

Lessons from *Atalanta* and EU counter-piracy policies

Paris, 23-24 March 2011
Brussels, 17 June 2011

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This report summarises key lessons and recommendations forwarded to the EU Political and Security Committee by the EUISS following its 10-month lessons-learned project which took place in two phases: an experts' group meeting on 23-24 March 2011 in Paris and a PSC-level seminar in Brussels on 17 June.



10 recommendations to the PSC and the EEAS:

The need for the EU to adopt a comprehensive approach

1. There is a need for a single EU piracy coordinator/ambassador/special envoy able to lead on:
 - maintaining counter-piracy high on the EU foreign policy agenda through, *inter alia*, communication and media work.
 - the comprehensive coordination of the whole range of EU counter-piracy policies in the Indian Ocean (and not only off the coasts of Somalia), including efficient coordination between military (EU NAVFOR OHQ) and civilian expertise.
 - the representation of the EU internationally in international counter-piracy fora and *vis-à-vis* appropriate international interlocutors (EU and non-EU flag states, counter piracy-related contact groups, UN bodies, the International Maritime Organisation (IMO), the World Food Programme (WFP), other military powers having fleets in the region, relevant flag states) on issues like military cooperation, law enforcement and judicial cooperation – specifically on Regional Maritime Capacity Building and regional jurisdiction to try suspected pirates – but also unilateral declarations on the use of vessel protection detachments (VPDs).
 - ensuring strategic coherence in EU counter-piracy policies in the region (including enhanced EU action on land within Somalia, human intelligence, development and judicial programmes and political dialogue with decentralised authorities).
 - promoting enhanced coordination within Member States' national transport, justice, defence and foreign affairs ministries on, *inter alia*, the implementation of the United Nations Convention on the Law of the Sea (UNCLOS) and the prosecution and trial of suspected pirates.

2. The Political and Security Committee (PSC) should consider ways to ensure more systematic manning of appropriate EU delegations with defence attachés competent on counter piracy (with wider mandates than security advisers).

Atalanta's planning: extension, capacities, and force generation

3. While acknowledging that the European External Action Service (EEAS) security rules are still in the making, the Operation Commander(s) should enjoy sufficient autonomy from the High Representative in the decision to circulate and share information with partners.
4. The *Athena* mechanism should be reformed to allow more efficient force generation for counter piracy as well as more efficient pooling and sharing of military capacities.
5. Studies for the establishment of a more stable FHQ on land in the region (provided that remote and physical communication assets are optimal) should be finalised and lead to a swift PSC decision.
6. The EEAS and above all the European Union Military Committee (EUMC) and the PSC should do more preparatory work with Member States to adopt 'quasi-dormant Rules of Engagement –

ROE – to be used when needed, with appropriate political control over it, and to be activated when appropriate'.

7. The PSC should encourage a more open and constructive cooperation between the EU NAVFOR OHQ and Member States' intelligence agencies.

International coordination

8. EU Member States should continue their discussions on the value of having two separate EU and NATO counter-piracy forces with a similar mandate.

Cooperation with the private sector

9. European flag states should be more efficient, through a better coordination between their own ministries of Transport, Foreign Affairs and Defence or agencies at national level, in ensuring their national merchant vessels comply with Best Management Practice (BMP).
10. Internationally agreed guidelines on Private Security Companies aboard ships should be adopted to ensure that proper regulation of security services is applied on the sea and to avoid 'chaos' or a 'security jungle' comparable to other crisis theatres like Afghanistan or Iraq.

Lessons from *Atalanta* and EU counter-piracy policies

‘There is no way to avoid piracy anymore; it now occurs in the whole of the North Indian Ocean’

Statement made by one participant in the meeting.

The Somali crisis and linkages with piracy

There is today no realistic end in sight to the current Somali conflict. State failure and piracy constitute a vicious circle and the absence of political will within Somalia to tackle these issues is a key part of the problem. The lack of credible authorities, the availability of weaponry and the absence of alternative economic prospects create the conditions of piracy. The Transitional Federal Government (TFG) is seen as corrupt and ineffective, since it has no authority outside a few blocks in Mogadishu. Piracy flourishes thanks to extensive criminal networks, an appetite for quick economic opportunities and a lack of political will and leadership to address it effectively.

The current centralised governance model is hardly compatible with the Somali clan structures and this is recognised by the TFG itself. This has strong implications for law enforcement and security engagement by international actors. If the centralised government model is bankrupt, experts have argued that there is a need for an alternative decentralised support approach, possibly along the lines of the decentralisation provisions of the Transitional Charter. Smaller entities do an actually better job at balancing interests; they are also more effective in maintaining consensual forms of government.

The example of Somaliland was given to demonstrate that a subnational political entity, though geographically vulnerable to piracy, can actually be piracy-free if local authorities have sufficient political will and are motivated by strong incentives (the quest for international recognition in the case of Somaliland).

One key recommendation is that international actors should focus on a more decentralised approach to support subregional and local governance entities like

Somaliland (and also Puntland, although its level of corruption and its own links with piracy make it a less reliable partner) to fight against piracy on land.

There seem to be two schools of thought when it comes to analysing the piracy phenomenon off the coast of Somalia. The first one is Somalia-focused and considers piracy as a mere symptom of state failure and underdevelopment. The second one looks at piracy as a phenomenon whose autonomy from the Somali governance environment has strengthened over time and the functioning extends over an area which is far wider than the sole Somali territory, involving the Somali diaspora in the Horn of Africa, in Europe, non-Somali networks or connections in Yemen and elsewhere, and having an impact on regional and global trade and economy, as well as on Europe's and the West's energy supply.

In the view of some, there is a danger in the common attitude of considering piracy as a mere symptom.

