# Policy Forum 09-012: The Somalia Multilateral Anti- Piracy Approach: Some Caveats

## Recommended Citation

# The Somalia Multilateral Anti-Piracy Approach: Some Caveats

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## Introduction

Mark J. Valencia and Nazery Khalid of the Maritime Institute of Malaysia write that the "vigilante" approach inherent in unilateral and multilateral initiatives to deal with piracy in the Gulf of Aden region has "provided an opportunity for naval powers to demonstrate their prowess, feel each other out, and establish the precedent of unilateral individual and group intervention in such situations." Cooperative action amongst the littoral states of Southeast Asia has reduced piracy in that region: "the littoral states have invited co-operation from outside powers – as long as it on their terms and does not involve the independent use of armed force." Valencia and Khalid conclude that "it is this strategy which must be pursued with increased vigour and vigilance if piracy and the new bogeyman of maritime terrorism are not to become internationally accepted excuses for foreign interventions."

## Essay: The Somalia Multilateral Anti-Piracy Approach: Some Caveats

Both unilateral and multilateral initiatives to deter piracy in the waters off Somalia and in the strategic Gulf of Aden have been touted as a great leap forward in the fight against piracy. Indeed this "vigilante" approach is gathering steam and participants at a remarkable rate. But some liken it to swatting a wasp while ignoring the hive. There is concern that it may turn out to be only a stop gap, short term response that satisfies some countries' strategic goals but fails to address the root cause of the problem while setting an undesirable precedent for some developing states bordering

piracy-prone waters.

There is no question that piracy off Somalia and in the Gulf of Aden is perceived as a serious problem by the shipping industry and the maritime powers. In 2008 alone – an annus horribilis for shipping in the Gulf of Aden--- pirates attacked some 111 vessels and hijacked 42 of them for ransom. The cumulative amount of ransoms paid thus far has exceeded USD150 million and increased insurance premiums have added a cost up to USD 20,000 per trip through the Gulf of Aden. In addition to the high costs incurred and the disruption of the flow of international trade, the threat to life, limb and liberty of crew members and to the victimized ships and their cargo is very real.

The attacks have provided an opportunity for naval powers to demonstrate their prowess, feel each other out, and establish the precedent of unilateral individual and group intervention in such situations. Several nations have dispatched warships to the Gulf of Aden to protect their own and other flag vessels. This includes the US, the UK, France, Germany, China, India, Malaysia and Saudi Arabia. Japan intends to do so in March. Moreover, an international anti-piracy force of some 20 nations is being formed and will be headed by US Rear Admiral Terance McKnight. And in late January 2009, at an International Maritime Organization - sponsored meeting, nine states from the region adopted a Code of Conduct Concerning the Repression of Piracy and Armed Robbery Against Ships in the Western Indian Ocean and the Gulf of Aden. Among others, the Code promotes the interdiction of ships suspected of engaging in acts of piracy - "in a manner consistent with international law"- an important qualification.

## UN multinational naval response: some caveats

Although the 'send in the navy' response has been generally well meaning and welcomed by the shipping community, it could have serious ramifications regarding the manner in which piracy is fought as well as for littoral states in other piracy prone areas. Prompted by the maritime powers, the UN Security Council (UNSC) has passed four resolutions authorizing - with some important qualifications – foreign intervention to repress piracy off Somalia and in the Gulf of Aden. On 16 December 2008, the UNSC passed the latest – Resolution 1851 – authorizing the hot pursuit onshore of pirates operating off Somalia. The US was the leading proponent.  But it was forced to compromise when Indonesia objected to including authorization to enter Somalian air space. Further clouding the issue and seemingly contradicting outgoing Secretary of State Condoleezza Rice's unqualified support for the initial draft, US Defense Secretary Robert Gates said that the US lacks sufficient intelligence to pursue the fight against pirates ashore. Visions of another "Black Hawk Down" may well have been haunting Mr. Gates.  Moreover from a political and logistical standpoint, naval forces are much better missioned to prevent hijackings than to resolve hostage situations once a ship and crew have been taken.

