

# ANNEX 15

## **STATUS OF PIRACY CASES BEING TRIED IN KENYA**

### **Background**

The escalation of incidents of piracy off the coast of Somalia in the last two years has led to a multipronged international response. A number of nations have sent naval ships to patrol the Gulf of Aden in an effort to protect international commercial shipping.

The United Nations Security Council has, in exercise of its powers under its Chapter VII to address threats to international peace and security, passed a series of resolutions that give these forces unprecedented legal authority to pursue pirates. While the traditional definition of piracy under international law restricts military responses by outside powers to those carried out on the high seas, the 2008 Security Council resolutions authorize the use of military force within sovereign Somali waters and territory. Despite this authorization of expanded powers to interdict and detain pirates at sea, states have expressed frustration at the limited available options for prosecuting captured pirates. Thus Britain, the EU, and Denmark have entered into agreements with Kenya to permit pirates captured by the Royal Navy to be tried in Kenyan courts. All these developments are innovative legal responses to a modern epidemic of the oldest recognized international crime.

Further, Nations have called for new avenues or possibilities for prosecuting the pirates, including an international tribunal or domestic courts in other countries in the region.

In December 2008, Britain signed a memorandum of understanding with Kenya formalizing the arrangement whereby captured pirates will be turned over for trial, and handed over the first group of captured pirates for prosecution. This was followed by MoUs between Kenya and the United States, the European Union, Canada and Denmark.

The EU, United States ,Great Britain and other patrolling nations are also discussing the possibility of other nearby states hosting piracy prosecutions.

The following is a summary of piracy cases either concluded or in their various stages in Kenya:

#### **1. MOMBASA C.M. CR. CASE NO 434/2006 R vs. HASSAN AHMED & 9 OTHERS**

The Ten (10) suspects were arrested on the High Seas by the **US Naval force** on and handed over to Kenya for trial. The case was

heard and determined on 1<sup>st</sup> November 2006. All the accused persons were found guilty and accordingly convicted. They were each sentenced to serve **seven years imprisonment**.

They appealed against the conviction and sentences vide HC CR.APPEALS NO. 198-208 of 2007. Among the grounds of appeal was the Kenyan courts did not have jurisdiction to try piracy cases. The appeals were heard by *Hon. Justice F. Azangalala* and accordingly dismissed. They are currently serving their sentences in various prisons in Kenya. They are about to complete their jail terms.

## **2. MOMBASA C.M. CR. CASENO 3486 OF 2008 R vs. SAID MOHAMED AHMED AND 7 OTHERS.**

The eight (8) suspects were arrested on the 9<sup>th</sup> of November 2008 in the High Seas of the Indian Ocean by the **UK Naval force**. The accused have since been convicted **and sentenced to serve 20years imprisonment. To our knowledge no appeal has been preferred, though there is a possibility.**

## **3. MOMBASA C.M. CR .CASE NO 840/2009- R vs. MOHAMED HARSI AND 8 OTHERS**

In this case the nine (9) suspects were arrested in the High Seas of the Indian Ocean by the **German Naval Force**, a member of the operation ATALANTA.

However, before completion of the case but after being put on the defense, the advocates for the accused filed a Judicial Review Application being Misc. Civil Application *No.434 of 2009* for Orders of prohibition ONLY.

The learned *Hon. Mr. Justice Mohammed Ibrahim* vide a Ruling delivered in the *Judicial Review quashed the proceedings and proceeded to order the immediate release of the accused persons.*

In his judgment the judge declared that Kenya has no jurisdiction to try the offence of Piracy. This is despite another High Court Judge had earlier on declared that Kenyan courts had jurisdiction to try piracy cases.

We have contested the Ruling and therefore filed a Notice of Appeal in the Court of Appeal. Further, we applied for stay of the Judge's

order before the said judge which was granted. We have further filed an Urgent Application in the Court of Appeal for the stay of the High Court Judge's orders. **The application is pending hearing before the Court of Appeal.**

The case **before the trial magistrate** nevertheless proceeded and is also pending delivery of Judgment.

**4 MOMBASA C.M. CR. CASE NO 1184/2009 - R vs. MUSA SAID & 6 OTHERS**

The seven (7) suspected pirates were interdicted by the **German Naval force** on 29<sup>th</sup> March 2009 on the High Seas and handed over to Kenya on 7<sup>th</sup> April 2009. The case was determined on 6<sup>th</sup> September 2010 and the accused were each sentenced to serve **five (5) years** in jail. They are yet to file appeal if, at all.

