

EU Governance of the Threat of Piracy Off the Coast of Somalia

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1 Introduction

Global emergencies differ, and can entail humanitarian disasters, natural or ecological disasters, terrorism, or—as discussed in this case—piracy. The focus of this contribution will be on how the latter type of emergency is governed by the EU.¹ The term ‘governance’ describes the framework of powers and capabilities available to deal with a certain problem. The key question is how the problem of piracy is managed in general and whether the EU action passes a certain quality threshold and could provide any relief.

In the first section, the problem of piracy off the coast of Somalia is analysed with special attention given to the root causes. Next, an overview will be provided of the kaleidoscope of international responses to the problem, the number of actors involved, and the many attempts undertaken to coordinate all these initiatives. Subsequently, the role of the EU, its powers and capacities to deal with the issue, and the initiatives it has taken to contribute to combating piracy will be explored. Finally, the question is asked whether one can talk of a comprehensive approach to combating piracy and whether the EU action shows a genuine added value for dealing with the problem.

¹ This contribution is based on a presentation given during the conference *EU Governance of Global Emergencies*, which took place on 22–23 October 2012 in Brussels. It also takes inspiration from an article written for the symposium issue on piracy of the *Journal of International Criminal Justice* with co-author Lennart Landman, entitled: “In search of a Sustainable and Coherent Strategy: Assessing the Kaleidoscope of Counter-piracy Activities in Somalia”, 10 (4), 2012, pp. 727–748; a presentation given in Mumbai on 24 November 2012 on the occasion of the port visit of the HNLMS Rotterdam; and a paper providing food-for-thought on the future of the Contact Group on Piracy Off the Coast of Somalia commissioned by the Dutch Ministry of Foreign Affairs, written with Frans-Paul van der Putten.

2 The Problem of Piracy Off the Coast of Somalia

Somalia is the classic example of modern state collapse. Since the fall of the Siad Barre regime in 1991 and the bloody civil war that followed, there has been a state of chaos and lack of state authority, which has allowed piracy to grow into the structured form in which it is now presented to us.² One of the main challenges in terms of Somali society stems from the lack of agreement on the structure of the political system and how the system should accommodate the claims to power of rebel groups of warlords and others, that also find their basis in the clan system and the egalitarian structure of the primarily pastoral and agro-pastoral Somali communities.³ Moreover, the growing power of pirate groups destabilises the authority of local governments by forcing the latter to choose either to support such pirate groups or lose the financial resources which they can bring to the community. Young pirates, who have recently become wealthy, might moreover call into question the power of clan leaders.⁴ Speaking of one Somalia, in terms of one sovereign state with effective control over its territory, is not possible. In particular the regions in the north, Somaliland and Puntland, function quite autonomously. Somaliland, which declared independence in 1991, has always been opposed by the Transitional Federal Government (TFG) and most of the international community. Puntland was established in 1998 as a non-secessionist federal state.

Furthermore, the 'official' government in Mogadishu is struggling with the militant Islamic group Al Shabaab, which controls large parts of South-Central Somalia, and was moreover struck by a major drought and famine in recent years. Puntland in particular is considered the epicentre of piracy, harbouring most of the pirates, and home to the ports where ships dock during ransom negotiations.⁵ As most members of the international community do not

2 See for more elaborate discussion of this topic for instance: J. Peter Pham, "The Failed State and Regional Dimensions of Somali Piracy", in: B. van Ginkel and F. van der Putten (eds.), *The International Response to Somali Piracy; Challenges and Opportunities*, Leiden/Boston: Martinus Nijhoff Publishers, 2010, pp. 31–64, or J. Dua and K. Menkhaus, "The Context of Contemporary Piracy: The Case of Somalia", *Journal of International Criminal Justice* 10 (4), 2012, pp. 749–766.

3 H. Ehrhart and K. Petretto, "The EU and Somalia: Counter-Piracy and the Question of a Comprehensive Approach", *Study for the Greens/European Free Alliance*, Hamburg, February 2012, p. 6.

4 J. Lang, 'Report of the Special Adviser to the Secretary-General on Legal Issues Related to Piracy off the Coast of Somalia', UN Doc S/2011/30, 24 January 2011, para. 22–23.

5 Lang, *op. cit.*, para. 19–20.

recognise the autonomy of Puntland, official 'aid' relations have been difficult,⁶ as this has been considered a *de facto* recognition of the autonomous state of Puntland. Yet, a broad consensus has emerged among experts that a bottom-up approach is more effective than a top-down strategy⁷ where every official contact requires to be arranged through Mogadishu. Currently, there seems to be more room for this regional approach. At the end of 2012, the TFG was replaced by a regularly elected government and parliament, which was one of the milestones of the September 2011 Roadmap on the ending of the transition period.⁸ Yet this government is only sustained with the support of troops of the African Union Mission in Somalia (AMISOM)⁹ capable of controlling the capital city Mogadishu and regions along most of the borderline of South Central Somalia, leaving a large part of the country as ungoverned territory. Clearly, the new government faces major challenges, yet in general, one is hopeful, also because better prospects for ownership and leadership including at regional and district level have been created. A key element in this respect has been the important role attributed to traditional elders in this process. Another essential element though, is the need to bring the problem of Somalia 'home' and let Somalia deal with the problem of Somalia. This understanding is fully in line with the Busan principle of the 'New Deal' approach for aid effectiveness.¹⁰

Since Somalia is a failed State, both a functioning law enforcement system and coast guard to deal with the specific problem of piracy are lacking. Other root causes of the piracy problem can be found in the lack of options for subsistence on land and the problems caused by illegal fishing by big foreign fishing trawlers in the unguarded seas of Somalia as well as the dumping of toxic waste. These issues have damaged the growing dependence¹¹ of the Somali population on the country's marine resources.¹²

The illegal fishing and toxic waste dumping activities have fed into the local narrative that the piracy activities were a justified response to protect the waters, by demanding fees for 'licences' to fish in the waters they protected. However, what might have started out as genuine grievances, soon turned

6 Interview with policy adviser of the Dutch Ministry of Foreign Affairs, September 2009.

7 Pham, *op. cit.*, p. 53.

8 See the signed Transition Roadmap on Somalia available at: <<http://unpos.unmissions.org/Portals/UNPOS/Repository%20UNPOS/110906%20-%20Initialled%20Roadmap.pdf>>

9 <<http://amisom-au.org/>>.

