

SMALL STATES IN THE CGPCS: DENMARK, WORKING GROUP 2, AND THE END OF THE DEBATE ON AN INTERNATIONAL PIRACY COURT

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SUMMARY

Denmark, a small state with an active foreign policy, hastily entered the arena of counter-piracy operations in the Gulf of Aden in 2008 due to its major maritime interests. Not prepared to prosecute suspected pirates in Danish courts, Denmark realized that it needed a multilateral framework to cope with the issue of an increasing ‘impunity problem’. The establishment of the CGPCS therefore came as a welcome initiative for Danish policymakers, and Denmark took up the responsibility of chairing its legal working group. Chairing working group two, the Danish government sought to weave together the existing mechanisms of national court systems with multinational naval forces in the region. Unable to ‘go-it-alone’, Denmark, a small state with limited resources, an active foreign policy and a major stake in the maritime industry, had been provided with a position to facilitate a multinational framework for solving its own problems, while simultaneously benefitting the international community.

HOW DENMARK BECAME INVOLVED IN THE CGPCS

Denmark, a small state of about 5.6 million people, entered the arena of the counter-piracy operations in the Gulf of Aden and the CGPCS due to its major maritime interests and active foreign policy. When the Danish government first joined the efforts against piracy in 2008, it quickly encountered the problem of impunity and realized that, as a small state with limited resources, it was not able to solve the problem itself. The establishment of the Contact Group on the Piracy off the Coast of Somalia in 2009 therefore came as a welcome initiative for the Danish policymakers, and Denmark took up the responsibility of chairing its legal working group.

Why did Denmark become so involved in the Contact Group, and what was its relation to the piracy in the Gulf of Aden? Two factors contributed to this development. First of all, Denmark had a major economic stake in the global maritime industry. The story begins in June 2007, when the Danish vessel

Danica White was hijacked in the Gulf of Aden and the subsequent escalation of piracy off the coast of Somalia. Piracy became a major economic problem in particular for smaller European states. Denmark has a disproportionately large stake in the maritime industry and, with its ten per cent share of global maritime trade, felt seriously exposed. In more concrete terms, Denmark's maritime trade interests meant that 100 Danish ships could be around the Horn of Africa at any given moment. The Danish Shipowners' Association estimated that piracy cost Danish shipping between 130 to 260 million Euros (1–2 billion DKK) annually.¹ If piracy did not receive wider public attention in Denmark before 2006, it was the hijacking of *Danica White* in June 2007 that hit the nail on the head for the Danish politicians and public. In the three months following the hijacking, the major newspapers in Denmark together published more than 600 articles on piracy in relation to *Danica White*.² The Danish maritime industry had sold its message well. One comment from a major newspaper describes the sentiment of the time well: "As one of the world's most globalized nations, Denmark will bear its share of the price to protect free trade".³ The expectations for action from the Danish media and public were clearly high. The Danish role also needs to be seen in the light of the move to an active and increasingly milita-

rised foreign policy, which led Denmark to take on an increasing role in the peace operations of the 1990s, as well as engaging in increasingly heavier operations that reached a climax with the Danish contribution in Helmand in Afghanistan, from 2002 until present, and in Basra in Iraq from 2003 to 2007. Though a small state, some have compared the increasingly militarised Danish foreign policy to a few of the characteristics of "traditional great power politics".⁴ Others say that as Denmark's foreign policy became more militarised, the Danish population became much more familiar with, and approving of, their country being at war.⁵ When Danish policymakers sent off the first Danish Navy vessel to fight pirates in the Gulf, the Danish Army was heavily involved in Afghanistan at the same time with about 700 men.⁶ Even so, the mission had staunch popular, political and military support.

On 15th January 2008, the Danish government decided to send two navy vessels to the Horn of Africa. That spring, *Thetis*, an older inspection ship, was sent to Somalia to conduct escorts for the World Food Programme going in and out of ports in Somalia, under Security Council Resolution 1772, with approximately 80 sailors and a special operations forces unit.⁷ Later that year, *Absalon*, a brand new flexible support ship, contributed

¹ Danish Shipowners' Association, 'The Challenge of Piracy'; Soefart.dk, 'Pirater Koster Milliarder', *Soefart.dk*, 2012 <<http://soefart.dk/?art=201>> [accessed 25 August 2014].

² Infomedia A/S (Media Intelligence), 'Search for Combination of Words in Major Danish Newspapers in the Period 1 June - 31 August 2007: Danica White Piracy. Newspapers Included: Jyllands-Posten, Kristelig Dagblad, Politiken, Weekendavisen, Information, Børsen, BT, Ekstrabladet.', 2013 <<http://www.infomedia.dk/>>.

³ Berlingske, 'Ledende Artikel: I Nationens Interesse', 24 August 2007.'

⁴ Anders Wivel, 'From Peacemaker to Warmonger? Explaining Denmark's Great Power Politics', *Swiss Political Science Review*, 19 (2013), 298–321 (p. 298).