**5 MOMBASA C.M. CR. CASE NO 1694/2009- R vs. MOHAMED HASSAN & 6 OTHERS**

The seven (7) suspected pirates were interdicted by **SPANISH Naval force** on the 7<sup>th</sup> May 2009. The case was determined on 23<sup>rd</sup> September 2010 and the accused were each sentenced to serve **five (5) years** in jail. They are yet to file appeal, if at all.

**6 MOMBASA C.M. CR. CASE NO 1695/2009 - R vs. JAMA ABDIKADIR FARAH Alias JAAMAC CLZAANDIR –TAARAX & 6 OTHERS**

7 The seven (7) suspected pirates were interdicted by **SPANISH Naval force** on the 7<sup>th</sup> May 2009. They were handed over to Kenya on the 16<sup>th</sup> of May 2009. The case was determined on 22<sup>nd</sup> October 2010 and the accused were each sentenced to serve **four and half (4 1/2) years** in jail. They are yet to file appeal, if at all.

**8 MOMBASA C.M. CR. CASE NO. 1374/09 R vs. LIBAN ALI & 10 OTHERS**

The eleven (11) suspected pirates were interdicted by **SPANISH Naval force** on the 15<sup>th</sup> of April 2009 and handed over to Kenya on the 22<sup>nd</sup> of April 2009. The case was determined on 29<sup>th</sup> September 2010 and the accused were each sentenced to serve **five (5 ) years** in jail. They are yet to file appeal, if at all.

**9. MOMBASA C.M. CR. CASE 1939/09 R vs. ABDIRASHID JAMA GAS alias KURIA JAMAA & 16 OTHERS**

The seventeen (17) suspected pirates were interdicted by **US Naval force** on the 13<sup>th</sup> of May 2009 and handed over to Kenya on the 10<sup>th</sup> June 2009. The case was heard and determined and the accused persons **acquitted under section 215 of the Criminal procedure Code.**

**Despite the State having filed an appeal, and applied for conservatory orders for stay of extradition under the Constitution, the High court still ordered the immediate release of the suspects. They have since been repatriated. The appeal is still pending for hearing.**

**10. MOMBASA C.M C.R CASE NO 791/ 2009 – R vs. MOHAMED KHEYRE &6 OTHERS**

The seven (7) suspected pirates were arrested by **US Naval force** on the 11<sup>th</sup> of February 2009. They were handed over to Kenya on 5<sup>th</sup> of March 2009. The matter has reached advanced stage. **One prosecution witness is remaining to testify.** The case is coming up for further hearing on **28<sup>th</sup> April 2011.**

**11. MOMBASA C.M C.R NO. 2463/2009 R vs. SHAFILI & 6 OTHERS**

The seven (7) suspected pirates were interdicted by the **SWEDISH Naval force** on the 28<sup>th</sup> of May 2009. They were handed over to Kenya on the 8<sup>th</sup> of June 2009. **The case is pending Judgment and will be mentioned on 24<sup>th</sup> February 2011 for directions.**

**12. MOMBASA C.M C.R NO.1582/09 R vs. AHMED ABDIKADIR HERSI alias ABDURALI HERSI & 10 OTHERS**

The eleven (11) suspected pirates were interdicted by the **French Naval force** on the 3<sup>rd</sup> of May 2009. The case is at **defense stage** with

six accused persons having testified on their own behalf. Four accused are yet to give their defense. However, on 23 rd February 2011 their advocate renewed bail application and being emboldened by the judgment in Misc. Criminal Application no.434 /2009 (above), have revisited the issue of jurisdiction of the court. **The ruling on the application will be delivered on 7<sup>th</sup> march 2011.**

**13. MOMBASA C.M. CR.CASE NO. 2127/09 R vs. SAID ABDALLA HASHI & 8 OTHERS.**

The nine (9) suspected pirates were interdicted by the **ITALIAN Naval force** on the 22<sup>nd</sup> of May 2009. The case is pending **Judgment and will be mentioned on 7<sup>th</sup> march 2011.**

**14. MOMBASA C.M. CR.CASE NO 3601/2009 REP. VS ALI BARA S 6 OTHERS**

The accused were transferred to Kenya by the **German Naval force**. The prosecution has closed its case. On 23 rd March 2011 the Court ruled that they have a case to answer. The case is fixed for **defense hearing on 25<sup>th</sup> March 2011.**

**15. MOMBASA C.M. CR.CASE NO. 1340 of 2010 HASSAN JAMA HALLEYS AND 5 OTHERS.**

The accused persons were transferred to Kenyan authorities for prosecution on 27<sup>th</sup> April 2010 by the British Navy. The case is **pending hearing on 21<sup>st</sup> and 22<sup>nd</sup> March 2011.**