10 During a High Level Forum on Aid Effectiveness in November 2011 in Busan, the g7+ of fragile and conflict affected states agreed on a New Deal for Engagement in Fragile States.

11 Dua and Menkhaus, *op. cit.* p. 753.

12 Lang, *op. cit.*, para. 12.

into a well-organised business model based on the simple driver of greed.¹³ Guesstimates show that an average pirate gets a cut of earnings of between \$30,000 and \$40,000 annually, with high estimates of up to \$78,000. Clearly, this is in stark contrast to the \$500 per capita GDP in Somalia, resulting in an economy that more and more depends on the support of pirates for entire villages with the approval of clan chiefs and members of the diaspora.¹⁴

In addition to the circumstances caused by the internal situation in Somalia, the geographical setting has also played a significant role in the steep increase in piracy in the region. Piracy is mainly a crime of opportunity and such opportunities have been plentiful with the sea lines of communications (SLOCs) passing through the area, with the Gulf of Aden as one of its chocking points through which 33,000 ships pass each year transporting 7% of world's trade, and the vastness of the area (2,000,000 sq nmi), making it hard to secure the whole region. Furthermore, certainly in the early stages of the increase in the piracy problem, many ships lacked proper protection, and slow speed and low freeboards made it rather easy to step on board.

Although the problem of piracy has always existed, the statistics of the International Maritime Organisation (IMO) show a stark increase between 2008 and 2010. In the period from 1998 to 2007 there were approximately 25 to 50 piracy incidents per year off the East African coast, in 2008 there were 73, in 2009 there were 222 and in 2010 there were 172.¹⁵ 2011 still showed an increase in the number of piracy incidents, but the success rate dropped from 28% in 2010 to 12% in 2011.¹⁶ This decrease in successful piracy attacks has

13 Pham, *op. cit.*, p. 43; Dua and Menkhaus, *op. cit.*, pp. 749–766; Lang, *op. cit.*, para. 16.

14 B. van Ginkel and L. Landman, "In search of a Sustainable and Coherent Strategy: Assessing the Kaleidoscope of Counter-piracy Activities in Somalia", *Journal of International Criminal Justice* 10(4), September 2012, p. 730; Lang, *op. cit.*, para. 16.

15 International Maritime Organization, *Annual Piracy Statistics Report* (2008; 2009; 2010), available at: <<http://www.imo.org/OurWork/Security/SecDocs/Pages/Maritime-Security.aspx>> (accessed 20 January 2013).

16 Commercial Crime Services International Maritime Bureau, "As World Piracy Hits High More Ships are Escaping Somali Pirates Says", *IMB News*, available at <<http://www.icc-ccs.org/news/710-as-world-piracy-hits-a-new-high-more-ships-are-escaping-somali-pirates-says-imb-report>> (accessed 15 July 2013). Reports may disagree on exact figures due to unreported incidents and false alarms muddling the estimates, but the upward trend since 2008 is clear. The 2010 annual report of the International Maritime Bureau reports 'Somali piracy' incidents as numbering 22 in 2006, 51 in 2007, 111 in 2008, 218 in 2009 and 219 in 2010. The 2011 annual report of the International Maritime Bureau (IMB) notes 237 incidents of Somali piracy. These resulted in 28 successful hijackings, 470 seafarers being taken hostage, and 8 seafarers being killed. Commercial Crime Services International

been attributed to effective sea-based counter-piracy initiatives such as self-protection measures of commercial ships in accordance with the Best Management Practices 4 (BMP4)¹⁷ and the presence of naval ships.

The *modus operandi* of the pirates in the region is different from that of pirates elsewhere, because they are not so much interested in the theft of the ships' cargo and the crew's belongings, but rather hijack in order to negotiate ransom payments for release. These ransom demands have also increased tremendously over recent years, going from an average of a few hundred thousand dollars in 2006 to \$5.5 million in 2010.¹⁸ As a result, insurance rates have skyrocketed over recent years, also contributing to an estimated total economic cost of piracy off the coast of Somalia of between 4.9 and 8.3 billion dollars for 2010.¹⁹

The area of operation of the pirates has also changed over recent years. In the early stages the main area of operation was near the coast line and in the Gulf of Aden, but due to the intensified surveillance of naval ships the pirates have moved as far as 1,750 nautical miles off the coast, and there have been reports of incidents as far away as the Red Sea, off the coast of India, as well as near Madagascar and the Seychelles.

Notwithstanding the large presence of naval ships, the deterrence factor in terms of fear of prosecution after arrest has not proved capable of playing a key role. On the contrary, in 2011 over 90% of the pirates apprehended by states patrolling the area were released without being prosecuted, because of lack of interest or lack of ability by states to prosecute. Although there is universal jurisdiction to prosecute, there is no universal obligation to do so, which means that it falls within the state prosecutor's discretion to decide whether they want to prosecute, if the state has implemented the relevant international

Maritime Bureau, *Piracy and armed robbery against ships Annual report January 1–31 December 2011* (2012), at p. 20.

17 This is a manual of "Suggested Planning and Operational Practices for Ship Operators and Masters of Ships Transiting the High Risk Area".

18 R. Middleton, "Trends in Piracy: A Global Problem with Somalia at the Core (2011)", available at <http://counterpiracy.ae/background_papers.html> (accessed 15 January 2013), at p. 2. Elsewhere, international law firm Ince & Co estimated that the average ransom payment had doubled from \$2 million in January 2010 to \$4 million by March 2011, see MARSH, *Piracy—the insurance implications* (2011).