While the knowledge of the root causes of the Somali crisis are quite well-known, there is no equivalent situational awareness of the piracy phenomenon in its complexity mainly due to a lack of deeply-rooted human intelligence gathering and sharing. The *Atalanta* operation does not have intelligence gathering sources on land and depends on intelligence sharing of EU Member States. Among those, only three are seen to actively share their intelligence with EU structures dealing with piracy.

One of the key consequences of this shortage of human intelligence sharing and lack of situational awareness (Operation *Atalanta* is said to work up to 95% on open intelligence sources), in the context of the close monitoring of pirate groups and their interaction with the clan and local governance structures, is the EU's inability to pre-empt pirates' behaviour and decisions before they act.

This being said, there is quite a lot known about the piracy pyramid structure with around 12 financiers clearly identified and about 50 logistics managers, all having recourse to several hundred 'foot soldiers'. While the identity of the top heads of the network is known, there is no evidence to charge them and more human intelligence on the ground would be needed to do so.

Despite this lack of sensitive intelligence sharing, it was however stressed that a lot of information is over-classified within EU NAVFOR and that there is a need – the EEAS security rules still being in the making – first to avoid over-classification and second for the Operation Commander to enjoy more autonomy from the High Representative in the decision to circulate and share information.

Furthermore, while there are nuances in the ways the links between pirates and terrorist groups operate (it is acknowledged for instance that Al-Shabaab and pirates groups have, very probably, mostly business-like rather than inspirational or ideological relationships), it was recognised that there is also a lack of intelligence on this aspect of the problem. Finally, some pointed out that the risk of a (so far doubtful) ‘piracy-terrorism nexus’ would be extremely bad news for the shipping industry, and they restated the importance of developing more human intelligence on land.

Against this background, various options for EU action are being discussed. The conditions under which the EU could engage Puntland authorities were raised, as well as its potential contradiction with the currently supported Kampala process still based on a global approach to Somalia. On the other hand, it was acknowledged that tensions between Somaliland, Puntland and TFG leaderships usually lead to no results when all three are consulted together. More generally, operating in Somalia is fraught with many difficulties, mostly related to security. The role of Al-Shabaab in the humanitarian sector, the need to develop alternative livelihoods, to engage young people and to deal with clan leaderships are challenges under examination.

Whether piracy is seen as a symptom or an autonomous phenomenon with serious consequences for global trade, there was a consensus that the EU should do more on land, with regard to development assistance and human intelligence but there was no clear consensus on military actions. It was pointed out that in the past, previous counter-piracy activities in Somalia were all delivered by proxies from other countries: Either in the form of (1) counter-piracy capacity building programmes, some of which have had unintended consequences (the training of Puntland coastguards by a private company with the support of the UK ten years ago for instance, which actually enabled pirates to improve their skills) or of (2) military interventions to regain influence on government authorities.

An EU comprehensive approach

While there has been a tendency to rush to identify effective tools that could be applied straightaway in Somalia, the discussion of the first session concluded on the need for a clear, consistent and comprehensive strategic approach to the problem of piracy off the coast of Somalia. This aspect was elaborated on in the second session dedicated to the EU’s comprehensive approach towards piracy.

As far as the EU is concerned, the main challenge is that such a comprehensive and consistent approach, which was lacking during the planning and deployment of Operation *Atalanta*, is slowly (two years and six months after the launch of EU NAVFOR) coming into existence, and should be materialised in the EU Horn of Africa strategy. The EU started by deploying a variety of instruments in parallel and in an uncoordinated manner before having such a strategic approach.

At the operational level, EU institutions have learned comprehensiveness ‘by doing’ (the case of systematic interdepartmental discussions of the draft council conclusions was given as an example¹) and had to cope with the institutional instability induced by the creation and the setting up of the European External Action Service (EEAS). Given the complexity of the piracy issue, comprehensiveness is even more of a challenge. Indeed, counter-piracy policies do not only involve and concern the traditional actors of EU crisis management (military and civilian planning and conduct of the operation, development, peacebuilding and diplomatic departments), as well as humanitarian actors, but also all maritime security-related bodies (DG MOVE, DG MARE, SAGMAS) and private sector interlocutors. This being said, it was agreed there had been ‘interactive influence between CSDP and other instruments on *Atalanta*’s subsequent mandates’ which were ‘completely shared’ with current and former (subsequently included in the EEAS) Commission’s departments.

Some experts considered that the to-be-adopted Horn of Africa Strategy was, in that respect, going in the right direction, although it may not be focused on security only. Unfortunately, the fact that the former Crisis Management and Planning Directorate (CMPD) and former DG Development did not participate in the

1. It was noted however that although the Crisis Response Coordination Team (CCRT) had met 25 times during EUFOR Tchad/RCA, it only met four times in the first half of 2009 to discuss piracy-related issues.

meeting precluded any substantial discussion on the Horn of Africa Strategy *per se*, undermining the scope of the discussion on coherence and a comprehensive approach. This reality was confirmed by some experts who stated, perhaps with exaggeration, that 'EU institutions were currently too much interested in competing with each other'. The term 'cultural reluctance' was also used to describe remaining barriers within the EEAS as much as 'structural barriers' in the Lisbon Treaty. In the current context, the OHQ sees itself very much at the vanguard of comprehensiveness efforts which have so far not brought significant results. The side effect of EU counter-piracy efforts has been to put the EU in a good international position. For instance the Chinese head of military staff visited Northwood in Spring 2011. *Atalanta* has enhanced the military dimension of the EU.

One suggestion during the meeting was the creation of two comprehensive EU-wide coordination mechanisms: a joint task force² on piracy in Brussels with one coordinator who could 'garner and drive forward a comprehensive strategy'; and the appointment (commanding less consensus among participants) of an EU Special Representative.³ Both ideas have already been suggested to the High Representative/Vice President but no action has been taken yet.

