



Netherlands Institute of International Relations “Clingendael”
‘Pioneering for Solutions Against Piracy’ *Focusing on a Geopolitical Analysis, Counter-piracy Initiatives and Policy Solutions*
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Summary

In order to be a pioneer in finding solutions against piracy, one needs to consider the underlying issues that contribute to the phenomena. Firstly, this summary will be focussed on the regional context and the balance of powers within the international community. The presentations that were concentrated on these aspects were given by Dr. May-Britt Stumbaum, Dr. James R. Holmes, and Dr. J. Peter Pham. Secondly, the attention will be shifted to options and challenges involved in the fight against piracy. The presentations that considered these selections were given by Mr. Roger Middleton, Mrs. Véronique Roger-Lacan, Vice Admiral Pim Bedet, and Dr. Douglas Guilfoyle. Following these presentations was an afternoon filled with discussions and remarks about the different situations that were sketched during the presentations. The summary of the questions raised and the discussions on the selection of topics will be integrated with the summary of the presentations on Part I and II. The conference was closed by Mr. Maxime Verhagen, Minister of Foreign Affairs. His speech is available on the Clingendael website (http://www.clingendael.nl/cscp/events/20090708/20090708_speech_needandevoc.pdf).

Part 1: The regional context

Due to the rise in naval powers in the Indian Ocean, the US is confronted with a declining dominance. The two upcoming naval powers, China and India, are struggling to shift the balance of power in their favour as their economies rely on the export and import of supplies over the Indian Ocean. The US, China and India find themselves in a strategic triangle in which the European Union needs to find its position.

The relationship between the US and China has been strained due to the shifting of powers. In the past, the US has had maritime dominance in the Indian Ocean, while China was formally a land power. Now that China is becoming an emerging power it is trying to extend its influence at sea. As the US and China have been testing the waters and examining what this shift entails for their relationship, India and the US have been very optimistic about cooperation between their naval powers, which includes a plan to work closely with each other's coastguards. Consequently, this triangle is leading to tensions between the different powers involved. This in turn has created an opportunity for Europe to establish its position within this triangle as a possible mediator.

Questions that were raised during the discussion entailed: How does the European response to piracy fit into the US-China-India power balance in the Indian Ocean? What are the political limits to international operational cooperation? What are the opportunities?

During the discussion, the point was made that there is a possibility that Europe could help shape the Sino-US-Indian triangle playing the role of a mediator. When we look at the long-term, Europe has experience with integrating new countries into their system. Therefore Europe might be helpful in integrating India and China into the world system. Europe could also be viewed as

more neutral compared to the US. For instance, if Europe were not involved in the missions involving piracy then Russia and China would not lend its support, because that would mean that the missions were actually American. Russians are willing to work closely with Operation ATALANTA, however Russia does not have the intention to join. SHAPE meetings have been evolving as the countries that are involved have a common enemy (objective). The challenge that will eventually arise is how to keep this momentum when the visibility of this common objective fades. The international community needs to grab this opportunity of sharing a common goal, for the time being, to strengthen cooperation between these different countries.

Of all the global commerce, 90 percent is transported by sea. A major passageway is the Gulf of Aden, of which China and India are dependent on to transport their goods, as it is the most efficient route for transportation. When piracy attacks in the Gulf of Aden rose by 200 percent from 2007 to 2008 and insurance costs increased tenfold, this affected the global commerce in a significant manner. Piracy has affected the shipping industries of multiple countries which has led to an increase in individual missions in the region to protect the transport of goods by merchant vessels.

The political situation in Somalia is unstable and is increasing the probability of piracy activities in the region. This country has been without a formal government since 1991, which enables the pirates to uphold their position, as lack of control in Somalia facilitates the economic advantage these pirates are gaining by their illegal activities. As long as piracy proves to be profitable, these activities will continue. In order to solve the problem, there should be a realization that piracy is essentially a land based operation, which happens to manifest itself at sea. The problems on land are directly related to the problems at sea. Somalia is a failed state, options such as working closely with *de facto* regimes in Somaliland and Puntland should be considered. Somaliland because this region seems to be more stable and less prone to piracy activities and Puntland also because it is more stable even though this region essentially is more prone to piracy.

