MARITIME SECURITY IN KENYA – A POLICY AREA UNDER DEVELOPMENT

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Kenya's waters provide significant economic opportunities. These prospects are, however, undermined by a wide range of maritime security challenges such as piracy, marine pollution, illegal, unregulated and unreported (IUU) fishing, as well as over-exploitation of maritime resources. The nature of these security concerns, in particular the impact of Somali piracy, has resulted in maritime security becoming an emergent priority for the Kenyan government. This is reflected in, for example, the 2014 Security Laws (Amendment Act), that established a Border Control and Operations Co-ordination Committee, work on developing a national maritime security strategy and the establishment of the Blue Economy Implementation Committee in January 2017.

This concept note provides a primer to the SAFE SEAS case study of the maritime security sector in Kenya drawing on elements of the SPIP methodology (SAFESEAS 2017). It examines the maritime spaces of Kenya, the problems and challenges facing these spaces, the existing legal, policy and institutional frameworks for tackling the problems as well as challenges and gaps and finally to briefly explore ways in which these gaps can be bridged.

AFTER SEABLINDESS? – KENYA'S MARITIME CONTEXT

The upsurge of maritime piracy in the western Indian Ocean after 2005 led Kenyan policymakers to recognize the importance of the sea both as a source of economic and political insecurity but also one of opportunity. At its height, piracy in the western Indian Ocean cost the Kenyan shipping industry between US$300 million and US$400 million per annum (Otto 2012: 2). Most significant was the reduction in cruise liner visits to Kenyan waters, which dropped from 35 in 2008 to zero visits in 2012 costing the Kenyan exchequer an estimated US$15 million per annum (Otto 2012: 2). The attack on the Mombasa bound *Seabourn Spirit* cruise liner by Somali militiamen in 2005 illustrated not only Kenya's lack of capacity to police its waters, but also the negative economic impact of piracy, as the liner bypassed Mombasa and diverted to the Seychelles. The attack also hastened a string of maritime security reforms such as the installation of a radar station operated by the Kenyan Navy and the procurement of a high-speed boat to the Port Police for patrolling littoral waters (Kenya Times 2005). Piracy not only focussed Kenyan attention toward the maritime space, but it also resulted in significant external maritime security capacity building activity.

Since the upsurge of Somali piracy in 2005, multiple external capacity building projects have been initiated in Kenya to help develop indigenous maritime security capacity. These have focused primarily on building coastal patrol capability (e.g. by EUCAP NESTOR), enhancing the judicial and legal capacity to prosecute and imprison suspected maritime criminals (e.g. UN Office on Drugs and Crime) and training and equipment provision to enhance Maritime Domain Awareness (MDA) (e.g. by the

IMO or EU CRIMARIO). In addition, external capacity building has also contributed to promoting an integrated approach to maritime security measures and maritime law enforcement in Kenya, which includes supporting Kenya's national capacity to perform coastguard functions through inter-agency cooperation and development of maritime strategies and contingency plans (IMO 2016). Kenya also works with national governments on a bilateral basis including with Denmark, Norway, South Africa, the United Kingdom and the United States.

Aside from piracy, the Kenya Maritime Police Unit (MPU) identifies small arms smuggling, cattle rustling, drug trafficking, child trafficking, influx of refugees, threats of terrorism, illegal fishing and trawling, and contra-bound activities as 'maritime threats to national security' (Kenya Police 2017). In addition, Kenya has also had to face environmental and marine safety issues. In 2005, for example, the Indian oil tanker *MV Ratna Shalini* discharged five million litres of crude oil into Port Reitz creek at the Kilindini Harbour which caused extensive damage to marine eco-system, in particular the destruction of mangrove trees (Wambua 2009: 4; Government of Kenya, Ministry of State for Special Programmes 2009: 12). In relation to incidences of marine safety, the sinking of the Kenyan MV *Likoni Ferry* at Mtongwe, Mombasa in 1994 was Kenya's worst maritime disaster in modern times, resulting in the deaths of 272 passengers (Daily Nation 2003).

