Institute for Security Studies
SITUATION REPORT

KENYA AND THE PEST OF PIRACY

a prospective partner for peace

Maritime piracy is a problem that the world has long been faced with – and one that has again reared its ugly head more prominently with the major upswing in pirate activities off the coast of Somalia since the mid- to late 2000s. The phenomenon has posed a multi-pronged threat to global, economic, strategic and security interests. Since 2008, members of the international community have come together amid mounting pressure to tackle the piracy menace.

Yet these efforts, which have mainly taken the form of advocacy and naval deployment, have not managed to adequately address the pest of piracy. In fact, statistics and incident maps show that the number of piracy attacks (both attempted and successful), have continued to increase in 2010 and 2011[2] – pirates have merely adapted themselves to the naval response, revising their tactics accordingly. In essence, although the percentage of successful attacks as a portion of attempted attacks has dropped, maritime piracy is still a transnational threat that is very real and that continues to wreak havoc on the world's shipping industry, as well as the global and regional economies.

For Kenya, the threat of piracy is particularly perturbing, with impacts and effects being felt throughout the country. There are a number of reasons why piracy should be a cause for concern to Kenya, and the same reasons should in turn motivate the international community to engage Kenya, and the region, as a crucial player in the counter-piracy effort in the Gulf of Aden and the Indian Ocean in future. There has been a resounding call for greater action, and Kenya is well placed, at least in theory, to be a key partner in on-going efforts to prevent, curb and, with some luck, eventually eliminate Somali piracy altogether.

This report, which is based primarily on field research,[3] investigates the effects of piracy on Kenya; including the costs that can be seen at the local level. It also evaluates the counter-piracy efforts to date, considering specifically the contributions that Kenya has made thereto. This is further expanded by considering the ways in which Nairobi could feed into the offensive against piracy more significantly and robustly on the domestic, regional and global levels. The report concludes with a number of recommendations that encapsulate the varied approach that is needed to ensure a triumph against the scourge of maritime piracy.

SETTING THE SCENE: KENYA AND PIRACY

Kenya has only recently begun to acknowledge the implications of Somali piracy on its security, strategic and economic imperatives. With Somalia on its border, and piracy on its doorstep, Kenya certainly has a vested interest

in its neighbour's state of affairs. Instability has plagued Somalia for two decades, and stability and security in this country would go a long way toward the protection of Kenya's interests. This is simple geopolitics. The piracy off Africa's east coast, which has arisen as a result of this political upheaval in Somalia and the weakness of its state, holds a litany of entangled consequences for Kenya.

The country has been suffering economically as a direct result of piracy

The benefits to Kenya as a result of piracy are questionable: the construction boom due to the investment of pirate money in property in Kenya may conversely have caused property prices to rise out of the reach of locals. There are also converse reports on the reported improvement in the local fishing industry, with piracy having warded off illegal fishing trawlers. Overall, however, the country has been suffering economically as a direct result of maritime piracy. Figures calculated by Inchcape Shipping Services, based in East Africa,[4] estimate that the costs to the shipping industry in Kenya alone are between US$ 300 million and US$ 400 million a year. The costs of both imports and exports have risen dramatically due to a piracy surcharge that now has to be added to shipping tariffs, since insurance companies have had to inflate their prices to account for the risk attached to traversing pirate-invested waters. For container imports estimated at 330 000 teu (twenty-foot equivalent units) for 2011, an additional US$ 200–300 is added to costs as a piracy surcharge – thus amounting to an extra expense nearing US$ 100 million. For dry bulk and liquid cargoes, which are anticipated to average 13 million tons in 2012, the piracy surcharge raises costs by approximately US$ 260 million. In the case of exports, this runs to US$ 12,6 million.[5]

The cost to tourism, one of Kenya's most important industries, has also been particularly noteworthy. While security concerns in general have curbed the influx of tourists, this trend has been exacerbated by recent kidnappings of tourists in the Lamu archipelago, the Kenyan incursion into Somalia and two grenade attacks that took place in Nairobi in October 2011. However, the negative impacts to the tourism industry that can be linked directly to piracy relate to the cruise liner business. In 2008 a total of 35 cruise ships called at Kenyan ports, with hopes that these numbers might rise to 50. Since then, the number of cruise liners operating in Kenyan waters has dwindled to zero. With roughly US$ 300 000 worth of revenue generated by each call by way of port duties, taxes, immigration, tourist activities and shopping being lost, the Kenyan economy is forfeiting an income of about US$ 15 million a year.[6] It can be further extrapolated, in the absence of supplementary figures, that piracy is indirectly costing the country's tourism industry a good deal more than this.