The clash between the maritime powers and straits states as exemplified by Indonesia's opposition to the initial wording of UNSC Resolution 1851 was not the first in this ongoing saga. A similar struggle - with a similar outcome - presaged the adoption of the first of the UNSC's resolutions on the Gulf of Aden, Resolution 1816.  Which stated that "states cooperating with the country's transitional Government would be allowed, for a period of six months, to enter the territorial waters of Somalia and use 'all necessary means' to repress acts of piracy and armed robbery at sea, in a manner consistent with relevant provisions of international law." This latter qualification is all important to some. Indonesia made it clear that the resolution must be consistent with international law, especially the 1982 UN Convention on the Law of the Sea and not create a precedent for intervention in other waters where piracy is common. It insisted that the resolution only apply to the territorial waters of Somalia, and that the Somali government – such as it is – must give prior

consent for such intervention. Vietnam concurred. This was not knee-jerk paranoia—and even if it was, paranoid nations have real concerns too.  Indeed, a draft of the first resolution introduced by the US implied that if the intervention was successful off Somalia, it or the principle – could be applied elsewhere, e.g., in the Malacca Strait.

The concerns voiced by Indonesia and the resultant compromises are indicative of the ongoing struggle between proponents of two different concepts of national sovereignty - the traditional Westphalian construct in which national borders are sacrosanct, and the relatively recent US doctrine of justifiable intervention in situations in which it decides a sovereign state cannot control internal strife, endangering either its own citizens or others outside the state.

There are also many unanswered legal questions regarding such interventions.  For example, can a foreign naval vessel legally fire on a ship believed to be under the control of, or carrying pirates? On 18 November 2008 this question became a practical reality when an Indian navy vessel – the INS Tabar – fired on and sank a Thai fishing boat the - Ekwat Nava 5 - which it mistook for a pirate "mother ship."  The vessel had been hijacked by heavily armed pirates and the crew tied up. The pirates escaped in speed boats while 14 of the fishing boat's crew died in the incident.  In its defense the Indian navy said the ship was a pirate vessel in "description and intent" and had fired at the Tabar.

The commander of the US Fifth Fleet, Vice Admiral William Gortney has urged that ship owners engage private security companies (PSCs) to guard commercial vessels transiting the area. But what if the sinking of the Thai fishing boat had been perpetrated by PSCs?  Who would be accountable? And if a ship is seized "without adequate grounds" by anti-piracy forces, how will the owners seek redress? Moreover if pirates are arrested, which country has jurisdiction and who can or should prosecute the pirates—the arresting country, the flag country of the pirated ship, or the pirate's home country? Finally, according to some legal interpretations, piracy occurs only on the high seas, i.e., outside the jurisdiction of any state, and only begins when the perpetrators, without permission, try to board a boat. Under this definition, many of the incidents off Somalia are not piracy but armed robbery at sea and the perpetrators may not legally be fair game to the intervening foreign navies.

But legal uncertainties are not the driving force behind Indonesia's concerns. Rather, it is colonial and recent history.  During Indonesia's struggle for independence from Holland, and subsequently for unity, the Dutch supplied their forces as well as separatist movements using Indonesia's straits and territorial waters with impunity, including the Malacca Strait. This is why Indonesia holds near sacred its archipelagic concept of the nation as consisting of both the land and the intervening waters. The transit passage regime allowing foreign vessels unimpeded passage through straits used for international navigation – like the Malacca Strait and the Lombok Strait – is still seen as a derogation of its sovereignty. Malaysia feels the same way.

And this is why both states reacted so negatively to the US proposal under its now defunct Regional Maritime Security Initiative—misinterpreted as it may have been-- to place US forces in the Malacca Strait to ensure its safety and security vis a vis pirates. Both straits states have also refused to join the Proliferation Security Initiative out of similar legal and sovereignty concerns. So it is no surprise that they would be wary of intervention proposals and resolutions that might set precedents and be applied to their waters. They also view the independent operation of private armed guards in their waters as illegal and thus a threat to their sovereignty.

