

## KENYA'S ROLE IN COUNTER-PIRACY AND THE CONTACT GROUP

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### **KENYA AND PIRACY**

Despite concerted efforts by the regional states and the international community to address piracy off the coast of Somalia, the menace still persists though currently at a reduced frequency. The efforts by the regional states and the international community to curb piracy and maritime insecurity off the coast of Somalia and the Gulf of Aden have been greatly hampered by the lack of appropriate legislative frameworks both at the international and national levels. At the international level, the most significant limitations to the legislative framework are posed by restrictive definitional and jurisdictional scopes in the provisions of article 101 of the United Nations Convention on the Law of the Sea (UNCLOS). In the present day, more than 85% of maritime insecurity acts occur within the territorial sea. Naval operations at sea have recorded considerable success in apprehending and intercepting pirates at sea.

Kenya has taken a lead in overhauling its legislative framework with a view to effectively dealing with the challenges that have been posed by piracy. Kenya has not only enacted a legislation to deal with actual piratical attacks but has also legislated against phenomena that promote piracy including money laundering and organized crimes. Kenya has successfully prosecuted suspected pirates arrested in the high seas by navies of other maritime nations.

As one of the means of combating piracy, the Contact Group on Piracy off the Coast of Somalia, (CGPCS) was established in 2009<sup>1</sup>. As an *ad hoc* voluntary international forum, the CGPCS brings together several stakeholders including regional states affected by Somali piracy, as well as states in Western Europe, Asia and the Middle East. In addition, the maritime industry, seafarer's organizations and non-governmental organizations (NGO's) are also included. Kenya is a member of Working Group 2 of the CGPCS. Initially Kenya had passion and enthusiasm in the work of the CGPCS, but of late Kenya's passion and enthusiasm has waned. The purpose of the study is to interrogate Kenya's participation

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<sup>1</sup> CGPCS was created on 14<sup>th</sup> January 2014 pursuant to the United Nations Security Council Resolution Number 1851.

in the work of CGPCS and why Kenya's interest has dropped.

## **METHODOLOGY**

In this study, handpicked naval officers, public servants in the Ministry of Foreign affairs and International Trade (MFAIT), prosecutors in the office of Director of Public Prosecutions (DPP), who possess information and share experiences relevant to this study, were interviewed. In this regard, purposive sampling of those groups was appropriate because they were informative and possessed the required characteristics by virtue of status as key players in the counter piracy naval operations and prosecution of suspected piracy in Kenya's national courts. The criteria for choosing the particular cases for target respondent interviews were therefore justifiable. However, due to logistical and financial constraints, the inquiry was restricted by purposive sampling to officers serving in the Kenya Navy who were involved in counter-piracy operations, officers in the MFAIT who were involved in the CGPCS activities and prosecutors in the Office of DPP who were involved in the prosecution of suspected pirates and the activities of the contact Group. Hence the preference for an appropriate sampling technique and purposive selection of respondents which did not in any way compromise the outcomes of the inquiry.

The handpicked key informants (full particulars held on file by the author) were interviewed by means of questionnaires (held on file by the author) suitably designed to facilitate the gathering of data on relevant

variables of interest. The information gathered forms the basis of the analysis and the concluding remarks made below dealing with Kenya's counter-piracy operations in the Indian Ocean and her diminished interest in the work of CGPCS. Due the sensitivity of the information and the fact that it was given in confidence by the respondents interviewed, the actual names of the officers interviewed are not disclosed in this study.

## **THE ROLE OF THE CGPCS IN COUNTER PIRACY OPERATIONS OFF SOMALIA**

The mandate of the CGPCS has been summarized to include the coordination of political, military and non – governmental efforts to counter piracy off the coast of Somalia; prosecution of captured pirates; and offering support to regional states to develop sustainable maritime security capabilities<sup>2</sup>. Kenya is among the 60 countries and international organizations that come together under the auspices of CGPCS to counter piracy off the Somali Coast.

## **THE MANDATE AND STRUCTURE OF THE CGPCS**

The CGPCS undertakes its work through working groups. Working Group One Chaired by the United Kingdom is responsible for facilitating effective naval operations and coordinating international efforts to support the building of the judicial, penal and maritime capacity of Regional States to ensure that they are better equipped to

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<sup>2</sup> CGPCS Newsletter, July 2014.

tackle piracy and maritime security challenges. At its thirteenth plenary session in December 2012, the CGPCS endorsed the creation of a new Capacity-Building Coordination Group (CBCG), which will report to and support the Working Group in facilitating the coordination of regional capacity development and the identification of future priorities for international action. CBCG will consist of partners from various UN agencies including the International Maritime Organization, European Union, North Atlantic Treaty Organization, African Union, The Inter-Governmental Authority on Development in East Africa, and representatives from the international naval Training Awareness and De-Confliction Group. The Working Group also offers support to those states and organizations countering piracy off the Coast of Somalia through contributions to, and funding from, the Trust Fund.

On naval coordination, Working Group One (WG1) has made clear its support for robust action by international naval forces against pirates, and welcomes the success of the coordinated patrols and convoys in the Gulf of Aden in reducing ship hijackings in this area and the positive development of the Shared Awareness and De-Confliction Mechanism (SHADE). The Working Group is clear on the importance of compliance by all vessels transiting the High Risk Area with industry-agreed self-protection measures as the first and most effective line of defence. The WG1 supports action taken against hijacked merchant vessels being used as mother ships, disruptions of pirate operations and the continued safe escort of World Food Program and AMISOM convoys. WG1 continues to support effective international co-ordination through SHADE with a view to optimizing

effectiveness and making best use of scarce naval resources. WG1 has consistently called for action to fill capability gaps as identified by the international naval forces, including vital maritime patrol aircraft and oil replenishment tankers.