In addition, costs often borne by the local consumer must also be accounted for – a problem that is worsened by high levels of unemployment and poverty in Kenya. Food prices have risen dramatically, with some estimating that commodities imported by sea are now 10 per cent more expensive on average than they were the year before, specifically due to the piracy threat in the Gulf of Aden and Indian Ocean. This food price inflation has implications for food security in Kenya and the region as a whole. The fishing industry, which provides an important source of protein to local communities, has also been under threat due to piracy.[7]

Further to this, the risks and indeed also the costs that are now associated with doing business in Kenya have reduced the inflow of foreign currency as investors seek safer destinations for their capital. Although piracy is not the exclusive cause hereof, the reduction of foreign direct investment in the country has tangible ramifications on the economic well-being of Kenya.[8]

These indirect costs far outweigh those incurred directly by piracy in the way of ransoms, which in 2010 brought in an average of US$ 238 million for the piracy industry.[9] Littoral states, particularly those situated adjacent to the piracy precinct, are having to shoulder significant losses on account of the phenomenon; and in East Africa, Kenya is bearing a sizeable portion thereof.

Moreover, there is evidence to suggest that a substantial portion of the upper echelons of pirate gangs or operations base themselves in Kenya.[10] There has certainly been a visible influx of money, often directed at the property market in what some suggest is a bid to launder the money. Bowden observes that, 'indeed, many pirates are investing in property … in neighbouring Kenya, thereby fuelling a construction boom and turning suburbs in Nairobi and Mombasa into Somali havens'.[11] This also has an inflationary effect on the market. Piracy's financial ties to Kenya, however, extend beyond property. There is emerging evidence that some piracy ransoms may often be negotiated by intermediaries in Mombasa and be paid there too.[12] While there are still groups operating from within Somalia, Kenya is in a position to address the piracy problem indirectly by seeking a domestic solution to tackle the masterminds and bosses who manage operations at a distance, from within its territory. This may be done through a variety of options, including a disruption of the money

flow, and a reduction in the opportunities available for the organised crime in the country.

Aside from the geopolitical and cost-based grounds for disquiet, Kenya's position as one of the stronger and more stable actors in the region places Nairobi in a position where non-action or limited action cannot continue to be an option. Indeed, all these factors make Kenya an obvious partner for the so-called 'coalition of the willing' that is currently engaged in counter-piracy endeavours. Not counting the various reasons why Kenya should be involved in the bid to rid international waters of pirates, the enlistment of a local actor or actors is no doubt crucial to the success of such a bid.

COUNTER-PIRACY TO DATE AND KENYA'S PARTICIPATION

Efforts to counter piracy off the north-east coast of Africa have been largely characterised by advocacy at the international level and combined foreign naval deployment, while a smaller role has been played by bilateral arrangements and regional organisations.

With regards to advocacy, the International Maritime Organisation (IMO) has been instrumental in putting the problem of piracy on the international agenda. As put by Onuoha,[13] the IMO has 'led the way in pushing the agenda for addressing the security challenges at international fora'. The resolution adopted by the IMO in 2005 in the wake of a rising incidence of maritime piracy, brought the threat that it poses to international security to the attention of the United Nations (UN) Secretary-General. The issue was thus brought to the UN Security Council (UNSC), and between 2005 and 2007 pressure mounted for the crime, with particular reference to Somali piracy, to be recognised and responded to.[14] Finally, in 2008 a number of meetings were held by the UNSC to discuss how the growing problem of piracy could be addressed in order to restore international peace and security. As a result, a series of resolutions were adopted under Chapter VII of the UN Charter, calling on member states to become actively involved in counter-piracy efforts and to coordinate naval and military efforts in collaboration with the Transitional Federal Government in Somalia.[15] Furthermore, UNSC Resolution 1851 (2008) sought to encourage regional cooperation and promote the use of legal avenues of resolution.[16]

This led to a proliferation of combined naval operations in the Gulf of Aden that sought to address the problem by facilitating safe passage of vessels traversing those waters – notably those carrying humanitarian aid – and by being on hand to respond to distress calls and possible pirate attacks. The key deployments in this regard include the United States' Combined Task Force 151 (CTF-151), the European Union's Operation Atalanta, and the North Atlantic Treaty Organisation's Operation Ocean Shield.