⁵ Jakobsen, Peter Viggo, 'Danskere Elsker Krig: Hvorfor Er Indsatsen I Afghanistan Så Populær?', *Foreningen af Historielærere ved Handelsgymnasiet*, 2011 (2011), 51–61.

⁶ Ministry of Defence of Denmark and Ministry of Foreign Affairs of Denmark (2008), 'Den Danske Indsats I Afghanistan 2008-2012.'

⁷ Danish Parliament, 'B32 (som Fremsat): Forslag Til Folketingsbeslutning Om Dansk Sømilitært Bidrag Til Ledsagelse Af Skibe Med Nødhjælp Til Somalia Chartret Af FN's Verdensfødevareprogram' (Folketinget, 2008).'

to Combined Task Force 150 with 120 sailors, a tactical command unit of 40 staff officers, a special operations forces unit, and a helicopter. All with the sole purpose of conducting counter-piracy operations in the Gulf of Aden.⁸ *Thetis* arrived in the Gulf for operations in February 2008 and continued as planned until late April. *Absalon* arrived in September, but did not return home until April 2009 after several extensions of operations.⁹ Contributing two ships with a total of 240 men, Denmark had entered a whole new ball game of maritime security operations. The Horn of Africa was well outside the traditional Danish area of operations in Northern Europe.¹⁰

The Danish Navy vessels became familiar with the problem of impunity, or the “put-and-take problem” as one anonymous Navy sailor named it, in the autumn of 2008. *Thetis* came and went during spring without encountering any pirates at all, but *Absalon* came into the fray right away. Most famous is the aftermath of the first apprehension, also called Operation Silent Night. On 17th September 2008, *Absalon* picked up 10 pirates in two small ships, during its first week of operation, but no preparations had been made in the Danish government for such a

coincidence. A Danish navy officer recalls what was general knowledge aboard the *Absalon*, when the crew left for the Gulf of Aden: “What should we do, if we have detained pirates that we believe we can prove are pirates? The answer from the Ministry of Justice was: Then we’ll look at the specific situation, when it occurs”. This disposition made sense in light of the fact that *Thetis* had operated south of the Horn of Africa for three months without ever coming close to such a situation. But in a broader perspective of counter-piracy operations it showed how urgent it was for Denmark to act on the problem, even without a holistic strategy.

Ambassador Thomas Winkler, then Under-Secretary of Legal Affairs in the Danish Ministry of Foreign Affairs, describes the situation: “There was a question in Parliament: What would you do if you caught any pirates? So we asked the task force ... and they said: We don’t. Or words to that effect ... Two weeks after they got down there, we detained the first suspected pirates and had to improvise from there”.¹¹ The Danish government was not prepared for handling suspected pirates, and clearly, other nations were not prepared for this either. On 12th November 2008, the British *HMS Cumberland* had the same experience and ended up transferring the suspected pirates to Kenya by an ad-hoc agreement in a similar way to what the US had done in 2006.¹²

Absalon was left to release the pirates on the Somali coast under cover of darkness – hence Silent Night. However, the story did

⁸ Danish Parliament, ‘B33 (som Fremsat): Forslag Til Folketingsbeslutning Om Dansk Deltagelse Med Sømilitært Bidrag Til Styrkelse Af Den Maritime Sikkerhed Ved Afrikas Horn’ (Folketinget, 2008).’

⁹ SOK, ‘Thetis I FN World Food Programme - Rejsebrev Nr. 50’, *Navy Operational Command of Denmark (Søværnets Operative Kommando)*, 2008 <<http://svaret.dk/SOK/Enheder/THET/thet08/Pages/2008-04-27thet50.aspx>>; SOK, ‘Absalon Ankommer København’, *Navy Operational Command of Denmark (Søværnets Operative Kommando)*, 2009

<<http://forsvaret.dk/SOK/Nyt%20og%20Presse/internationalt/Pages/ABSALONankommerK%C3%B8benhavn.aspx>>.

¹⁰ Geiss, Robin Geiss and Anna Petrig, *Piracy and Armed Robbery at Sea: The Legal Framework for Counter-Piracy Operations in Somalia and the Gulf of Aden* (Oxford University Press, 2011), i.

¹¹ Interview with Thomas Winkler, 7th April 2014.

