

New thrust for the CSDP from the refugee and migrant crisis

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Abstract

Attempts to broach 'fortress Europe' have created a border management crisis for EU member states, and a humanitarian disaster of proportions not seen since World War II. In response, EU institutions and member states have in practice given priority to security-driven (home affairs) and military concerns. Fraught with risks and uncertainties, the launch of the EU's naval Operation Sophia signalled the beginning of a more proactive engagement to restore stability in the wider Mediterranean region. The new thrust given to the Common Security and Defence Policy (CSDP) has led to an approximation to measures adopted in the Area of Freedom, Security and Justice (AFSJ). Conversely, the EU's external border control agency Frontex has been lured 'out-of-area' in its cooperation with NATO. Further evidence of AFSJ actors blending with the military in an expeditionary mode can be found in the recently endorsed Regulation on a European Border and Coast Guard.

As the objectives and mandates of the EU's internal and external security activities blur even more, questions about the limits of the Lisbon Treaty will come into sharper focus. Yet, the cross-fertilisation of lessons learnt in the hitherto separate legal spheres of AFSJ and CSDP should benefit not only strategic analysis, planning and conduct of operations, but also the design, development and training of civil-military capabilities. It is time, therefore, to step up the comprehensive approach to EU external action and involve AFSJ elements and actors on a more structural basis. It is only then that the blurred boundaries between internal and external security will become a continuum and enable a more effective handling of the security crises confronting the European Union.

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New thrust for the CSDP from the refugee and migrant crisis

Steven Blockmans*

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1. Introduction

The dramatic spike in asylum applications to EU member states in 2014-15 is one of the most distressing consequences of the depleted security environment on the European Union's outer periphery.¹ The run on 'fortress Europe' has created a crisis in terms of EU member states' borders management, and a humanitarian disaster of proportions not seen since World War II. One should keep both aspects in mind when using the term 'refugee and migrant crisis'.

The last two years have tested the added value and legitimacy of the European Union when responding to this multifaceted crisis. The public outcry and unprecedented levels of political and media attention to the appalling experiences and unsettling images of asylum seekers arriving to the EU have put huge pressure on the Union to show that it is up to the challenge. The crisis response by individual member states, the EU's institutions and external border control agency Frontex, as well as NATO, has been meritorious given the traditional boundaries between external and homeland security. Yet the EU policy responses, both internally and in cooperation with third countries, have so far lacked the 'comprehensive approach' the EU professes to employ in its strategic actions. Moreover, EU institutions and member states have in practice given priority to security-driven (home affairs) and military concerns. The focus on border controls, return and readmission and combating smuggling have by and large prevailed, instead of first ensuring full compliance with fundamental human rights standards and principles. This, as has been argued elsewhere, "constitutes one of the Achilles heels of the current European Agenda on Migration".²

Nevertheless, the European Agenda adopts a holistic approach to migration that aims to respond to the immediate need to save lives and address emergency situations, and to tackle the root causes of irregular migration and fight traffickers. Indeed, it is only in conjunction with an effective internal strategy to safeguard the Area of Freedom, Security and Justice (AFSJ) that the EU's external action, including that under the Common Security and Defence Policy (CSDP), can work. In this respect, it is worth noting that the Council Decision to launch

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¹ Eurostat figures for 2014 show more than 600,000 asylum applications (almost 200,000 more than the highest figures in the previous 15 years), whereas 2015 broke all records with almost 1.4 million applications.

² See S. Carrera, S. Blockmans, D. Gros and E. Guild, "The EU's Response to the Refugee Crisis: Taking stock and setting policy priorities", CEPS Essay No. 20, 16 December 2015; E. Guild and S. Carrera, "EU Borders and their Controls: Preventing unwanted movement of people in the EU?", CEPS Essay No. 6, 14 November 2013; and S. Carrera, "The EU's Dialogue on Migration, Mobility and Security with the Southern Mediterranean: Filling the Gaps in the Global Approach to Migration", CEPS Paper in Liberty and Security in Europe, June 2011.

EUNAVFOR MED, one of the most emblematic reactions by the EU to the refugee crisis, states that the CSDP naval operation will cooperate closely and coordinate activities with AFSJ actors like Frontex and Europol and conclude arrangements to that end.³ At the same time, the High Representative for Foreign and Security Policy (HR), who is also Vice-President of the European Commission (VP), has spearheaded EU efforts to establish partnerships with, inter alia, the International Organisation for Migration (IOM), the UN High Commissioner for Refugees (UNHCR) and other members of the UN family, as well as regional partners (such as the African Union and the 'G5' of the Sahel: Mali, Mauritania, Niger, Chad, Burkina Faso) to tackle some of the root causes of fragility in the regions of origin, namely poverty, unemployment and conflict, and to decide on joint approaches to stemming migratory streams and fighting human traffickers. One dubious European Commission initiative from June 2016 was intended to replicate the infamous but effective EU-Turkey deal⁴ and make development aid to Ethiopia, Mali, Niger, Nigeria and Senegal conditional on their acceptance to help stop people heading for Europe.⁵ These so-called 'migration compacts' would not be restricted to Africa but would also extend to Lebanon, Jordan and other parts of the Middle East.⁶ In the margin of the Sahel G5 meeting in Brussels on 17 June 2016, the HR/VP also launched an EU-facilitated dialogue between Libya, Chad and Niger on border management.

While recognising the existing efforts, but also deficiencies, in the multi-sector approach of the EU, this paper asks how the Common Security and Defence Policy has developed as a result of the ongoing refugee and migrant crisis, and what inroads it has made into the policies supporting the Area of Freedom, Security and Justice to join up the different actors and instruments in order to arrive at a more comprehensive approach. The emphasis of the analysis rests on Operation EUNAVFOR MED 'Sophia' and the emergence of a semi-military European Border and Coast Guard. The EU Integrated Border Management Assistance Mission in Libya (EUBAM Libya), which was launched in 2013 but terminated in 2015 due to the instability of the country, remains outside the scope of the present paper.⁷

³ Council Decision 2015/778/CFSP of 18 May 2015, OJ 2015 L 122/31, Art. 8.3. More generally, working arrangements between the EEAS, Frontex and Europol had already been signed.