These deployments now operate under a wide remit, with Operation Atalanta offering protection to vessels of the World Food Programme, and attempting to thwart pirate attacks and turn captured pirates over for prosecution.[17] CTF-151 is dedicated to addressing piracy and operates in the Gulfs of Aden and Oman, the Red Sea and the Indian Ocean; while Operation Ocean Shield 'provide(s) maritime security in the region, but it also offers training to regional countries in developing their own capacity to combat piracy activities'[18] – something Kenya could exploit.

It was hoped that the UN-brokered Djibouti Accords between the Somali parties in 2008 – initiated by the UN Special Representative Ahmedou Ould-Abdallah – would culminate in political reconciliation, possibly leading to a unity government, which could bring some much-desired stability to the country.[19] This is therefore also cited as one of the efforts by the international community to address piracy by way of bringing stability to Somalia.

It is not that Kenya has not been collaborating with the international community with regard to the piracy problem; in fact there are a few instances, as will be discussed below, in which the country has made some contribution. Unfortunately, however, these have borne very little fruit, with efforts not ever really taking off and ultimately fizzling out. Some analysts like Paul Wambua[20] proffer that Kenya has in fact done enough to contribute to counter-piracy efforts, but that the international community has not met Kenya halfway in support of these efforts; by for example, providing adequate assistance in the project of prosecuting pirates. Other non-government actors in Kenya disagree with this assertion, suggesting rather that prosecution has constituted the main thrust of its efforts.

While the international community might have been more engaged, it did previously seek to interact with Kenya on the issue of piracy, particularly with regard to the prosecution of pirates. Following an increasing trend for captured pirates to be released due to logistical concerns related to bringing them to book, the United Kingdom and Kenya signed a Memorandum of Understanding in December 2008 to allow for the transfer of suspected pirates to face trial in Kenya. The US followed suit, coming to a similar agreement with Kenya in January 2009, thereby making Kenya a 'regional leader for disposition and legal action [having] prosecuted pirates in 2006 after the US ship, the *USS Churchill*, disrupted a vessel hijacking'.[21] Kenya thus began holding piracy trials in 2009, but with limited success.

There have been several suggestions from stakeholders and experts alike that this approach should be replicated in the region in a bid to increase the risk related to conducting pirate activities. Nonetheless, it is evident that there are a number of challenges within the realm of the law and its enforcement that will need addressing in order for such measures to be truly successful.

These challenges have certainly hampered the success of piracy trials in Kenya, which has been seen as an ideal venue for the prosecution of pirates. Western states have been reluctant to prosecute pirates on their home soil due to concerns surrounding asylum. Five particular challenges stand out, as elucidated by Wambua.

Firstly, the question of jurisdiction has been problematic due to the substantial disparity between international and domestic law in many cases, as well as the jurisdictional quagmire that is borne of the capture of a pirate or pirates in the various ocean zones delineated within law. Kenya has seen several inconsistent court rulings in this regard, leaving the matter at the Court of Appeal. As put by Petretto,[22] 'this intersection between different geographical spaces and national jurisdiction represents a great challenge in the fight against piracy'.

Secondly, there are numerous challenges with regard to Kenyan evidentiary requirements and the provision hereof. Wambua calls it 'an archaic law on evidence', which does not provide for evidence that is photographic or video-based. Moreover, there is a lack of knowledge on evidentiary requirements on the part of forces capturing pirates, resulting in the accused being released due to technicalities or a provision of evidence that falls outside of the law. Stemming from this is another challenge: Kenyan law requires witnesses to provide evidence in person, and many people therefore decline to attend court due to the time-consuming and cost-incurring implications this holds, especially for seamen.

The fact that Kenyan courts are ill equipped also hinders the legal process from being followed through. Moreover, a deficiency in the training of legal officials such as prosecutors and magistrates on the subject of piracy constrains the efficiency of the courts. Indeed, as illustrated by the last two points, the question of Kenyan capacity to prosecute is of great concern.