19 Geopolitics, *The Economic Costs of Piracy: Pirate Ransoms & Livelihoods off the Coast of Somalia* (2011). Another study estimates the costs of piracy worldwide at 7 to 12 billion dollars annually: One Earth Future, *The Economic Costs of Maritime Piracy*, One Earth Future Working Paper, December 2010.

law into national legislation.²⁰ States might also decide not to prosecute due to the fear that pirates may apply for asylum.²¹ Furthermore, legal shortcomings such as the absence of a clause in the criminal code prohibiting the *intent* to commit piracy might pose a problem for successful prosecution.²² This problem of impunity is being referred to as the ‘catch and release’ practice.²³

3 The International Response to Piracy Off the Coast of Somalia

In 2008, the rise in piracy attacks off the Coast of Somalia as well as the amounts of the ransoms, attracted worldwide media attention. However, piracy is certainly not a new phenomenon. After all, pirates have for a long time been considered ‘*hostis humani generis*’. The international response to the problem off the coast of Somalia, so far, has taken the form of a sea-based approach, a land-based approach, and a variety of initiatives coming from the private sector.

In a way it is surprising that it took until 2008 before the international community really started to pay attention, since in 2004 and 2005 many of the humanitarian transportations of the World Food Program (WFP) were already under attack. Whereas no additional actions were undertaken at first, in 2007, the IMO and WFP issued a joined communiqué in which they called for a more concerted effort to combat piracy. They argued for the need to allow ships, according to the powers attributed to war ships in Article 107 of the United Nations Convention on the Law of the Seas (UNCLOS), to enter Somali territorial waters to protect transportations of food.²⁴ France was the first nation to start escorting WFP ships in 2007, followed by Denmark, the Netherlands and Canada.²⁵

In 2008, the United Nations Security Council (UNSC) adopted Resolution 1816 (followed by numerous other resolutions) determining that piracy committed in Somali territorial waters was considered a threat to international

20 D. Guilfoyle, “The legal challenges in fighting piracy”, in: B. van Ginkel and F. van der Putten (eds.), *The International Response to Somali piracy; Challenges and Opportunities*, Leiden/Boston: Martinus Nijhoff Publishers, 2010, pp. 127–152.

21 Ehrhart and Petretto, *op. cit.*, p. 38.

22 *Ibid.*

23 Lang, *op. cit.*, para. 14. See also Preambles to UNSC Resolutions 1976 (2011), 1950(2010), 1918 (2010), 1897 (2009), and 1851 (2008).

24 International Maritime Organisation and World Food Programme, *Joint Communiqué*, 7 July 2007.

25 World Food Programme, WFP *press releases*, 2 October 2007, 2 February 2008, 8 August 2008, 26 September 2008, 23 October 2008 and 19 November 2008.

peace and security and authorizing international naval forces with the consent of the Somali authorities to conduct counter-piracy operations in Somali waters.²⁶ This created an exceptional situation, as was stressed by many states, since according to public international law, naval interventions by foreign states cannot take place within territorial waters.²⁷ They emphasized that this ability to act against what is legally termed 'armed robbery at sea' (piracy within the territorial waters) has exclusively been made possible for Somalia, and is in no way applicable to counter-piracy *per se* or anywhere else. Resolution 1846 of the same year, even extended the mandate to include activities on land to counter piracy.²⁸

The protection of the WFP ships became part of the mandate of the NATO Operation Allied Provider,²⁹ which had a predominant mandate in counter-terrorism operation Enduring Freedom and was already present in the region. Later on, this mandate was transformed into NATO Operation Ocean Shield especially dedicated to counter-piracy.³⁰ After NATO, the EU followed with the setup of EU Operation Atalanta.³¹ This marked the beginning of a much wider interest among different international organisations and states, such as for instance the deployment of the Combined Maritime Forces 150 (CMF 150) and later CMF 151, a voluntary multi-national naval partnership which includes up to 27 nations under the lead of the USA.³² Individual states, such as China, India, Japan, Malaysia, Russia, Saudi Arabia, South Korea and Yemen also deployed naval ships to contribute to the patrolling activities in the region. In total, approximately 30 to 40 warships are deployed in an area 1.5 times the size of Europe. To understand these proportions, one could imagine a ship

26 United Nations Security Council Resolution 1816, June 2008, followed i.a. by Resolutions 1831, 1838, 1844, 1846, 1851, and 1853 (all 2008).

27 See UN Doc S/PV.5902, 2 June 2008.

28 United Nations Security Council Resolution 1846, 2 December 2008.

29 NATO Maritime Command website, available at: <<http://www.mc.nato.int/Pages/home.aspx>>

30 *Ibid.*

31 Council of the European Union, *Council Joint Action on the European Union Military Coordination Action in Support of UN Security Council Resolution 1816*, 2008/749/CFSP, 19 September 2008.

32 The Combined Maritime Forces (CMF) is a multinational naval partnership, which exists to promote security, stability and prosperity. Participation is voluntary. It comprises 27 nations: Australia, Bahrain, Belgium, Canada, Denmark, France, Germany, Greece, Italy, Japan, Jordan, Republic of Korea, Kuwait, Malaysia, the Netherlands, New Zealand, Pakistan, Portugal, Saudi Arabia, Seychelles, Singapore, Spain, Thailand, Turkey, the UAE, the UK and the US.

calling for help in the south of Spain, and a warship responding from the vicinity of Norway. Some of the mandates of these operations have, in addition, been expanded to include activities such as escorting, group transit escorts, patrolling, arresting, disrupting in the wider area of the Gulf of Aden and the Indian Ocean.

For the purpose of this chapter, it is interesting to zoom in on the mandate of EU NAVFOR Atalanta. Operation Atalanta was launched in December 2008 within the framework of the EU Common Security and Defence Policy (CSDP), under the Nice Treaty.³³ The Atalanta operation³⁴ is significant since it is the first naval operation of the EU but represents only one aspect of the EU's wider regional strategy in Somalia.³⁵ Based on the mandate provided by the SC Resolutions and its own Rules of Engagements,³⁶ the Operation conducts protection of vessels of the WFP delivering food aid to displaced persons in Somalia; the protection of the African Union Mission in Somalia (AMISOM) shipping; the deterrence, prevention and repression of acts of piracy and armed robbery off the Somali coast; and the protection of vulnerable shipping off the Somali coast on a case by case basis.³⁷ In addition, the Atalanta forces can arrest, detain and transfer persons who have committed or are suspected of having committed acts of piracy, as well as seize pirate vessels. Since 2012, the mandate has also included the possibility to act against some land-based targets.³⁸ In addition, Atalanta shall also contribute to the monitoring of fishing activities off the coast of Somalia,³⁹ and through MoUs with regional states (for instance Tanzania and the Seychelles).⁴⁰ Atalanta also has the ability to

33 See the website of EU NAVFOR Atalanta, available at: <<http://eunavfor.eu/>>.

34 The mandate has been renewed several times. The Council has recently decided to extend the operation until December 2014.