⁴ See by S. Carrera and E. Guild, "EU-Turkey plan for handling refugees is fraught with legal and procedural challenges", CEPS Commentary, 10 March 2016; and W. Booth, "Greece was once the fast lane to Europe for refugees. Now it's a grim waiting room", *Washington Post*, 7 July 2016: "Arrivals in the Greek islands are down 97 percent."

⁵ See Foreign Affairs Conclusions on the Sahel of 20 June 2016. With the backing of all member states to the negotiation of partnership frameworks the HR/VP started on 17 June 2016 with migration compacts with two of the G5 Sahel countries: Mali and Niger. She was asked by Commission President Juncker to form a specific project team on this with Commissioners and Vice-Presidents. In addition, the implementation of the Trust Fund for Africa established at the Valletta Summit had reached a total amount of €2.3 billion of EU funds by the end of June 2016 and a start had been made with the financing of projects. For the Sahel, about €530 million worth of projects were being funded, among others security and border management projects to ensure more effective territorial control and to better tackle more illicit flows and trafficking.

⁶ As reported by E. Zalan, "EU to make aid conditional on help with migrants", *EU Observer*, 7 June 2016; and N. Nielsen, "EU development aid to finance armies in Africa", *EU Observer*, 5 July 2016.

⁷ This EUBAM was tasked to support the Libyan authorities in a non-executive function.

2. Inter-institutional action

Although southern frontline states of the EU have been coping with refugee and migrant flows for years, they have largely shouldered the burden on their own, despite sudden spikes in numbers (e.g. in 2005 with the ‘assault’ on the border fences at Ceuta and Melilla) and calls for a common response. It is the dramatic increase in the numbers of people seeking refuge from wars in the Middle East, which spurred economic migrants from further afield to follow and try their luck in finding a better life in Europe that has provoked an EU-wide reaction.

The refugee crisis has mostly materialised over two migratory routes: through the south-central Mediterranean and the Aegean Sea.⁸ The origins of the EU’s military response to the crisis went back 18 months before a CSDP was officially launched, to the coast of Lampedusa. In November 2013, Italian Foreign Affairs Minister Emma Bonino and Defence Minister Mario Mauro asked former High Representative Catherine Ashton for various measures, including the establishment of a naval rescue operation and the fight against traffickers, the strengthening of Frontex, and a discussion with third countries on migration. The options developed were military, civilian and diplomatic. Italy and Greece agreed to act together, but their push towards other member states failed. Most refused to fund the Italian-run rescue operation ‘Mare Nostrum’ and the European Council of December 2013 ended without result. Rome and Athens did not give up, however, and supported by Malta, Spain and Bulgaria, they demanded more European solidarity.

In response to a rise in fatalities at sea since February 2015, ‘migration’ has become a key domain of intervention by High Representative Federica Mogherini, who in her capacity as Vice-President is responsible for the Commissioners’ Group on External Action (CGEA)⁹:

We cannot allow other tragedies at sea in the coming weeks and months; we need to be able to give a strong political and operational response. As I have announced today during the College in Strasbourg, I will convene an extraordinary meeting of the Commissioners’ Group on External Action in the coming days in order to discuss with the Commissioner for Migration, Home Affairs and Citizenship, Dimitris Avramopoulos, a review of our policies. I’ve also decided to put a discussion on migration on the agenda of the Foreign Affairs Council soon. The fight against smuggling and trafficking, the rescue of migrants at sea, the protection of asylum-seekers are shared challenges; they require a stronger exercise of shared responsibility.¹⁰

On the occasion of the Foreign Affairs Council in March 2015 (the first in ten years to discuss ‘migration’), it was decided to organise an extraordinary meeting of Foreign and Interior Ministers on April 20th. This first-ever joint ministerial prepared the first ‘special’ European Council meeting on the refugee crisis on April 23rd, after the single-most deadly shipwreck

⁸ For an overview of routes: <http://frontex.europa.eu/trends-and-routes/migratory-routes-map/>.

⁹ See S. Blockmans and S. Russack, “The Commissioners’ Group on External Action - Key political facilitator”, CEPS Special Report No. 125, 17 December 2015. The CGEA includes Commissioner Avramopoulos (DG HOME) in the broader cluster.

¹⁰ See http://eeas.europa.eu/statements-eeas/2015/150210_03_en.htm.

on the Mediterranean claimed more than 900 lives. Mogherini has played an instrumental role in keeping the external dimension of the refugee crisis on the agenda since.

Whereas “the need to manage migration properly” (and strengthen ‘Triton’, the Frontex Operation in the south-central Mediterranean and the EU’s support to the countries of origin and transit) had already been recognised by EU Heads of State or Government in 2014, European Council President Donald Tusk tried to respond to the concerns expressed by an ever-louder chorus of EU leaders by coordinating a more concerted effort at the highest political level. He appointed the European External Action Service’s (EEAS) former Executive Secretary General Pierre Vimont as his point man for the Valetta Summit process and has kept refugee and migration issues on the agenda of every regular European Council summit since. In parallel, the CSDP track was developed. It is in this context that the EU congratulated itself on the unanimity and speed with which a decision was taken, on 22nd June, to launch a common military response — two months after the above-mentioned shipwreck.

3. South-central Mediterranean

3.1. EUNAVFOR MED: The need for speed

Seen through the narrow prism of the CSDP, the time needed to move from the political initiative to conceive the operation, to identify capabilities, to build consensus for activation by Council decision and start deployment has indeed been remarkably short, even compared to previous fast EU deployments in Congo in 2003 (Operation Artemis) and Georgia in 2008 (a civilian monitoring mission).¹¹ Force generation, the usual headache in mounting EU operations (witness Chad in 2008), took only one month to be agreed upon, in line with the initial intention to finalise planning by the Foreign Affairs Council in June 2015. The CSDP military operation in the south-central Mediterranean was given a mandate to “identify, capture and dispose of vessels as well as enabling assets used or suspected of being used by migrant smugglers or traffickers”.¹²

The price the EU paid for the speed to deploy its new naval force deployment in the Mediterranean —EUNAVFOR MED— was the criticism it drew from international partners and the general public alike when plans for a ‘boat-sinking’ operation were unveiled, raising fears about unacceptable levels of violence and collateral damage – a European version of Mexico’s drug war. Civil society organisations and some international partners (e.g. Ban Ki-Moon spoke at the European Parliament on 27th May 2015) have reacted negatively to an operation that appears to heighten humanitarian risk by putting migrants in the cross-fire. Mogherini was on the defensive, stating time and again that the targets are not migrants but “those who are making money on their lives and too often on their deaths”.¹³ For the first time in years, the EU was being criticised for overreaction rather than for its absence from crises.