Furthermore, the country's recent incursion into Somalia must also now be considered as playing a role in addressing piracy, even if indirectly; however, stakeholders and commentators differ on how substantial the impact on piracy will be. Wambua suggests that a causal link can be established between the incursion and a decline in pirate activities; an occurrence that some conversely suggest is attributable to the monsoon season, which results in a piracy 'low season'. Yet Wambua asserts that if Kenya can successfully capture Kismayu and transfer areas that have been occupied by Al Shabaab to Somalia's Transitional Federal Government, then piracy may well dwindle in both frequency and magnitude, as there has been much discussion surrounding possible links between pirates and Al Shabaab. Other actors in Kenya, within both the diplomatic community and the non-government sector, propose that the effect will be more limited, despite the potential of the incursion to be a game-changer; perhaps

resulting in the relocation of pirates in the short term if their strongholds or freedom of movement are affected. What is clear, however, is that an elimination of piracy can only be brought on by sustained stability in Somalia. The most solid contribution the Kenyan incursion can thus make with regard to stifling piracy is improving stability in Somalia.

Certainly, the incursion has led to an increased naval presence in the volatile upper region of Kenya's coast on the border with Somalia. This presence will have offered some deterrence to piracy by hampering the movement of pirates southwards into the Indian Ocean. Patrols now take place on a constant basis, from both the sea and the air. Members of the shipping industry assert that, for a country with limited means, this is a positive development.[23]

The question of Kenyan capacity to prosecute is of great concern

Many stakeholders and commentators in Kenya seem to agree that another impact the incursion has had on piracy is that the nature of the phenomenon is being pushed into evolution. Pirates' tactics appear to be metamorphosing in response to the additional challenges they now face on land. There seems to be an increasing sense of desperation that suggests that pirates will enter into arrangements and practices that had not previously characterised them. While this is as yet unproven, there is suspicion that Somali pirates may diversify and increasingly engage in other money-generating activities such as gunrunning and the kidnapping of individuals, as well as holding entire vessels to ransom as per their traditional operations. This follows on suspicions that pirate groups might have been involved in the kidnappings in Lamu, and that they may become more amenable to cooperating with terrorist organisations.

TOWARDS A MORE ACTIVE ROLE FOR KENYA

Kenya is strategically placed, from both a geostrategic and an interest-based perspective, to engage as a key actor in the East African region with regards to the problem of Somali piracy. As such, Kenya can generate consolidated support on three levels by approaching the international community to support Nairobi in various ways, which may include measures to strengthen naval capacity, for example; by reaching out regionally to bring forth a combined and determined effort; and by acting domestically to enact policy, for example, by sustaining a naval presence off the coast with regular patrols. Such initiatives must be informed

by a reasoned, robust and resolute anti-piracy policy that sets out the ways in which Kenya approaches and tackles piracy. While efforts are on-going by Kenyan policy-makers to develop such a policy, local commentators assert that a final draft should not be expected for some time as parliament has to consider a number of bills that carry greater political priority ahead of the next set of elections in the country, which are scheduled for the latter part of 2012.

Nonetheless, in light of the fact that Kenya has yet to put together this policy, Nairobi must take into account the wealth of information on counter-piracy measures, as well as the thrust hereof. In particular, Kenya must appreciate that a holistic counter-piracy approach that carries the highest chance of success is one that acknowledges that sea-based efforts alone are not enough. Indeed, the thrust of opinion at present, which stems from observations of Somali counter-piracy, is that a two-pronged tactic is needed – piracy must be fought both on land and at sea. Ideally Kenya should lobby the international community to assist in a productive effort to rebuild the Somali state and to reinforce stability there, considering also that Kenya has illustrated a willingness to engage in land operations by launching its military operations in Somalia in late 2011. Kenya should also inculcate this policy internally, addressing the piracy problem by following and hindering the flow of pirate money within the country, in order to find and deal with pirate bosses who are based in and operate from Kenya.

