



Geostrategic Focus Series Mediterranean Migration Crisis : Realities & Challenges



The terrorist attacks on November 13, 2015, indeed a wake-up call for France, may have brought us back from a welfare state to a warfare state, even as we were witness to the decline in defense spending in the West, due to the financial crisis and bulging deficits, increased social expenditures and rising unemployment in the face of a greying population.

Is globalisation threatening democracy and security, where modern technologies, instant transmission of communications and personal data expose States to the worst means of computer piracy, terrorist attacks, infiltration and distribution of energy resources or chemical substances by everyday means of transport and transmission?



“In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail.”

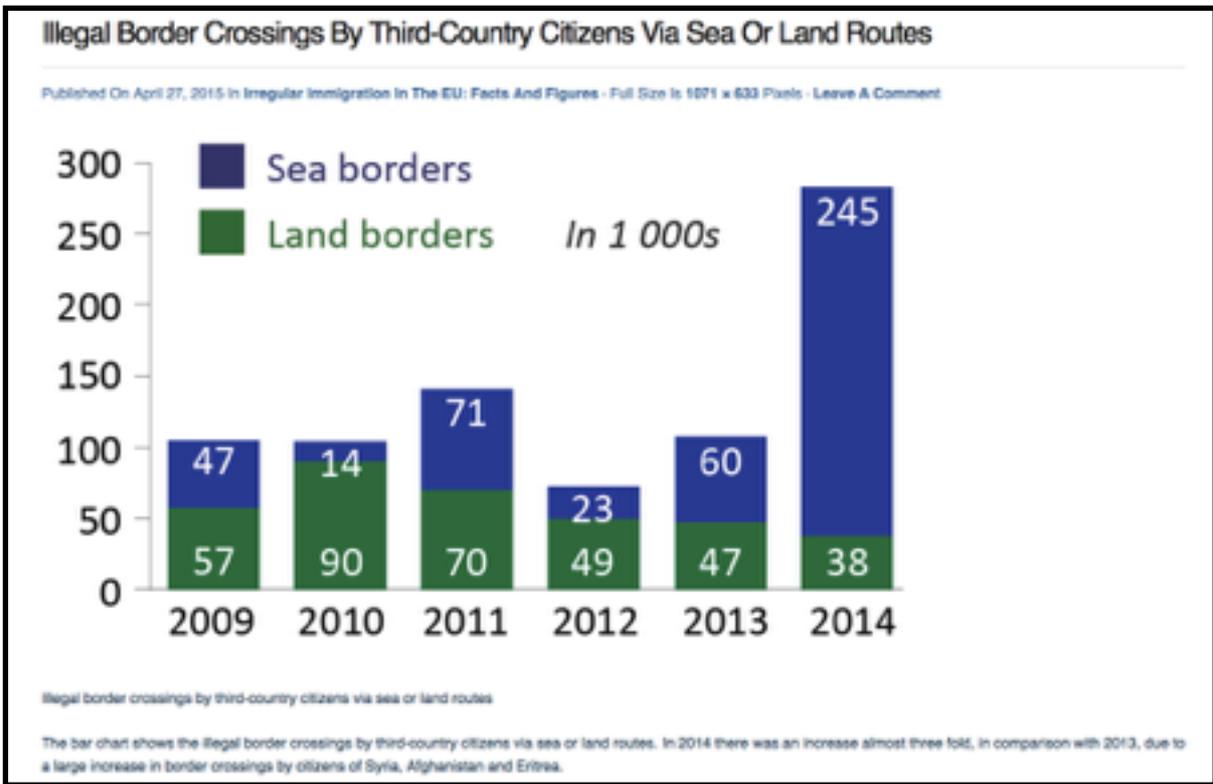
We have had to adapt to asymmetric menaces and strengthen our alliances, coupled with the use of new technologies, new military doctrines, such as the « *Strategic Concept* » of NATO defined in 2010. The 12th Secretary General, Anders Fogh Rasmussen, encouraged the allies to invest in «*key capacities*» to reinforce collective defense against ballistic and cyber-terrorist attacks.