35 Council Decision 2012/174/CFSP of 23 March 2012.

36 SC Resolutions 1816 (2008), 1838 (2008), 1864 (2008), 1851 (2008), 1897 (2009), 1918 (2010), 1950 (2010), 1976 (2011), 2015 (2011), 2020 (2011), and 2077 (2012).

37 Council of the European Union: Council Joint Action 2008/851/CFSP, Brussels, 10 November 2008.

38 *Ibid.*, Article 1, para. 2.

39 Council of the European Union: Council Joint Action 2009/907/CFSP, Brussels, 8 December 2009.

40 A similar agreement between the EU and the Republic of Mauritius, based on Council Decision 2011/640/CFSP of 12 July 2011 has been challenged by the European Parliament before the Court, pending case C-658/11, European Parliament v. Council, action brought on 21 December 2011. The EP considers that the Agreement also relates to issues of judicial cooperation in criminal matters, police cooperation and development cooperation, covering fields for which the consent of the European Parliament is necessary.

transfer suspected pirates captured by the EU NAVFOR operation to competent authorities in the region with a view to their prosecution, a competence that NATO's Ocean Shield operation does not have.⁴¹ NATO's lack of explicit competence in this field initially led to the false understanding of contributing states to the Ocean Shield operations that after capture they had no other option than to release, thereby contributing to the 'catch and release' practice discussed above. However, flag states have an autonomous competence to decide whether to prosecute,⁴² which could thus imply that suspects of piracy captured by either NATO ships⁴³ or Atalanta ships (as long as not transferred to regional authorities) could be transferred to European jurisdictions to stand trial there.⁴⁴ In a Report of the Secretary-General of 20 January 2012, it is stated that of a total of 1,063 pirates prosecuted since 2006, 57 were prosecuted and 18 convicted by European states.⁴⁵

As with other CSDP operations, third states also contribute to the Atalanta mission. Norway was the first non-EU state to contribute to Atalanta with a

41 It can be debated whether EU competence in this respect is evidence of the potential added value of the EU actions with respect to international action. After all, it normally depends on the discretion of the prosecutor of the flag state whether to prosecute or extradite for prosecution elsewhere (something that was not yet clear to some contributing states to the NATO operation). However, in general it is evidence of the attempts made by the international community to facilitate capacity building within the region for prosecution.

42 Under customary international law all states have universal jurisdiction to arrest and prosecute pirates. Although all states have the legal authority to capture and prosecute, there is no universal obligation to do so according to international law. According to Article 105 of the United Nations Convention of the Law of the Sea (UNCLOS) there is only a discretion to prosecute. Whether a state will prosecute is now dependent upon two things: 1) the universal jurisdiction to prosecute piracy should also be implemented in the national criminal code, and 2) the national prosecutor's office should, in accordance with its discretionary powers, decide to prosecute. For more detailed discussion on this see Guilfoyle, *op. cit.*, pp. 127–152. For a more in-depth analysis of the difference in piracy prosecutions in national courts, see M. Gardner, "Piracy Prosecutions in National Courts", *Journal of International Criminal Justice*, 10, 2012, pp. 797–821.

43 The arrest of eleven Somali men who attacked an Italian oil tanker in January 2012 by Italian marines participating in NATO's Ocean Shield operation is evidence of the competence of flag states to decide to prosecute.

44 See for a critical assessment of the 'Catch & Release Practice', i.a. Lang, *op. cit.*; and Ehrhart and Petretto, *op. cit.*, p. 6 and pp. 38–40.

45 Report of the Secretary-General on specialized anti-piracy courts in Somalia and other States in the region, UN Doc. S/2012/50, 20 January 2012, para. 10. The European states that prosecuted and convicted pirates are: Belgium, France, Germany, the Netherlands and Spain.

warship.⁴⁶ Furthermore, staff officers for the Operational Headquarters have been contributed by Croatia and Ukraine. Additionally, offers by Montenegro and Serbia have been accepted and a Participation Agreement has been concluded to this effect, allowing for the contribution of naval officers.⁴⁷

In order to coordinate the different deployments in the region by the EU, NATO and other actors, SHADE meetings (Shared Awareness and Deconfliction) have been set up.⁴⁸ In SHADE meetings, the representatives of the different navies of nations deploying to the region, enforcement agencies, the shipping industry and nations discuss tactical and operational matters. They can make agreements on communication and geographical reference standards, the sharing of operational information and assets and the synchronisation of operations. The Internationally Recommended Transit Corridor (IRTC) was developed during SHADE meetings. The IRTC functions as a designated corridor in the Gulf of Aden that directs merchant traffic away from the Somali coast and organizes it so that international navies can provide better protection. The SHADE meetings help to establish principles of coordination and cooperation, while the operational implementation consists of a mixture of *ad hoc* coordination and cooperation through several centres. Notwithstanding all of these efforts to organise better coordination and cooperation, it is important to note that although every stakeholder calls for better coordination, no one wants to be coordinated, or to operate under the command of another nation or organisation. Although the SHADE meetings do fulfil a function, it will always be suboptimal.

In addition to all of these sea-based counter-piracy measures, a number of legal as well as land-based counter-piracy measures have been developed. In particular, the Djibouti Code of Conduct Concerning the Repression of Piracy and Armed Robbery Against Ships in the Western Indian Ocean and the Gulf of Aden (more often referred to as the Djibouti Code),⁴⁹ established by the International Maritime Organisation, has played an important role. The Djibouti Code includes agreements on the conduct of shared operations, the rescue of hijacked ships and crew, interdiction and seizure of pirate vessels, and the prosecution of suspected pirates. It also provides for the exchange of

46 See <<http://eunavfor.eu/mission>>.

47 *Ibid.*

48 The first SHADE meeting took place in December 2008. On SHADE, see <<http://oceansbeyondpiracy.org/matrix/activity/shared-awareness-and-deconfliction-shade>>.