Concurrently, the onus should not be only on Kenya. Rather, with an expression of Kenyan willingness – and even regional willingness – the international community too should continue to engage in multilateral and holistic efforts to counter the piracy scourge. It is evident that Kenya, having been previously enlisted by Western actors, has been identified as an important and able player. The international community should therefore ensure that Kenya is involved to its fullest capacity in initiatives going forward, and also endeavour to support the country in terms of developing and building this capacity. It must be noted that, with piracy presently being predominant on the African continent, the inclusion of an African actor should be considered an essential part of a global action plan that seeks to tackle maritime piracy. To this end, the February 2012 international anti-piracy conference, co-hosted by Kenya and the UN, is a good start.

AVENUES FOR CONCRETE ACTION

Based on the arguments made by various stakeholders in the counter-piracy context, it is clear that much can still be done to improve the global fight against piracy. While there are some suggestions that are cause for disagreement between actors, a number of key recommendations can be drawn from an appraisal of the contributions and views of these actors and stakeholders. It is abundantly clear that a sea-based approach will not suffice. Instead, a multi-pronged strategy is needed to address piracy, on land as well as at sea. It is in this regard where Kenya has the potential to contribute.

This report, therefore, makes a number of recommendations applicable in the general context, but that refer in particular to Kenya:

Firstly, it is of the utmost importance that greater cooperation be fostered at a regional level. Since there will be challenges in producing buy-in from non-littoral states in particular and generating consensus in terms of policy and strategy at a continental level, it is more feasible to institute this process at a regional level. Many regional organisations are already actively working on maritime security strategies, and this work should be encouraged to continue within these communities and to be started in others. The East African Community (EAC) will likely be a good place for Kenya to start with regional engagement, as the small number of states within the community allows for a greater chance of garnering consensus in order to create a goodwill coalition that can offer a legal avenue for tackling piracy. The non-littoral states may then be motivated to buy in, as their trade will also be affected by bad order at sea, and Tanzania, being littoral, will have similar motivations to those of Kenya. If these states can manage to uphold the common good as an overarching goal, without petty politics getting in the way, they will undoubtedly receive support from members of the international community in their endeavours. The UN is already involved in supporting local and regional counter-piracy initiatives, as are several Western states, and so a coordinated advance from regional actors will be looked upon favourably. As illustrated by recent UNSC Resolution 2015 (2011), there is support, at least notionally, for a court in the region dealing with Somali pirates.

Further to this, and in order to deal with previous failings in this regard, a supranational court might be established alongside a prison, arguably in Arusha. Here pirates may be prosecuted on the basis of an EAC policy or strategy, where the applicable law has been streamlined, and by entering into multilateral agreements with states, particularly those engaged in naval-based counter-piracy in the Gulf of Aden and its surroundings. Such a measure would offer relief from some of the many legal and jurisdictional tribulations faced in the prosecution of pirates, as discussed previously; although it would conceivably be limited by the prolonged timeframe needed for its implementation. The draft version of the East African Integrated Maritime Strategy makes similar suggestions, and the adoption of this document would be very helpful in this regard. Such endeavours at streamlining these activities at a regional level would definitely find favour with the many bodies and states concerned with piracy, as similar suggestions have

been made in the past. On this basis, arrangements that expand the applicability of these mechanisms may be sought, and financial assistance may be acquired to aid the establishment and upkeep of these facilities. Again, Kenya is well placed to initiate activities in this vein considering that Western states have previously sought the prosecution of pirates in this country with limited success. Such an initiative may minimise Kenya's responsibility by sharing it with its neighbours, and by inviting the cooperation of the international community, therefore allowing for greater prospects of success.

Another avenue of concrete action is in peace-making in Somalia, and efforts at this should be intensified with a two-pronged approach: both military and political or diplomatic. The rebuilding and strengthening of the Somali state must be attempted, be it through the provision of a clearer mandate for the African Union Mission to Somalia (AMISOM) with Kenyan operations being brought in line herewith, or through seeking to engage with all the stakeholders, including Al Shabaab.[24] This has merits on the basis of not only countering piracy, but also increasing stability and allowing for the operation of more functional and effective state apparatus, which would have a drastic impact on piracy. As it stands, pirates operate under relatively low-risk conditions with comparatively high rewards, knowing that they have a safe haven in Somalia that allows them to escape the law.[25] With institutions in a working order there could be a greater capacity for patrolling and policing in general and the prosecution and incarceration of pirates in particular; especially since the location of pirate bases are common knowledge. Disrupting pirate strongholds will be one way in which pirates can be stopped before the crime is committed. Such a rebuilding exercise would be, without doubt, a mammoth task, but perhaps Kenya's incursion into Somalia is a first step in this regard. Moreover, it is imperative that current missions providing humanitarian, political and other assistance in Somalia be supported and reinforced. Further, it has been suggested that funding allocated to naval deployments in the Gulf of Aden might be redirected to such purposes. If, for example, naval activities are minimised during the piracy low season, the funds saved could be put toward establishing a rebuilding effort in Somalia or supporting one that exists, in an indirect bid to address the piracy problem.