Questions that arise when looking towards Somaliland and Puntland for cooperation could include the option of separation from the rest of Somalia. In the past, Somalia has always been known as a relatively democratic country. However, the Transitional Federal Government (TFG) is not recognized by most Somali people as having the authority to rule the country, as it was not democratically elected by the people, rather placed in power by the Western World. When looking for solutions to the problem of piracy, the Western World has been focussed on maintaining a unitary Somali state. However, if large regions such as Somaliland and Puntland are either openly opposed or resistant to it, should this unity remain a goal? The Western World should refrain from making a decision about unity as this problem should be resolved by using a 'bottom-up' approach. In other words, the focus should be on local actors and regional initiatives such as the AU when making this decision.

During the discussion, there were a few more questions that were conferred about. If the stability in Somalia is the durable solution to the problem of piracy, what steps should be undertaken to optimize the efforts already in place? Is it possible that not only the delivery of goods and services to the Somali people, but the interests of the international community – including the suppression of piracy offshore – might be better served by working with effective authorities wherever they are to be found, even if that means permitting the devolution of political authority?

In answer to these questions, points were made that, the TFG is ineffective since it only protects a few blocks in Mogadishu and this is only because the TFG is protected by UNOSOM. Total abandonment of the TFG is, however, not an option, even though the attention should be

shifted towards other territories that are more willing, such as Somaliland and Puntland. Local partners need to be involved in order to build a new strong state. Somaliland is one of the most effective systems in the region. European aid goes through Somaliland, due to the corruptness of other areas in the region. However, the decision to create an independent Somaliland is up to the African Union as mentioned above. The Western World may not believe that the form of government is the best option, but when there is a government that is functioning in a turbulent region then why change it. There is one service that Somalia cannot provide: security. However, we should not impose Western ways on them; trying to find solutions for liquidity might be more helpful than catching pirates. Somalia has poorly integrated their two armed forces and due to limited resources especially in manpower, this is more a political problem. The Western World treats the TFG as a government, however the Somali people do not all recognize it due to the manner in which the TFG was set up as was also mentioned during the presentations.

Another difficulty that becomes apparent is that there are too many actors involved in Somalia. Especially the regional actors can prove to be a challenge during the upcoming elections in Somaliland. The Western World has been wise not to let neighbouring countries into the peace negotiations in Somalia. The Diaspora in neighbouring countries could have a negative effect on the elections. Added to that, the surrounding countries should first acquire capacity building before they can be involved in this process. Somalia has to be built from scratch, and regional problems such as the conflict between Ethiopia and Eritrea could only irritate the situation.

Part 2: Counter-piracy initiatives

The need for a 'what works' solution has become exponential as the phenomena of piracy is only relocating itself to other waters. Bringing as much stability as possible without it seeming as an intervention is a priority. The problems that facilitate piracy have been going on for decades, thus solving the problem of piracy is directly linked to the inland security issues. In this following part options and challenges related to piracy will be examined.

In the fight against piracy one can discuss different options such as, either squeezing the pirates from without through naval force or squeezing the pirates from within through Somali politics. As mentioned before, the benefits of piracy outweigh the costs. Pirates may run the risk of being shot, however the economic benefits are much greater seeing as ransom is being paid quite often. Therefore a solution that should be examined is how to increase the costs of piracy so that these are greater than the benefits the pirates gain. When considering such solutions, a problem that may arise trying to squeeze the pirates from without is the lack of coordination between the different naval forces in the region, including the countries that are non-aligned with the EU and NATO and setting up their own convoy systems. Another problem that should be dealt with when considering this option is the battle of public relations. Pirates have learned how to use the media to their benefit. The message that illegal fishing in their water has driven them to piracy activities is well received in the international community. In order to win this battle, the international community needs to stop illegal fishing in Somali waters and demonstrate that there is a long-term commitment to help the Somali fishing industry.

There are a few other options that are also worth discussing such as: whether or not private security companies should be involved in the protection of merchant vessels. The danger with this option is that it is not yet clear to which extent these private companies are accountable for their actions and whether or not they are breaking international sea laws. Private security companies are looked at with scepticism as most countries believe that the monopoly of violence should remain a state power. This option is not recommended by naval forces as they deem it to be their responsibility to protect the waters.

Secondly, a regional approach should be enhanced in order to stabilize the region as a whole. This option includes the establishment of a regional coastguard in cooperation with Yemen and Kenya and the improvement of prosecution abilities within the region.