At a strategic level, it was noted that some strong ambiguities remain; it was acknowledged that no clear-cut choice has been made between a Somalia-first or a piracy-first approach, both being seen as important and mutually beneficial. It was also underlined that the adoption – hopefully soon – of a Horn strategy (focusing *inter alia* on Somalia, piracy and the ESA/IO regional strategy against piracy and for maritime security) would fill the existing gap. However, some argued that in the absence of a complementary EU owned (jointly by EU institutions and Member States) Somalia-focused piracy strategy (an 'EU comprehensive strategy to fight piracy off the coast of Somalia') implemented by one single EU figure, the risk for the EU is to continue to have a piecemeal approach (a myriad of uncoordinated though supposedly complementary instruments each having a different priority) or a proxy approach (the choice being to support local actors' counter-piracy strategies – in this case the

2. The example of the informal task force on Sudan coordinated by the EUSR for Sudan was highlighted as well as the need to identify clear terms of reference for such a task force.

3. Those opposed argued that an EUSR would still not have the appropriate mandate to coordinate services which do not depend on the EEAS, i.e. Commission's DGs, not speaking of ECHO which is in a particular situation.

EAS/IO one, as stated in the Horn of Africa strategy draft). Once the new EU Horn of Africa strategy is adopted, the key challenge in EU counter-piracy efforts will be to ensure that their implementation is (1) really coordinated by a well-identified EU leadership; (2) comprehensive enough to include both existing EU instruments and Member States' bilateral actions according to an effective burden-sharing approach; and (3) leads to a more coherent EU representation in international fora dealing with piracy-related issues (IMO and UN working groups among others).

While comprehensiveness has been taken into consideration during *Atalanta's* extension phases although not in the initial planning phase, another coherence challenge had to be faced, namely clear burden sharing between EU institutions and Member States, particularly regarding the prosecution of suspected pirates, as detailed in the section on legal issues.

At the operational level, more generally, it seems Member States do not yet have a national whole-of-government comprehensive view of the Somali piracy issue shared by all departments of each respective government. Some departments like Foreign Affairs may have such a view but others (the example of Ministries of Transport was mentioned) do not. There seems to be a general lack of interdepartmental coordination at Member States level, particularly between Ministries of Transport in charge of IMO-related issues on the one hand and Ministries of Foreign Affairs and Defence on the other. Some participants gave the example of a country where information circulated by the OHQ does not actually reach the appropriate national administrations, who, as a consequence, feel they are not informed.

A second level of information deficit lies in the EU and national narratives about the piracy issue. It seems agreed that governments are indeed aware of the global scope of piracy's impact on the economy. However, the real cost of it does not seem to be that well-communicated, because of the difficulty of building up an efficient standard narrative that would be equally convincing in all Member States. Counter-piracy policies' external communication strategies therefore need further work on various kinds of outreach: outreach to the individual Member States, and outreach to the broad public opinion via the media. It was acknowledged that despite successful media work the available human resources were largely insufficient to design more sophisticated and comprehensive communication and media strategies and therefore appropriate quality and impact.

While EU NAVFOR has experienced difficulties in dealing with the abovementioned information and burden-sharing deficits, it however also broke new ground in approaching the issue comprehensively. The operation has *de facto* developed a network of EU counter-piracy contact points in the region (Kenya, Mozambique, Madagascar, Yemen, India, Seychelles), and built up relations with around 10 port authorities. This has required a lot of engagement. In parallel to internal changes ongoing within EU delegations (the shift from a development-focused approach towards a more comprehensive political approach, including also security aspects), the operation had to rely on facilitators and liaison staff whose work is said to 'have moved to a shadow defence attaché role' (particularly in Djibouti and the Seychelles) while some staff were co-located in some EU delegations (Djibouti) or in Member States' premises (rotating between the UK High Commission and the French embassy in the Seychelles). One of the lessons of this experience is the identified need to man appropriate EU delegations properly with defence attachés (with wider mandates than security advisers).

A second lesson on comprehensiveness is the usefulness of having civilian maritime expertise (drawn from both the Commission and private sector) working together with the military within – although not necessarily on a permanent basis – the OHQ itself to ensure that the regulation dimension of maritime security is adequately factored into military work.

Legal issues

Legal issues involved in EU counter-piracy policies first relate to the judicial chain of actions pursued in the case of suspected pirates being arrested at sea. They comprise evidence collection, suspects' transfers, prosecution, trial and detention. A second group of issues has to do with the use of governmental vessel protection detachments (VPDs) and of private armed protection (on board or as private escorts).

There are currently no EU-wide criminal procedures on piracy and any action against suspected pirates takes place in a national criminal procedure framework. This fact increases complexity at the operational level.

Although any EU state is allowed to arrest and prosecute suspected pirates, Member States are extremely reluctant to do so and very few of them have explicitly

incorporated the crimes of piracy and armed robbery at sea into their respective criminal codes. There was a debate among participants about the relevance of Member States' positions on the matter. Some considered that prosecuting suspected pirates in Europe represents too high a political cost for European governments, given public opinion's sensitivity about further immigration (the Netherlands, Greece and Germany were quoted). Others denied the right to pirates to stay in the country where they have served their sentence. Some underlined the fact that decent detention conditions in Europe did not play a deterrent role for pirates, rather the opposite. It was also stated that 'fair burden sharing requires the states in the region to prosecute more vigorously and to enter into transfer agreements with the EU'. Another group of participants stressed the fact that prosecuting and incarcerating pirates in Europe was the best way to collect evidence and intelligence about pirates' networks and to demonstrate the consistency of Member States' commitment to the fight against piracy. The argument was also made that social reintegration in Europe of pirates who have served their sentence and who decide to stay on the European territory is a fundamental human right. The point was also made that relying on regional countries unwilling or unable to solve the prosecution and detention issue was probably a flawed strategy in the short term and that the option for the EU Member States to actually do their job fully (i.e. not only arresting but also prosecuting, trying and incarcerating) was the most effective way to combat piracy and to avoid the current 'capture and release' phenomenon. At the moment, around 940 suspected pirates are being prosecuted in 18 countries but many of them are released because of lack of evidence.