¹² Douglas Guilfoyle, ‘Counter-Piracy Law Enforcement and Human Rights’, *International and Comparative Law Quarterly*, 59 (2010), 141 (pp. 141–142).

not pass very silently in Copenhagen. The lack of a practical framework for prosecution produced a massive outburst of frustration in Denmark, though the reasoning behind the release was sound. The first consideration was to hand them over to regional states, however the view was that the suspected pirates could risk facing the death penalty. This prohibited Denmark from extraditing them under Danish law. The second consideration was to prosecute them in Denmark, in the absence of an international or regional mechanism at the time. But if convicted, it would be almost impossible for Denmark to forcefully transfer the convicts back to Somalia once their sentences were served. The political instability of Somalia, it was assessed, could make that a hard case, and the Danish government would then end up having former pirates walking the streets of Copenhagen. Nevertheless, when the release came, it neatly displayed the impunity problem to the Danish public and politicians.¹³ No development came about in Copenhagen during that autumn on the impunity problem. On 3 December, *Absalon* encountered two more pirate crews but was unable even to treat them as suspects. The first time, the Danes were denied the right to board the vessel, since the pirates no longer posed a threat. The second time, the Danish were told to treat the pirates as shipwrecked.¹⁴ Something had to be done.

The Danish counter-piracy operations had extraordinary broad support from Danish politicians, the public and industry. The impunity problem was widely perceived as major problem and was taken seriously. Estimates of how many pirates were released at the time due to this problem are speculative, but one report to the UN Security Council assesses the number to have been about 90 per cent.¹⁵ Whether these figures are accurate or not, when the Contact Group was established in January 2009 it was received as a welcome effort of multinational coordination and a venue for discussing the problem of impunity. From the start Denmark became a key partner in the work of this new 'coalition of the willing'. Ambassador Winkler explains: "It was a clear Danish agenda. Ten per cent of the ships in the world are Danish-owned or flagged, so there was a strong group here that had to do something". He adds that when Denmark was asked to participate in the Contact Group "the first answer was of course: Yes, and then shortly after we were asked, if we would like to take lead on the judicial issues".¹⁶ Working Group 2 (WG2) was to advance the "judicial track to arrest, detain and prosecute pirates".¹⁷ The work began from scratch with all states unsure of what road to take.¹⁸ Ambassador Winkler also describes the situation as such: "In 2009. . . we had all the delegates looking at one another and asking, 'What is piracy from a legal perspective, and how do we deal with it?' And there were

¹³ Jyllands-Posten, 'Piraterne Ingen Ville Røre', *Morgenavisen Jyllands-Posten*, 25 September 2008; *Weekendavisen*, 'Pirater: Pirater Og Deres Menneskerettigheder', *Weekendavisen*, 28 November 2008.

¹⁴ *Politiken*, 'Dansk Fregat Må Slippe Piratskib, Mens Nato Er Rådvild over Truslen', *Politiken*, 4 December 2008; *Weekendavisen*, 'Piratjagt: Syv Mænd Med Bare Tæer', *Weekendavisen*, 12 December 2008.

¹⁵ UNSC, 'S/2011/30: Letter Dated 24 January 2011 from the Secretary-General to the President of the Security Council', 2011, p. 13.

¹⁶ Interview with Thomas Winkler, 7th April 2014.

¹⁷ CGPCS, 'Communique of 1st Plenary Session'.

¹⁸ CGPCS, '1st Meeting of Working Group 2 on Legal Issues, 5th March 2009, Vienna'.

very few answers at the time”.¹⁹ The WG2 started out as a meeting venue for like-minded nations. But it very quickly became clear that the member states had quite different ideas about how to solve the impunity problem.

A FRAMEWORK FOR PROSECUTION AND THE END OF THE DEBATE ON AN INTERNATIONAL PIRACY COURT

The legal working group discussed different frameworks, or models, for solving the impunity problem. Some members of the group called for the establishment of an international piracy court. The diverging opinions about the need for establishing such new judicial mechanisms lead to a split of the efforts into two tracks – the national model and the international model. As a small state, Denmark was used to applying a pragmatic approach to problem-solving, but that did not apply to the area of international law. Denmark has traditionally been a strong supporter of basing solutions on international law, thereby achieving legitimacy for sustainable frameworks. The Danish focus on international law has been steadily increasing over the years but picked up additional momentum in 2005-2006, when Denmark was a member of the UN Security Council. With then foreign minister Per Stig Møller in front Denmark - among other things - succeeded in obtaining agreement on a presidential statement about the importance of international law as a foundation for the

UNSC's work, and Denmark was working actively to ensure the passing of Resolution 1593 on Darfur and the International Criminal Court. Finally, the capital of Denmark had given name and venue to the Copenhagen Process on Detention in International Military Operations later in from 2006 to 2012, which reflected Denmark's policy to combine its strong support for international law and human rights on the one hand and the need to find also practical solutions when combatting threats to international peace and security on the other hand.²⁰ Despite this dedication to the traditional route of international law, Denmark increasingly found itself supporting a more ad-hoc national approach to the problem of piracy in at the Horn of Africa due to a sense of urgency.