Working Group Two (WG2) is chaired by Denmark and consists of representatives from nearly 60 States, including the European Union, various UN agencies, the Intergovernmental Authority on Development, the IMO, INTERPOL, NATO, and the League of Arab States. It provides specific, practical and legally sound guidance to the CGPCS, states and organizations on all legal aspects of counter-piracy. Participants exchange information on on-going judicial activities, including specific court cases, as well as on relevant capacity building activities in states in the region. Through this exchange of information, WG2 contributes to a common approach to and understanding of legal issues arising from piracy. WG2 has furthermore developed a legal toolbox for States wishing to improve their ability to prosecute pirates, including checklists for the prosecution of suspected pirates, overview of impediments to prosecution, mechanisms for prosecution, applicable international law, transfer of convicted pirates, evidence collection, private armed guards and ship-riders, and human rights considerations. Kenya is a member and key participant in WG2.

Working Group three (WG3) under the chairmanship of the Republic of Korea, handles concerns of the participant states, maritime industry and labor groups regarding the actions that should be used to provide self-defensive actions to protect vessels from hijacking by pirates in the high risk waters off the coast of Somalia. WG3 has worked closely with the industry for the

completion and distribution of the "Best Management Practices for Protection against Somalia Based Piracy", now in its 4th version (BMP4-August 2011). WG3 has paralleled efforts by the IMO and the world maritime industry for the best self-defense practices for world shipping, as well as for the security training and post-hostage care of crew members involved in piracy incidents. Work is progressing through industry based roundtable development for audio-visual counter-piracy training for the mariners, continuous review of the BMP and the development of vetting procedures for maritime companies to hire the most professional and effective privately contracted armed security teams when risk assessment of vessel voyages support the high risk determined.

Working Group five (WG 5), chaired by Italy, focuses on advance information sharing internationally and between industry and government authorities to disrupt the pirate enterprise ashore. It also works with other key partners such as INTERPOL, national law enforcement/prosecution agencies currently pursuing piracy investigations/prosecution, and the World Bank to better understand how illicit financial flows associated with maritime piracy are moving in the area. WG5 works with WG2 to create new opportunities for prosecutors and investigators to exchange information about and harmonize their ongoing investigations and proactively target the arrest and prosecution the top organizers, financiers, and negotiators of Somali piracy.

## **COUNTER PIRACY MEASURES BY KENYA**

The economies of all countries are interconnected and regional challenges sometimes

have global impact. Piracy, transnational crime and human trafficking are regional challenges facing the East African region and which have global impact. As the major component of the world's trade is carried on board ships, global commerce is inexorably linked to maritime security. Being a maritime nation, Kenya has faced major challenges from its geographical proximity to Somalia. Somalia has not had any effective army, police, navy or coast guard, a permanent national government or national legal system since 1991. Indeed, Kenya has been involved in the prevention of the clan and militia infighting in Somalia from spreading across her border. The Government of Kenya (GOK) has played a key role and was involved in efforts to find lasting peace in Somalia leading to the formation of a Transitional Federal Government of Somalia which for some time was hosted in Nairobi.

As noted above, the insecurity in Somalia has escalated resulting in increased piratical attacks in the Gulf of Aden and off the Coast of Somalia with a spillover into the territorial waters of other states in the region. Kenya has borne the brunt of this phenomenon, leading to a reduction in cruise industry and a slowdown in the distribution of food aid to Somalia. Due to several of their ships being attacked, the United Nations World Food Program has increasingly been opting to transport relief on roads.

As a country with significant interest in regional maritime security, the GOK has taken keen interest in the regional and international efforts in the fight against piracy in the Gulf of Aden and off the coast of Somalia. Some of the initiatives by the GOK include the deployment of the Kenya Navy to escort the merchant ships; and prosecution of suspected pirates in national courts.

In the following paragraphs we examine the specific counter piracy efforts by the GOK.

## **BILATERAL MEMORANDA OF UNDERSTANDING**

Kenya has signed several bilateral Memoranda of Understanding (MOU) to facilitate the prosecution of suspected pirates in the national courts.<sup>3</sup> These MOUs provide the legal and logistical framework for the prosecution of suspected pirates. In exchange of Kenya facilitating the prosecution of suspected pirates apprehended in the High seas, Kenya was to receive financial support to build the capacity of judicial officers and the personnel in the Attorney Generals in charge of prosecution. Some commentators have argued that in exchange for Kenya's role in allowing its courts to prosecute pirates, it in turn enjoyed substantial financial support by wealthy donor countries.<sup>4</sup>

Between last quarter of 2008 and early 2009 Kenya signed MOUs with the UK, the US and the EU.<sup>5</sup> These agreements were mainly designed to facilitate the prosecution in Kenyan courts of pirates captured on the high seas by the navies of other states parties to the MOUs. The MOU between Kenya and EU is contained both in a formal draft document and in agreement by exchange of letters dated 6<sup>th</sup> March 2009.<sup>6</sup> The formal document is divided into nine parts with part one dedicated to the objec-

tives of the MOU; the main objectives being to support the Kenyan prosecutors, the police and the judicial service to ensure that the trial of piracy cases are fair, humane, efficient and conducted within the sound framework of the law. The MOU further enumerates the challenges that the Kenyan judicial system was facing including overstretched capacity; logistical requirements; and financial constraints. The MOU then notes the role Kenya is to play and lists the needs which have to be taken into account in implementing the MOU such as legislative review especially of the Evidence Act to allow for admission of new forms of evidence (e.g. video link evidence instead of direct oral evidence); the need for legal research and materials; and the need for specialized training for prosecutors, police officers and magistrates; prisons reform pilot projects at Shimo-la-Tewa and Manyani prisons; and finally the need for Kenya to give support to other regional countries through sharing of experience.