Kenya has a coastline of 600km on the Indian Ocean, and moderate Exclusive Economic Zone (EEZ) with a total area of 142,400 km^2. Yet, the marine fisheries and aquaculture sector contributed just 0.54 percent to the country's Gross Domestic Product (GDP) in 2013 with fishing and fish farming employing around 130,000 people (Food and Agriculture Organization (FAO) 2015). Agriculture, in contrast, has long been the mainstay of Kenya's economy, contributing approximately 26% of the GDP and providing employment, income and food security needs for more than 80% of the Kenyan population (FAO 2014: 7). In January 2017, the Kenyan government created a Blue Economy Implementation Committee. This is indicative of a shift toward recognising the opportunity in sustainable development of ocean resources. According to Kenyan Agriculture Cabinet Secretary Willy Bett, "The fisheries sector will be one of the key pillars of economic growth in Kenya and culminate in opportunities for major investments [and] additional livelihoods for the coastal communities (The Nation 2017).

ORGANISATION OF MARITIME SPACES

Kenya's maritime zones are established under both the 1982 United Nations Convention on the Law of the Sea (UNCLOS) and several domestic legislative instruments including the Constitution of Kenya, 2010; Maritimes Zones Act, 2012 and the Environmental Management and Co-ordination Act, 1999 (EMCA). Maritime zones consist of the (i) coastal zone (ii) territorial sea (iii) contiguous zone (iv) EEZ (v) the continental shelf and (vi) the Ungwana (Formosa) bay as an historic bay. The 'coastal zone' is provided for under the EMCA Amendment bill of 2013 and is defined as the "geomorphologic area where the land interacts with the sea comprising terrestrial and marine areas made up of biotic and abiotic components and systems coexisting and interacting with each other and with socio-economic activities" (Environmental Management and Co-Ordination (Amendment) Act 2013: 2). The Kenyan

Constitution also, for example, defines 'land' as including any body of water on or under the surface; marine waters in the territorial sea and exclusive economic zone; natural resources completely contained on or under the surface; and the air space above the surface (Constitution of Kenya 2010: article 260).

Kenya also has established Marine Protected Areas (MPAs) divided into National Parks and National Reserves, with Malindi and Watamu Marine Parks and Reserve first established in 1968. According to the Kenya Wildlife Service (2017), there are at present four marine National Parks and six marine National Reserves. The marine parks are fully protected with no extraction or fishing allowed whereas the marine reserves allow restricted fishing rights under specific conditions. Dissatisfaction among local artisanal fisher communities on the negative impact of marine parks in Kenya has led to the creation of ad-hoc Locally Managed Marine Areas (LMMAs) to conserve fisheries and marine resources and as a way of securing alternative livelihood activities (Kawaka et al. 2015: 4).

In terms of regulation, Kenya has adopted a significant number of international instruments (e.g. UNCLOS and the Maritime Labour Convention, 2006) and entered into multilateral agreements (e.g. Indian Ocean Memorandum of Understanding on Port State Control, 1998; the Djibouti Code of Conduct, 2009 and the Southern Indian Ocean Fisheries Agreement, 2006). In addition, there are multiple domestic legal and institutional frameworks governing Kenya's maritime sector including the Constitution of Kenya (2010) as well as frameworks relating to maritime governance (2006), merchant shipping (2009); fisheries (2012); maritime zones (1989); sea-mining (1987); petroleum exploration and production (1984); and environmental management and coordination (1999).

A difficulty with Kenya's single-sector regulatory framework approach[1] is that it has led to multiple regulations and conflicting mandates over identical issues that are often not in tandem with the actual physical environment and socio-economic dynamics (Kibiwot 2008: 63). As a 2009 report from the National Environment Management Authority (NEMA) states, 'the management of Kenya's coastal and marine resources has for a long time been undertaken through uncoordinated sectoral approaches by various institutions, often operating under conflicting legislations. This situation has contributed to weak control, overexploitation of resources and environmental degradation' (Government of Kenya, NEMA 2009: vii).