¹¹ Sections 3.1 and 3.2 draw on G. Faleg and S. Blockmans, “EN Naval Force EUNAVFOR MED Sets Sail in Troubled Waters”, CEPS Commentary, 26 June 2015.

¹² Council Decision 2015/778/CFSP of 18 May 2015, OJ 2015 L 122/31, Art. 1(1).

¹³ Statement by High Representative/Vice-President Federica Mogherini on the Council decision to launch the naval operation EUNAVFOR Med, Luxembourg, 22.06.2015.

Yet the problems of EUNAVFOR MED lay less in clumsy public diplomacy than in the perilous mismatch between its stated objectives and the absence of a clear strategy and a mandate under international law, thus creating both operational and political risks for member states involved in the operation. Phase 1 of the operation (surveillance and assessment), began with no legal mandate to carry out the crucial phases 2 and 3 (seek and destroy), whose military planning and outcomes were undetermined. Despite these limitations, the naval force nevertheless marked a turning point in the EU's security narrative, because it meant that the Union was finally addressing the threats to security and the humanitarian tragedies in the south-central Mediterranean.

3.2. Scope and mandate of the military operation

The operational model of EUNAVFOR MED is largely inspired by the EU's Naval Force Operation Atalanta off the Horn of Africa and in the Western Indian Ocean. Launched in 2008, Atalanta has allowed the EU to acquire valuable know-how in maritime security, namely in deterring and disrupting acts of piracy and armed robbery, not just on the high seas but also ashore (cf. the helicopter gunship attacks to destroy pirates' logistical bases on the coast). This operational experience helped the EU to plan for EUNAVFOR MED, which is embedded in the idea of a holistic approach to migration.

The operation was launched on 22nd June 2015. At the outset of the surge, its force strength comprised nine surface units (warships), one submarine, three fixed-wing maritime patrol aircraft, five helicopters and one drone operating under the national flag of 14 member states (Belgium, Finland, France, Germany, Greece, Hungary, Italy, Lithuania, Luxembourg, the Netherlands, Slovenia, Spain, Sweden, and the UK).¹⁴ The operational strength in June 2016 is depicted in the infographic below.

In many respects, EUNAVFOR MED is the trickiest CSDP operation in years. As mentioned above, public diplomacy has clearly lagged behind its inception process. But the real blind spots of the operation had to do with its strategy, legal mandate and operational practicalities. Phase 1 did not need a UN Security Council (UNSC) Resolution, because surveillance is executed in international waters and airspace. But beyond this point there was little indication of what EU forces should do during phases 2 and 3; which means and budget should be used to carry out these tasks; and what conditions would have to be met for the Council to decide on the transition beyond phase 1, into Libyan territories. Success was not assured, either. Attacking traffickers and destroying their means might lead to counter-attacks by the militias that protect these resources, benefit from or organise trafficking in one way or another. Indeed, the EU would have to calibrate its military activities, particularly when moving within Libyan territorial waters or ashore, to avoid destabilising a political process by collateral damage, by disrupting legitimate economic activity or by creating a perception of having taken sides.¹⁵

¹⁴ See EEAS (2016) 126, 27 January 2016, <https://wikileaks.org/eu-military-refugees/EEAS-2016-126>.

¹⁵ Illustrative in this respect is the report of 25 January 2016 by the Operation Commander, Rear Admiral Enrico Credendino of the Italian Navy, for the EU Military Committee and the Political and Security Committee. It gives refugee flow statistics and outlines the performed and planned operation phases (1, 2A, 2B and 3), the corresponding activities of the joint EU forces operating in the Mediterranean and the future strategies for the operation. See EEAS, 'EUNAVFOR MED Op SOPHIA - Six Monthly Report

INFOGRAPHIC: operational strength of EUNAVFOR MED, June 2016

Source: http://eeas.europa.eu/csdp/missions-and-operations/eunavfor-med/news/20160527_01_en.htm.

These considerations led to protracted discussions with Russia and China on the language of a UN Security Council resolution. Russia, in particular, insisted on a watertight mandate to prevent a repetition of what it considered to be an abuse by western nations of a resolution to intervene militarily in Libya in 2011. The discussions in the Security Council revolved, inter alia, around the word “disposal” (read: sinking) of vessels and related assets, “before use”, and the legal definitions of “traffickers” and “smugglers”, who, unlike pirates, fall outside the scope of classic international law. Ultimately, Operation EUNAVFOR MED was granted an international legal mandate by way of UNSC Resolution 2240 on 9th October 2015. This Resolution authorises states and regional organisations to intercept, inspect, seize and dispose (i.e. destroy) vessels on the high seas off the coast of Libya for a period of one year, but only when they have “reasonable grounds to believe” that these vessels, inflatable boats, rafts and dinghies are being used for smuggling and human trafficking from Libya.

In fact, UNSC Resolution 2240 circumscribes the kind, level and reach of the intervention within strict rule of law parameters. For instance, the Resolution puts special emphasis on the need for states and regional organisations to display “good faith efforts to obtain the consent of the flag state” before the inspection of the vessels. Any subsequent seizure or disposal of such vessels must happen in accordance with applicable international law “with due consideration of the interests of any third parties who have acted in good faith”. The

22 June-31 December 2015’, EEAS(2016) 126, 27 January 2016, available at <https://wikileaks.org/eu-military-refugees/EEAS-2016-126>.

Resolution also stresses the obligation of states and regional organisations carrying out such UNSC mandated activities “to provide safety for the persons on board as an utmost priority and to avoid causing harm to the maritime environment or to the safety of navigation” (cf. paragraphs 7, 8 and 10 of the Resolution).