The irony of the current situation is that while piracy threatens global trade seen as a 'common good', responses to it are still very much fragmented and reflect diverse national interests, which actually has become a largely irrelevant approach: a merchant vessel cannot be identified as belonging to one country only anymore because of the diversity of its legal bounds: crew members are very often from different nationalities, the flag state under which the ship is registered also has some responsibility, the destination of its cargo is related to one or several countries' particular interests, etc. This reality led the participants to consider that there is a discrepancy between the global and universal nature of the piracy threat on the one hand and the nation-based judicial responses to it on the other.

Although EU NAVFOR staff are trained to collect evidence, they are not forensic experts. When a captured merchant vessel is released, there is a high risk that some evidence (blood stains, DNA samples) is erased – not purposely – by the crew and that the crew and vessel itself will not be available to appear as witnesses or evidence during the trial. This undermines evidence collection and contributes to the ‘capture and release’ dynamic.

Military vessels are not equipped to detain suspects for long periods of time. However, there is sometimes no choice but to transform them into floating detention cells while a judicial decision is taken about their transfer. This presents risks for Member States who may be met by claims for compensation for unlawful detention (as it has been the case for one of them).

Each European country follows the provisions of its own criminal procedure code. This leads to incoherent situations and actions that are not commensurate to the EU dimension of EU NAVFOR.

One recommendation which came out of the discussion was to push for a swifter and stronger harmonisation of EU Member States’ criminal codes regarding piracy and notably to encourage those that have not yet done so to include explicitly the crimes of piracy and armed robbery at sea in their respective codes.

Another recommendation was to implement more systematically the involvement of law enforcement officers/ship riders (even though ship masters are actually law enforcement officers in some countries) provided by existing UNSC resolutions.

Another aspect of prosecution is the input provided by evidence collection to counter piracy intelligence. In this field, some cooperation is ongoing between EU NAVFOR and Interpol, which receives all evidence collected by the operation. The degree of information sharing has varied over time and according to the number of direct interventions made by EU NAVFOR (hence a small decrease in the last few months).

Although the EU has concluded transfer agreements with regional countries like Kenya and the Seychelles, the implementation of these agreements is becoming more and more problematic. In the last 12 months only 4 suspected pirates were transferred to Kenya and the agreement with this country was depicted as a ‘failure’ or ‘very disappointing’. The prison system in

the Seychelles is reaching its capacity limits. Some solutions are being looked for – if they have not already been found – in Somalia itself. Regional entities like Somaliland and Puntland are now being approached to start developing capacities to incarcerate Somali pirates who have been tried in another country. Such arrangements would follow the UN Special Representative for Piracy’s report recommending *inter alia* that special jurisdictions should be set up on the Somali territory. An agreement between the Seychelles and the TFG was signed in February 2011 on post-trial transfers and memoranda of intent were signed with Puntland and Somaliland. These agreements provide that the Seychelles and the EU will be able to monitor transferred prisoners.

Some doubts were raised about this option: the reliability of Somali authorities –especially the TFG and Puntland – was questioned; this solution will require sustainable funding from the international community and this was not guaranteed. Alternatively, other countries of the region, like Tanzania, could be interested in the idea of hosting a regional tribunal for piracy, and this possibility is being examined. Finally, while developing the Somali prison sector only will not be possible without developing the whole justice and rule-of-law systems that are related to it, the conduciveness of current conditions in Somalia for such ambitious reforms were seriously questioned by some participants.

Against this background, some experts concluded it would be highly probable that under the current circumstances (no appetite among Member States to prosecute the suspects themselves, limits of the transfer agreements option and unlikelihood of a Somali solution in the short term), suspected pirates will continue to be released on a rather large scale. This will probably not go unnoticed to the press, European public opinion and the maritime industry. In this context, it was concluded that there was still ‘a political gulf between what we can do and what we will do’ and that ‘without political involvement’ the military alone ‘will still be able to do very little’.

Legal issues - The VPD debate

Military and civilian assessments of the evolution of piracy concur that maritime insecurity in the Gulf of Aden and off the coast of Somalia has increased for merchant vessels. More precisely, it has been admitted over the last few years, pirates have changed their

working method several times, and use more sophisticated technology in a larger area than in the past. This fact has led the maritime industry, which unanimously refuses the very principle of arming crew members, to push for increased security engagement aboard vessels, in addition to existing escorts and deterrence measures.

Two options are on the table: governmental vessel protection detachments (VPDs) and private armed guards and escorts. Both are subject to debates among experts.

The industry has also stated its preference for government-armed guards: in that case, they see the chain of command is clearer, as well as the use of lethal force. In the event that a crew member is killed, the liability is also clear because the merchant vessel is legally considered as an extension of the troops' state. (In that case, the ship master loses his responsibility with regard to the detention of the suspected pirates).

As far as state-managed VPDs are concerned, it is up to each flag state to declare that it accepts the principle of having VPDs on board. It is also up to each government to decide if it wants to deploy VPDs aboard merchant vessels allowed to do so by their flag state. Some EU Member States are sometimes in both situations and there are national debates on each type of responsibility (flag state on the one hand and security provider on the other).

One of the lessons already identified and repeated during the meeting is that there is a need for the EU to be more efficient in convincing flag states (EU and non-EU) to issue unilateral declarations allowing VPDs aboard their vessels. So far only three third states have done so (Liberia, Sierra Leone and St Vincent and Grenadines). Within the EU, the EU NAVFOR OHQ has been the one body negotiating with third flag states. Negotiations are said to have been 'chaotic'. Thus the relevance of this tasking, given the limited political staff available in the OHQ, was questioned. It was suggested that perhaps another diplomatic entity of the EU (for instance EU delegations abroad) should be assigned to negotiate with third flag states (Panama, Marshall Islands, etc.), especially those which carry WFP cargo. In this particular case, it was stressed that escorting WFP vessels, which is its key task, is still very time- and capability-consuming for EU NAVFOR, and that the systematisation of the use of VPDs aboard these

vessels would allow more robust and sophisticated capabilities to conduct other tasks.