**16. MOMBASA C.M CR.CASE NO. 3149 of 2010 ALI MUSE AND 8 OTHERS.**

The accused persons were transferred to Kenya for prosecution by the US Navy on 12<sup>th</sup> October 2010. The matter is scheduled for **Hearing on the 28<sup>th</sup> FEB 2011.**

## **II. CHALLENGES OF PROSECUTING PIRACY OFFENCE IN KENYA**

### **Introduction**

The international crime of piracy, like the slave trade, was believed to have largely disappeared in modern times, or at least to have fallen to levels that would not demand international attention. Contrary to that belief, for the past several years, piracy has become endemic off the coast of Somalia, which has not had a government capable of broadly asserting its authority over the country since 1991. In the recent past, attacks on international shipping in the Gulf of Aden have increased tremendously. But the surge in sea piracy over the past three years is unprecedented, and perhaps the most significant eruption of such criminal activity in nearly two hundred years.

The problem is compounded by the location of the International Transit Corridor. All vessels transiting the Suez Canal must pass through this narrow straight between the Horn of Africa and the Arabian Peninsula, where cargo vessels with unarmed crews become easy prey. Currently hundreds of crewmembers including Kenya from many different countries remain in captivity pending ransom negotiations. In the past year, the pirates have become busier and bolder. Pirates have attacked a vessel even further from the coast, with some moving as far as 200 nautical miles (about 400kms), and made some spectacular seizures, including a Saudi freighter loaded with oil, a ship carrying Ukrainian tanks bound for Mombasa, Kenya, and most tragically, Kenyans have been hijacked and taken to pirate into custody besides several ships laden with United Nations relief supplies for Somalia. The pirates make no discrimination among vessels. Anything is fair game. They are known to attack even warships on mistaken belief that they are merchant ships! They recently attacked a Kenyan Navy Patrol board but were repulsed and four of them killed.

### **1. Jurisdiction to Try Captured Pirates**

One of the most important questions always raised is whether pirates captured in Somali territory would be amenable to universal jurisdiction. Piracy is the original crime of universal jurisdiction.

The doctrine of universal jurisdiction allows any nation to try certain offenders who have committed international crimes, even if the crime, the defendant and the victims have no nexus with the state carrying out the prosecution. For hundreds of years the doctrine applied exclusively to piracy. In recent decades, universal jurisdiction has been applied by national

courts to prosecute cases of war crimes, crimes against humanity and torture. While its original application to cases of piracy appeared to have fallen into disuse, now universal jurisdiction has the potential to come full circle to help address the modern piracy epidemic.

However, in practice, the nations patrolling the Gulf of Aden have chosen not to prosecute pirates because of the anticipated difficulty and expense.

This has largely been because of their domestic legislation which often than not requires some nexus with the suspects and the national interest.

What to do with apprehended pirates has become the central legal question of the current anti-piracy campaign. The dominant approach has been to avoid capturing pirates in the first place, or, if captured, releasing the pirates without charging them with a crime. Returning pirates to Somalia for trial has generally not been considered an option both because of the lack of a functioning government and the probability that the accused would be subject to unfair trials and cruel treatment. Such rendition is likely to present a problem of international law of *non-refoulement* under various international treaties, which prohibit sending people to countries where they are likely to be abused.

#### **a) The legality of the transfers**

The legality of such transfers from outside capturing states to third party states call in the need for interpretation of article 105 of the United Nations Convention of the Law of the Sea (UNCLOS), a comprehensive multilateral treaty often described as the “constitution of the oceans.”

This article provides

*‘Article 105*

*Seizure of a pirate ship or aircraft*

***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.***

Contrary to popular argument, the article does not; impose an obligation on the capturing state to prosecute. It merely states that the state that carried out the arrest may decide what penalty to impose or what to do with them. The capturing states which have a memorandum of understanding with Kenya has often handed them over to Kenya for trial.

Under article 100 the member states have the obligation to cooperate in the fight against piracy and Kenya fulfils this obligation by agreeing to accept the captured pirates.

No court or tribunal has yet ruled on the effect of UNCLOS Article 105, but it has emerged often as an issue in the cases going on in Kenya. Although international law defines piracy as an act taking place on the high seas, the increased authority conferred on outside states to take military action may not translate into a coextensive authority to prosecute without formal agreement between states to cooperate.