49 Signed by: Djibouti, Ethiopia, Kenya, Madagascar, the Maldives, the Seychelles, Somalia, the United Republic of Tanzania, Yemen, the Comoros, Egypt, Mauritius, Saudi Arabia, Sudan and the United Arab Emirates.

information through regional Information Sharing Centres in Mombasa (Kenya), Dar es Salaam (Tanzania), and Sana'a (Yemen). Since November 2011 these centres have also begun sharing information with the Information Sharing Centre of the Regional Cooperation Agreement on Combating Piracy and Armed Robbery against Ships in Asia (ReCAAP). The United Nations Office on Drugs and Crime (UNODC) also works on enhancing the judicial infrastructure in the region, which includes developing Somali capacity for the humane and secure imprisonment of pirates. The United Nations Development Programme (UNDP) works together with UNODC in Somalia, and with its UNDP Rule of Law and Security programme aims to develop policies and contribute to prison and custodial capacity building, invests in improving legal representation and due process for suspected pirates, and improves the security of the community at local level.

To address the underlying problems of Somali society and to monitor and advise the political process of reform, the United Nations Political Office for Somalia (UNPOS) and the International Contact Group for Somalia also play an important role.

In response to a UNSC call for more coordination among the different sea- and land-based efforts to combat piracy in the region, the Contact Group on Piracy off the Coast of Somalia (CGPCS) was established in January 2009. The informal and non-binding setup of the Contact Group creates low barriers for participation and can be considered very effective in bringing together a wide range of actors that would otherwise not have participated in a formal framework. It is also potentially the most comprehensive coordination initiative with regard to piracy off the coast of Somalia. The Contact Group has five working groups in which nations and international organisations can exchange ideas and information. Other stakeholders can also participate in the deliberations. Working Group (WG) 1 focuses on effective naval coordination and cooperation and capacity building on judicial, penal and maritime capacity of regional states. Working Group 2 deals with legal issues. Working Group 3 has contributed to the further development of the BMPs. Working Group 4's focus is on strategic communication. Finally, Working Group 5 focuses on identifying and disrupting financial networks. The purpose of the CGPCS as formulated on its website is to "facilitate the discussion and coordination of actions among states and organizations to suppress piracy off the coast of Somalia".⁵⁰

Although a very flexible and informal platform which had a lot of support certainly at the beginning of its existence, the main question will be whether

50 See the website of the Contact Group on Piracy Off the Coast of Somalia, available at: <<http://www.thecgpcs.org>>.

the CGPCS is an adequate mechanism for achieving the aim of facilitating discussion and coordination with regard to suppressing piracy off the coast of Somalia. Related to this is the question of whether it is actually the purpose of the CGPCS, and hence its reason for existing, to completely eradicate piracy off the coast of Somalia or merely to bring it back to manageable proportions. These questions are important, because the flexible and informal platform where a lot of information exchange can take place is, at the same time, dependent upon the continued support of states and international organisations which need to stay committed to the rather undefined goal. When the work of the CGPCS proves to be effective this will be less of a problem. However, notwithstanding the number of instruments, fora, mechanisms and actors involved in counter-piracy related programmes (which are impressive) it is also clear that there is a lot of overlap in activities. Many of the topics covered by the working groups of the CGPCS are thus also on the agenda of other mechanisms. The themes of WG 1 are, in part, also on the agenda of SHADE, MSCHOA, and the Djibouti Code of Conduct. The issues discussed in WG 2 have already contributed to different capacity-building initiatives, and i.a. are going to be part of the mandate of the newly established Regional Anti-Piracy Prosecution and Intelligence Coordination Centre (Rappicc), which could possibly also look into the topics on the agenda of WG5. Furthermore, the Djibouti Code of Conduct deals with legal issues, as well as the IMO, which gives guidance on legal questions related to the use of private security companies. The focus of WG 3, the development of the BMP and the work of the IMB show some overlap. Only the work of WG 4 does not find a match in other existing mechanisms, except to a certain extent in the mandate of the UN Contact Group on Somalia or in the EU Comprehensive Strategy on the Horn of Africa. It could also be transferred to the agenda of the African Union or IGAD. With the success rate of pirate attacks going down, the question is whether states will stay as committed as they were to profit from the strength of the CGPCS in comparison to other instruments.

Even though, as mentioned, statistics show that the success rate of pirate attacks has declined in the last year, the number of attacks has not gone down by the same percentage. Strategies that really target the root causes of piracy, as far as they are implemented at all, have not been successful yet. As mentioned before, the implementation of the Roadmap and the establishment of the new government is a step in the right direction, but not one with which the underlying causes of piracy have been solved. These topics are, in any case, not really covered by the working groups of the CGPCS. Furthermore, the narratives of the pirate communities as well as the Somali community at large, are still based on the protection narrative. According to that narrative,

Somali fishermen needed to protect their sources of income from the intrusions of Western fishing trawlers that were fishing illegally in Somali waters. We can therefore conclude that in particular WG 4 on public diplomacy and strategic communication, has not been very successful in its messaging campaign. In that sense, more commitment to a flexible allocation of resources with multiple stakeholders is needed to contribute to sustainable solutions to the problem.

As mentioned, the private sector has also contributed to bringing the risk of piracy down. There is close cooperation between, on the one hand, navies and governments with, on the other hand, stakeholders in the merchant community, such as shipping companies, regulatory agencies, insurance companies, and maritime international organisations. Again, one finds an overwhelming number of active entities in this field, making coordination very difficult. Prominent actors in the Gulf of Aden region are the International Maritime Organisation (IMO), the International Maritime Bureau (IMB),⁵¹ and the Baltic and International Maritime Council (BIMCO). The IMO is the UN agency concerned with regulating international shipping. It has long been active in the field of counter-piracy, for example through its recommendations and guidance for governments and the shipping community on the prevention and suppression of acts of piracy and armed robbery against ships. The IMO also provides statistics and reports on developments in piracy. Globally, the Piracy Reporting Centre of the IMB serves as a global contact point in the case of pirate attack. However, for the Gulf of Aden, the United Kingdom Maritime Trade Operations (UKMTO) and the Maritime Security Centre Horn of Africa (MSCHOA) play a more important role. IMB is only secondary, and reports to the IMO are more for documentation purposes than direct response.

