

Pioneering for Solutions to Somali Piracy – Facing the Challenge, Seizing the Opportunity

Recent years have seen a surge in piracy in the Gulf of Aden, followed by growing international involvement in pursuing pirates off the Somali coast. The piracy problem is multifaceted and includes complex geopolitical, regional, legal and operational challenges. But the commitment demonstrated by a broad range of actors to fight piracy in Somali waters also offers unique opportunities. The unprecedented awareness of and attention to the region's insecurity provides international stakeholders with the momentum to strengthen their ties and address the root causes. This policy brief gives a comprehensive account of the piracy issue and presents recommendations to nations engaged in counter-piracy activities.

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Background¹

Piracy incidents off the coast of Somalia have increased sharply since 2008. According to the International Maritime Bureau, by early May 2009 the number of piracy attacks in the region had already exceeded the total number for 2008². In response to this development, the international community has begun to take action to protect the shipping lanes in and around the Gulf of Aden, one of the world's main trade routes. An unusual coalition of actors – ranging from the EU and NATO to the USA, China, Russia and Japan – has emerged to address the problem and has quickly established an impressive naval presence in Somali waters. So far, however, this has not deterred the pirates, although they are scoring slightly fewer successes with their attacks.

¹ On 8 July 2009, the Clingendael Institute organised a conference on piracy, during which international experts and policy-makers discussed the various dimensions of the problem and searched for policy solutions. The initiative was partially prompted by the forthcoming Dutch command of the EU NAVFOR Somalia (operation 'Atalanta'), the EU's anti-piracy operation, scheduled to start on 13 August 2009. This Policy Brief partly draws on the outcomes of the conference, although the authors remain fully responsible for its content.

² Retrieved from http://www.icc-ccs.org/index.php?option=com_content&view=article&id=352:pirate-attacks-off-somalia-already-surpass-2008-figures&catid=60:news&Itemid=51

Piracy is big business. Driven by economic incentives, Somali pirates organize themselves remarkably well and share information so as to maximize their profits. Moreover, the practice of hijacking ships is based on a careful cost-benefit calculation. Faced with a crime of opportunity which flourishes in the context of a stateless and highly instable region, the international community is fighting a battle that its warships alone cannot win. Piracy is a complex and multi-faceted phenomenon. Any effective strategy to tackle it will have to take into account its geopolitical, regional, legal and operational dimensions.

The Geopolitical Dimension

The fundamental geopolitical dynamic in maritime Asia is the product of the rise of China and the response of the USA, seeking to protect its security interests. US-Chinese maritime relations in the Indian Ocean are less well established than those in the Pacific. China is rapidly expanding its economic and political influence in the region, where it has vital energy and shipping interests. This affects not only the USA, traditionally the predominant actor in maritime security, but also other major powers. Japan, India, Russia and Europe are all increasingly showing an interest in stepping up their involvement in the region.

The piracy problem in Somali waters has accelerated geopolitical developments, as the USA, China, Russia, India, South Korea, Malaysia, Japan and numerous European countries have all dispatched warships to the western Indian Ocean. Multilateral organizations including the EU and NATO are represented, while there is also a US-led multinational initiative, the Combined Maritime Forces (CMF). Recently, a group of 11 Arab countries announced their intention to set up an anti-piracy naval task force in the Red Sea.

There exists an obvious risk of countries competing for regional influence; this would mainly concern relations between China, India, Japan and the USA. But there is also a risk of inter-organizational rivalry between the EU, NATO and the CMF – a so-called ‘beauty contest’ of institutions³. At the same time, the shared interest in fighting piracy provides major opportunities. Interaction at the operational level, which is relatively easier on sea than it is on land, can contribute to improved geopolitical relations. The presence of so many maritime actors with one common goal should be seized on as an opportunity to improve maritime cooperation and strengthen military-to-military ties, thus reducing the risk of any possible future confrontations.