Adopted under Chapter VII of the UN Charter, the Resolution thus effectively details the circumstances under which the use of force may be used, all in keeping with the protection of migrants’ rights, international human rights obligations, international refugee law and the UN Convention on the Law of the Sea. In short, UNSC Resolution 2240 lays down a set of standards which may well complicate the practical running of the operation, especially when confronted on the high seas with smugglers who have proven to possess callous disregard for the well-being of their ‘clients’. To be sure, UNSC Resolution 2240 does not authorise EUNAVFOR MED to act within the territorial and internal waters of Libya, let alone on Libyan territory, as projected by the Decision adopted by the Council of the EU.¹⁶

The alternative legal justification for the implementation of phases 2 and 3 of EUNAVFOR MED would be for the EU to act on the invitation of the legitimate government of Libya. However, with two power centres vying for dominance, any strategy that hinged on the invitation of one of the rivalling parties (i.e. that of the internationally recognised ‘government’ in Tobruk) risked irking the other (i.e. the Islamist ‘government’ in Tripoli). The EU’s operation therefore carried serious political risks and might have even ended in impasse. For this reason the EU actively supported the efforts of the UN Secretary General’s Special Envoy (first Bernardino de León, then Martin Kobler) to mediate an agreement for the formation of a unity government in Libya. Efforts to bring the competing parliaments and their backers together in a ‘Government of National Accord’ were further supported in an Italo-American process that led to the adoption of the Rome Communiqué of 13 December 2015, which formed the basis of the UN-brokered ‘Libyan Political Agreement’ reached at Skhirat on 16 December which, in turn, was unanimously endorsed by UNSC Resolution 2259 of December 23rd. The first meeting of the cabinet of the Government of National Accord took place on 2 January 2016 in Tunis but it was not until 30 March 2016 that key members arrived in Tripoli.

In the meantime, the practice of fighting traffickers had led to the re-baptism of EUNAVFOR MED as ‘Operation Sophia’, after the name given to the baby born on the ship that rescued her mother on 22nd August 2015 off the coast of Libya.¹⁷ Shortly afterwards, on 7th October 2015, EUNAVFOR MED ‘Sophia’ entered its second phase. According to the information presented on the website of the EEAS, the Operation contributed to saving more than 14,800 people in its first year of deployment, while 71 people had been reported to the Italian authorities as possible smugglers and 127 vessels had been “removed” from the reach of illegal organisations.

On 20th June 2016 the Council decided to extend the mandate of Operation Sophia for one year and expand it to two additional tasks: training Libyan coastguards and contributing to the implementation of the UN arms embargo on the high seas. These extra tasks were

¹⁶ See part (ii) of phase 2 as well as phase 3 of the Operation, in Art. 2(2)(b) and (c) of Council Decision 2015/778/CFSP.

¹⁷ See Council Conclusions on Migration, 12 October 2015, <http://www.consilium.europa.eu/en/policies/migratory-pressure>.

suggested by HR/VP Mogherini to the Government of National Accord Libya,¹⁸ which requested EU support one month later.¹⁹ This was subsequently unanimously endorsed by the UNSC in Resolution 2292 on 14th June 2016. The latter is, indeed, a very strong signal of international support to the EU's role in the Mediterranean in tackling the smuggler networks, something that France and the UK, in particular, had been insisting on for a long time.²⁰ The UNSC Resolution also constitutes an implicit Russian snub to NATO, which was active in the Libyan air and maritime space in 2011.

Thus, Operation Sophia matured from its surveillance & rescue phase into a proper 'Chapter VII' operation, since it will help enforce the arms embargo imposed by the UN Security Council. The last time the EU member states carried out such an operation was in the Adriatic Sea under the cover of the Western European Union in the context of the wars in former Yugoslavia (1992-93). That operation was carried out in cooperation with NATO.²¹

4. Aegean Sea: NATO first?

Until February 2016 the response to the refugee crisis was completely managed by the EU. While member states traditionally prefer to act through the EU to address 'soft' security issues, the mandate of EUNAVFOR MED showed governments willing to push for more robust EU action. This raises the question why an operation in the Aegean Sea was not launched under the umbrella of the CSDP, either by broadening the geographical mandate of EUNAVFOR MED or by launching a similar operation in full cooperation with Frontex. Arguably, the activation of NATO's Standing NATO Maritime Group 2 (SNMG2) in the Aegean served political purposes in Greece, Germany and Turkey, the three countries that asked the Alliance to rise to the occasion. Germany, as the preferred destination for many refugees and migrants, obviously had an interest in disrupting smuggling routes departing from Turkey's Aegean coastline. In Berlin's bilateral efforts to spearhead an EU agreement with Ankara to stem the flow of people across the Aegean Sea, it sought to launch a surveillance assistance mission that could straddle Turkey's territorial waters and help stabilise relations with Greece in the process. The choice to cooperate through an organisation of which the three countries are a member was obvious enough. NATO's Secretary General underlined the rationale by stating that

Our added value is that we can facilitate closer cooperation and assist in greater exchange of information between Greece and Turkey, as both are NATO Allies, but only Greece is in the EU. Today's agreement also means that we are working closer

¹⁸ Remarks by High Representative/Vice-President Federica Mogherini at the press conference on Libya, Luxembourg, 18.04.2016; and Ministerial Meeting for Libya Joint Communiqué, Vienna, 16.05.2016.

¹⁹ See Statement by the HR/VP Federica Mogherini on Libya, Brussels, 22.05.2016.

²⁰ See N. Gros-Verheyde, "L'opération Sophia devient une "vraie" mission de présence en mer", Bruxelles2.com, 20 June 2016. The German government was less insistent, as it has to obtain a new mandate by the Bundestag.