The provisions of the MOUs are vague on the question of financial support and do not contain a firm commitment of financial resources to fully and successfully implement the terms of the MOU. Although Kenya had prepared and submitted a budget of \$5.1million for the period of 18 months when the first cycle of the MOU was to last, the United Nations Office on Drugs and Crime (UNODC) only committed itself to financing only \$2.3million leaving a resource gap of \$2.6million.<sup>7</sup> It was intended

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<sup>3</sup> J. T. Gathii. 2010. "Kenya's Piracy Prosecutions", *American Journal of International Law*, 2010 -104, p.416.

<sup>4</sup> Taussig – Rubbo, Mateo. 2010. "Pirate Trials, the International Criminal Court, and Mob Justice: Reflections on Postcolonial Sovereignty in Kenya", *Humanity: An International Journal of Human Rights, Humanitarianism and Development*, 2010-1, p, 60.

<sup>5</sup> Supra note 3 above.

<sup>6</sup> *Official Journal of the European Union* dated 23<sup>rd</sup> March 2009 L 79/49 and available at [http://publications.europa.eu/official/index\\_en.htm#Section2-EU](http://publications.europa.eu/official/index_en.htm#Section2-EU) (last accessed on 27<sup>th</sup> November 2009).

<sup>7</sup> Part 10 of the draft formal MOU document titled "Breakdown of Activities" where a sum of \$2.3million or

that the figure of \$2.3million was to cover reforms in the judiciary, prison services, State Law Office and the Department of Police. The opening paragraphs of the MOU commit UNODC to giving ‘limited support’ to Kenya, which includes reviewing some of the cases of convicted persons serving jail terms with a view to decongesting the prisons.<sup>8</sup> Lack of adequate financing led to the virtual collapse of the MOU framework as it became very difficult (and politically imprudent too) for Kenya to continue to support the prosecutions by its limited resources.<sup>9</sup>

It is worth noting that the MOU was not intended to be a formal binding agreement but a mere framework document<sup>10</sup> facilitating further detailed and specific agreements on the pertinent issues covered by the agreement. One notable feature of the MOU is the absence of an indemnity clause. It is not clear from the document which party to the agreement was to shoulder the burden of paying damages for wrongful arrest and confinement of the suspected pirates where the courts acquired them on whatever ground. It was clear that Kenya as the prosecuting state would be liable for damages for wrongful confinement/detention and for

malicious/wrongful prosecution or improper exercise of adjudicative jurisdiction. Besides, there have been allegations of inhuman treatment and abuse of human rights by the arresting naval officers. There still exists the moot point as to which state would take responsibility to indemnify the suspected pirates should such allegations be proven to the satisfaction of the court. The MOU further places on Kenya the extra burden of supporting other regional countries in sharing her experience; hence the exasperation by the Kenyan leadership at the failure by other states parties to the MOUs to fully honor the terms of the MOUs.<sup>11</sup>

## ACTUAL PROSECUTION OF PIRATES

For purely political reasons and national interests, many maritime nations involved in counter piracy operations off the Coast of Somalia have not been keen to prosecute pirates in their national courts. Within the framework of the MOU Kenya has successfully prosecuted pirates in its national courts. One of the issues which arose in these prosecutions is whether the courts had jurisdiction to hear the cases. In *Republic*

EUR 1.75million is provided for as the budget to implement the terms of the MUO.

<sup>8</sup> Kenya has undertaken a reform of its prison services under the donor funded Governance, Justice and Law Sector (GJLOS) reforms initiative through a common basket of donor funds administered through the Ministry of Justice, National Cohesion and Constitutional Affairs (See <http://www.gjlos.go.ke/gjinner.asp?pcat2=agencies&pcat=vphomeaffairs&cat=kenyaprison>, (last accessed on 27<sup>th</sup> November 2009).

<sup>9</sup> Ondari, J, *The Challenges of Prosecuting piracy in Kenyan Courts* (unpublished and on file with the author) pp. 3-8.

<sup>10</sup> Under section 9(a) entitled “implementing arrangements” the MOU provides that: “For the purpose of the application of these provisions, operational, administrative and technical matters may be the subject of imple-

menting arrangements to be approved between the competent Kenyan authorities on the one hand and the competent EU authorities, as well as the competent authorities of the sending states on the other hand.”

<sup>11</sup> See the statement attributed to the Attorney General of Kenya and reported in the *Daily Nation* edition of 14<sup>th</sup> September 2009; story titled *Death Knell Tolls For Prosecutors* in which he expressed concern by Kenya’s Partners in the MOUs to honor their part of the bargain. See also the statement by Kenya’s Minister for foreign affairs noting that the MOU was not an “an open door for dumping pirates onto Kenya [sic] soil because it will not be acceptable” reported in *The Journal of the Turkish Weekly, Kenyan Foreign Minister Shed Light on U.S.-Kenya Piracy Agreement*,” J. TURKISH WEEKLY, available at <http://www.turkish-weekly.net/print.asp?type=1&id=63755> (accessed 9<sup>th</sup> December 2009).