The recommendation which emerged from the discussion is that EU Member States should work to agree on a common approach to increase the number of unilateral declarations from third states authorising VPDs. Another recommendation was for Member States to clarify the modalities according to which VPDs could collect evidence against suspected pirates in case of an attack. The need for increased harmonisation of national EU legal systems as far as suspected pirates' prosecution and interrogation by a judge – possibly via video conference means – were also discussed.

As flag states, EU Member States, for various reasons do not have the same position on allowing their merchant vessels to have VPDs on board. In Greece, the shipping industry is against it and has been lobbying the Greek government in this direction. However, recent attacks seem to have blurred the positions in Greece on the issue. Within the Greek administration, it is also acknowledged that there are legal loopholes on liability in the event that merchant ships with VPDs are attacked and individuals are injured or killed or if the vessel is damaged.

Other EU Member States have been using VPDs to protect their own national vessels. However, this position is rather unclear given the fact that the existing legal framework does not help states to define the nature of their national interest connected to each merchant vessel. Several factors need to be considered altogether: the citizenship of the crew member, the state where the vessel is registered, the destination of the cargo and the state economy benefiting from the shipping supply. This ambiguity related to the definition of national state interests was illustrated by the Dutch example, with Rotterdam being the main destination of most of the cargoes which could therefore be considered in the remit of Dutch national interest. Until recently, the Dutch government was against the use of VPDs but it has recently deployed two crews to India and Singapore to escort two vessels of high value. This example shows that political positions can evolve on this topic.

Experts reminded the group that the quantitative need for more VPDs has already been calculated and amounts to around 400 armed guards. It was underlined that EU Member States currently do not have such capacity nor willingness to reach this level.

In this context, several options are to be envisaged by the EU and its Member States. The first one is to deploy VPDs according to certain priority criteria based for instance of vessels' vulnerability to attacks. Secondly, more could be done at the political level to support countries of the region to develop their own VPDs in the context of capacity building commitments. The first option does not, however, solve the question of lack of governmental VPD capacity, while the second one would not bring solutions in the short term.

Hence the discussions about the possible use of private armed guards aboard vessels who, according to some experts, 'should only ever be considered when passive defence measures cannot be applied anymore or are inefficient'.

Ship owners already increasingly use private security companies (PSCs) to ensure their security. Legally, their flag states should take this responsibility officially through unilateral declarations. They sometimes do not do so and turn a blind eye to ship owners' contracting PSCs.

The current IMO guidance contains some provisions stating that the organisation does not support the deployment of PSCs aboard vessels. For some experts, these provisions should be changed or removed because they are used in bad faith by flag states in order not to have recourse to PSCs. Finally, while some experts considered the IMO should do more to open the debate on the international regulation of private armed guards, others argued that this organisation probably lacks the expertise to do so.

The use of PSCs on board has specific legal and security consequences. First, PSCs are not allowed to fire shots except in self defence. Their deterrent role is therefore limited. Second, an increasing amount of weaponry on the sea made some participants worry about an escalation of the level of violence in the area. For some experts, this risk is the price to pay for increased piracy deterrence. The discussion led to the conclusion that internationally agreed guidelines on PSCs aboard ships should be adopted to ensure that proper regulation of security is applied on the sea and to avoid 'chaos' or a 'security jungle' comparable to other crisis theatres like Afghanistan or Iraq. Some states have particularly strong reservations on the use of PSCs since UNCLOS stipulates that only sovereign states have the responsibility to ensure freedom of movement on the sea.

Atalanta's planning: extension, capacities, force generation

LESSONS FROM PLANNING

EU NAVFOR was launched in 10 weeks which was described as a remarkable achievement. The mission planning was done by a relatively small but efficient team, contradicting the thesis according to which large planning structures are better. Synergies between the OHQ (which was not established early enough) and CMPD was commended and one lesson to be taken away is that it would have been good to already benefit from the presence of OHQ level planners within the OHQ from the very beginning of the process. This lesson was seen by some – not all – participants as a confirmation of the need for a central permanent OHQ, reinforced by the fact that a lot of time seems to be spent by OHQ staff in their liaison work with different Brussels services that do not always share the same positions. Another lesson identified was the need to involve CPCC and the Commission more closely into a more comprehensive Civ-Mil planning process to encompass the military as well as law enforcement dimensions of the operation when the CMC is drafted.

A third lesson from EU NAVFOR planning is that it appeared to be firstly designed for a small-scale and short-term operation, relying on the OHQ dealing with frequently rotating FHQs and having to periodically review the OPLAN accordingly. With the evolution of the threat and consequently of the operation, the engagement became more enduring and the forces generated more significant. The idea of a more stable FHQ on land in the region (provided that remote and physical communication assets are optimal) seemed to be consensually welcome by the participating experts, but there is no consensus among Member States. This option – which is expected to be the subject of a specific internal study – would avoid too high a rate of staff turnover and the use of available vessels by the Force Commander to carry out his commanding task. It would however probably create additional common costs. For CSDP in general, it was stated that the EU future operations should provide more clarity in the chain of command between the OHQ and the FHQ and in the definition of the OPLAN.

The end state approach employed for EU NAVFOR was criticised. It was said that it presented several challenges to the EU's comprehensive approach, to the efficiency of force generation (until now effective

Member States' capacities have remained very unclear although the Libya crisis has shown there is probably much more capacity available than stated during force generation meetings on piracy), to the creation of a long-term results-oriented mindset among the troops. In other words, the feeling was shared that 'the political objectives of this mission had much more to do with domestic objectives to bring Member States together towards a consensus, than with fighting piracy and addressing the root causes.' One formula summed up Member States' dilemma: 'an economy of force or an economic force?'