4 EU Policies in Targeting the Problem of Piracy Off the Coast of Somalia

Since 1999, the EU has been clear on its ambition to play a role as a civil-military crisis and conflict manager.⁵² The Common Security and Defence Policy (CSDP), as an integral part of the Common Foreign and Security Policy (CFSP), shall, according to Article 24 of the Treaty of the European Union (TEU) as

51 The IMB is a division of the International Chamber of Commerce that deals with maritime crime and security.

52 European Council: Conclusions of the Presidency, Annex III: Declaration of the European Council on Strengthening the Common European Policy on Security and Defence, Cologne, 3–4 June 1999; and the Helsinki Summit 10–11 December 1999.

modified by the Lisbon Treaty, “cover all areas of foreign policy and all questions relating to the Union’s security, including the progressive framing of a common defence policy that might lead to a common defence”. With the setup of the institutional architecture, the EU has been trying to push for some policy orientation, which—traditionally—is hard to decide upon with all Member States beforehand through the formulation of clear policy objectives. Instead, by setting up institutions and instruments, such as the Political Security Committee (PSC), the Military Committee (EUMC) and the European Union Military Staff (EUMS), as well as the introduction of concepts such as the Civil-Military Coordination (CMCO) and the creation of the Civilian Planning and Conduct Capability (CPCC), and an *ad-hoc* military Operations Centre (OpsCenter), to name just a few, the hope is to give policy direction through the activities which these organs undertake. In rather broad terms, an attempt to formulate some policy orientation has been made in terms of the European Security Strategy (ESS) adopted in 2003.⁵³ One challenge highlighted in the ESS, is bringing together the different instruments and capabilities, both military and civilian, and the way in which they can play a role in fragile states, especially where policies at the nexus of security and development are concerned. With this approach, the EU would certainly be able to provide an added value in situations concerning fragile states, as these elements lay down the groundwork for a comprehensive approach. Whether this has so far resulted in a comprehensive and effective approach to the problem of piracy off the coast of Somalia, can be debated.

In 2005, the EU Commission adopted the Africa Strategy: Towards a Euro-African pact to accelerate Africa’s development, which takes a broad approach, including issues such as peace and security, human rights and governance, development and sustainable growth, and future partnership with Africa.⁵⁴ The Joint Africa-EU Strategy, subsequently adopted by the Council of the EU in 2007, aims to further strengthen the partnership between the EU and African states based on shared visions of some key principles.⁵⁵

53 “A Secure Europe in a Better World”, European Security Strategy, Brussels, 12 December 2003.

54 European Commission: EU Strategy for Africa; Towards a Euro-African pact to accelerate Africa’s development, COM (2005) 489 final, Brussels, 12 October 2005.

55 Council of the European Union: The Africa-EU-Strategic Partnership. A Joint Africa-EU Strategy, Lisbon, 9 December 2007. The key principles are: the unity of Africa, the interdependence between Africa and Europe, ownership and joint responsibility, and respect for human rights, democratic principles and the rule of law, as well as the right to development.

It was against the background of these ambitions, that the EU began its engagement with Somalia. This engagement initially took the form of humanitarian assistance, which goes back to 1994.⁵⁶ The main actor in terms of humanitarian assistance is the European Commission Directorate-General for Humanitarian Aid and Civil Protection (ECHO). Because of the necessity to adhere to the humanitarian principles of humanity, neutrality, impartiality and independence, the activities of the ECHO do not directly form a part of the EU crisis management framework and are not integrated into the structures of the European External Action Service (EEAS). Since the beginning of the 21st Century, the EU has been the largest provider of development aid in Somalia. In particular, the development instruments⁵⁷ have become more and more adept at addressing the changing situation in Somalia, including the security risks posed by piracy, and have recently begun to target the improvement of the regional response towards piracy, for instance through supporting the law enforcement agencies in the region and the implementation of the Djibouti Code. In addition, more attention has been paid to the identification and encouragement of 'home grown' governance initiatives in different parts of the country which have been supported by the local population and which do not exclude a possible future federal structure in, for instance, Somaliland or Puntland.⁵⁸ The EU has also played a role in crisis management by supporting the peace process and the implementation of the Roadmap.⁵⁹ Key instruments of the Commission have been the African Peace Facility (APF)⁶⁰ and the Instrument for Stability (IfS).⁶¹

56 European Commission: Humanitarian Aid and Civil Protection: Somalia Factsheet, February 2013, available at: <http://ec.europa.eu/echo/files/aid/countries/factsheets/somalia_en.pdf>

57 European Commission: Strategy for the Implementation of Special Aid to Somalia 2002–2007, Brussels, 2002; European Commission: Somalia: Joint Strategy Paper for the period 2008–2013, Brussels 2007.

58 European Commission: Somalia: Joint Strategy Paper for the period 2008–2013, Brussels 2007: Para. 20.

59 The EU is a member of a Technical Committee established to monitor the progress of the implementation of the Roadmap. See also the support given by the EU to the Kampala Process: Council of the European Union: Council Conclusions on Somalia, 3076th Foreign Affairs Council Meeting, 2011, Brussels, 21 March 2011:3.

60 Joint Council Decision 3/2003, 11 December 2003.

61 Regulation (EC) No. 1717/2006 of the European Parliament and of the Council of 15 November 2006 establishing an Instrument for Stability Launched in 2007.

In 2008, the EU began its first military engagement in the region by setting up the EU NAVFOR Atalanta operation⁶² that had as its main task, protecting AMISOM. In 2010, the EU launched a military mission to contribute to the training of Somali security forces, EU Trainings Mission (EUTM) Somalia,⁶³ in response to the request for technical assistance of regional organizations made by Security Council Resolution 1872 of 2009. The mission, which is still on-going, focuses on command and control, specialist training, and 'train the trainer' programmes, which aim to develop Somali control of future training. Trainees additionally receive familiarisation courses in international humanitarian law, human rights law and in the protection of civilians. In 2012 the EU Council launched a new Common Security and Defence Policy mission to support regional maritime capacity building in the Horn of Africa and Western Indian Ocean states: EUCAP Nestor.⁶⁴ The latter is a regional training mission planned to become operational in the second quarter of 2013, and which will aim at strengthening the maritime capacities of eight countries in the Horn of Africa and the Western Indian Ocean. It will be a civilian mission carried out under the Common Security and Defence Policy (CSDP), augmented with military expertise, and is intended to be fully complementary to the EU Atalanta operation and the EUTM.