²¹ See S. Blockmans, *Tough Love: The EU's relations with the Western Balkans* (The Hague, Asser Press 2007), p. 178.

with the EU than ever before. So NATO has a unique role to play as a platform for cooperation.²²

The scope of the NATO mission in the Aegean is more limited than that of its EU counterpart in the south-central Mediterranean. While Operation Sophia has its own capabilities and is trying to tackle the smuggling networks, NATO has not been tasked with boarding, searching, seizing and destroying boats or apprehending smugglers. SNMG2's goal is "to find the intelligence to cue" the Turkish and Greek coastguards and Frontex assets, "to be able to intercept the migrant boats and bring them back onshore into Turkey".²³ NATO is tasked to conduct reconnaissance and to that end "arrangements have been established on the operational and tactical level providing for the exchange of liaison officers and real-time information sharing."²⁴ Yet, cooperation between NATO, Frontex and Greek coastguards is taking place outside of the established CSDP-NATO framework, which diversifies inter-organisational cooperation but thereby also risks further complicating EU-NATO coordination in crisis management. Likewise, there is no "formal intelligence sharing arrangement" between NATO and Operation Sophia.²⁵ This strikes one as particularly odd, seeing that the two operations — while geographically and institutionally discrete — both take aim at the smuggling networks based on the shores of the Mediterranean. There is, in other words, "an overlap in the intelligence required".²⁶ It would seem, however, that "certain Allied national positions on EU-NATO co-operation (...) limit the scope for [mutual] support" between the EU and NATO in the Mediterranean.²⁷ The reference here is to the continuing disagreements between Turkey and Cyprus.²⁸

The decision to launch a NATO mission of little or no added value constitutes a missed opportunity to enhance an intra-EU comprehensive approach to efficient and effective crisis management. Whereas ad hoc and informal cooperation at both the "Brussels level"²⁹ and in the field may resolve part of the problem and lead to new synergies in crisis management, the EU-NATO relationship is in practice constrained by diverging political considerations of member states, as well as differences in institutional cultures and lines of control and command. In an age of austerity in defence spending and a European neighbourhood in turmoil, NATO and CSDP efforts should be fully complementary.³⁰ In particular, common

²² Statement by the NATO Secretary General on NATO support to assist with the refugee and migrant crisis, 25.02.2016.

²³ See the evidence provided to the House of Lords, "Operation Sophia, the EU's Naval Mission in the Mediterranean: An Impossible Challenge", HL Paper No. 144, May 2016, point 86.

²⁴ NATO Overview of Aegean Sea Mission 2016.

²⁵ HL Paper No. 144, point 88.

²⁶ *Ibid.*, point 91.

²⁷ *Ibid.*, point 92.

²⁸ See also S. Blockmans, "Participation of Turkey in European Security and Defence Policy: Kingmaker or Trojan Horse?", Leuven Centre for Global Governance Studies Working Paper No. 41, April 2010.

²⁹ Cf. to the city hosting both the EU and NATO.

³⁰ See, S. Blockmans and G. Faleg, "More Union in European Defence", report of the CEPS Task Force chaired by Javier Solana, CEPS 2015.

strategic direction will be indispensable. After all, “[p]ragmatism and ad hocery are unlikely to provide a convincing rationale to meet the challenges of a rapidly changing geopolitical context.”³¹

In the first-ever joint EU-NATO declaration, signed by the Presidents Tusk and Juncker together with the NATO Secretary General Stoltenberg in Warsaw on 8th July 2016, new areas of increased practical cooperation were outlined as a “strategic priority” to confront “unprecedented challenges emanating from the South and East”.³² The signatories stress the urgent need to, inter alia, “[b]roaden and adapt our operational cooperation including at sea, and on migration, through increased sharing of maritime situational awareness as well as better coordination and mutual reinforcement of our activities in the Mediterranean and elsewhere”. Building resilience in strategic communications, coordinated EU-NATO exercises and strengthened maritime security cooperation through capacity building are all listed as examples to the new impetus in EU-NATO cooperation. As “speedy implementation is essential”, both organisations have been called upon “to invest the necessary political capital and resources to make this reinforced partnership a success”. The EEAS and the NATO International Staff, together with Commission services as appropriate, have been tasked to develop concrete options for implementation, including appropriate staff coordination mechanisms, to be presented by December 2016. On the EU side, HR/VP Mogherini will steer and coordinate this endeavour.

5. Towards a semi-military European Border and Coast Guard?

The refugee crisis through the south-central Mediterranean and the Aegean Sea have both been covered by Frontex border missions (Triton and Poseidon, resp.), and supported by military operations (CSDP and NATO, resp.). The European Agenda on Migration adopted in May 2015 anticipated that “within the scope of the Treaties and its relevant Protocols”, the European Commission would launch a reflection on how to foster “a shared management of the European border”. It stipulated that

a European System of Border Guards...would cover a new approach to coastguard functions in the EU, looking at initiatives such as asset sharing, joint exercises and dual use of resources as well as the possibility of moving towards a European Coastguard.³³

To be sure, the idea of establishing an integrated system for the management of external borders, and a European System of Border Guards, is not new. It has been under discussion since 2001, when the idea was floated in the Laeken Declaration.³⁴ Spurred by discussions in the framework of Working Group No. 10 of the Convention on the Future of Europe, the

³¹ S. Duke and S. Vanhoonacker, “EU-NATO Relations: Top-down strategic paralysis, bottom-up cooperation”, Paper prepared for the UACES 45th Annual Conference at the University of Deusto, 7-9 September 2015, p. 17.

³² See the joint declaration, http://www.nato.int/cps/en/natohq/official_texts_133163.htm.

³³ European Agenda on Migration, COM(2015) 240, 13.5.2015, p. 17.

³⁴ European Council Conclusions, Laeken, 14 and 15 December 2001, point 42. It led to a study on the possibility of establishing a “European border police”.

