a violation of such a right was not only a breach of the

²¹⁹ *Avena and Other Mexican Nationals (Mex. v. U.S.)*, Judgment, 2004 I.C.J. 12 ¶ 40 (Mar. 31).

²²⁰ *Id.* ¶ 85.

²²¹ See Section 8(3)(a) of the 2019 legislation. 2019 Maritime Offences Act, *supra* note 11, at § 8(3)(a).

²²² *Avena* 2004 I.C.J. at ¶ 85.

²²³ *Jadhav (India v. Pakistan)* Judgment, 2019 I.C.J. 418 ¶ 107 (July 17).

²²⁴ The *Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law*, Advisory Opinion OC-16/99 Inter-Am. Ct. H.R. (ser. A) No. 16 ¶ 35 (Oct. 1, 1999) (concurring opinion by Trindade, J.); *see generally* Juridical Condition and Rights of Undocumented Migrants, Advisory Opinion OC-18/03, Inter-Am. Ct. H.R. (ser. A) No. 18 (Sept. 17, 2003).

²²⁵ *Jadhav (India v. Pakistan)*, Judgment, 2019 I.C.J. 418, 462 ¶ 39 (July 17) (separate opinion by Trindade, J.). Judge Trindade also said this right was “undoubtedly interrelated with human rights” and had the “character of a human right.” *Id.* ¶ 37, 27.

VCCR, but also a breach of an individual's human rights, especially those regarding fair trial and due process.²²⁶ In his view, the juridical consequences of such a delict would go beyond a mere failure to grant the foreigner such access by merely taking steps to “redress and reconsider . . .” the conviction and sentence of the individual, as stated by the majority decision in the case and previous ICJ decisions on this issue, but would also pertain to an international responsibility of such State for breaching human rights, as well as the duty of reparation for such a human rights breach.²²⁷ The ICJ also stressed that what constitutes “without delay” under Article 36(1)(b) would be determined on a case-by-case basis.²²⁸

The practical implication for the Nigerian government is that any foreign national who is not informed of this right to request consular access may bring a human rights claim against the government in an appropriate domestic or regional court with jurisdiction to hear human rights cases.²²⁹ Considering the range of Nigerian government bodies that could potentially be involved in maritime security activities, the 2019 Maritime Offences Act empowers the NIMASA, under the supervision of the appropriate minister, to be the coordinating body for all maritime activities under the Act, and shall ensure the following: effective formulation and implementation of a comprehensive national maritime strategy; collaboration with the Nigerian navy to build capacity for effective discharge of all

²²⁶ See generally *id.* ¶ 9, 28, 38, 39; see also Jadhav 2019 I.C.J. at 510 ¶ 2(xii) (declaration of Robinson, J.).

²²⁷ See Jadhav 2019 I.C.J. at 465 ¶ 9.

²²⁸ See *id.* at 449 ¶ 113.

²²⁹ See also CONSTITUTION OF NIGERIA, MAY 29, 1999, § 6(6)(b) (“The judicial powers vested in accordance with the foregoing provisions of this section . . . shall extend, to all matters between persons, or between government or authority and to any persons in Nigeria, and to all actions and proceedings relating thereto, for the determination of any question as to the civil rights and obligations of that person.”). For a discussion on the Nigerian Fundamental Rights Enforcement Rules 2009, see generally Anthony O. Nwafor, *Enforcing Fundamental Rights in Nigerian Courts – Processes and Challenges*, 4 AFR. J. LEG. STUD. 1–11 (2009) and Abiola Sanni, *Fundamental Rights Enforcement Procedure Rules, 2009 as a Tool for the Enforcement of the African Charter on Human and Peoples’ Rights in Nigeria: The Need for Far-Reaching Reform*, 11 AFR. HUM. RTS. L. J. 511–531 (2011).

security, intelligence and law enforcement functions under the Act and any other domestic law in Nigeria dealing with maritime offences; and do any other act as would be necessary for the implementation of the Act.²³⁰

NIMASA's role is particularly interesting as the Nigerian National Assembly had enacted a Maritime Security Operations Coordinating Board (Amendment) Bill 2018, to establish a board to coordinate maritime security operations in Nigeria.²³¹ The president, however, declined to assent because, in his view, the bill would "create distortions and duplications with the functions and operations of the Nigerian Maritime Administration and Safety Agency (NIMASA)."²³² He urged the National Assembly to focus more on passing the suppression of Piracy and Other Maritime Offences Act.²³³

For the Nigerian legislative framework to be compliant with the Yaoundé Code of Conduct, it must engage with maritime security in the GoG using a multidimensional approach aimed at building up a sustainable blue economy that generates national revenue, employment, and stability. Its national maritime security strategy would need to promote a legislative plan that is aimed at going beyond the 2019 Maritime Offences Act by eventually enacting and adopting a bundle of legislation that would embrace a multidimensional approach in suppressing transnational maritime crimes and security threats in the maritime domain.

CONCLUSION

This article has engaged in a multilevel exploration of various legal instruments dealing with maritime insecurity in the GoG. It has examined, at the global level, the relevant UNSC resolutions; at the sub-regional level, the Yaoundé Code of Conduct; and at the national level, Nigeria's 2019 Maritime

²³⁰ 2019 Maritime Offences Act, *supra* note 11, at § 17(2).

²³¹ Maritime Security Operations Coordinating Board (Amendment) Bill (2018) Cap. (HB. 1056) (Nigeria).

²³² Deji Elumoye, *Nigeria: Buhari Declines Assent to Five Bills*, THIS DAY NEWSPAPER (Jan. 17, 2019), <https://allafrica.com/stories/201901170065.html>

²³³ *Id.*

Offences Act, a key State in the GoG that is regarded as a hive of maritime insecurity activities. It argues that the UNSC resolutions are non-binding and notes that the resolutions' binary approach of merely dealing with piracy and armed robbery at sea is inadequate in engaging with the complex maritime insecurity situation in the GoG. Further, it argues that the Yaoundé Code of Conduct, although is still a non-binding legal instrument, with the possibility that it may eventually evolve into a binding legal instrument, adopts a more multidimensional approach in engaging with maritime insecurity in the GoG. As such, to effectively confront the issue of maritime security in the GoG, States party to the Code should implement its multidimensional approach in their national legislation and policies. Thus, it is puzzling that Nigeria's 2019 Maritime Offences Act, given the country's status as a major hive of the maritime insecurity challenges in the GoG, and although it covers a wider range of maritime crimes than the UNSC resolutions, is not fully compatible with the Yaoundé Code of Conduct because it does not fully embrace the range of maritime crimes mentioned therein. Therefore, the Nigerian government would need to eventually adopt and enact further maritime security legislation that would criminalize other maritime crimes not covered by the 2019 Maritime Offences Act to achieve the goal of stamping out maritime criminality in the GoG region. It is vital for Nigeria and other Party States of the Yaoundé Code to adopt adequate legislative framework that fully embraces the multidimensional approach of the Code.