A fourth avenue for Kenya to fight piracy is through following the money trail in the country. It is well established that ransom money makes its way into Kenya and that operations are often run, at least in part, from within Kenya. As established by Rotberg, 'the battle against piracy will be assisted when we know precisely where the money goes, who controls the sources of financing, and who receives the profits'.[26] This may even allow for the establishment of already suspected financial links between pirate and terrorist groups which, if further investigated, could expand the remit of counter-piracy and counter-terrorist forces. As such, advanced money laundering laws should be in place: funds suspected to be associated with piracy followed and assets seized as a way through which to impede impunity.[27] This is particularly important in Kenya due to the roots pirate gangs have there, and as such the scope and mandate of its anti-money laundering unit must be amended. Some Western states may thus be approached for access to their expertise on this particular point.

Kenya can begin more consolidated efforts once a policy on maritime piracy has been drawn up. However, the country cannot do this alone and would need to seek support from the international community. With Kenya's important geostrategic location, it is in a position to lobby concerned actors for assistance with greater engagement in maritime security issues like piracy.

There will surely be challenges in implementing these recommendations, not least of which being the issue of will, followed by questions on finances and capacity issues. The latter issues have a better likelihood of being addressed if the former is present. Furthermore, Somali piracy is a fluid operation subject to evolution. As pirates become more desperate, they will change their tactics and amend their relationships, as has been suggested herein. Any counter-piracy initiatives must be prepared for this eventuality, and it is therefore crucial that countries and joint operations share information.

CONCLUSION

There is no doubt that piracy has a negative impact on both Kenya's government and its people. Kenya can play a greater and more valuable role in the counter-piracy domain, and is the best-placed prospective partner of the international community for peace in the East African region. Indeed, both Kenya and the international community should step up to the plate, taking a proactive stance in seeking partnerships that will thwart bad order at sea and promote practices and initiatives that will restore peace to global waters. If Kenya can summon the necessary political will to pursue such concise and coordinated measures to tackle piracy, then the concerns regarding finances and capacity can be attended to by the international community. This is where the 'coalition of the willing' will need to come on board and fulfil commitments toward assisting the development of African mechanisms for fighting piracy. What is needed on the part of Kenya is a clear appreciation of the costs of piracy to the country, the region and also the globe; and a determination to use its political, economic and geostrategic positioning to address the pest of piracy in earnest.

NOTES

1 Lisa Otto currently works as a researcher at the South African Institute of International Affairs (SAIIA) in Johannesburg. At the time she completed this paper, she was working as a research intern in the African Conflict Prevention Programme of the ISS in Pretoria. The author wishes to acknowledge the input and suggestions made by Dr. Emmanuel Kisiangani, Cpt. Johan Potgieter and Dr Issaka K. Souaré of the ISS, as well as the anonymous external reviewer for their comments and suggestions that helped to improve the quality of the paper.

2 International Maritime Bureau Piracy Reporting Centre, http://www.icc-ccs.org/home/piracy-reporting-centre/imb-live-piracy-map-2010. (accessed 22 November 2011).

3 The author conducted field research in Kenya (Nairobi and Mombasa) in November 2011, engaging with various stakeholders across the board. Her interactions and conversations with these stakeholders have informed this report to a large extent. However, in an effort to ensure the confidentiality of the individuals with whom she engaged, explicit reference may not necessarily be made to these individuals.

4 Figures elucidated in email correspondence between Inchcape Shipping Services and the Kenya Maritime Authority, as provided by the latter.

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6 Ibid.

7 L Otto, Benefits of buccaneering: The political economy of maritime piracy in Somalia and Kenya, *African Security Review* 20 (4) (2011), 45–50.

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