Frontex external border control agency was set up in 2005.³⁵ But as a result of the dramatic increase of first-time asylum applications to EU member states in 2014/5, Commission President Juncker underlined in his 2015 state of the union speech the need to reinforce significantly Frontex's competences and "develop it into a fully operational European border and coast guard system."³⁶ This policy priority was reflected in the Commission's Work Programme for 2016 "No Time for Business as Usual",³⁷ which anticipated the presentation of proposals before the end of 2015 "for a European Border and Coast Guard, building on a significant strengthening of Frontex". In the European Council Conclusions of October 15th, the member states' political leaders called for the need

in accordance with the distribution of competences under the Treaty, in full respect of the national competence of the Member States, enhance the mandate of Frontex in the context of discussions over the development of a European Border and Coast Guard System, including as regards the deployment of Rapid Border Intervention Teams in cases where Schengen evaluations or risk analysis demonstrate the need for robust and prompt action, in cooperation with the Member State concerned.³⁸

The Commission followed up with the publication on 15 December 2015 of a package of proposals for legislative measures.³⁹ The Communication "A European Border and Coast Guard and effective management of Europe's external borders" laid down the main components of the Commission's initiatives and the features of the new European Border and Coast Guard (EBCG).⁴⁰

Based on Article 77.2(b) and (d) and Article 79.2(c) of the Treaty on the Functioning of the EU (TFEU), the EBCG was developed in the shape of a regulation under the ordinary legislative procedure.⁴¹ Endorsed in first reading by the European Parliament on 6th July 2016, i.e. barely half a year after the Commission tabled its proposal, the EU was swift in delivering on its

³⁵ Council Regulation (EC) 2007/2004 establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union, OJ 2004 L 349/1.

³⁶ See http://ec.europa.eu/priorities/soteu/docs/state_of_the_union_2015_en.pdf.

³⁷ COM(2015) 610, 27.10.2015.

³⁸ See <http://www.consilium.europa.eu/en/press/press-releases/2015/10/16-euco-conclusions/>.

³⁹ See http://europa.eu/rapid/press-release_IP-15-6327_en.htm. The package includes a Proposal for a Regulation amending Regulation No 562/2006 (EC) as regards the reinforcement of checks against relevant databases at external borders, COM(2015) 670 final, 15.12.2015; a Recommendation adopting the Practical handbook for implementing and managing the European Border Surveillance System (EUROSUR), C(2015) 9206 final, 15.12.2015; the Eighth biannual report on the functioning of the Schengen area 1 May - 10 December 2015, COM(2015) 675 final, 15.12.2015. Other measures are indicated in the text and footnotes below.

⁴⁰ COM(2015) 673 final, 15.12.2015.

⁴¹ See the consolidated text of the compromise Regulation, <http://statewatch.org/news/2016/jun/eu-border-coast-guard-consolidated-text-6-16.pdf>.

commitments.⁴² But the need for speed has resulted in less resolute legislative action than anticipated.

The EBCG will be based on a new agency that builds on Frontex and the national authorities of member states that are responsible for border management. While retaining the same legal personality as Frontex, with full continuity in all its activities and procedures, the tasks of the new EBCG Agency have been expanded to include, first, facilitating the development and implementation of common EU border management standards; and second, operationally supporting frontline EU member states whose national border authorities are not effectively coping with the challenges on the ground. According to Article 7 of the Regulation,⁴³ the Agency will have four main additional competences: developing the so-called ‘hotspot’ approach; coordinating operational cooperation with third neighbouring countries; initiating return operations and supporting member states’ in returns; and providing technical and operational assistance to member states and third countries, in the support of search and rescue operations for persons in distress that may arise during border surveillance operations at sea.

Some of the proposals made by the Commission have proved to be controversial with member states and have subsequently been modified following discussions in various Council working parties. Significantly, the possibility for “direct interventions” by the Agency in those member states deemed to be inadequately controlling their borders has been removed. Instead, there will be a possibility for the rest of the member states to reintroduce temporary border controls, as a last resort. The EBCG makes the approach a more European one, as the decision will from now on be made by the Council and no longer by a member state acting unilaterally.

In such cases where a member state does not take the necessary measures in line with the vulnerability assessment or in the event of disproportionate pressure at the external borders where a member state has not asked the Agency for sufficient support or is not taking the necessary actions for the implementation of these measures, rendering the control at the external border ineffective to an extent that jeopardises the functioning of the Schengen area, a unified, rapid and effective response could henceforth be delivered at EU level. For the purpose of mitigating these risks, and to ensure better coordination at EU level, the Regulation provides that the Commission should identify and propose to the Council the measures to be implemented by the Agency and require the member state concerned to cooperate with the Agency in the implementation of those measures. The implementing power to adopt such a decision is conferred on the Council because of the potentially politically sensitive nature of the measures to be decided, often touching on national executive and enforcement powers. The EBCG Agency should then determine the actions to be taken for the practical execution of

⁴² Joint Statement on the adoption by the European Parliament of the Commission’s proposal for the creation of a European Border and Coast Guard, STATEMENT/16/2431, Strasbourg, 6 July 2016. See also the provisional edition of the European Parliament legislative resolution of 6 July 2016 on the proposal for a regulation of the European Parliament and of the Council on the European Border and Coast Guard and repealing Regulation (EC) No 2007/2004, Regulation (EC) No 863/2007 and Council Decision 2005/267/EC (COM(2015)0671 – C8-0408/2015 – 2015/0310(COD)), P8_TA-PROV(2016)0305, available at www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+TA+P8-TA-2016-0305+0+DOC+PDF+V0//EN.

⁴³ Article 7 is reproduced in the Annex of this paper.

the measures indicated in the Council decision, and an operational plan should be drawn up with the member state concerned. If a member state does not comply within 30 days with this Council decision and does not cooperate with the Agency in the implementation of the measures contained in this decision, the Commission may trigger the application of the specific procedure where “exceptional circumstances” put the overall functioning of the area without internal border control at risk.⁴⁴ A rapid reaction force of 1,500 guards drawing on a pool of technical equipment would be able to deploy even if a member state did not ask for its help. As such, the EBCG Agency would serve as a safety net whereby national border guards in EU member states will be supported in exceptional situations. When properly resourced, there should in principle no longer be shortages of staff or equipment for operations at the EU’s external borders.

The functioning of the Agency relies on *liaison officers* who will be sent or seconded by the agency to the EU member states concerned.⁴⁵ They will be fully integrated into the national authorities’ work and information systems, so that the Agency will be informed in real time. Thus, the new agency will continue to rely on the EU member states’ authorities responsible for border control and national coastal guard authorities when they perform maritime border surveillance. As regards the budgetary implications of the proposal, the Commission envisaged an amount of “at least” €31,5 million in 2017 to be added to the Agency’s Union budget of €238 million (i.e. a 13% increase) and an additional 602 posts (329 establishment plan posts and 273 external staff) until 2020.⁴⁶ The Agency will be granted an autonomous budget whose revenue comes essentially from a subsidy from the EU entered in the general budget (Commission section), and – to a lesser extent – from a contribution from the countries

⁴⁴ Cf. Art. 29 of Regulation (EU) 2016/399 of the European Parliament and of the Council of 9 March 2016 on a Union Code on the rules governing the movement of persons across borders (Schengen Borders Code), OJ 2016 L 77/1, which will be amended accordingly.