Europe needs not only to ensure the stability in its internal affairs, but also in its immediate neighborhood, thus enlarging the security zone on its immediate borders. Europe needs to take an active part in reinforcing an international order governed by the principles of multi-lateralism, good governance, transparency, social responsibility and the exchange of good practices, capacity building, monitoring, evaluations and peer reviews. The Criteria of Copenhagen, in a word.

The EUROMED partnership, which is also called the Barcelona Process, was created in 1995 in Barcelona at the initiative of the EU and 10 littoral States on the Mediterranean Sea (Algeria, Palestinian Authority, Egypt, Israel, Jordan, Lebanon, Morocco, Syria, Tunisia and Turkey). Albania and Mauritania joined the organisation in 2007, while Libya, which has observer status since 1999, normalised its relations with the UE in 2004, but has suspended those relations since 2011.

The principal themes of EUROMED are peace, security and prosperity. Euromed was founded on mutual exchange, such as free trade and immigration and has joined the fight against terrorism. And the EU gave its financial support to the organisation to the tune of 16 billion Euros from 1995-2007. These ten States mentioned above benefited from an additional two billion Euros through the MEDA program of the European Investment Bank (EIB).

It was underlined in a conference held in Paris on June 18, 2013 in Paris at the EU representation office, that a common European border can not replace national responsibilities of controlling immigration. How can EU countries safeguard their borders from piracy, trafficking and migration? We can break down migration into three categories : 1) economic immigration; 2) refugees; 3) asylum seek-



ers. The EU must resign itself to accept legal immigration, to allow migrants to leave their country and emigrate to Europe, allowing them to pass through the legal channels of immigration; if not, many of them will try to enter Europe through the asylum mechanism.

Since the creation of the Schengen Space, which guarantees the free circulation of people and goods, is controlling the EU borders the most appropriate way to control and regulate migration flows? Marie-Christine Vergiat, European Socialist Deputy, of the sub-commission of Human Rights, spoke of the Lisbon Treaty and the security drift and remarked that the EU externalises migration influxes to those countries which do not respect human rights, such as Libya, and Tunisia under their former leaders. She also underlined the fact that if these countries did not take back their citizens, they would no longer receive financial aid.

Antonio Vitorino, former European Commissions of Interior Affairs, reminded us that the EU's population is aging and that we need immigration, which would require more migratory flexibility, such as exists between Morocco and Spain, and that would require a political response. Should not the EU liberalise its visa conditions by a decision taken by the Foreign Affairs Ministry? A dialogue with third party countries should be opened, with Turkey, for example, that lets its citizens and other migrants pass through its territory and enter Europe.

So how should the EU deal with the lucrative business of trafficking, which generates annual revenues of approximately €7 million?

Where is the equilibrium point between Security, Liberty and Democracy?

Which brings us full circle to the subject at hand, “Les Enjeux des Espaces Maritimes” debated at the Institut Royal des Etudes Stratégiques (IRES) in Rabat, Morocco, following the Valletta Summit in Malta that took place on November 11-12, 2015, where the objectives of the European Union were on five specific areas (source : consilium.europa.eu) :

- 1) addressing the root causes by working to create peace and stability and economic development
- 2) improving work on promoting and organising legal migration channels
- 3) enhancing the protection of migrants and asylum seekers, particularly vulnerable groups
- 4) tackling more effectively the exploitation and trafficking of migrants
- 5) working more closely to improve cooperation on return and readmission

What follows below is a portion of my presentation at IRES.

PART ONE : REALITIES on a regional scale

The Mediterranean is currently experiencing an extremely grave crisis : its southern shore is an arc of instability linked with armed group clashes and vastes swathes of economic under development. This situation creates a strong draw, a magnet for illegal activity of all sort. And the most worrying of all is the emigration phenomenon towards the North shore. In 2014, the numbers beat all records in terms of individuals making the crossing to Europe by sea (approximately 207,000), as well as the number of deaths or disappearance at sea (approx. 3,500).