TOWARD AN INTEGRATED MARITIME POLICY APPROACH?

There are a significant number of national agencies dealing with the management of Kenya's maritime spaces. These agencies are required to operate under the direction of the Kenya Maritime Authority (KMA), which is the central agency for regulation and oversight of maritime affairs (Kenya Maritime Authority Act 2006). The agencies include the KMA itself, National Environmental Management Authority (NEMA), Kenya Defence Forces (KDF), Kenya Ports Authority (KPA), Kenya Police, Kenya

[1] A single-sector regulatory framework approach refers to multiple regulatory agencies with responsibility for managing one sector (i.e. marine) as opposed to a multi-sector regulatory approach, which is understood to be the functioning of a single regulatory agency that has responsibility for several different sectors with similar economic and legal characteristics (Hellerstein et al. 2008: 1).

Wildlife Service (KWS), Coastal Development Authority (CDA), the State Department of Fisheries and State Department of Shipping (both under the Ministry of Ministry of Agriculture, Livestock, Fisheries and Blue Economy), Kenya Marine Fisheries Research Institute (KMFRI), Ministry of Transport and the Office of the President.

It is evident that this multi-agency approach to governance of Kenya's maritime zones creates duplicity and overlap. For example, as Wambua (2009: 7) notes, both wildlife officers and NEMA officials have the power to surveil marine ports and other maritime estuaries in order to meet conservation and management goals. Another example is the overlap between NEMA and the KMA relating to marine pollution regulation, where the 2015 KMA draft marine pollution regulations were deemed by the State Law Office a duplication of what NEMA and other agencies do and subsequently were not been approved (National Environment Management Agency (NEMA) 2016). This conflict appears to have been temporarily resolved, upon informal engagement between the two institutions. However, the two Acts have not been formally revised.

These problems are reflected in a 2009 report by the Kenyan Ministry of Transport, which highlighted several 'critical issues' that impede effective maritime security and safety in Kenya that can be addressed at a national level. It states:

> …the lack of specialized maritime security corps, inadequacy in coordination between concerned agencies, nonexistence of a maritime security policy, inadequate sea and air transport facilities for security personnel, inadequate tools and equipment, including telecommunications and information technology, lack of essential skills in research in international crime and other security issues, inadequate patrol of both the territorial waters and Exclusive Economic Zone, inadequate liaison with international security agencies for exchange of data, criminal profiles and other general information (Government of Kenya, Ministry of Transport 2009: 93).

Since 2009, and motivated by maritime insecurities such as piracy, reforms have been made in the maritime sector. The 2014 Security Laws (Amendment Act), for example, established a Border Control and Operations Co-ordination Committee which aims to coordinate the exchange of information between the respective agencies responsible for the security and management of the borders (Security Laws (Amendment Act) 2014: 352). In 2017, the Blue Economy Implementation Committee was established by Kenyan President Uhurhu Kenyatta headed by the Chief of Kenya's Defence Forces Samson Mwathethe. The primary aim of the committee is to coordinate marine investments while also advising the government on appropriate policies to boost earnings from blue economic activity (Business Daily 2017). A key reform proposed by the Blue Economy Implementation committee is the creation of a Kenyan Coast Guard made up of various security agencies such as KDF, National Police Service, KWS and customs officials (Business Daily 2017).

A range of further maritime programmes and projects are under development, but have not been implemented due to 'reduced budget ceilings and tight budgetary constraints', according to the Kenyan State Department for Fisheries and the Blue Economy (Business Daily 2017). This includes Marine Spatial Planning and Coastal Zone management projects as well as a plan to restructure the Kenya

Marine Fisheries Research Institute (KEMFRI) to provide human resource capacity for a national Blue Economy knowledge base to guide investments and development (Business Daily 2017).