The EU is well-positioned to stimulate enhanced international cooperation. It has a relatively large maritime counter-piracy mission in the region – known as the ‘Atalanta’ mission – which in itself is a striking example of multinational cooperation. This EU mission obviously needs to coordinate closely with NATO and NATO-allies that participate in the CMF. Extending this international cooperation to include the remaining nations engaged in anti-piracy missions would be feasible, and worth striving for.

Moreover, the fact that Europe is not regarded as a major player in Asian security affairs may help it to bring together such actors as the USA, China, Japan and India in a single cooperative setting. For this reason the experience gained through Atalanta will help the EU to define its role as an international security actor in Asia. This role might include acting as a mediator between great powers with a higher military profile in the region. This, by exten-

sion, also serves to further develop the overall European Security and Defence Policy. Reaching out to China could be especially rewarding for the EU. The Chinese navy is set to be one of the key naval actors of the 21st century, but so far, operational contacts with Western navies have been very limited.

Recommendations

To nations engaged in anti-piracy missions

- Seize the opportunity to cooperate at the operational level, not only to fight piracy more effectively, but also to decrease geopolitical tensions. Therefore, adopt a ‘seaweed’ (the marine equivalent of grassroots) approach.

To the EU

- Explore possibilities for taking the initiative in this ‘seaweed’ approach and play a coordinating role. This could evolve into a mediating role in Asian security relations.
- Benefit from the opportunity to interact at the operational level with the Chinese navy. Given the expected prominence of China in maritime security, this would increase European insight into and personal ties with an emerging major naval power.

The Regional Dimension

Piracy is fundamentally a land-based problem. Somalia, a key operations base for pirates in the Gulf of Aden, has been without a functioning government since the ousting of the Siad Barre regime in 1991. Despite an early international attempt (1992-95) to restore order, the country soon developed into the prime example of a failed state. While violent lawlessness, warlordism, regional proxy wars and humanitarian crises marked the following 18 years, Somalia slowly but surely disappeared from the international radar screen.

The threat posed by Somali pirates has made the country the focus of renewed attention, as it was rapidly understood that, while solutions to the piracy problem were being sought, the appalling situation in Somalia itself could not be ignored. This renewed international attention coincided with developments that appeared to offer a window of opportunity for addressing the country’s internal turmoil. In January 2009 Ethiopia withdrew its troops, thereby ending a controversial and fiercely contested two-year military presence. Later that

³ Presentation by May-Britt Stumbaum at the Clingendael piracy conference: http://www.clingendael.nl/csctp/events/20090708/20090708_note_stumbaum.pdf.

month, Sheikh Sharif Sheikh Ahmed replaced the intransigent warlord Abdellahi Yusuf to become President of the Transitional Federal Government (TFG). The international community seized on this apparent momentum and readily pledged support for the TFG's new leadership and its stated objective of regaining control over the country. In April, donors pledged \$213 million to boost Somali security institutions and the African Union peacekeeping mission in Somalia (AMISOM).

At the time of writing, however, President Sheikh Sharif faces serious difficulties and his nominal government could be on the verge of collapse. Mogadishu is at present the scene of intense fighting between Islamic insurgents, who already dominate large parts of southern and central Somalia, and troops loyal to the government. Meanwhile AMISOM is unable to halt the violence and has itself become a target for extremists, who demand its immediate departure. Amid doubts about the durability of the TFG, there is a growing fear that Somalia will fall into the hands of the radical Al-Shabab and become a safe haven for terrorists. The international community has yet to define a realistic and consistent strategy for engaging in Somalia's many problems. If, in order to end acts of piracy off the coast of Somalia, it is indeed essential to address the widespread insecurity on land, then there is a tremendous challenge ahead.

Recommendations

On Somalia

- Support only broad-based, Somali-led initiatives to re-establish central rule, as experience teaches that top-down approaches of an exclusive nature are highly counterproductive.
- Enhance international engagement with legitimate and effective non-state authorities in Somalia, particularly in Somaliland and Puntland.
- Decide, in accordance with relevant stakeholders, on the future of AMISOM. Either extend its mandate and assign it a clear and realistic role in ongoing efforts to promote Somalia's internal security, or start moving towards a responsible exit strategy.
- Encourage neighboring countries to abstain from meddling in Somalia's internal affairs and supporting rival armed groups. In this regard, improving Ethiopia-Eritrea relations so as to end their proxy war on Somali soil is of vital importance.