*vs. Mohamud Mohamed Hashi alias Dho-dhi and Eight (8) others*,<sup>12</sup> and *Republic vs. Abdirahman Isse Mohamed and Three (3) others*,<sup>13</sup> the question arose as to whether the magistrate's courts had jurisdiction to try the offence of piracy in Kenya. Both cases ended up in the High Court albeit before different benches.<sup>14</sup> In this first case, the High Court held that the Magistrates courts in Kenya had no jurisdiction to try the offence of piracy. The reasoning of the court was that the provisions of section 69 of the Penal Code on the basis of which the charges were brought had been repealed by the new Merchant Shipping Act of 2009. The second case (heard by Honorable Justice Ojwang')<sup>15</sup> held that the Magistrates courts in Kenya had jurisdiction to try the offence of piracy. The two conflicting decisions introduced a measure of uncertainty to the law and generated a good measure of debate.<sup>16</sup> The Court of Appeal settled the matter by upholding the decision of Justice Ojwang that indeed the Magistrates Court had jurisdiction to try suspected pirates.

In the earlier case of *Hassan M. Ahmed & Others vs. Republic*,<sup>17</sup> the High Court held that Kenyan courts had universal jurisdiction to try piracy *jure gentium* commenced under provisions of the repeal section 69 of the Penal Code.<sup>18</sup> Kenyan courts have

shown willingness to extend the definition of piracy beyond that found in the United Nations Convention on the Law of the Sea (UNCLOS). In *Omar Shariff Abdalla vs. Corporate Insurance Company Limited*,<sup>19</sup> Honorable Lady Justice Joyce Khaminwa declined an argument by the Insurer to limit the definition of piracy to the United Nations Law of the Sea Convention of 1982,<sup>20</sup> since the vessel was operating within the geographical limits set out in the policy.

## APPROPRIATE LEGISLATIVE FRAMEWORK

As of July 2011 Kenya had over twenty convicted pirates serving jail terms ranging between seven and twenty years and over one hundred suspected pirates were awaiting trial in national courts.<sup>21</sup> This is the largest number of suspected pirates held and tried in any one state at any given time in modern history.

### The Merchant Shipping Act

The prosecution of piracy in Kenya is currently undertaken under the Merchant Shipping Act, Act No. 4 of 2009 of the Laws of Kenya<sup>22</sup> (the MSA 2009). Prior to the enactment of the MSA 2009, the offence of

<sup>12</sup> This case came up before Honourable Ms. T. Mwangi, Senior Resident Magistrate. Mombasa – Chief Magistrates Court Criminal Case Number 840 of 2009

<sup>13</sup> This case came up before Honourable Mr. Ole Tanchu, Senior Resident Magistrate. Mombasa – Chief Magistrates Court Criminal Case Number 3012 of 2010

<sup>14</sup> The first case ended up before Honourable Justice M. K. Ibrahim through High Court Miscellaneous Application Number 434 of 2010 and is reported in [2010]eKLR and judgment was delivered on 09/11/2010.

<sup>15</sup> High Court Criminal Application Number 72 of 2011 – Mombasa.

<sup>16</sup> See the views by the Then Chairman of the Law Reform Commission (Kathurima M'Inoti) in the Daily Nation Edition of 16/11/2010 and those of the author published at [www.musyokawambua.co.ke](http://www.musyokawambua.co.ke) on 23/03/2011 at 20.27

<sup>17</sup> [2009]eKLR

<sup>18</sup> But the issue of which specific court, lower or High Court was not handled. Also not handled was the contraction between sections 4 of the Judicature Act and Criminal Procedure Code.

<sup>19</sup> HCCC No. 320 of 1998 – Mombasa [2005] eKLR

<sup>20</sup> UNCLOS

<sup>21</sup> This information was obtained from the Commissioner of Prisons vide a confidential brief to the author in the month of July 2011 by virtue of his position as the Chair of the Task force on persons in detention, held in custody or imprisoned

<sup>22</sup> Cited as the Merchant Shipping Act 2009 Act No 4 of 2009 and available online at [http://www.kenyalaw.org/kenyalaw/klr\\_app/frames.php](http://www.kenyalaw.org/kenyalaw/klr_app/frames.php) (last accessed 1<sup>st</sup>

piracy was provided for under the repealed section 69 of the Penal Code<sup>23</sup>. The MSA 2009 has not only extended the jurisdiction of the Kenyan courts to try piracy committed by non-nationals on the high seas, it also defines more extensively and comprehensively the offence of piracy than was previously defined under the repealed section. The MSA 2009 has domesticated all key international Conventions on piracy and other maritime offences. The key conventions domesticated under the provisions of the MSA 2009 are the United Nations Convention on the Law of the Sea (UNCLOS), the International Convention on the Suppression of Unlawful Acts against Maritime Navigation (the SUA Convention), the Djibouti Code of Conduct (the Djibouti Code) and the African Maritime Transport Charter<sup>24</sup>.

