

MEMORANDUM OF UNDERSTANDING

BETWEEN

THE KINGDOM OF DENMARK

AND

THE REPUBLIC OF KENYA

ON

**CONDITION OF TRANSFER OF SUSPECTED PIRATES
AND SEIZED PROPERTY TO THE REPUBLIC OF
KENYA**

MEMORANDUM OF UNDERSTANDING BETWEEN THE KINGDOM OF DENMARK AND THE REPUBLIC OF KENYA ON CONDITION OF TRANSFER OF SUSPECTED PIRATES AND SEIZED PROPERTY TO THE REPUBLIC OF KENYA

THE REPUBLIC OF KENYA ("KENYA") of the one part, and THE KINGDOM OF DENMARK ("DENMARK") of the other part,

Together hereinafter referred to as the parties.

TAKING INTO ACCOUNT:

United Nations Security Council Resolutions (UNSCR) 1814 (2008), 1816 (2008), 1838 (2008), 1846 (2008) and successor Resolution,

The 1982 UN Convention on the Law of the Sea (UNCLOS), in particular Articles 100 to 107 thereof,

International Human Rights Law, including the 1966 International Covenant of Civil and Political Rights, and the 1984 Convention against Torture and other Cruel, inhuman or Degrading Treatment or Punishment,

That this Memorandum of Understanding (MOU) will not affect the parties rights and obligations under international agreements and other instruments establishing international courts and tribunals:

HAVE REACHED THE FOLLOWING UNDERSTANDING:

Article 1

This MOU defines the condition and modalities for the transfer of persons suspected of having committed acts of piracy and retained property in the possession of Danish Forces, to the Kenya Government for prosecution.

Article 2

For the purposes of this MOU

- (a) "Danish Forces" means members of the Danish Armed Forces, together with members of all Danish law enforcement agencies competent to investigate piracy at sea serving alongside Danish Forces, their Ships, aircrafts and other assets;
- (b) "Operation" means the preparation, establishment, execution and support of any military mission by Danish Forces either acting along or together with the Armed Forces of other States;
- (c) "Operation Commander" means the Operational Commander of the Danish Forces;
- (d) "Piracy" for the purpose of this MOU means piracy as defined in Article 101 of UNCLOS and under Kenya's Penal Code;
- (e) "Transferred Person" means any person suspected of having committed acts of piracy at sea transferred by members of Danish Forces to competent law enforcement authorities of Kenya under this MOU; and
- (f) "Representative of the kingdom of Denmark" a designated person or entity which may be a diplomatic agent or consular official of the Kingdom of Denmark accredited to Kenya.

Article 3

General Principles

1. Kenya will accept, upon the request of Danish Forces, the transfer of persons detained by Danish Forces, in connection with Piracy and associated seized property by Danish Forces and will submit such persons and property to its competent authorities for the purpose of investigation and prosecution.
2. Danish forces will, when acting under this MOU, only transfer persons to competent Kenyan law enforcement authorities.
3. The Parties confirm that they will treat persons transferred under this MOU, both prior to and following the transfer, humanely and in accordance with international human rights obligations, including the prohibition against torture and cruel, inhumane and degrading treatment or punishment, the prohibition against arbitrary detention and in accordance with the requirement to have a fair trial.

Article 4

Treatment, prosecution and trial of transferred persons.

1. Any transferred person will be treated humanely and will not be subject to torture or cruel, inhuman or degrading treatment or punishment, will receive adequate accommodation and nourishment, access to medical treatment and will be able to carry out religious observance.
2. Any transferred person will be brought promptly before a judge or other officer authorized by law to exercise judicial power, who will decide without delay on the lawfulness of his/her detention and will order his/her release if the detention is not lawful.

3. Any transferred person will be entitled to trial within a reasonable time or to release.
4. In the determination of any criminal charge against him/her, any transferred person will be entitled to a fair and public hearing by a competent, independent and impartial court established by law.
5. Any transferred person charged with a criminal offence will be presumed innocent until proved guilty according to law.
6. In the determination of criminal charge against him/her, everyone will be entitled to following minimum guarantees, in full equality:
 - (a) To be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him/her;
 - (b) To have adequate time and facilities for the preparation of his/her defense and to communicate with legal counsel of his/her own choosing;
 - (c) To be tried without undue delay;
 - (d) To be tried in his/her presence, and to defend himself/herself in person or through legal assistance of his/her own choice; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him/her, in any case where the interests of justice so require, and without payment by him/her in any such case if he does not have sufficient means to pay for it;
 - (e) To examine, or have examined, all evidence against him/her, including affidavits of witnesses who conducted the arrest, and to obtain the attendance and examination of witnesses on his/her behalf under the same conditions as witnesses against him/her;

- (f) To have the free assistance of an interpreter if he cannot understand or speak the language used in court;
 - (g) Not to be compelled to testify against himself/herself or to confess guilt.
7. Any transferred person convicted of a crime will be permitted to have the right to his/her conviction and sentence reviewed by or appealed to a higher court in accordance with the law of Kenya.
 8. Kenyan law enforcement authorities will not transfer any transferred person to any other State for prosecution without prior written consent from representatives of the Kingdom of Denmark.