The benefits for the Western World involving itself in the fight against piracy also outweigh the costs of these missions. The violence that is associated with the counter piracy mission is relatively low and could be seen more as a business transaction. War ships mostly remain out of harms way, while the 'beauty contest' can prove the capabilities of each navy that is involved in this struggle. However, even when there is little violence actually involved, many merchant vessels are taking different transportation routes due to the threats in the Gulf of Aden. One of the options to improve strategic and operational challenges is to realize that a shift needs to be made from cooperation to coordination to integration of operations. There is a whole list of benefits once the different naval forces start working together: common operating picture, intelligence sharing, communications and data exchange, deconfliction of tasks, avoidance of duplication of effort, clarity on rules of engagement, capacity building and regional engagement. NATO could take the lead in this cooperation effort as NATO has been dealing with political dialogue for 60 years, there is a clear command structure, the availability of diverse trained and 'ready use' assets, and there is a proven intelligence network.

Many are still expected to join in the effort against piracy, such as countries taking part in ATALANTA, Arab nations trying to initiate an Arab League against piracy and some other countries, such as Russia, creating their own convoy systems. The biggest challenge will be the coordination between these various chains of command, various mandates and various end-states. The different strategic interests are mostly nationally based, which could be perceived as part of the problem in the fight against piracy. The real challenge that needs to be overcome is that there is no clear end-state, and questions such as how long each country will be committed to the fight against piracy, what the future of ATALANTA could be and how long the political will exists remain uncertain. The fight against piracy is being played out on different theatres, however there seems to be a lack of coordination between these initiatives. The UN is not up to the task in leading the coordination of all the different missions. All the same, SHADE is also not expected to ensure progress as it is seen as a western initiative. The way forward should include regional cooperation with countries such as Djibouti, training ship riders to be able to better judge the situation, and more international assistance towards Kenya for possible trials as they are already providing the international community with evidentiary templates.

The discussion that followed these presentations was guided by questions such as: what the strategic and operational challenges are in the maritime counter-piracy initiatives? What implications does this have for future cooperation between the different actors present? How can the maritime cooperation contribute to pro-active counter-piracy operations, like the seizing of mother ships, and the arrests of pirates before they engage in hijacking operations? How should the system of transit passage or escorted passage, taking into account the specific requests of slow ships, be organized, without limiting the execution of escorted transits to flag ship alliances?

Operation ATALANTA was set up to protect the World Food Programme (WFP) shipping as well as other vulnerable shipping. In doing this, more information about the Gulf of Aden has become known; such as that there are fewer attacks at night, where the high risk areas are located and what the warship capabilities are. This information sharing and deconfliction are critical for the development of a comprehensive approach between the different actors that are involved in the fight against piracy. Area protection, instead of convoys, has recently proven to be the most effective way to help merchant vessels pass through the Gulf of Aden. Area protection is

essentially the planning of a number of merchant vessels that all pass together through the Gulf of Aden at certain times that attacks are least likely and that the warships are located at the highest risk points. This is efficient as many more merchant vessels are able to pass through than would be possible when travelling in a convoy.

However, the information that has been gathered by the different countries and operations that are present in the region is not always accessible to the shipping industry. This should be made available for the shipping industry so that the industry does not take matters into own hands.

One of the questions that was raised during this discussion was whether or not the pirates are adapting to the navies' strategies. The ships that are hijacked are being used as 'mother ships' which makes it difficult to determine whether or not the original crew members are still on board. The pirates have also started hijacking at night before the monsoon season started, but this has not proven to be the norm until the monsoon season ends. There is also a fear that the hijacked crew will be brought on land in the future. There have also been reports of more attacks in the Indian Ocean and the Eastern coast, which could mean that the fight against piracy is only moving to new theatres instead of actually being won.

Certainly, there are also legal challenges which include defining the legal status of pirates. Should they be seen as common criminals or are they combatants? As there is no coordination between the different pirate activities and as it is not regulated by a single entity they cannot be seen as being part of a combatant group. This clarifies which laws can be used in the fight against piracy, as they should be treated as common criminals. The international law is clear and simple and gives navies mandate on the high seas. The problem is then not defining the legal status of pirates, but whether or not national or international law is applicable.

First, we need to answer the question, where are these pirates going to be able to stand trial. Without this knowledge it is difficult to know which standards the court of the prosecuting country wants to uphold, for example what the regulations are on the use of evidence.

All state government vessels have powers to visit, search, seizure and arrest pirates, as well as being allowed to subject pirates to trial. All states have universal jurisdiction, however they do not have the duty to prosecute these same pirates. The only duty that is available at the moment is the duty to cooperate, but there are no laws requiring countries to prosecute in their territory.