Jean-Paul Pancraccio¹ suggests that there are two essential points that stand out : first, this migration pressure will only grow, which will test the cohesion of the littoral countries, the future economic perspectives for their youth and of course the relations amongst these countries is of the utmost importance in these turbulent times. Secondly, the present migration pressure can not be diminished, solved only from a security approach. And the European Union has to roll up its sleeves and get involved in a long-term, global approach, one that treats the problem at its core.

It has been suggested that France could promote a specific convention for the Mediterranean Sea, to compliment the UNCLOS (United Nations Convention of the Law of the Sea), that does not have a notion of migrant trafficking. Several dispositions exist in the Additional Protocol III of the Palermo Convention adopted in 2000, not specifically applicable to the Mediterranean space and continues to be a blockage for obtaining the authorisation to act on the high seas vis-à-vis a boat flying a flag on the high seas.

¹ Jean-Paul Pancraccio, professor emeritus, Université de Poitiers

All of these measures will help meet security objectives in the short term to deal with illegal immigration and the traffickers/smugglers. This should be the priority, to dissolve the criminals that organise the crossings, in coordination with transit countries. These measures will be much more effective if they are managed and organised bilaterally with the EU to stem the flow of migrants. And there should be integral approach for both legal and illegal migrations regarding delivering visa, departure and welcoming shelters, discouraging illegal migration techniques.

And the whole chain of security forces should be involved, from the police, the gendarmerie and the Navy. They should also involve the cultural domain, exchanging personnel in trainings in schools, in immersion and via their attachés and liaison officers. And there should be a vibrant technical cooperation that should benefit both sides of the Mediterranean. The security forces should be more involved, implicated in controlling and patrolling their borders, using a border closure as a dissuasion to allow the State to fight effectively against illegal migration and to be credible vis-à-vis its citizens. It will be necessary to invest in personnel and equipment in this regard.

Contrary to the measures taken to fight piracy mentioned above, no measures as of yet have been taken to fight trafficking of migrants on the high seas, which makes it almost impossible to catch and arrest the criminals.

The Additional Protocol of the Convention of Palermo against organised transnational crime deals with the illicit trafficking of migrants, but remains the exclusive competence of the vessel, except to negotiate agreements of the transfer of competence permitting the repression of the traffickers by the State interceptor. By the way, nothing allows to pursue the State of the vessel complacent to illegal immigration from their own territory or those that don't accept the return of persons saved.

The Geneva Convention, integrated into the constitutional law of the European Union, is the legal basis of the European asylum system, privileges the derivative of European law. Different statutes were created by the European law to guarantee the effectiveness of the this international principal of no return. The subsidiary protection, which, by definition, applies to people not being able to benefit from the main protection, which is the statute of a refugee, amplifies the domain of international protection against the refusal to entry. The Convention considers that any person potentially menaced by a war situation or generalised violence in his own country, could benefit from a protection founded on humanitarian considerations and apart from his right expressed in the Geneva Convention.

The principal of no refusal, as applied within the EU means :

- the migrants are protected against a forced return to their country of origin;
- If they are intercepted at sea, the State flying the flag on a vessel intercepted must ensure against the risk of return and that the migrants benefit from legal protection in the country where they arrive.

So how can the EU defend its external borders so as to fight against terrorism, slavery and illegal immigration?

In the Lisbon Treaty, Article 79, has three objectives :

- ensure an efficient management of migration flows;
- guarantee a fair treatment of citizens from other countries that are residing legally in European countries;
- prevent and sanction illegal immigration and human trafficking.

So how can the European Pact (September 24, 2008) on immigration and asylum apply here? Immigration policy being a domain for a sovereign state to decide, the EU has established several norms, that the European member countries² were invited to reach by 2010 and 2012, but which have not as yet been reached, at least as far as asylum is concerned.