EXTENSION PLANNING PROCESSES

As the operation evolved, EU NAVFOR set itself objectives about 'acceptable levels of piracy' which also had to evolve over time. This practice has brought one key lesson about EU NAVFOR: EU institutions need to be more agile in their adaptation to ongoing challenges. Member States would benefit from adopting a more multilateral and common approach relying, for instance, on more systematic resources pooling (the example of embarking one Member State's troops aboard another Member State's vessels was given).

The preparation of Operation *Atalanta's* strategic review lasted surprisingly long (seven months) because of institutional reforms implied by the implementation of the Lisbon Treaty. Decisions on EU NAVFOR Rules of Engagement (ROE) depended on the adoption of a new OPLAN which itself depended on progress made on RMCB by other EEAS structures. The alleged tendency of Brussels institutions to be 'happier to talk about the process rather than the outcome' has certainly very much slowed down the pace of adaptation of EU NAVFOR.

Extension planning has also proved to lack agility due to the fact that Council decisions are usually (for political reasons) too detailed and that each Member State has to consult national parliaments for any modification. Another reason for slowness is that decisions on extension have been taken at Council level while some experts suggested that a set of decisions on operational changes could actually be dealt with by the PSC itself more frequently. This diagnosis was qualified by a critical appraisal of the role of the EUMC, seen as not proactive and fast enough in its role of

providing military advice to the PSC (which was depicted as a potentially very swift decision-making body as demonstrated during the Georgia crisis) when it is tasked to do so.

Capabilities wise, EU NAVFOR, after two years of operation, is still short of maritime patrol aircrafts, medical support and maritime tankers. This situation, according to experts, is mainly due to political and institutional unwillingness to accept a more commercial approach, through subcontracting, to fill these capabilities gaps. The successful experience of Luxembourg which funded the use of private aircrafts was given as a good example of Member States' possible innovative approaches. However, Member States' reluctance to consider an increase of common costs within the Athena mechanisms maintains a status quo that is to the detriment of operational efficiency.

The Libya crisis has already started to have a very serious impact on international military counter-piracy efforts which have consequently been cut by 25% due to rerouting of vessels and the withdrawing of a US tanker. Potential instability in other parts of the Middle East could also probably require the mobilisation of further resources away from the counter-piracy operation. A number of nations have already imposed caveats on movements of their warships committed to EU NAVFOR which have started to constrain the ability of the Force Commander to deliver the mission ordered by the Operation Commander.

Although its mandate is not only to contribute to deterring piracy, but primarily to protect WFP and AMISOM shipping, the OHQ repeatedly pointed out the fact that WFP escorting binds an unnecessary large proportion of EU NAVFOR's assets and that there is a need to rethink burden sharing. It seems there has been very little responsiveness at the political level in Brussels where the HR is reportedly working on the matter.

As for evolving Rules of Engagement (ROE) some experts also advised the EEAS and above all the EUMC to do more preparatory work with Member States and to adopt 'quasi-dormant ROE to be used when needed, with political control over it, and to be activated when appropriate'. The amendment in May 2011 of *Atalanta's* ROEs has however brought significant results, for instance with the implementation of the 'see and avoid' concept.

EXIT STRATEGY PLANNING

EU NAVFOR has been extended according to the principle of a 'rolling end date'. However, experts agreed that the perpetuation of such temporary measures without any end state does not make much sense and that it was time to start thinking of an exit strategy.

It was noted that there could be divergences in the interpretation of what 'an acceptable level of piracy' is. While for Member States it seemed that the current state of play is politically acceptable, this is clearly not the case for the Industry. Giving the enduring nature of the piracy threats and the relatively low level of political eagerness to remain engaged in the area for too long (some participants even warned against the risk of transforming EU NAVFOR into a 'playground for unemployed navies'), some alternative options should be considered to hand over the counter-piracy work to other actors. As far as the 'dark blue work' is concerned, experts recognise that there are only a few nations able to cope with it, and even less willing to do so and that most countries in the region are among them. While India is very active, South Africa remains largely passive (with the exception of recent engagement next to its borders), Saudi Arabia and Oman silent. The need for a potential EU NAVFOR exit strategy and handover to other international or regional players was raised, but no clear answer or views came up.

International coordination - NATO, UN

The starting point is that not a single maritime force alone is able to bring a solution to the piracy problem in the area. Experts estimate that while 83 warships should be permanently deployed in the area in order to have always one vessel at a one hour reaction distance from potential attacks, there are currently only around 34 warships patrolling in the area. The second challenge is political, since it seems impossible to unify all international actors along the same political lines. As a consequence, the work of SHADE, co-chaired by the EU and the CMF and which meets every six weeks, is more about 'deconfliction' than genuine coordination. SHADE meetings are therefore focusing on the tactical level and as one expert stated, 'we make sure we don't raise discussions at the political level, otherwise it stops the talks.' So far, only tactical coordination, described as 'very good', is possible because of a lack of a more ambitious political

mandate assigned to the forces. In one organisation or the other, EU Member States have the 'tendency to pitch at the minimum force level' and are very cautious in the way OPLAN is drafted.

EU NAVFOR coordination with NATO has to be understood in the broader framework of EU-NATO relations; that a former NATO Secretary General often describes as a 'frozen conflict'. When tensions arise, they do so at political level, sometimes because of individual antagonistic attitudes. As some experts said, there is the 'impression of a beauty contest between the EU, NATO and CMF'. It is the fourth time NATO and the EU simultaneously deploy forces in the same area and with the same mandate (EUFOR *Althea* and NATO HQ Sarajevo, strategic lift for AMIS, police mission in Afghanistan). From an outsider's point of view, EU-NATO competition on piracy has grown and is a matter for concern for the industry. The EU and NATO also compete for media coverage and visibility and it was underlined that 'while success is not shared, failure is.'