The proponents of the national model, seeking to build on existing national court systems in the region, counted among their numbers Denmark, the United States and the United Kingdom. The view and motivation of this group was that attempts to establish an international court would *not* result in increased prosecution rates. More likely, it would be time-consuming and costly, thereby stalling the process and on a long-term basis creating an unsustainable framework.²¹ A quicker and more sustainable solution to impunity would be to connect existing national mechanisms to the multinational naval forces in the Gulf, while building capacity within these systems. Without the resources to ‘go-it-alone’, Denmark, for one, was wor-

¹⁹ Danielle A. Zach, D. Conor Seyle and Jens Vestergaard Madsen, *Burden-Sharing Multi-Level Governance*, 2013, p. 12.

²⁰ Interview with Thomas Winkler, 7th April 2014.

²¹ CGPCS, ‘1st Meeting of Working Group 2 on Legal Issues, 5th March 2009, Vienna’, p. 3; CGPCS, ‘4th Meeting of Working Group 2 on Legal Issues, 26-27th November 2009, Copenhagen’, 2009, p. 3; CGPCS, ‘Communique of 3rd Plenary Session’, p. 2.

ried that the much needed resources and political momentum of the international community to set up an international court would move focus away from what was seen as low-hanging fruits. Ambassador Winkler put it this way: “From the outset there was actually a quite good legal basis in international law, but we still needed to identify it, interpret it, to get a common approach to what was actually in the legal framework”.²² The advocates of the international model, setting up an international piracy court or a specialized piracy chamber in the region, were, in particular, France, Portugal, Russia and Germany. The motivation for this group seems to have been the lack of judicial capacity in the East Africa at the time. Meeting summaries from the WG2 are sparse on information about their motivations, but the documents display a call for increased prosecution rates and request “regional or international mechanisms when national prosecution is not possible”.²³ To proponents of an international model, it must have seemed like there was not enough progress with the national framework alone. Furthermore, one might argue that an international element would also have brought an extra degree of transparency and legitimacy to an area of increasing interest of the world opinion. Finally, a string of politicians in European governments had expressed a wish for such a court only a month before, for instance the German minister of defence argued: “It needs to be an international authority. No one wants a ‘Guantánamo on the sea’”.²⁴ A

few weeks before that the Danish Minister of Foreign Affairs Per Stig Møller had urged the UN to set up piracy court.²⁵ While Minister Møller, and Denmark, might have changed his mind about the issue later, the concept stuck with the media – solving international problems requires international solutions.

Despite the disagreement, more and more states joined the national model and the number of pirates under prosecution rose. This followed from the informal and pragmatic working processes of the CGPCS, which did not require states to agree but neither granted the Contact Group decision authority. Accordingly, states in the legal working group could use whatever they found useful, since the agreed task of the group was to “provide specific, practical and legally sound guidance”, not to stipulate norms or rules.²⁶ In the words of the Dutch Ambassador Henk Swarttouw, in the Contact Group, one could “agree to disagree, that is where many of these international organisations get stuck on one or another issue”.²⁷ For Denmark, this was a useful model. But the Danish chairmanship of the legal working group was worried that the focus on an international piracy court would divert valuable efforts from some states taking action on a national level. This could postpone a solution and result in continuous high rates of attacks, hijackings and more suspected pirates walking away unpunished, which neither Danish maritime stakeholders

²² Zach et al. p. 22.

²³ CGPCS, ‘1st Meeting of Working Group 2 on Legal Issues, 5th March 2009, Vienna’, p. 3.

²⁴ New York Times, ‘Germany Calls for International Piracy Court’, 2008 <<http://www.nytimes.com/2008/12/23/world/africa/23iht->

[23germanpirates-FW.18893813.html?_r=1&>](http://www.nytimes.com/2008/12/23/world/africa/23iht-23germanpirates-FW.18893813.html?_r=1&>) [accessed 25 August 2014].

²⁵ Politiken, ‘Dansk Fregat Må Slippe Piratskib, Mens Nato Er Rådvild over Truslen’, *Politiken*, 4 December 2008.

²⁶ CGPCS, ‘3rd Meeting of Working Group 2 on Legal Issues, 26-27th August 2009, Copenhagen’, p. 1.

²⁷ Zach et al. p. 38.

nor the government could afford. To Ambassador Winkler, the way forward seemed clear: "International support to the states in the region was the way forward. The UNODC had counseled the Seychelles for many years on counterpiracy law, which meant that we had a pretty modern legislation in the region. There was not a hole. There were practicalities. How do we get an agreement between Denmark and the Seychelles? We already had one with Kenya".²⁸ The US was concerned as well. According to Donna Hopkins, coordinator of counter piracy activities at the U.S. State Department's Bureau of Political-Military Affairs, an international piracy court was "not going to solve the problem". There were too many problems, including jurisdiction and expense, with an international court. If the estimated expense was to be hundreds of thousands dollars per convict, then who would fund the transportation, prosecution, and eventual repatriation of the hundreds of pirates being pulled in by the naval coalition forces? Who would find, designate and fund international prisons and personnel? And under which jurisdictions and laws would both court and prisons operate, since they would be located in the territory of one or more sovereign states? These were much more complex and expensive questions than those concerning the national model of bilateral agreements for prosecution.²⁹