The MSA 2009 domesticates the relevant provisions of UNCLOS and SUA Convention. Section 369 of the MSA 2009 adopts the definition of piracy in article 101 of UNCLOS. Section 370 of the MSA 2009 adopts the offences of hijacking and destroying of ships<sup>25</sup> contained in Article 3 of the SUA Convention. Article 6 of the SUA Convention requires that there be a nexus between the offence committed and the state establishing jurisdiction<sup>26</sup>. The nexus is established if the ship flies the flag of the state<sup>27</sup>; if the offence is committed in the

territory of the state or its territorial sea<sup>28</sup>; if the offence is committed by the national of that state<sup>29</sup>; if the offence is committed by a stateless person whose habitual residence is in that state<sup>30</sup>; if a national of that state is seized, threatened, injured or killed in the process of committing the offence<sup>31</sup>; or if the offence is committed to compel that state to do or abstain from doing any act.<sup>32</sup> Section 370 (4) (a) provides that the offences created under section 370 apply “*whether the ship...is in Kenya or elsewhere,*” or *whether the offences were “committed in Kenya or elsewhere” or whatever the nationality of the person committing the act.*”

In this sense, the MSA 2009 confers Kenyan courts with jurisdiction wider than that in the SUA Convention. The MSA 2009 also criminalizes acts of violence committed in the high seas in line with Article 9 of the SUA Convention.<sup>33</sup> The SUA Convention further requires that, if a state wishes to establish jurisdiction in the last three instances then such a state should notify the Secretary General of the IMO. Kenya did not give any notification to the IMO Secretary General and therefore the legality of provisions of section 370 of the MSA 2009 remains doubtful under international law.

Kenya has recently enacted three key legislations that may be used to fight and curb the sponsors of piracy. These are The Anti

September 2011). The Act came into force on 1<sup>st</sup> September 2009

<sup>23</sup> Cited as the Penal Code Cap 63 Laws of Kenya and available at [http://www.kenyalaw.org/kenyalaw/klr\\_app/frames.php](http://www.kenyalaw.org/kenyalaw/klr_app/frames.php) (last accessed 1<sup>st</sup> September 2011).

<sup>24</sup> For the full text see [http://www.africa-union.org/root/au/Documents/Treaties/Text/AFRICAN\\_MARITIME\\_TRANSPORT.pdf](http://www.africa-union.org/root/au/Documents/Treaties/Text/AFRICAN_MARITIME_TRANSPORT.pdf) and also [http://www.africa-union.org/root/ua/Conferences/2007/fevri/IE/doc/Report\\_The\\_Experts\\_Meeting.pdf](http://www.africa-union.org/root/ua/Conferences/2007/fevri/IE/doc/Report_The_Experts_Meeting.pdf) (last accessed 1<sup>st</sup> September 2011)

<sup>25</sup> Section 369(6).

<sup>26</sup> See also Article 6(4).

<sup>27</sup> The SUA Convention, Article 6(a).

<sup>28</sup> Above, Article 6(b).

<sup>29</sup> Above, Article 6(c).

<sup>30</sup> Above, Article 6(a).

<sup>31</sup> Above, Article 6(b).

<sup>32</sup> Above, Article 6(c).

<sup>33</sup> Article 9 provides that the Convention does not in any way affect “the rules of international law pertaining to the competence of States to exercise investigative or enforcement jurisdiction on board ships not flying their flag

Corruption and Economic Crimes Act (Cap 65 laws of Kenya), Proceeds of Crime and Money Laundering Act and Prevention of Organized Crimes Act.

### The Anti Corruption and Economic Crimes Act

The Anti Corruption and Economic Crimes Act (ACECA) was enacted in 2003 and provides for the prevention, investigation and punishment of corruption, economic crimes and other related offences. ACECA provides that a person who deals with property that he or she believes or has reason to believe was acquired in the course of or as a result of corrupt conduct (that is conduct constituting corruption or economic crime) is guilty of an offence.<sup>34</sup> For any such offence ACECA imposes a fine of Kenya shillings one million and an additional mandatory fine if the person committing the offence received a quantifiable benefit or any other person suffered a quantifiable loss.<sup>35</sup>

ACECA further provides that “*it shall be no defense that the receiving, soliciting or offering of any benefit is customary in any business, undertakings, office, profession or calling.*”<sup>36</sup> The Act also provides that “unexplained assets may be taken by the court as corroboration that a person accused of corruption or economic crime received a benefit”<sup>37</sup>.

<sup>34</sup> The Anti Corruption and Economic Crimes Act section 47.

<sup>35</sup> Ibid, section 48.

<sup>36</sup> Ibid, section 49.

<sup>37</sup> Ibid, section 57.

<sup>38</sup> Proceeds of Crime and Money Laundering Act the Memorandum of Objects.

<sup>39</sup> Ibid, Sections 3 Sections 2 and 3 but also see generally the provisions of Part II (Sections 3 to 18) which provides

### Proceeds of Crime and Money Laundering Act

The Proceeds of Crime and Money Laundering Act (PCMLA) makes provision for a broad legislative framework for combating the crime of money laundering and provides for the identification, tracing, freezing, seizure and confiscation of the proceeds of crime.<sup>38</sup> The broad nature of the provisions in the PCMLA can be seen from the definition of money laundering and the broad net it casts by including any person who knowingly enters into a transaction with another with a view to facilitating such other person to conceal the proceeds of crime or money laundering.<sup>39</sup>

It should also be noted that it does not matter whether the offence is committed in Kenya or outside Kenya or whether or not it was committed before the PCMLA came into force<sup>40</sup>.