However 12 of the 15 cases were brought under the Penal Code which has since been repealed by the Merchant Shipping Act

#### **b) . Definition of piracy**

The Penal Code does not outline the elements of piracy. The Act merely provides:

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#### ***“Piracy***

**69 (1)** *Any person who, in territorial waters or upon the high seas, commits any act of piracy **jure gentium** is guilty of the offence of piracy.*

**(2)** *Any person who, being the master, officer or member of the crew of any ship and a citizen of Kenya-*

*(a) unlawfully runs away with the ship; or*

*(b) unlawfully yields it voluntarily to any other person; or*

*(c) hinders the master, an officer or any member of the crew in defending the ship or its complement, passenger or cargo; or*

*(d) incites a mutiny or disobedience with a view to depriving the master of his command, is guilty of the offence of piracy.*

*(3)Any person who is guilty of the offence of piracy is liable to imprisonment for life”*

According to Stephen<sup>1</sup> *‘Every one commits piracy by the law of nations who, without legal authority from any state and without any colour of right:-*

*a)seizes or attempts to seize any ship on the high seas within the jurisdiction of the Lord Admiral by violence or by putting into fear those in possession of such ship; or*

*b) attacks such ship and takes and carries away any of the goods thereon by violence or by putting those in possession of such ship in fear; or*

*c)attacks or attempts to attack such ship with intent to take and carry away any of the goods thereon by violence or by putting those in possession of such ship in fear; or*

*d) attacks such ship and offers violence to anyone on board thereof or attacks or attempts to attack such a ship with intent to offer violence as aforesaid’*

By this definition, Kenya is conferred with what is referred to as ‘Universal jurisdiction’ under Customary International Law to try piracy.

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<sup>1</sup>*Stephen Digest of Criminal Law, 9th ed., 101*

An offence subject to the universal jurisdiction is one which comes under the jurisdiction of all states whenever it is committed. It is what is referred to as *piracy by law of nations*.

### **c) . International cooperation**

One of the greatest challenge to a successful prosecution of a piracy case whether under the Penal Code or under the new Act is the need for international co-operation. This is particularly important because the offence is almost always extra-territorial.

It may be (as is always the case) that the flag state is different from the interdicting state which therefore calls for mutual co-operation

The prosecution has had some difficulties in getting some of these witnesses on time thus unnecessarily delaying the trial. This is however to be understood bearing in mind the nationalities of the witnesses and the fact that almost all the witnesses to piratical attack are either the seamen or the naval officers who move widely and for a considerable period of time. Some foreign witnesses when they turn up are very impatient and openly unhappy and threaten not to come over again. It is like Kenya is the only country where cases are adjourned!

#### **d). Legal Regimes**

Then there is the problem of legal regimes. In the event of an agreement with a trial State, there are variations on the law, procedure and evidence gathering mechanism. The law to apply is the law of the trying state. The difficult is that the suspects may have been arrested, interrogated, and recorded statements under a different legal regime from that applicable in Kenya. This forces the Kenyan law enforcement officers to step in and record statements so as to comply with Kenyan law.

#### **e). Language**

Language is another big barrier. Kenya is an English/Swahili speaking State and the interdicting state may not necessarily be English speaking. This is of particular significance when recording and translating the statements. Quite often than not, some of the statements are unintelligible, and understandably so because of the language barrier between the naval officers.

This has led to further delays as the prosecution seeks some clarifications on the recorded statements. And it so happens that the witnesses have already left Kenya and efforts have to be made to trace them.

#### **f). Unwillingness by witnesses to appear and testify**

Piracy attacks instill a lot of fear among witnesses. Perhaps this has got a lot to do with the trauma suffered by the victims (witnesses) in the attempted hijacks than the extra-territorial nature of the offence. Some witnesses get so traumatized that it becomes nightmarish to imagine that they are going to face their tormentors in court! Yet under Kenya Constitution, every person accused of an offence is entitled to confront his accuser in an open court. Some witnesses, because of the nature of their work want judicial protection and yet our Witness Protection Programme is yet to be fully operationalised.

### **g) Evidence Act (Cap 80 of the Laws of Kenya)**

The Evidence Act came into force in 1963. It has not been extensively reviewed since then in spite of the changing nature of crime. Technological advancement and emerging global security threats such as Piracy and terrorism require a more dynamic approach in the collection, preparation, preservation, presentation and admission of evidence.

The need to undertake an urgent review of the Evidence Act cannot be over-emphasized. For instance, admissibility of photographic evidence obtained by Naval Officers engaged in counter Piracy operations is contestable. Similarly, chemical or biological analyst reports obtained during interdiction by officers other than Kenyan gazetted analysts would be a subject of challenge.