The Libya crisis, with strong German reservations about the EU using lethal force, has reinforced the diversity of positions on the EU's role in counter piracy and the use of force by EU NAVFOR.

EU NAVFOR relations with NATO have evolved over time. While it was acknowledged that two years ago both organisations considered they had reached the limits of coordination, some progress was then made on closer relations: information sharing has improved, VTC meetings are held more frequently and similar CONOPS on Somali Basin and Gulf of Aden operations have been adopted (together with the CMF).

NATO is still very much in a quest for legitimacy in the counter-piracy field and makes its case by describing its large permanent planning and training capabilities as well as its intelligence fusion centre and strong permanent SITU. However, figures speak for themselves and EU NAVFOR is clearly, including in the views of the private sector, the leading actor in counter piracy off the coast of Somalia: it ensures 90% of WFP/AMISOM convoy escort (thus NATO only 10%). As for NATO, doubts were raised about Ocean Shield's ability to implement its mandate given the very few assets it has at its disposal.

EU Member States who are members of both organisations usually try to maintain a balanced commitment

towards the two organisations although some experts have openly questioned NATO's added value in counter piracy in the region. EU Member States are divided along two opposed positions: one consisting of considering that in the future EU Member States' assets provided to Ocean Shield should be transferred to EU NAVFOR (an option that some see as unlikely on the grounds that should Ocean Shield be disbanded, its vessels would be redeployed elsewhere but surely not to the benefit of EU NAVFOR) and another supporting a more pragmatic 'multiple clubs' approach.

Some more thinking is needed to envisage the next steps for EU-NATO coordination. A first challenge for EU-NATO cooperation is to improve joint efforts to reach out to other international navies active or potentially engaged in the area. Despite joint démarches towards China (joint EU-NATO visits to China), Russia, India and South Africa (invitations to attend coordination meetings and to use the Mercury information sharing system), very little has been achieved.

Russia appears to be a very versatile interlocutor. South Africa does not attend meetings to which it is invited although it has started to engage in the south of the area of operation. India does not share information and sees the Indian Ocean as its own backyard. Chinese forces are responsible for the security of their national merchant vessels and face extremely severe sanctions in case of failure. One opportunity was missed by EU NAVFOR to engage their Chinese counterparts in cooperation on the IRTC because of a technical mistake made by the EU. Since then, China has not seemed to be keen to repeat the experience. The planning of Chinese convoys is done in their Ministry of Transport, which operates within a hierarchical process separated from the Ministry of Defence with whom the EU and NATO have been in contact. Other Asian countries like Japan, South Korea and Thailand are involved in counter piracy but not under any EU or NATO framework. The analysis of the EU military is that they have done their best to engage other international actors but that their work has reached its limits and that the only way forward is to discuss counter-piracy coordination at a more political level. While it was suggested that piracy could be put on the agenda of political dialogue with some of the abovementioned countries, it was also acknowledged that there is still a long way to go before CFSP is considered as a credible political dialogue channel.

A second challenge is to share the burden of escorting WFP vessels with NATO. So far, NATO has

only accepted twice to escort WFP and AMISOM vessels in the last year. It is a very asset demanding task and because of NATO's limited capabilities, the organisation is not very keen to take it over.

Regional Maritime Capacity Building (RMCB)

Ongoing efforts on Regional Maritime Capacity Building (RMCB) were seen by planning experts as the only way out for the EU if it does not want to 'be stuck' in the area of operation.

On the military side, participants seemed to agree that more should be done to enhance regional countries' maritime security capacities through short and long-term programmes. The CMPD has been working on options for CSDP operations to be considered by the PSC. Even if RMCB does not bring any immediate solution, it will certainly help create a better environment for the navies. It could be based on the experience of navy visiting teams offering training while being harboured in regional countries' port facilities. Training could include counter-piracy methods (evidence collection, destruction or storage of equipment, etc.). Some participants suggested more cooperation should be developed with NATO and Africom in this field. Another dimension concerns capacity building of regional coastguards at national and regional level, currently implemented in the framework of the Critical Maritime Routes programme managed by the Commission. It was also mentioned that the EU could perhaps try to engage the UN more substantially on the piracy file in order to design a global solution to an already global challenge.

On the civilian side, the debate focused on the need to improve the judicial chain in the region. So far, incarceration in the region – as the result of post-trial agreements signed or in the process of being signed between Somali authorities and other countries like the Seychelles – has attracted most of the attention. The UN Office on Drugs and Crime (UNODC) has developed a multi-donor regional programme (almost 20 million USD so far) funded by the EU, its Member States and other donors. The main projects involved plans to build new prison facilities in Somalia (Garoowe in Puntland funded mainly with UK resources and Hargeisa in Somaliland). Projects costs will also include convicted pirates' repatriation costs and prison guards training. One option suggested by the experts was to channel EDF, other international and even private – from the industry – funds to the UNODC trust

fund. Some reservations however were made regarding the effectiveness of such a programme which still has to demonstrate its added value in putting an end to the capture and release phenomenon. The UNODC is currently processing around 800 suspected/convicted pirates' cases under its programme. It was pointed out that many suspected/convicted pirates have been released from Puntland facilities, included some piracy financiers, which makes it necessary to undertake closer political dialogue with Puntland authorities. One advantage of developing prison facilities could be easier access to suspected pirates for prosecutors and navies to collect evidence and gather intelligence on piracy networks.

It was noted that arresting and detaining suspected pirates would lead to a loss of revenues for Somali people and that focusing only on the judicial chain in the region and in Somalia would not bring alternative livelihoods to communities.