In an attempt to bring more coherence to the different policies, and because of the EU's ambition to develop a comprehensive approach, the Council adopted yet another 'EU policy on the Horn of Africa—towards a comprehensive EU strategy' in December 2009.⁶⁵ This policy was supposed to provide strategic guidance and formulated four principles to guide the response towards the region: 1) recognizing the need for a comprehensive approach, 2) understanding the root causes and drivers of conflict, 3) recognizing the imperative of a regional approach, and 4) building upon local ownership. In November 2011, the Council finally adopted a 'Strategic Framework for the Horn of Africa'.⁶⁶

62 Council of the European Union: Council Joint Action 2008/851/CFSP, Brussels, 10 November 2008.

63 Council Decision 2010/96/CFSP of 15 February 2010 on a European Union military mission to contribute to the training of Somali security forces.

64 Council Decision 2012/389/CFSP of 16 July 2012 on the European Union Mission on Regional Maritime Capacity Building in the Horn of Africa (EUCAP NESTOR).

65 Council of the European Union: An EU Policy on the Horn of Africa—towards a comprehensive EU strategy, 17383/09, Brussels, 10 December 2009.

66 Council of the European Union: Horn of Africa-Council Conclusions, 16858/11 COAFR 315, Brussels, 14 November 2011.

The Strategic Framework for the Horn of Africa aims to guide EU action for greater peace, stability and prosperity in the region. The strategic framework sets out five areas for EU action: building robust and accountable political structures; contributing to conflict resolution and prevention; mitigating security threats emanating from the region; promoting economic growth; and supporting regional economic cooperation. The specific objectives of the comprehensive approach are to prevent and deter pirates from interrupting global maritime trade but also to contribute to a sustainable and long-term solution to piracy through building-up the capacity of the states in the region, including Somalia, to take charge of the fight against piracy. The EU also appointed a Special Representative for the Horn of Africa, Alexander Rondos.⁶⁷ He is tasked with coordinating the initiatives. Financial assistance and guidance on policies, however, comes from different organs such as the Africa desk of the EU External Action Service (EEAS) on most of the development aid programmes and the EEAS' Crisis Management Planning Department (CMPD) on the civil/military operations. The Commission's Development and Cooperation—EuropeAid Directorate-General is also involved, however. So, although the overarching ambition is to “streamline and strengthen the coordination of all actors and international donors to Somalia”, the drafting and implementing of the specific policies will remain with the Commission, the Council or the Member States.

5 Is EU Governance on Piracy an Added Value? Challenges for the Future

The analysis of the problem of piracy shows the complexity of the issue. Although many resources have been allocated to the maritime response to piracy, all stakeholders agree that the solutions to the piracy problem are to be found on land. This implies dealing with the root causes of piracy, which are manifold. Both the description of the international response to piracy and the overview of EU policies on the topic show that many policies have indeed been developed to deal with the different aspects of the problem. The introductions of the different policies were not always based on a grand master plan to deal with the problem of piracy, but in many cases necessitated that existing policies were also targeted at addressing aspects of the root causes of piracy, whereas others were specifically developed for that purpose. The need for more coherence and comprehensiveness in the policy approaches was felt

67 *Ibid.*

though, and was consequently put on the agenda of the different international platforms, such as the Contact Group on Piracy Off the Coast of Somalia. The development of the 2011 Strategic Framework for the Horn of Africa, and the development of the Djibouti Code of Conduct by the EU are also proof of that. However, the fact that existing policies now need to be fitted into an overall comprehensive approach is not obvious from the outset and thus sometimes a complicating factor. After all, one starts off with a patchwork quilt of existing policies, with possible overlaps,⁶⁸ contradicting priorities⁶⁹ and lacunae⁷⁰ of sea- and land-based counter-piracy strategies. These strategies target different policy goals, namely protection and deterrence; prosecution; capacity-building and training programmes; regional security and stabilisation; and unravelling the criminal networks in terms of financing. The challenge is thus to make these policy goals truly complementary to each other. Issues of coordination and cooperation, that became imminent, were subsequently dealt with in newly established coordination and consultation mechanisms. These mechanisms, such as the CGPCS, potentially could function as a truly comprehensive framework within which the problem of piracy including its root causes is addressed. However, what is missing is an in-depth, thorough and shared analysis of the problem which identifies the areas and the communities in society that need to be addressed. Going forward, the instruments that are necessary to meet those needs require to be developed, and one needs to ensure that overlaps or contradictory or counterproductive effects are prevented from taking place. One also needs to acknowledge that other geopolitical interests are at play in the region, such as counter-terrorism, corruption,

68 See for instance the overview provided with regard to the activities of the different working groups of the CGPCS, and the overlap with activities of other organisations.

69 Examples of contradicting priorities can be found in the ambition to deal with corruption in a society in which the economy is largely based on an old and enduring practice in Somalia of clans and communities exercising the right to collect fees or protection money. The result of the implementation of that policy might create new economic problems for the communities. Clearly, a context-specific approach is needed in order to provide sustainable solutions. Another example can be found in the mandate of Atalanta to act against land-based targets, while the analysis of the narratives of the Somali community shows that the naval activities of the various international actors are perceived as operations to steal camels and other livestock, indicating the disconnect in communication strategies. See for the latter example also Dua and Menkhaus, *op. cit.*, p. 765.