Although the prosecutor may argue in favour of the use of such evidence gathered by the foreign naval forces on the ground that the world has become a global village and that we cannot sit and moan our archaic laws, the identified challenges underscore the need for an urgent and comprehensive review of our legal framework, **not just for the piracy trials** and international crimes but because as a country we need to move forward, away from the woods.

### **(h) Detention Facilities**

The prison holding capacity in Kenya has already been surpassed leading to overcrowding and heavy congestion.

This can be attributed to a number of factors which include rise in crime generally, population increase without concurrent expansion of prison facilities, economic slump with little or no resources to space for expansion of detention facilities etc.

The acceptance and remanding of the suspected pirate (they are always *denied* bail for fear of absconding) only exacerbates the situation.

Shimo La Tewa Prison is currently holding a total of 119 convicted and suspected pirates. It should be noted that this calibre of suspects is unique in the sense that they are all conversant with the use of military hardware and the workings of organized gangs.

So far, there has not been evidence of any link of piracy to terrorism but the existence of such a relationship cannot be ruled out. To hold piracy suspects in one prison facility is an invitation to danger. Hence there is need for a dispersal mechanism within or without Kenya has to be worked out.

#### **i) Pre-Trial Detentions**

Both the *retired* and new Constitutions of Kenya provide that persons charged with bailable offences such as piracy ought to be brought before a Court of competent jurisdiction **within 24 hours** of their arrest unless the detaining authority can give a reasonable explanation as to their inability to present the suspects before Court within the prescribed period. The courts have variously interpreted this provision with the effect that some decisions have resulted in the discharge of suspects on the ground that their fundamental rights were violated through long pre-trial incarceration

Our experience so far has shown that it is impractical to interdict pirates upon the High Seas and arraign them before Court within the stipulated period but some delays cannot in all fairness be explained unless we argue that there is relationship between the arrest by the Foreign Naval forces and Kenyan police authorities.

#### **(j) Compensation upon Breach of Fundamental Rights**

The prosecution of piracy suspects is likely to result into any of the following: A discharge, an acquittal or a conviction.

In the first 2 instances, the accused persons may elect in suitable cases to file claims for malicious prosecution.

In such an eventuality the Government of Kenya would be held liable to compensate them.

Luckily, the Contact Group on Piracy off the Coast (CGPCS) of Somalia while sitting in New York on 10<sup>th</sup> September, 2009 ratified the establishment of a Trust fund (the International Trust Fund for Piracy) to defray such expenses.

The International Trust Fund has the principal purpose of meeting expenses associated with the prosecution and detention of suspected pirates, as well as other activities related to implementing the objectives of the Contact Group, including supporting relevant legal capacity-building activities. **However this fund has been of very little help to Kenya.**

### **(k) Notification of transfer of suspected pirates**

Although we have previously expressed our desire that any intended handover of suspected pirates be notified to the relevant Kenyan authorities in good time, often and times we have continued to receive requests to accept suspected pirates when the suspects are already on the way to Mombasa. This makes it very difficult for the police and the prosecutors to peruse the evidence gathered to ascertain whether they meet the standard for prosecution.

Besides, some countries expect Kenya to receive every group of pirates interdicted irrespective of the evidence gather and take it unkindly when Kenya declines such request. A case in question is the group interdicted by the Belgian Naval force.

### **l) Prosecutorial Capacity**

The, Department of Public Prosecutions currently has three (3) prosecutors who besides their routine prosecutorial work load have had to undertake prosecution of piracy cases.

The Headquarters was constrained to draw from its limited human resource base of prosecutors boost the prosecutorial capacity.

## **III NATURE AND ADEQUACY OF SUPPORT RECEIVED.**

This has obviously impacted on the routine functioning of the department besides depleting financial resources earmarked for other equally important tasks to ensure piracy matters are accorded the necessary attention and priority they deserve.

It is against this background that the Department requested for support from the international partners for the following among other things:

### **Items**

1. Acquisition of office space.
2. Office equipment to wit computers, laptops, printers, scanners, fax machines, fire proof cabinets.

3. Office stationery.
4. Office furniture
5. Acquisition of library space and library equipment.
6. Communication facilities to wit internet connectivity and mobile services.
7. Motor vehicle
8. Travel accommodation and subsistence for our prosecutors
9. Capacity building to wit internal and external training of prosecutors, facilitation to attend international conferences and meetings on piracy, facilitation to attend and participate in international working group of the U.N. on piracy.
10. Air conditioners, water dispensers.