It was also underlined by some experts that capacity-building measures should also ensure the development of sustainable and reliable maritime administrations in the concerned countries of the region which is the prerequisite for the further development of any constabulary (coastguard) function. In addition, as already experienced in other regions exposed to piracy and armed robbery at sea, such as in the Singapore and Malacca straits, strong EU support to a regional maritime cooperation agreement aiming at reinforcing cooperation between coastal countries and facilitating intervention of international forces could be the framework of an exit strategy ensuring the setting up of strategic logistic support and surveillance of the Western Indian Ocean, thereby guaranteeing the increased security of EU economic supply and trade interests.

While piracy was depicted by many as a symptom of the Somali crisis, there was some discussion about ransoms payment and money laundering tracking seen by some participants as 'the symptom of the symptom'.

Several agencies are working on International Money Laundering (IML) in the region: Interpol, Europol, and more recently the UNODC. The UN contact group on piracy has set up a new working group on financial flows in 2011 and has started to work on the issue. UNODC is working on the matter in coordination with Europol, Eurojust and Interpol. It was admitted that tracking proves to be an extremely difficult work given

the degree of informality of money transfers often using an illegal local 'hawala' transfer system. There is a clear lack of human intelligence that would make it possible to know more about how piracy networks function, and this is even truer for informal financial flows. Furthermore, experts agree that around two thirds of ransom payments actually stay in Somalia and are reinvested in other activities. The rest is likely to go to countries hosting large Somali diasporas (Nairobi more particularly, but also Dubai and Uganda where the diaspora is said to be linked to oil trafficking).

Any effective action on IML in the region will need to rely on judicial processes against piracy financiers and therefore on regional capacity building in this sector, namely the adoption of appropriate legislation and the setting up of powerful national financial crime departments. So far, the degree of commitment and political willingness in the region seems rather low despite isolated statements. Although some efforts could be made in targeting the main piracy financiers by finding legal grounds for their arrest by local or international agencies on the basis of national or international warrants, the current state of play led some participants to express some doubts about IML tracking as the best and quickest route to suppress piracy.

A second conclusion is that without covert human intelligence on land, very little can be achieved on International Money Laundering (IML). The only option for the EU and other powers in their fight against piracy is therefore to substantially invest in covert human intelligence within Somalia. A third suggestion was to increase information sharing and cooperation between European prosecutors, the UNODC and private insurance companies involved in ransom negotiations on IML and other judicial issues related to individual suspected pirates' cases. Finally, more cooperation should also be encouraged between EU NAVFOR, UNODC and Interpol on these issues.

Coordination with the private sector- Best Practice

Since the launch of EU NAVFOR, the industry considers that the EU military has done an excellent job but that their task is constrained by a lack of political will to be more proactive and efficient in deterring piracy. Some participants therefore stated that in their view 'governments have failed to prevent piracy'. The private sector has learned over time that the European

military were not the only interlocutors they should deal with, especially regarding Best Management Practice (BMP) implementation.

This political passivity has led the industry to engage in wide advocacy campaigns to put pressure on governments. Recent statements from the private sector also indicate that if no progress is made in the fight against piracy off the coast of Somalia in the coming months, alternative shipping routes would be more and more seriously considered, despite their foreseen additional cost.

Cooperation between the industry, the European Commission (DG MOVE) and EUNAVFOR was described as extremely fruitful. The co-location of private sector representatives within the OHQ and the operation's policy of 'complete openness and liaison' is an unprecedented success.

However, several challenges remain.

First of all, there is no common understanding between the private sector and governments about what an acceptable level of piracy would be and seafarers want more effective actions to ensure their security.

Second, cooperation on ships' Best Management Practice (BMP) has reached certain limits – despite 'significant improvements', with key flag states not doing enough to ensure their national merchant vessels comply with BMP. For instance, some vessels have armed guards on board but are not necessary compliant. Furthermore, a number of flag states do not provide the necessary instructions on their Long Range Identification Tracking (LRIT) to their national vessels and fail to share this information with the European Maritime Security Agency (EMSA) and EU NAVFOR. LRIT information sharing would be key to implement new protection approaches envisaged by EU NAVFOR based on the avoidance of pirates' mother ships thanks to vessels' routes monitoring. Among those flag states who could cooperate more actively are 6 EU Member States, one flag under the EU, one associated country, one candidate country, and 4 overseas territories of 3 different Member States. This

situation is in clear contradiction with the agreement signed by 19 Member States, one associate country and one overseas territory of a Member State to provide LRIT information to EU NAVFOR. The European Commission (DG MOVE in charge of maritime security) has adopted a Commission Recommendation fostering full use of the BMP by EU bodies and first of all by EU Member States' flagged ships. It sends on a weekly basis 'gentle reminders' to these flag states' ministries of transportation based on the information on compliance with BMP provided by EU NAVFOR. Such a policy has met with positive reactions from flag administrations, but it is still a process that can be improved by better involvement of all actors. This state of play, for some experts, undermines deterrence efforts, as demonstrated by the attack in the last few months of three ships, sailing under the flag of the same EU Member State, which were not in compliance. There is still some debate between this EU Member State (which is also a contributing nation to EU NAVFOR) and the European Commission on these cases. More generally, it is unclear why 6 Member States still omit or refuse to share their LRIT information. On the private side, it is not clear how ship masters and officers interpret and apply BMP and experts say 'many see them as a pick and mix of recommendations' while they should be strictly and fully followed. One conclusion of the debates on BMP compliance was the need to increase European Flag States' sense of responsibilities *vis-à-vis* their national merchant vessels through a more efficient coordination between Ministries of Transport, Foreign Affairs and Defence or agencies at national level.

Third, the private sector has a wide interpretation of the UNCLOS regarding conspiracy to piracy, which it considers as sufficient grounds for targeting and prosecuting suspected pirates. Governments do not see things that way.

Fourth, the private sector has repeatedly stated it favours more ashore actions against pirates and regrets there is no political appetite for them. Debates among Member States in the PSC were still ongoing on this matter, although EU NAVFOR's mandate already envisages robust action to be taken if needed.