A unique feature of the informality within the Contact Group was the opportunity to bring in outside expertise to support the work. Denmark took advantage of this opportunity multiple times. Over time a hand-

ful of legal experts, who became involved in this way, helped form the debate on the prosecution framework. One of them was Dr. Douglas Guilfoyle, University College London, who was initially tasked, at WG2's second meeting, with the preparation of a compilation of the international legal basis for prosecution of suspected pirates by WG2 as early as its second meeting.³⁰ Calling himself an "outsider on the inside", he too noticed how the question of the prosecution framework became a pivotal debate at several WG2 meetings: "It was an idea that kept coming back", he says about the concept of an international piracy court.³¹ However, some countries seemed stuck on a political road that was hard to backtrack from: "a number of governments, including Russia, were somewhat politically embarrassed by a catch-and-release episode ... often a government would make a lot of noise about 'We are going to prosecute these pirates we've captured' and then for whatever reason they let them go often because of a lack of a national law under which to prosecute them". He adds, "I think in the Russian case then president Medvedev said 'Well, obviously there should be an international piracy tribunal', and that became the Russian national position for quite a while".³² Another legal expert was Associate Professor Birgit Feldtmann from Southern Denmark University. She had followed the development on judicial responses to piracy in the Gulf and was later brought in as an adviser to the working group as well. "It was still-born from the beginning", she says referring to

²⁸ Interview with Thomas Winkler, 7th April 2014.

²⁹ Interview with Donna Hopkins, 6th June 2014.

³⁰ CGPCS, '2nd Meeting of Working Group 2 on Legal Issues, 5-6th May 2009, Copenhagen', p. 2.

³¹ Interview with Douglas Guilfoyle, 19th June 2014.

³² Interview with Douglas Guilfoyle, 19th June 2014.

the idea of an international piracy court. In her opinion, the proponents of an international solution should have looked at how long and complex a process it was to establish the International Criminal Court to handle as serious events as crimes against humanity or genocide. Even then, major states failed to ratify the court. How should they be able to find the political momentum to agree on the limits of an international court on an issue of organized crime? With all due respect for the victims of piracy, the issue was on a different ‘level’ in the perspective of world politics.³³ Still, several member states continued to press for the establishment of an international piracy tribunal. On 7 July 2009, the Dutch government held a workshop on the topic in The Hague, where a joint German-Russian paper “Towards an International Tribunal for the Prosecution of Pirates” was presented. Furthermore, Portugal presented its own paper on the establishment of a “Somali special chamber” made up of Somali judges placed outside Somali territory, also called a “hybrid court”. With the continuous interest from key members of the working group in establishing a court with an international element, the topic demanded attention from the Danish chair. Perhaps in order to gain a measure of control over the discussion, the chair proposed to produce a paper on the issue.³⁴ Although discussion and ideas were much welcomed in the group, this represented the fear that Denmark had had about resources becoming split into two tracks – resulting in a potential lessened impact on the impunity problem. Something had to be done for the

group to identify the most viable strategy and fast track it to achieve an end to impunity.

Later that year, on the 20th – 21st of October, another expert meeting was held in The Hague, but this event turned out differently. Winds started blowing against an international court. In the words of the chairman’s conclusions: “The Netherlands reported on the Hague meeting and concluded that *few* States and organisations supported the establishment of a full-fledged international or regional [extraterritorial] hybrid court. Instead *many* States and organisations pointed to the need to support existing mechanisms of prosecutions through capacity building”.³⁵ This represented a large step away from earlier statements. At earlier meetings further discussion had been encouraged and no final position had been taken on the pursuit of an international model. The chair brought forward further findings, for example a conclusion that no state in the region, during consultations with states and organisations in the region, wanted an international model or an extraterritorial court. Instead, they would rather receive the capacity building necessary to do the work themselves. The support of the international community “should add value to the already existing mechanisms”, thereby enabling national courts “to prosecute pirates through capacity building” until Somalia could do this on its own.³⁶ Ambassador Winkler recalls his visit to the regional states, and how he reported back to WG2: “I have spoken to the Somalis. They think it’s a really bad idea, because

³³ Interview with Birgit Feldtmann, 23rd May 2014.

³⁴ CGPCS, ‘3rd Meeting of Working Group 2 on Legal Issues, 26-27th August 2009, Copenhagen’, p. 3.

³⁵ CGPCS, ‘4th Meeting of Working Group 2 on Legal Issues, 26-27th November 2009, Copenhagen’, p. 3 *cursive added*.