⁴⁵ Art. 11.3 of the Regulation lays down the specific tasks of the officers, which include “(a) act as an interface between the Agency and the national authorities responsible for border management, including coast guards to the extent that they carry out border control tasks; (aa) support the collection of information required by the Agency for the monitoring of irregular migration and risk analyses referred in Article 10; (b) support the collection of information as referred to in Article 12 and required by the Agency for carrying out the vulnerability assessment referred to in Article 12; (c) monitor the measures taken by the Member State at border sections to which a high impact level has been attributed in accordance with Regulation (EU) No 1052/2013; (ca) contribute to promoting the application of the Union acquis relating to the management of external borders, including with regard to respect for fundamental rights; (d) where possible assist the Member States in preparing their contingency plans concerning border management; (da) facilitate the communication between the Member State and the Agency, share relevant information from the Agency with the Member State, including information about ongoing operations; (e) report regularly to the Executive Director on the situation at the external border and the capacity of the Member State concerned to deal effectively with the situation at the external borders and on the execution of return operations towards relevant third countries. If the report raises concerns about one or more of these aspects relevant for the Member State concerned, the latter will be informed without delay by the Executive Director; (f) monitor the measures taken by the Member State with regard to a situation requiring urgent action at the external borders as referred to in Article 18”.

⁴⁶ See Proposal for a Regulation of the European Parliament and of the Council on the European Border and Coast Guard and repealing Regulation (EC) No 2007/2004, Regulation (EC) No 863/2007 and Council Decision 2005/267/EC, COM(2015) 671 final, 15.12.2015, p. 8.

associated with the implementation, application and development of the Schengen *acquis*, any voluntary contribution from the member states and fees for services provided (Article 75.1). The expenditure of the Agency includes the staff, administrative, infrastructure and operational expenses for actions at the external borders of the EU (Article 13.3) and for return operations, giving priority to those conducted by more than one member state, or from hotspot areas (cf. Articles 26.1(f), 27.6 and 32.6).

To avoid the shortcomings witnessed in the past, the Agency will for the first time be able to acquire equipment itself (Article 37) and to draw on a pool of technical equipment provided by the member states (Article 38). In terms of capability development, the EBCG would benefit from cooperation with the European Defence Agency (EDA) and thus enhance the kind of civil-military (CIV-MIL) dimension that the European Council has called for in its conclusions of December 2013. As such, the EBCG could have a beneficial impact on the full life-cycle of dual-use capabilities, from design to disposal, including training and exercises. One area of cooperation relates to common maritime information sharing, where the EDA already works intensively for its project on an EU military naval maritime surveillance network (MARSUR) to become an interoperable part of the Common Information Sharing Environment (CISE). If the EBCG is to overcome legal, security or other constraints, there is a need for such interoperable solutions and procedures. In order to leverage CIV-MIL synergies, ensure the best use of resources and maximise operational output, the EBCG's personnel will also have to be educated and trained on similar principles and procedures. The EBCG should therefore cooperate with existing initiatives in maritime training; one 'Coastguard Academy Network' ran and developed by the European Coastguard Functions Forum (ECGFF); a civilian Maritime Training network developed by a contractor (ECORISE); and a Naval Training Network developed by the EDA. In short, cooperation with the EDA will give the EBCG a credible and enhanced ability.

6. Concluding remarks

The EU plays an important role in responding to the multi-faceted 'refugee' crisis in the Mediterranean and in addressing the root causes of fragility and instability that lie further afield. Applying its full range of instruments in the field of diplomacy, humanitarian assistance, long-term development cooperation, support for human rights, institution- and resilience-building, the EU is increasingly blending military efforts into its comprehensive approach to external action. This highlights the need, felt among institutions and member states alike, to ensure that the instruments available to the EU are used strategically and in a coordinated manner in search of efficiencies and synergies. At the same time, it has triggered criticism about the "militarisation of a humanitarian crisis".⁴⁷

Around the Horn of Africa, EUNAVFOR Atalanta had already demonstrated the EU's capacity to act as an effective crisis responder, as part of a more holistic and strategic approach to the Sahel region. EUNAVFOR MED is following the same model and has signalled the beginning of a more proactive European engagement to restore stability in the wider Mediterranean region. The uncertainties and risks surrounding the launch of Operation Sophia were the by-product of ten years of strategic inertia by the EU in the Mediterranean basin. But in the dramatically altered security climate of the past two years, action could no

⁴⁷ A. Rettman, "Nato to join EU warships in Libya migrant operation", EU Observer, 10 July 2016.

longer be deferred. As former High Representative Javier Solana is fond of saying: all operations have unknowns and risks. Indeed, waiting until all the elements fell into place to execute a detailed Mediterranean operation could have posed a far greater risk. A more assertive European presence in the Mediterranean was badly needed, as civilian missions deployed by individual member states, through Frontex operations and an EU Border Assistance Mission to Libya, had proved ineffective.