While the KMA, for example, has published a five-year strategic plan (Kenya Maritime Authority 2012) there is no holistic national maritime security strategy. The Border Management Committee has indicated that a such a strategy is currently under development, however, no draft outline or indication of content is currently available and no proposed date has been specified for its completion or implementation. The KMA's five-year strategic plan has several aims: (i) direction on how KMA shall provide an enabling environment for the maritime sector in Kenya (ii) support the implementation of *Kenya Vision 2030* by strengthening maritime security (iii) facilitate Kenya to remain white listed by the International Maritime Organization and (iv) increase the generation and utilization of Research and Development results in maritime policy development (KMA 2012: xi). A Coordination Framework was also developed to facilitate coordination and collaboration with other actors involved in implementing the strategic plan (KMA 2012: ix).

While there is no standard operations procedure or strategy document with respect to how Kenyan maritime agencies jointly address the challenges, collective responses to a number of maritime issues have been formulated. Kenya's Search and Rescue (SAR) obligations are coordinated through the KMA and the Mombasa based Regional Maritime Rescue Co-ordination Centre (RMRCC). The centre operates as a section under the Maritime Safety Department of the KMA, and coordinates the SAR regions of Kenya, Tanzania, Seychelles and Somalia. Apart from its SAR role, the centre is one of three regional information sharing centres under the Djibouti Code of Conduct that acts as a focal point for reports of pirate activity and suspicious dhow movements in the central area of the western Indian Ocean. It operates as a 24-hour information monitoring and sharing portal primarily through the use of two systems - the EU funded 'Mercury' system and the US funded 'Sea-vison' system. These systems provide a real time AIS picture of vessel movement and a direct line of communication with multinational naval assets in the western Indian Ocean. A key source of information to the centre is human intelligence provided by local artisanal fishermen on illicit threats and movements (Interview with RMRCC official 2017). This relationship is fostered through a principle of reciprocity – with the RMRCC providing emergency training and education in marine business practice to fishermen who in turn are encouraged to report illicit activity that might interfere with this practice.

In terms of managing environmental threats such as oil spills, Kenya has a National Marine Spills Response Contingency Plan, which outlines the procedure for enabling effective response to marine spills (oil and HNS) incidents. The KMA manages the National Plan, working with the Oil Spill Mutual Aid Group (OSMAG), KPA, RMRCC and oil companies to maximize Kenya's marine pollution response capability (KMA 2017b). The plan sets out the procedure in the event of an oil spill, responsibility of each oil spill response action team, contacts of the personnel to be conducted in case of an oil spill and waste management after oil spill clean-up is completed. In theory, the Contingency Plan is supposed to be updated every two years or after a major clean-up operation (KMA 2017a).

CONCLUSION

While there have been advancements in fostering inter-agency collaboration and coordination and developing policies for the sustainable development of the blue economy, the existing multi-agency approach to maritime governance indicates that there are risks of over-lap, and unclear responsibilities. This suggests that a single comprehensive integrated framework would be useful to ensure that there is no conflict in practice and that they complement each other to ensure efficiency and effectiveness. Recent proposals for the creation of a coast guard and the development of a national maritime security strategy imply that these risks are recognized and means are being developed to mitigate them.

While Kenya has a renewed focus on maritime affairs, the maritime security of the Western Indian Ocean has also undergone a transformation since the upsurge of maritime piracy around 2008. Weak maritime governance structures have facilitated a range of maritime security threats beyond piracy, such as illegal fishing and drug smuggling, that are interlinked and in some cases interdependent.

Maritime security and law enforcement in the Indian Ocean is of international importance due to the high level of trade routed via the sea. A lack of a policies to regulate the activities of the sea has precipitated economic loses to the Kenyan government due to high rates of transportation cost, trade cost and insurance. According to Robert Kibiwot (2008: iii), an integrated policy framework is required. It can only be realised through the "harmonisation of activities and programmes related to the coastal and marine areas and having in place an effective legal and institutional mechanism".

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