³⁶ CGPCS, ‘4th Meeting of Working Group 2 on Legal Issues, 26-27th November 2009, Copenhagen’, p. 3.

they would rather have us use the resources on educating judges in Somalia than sending their few ones – there were only about ten judges in Somalia at the time – to Tanzania”.³⁷ However, the Danish chair also admitted “States and organisations continue to have different views on the need to establish additional mechanism [sic] for prosecution and that it was for the CGPCS to take appropriate decision on this matter.”³⁸ Later, this became an omen for what seemed the last days of the aspirations for an international piracy court and at the fifth CGPCS plenary, the international court was declared dead. States and organisations were called upon “in the strongest possible terms” to “step up assistance to targeted judicial capacity building in the region” rather than continue efforts for an international court. A small hatch was left open for “establishing specialized or dedicated piracy chambers” in the region.³⁹ But the aspiration of an international piracy court was dead.

DEAD MAN WALKING? WHITTLING AWAY AN EXTRATERRITORIAL COURT

To the dismay of Danish policymakers, the diverging opinions about the need for establishing such new judicial mechanisms lead to a split of the efforts to into two tracks – the national model and the international model. However, the informal working process of the CGPCS meant that the develop-

ment of the national model could move forward nonetheless. When the CGPCS declared the idea of an international piracy court dead, one would have thought that the case would rest there. But things turned out differently. On the 27th April 2010, the UN Security Council passed Resolution 1918 (2010) requesting the Secretary General to present a report on piracy considering the options for “creating special domestic chambers possible with international components, a regional tribunal or an international tribunal”.⁴⁰ Why the issue was taken to the level of the Security Council is unclear, but the increasing political attention of the issue was deemed to make it harder for a small state to manoeuvre and endure in its efforts to ensure progress under its leadership. It was clear that the informal CGPCS-model, carrying no decision authority over its member states and organisations, had not convinced all of its members. Nevertheless, the Contact Group and the chairmanship gave Denmark a platform to work from and expand the use of the national model. In fact, despite the seeming challenge of the national model from the UNSC, the Chairman struck an optimistic note in the working group in May 2010. From his perspective, the national model was demonstrating “significant progress” as well as an “increase in the number of national piracy trials”.⁴¹ A host of states were taking in suspected pirates for trial and discussions were forming on a new post-trial transfer system for taking convicts to Somalia.⁴² But a little less than a

³⁷ Interview with Thomas Winkler, 7th April 2014.

³⁸ CGPCS, ‘3rd Meeting of Working Group 2 on Legal Issues, 26-27th August 2009, Copenhagen’.

³⁹ CGPCS, ‘Communique of 5th Plenary Session’, p. 3.

⁴⁰ UNSC, ‘Resolution 1918 (2010)’ (United Nation Security Council, 2010), p. 3.

⁴¹ CGPCS, ‘5th Meeting of Working Group 2 on Legal Issues, 17-18th May 2010, Copenhagen’, p. 1.

⁴² CGPCS, ‘5th Meeting of Working Group 2 on Legal Issues, 17-18th May 2010, Copenhagen’, pp. 1–3.

year later, on 25th January 2011, the extraterritorial court was back on the table of the UNSC. The Council was presented with a report from the Secretary General's newly appointed Special Adviser Jack Lang on piracy in the Gulf of Aden, which recommended the establishment of a Somali extraterritorial court on top of "building of Somali judicial capacity fairly quickly". The plan was detailed and ambitious. Perhaps a little too ambitious, since only five per cent of the 242 Somali judges and prosecutors had the legal training required to prosecute Somali pirates.⁴³ The plan had been presented earlier to Working Group 2, but the group had chosen to continue its work on the national model. Though some were interested, the majority had confidence in the existing national model and seemed afraid, as with the aspirations of an international court, that efforts towards an extraterritorial court might divert critical time and resources from what was already working.⁴⁴ The working group, as such, was demonstrating itself as a resilient working platform for the Danish preference to the national model.

From this point onwards, the process of the working group and the Council split into two completely different directions. On 11th April 2011, the Council accepted the Special Adviser's plan for the extraterritorial court and requested further information on how to implement it.⁴⁵ In contrast, from 3rd March 2011 and onward, the working group simply stopped having substantial discussions on any extraterritorial or international court so-

lutions. Instead it chose to focus on improving the national model and setting up a post-trial transfer system. The results were clear. Of the estimated 824 total prosecutions under way or completed already by then, the lion's share of about 670 cases were processed in regional states and within three months the number of total prosecutions rose by 26 per cent to 1045.⁴⁶ On 15th June 2011, the Special Adviser returned with information that one should have thought would have shaken the foundation of the court. Upon consultation with more than seven ministers from the TFG, Puntland, Somaliland and Galmadug, it turned out that the Somalis did not want an extraterritorial court. Generally, the view was that it is "not a good idea". Even though it had been "discussed many times among Somalis", the ministers "never agreed to the concept of an extraterritorial court", and clearly "expresses concern about diverting capacity building resources from Somalia". Meanwhile, the Seychelles, who were already effectively prosecuting suspected pirates and recently set up post-trial transfer system with Somalia, were also hesitant of the concept. The only regional countries open to the suggestion were those not yet contributing, but on the verge of doing so – Tanzania and Mauritius.⁴⁷ On 24th Oct 2011, the Council requested that the Secretary General politely ask again ("further consult with Somalia and regional States") though the Somalis had by then stated twice, when including the WG2 meeting in 2009, that they were not interest-

⁴³ UNSC, 'S/2011/30: Letter Dated 24 January 2011 from the Secretary-General to the President of the Security Council', pp. §34, 38–40.