### Prevention of Organized Crimes Act

The Prevention of Organized Crime Act (POCA) came into force in September, 2010<sup>41</sup>. POCA was enacted with the objective of not only preventing organized crime but also providing for recovery of proceeds of organized criminal activities.<sup>42</sup> POCA defines an organized criminal group as a *structured group of three or more persons, existing for a period of time and acting in concert with the aim of -*

for the offence of money laundering and other related offences.

<sup>40</sup> Ibid, Section 3.

<sup>41</sup> The Act can be accessed at <http://www.kenyalaw.org/klr/fileadmin/pdfdownloads/Acts/Prevention-ofOrganisedCrimesAct2010.pdf> ( last accessed on 21<sup>st</sup>Septemeber , 2011)

<sup>42</sup> Preamble to the Act

*(a) committing one or more serious crimes; or (b) committing one or more serious crimes in order to obtain, directly or indirectly, a financial or other material benefit or any other advantage for the organized criminal group or any of the members of organized criminal group*

The Minister for Internal security is empowered, under section 22 of POCA, to declare any group an organized criminal group for the purposes of the Act.

Section 3 lists various instances where a person is deemed to have been involved in organized criminal activities such as professing membership to an organized criminal group, recruiting another person to join an organized criminal group, and acting in concert with others to commit a serious crime in order to gain financial benefit among others. Section 4 makes it an offence to engage in organized criminal activities and on conviction a person is liable to Ksh. 5,000,000/= fine or 15 years in prison or both.

Section 15 of the Act empowers the Attorney General to apply to the court to obtain an order to have a person who is suspected to be involved in organized crime to deliver any documents relevant in tracing and quantifying the property. Moreover, the Attorney General may apply to the court to get an order requiring a bank or any other financial institution, trustee, cash dealer or custodian to produce all information and deliver up all documents and records regarding any business transaction conducted by or on behalf of a person suspected to be involved in organized criminal activities. Section 18 of the Act empowers the court to make an order of forfeiture of such property upon conviction.

POCA has clear provisions which may be used to seize proceeds of piracy and therefore make it a high risk low return venture. It is worth noting that no property has been seized and no prosecutions have been undertaken under the provisions of the Act since its enactment.

## **EXPERIENCE OF THE KENYA NAVY**

Traditionally Kenya's naval forces have undertaken surveillance in Kenya's territorial waters and the Exclusive Economic Zone. Due to increased piratical attacks on merchant ships off the coast of Somalia, Kenyan naval ships have extended patrol and surveillance to cover more areas of the Indian Ocean as far as Kismayu in Somalia. The extended patrol area is designed to protect merchant ships accessing the Port of Mombasa using the Indian Ocean shipping lines. Kenyan naval forces in cooperation with their foreign counterparts therefore continue to play a key role in the response against piracy in the Indian Ocean Region by collecting intelligence and identifying and disarming suspected pirate vessels before they pose any threat to merchant vessels.

In response to the increased threat to the tourism industry occasioned by hijacking and murder of tourists in the Lamu Archipelago by Al-shabaab militants crossing from Southern Somalia, Kenya Defense Forces (KDF) moved into Somalia and teamed up with allied forces to defeat the Al-shabaab and to help the Transitional Federal Government (TFG) to take full control of the country. Following KDF's incursion into Somalia, there has been a dramatic decline in piracy incidents off the coast of Somalia.

Al-Shabaab militants had used Kismayo as their main base for more than a year but moved out as TFG forces backed by Kenyan and African Union troops advanced towards the port city. Attacks in seas around Somalia continued to fall dramatically, with just 10 incidents attributed to Somali pirates in 2013, down from 70 in the same nine months of 2012.<sup>43</sup>

### **Kenya's Counter piracy operations within the framework of CGPCS**

The Ministry Foreign Affairs and International Trade (MFAIT) facilitates participation of other stakeholder departments and agencies in the work of the CGPCS. Other stakeholder departments and agencies include the Office of the Attorney General, Kenya Defence Forces (specifically the Kenya Navy); Office of the Director of Public Prosecutions (DPP) and Kenya Maritime Authority (KMA). Initially, Kenya was very passionate and enthusiastic in the work of CGPCS. Kenya's passion and enthusiasm was based on a number of reasons. Firstly, the CGPCS's activities were seen as part of wider international efforts to secure peace and stability in Somalia which was seen to be in Kenya's best interest as a neighbor to Somalia. Secondly, through collaboration with other significant agencies in the war against piracy off the Coast of Somalia such as the United Nations Office on Drugs and Crime (UONDC), and the United Nations Development Program (UNDP), Kenya was benefitting from financial support to reform of the judiciary through building capacity in the judicial officers and the office of the Director of Public Prosecution. The benefit to Kenya came

through the CGPCS's focus on six critical areas, which include improvement of operational and information support to counter piracy; the establishment of a counter piracy mechanism; strengthening judicial frameworks for the arrest, prosecution and detention of pirates; strengthening commercial shipping awareness as well as other capabilities; pursuing improved diplomatic and public information efforts; and tracking down financial flows related to piracy.<sup>44</sup>

Lately Kenya has not been very passionate in its participation in the work of CGPCS. As a result there has been lethargy in the manner in which the country has handled the issues of falling within the mandate of CGPCS. Some of the stakeholder departments and agencies blame the MFAIT. Most, if not all, of the invitations for the CGPCS's meetings are channeled through MFAIT. More often than not, the Office of the DPP and other stakeholder departments and agencies are not informed and are therefore unaware of the meetings convened by CGPCS. After the invitations are received, there is no timely facilitation for the officials of the ministry to attend the CGPCS meetings which are normally held at the UN headquarters in New York. In most cases the MFAIT headquarters organizes for representation of Kenya by the embassy officials based at Kenya's embassy in Washington DC, who may not have good working knowledge about the issues to be discussed at the meetings. There is a lack of passion and enthusiasm on the part of the officials attending the CGPCS meetings and little or no follow-up action on most of the matters discussed.