Which options are then available? Should it be a regional or international piracy court? There is of course the question of political will, the willingness to pay expenses, the factor of delay when creating a new institution, which benefits it could bring to the region, and in which ways expertise will be dispersed. However, maybe the best option would be to strengthen local tribunals. Most states limit their jurisdiction following their own interests.

As the international community disperses more expertise it may be more useful to strengthen regional courts with these capabilities rather than building new institutions. These new institutions would take a long time to be built, just as regional courts may take some time as well when trying to decide in which country these pirates should be prosecuted.

These legal options and challenges also brought some interesting questions into the discussion. Does the current limitation in the UN Convention on the Law of the Sea, that only allows states to act against piracy on the high seas, still – in all circumstances – satisfy the wishes of the international community to provide safety at sea? Should special circumstances allow anti-piracy acts by the international community within the territorial waters of a state that is unwilling or

unable to guarantee the safe use of sea lines of communication, or should such actions be limited to situations of hot pursuit from the high seas into the territorial waters? In the case of Somalia, should the international community make use of the authority to act against piracy on the territory of Somalia? What steps should be undertaken to avoid impunity of piracy activities?

In light of these questions, one should realize that there is a difference between having the authority to act and being willing to act on that authority. Once pirates are at sea it is as difficult as finding a needle in a haystack. A second problem is being able to define what a 'mother ship' is, and if one finds a 'mother ship' how to convince an international prosecutor with the correct evidence. International law does not have a hierarchy, so the country that decides to prosecute will carry the responsibility. The trials will happen; however finding a country that is willing to prosecute is difficult. There is reluctance within nations to prosecute, because there are too many challenges involved in a prosecution and these nations do not want pirates requesting asylum in the country in question.

There was a question posed whether or not there is a way to seize and destroy 'mother ships'? Maybe there is even a way to tag these ships so it becomes more easily traceable? Before the confiscated objects can be destroyed it has to be known whether or not a country is going to prosecute the pirates, otherwise evidence might be destroyed. When seizing 'mother ships' it should be kept in mind what needs to be done as a follow-up to the arrest in order to be able to prosecute the pirates. Evidence is needed to prosecute against organized crime and each country has different standards for allowing evidence during trial. Thus making it very important to realize who is going to prosecute the pirates and in which manner.

Another point that was made during the discussion is that there needs to be cooperation between Interpol and Europol in order to receive a better picture of the money flow and criminal activities that are involved in piracy. Evidence should be gathered and catalogued. Which brings another issue into focus: there is an enormous amount of evidence available at the time of the hijacking of a merchant vessel, but there is nobody in the area to collect it.

There is much opposition to creating an international tribunal. The main arguments against a new international tribunal are costs and urgency, taking international tribunals such as that of Yugoslavia as example. However, these piracy cases should not be compared to those of the Yugoslavia tribunal. These cases are straightforward and they would not turn out to be extensive court cases that take years. The greatest challenge would be that of the incredible amount of cases. There has been talk of solutions such as transferring detainees to Kenya, however, there is also a great need not to overwhelm the Kenyan judicial system. If a tribunal is not created, there are still pirates that need to be prosecuted. Thus another option becomes available which is that of a mixed tribunal which could be more cost-efficient. However, is there political will to create another tribunal? Would it not be easier to operate within national courts? All these questions that were raised should lead to a debate on which kind of model should be used to prosecute these pirates. We need to keep in mind that it is a new proposal and that much still needs to be discussed. Piracy is an international crime, so there should not be any problems with legitimacy of the prosecuting party. The prosecuting party should be on the relative safe grounds when considering jurisdiction.

One option that was discussed was the arming of ships since this has also been an issue in the news lately. Arming ships is not being considered as an option for now. Arming sailors could be more harmful because they are not trained to use a weapon. Installing armed security guards could bring legal problems. These security guards could be arrested because carrying a weapon could be a firearm offense which could lead to the insurance of the merchant vessel becoming

invalid. The monopoly of violence should remain in the hands of the government. However, security guards could be there to act as an advisor to help the captain of the merchant vessel through a hijacking situation but they should not be armed.

In conclusion, there is still much left to be discussed but this expert meeting was a good start. One of the most important outcomes of the meeting was the relevance of a bottom-up approach to solve the problem of piracy off the coast of Somalia. The policy brief that is being published by the Clingendael Security and Conflict Programme (CSCP) will provide some recommendations for the fight against piracy.

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