⁴⁴ CGPCS, '6th Meeting of Working Group 2 on Legal Issues, 2-3rd November 2010, Copenhagen', p. 7.

⁴⁵ UNSC, 'Resolution 1976 (2011)', 2011, p. 5.

⁴⁶ CGPCS, '7th Meeting of Working Group 2 on Legal Issues, 3-4th March 2011, Copenhagen', p. 2; CGPCS, 'Communique of 8th Plenary Session', p. 2.

⁴⁷ UNSC, 'S/2011/360: Report of the Secretary-General on the Modalities for the Establishment of Specialized Somali Anti-Piracy Courts' (UNSC, 2011), pp. §52–55; §57–59.

ed.⁴⁸ The Council kept reiterating its position, requesting the implementation of an extraterritorial court.⁴⁹ In fact, it was not until two years later, on 18th November 2013, that the aspirations of an extraterritorial court evaporated. At that point the Council acknowledged that piracy at the coast of Somalia was at its lowest since 2006. At the same time, it commended Kenya, Mauritius, the Seychelles and Tanzania for the work they have done in their national courts.⁵⁰

Summing up, it took the Security Council a long time to accept the national model as a final framework. Part of that may possibly have been attributed to the continuously high number of attacks, hijackings and suspected pirates evading prosecution. But some of it, at least, seems to have been a lack of knowledge about what was in fact already in place. When reflecting on the achievements of the legal working group, Ambassador Winkler said: “We have gone from a situation in which there was very little knowledge or clarity on the legal issues to a situation where there is much clarity”.⁵¹ Dr. Guilfoyle analyses the situation in a similar manner, putting weight on the gap of information and balancing of expectations in the international community: “The idea of an international piracy court entered this process of being whittled away from ‘Well, it should be an international piracy tribunal’ to ‘it should be an international tribunal or a mixed UN-national tribunal ... or it could be that we provide international support to national prosecutions in select jurisdictions but

we could call that a piracy prosecution centre’ to the realisation that ‘Oh, that piracy prosecution centre model is what we already actually do in practice.’”⁵² As such, the national model became the best solution available at the time. The international court was discarded for the lack of regional support as well as the costly and complex process anticipated for its establishment, while the call for an extraterritorial court evaporated as soon as the piracy threat had resumed to what was regarded as ‘normal’.

It is clear that Denmark would not have been able to withstand the pressure of the Security Council without the platform of the Contact Group and Working Group 2. These enabled the Danish chairmanship to advocate its solutions and knowledge. The Contact Group provided a special opportunity for small states with maritime interests to take the lead in the sense that it provided a pragmatic and issue-specific arena for problem solving. With no terms of reference, the focus of the Contact Group was on the issue of piracy rather than on organisational formalities. Small states cannot afford too many formalities and must focus their limited resources on a few selected subjects in order to gain influence, since one must dedicate subsequently more time, money and manpower to achieve progress. The Contact Group was unique in the sense that it not only had a very narrow focus but also enabled states to take action on an issue, which was, in fact, a shared concern among all involved states. This meant less diplomatic foot-dragging and lowered costs of being actively taking part in solving the problem. With the barriers of entry to influence and

⁴⁸ UNSC, ‘Resolution 2015 (2011)’, 2011, pp. 4–5.

⁴⁹ UNSC, ‘Resolution 2020 (2011)’, 2011, p. 6; UNSC, ‘Resolution 2077 (2012)’, 2012, p. 7.

⁵⁰ UNSC, ‘Resolution 2125 (2013)’, 2013, p. 4.

⁵¹ Zach et al. p. 38.

⁵² Interview with Douglas Guilfoyle, 19th June 2014.

impact lowered, Denmark was able and willing to dedicate a comparably large amount of time, money and manpower to take the lead on solving the impunity problem. Had the barriers had been higher and the margins of progress lower, the Danish government would probably have thought twice about continuously devoting such resources to the elimination of piracy in the Gulf, most likely seeking out and testing other venues for influence as well.⁵³ However, that was not how things turned. Instead, unable to ‘go-it-alone’, Denmark, as a small state with limited resources, an active foreign policy and a major stake in the maritime industry, had been given a position with the opportunity to facilitate a multinational framework for solving its own problems, while simultaneously benefitting the international community.