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<sup>43</sup> See the *World's Maritime Watchdog* of September 2013.

<sup>44</sup> *Policy Statement; Contact Group on Piracy off the Coast of Somalia*, U. S. Department of State, January, 14<sup>th</sup> 2009.

MFAIT views itself as less of a lead agency and more of a convener or facilitator for the informal preparatory meetings held in Nairobi. In this facilitator role, the MFAIT sees its main mandate as bringing together of stakeholders such as the office of the Attorney General, office of the DPP and the Kenya Maritime Authority who are the right parties to address the issues handled by CGPCS.

Within the MFAIT itself, there are no officers dedicated to CGPCS's activities. This means that when officers are transferred internally within the ministry or are posted to Kenya's mission abroad, there is a lack of continuity in the participation of the ministry in the work of the CGPCS as those who attend meetings are chosen on an *ad hoc* basis. As a result of the frequent transfers of ministry officials handling the matters falling within the mandate of CGPCS a resource base for future engagements by the ministry officials has not been developed.

Apart from the inefficiency and lack of coordination at the MFAIT, there are also other factors that have contributed to Kenya's apparent gradual loss of interest in the work of CGPCS. With the decline in piracy incidents off the Coast of Somalia, the EU and other leading western maritime nations drastically reduced their funding for counter piracy operations and related activities. Due to this reduced funding by the leading partners in the fight against piracy, Kenya's participation in the CGPCS and related activities slowed down.

As noted above,<sup>45</sup> Kenya has entered into MoUs with other states and foreign regional bodies through the Ministry of Foreign Affairs and International Trade for purposes

of combating piracy off the Coast of Somalia. However, there is concern that these MoUs are aimed at only safeguarding the shipping and security interests of the EU, the USA and the developed maritime nations and not to safeguard Kenya's national interests. The general unofficial view in government circles is that before executing such MOUs, the Ministry of Foreign Affairs and International Trade ought to have had sufficient consultations with other stakeholders such as the Kenya Maritime Authority (KMA), office of the DPP and the Office of the Attorney General.

It is important to observe that the KMA has taken the work of CGPCS and its meetings very seriously. KMA has been participating in many of the CGPCS's meetings as well as its working groups more than any other government department or agency. The apparent decline in Kenya's interest in the work of the CGPCS can also be partially attributed to the general view that Kenya's incursion into Somalia and the successful prosecution and conviction of suspected pirates had greatly reduced the incidents of piracy off the coast of Somalia. The successful prosecution and conviction of suspected pirates is attributable to Kenya's fairly well developed legal system, policy framework and enhanced capacity in handling maritime offences. It is noted that Kenya has ratified and domesticated many international Conventions on piracy and other maritime offences through the coming into operation of the Merchant Shipping Act.

The politics surrounding the prosecution of the Kenyan President and the Deputy President at the International Criminal Court at

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<sup>45</sup> *Supra*, note 7.

The Hague following the post-election violence of 2007/2008 may have also contributed to the country's disinterest in the work of CGPCS. Some scholars have argued that as a retaliatory measure against the international community, Kenya may have deliberately halted piracy prosecutions.<sup>46</sup> The priority of the top government leadership was the pending cases at the ICC, while the work of the CGPCS has not been a priority.

### PERSPECTIVES OF THE KENYA NAVY

Piracy is admittedly one of the greatest challenges that the Kenyan Navy have ever encountered. To counter piracy, the officers are required to spend a lot of time and resources in meetings. Counter piracy operations require hands on approach and not arm chair analysis or boardroom resolutions. The Kenyan naval officers interviewed are aware of the existence of the CGCPS and its activities. Indeed the representatives of the Kenya Navy attended several of the meetings of CGCPS including one held in November 2013 in Djibouti.

Although navies of other Western nations have assisted and cooperated with the Kenyan Navy in counter piracy operations off the Coast of Somalia, their main aim/objective is to protect the shipping lines of the Indian Ocean used by western maritime nations particularly Denmark and Sweden than genuine concern for Kenya's maritime security. The cooperation with these navies is more to do with information sharing rather than joint operations.

Piracy has grown into a fully-fledged and thriving business controlled by sponsors who live outside Somalia. The regional and

international piracy networks are difficult to dismantle. The available evidence shows that Piracy off the coast of Somalia is a very well structured, organized and well-funded business. To combat piracy there is a need for timely, reliable and actionable intelligence. Many countries such as Tanzania, Mozambique and Seychelles have not shown political will to fight piracy. Some commentators have advocated for the formation of a coast Guard similar to the coast guards of the US and India. However, setting up a coastguard for Kenya may not be prudent as it may prove to be expensive but is also likely to lead to duplication of roles. The Kenyan navy and other agencies such as the port police and KMA have sufficient capacity to deal with piracy and other maritime offences.