The measures taken in response to the refugee crisis are the living proof of the growing AFSJ-CSDP nexus. Not only has the existing civilian crisis management of Frontex morphed into the military realm of operations like Sophia, plans have also matured to forge a semi-militarised European Border and Coast Guard. As a result, we witness the convergence of objectives, mandates and operations pursued by EU actors hitherto confined to either internal or external security, whereas their legal bases, decision-making procedures, budgetary modalities and staffing arrangements remain distinct. This evolution shows the propensity of the EU collectively, i.e. institutions and member states alike, to adapt to new circumstances rather than getting stuck in old paradigms.⁴⁸ It is testament to the idea that no medium-to-small EU member state can address today's security challenges on its own.⁴⁹

As the Common Security and Defence Policy moves closer to the EU's internal security activities, questions about the limits posed by the Lisbon Treaty to territorial defence (cf. Article 42.7 TEU) and intra-EU solidarity (Article 222 TFEU) will come into sharper focus.⁵⁰ Simultaneously, AFSJ actors are being lured 'out-of-area', as shown in the competences attributed to the new CBCG to conduct operations in third countries and in the cooperation between Frontex and NATO in the Aegean, a maritime area where — because of political idiosyncrasies in bilateral relations with Turkey — working through the North Atlantic Alliance trumps a CSDP deployment. Cross-fertilisation of lessons learnt in the hitherto separate spheres of AFSJ and CSDP should benefit not only strategic analysis, planning and conduct of operations,⁵¹ but also the design, development and training of civil-military capabilities (e.g. CBCG-EDA). It is time, therefore, to take the comprehensive approach to EU external action up a notch and involve elements and actors of the Area of Freedom, Security and Justice on a more structural basis. It is only then that the blurred boundaries between internal and external security will become a continuum and enable a more effective handling of the security crises confronting the European Union.

⁴⁸ See T. Tardy, "Civilian Crisis Management: Towards a new paradigm", EUISS Brief No. 23, July 2016.

⁴⁹ See "Shared Vision, Common Action: A Stronger Europe - A Global Strategy for the European Union's Foreign and Security Policy", June 2016.

⁵⁰ See S. Blockmans, "L'Union fait la force: Making the most of the Solidarity Clause (Art. 222 TFEU)", in I. Govaere and S. Poli (eds.), *EU Management of Global Emergencies: Legal Framework for Combating Threats and Crises* (Brill Publishers 2014), pp. 111-135.

⁵¹ See, e.g., the Joint Staff Working Paper, 'Strengthening Ties Between CSDP and FSJ Actors', SEC(2011)560 and the creation of a CIVCOM-COSI Support Group; the working arrangements between the EEAS and AFSJ agencies like EUROPOL and FRONTEX, annexed in the EEAS Working Document, "Strengthening Ties between CSDP and FSJ: Road Map implementation - Fourth annual progress report", EEAS(2015) 1422, 26.10.2015; and Joint Communication of the European Commission and the High Representative to the European Parliament and the Council, "Elements for an EU-wide Strategic Framework for supporting Security Sector Reform", JOIN(2016) 31 final, 05.07.2016.

ANNEX. Article 7 - Tasks (the EBCG Regulation as endorsed by the EP on 6 July 2016)

1. In view of contributing to an efficient, high and uniform level of border control and return, the Agency shall perform the following tasks:

- (a) monitor migratory flows and to carry out risk analysis as regards all aspects of integrated border management;
- (b) carry out a vulnerability assessment including the assessment of the capacity and readiness of Member States to face threats and challenges at the external borders;
 - (ba) monitor the management of the external borders through liaison officers of the Agency in Member States;
- (c) assist Member States in circumstances requiring increased technical and operational assistance at the external borders by coordinating and organising joint operations, taking into account that some situations may involve humanitarian emergencies and rescue at sea in accordance with Union and international law;
- (d) assist Member States in circumstances requiring increased technical and operational assistance at the external borders, by launching rapid border interventions at the external borders of those Member States facing specific and disproportionate challenges, taking into account that some situations may involve humanitarian emergencies and rescue at sea in accordance with Union and international law;
 - (da) in accordance with Regulation (EU) No 656/2014 and international law provide technical and operational assistance to Member States and third countries, in support of search and rescue operations for persons in distress at sea which may arise during border surveillance operations at sea;
- (e) set up and deploy European Border and Coast Guard Teams, including a rapid reaction pool, that are to be deployed during joint operations and rapid border interventions and in the framework of the migration management support teams;
- (f) set up a technical equipment pool to be deployed in joint operations, rapid border interventions and in the framework of migration management support teams, as well as in return operations and return interventions;
- (g) Within the framework of the migration management support teams at hotspot areas:
 - 1. deploy European Border and Coast Guard Teams and technical equipment to provide assistance in screening, debriefing, identification and fingerprinting;
 - 2. establish in cooperation with the European Asylum Support Office (EASO) and national authorities a procedure for the provision of initial information to and the referral of persons who are in need of, or wish to apply for, international protection;
- (h) support the development of technical standards for equipment, especially for tactical level command, control and communication as well as technical surveillance to ensure interoperability at Union and national level;

- (i) deploy the necessary equipment and border guards and other relevant staff of the rapid reaction pool for the practical execution of the measures needed to be taken in a situation requiring urgent action at the external borders;
- (j) assist Member States in circumstances requiring increased technical assistance and operational assistance for implementing the obligation to return those third-country nationals, who are the subject of return decisions, including through the coordination or organisation of return operations;
 - (ja) within the respective mandates of the agencies concerned, cooperate with Europol and Eurojust and provide support to Member States in circumstances requiring increased technical and operational assistance at the external borders in the fight against organized cross-border crime and terrorism;
- (k) set up pools of forced return monitors, forced return escorts and return specialists;
- (l) set up and deploy European Return Intervention Teams during return interventions;
- (m) assist Member States on training of national border guards, other relevant staff and experts on return, including the establishment of common training standards;
- (n) participate in the development and management of research and innovation activities relevant for the control and surveillance of external borders, including the use of advanced surveillance technology and develop pilot projects regarding matters covered by this Regulation;
- (o) develop and operate, in accordance with Regulation (EC) No 45/2001 and Framework Decision 2008/977/JHA, information systems that enable swift and reliable exchanges of information regarding emerging risks at the management of the external borders, illegal immigration and return, in close cooperation with the Commission, Union agencies, bodies and offices as well as the European Migration Network established by Council Decision 2008/381/EC;
- (p) provide the necessary assistance for the development and operation of a European border surveillance system and, as appropriate, to the development of a common information-sharing environment, including interoperability of systems, in particular by developing, maintaining and coordinating the Eurosur framework in accordance with Regulation (EU) No 1052/2013;
- (q) cooperate with the European Fisheries Control Agency and the European Maritime Safety Agency, each within their mandate, to support the national authorities carrying out coast guard functions, as set out in Article 52, by providing services, information, equipment and training, as well as by coordinating multipurpose operations;
- (r) assist Member States and third countries in the context of technical and operational cooperation between them in the matters covered by this Regulation.