LESSONS LEARNED

A handful of lessons can be drawn from this case study:

- First, the comparative advantage of the international community is not necessarily to be the implementing party, but rather its ability to convey legitimacy to implementing partners;
- Second, the challenge of problem-solving does not always lie in establishing new

mechanisms but in weaving together existing mechanisms, complimented by new ideas, in order to provide a new solution for a new problem;

- Third, in a globalized world, small states can act as effective leaders and facilitators on low-politics issues on behalf of and to the benefit of the international community, given that they have the right resources, motivation and international support.

Beginning with the first lesson, the ability of the international community to convey legitimacy to its implementing partners was essential to the success of the national model. The international and the extraterritorial piracy courts were respectable ideas, but perhaps unnecessary in the situation. The efforts to set up an international or extraterritorial court could have increased the legitimacy of the prosecution process. But it might also have stalled the prosecutions while doing so, since establishing such courts by experience require gargantuan political and economic efforts. The informality and openness of the legal working group, and CGPCS in general, ensured that ideas and initiatives could flow quicker and more freely than they could in the Security Council. In hindsight, it seems the national model was the best solution available at the time, not least in the light of the financial crisis from 2008 and forward. The CGPCS was able to reach this conclusion before the Council partly due to its organisational character. Another explanation for the prolonged insistence on establishing courts with international elements could origin from an organisational turf consciousness within parts of the UN. However, that is a question, which requires further research and organi-

⁵³ The total costs of Denmark’s military and diplomatic engagements is still to be determined. One indication, however, is how the Danish Ministry of Defense expected to spend more than 25 mio. Euros in 2014 on military operations and capacity-building alone (See the Ministry’s performance contract for 2014). Keeping in mind the continuous Danish contribution since early 2008, and adding the costs of Danish diplomatic efforts in relation to Working Group 2, should put the figure into perspective.

sational context, especially from within the UN. Speculations aside, the working groups were an efficient decentralisation of a task to solve an international problem.

This leads to the second lesson. The success of the national model shows that the challenge of problem-solving does not always lie in establishing new mechanisms but in weaving together existing mechanisms, complimented by new ideas, in order to provide a new solution for a new problem. It was not always obvious that the national model could tackle the impunity problem, e.g. when attacks and hijackings reached a climax in 2010 and 2011. But with the platform of the Contact Group and Working Group 2, a small state like Denmark could lead the hard, systematic work of weaving together national judicial mechanisms in the region and multinational naval forces through bilateral agreements came through successfully. Of course, the piracy problem itself was not solved, for now on sea, by solving impunity. Multiple factors contributed to this end – from best management practices and national judicial mechanisms to private guards and multinational naval forces – and the future safety of global trade at the Horn of Africa would look uncertain, if the multinational forces left before capable coast guard units have been set up in the region. However, the national model did prove a workable solution to impunity. The international community must be ready to react with the same speed and efficiency in weaving a new solution from existing mechanisms as it did in the Gulf of Aden for cases of piracy that might emerge in other regions. Then, an assessment can be made whether the problem is of a nature that it

requires an institution of its own to handle it on a long-term basis.

Finally, the third lesson relates specifically to small states. The Contact Group enabled the Danish government to devote time and resources to, as well as lead a process on, solving the specific issue of piracy and impunity in the Gulf, without having to tackle too many formalities. The Danish government certainly had the political-economic incentive, the judicial competence and the necessary facilitator skills to take on the responsibility of chairing the legal working group. But without the platform of the Contact Group and Working Group 2, it is questionable whether Denmark would have had as much ‘bang for the buck’ in its counter-piracy efforts or the self-confidence to silently defy the (initial) will of the Security Council. Small states rarely devote their limited resources to issues that are not in their direct interest. Giving Denmark this position was not only the inclusion of a state involved in the military side of counter-piracy operations. It was also a smart move, which gave a small state, exceptionally dependent on the safety of global sea lanes and without the means to ‘go-it-alone’, the opportunity to gather cooperative efforts and create a framework to solve its own problems but which could also benefit the international community. Furthermore, the informal character of the meetings in the Contact Group was a contributing factor. On the one hand, some degree of formality in international affairs can provide legitimacy as well as act as an enabler to small state participation by giving them a seat at the table. On the other, too much of it can also hamper the ability of small states to lead on specific issues as

the barriers of entry increase with the degree of formality. Small states simply cannot afford to engage in too many subjects and areas of interest with a greater degree of formality and must focus its resources sharply. Therefore, it was crucial that combating piracy was never a controversial issue and that Denmark, in general, enjoyed the support of the international community for its actions. Traditionally, when the status quo benefits one or more major states, this leaves small states short of resources to engage in the facilitation of long-term discussions on an international issue. However, states cannot tolerate piracy, since it imposes unnecessary costs to their economies and risks to their sailors. This ensured, despite piracy being a security issue, a greater space for action for small states. This leads to the tentative lesson that small states, in a globalized world, can act as effective leaders and facilitators on low-politics issues on behalf of and to the benefit of the international community, given that they have the right resources, motivation and international support.

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