To ensure that the vessels sailing in Kenya's territorial waters are safe, the Kenya Navy has designed a maritime security zone where vessels waiting to enter the port of Mombasa or leaving the Port for other ports such as Dar es Salaam are protected by Kenyan Navy vessels. Congestion at the port of Mombasa requires vessels to wait in the open sea before being cleared to dock at the port by using the narrow Likoni Channel. Pirates operating in the Indian Ocean region are aware of this fact and there is a risk that vessels may be attacked as they wait to dock at the port of Mombasa. The security operation zones are kept under constant surveillance by the Kenyan naval vessels.

Owing to the vastness Kenya's territorial sea and the Exclusive Economic Zone, Kenya cannot effectively patrol the waters. It needs the support and cooperation of

<sup>46</sup> Milena S; *Piracy off the Coast of Somalia; The Argument for Pirate Prosecutions in National Courts of Kenya*,

*The Seychelles, and Mauritius*, Amsterdam Law Forum, 2012, Vol. 4;2, p.113.

other maritime nations with naval forces operating in the Indian Ocean region. The CGPCS and other partners should therefore focus on encouraging opportunities for better training as well as funding. A regional approach is better because the sea is vast and borders are shared. Other countries in the region should be encouraged to join Kenya in its counter piracy efforts. A joint naval surveillance and patrol by the navies of the coastal states and neighboring Kenya supported by navies of other willing foreign partners would achieve better results. Kenya's landlocked neighbors who benefit from, and are served by, the Indian Ocean shipping lanes can contribute to the cost of the naval operations. Already there exists an infrastructure for such cooperation following the introduction of the maritime component in the East African Standby Brigade. Kenya's neighbors can also cooperate in prosecuting pirates in their national courts or to imprison convicted pirates in their prisons.

At the time of commencing counter-piracy operations in the Indian Ocean for the first time, the Kenya Navy had numerous challenges including: (i) lack of surveillance vessels as most of its naval ships were in the process of being serviced; (ii) lack of adequate or sufficient financial resources; (iii) the limited partnership being offered by foreign navies of the EU members and the US, who confined their operations north of the Kenyan coast and focused on safeguarding their own trading interests without being genuinely concerned about Kenya's national security interests; (iv) lack of appreciation of the fine distinction and link between piracy and terrorism with some states showing reluctance to fight the latter; (v) lack of a proper procedure and legal framework for handling suspected pirates after

they are apprehended on the High Seas; (vi) the expansive size of Kenya's Exclusive Economic Zone is which made it practically impossible to police and monitor.

## **CONCLUSION AND WAY FORWARD**

Kenya has played a key role in the fight against piracy off the coast of Somalia through the framework of the CGPCS by direct involvement in counter-piracy operations in the Indian Ocean region and also by facilitating the prosecution of suspected pirates captured on the High Seas by naval forces of other maritime nations. However, Kenya has of late lost enthusiasm for the work of CGPCS for various reasons, some of which are related to genuine concerns for national interest as a sovereign nation. Some of the reasons identified include: bureaucratic politics and lack of effective cooperation communication and coordination between various government agencies and departments; decline of interest in piracy; and the politics around the pending ICC trials involving the President and the Deputy President. However Kenya's participation in the work of CGPCS is desirable as piracy off the coast of Somalia may have subsided but the risk of attacks on merchant vessels is still present.

Through its participation in the work of CGPCS, Kenya can help to develop the capacity of neighboring countries such as Tanzania, Djibouti and Seychelles in combating piracy in their respective maritime zones and prosecuting pirates in their national courts. Kenya's experience in the fight against piracy has led to a change in the tactics in combating the vice. Experience gained by the Kenya Navy from counter-piracy operations off the coast of Somalia and its work in the CGPCS have been

applied in shaping Kenya's policy and operational tactics in fighting piracy. Such experience should be shared with other regional states.

## **SUMMARY OF SUCCESSES AND FAILURES**

CGPCS contributed to Kenya's reform of the legal sector and naval strategy by:

- Building capacity through workshops in the personnel of the office of the DPP, MFIT, KMA and other stakeholders.
- Creating avenues for the training of Kenya's naval officers in counter piracy operations.
- Sharing of information on counter piracy operations in the Indian Ocean region
- Supporting the prosecution of suspected pirates in national courts.

What CGPCS members could have done to avoid the Kenyan decline of interest:

- Failure to win political support from the top government leadership for the work of the CGPCS.
- Failure to identify and engage all relevant stakeholders and government departments/agencies and invite them to meetings of CGPCS.
- Failure to hold meetings locally to identify with and engage all government departments /agencies and stakeholders in the work of CGPCS.
- How Kenya could be brought back to the CGPCS and prospects for a regional solution
- Pursue the establishment of a fully-fledged and funded Liaison office in

Kenya to spearhead and coordinate regional cooperation in counter piracy operations and prosecution of pirates in national courts.

- Increase awareness through regular and widely circulated publications.
- Identify with and openly support Kenya's incursion into Somalia as part of counter piracy operations
- Help reduce congestion at the port of Mombasa, which often makes ships vulnerable to piracy attacks.
- Hold regular consultative meetings with regional bodies like EAC and IGAD in order to secure the support of the regional political leadership
- Identify with and support the vision of African Integrated Maritime Strategy (AIMS) to guarantee support from the African Union.
- Undertake joint naval operations with the Kenya Navy to generate confidence and trust that the foreign naval fleets are genuinely concerned about Kenya's national interests.

## About the Author

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