Article 5

Death Penalty.

1. In deciding the appropriate charges to bring against any transferred person the competent Kenyan authority will not charge any transferred person with an offence that carries the death penalty.
2. No transferred person will be liable to suffer the death penalty. Kenya will take steps to ensure that any death sentence is commuted to a sentence of imprisonment, in accordance with the law.

Article 6

Records and Notifications.

1. Any transfer will be the subject of an appropriate document signed by a representative of the Danish Forces and a representative of the competent Kenyan law enforcement authorities.
2. Danish Forces will provide detention records to Kenya with regard to any transferred person. These records will include, so far as

3. possible, the physical condition of the transferred person while in detention, the time of transfer to Kenyan authorities, the reason for his/her detention, the time his/her detention commenced, and any decision taken with regard to his/her detention.
4. Kenya will be responsible for keeping an accurate account of all transferred persons, including but not limited to keeping records of any seized property, the person's physical condition, the location of their places of detention, any charges brought against him/her and any significant decision taken in the course of his/her prosecution and trial.
5. These records will be available to representatives of the Kingdom of Denmark upon request in writing to the Kenyan Ministry of Foreign Affairs.
6. In addition, Kenya will notify the Kingdom of Denmark of the place of detention of any person transferred under this MOU, any deterioration of his/her physical condition or any allegations of improper treatment. Representatives of the Kingdom of Denmark will have access to any persons transferred under this MOU as long as such persons are in custody or are subject to criminal proceedings and will be entitled to question him/her.
7. At their request, national and international humanitarian agencies will be allowed to visit persons transferred under this MOU.
8. For the purposes of ensuring that the Kingdom of Denmark is able to provide timely assistance to Kenya with attendance of all foreign witnesses and the provision of relevant evidence, Kenya will notify the Kingdom of Denmark of its intention to initiate criminal trial proceedings against any transferred person and the scheduled dates for provision of evidence, and the hearing of evidence.

Article 7

Assistance of the Kingdom of Denmark.

1. The kingdom of Denmark will, within its means and capabilities, provide all assistance to Kenya in respect of investigations, prosecutions, trials and detention of transferred persons.
2. In addition, Danish Forces will:
 - (a) Hand over detention records drawn up pursuant to Article 6 (2) of this MOU.
 - (b) Process any evidence in accordance with the requirements of the Kenya competent authorities as agreed in the implementing arrangements described in Article 10 below;
 - (c) Endeavour to produce statements of witness or affidavits by Danish Forces personnel involved in any incident in relation to which persons have been transferred under this MOU;
 - (d) Hand over all relevant seized property in the possession of Danish Forces.

Article 8

Relationship to other rights of transferred persons.

Nothing in this MOU is intended or may be construed to derogate from any rights that a transferred person may have under applicable domestic or international law.

Article 9

Liaison and disputes.

1. All issues arising in connection with the application of this MOU will be examined jointly by the competent authorities of Kenya and the Kingdom of Denmark.
2. Failing any prior settlement, disputes concerning the interpretation or application of this MOU will be settled exclusively by diplomatic means between Kenya and the kingdom of Denmark.

Article 10

Implementing arrangements.

1. For purposes of application of this MOU, the parties may conclude implementing arrangements on operational, administrative and technical matters.
2. These implementing arrangements may inter alia cover:
 - (a) The identification of competent law enforcement authorities of Kenya to whom the Kingdom of Denmark may transfer persons.
 - (b) The detention facilities where transferred persons will be held
 - (c) The handling of documents, including those related to the gathering of evidence which will be handed over to the competent law enforcement authorities of Kenya upon transfer of a person.
 - (d) Points of contacts for notifications
 - (e) Documents to be used for transfers.

Article 11

Coming into effect and termination

1. This MOU will come into effect from the date on which it is signed.
2. This MOU will continue to have effect until 6 months after either party has given the other written notification of its intention to terminate the MOU.
3. This MOU may be varied by mutual arrangement between the Parties.
4. Termination of this MOU will not affect any benefits or obligations arising out of the application of this MOU before such termination, including the benefits to any transferred persons as long as they are held in custody or are prosecuted by Kenya and the provisions relating to access in accordance with article 6.

Signed at Nairobi on this ^{9th}.....Day of ^{July}.....2009 in the English Language.

FOR THE KINGDOM OF DENMARK



H.E. Mr. Bo Jensen
Ambassador for the Kingdom of Denmark

FOR THE REPUBLIC OF KENYA



H.E. Hon Moses Wetangu'la, EGH, MP
Minister for Foreign Affairs