Following the signing of the Exchange of Letters and the Memorandum of Understanding signed between the EU, US and the Government of Kenya on conditions of transfer and prosecution of pirates, the Department of Public Prosecutions has received support from the partners as hereunder:-

<b>a)</b>	<b><u>FROM EUNAVFOR –(EU NAVAL FORCE)</u></b>	<b>OFFICE</b>
i.	Two Laptops	Mombasa
ii.	One Color Printer	”
iii.	One HP LaserJet Printer	”
iv.	Two Safaricom Broadband Modems	”
<b>b)</b>	<b><u>FROM UNODC</u></b>	<b>OFFICE</b>
i.	1 Toyota Saloon car	Mombasa
ii.	8 Desk top computers	”
iii.	Two HP printers	”
iv.	8 low back seats	”
v.	One HP Laptop	”
vi.	One photocopier	”
vii.	4 air condition units	”
viii.	3 fire proof safes	”
ix.	One water dispenser	”
x.	”	”

- xi. Return Air Tickets from Nairobi to Mombasa ,accommodation and subsistence allowances for prosecuting counsels attending court in Mombasa.
- xii. 2 Return Air tickets to Rome – 14th to 17th June 2009 to attend a meeting on Legal, Political and Security issues on Sea Piracy.
- xiii. Return Air Tickets to Copenhagen –for member of the Department to attend the 2<sup>nd</sup> and 5<sup>th</sup> Meeting of the Working Group 2 of the Contact Group on Piracy off the coast of Somalia,
- xiv. Return air tickets and accommodation in Nairobi for two State Counsel from Mombasa,– for Two days to Attend a meeting on 17th to 21st June 2009
- xv. Airtime of Kshs 4000 for the Month of June for two State Counsels

c) **UNITED STATES OF AMERICA**

**OFFICE**

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|-------|--|---------|
| i.    | Printer, Hp Office Jet Pro L7780 Color               | Mombasa |
| ii.   | Toner Cartridges – Black and Color, 12               | ”       |
| iii.  | Printing Paper, 4 dozen reams                        | ”       |
| iv.   | Legal Pads, 2 dozens                                 | ”       |
| v.    | 1Hp Office jet Pro L7780 Color fax, scanner, copier  | ”       |
| vi.   | Surge Protector – 1                                  | ”       |
| vii.  | Toner Cartridges, Black and Color, 12 ink cartridges | ”       |
| viii. | Transparent document holders – 50                    | ”       |
| ix.   | Tabbed Indexes – 2 dozen                             | ”       |
| x.    | Adjustable 3 hole punch – 1                          | ”       |
| xi.   | Paper – 4 dozens                                     | ”       |
| xii.  | Legal Folders – 100                                  | ”       |
| xiii. | Ring Binders – 1 dozen                               | ”       |
| xiv.  | Legal pads – 2 dozen                                 | ”       |

#### **IV. POSSIBLE OPTIONS TO FURTHER THE AIM OF PROSECUTING AND IMPRISONING PERSONS RESPONSIBLE FOR PIRACY AND ARMED ROBBERY AT SEA**

Although increased military presence of the Naval Forces from the different countries has successfully prevented or interrupted numerous attempted piracies, and members of the coalition have on several occasions exchanged fire with the Somalis. Yet thus far the role of the naval force has been to ward off pirates, rather than to pursue or apprehend them, which may not be sufficient to deter piracy motivated by outsized financial gains.

Thus Britain, the EU, the US , China and Denmark entered into agreements with Kenya to permit pirates captured by the Royal Navy to be tried in Kenyan courts. All these developments are innovative legal responses to a modern epidemic of the oldest recognized international crime.

But Kenya alone cannot wage the much needed prosecutions in every case of piracy. Besides Kenya only has an ill-equipped navy with no naval ship which she can send to the High seas

Towards that end the UN Security Council established the Contact Group on Piracy off the Coast of Somalia (CGPCS) . The Contact Group leads and co-ordinates the efforts of the States and relevant organisations to counter piracy and armed robbery at sea off the coast of Somalia.

The CGPCS has established four Working Groups to assist in the fight against piracy.

In its meeting in New York on 27<sup>th</sup> April 2010 the UN Security Council requested the Secretary General to present a report on possible options to further the aim of prosecuting and imprisoning persons responsible for acts of piracy and armed robbery at sea off the Coast of Somalia .

This included in particular, options for creating special domestic chambers possibly with international components, a regional tribunal and corresponding imprisonment arrangements taking into account the work of the Contact Group on Piracy off the Coast of Somalia, the existing practice in establishing international and mixed tribunals and the time and resources necessary to achieve and sustain substantive result.