On piracy in Somali waters

- Monitor and prosecute the practice of illegal

fisheries and the dumping of toxic waste by foreign ships in Somali waters, in order to safeguard legitimate livelihoods for Somali men.

- Disrupt the pirate economy by targeting associated organized criminal syndicates.

The Legal Dimension

According to international law, warships on the high seas – and, in this specific situation, within the territorial waters of Somalia as stated in a Security Council resolution – are allowed to seize pirate ships and ships hijacked by pirates, and subsequently to arrest pirates. To allow for an adequate investigation and prosecution to take place, states have to make the necessary arrangements within their national legislation and decide whether or not to prosecute or ask for extradition. There is a discrepancy between 'power' and 'duty' when it comes to interpreting the right to intervene, as well as the right to prosecute pirates.

Not all states have implemented national legislation to prosecute piracy. Moreover, for political reasons, some states have decided not to prosecute at all, or only in limited cases. Only a few Western states currently conduct criminal trials against Somali pirates. Some states and organizations present in the area off the coast of Somalia, such as the EU, have made arrangements with Kenya in order to deal with captured pirates. According to such arrangements, arrested pirates may be surrendered to the Kenyan authorities to face trial. However, this puts a severe strain on Kenya's legal system, given that 111 alleged pirates are already being detained in the country.

Some countries, notably the Netherlands, Russia and Germany, have called for an international tribunal on piracy to be established in the region. When considering this option, it is important to take into account the potential risk of overburdening a single country and the time it would take to have an international court fully operational. Making use of local courts can help strengthen local justice systems and avoid the risk of accumulated experience being dispersed if the international tribunal is eventually closed down.

The Security Council recommends using 'ship riders': law-enforcement officers from prosecuting nations travelling on board foreign ships. This

arrangement would combine the prosecuting capabilities of countries in the region with the naval capabilities of extra-regional countries. Ship riders could be granted the authority to assess piracy incidents and make appropriate decisions, for example regarding a ‘reversed hot pursuit’⁴. They could also secure the evidence needed for a prosecution. Since each national criminal system requires a different standard of evidence to prove piracy, every warship in the area needs someone on board with knowledge of all the various legal systems that allow prosecution for acts of piracy, in order to secure the necessary evidence.

Most warships in the area still lack both the knowledge and the authority to fulfill this need. Especially in cases where there is no specialist knowledge of the relevant rules of engagement, foreign warships usually sink most of the pirates’ skiffs and destroy the ‘mother ships’, and sometimes they also destroy communications equipment such as cell phones. However, preserving the ships and the communications equipment is essential for gathering evidence. They potentially contain not only contact information but also DNA material or other biometric forms of evidence.

Another option – one that possibly could complement a ship rider system – is to have a team of Europol or Interpol officers stationed at a base in the region. Such a team could be flown out by helicopter to board relevant ships in the event of an act of piracy. It might also be possible to station officers on board warships on a more permanent basis. In all cases it should be remembered that, despite the prominent involvement of military resources, anti-piracy missions are essentially law-enforcement operations.

Recommendations

To nations involved in anti-piracy missions

- Beware of putting too much pressure on the Kenyan judicial system. Invest in strengthening

⁴ A right to hot pursuit entails the right to continue a pursuit from within the territorial waters (or the contiguous zone) on to the high seas, when a violation of the laws of the coastal state is committed in the territorial waters (or the contiguous zone), and the pursuit is not interrupted. Reversed hot pursuit entails a pursuit into the territorial waters when a crime has been committed outside the territorial waters. This right does not yet exist. A reversed hot pursuit can only take place with the consent of the coastal state.

courts elsewhere in the region, and develop legal expertise and build detention facilities in these countries.