70 Effective strategic communication and public diplomacy to better engage with the population by setting up a successful messaging campaign to explain the different policy goals of the international community and create local ownership is still lacking.

human trafficking and illegal migration, improving the humanitarian circumstances, and regional power dynamics.⁷¹

Some argue that we need to approach the problem through a post-conflict lens, implementing lessons learned from peace-building such as context sensitivity, pragmatic incrementalism (an approach that does not use technocratic idealized objectives), showing more sensitivity to the complexity of the situation and not assuming that there are best solutions or any wishful thinking or ambitious nation-building projects.⁷² The progress made with regard to the implementation of the Roadmap, the election of the new parliament and the new government are major developments within the region, which should be reflected in the way the international community is dealing with the problem. The ambition to bring the 'Somali problem', including the problem of piracy, 'home to Somalia' in line with the New Deal approach, agreed upon in the Busan meeting on Aid effectiveness,⁷³ requires that the patchwork approach—but also the attempts for better international cooperation—should be brought into line with the ambitions of governments. It will also still be important to take into account that each policy creates winners and losers, and the latter can act as spoilers. At least all stakeholders should be part of the process, including local communities.

The question is whether the EU is currently dealing with the problem in an adequate fashion. The EU's Strategic Framework for the Horn of Africa,⁷⁴ shows the EU's ambition to deal with the problems in a comprehensive way. However, on closer examination it again rather comprises of a set of strategies dealing with different aspects of the problem, but which, in the author's opinion, together, do not qualify as a coherent strategy. This conclusion was also drawn in a Study commissioned by the Greens and the European Free Alliance on the question of a comprehensive approach of the EU Somalia

71 Such as the interference of regional states in Somalis' internal affairs for instance for reasons of fighting proxy wars and the fact that the different anti-piracy naval operations also serve a different purpose: namely having a naval presence in the Indian Ocean, one of the areas where the geopolitical battle regarding who has naval supremacy in the world is fought.

72 C. Bueger, J. Stockbruegger and S. Werthes, "Pirates, Fishermen, and Peacebuilding: Options for Counter-Piracy strategy in Somalia", *Contemporary Security Policy* 32, 2011, pp. 356–381.

73 During a High Level Forum on Aid Effectiveness in November 2011 in Busan, the g7+ of fragile and conflict affected states agreed on a New Deal for Engagement in Fragile States.

74 Council of the European Union: Horn of Africa-Council Conclusions, 16858/11 COAFR 315, Brussels, 14 November 2011.

strategy, in February 2012.⁷⁵ The authors of the study point out that the EU institutions are path-dependent and evolve incrementally. So the new crisis management structures such as the Political Security Committee (PSC), the Military Committee (EUMC) and the European Union Military Staff (EUMS) became part of the intergovernmental second pillar while the Commission adopted its own crisis response instruments and mechanisms and preserved its competencies in the realm of development cooperation and humanitarian aid.⁷⁶ As a result, the risk of the Council and the Commission each following a different path remains real. They even speak of different tribes of EU external action.⁷⁷ They point for instance to the 'Africa Strategy: Towards a Euro-African pact to accelerate Africa's development'⁷⁸ adopted by the EU Commission and the Joint Africa-EU Strategy adopted by the Council of the EU. In their assessment, this shows that there is much talk about comprehensiveness and coherence in the documents, but practice shows that the efforts of the EUMS and the CPCC staff to draft concepts aimed at enhancing the comprehensive approach are still unsuccessful. This might be due to the fact that there are still disagreements about the meaning, the direction and the institutional prerequisites of a comprehensive approach.⁷⁹

The study concludes that any coherence is lacking in the comprehensive strategy. A set of more than 30 recommendations are added to the report,⁸⁰ such as the advice that EUNAVFOR Atalanta should dedicate more capabilities to monitoring the international rules and regulations on fishing activities.⁸¹ The authors also advocate that better and more intensive joint planning and strategy building within the Union is needed.⁸² For this, they argue, the EU should establish a thorough assessment of all ongoing activities of its agencies and Member States; clarify the purpose of the engagement as a whole; identify the concrete objectives; prioritize these objectives; and break them down in terms of means and instruments available and needed.⁸³ Another example of how a more strategic approach can benefit the effectiveness of different

75 Ehrhart and Petretto, *op. cit.*

76 *Ibid.*, p. 9.

77 *Ibid.*, p. 11.

78 European Commission: EU Strategy for Africa; Towards a Euro-African pact to accelerate Africa's development, COM (2005) 489 final, Brussels, 12 October 2005.

79 Ehrhart and Petretto, *op. cit.*, p. 11. They base their conclusions on interviews with EEAS on 1 April 2011 and 13 September 2011.

80 *Ibid.*, pp. 46–48.

81 *Ibid.*, p. 35.

82 *Ibid.*, p. 44.

83 *Ibid.*, p. 46.

initiatives, can be found in the implementation of the EUTM, for which a totally new set up of security provision structures needs to be set in place before the actual training of soldiers can take place. However, as long as there is no agreement on the overall governance model of Somalia, including the advised model of local governance systems, the EUTM will not be able to achieve real results. They furthermore, advise that the EU takes a leading coordinating role within the international community. The Strategic framework and the appointment of the Special Representative could be first steps in this respect. However, what is still missing is a “concept on how to actually align the drivers’ lines of engagement of all branches that make up the different policies”.⁸⁴

6 Conclusion

When assessing the actions of the EU to counter piracy in Somalia one can state that the EU is concerned with the problem of piracy and that it has a framework of powers and financial and operational capabilities in place to deal with it. The effectiveness of the EU’s action is, however, altogether questionable.

The added value of the EU lies, in particular, in its ability to address multiple aspects of the piracy problem, if it can exercise that power coherently and take a leadership role in the other international fora by monitoring the comprehensiveness and coherence of the different initiatives. To a certain extent, the EU has already provided proof of its capacity to improve cooperation with NATO, even though so far these efforts concern the engine-room level and have not overcome the political difficulties concerning EU-NATO cooperation. A further area in which the EU, in particular through its EUNAVFOR Atalanta operation, has shown a leadership role concerns its relations with China, Russia and South-Korea. Several initiatives have been deployed with regard to information sharing, closer cooperation with regard to patrolling within the IRTC, and informal cultural exchange visits on board ships, which have all contributed to building trust and overcoming cultural and linguistic barriers. Should the EU be able to improve the way in which it deals with the problem of piracy off the coast of Somalia and prove that it is able to take a leading role in the international community, this will show that the EU is an international actor capable of playing a leading role in the governance of global emergencies.

84 *Ibid.*