Among the onerous tasks of the Working Group 2 is to explore other legal and judicial mechanism in the apprehension and prosecution of persons suspected of acts of piracy off the coast of Somalia.

Among the options suggested by the Working Group were:

**Option 1: The enhancement of United Nation assistance to build capacity of regional States to prosecute and imprison persons responsible for act of piracy and armed robbery at sea off the coast of Somalia.**

This option involves consolidating and building on the successes already achieved, such as the opening of the new high security courtroom in Shimo la Tewa, Mombasa, to hear piracy cases and to try other serious criminal offences.

**Option 2: The establishment of a Somalia court sitting in the territory of a third State in the region, either with or without participation by the United Nations**

The purpose of this option would be to provide a secure environment in which Somalia courts conduct prosecutions. This would require a legislative agreement between Somalia and the host state, and, if established with United Nations participation, would also require an agreement with the United Nations.

**Option3: The establishment of a special chamber within the national jurisdiction of a State or States in the region, without United Nations participation**

The first consideration under this option is whether the State concerned is conducting or could potentially conduct a sufficient number of piracy prosecutions to justify a special chamber conducted to such prosecutions. Somalia may be the one State at present where, in the regions of Puntland and Somaliland, there may be a sufficient volume of prosecutions to justify a special chamber.

**Option 4: The establishment of a special chamber within the national jurisdiction of a State or States in the region, with United Nations participation.**

Participation by United Nations selected judges, prosecutors and/or staff in such a chamber would require an agreement between the State concerned and the United Nations. As with option 3 above, the first consideration would be whether there are or could potentially be sufficient piracy prosecutions in that State to justify a special chamber dedicated to such prosecutions.

**Option 5: The establishment of a regional tribunal on the basis of a multilateral agreement among regional States, with United Nations participation.**

This option would require a multilateral treaty to be negotiated among regional States, ideally including Somalia. Participation by United Nations judges, prosecutors and/or staff would require an agreement with the United Nations.

**Option 6: The establishment of an international tribunal on the basis of an agreement between a State in the region and the United Nations**

This option would require an agreement between the United Nations and the State concerned to establish an international tribunal with both United Nations and national components.

**Option 7: The establishment of an international tribunal by Security Council resolution under Chapter VII of the Charter of the United Nations**

An international tribunal established by Security Council resolution under chapter VII would comprise of entirely United Nations selected, judges, prosecutors and staff, and might or might not be located in the region. Inclusion of United Nations selected judges from the region, including Somalia, would promote regional capacity-building. If judges, prosecutors and/or staff were drawn from Kenya or Seychelles, the tribunal would benefit from their experience, but their inclusion may risk inhibiting those States' capacity to prosecute nationally.

## **THE CONTACT ON PIRACY OFF THE COAST OF SOMALIA AND THE INTERNATIONAL TRUST FUND TO SUPPORT INITIATIVES OF STATES COUNTERING PIRACY OFF THE COAST OF SOMALIA**

The Contact Group on Piracy off the Coast of Somalia was established on 14 January 2009, to facilitate discussion and coordination of actions among States and organizations to suppress piracy off the coast of Somalia. The Security Council, in resolution 1851 (2008), encouraged “*all States and regional organizations fighting piracy and armed robbery at sea off the coast of Somalia to establish an international cooperation mechanism to act as a common point of contact between and among States, regional organizations and international organizations on all aspects of combating piracy and armed robbery at sea off Somalia’s coast*”. The Contact Group leads and coordinates the efforts of States and relevant organizations to counter piracy and armed robbery at sea off the coast of Somalia.

The terms of reference for the International Trust Fund were negotiated in the Contact Group on Piracy off the Coast of Somalia, and were formally endorsed by the United Nations Controller and the Contact Group on 27 January 2010. The International Trust Fund has the principal purpose of meeting expenses associated with the prosecution and detention of suspected pirates, as well as other activities related to implementing the objectives of the Contact Group, including supporting relevant legal capacity-building activities. It has received a total of \$2,973,900 since its establishment, and has disbursed \$2,437,372 to fund a total of six projects supporting prosecution and detention-related activities in Kenya, Seychelles and Somalia, and one project implementing a strategy to enable the Transitional Federal Government to raise awareness among Somalia populations of the risks associated with involvement in piracy and other activities, as well as of alternative livelihood options.