- When considering establishing an international piracy tribunal, keep in mind that building on existing courts in the region may be more effective, given the time it would take for the tribunal to become fully operational, and the importance of strengthening regional justice systems, and of retaining relevant experience within the region.
- Explore the options of the systematic use of ship riders from prosecuting states so as to secure evidence, preferably not only off the coast of Somalia but also in the wider region, and of involving Europol and Interpol.
- Train military personnel on board warships so that they can properly deal with evidence and other law-enforcement issues.

To the EU

- Invest in training EU military forces to secure and collect forensics in anticipation of ship rider or other agreements regarding the use of law-enforcement personnel.

The Operational Dimension

It is against the backdrop of the geopolitical importance of the Indian Ocean, the legacy of the failed state of Somalia and the inadequacy of the international legal framework that the various naval powers present in the Somali Basin have to operate. Piracy cannot be solved by military engagement alone. Nevertheless there is a need to maximize the benefits of the current military deployment. Given the internationally diverse nature of the naval presence, coordination and complementarity are key prerequisites for effectiveness.

An Internationally Recommended Transit Corridor (IRTC) has been established for ships passing through the Gulf of Aden. The IRTC limits the area that needs to be patrolled by warships. However, some important problems remain and solving these will require further coordination of the international naval contributions. Several countries concentrate on providing escorts – usually for ships linked to their own nationality – rather than on improving the overall safety of the corridor. This limits the availability of naval capacity for the IRTC system. A partly related problem is that the corridor transit

system does not provide a safe passage for ships with a speed of less than about 10 knots. Getting all countries to use the IRTC may require devising a system that avoids vertical relations of command between navies. China and the USA, for example, are unlikely to place naval units under multinational or foreign command. A possible solution could be to divide the transit corridor into zones and allocate the protection of ships within each zone to a specific nation or organization. This would require close coordination without necessitating an overarching command structure.

Some commercial shipping companies have put forward requests for military protection on board. This might work well in combination with an escorting warship that can give instructions in case of a pirate attack. In the absence of an accompanying warship, however, there is the risk of a lack of clarity regarding the division of responsibilities between ships' masters and the military personnel stationed on board.

Private security companies are offering their services, even though not all states allow their shipping companies to make use of this arrangement. Some private security companies claim they have found a loophole in the law, enabling them to include arms on the ship's manifest, so these can be used by their personnel on board commercial ships when in danger. Clearly this is a misinterpretation of the intended objective of the law. Moreover, it prevents commercial ships from entering harbors of states for which they do not have the necessary permits to include arms in their cargo. Furthermore, there is a great risk of a spiral of violence developing, not to mention the responsibility and accountability issues that will be

raised in situations of misuse. A less complicated and tricky way for security companies to contribute to increased security is through the provision of consultancy services and situational data.

Recommendations

To nations involved in the IRTC

- Encourage all navies active in the Gulf of Aden to join the IRTC or a similar mechanism. Bringing together all nationalities is essential for an efficient use of available naval resources. This may require adjusting the IRTC to accommodate the needs of individual countries.

To nations involved in anti-piracy missions

- Investigate the possibility of establishing a multilateral coordination centre in the region under auspices of the Contact Group on Somali Piracy and the UN, to be staffed by liaison officers from all naval forces for de-confliction and information-sharing. This initiative could be modeled on the CMF- and EU-sponsored Shared Awareness and De-confliction (SHADE) meetings in Bahrain.
- Increase air patrols to complement the naval presence, and move towards greater situational awareness through, for example, increased intelligence-sharing between the countries involved.
- Support regional initiatives for anti-piracy training and co-operation such as those launched at the high-level meeting convened in Djibouti by the International Maritime Organization in January 2009. Potentially important initiatives include the setting up of a Regional Training Centre and Maritime Rescue Coordination Centre in Mombasa, Kenya; a Sub-regional Coordination Centre in Dar es Salaam, Tanzania; and a Regional Information Centre in Sana'a, Yemen.

ABOUT CLINGENDAEL

The Netherlands Institute of International Relations Clingendael is a training and research organization concerned with international affairs. The Clingendael Security and Conflict Programme (CSCP) looks into contemporary conflicts, security threats and issues of international justice.

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