This 'interventionist movement' in the Gulf of Aden has attracted the support and participation of China and Japan, much to the consternation of several nations in Southeast Asia. Both Beijing and Tokyo want to demonstrate their 'blue-water' naval capability. And they have both frequently and publicly stated their long term strategic interests in the safety and security of the Strait of

Malacca. In times of conflict, they can be expected to protect their vessels transiting the Strait carrying much of their energy supplies and imports, and to try to deny access to their adversaries. Indeed, Japan has in the past proposed an international force to ensure safety and security in the Strait of Malacca, and China has expressed its interest in assisting the littoral states to maintain the safety and security of the Strait in any way it can.

Wu Shengli, the Commander of the Chinese Navy, told his sailors that were being dispatched to Somalian waters "It's the first time we go abroad to protect our strategic interests armed with military force - and the first  time for our navy to protect important shipping lanes far from our shores." Indonesia and Malaysia fear it will not be the last. Indeed, piracy in Southeast Asia is soon expected to rise again because of the global financial crisis.

Of course there are drastic differences between the situation in Somalia and that in the Malacca Strait. Off Somalia, pirates run rampant because Somalia has a weak and ineffective government - some say it is a failed state. It is not just a question of lack of enforcement at sea but of disorder on land and the growth of land-based networks and infrastructure – even feudal-like fiefdoms – supporting the pirates' operations. This does not exist to the same degree in Southeast Asia. The Somali pirates have also rationalized their activities by arguing that they are collecting "fines" for foreign illegal use of Somalia waters – particularly tuna fishing – that puts locals out of work. They also resent their neighbor Egypt for making a great deal of money from ships through payment for the use of the Suez Canal while Somalia gets nothing from the same ships using its waters. In other words some pirates view themselves as justified modern day "Robin Hoods."

This disorder and sense of victimization gives rise to an uncommon brazenness. Well-organized military-type attacks in broad daylight with displays of heavy weapons hundreds of miles out to sea using 'mother ships' have become common. In Southeast Asia pirates are not nearly as well organized, are more opportunistic, and generally much less grandiose in their targets and choice of weapons.

## Fighting piracy in the Gulf of Aden: lessons from the Strait of Malacca

In the last decade piracy was rampant in the Malacca Strait and Indonesian waters. But the littoral states have themselves stepped up their anti piracy efforts and the threat has receded-- at least for now. Such efforts include the "Eye in the Sky" and "Malacca Strait Patrols" involving co-ordinated and sometimes joint Indonesian, Malaysian, Singaporean as well as Thai air and sea surveillance and considerable information exchange.  And the littoral states have invited co-operation from outside powers – as long as it on their terms and does not involve the independent use of armed force. For example, India and Indonesia have conducted joint patrols in the northern Malacca Strait, and Indonesia and Singapore have engaged in anti-piracy exercises with the United States.  Japan has contributed to capacity building via training and gifts of equipment. But this has all been part of a purposeful strategy on the part of Indonesia and Malaysia to placate the maritime powers and keep them at arms length, preserving the notion - if not the reality - that their sovereignty reigns supreme. This means assistance to enhance political and social stability, economic development, as well as anti-piracy technology and training with the goal of indigenous control of the anti-piracy response.

## About the authors

**Dr. Mark J. Valencia** is an internationally known maritime policy analyst, political commentator and consultant focused on Asia.  He was a Senior Fellow with the East-West Center for 26 years where he originated, developed and managed international, interdisciplinary projects on maritime policy and international relations  in Asia.  He is presently a Visiting Senior Fellow at the Maritime

Institute of Malaysia. Electronic mail: [mjvalencia@hawaii.rr.com](mailto:mjvalencia@hawaii.rr.com)

**Nazery Khalid** is Senior Research Fellow at the Maritime Institute of Malaysia, a Kuala Lumpur based policy research institute.  The thrust of his research is in the field of maritime economics but he also dabbles occasionally on maritime strategic and security issues.  He has published extensively in various forms including books, refereed journals, magazines, newspapers and online publications on a wide spectrum of maritime issues, and to date has over 100 articles and three books to his name. Electronic mail: [nazery@mima.gov.my](mailto:nazery@mima.gov.my)

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