### *Comment*

*The Kenyan Delegation was instrumental in the discussions which gave rise to the establishment of the Trust Fund. In particular the undersigned had to insist on a clause being inserted in the agreement allowing speedy disbursement of funds to assist in defraying the expenses associated with the prosecution of the cases. Kenya has a rich experience of the delays that are attendant to the UN Procedures of disbursement of such funds.*

*Having taken in the largest number of suspected pirates outside Somaliland, and taking into account that Kenya is detaining a number of the suspected piracy it is a fund that should assist the Country.*

*Sadly though, when we really needed this assistance in the extradition of the 17 suspected pirates who were set free in the case above, the UNODC disappointed. The best they could do was to promise to reimburse Kenya the cost of removing the 17 Somalia nationals who were brought here by the EU Naval forces. This is not fair at all ! . Kenya is a poor and struggling nation; to be thrust on such burden of the international community is ridiculous in the extreme.*

## **OTHER RELEVANT MATTERS**

### **i) Establishment of a fully fledged Anti Piracy Prosecution Unit (APU)**

The Department of Public Prosecution's capacity to deal with piracy cases and other cases would be greatly improved if the items listed above were to be provided. Indeed, an Ant-Piracy Unit has been constituted with a membership of 12 prosecutors currently thus piracy prosecutions would certainly be expedited upon rendering the necessary support.

The Department has also developed a concept paper on training aimed at boosting prosecutorial efficacy in the handling of piracy prosecution. This however requires funding to achieve the desired objective.

### **ii) Uncoordinated Approach between Donor Agencies and the Kenya Law Enforcement Agencies**

At present there is no structured inter-agency arrangement on countering piracy thus the need to establish an inter-ministerial team to coordinate the efforts.

### **iii) Regional cooperation and coordination.**

The international community needs to lobby the regional states to join Kenya in the prosecution of Piracy cases. The participation of these Nations will dispel the impression that Kenya is a Pirates dumping ground.

**iv) Repatriation and settlement of Acquitted and Discharged Piracy suspects.**

The international community must address the issue of repatriation and resettlement of acquitted or discharged suspect. It should not be the burden of the Kenyan tax- payer to ensure that these suspects are removed from this country and resettled in their home country.

**D) Support Received By DPP from Donor Partners**

**E) Way Forward**

Notably, Kenya and Seychelles are the only countries in the region handling piracy cases. The 2 countries cannot sustain prosecution and detention of the piracy suspects on their own in the long term. The U.N. Security Council emphasized the need to build a regional capacity which in the long run would ensure that a wide dispersal area of suspected pirates is created.

Regional approach would also remove focus by:-

Somali insurgents on a particular country therefore, removing the potential threat of retaliatory attacks against Kenya and the Seychelles who have taken the lead to prosecute in the region. It should be noted that countries need not only co-operate in the area of prosecutions. In those jurisdictions where prosecutions cannot be entertained owing to Legislative impediments, the following lines of co-operation may be pursued:

**(a) Bilateral Agreements between the Transferring States, Kenya and the Regional Countries on Transfer of Convicted Prisoners**

The transferring states would enter into agreements with regional countries to accept convicted prisoners to serve sentence in those countries. The conclusion of such bilateral agreements would ease the pressure of those countries such as Kenya that are prosecuting the cases. In accepting prisoners to be transferred to serve sentence, the regional countries would have made their contributions to the war against piracy as is required by them by the U.N Security Council.

On the other hand, the states interdicting and transferring suspected pirates for prosecution should also consider having been transferred to their

countries upon conviction to serve sentence. The model of the dispersal of the Guantanamo Bay suspects of terrorism by the U.S should be explored in dealing with piracy suspects.

**(b) Memorandum of Understanding between Kenya and Other East African Countries**

Kenya needs support from the International Community to negotiate with the E.A. Countries Memorandum of Understanding on the transfer of convicted piracy prisoners to serve sentence in those countries. Obviously the E.A countries would then require support in building the detention facilities to accommodate the transferred prisoners.

As a country we are building investigative, prosecutorial and judicial expertise on piracy cases that we would be willing to share with the regional countries and the World at large.

However, this cannot be done without the establishment of formal structures and mechanisms of co-operation.

In conclusion, capacity building should encompass all aspects that would improve, strengthen and modernize the criminal justice system within the region to ensure a smooth expeditious and efficient administration of Justice not only in dealing with piracy cases but all criminal cases in the region. The strengthening of regional capacity would go a long way in assisting Somalia to return to peace stability and re-establishment of functional law enforcement and justice administration institutions. If piracy is to be eradicated, the root causes of the problem must be correctly diagnosed and fully addressed.

**END**