SECOND PART : CHALLENGES on a global scale

So what can the UN Security Council do to tackle the above mentioned humanitarian and security challenges in the maritime space? No more than 25 Security Council resolutions since 1966 have authorised the enforcement of embargoes, cargo verification, and boarding foreign flagged vessels on the high seas.

Transnational trade and cargo are intimately linked to national security interests. We cannot be entirely surprised that the UN has focused on maritime security to support broader security concerns.

The general principle of exclusive flag state jurisdiction, articulated in the Law of the Sea Convention, is not absolute, and several exceptions exist, including UN Security Council Resolutions.

This era began in the 1990's with UNSCR resolution 665 (1990) becoming a landmark decision that came to be considered a reference for the next 25 years of UNSC action to come. This resolution provided expanded interdiction authority. NATO's Operation Sharp Guard challenged thousands of ships, stopping 803, and diverting 176 ships for inspection, resulting in the detection of 9 violations of Security Council Resolutions.

The Search and Rescue Convention (SAR), as well as the Salvage Convention (SOLAS), the UN Convention against Transnational Organised Crime and the aforementioned Palermo Protocol, all allow the UNSC to take immediate action. No more than 25 SC resolutions since 1966 have authorised embargoes, cargo verifications and boarding foreign flagged ships on the high seas.

And what about the flags of convenience? The vessel carrying a flag is only subject to the jurisdiction of the country wherein the vessel is registered, making it difficult to conduct to hold accountable those who commit illicit acts on the high seas.

Brian Wilson³ suggests that there are four general categories of maritime-focused Security Council resolutions :

- Authorization to enter the territorial sea of a coastal state: The Somalia counter piracy model (in varying forms from 2008-2014), based in part on a request from the coastal/affected State, where authorization is provided to enter the territorial sea along with, potentially, entry into the country, along with authority to scuttle a vessel engaged in illicit or proscribed activity;
 - On the high seas, Flag State consent not required: Boardings (or blockading or diverting) of vessels are authorized without flag state consent, generally similar to Resolution 1973 (2011) on Libya, though such action may occur only when reasonable grounds exist to suspect the proscribed conduct;
 - On the high seas, Flag State consent to be sought, though not required: The hybrid construct of Resolution 2182 (2014) on Somalia, where flag state consent is to be sought (“good faith effort”) prior to boarding vessels suspected of engaging in proscribed conduct, but if authorization is not obtained (as opposed to the request being denied), then a boarding – and potentially, seizure – may occur; and
 - On the high seas, Flag State consent required: Boardings or enforcement action are authorized only with flag state consent, comparable to, among other resolutions, 1874 (2009) on North Korea, and 1929 (2010) on Iran.
- . Authorizing action within a State’s territorial sea without the coastal state’s consent, for example, would represent an extraordinary action.

As 90% of all international trade traffic takes place on the seas, it is quite naturally that the UN has been concerned and implicated in decisions regarding the national security interests of the 194 member countries, articulated in Chapter VII, articles 39, 41, 42 of the UN Charter, binding to all member states. The UN Charter article 103 provides: *“In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail.”*

To put a light on maritime-focused resolutions, which began with UNSCR 665 in 1990, here are some key resolutions on which were voted to stave criminal activities by interdiction on the seas : that concern the Mediterranean arena and are noteworthy :

³ Brian Wilson, 2015 Harvard NSJ / The Mediterranean Migrant Crisis: Key Considerations for the UN Security Council

1990 : UNSCR 665 (Kuwait) : provided expanded interdiction authority while not including explicit details best left to naval commanders and national-level/task force direction.

2006 : UNSCR 1816 (Somalia). “entry into the territorial waters of Somalia for the purpose of repressing acts of piracy and armed robbery at sea, in a manner consistent with such action permitted on the high seas with respect to piracy under relevant international law...”

2008 : UNSCR 1874 (N.Korea). “all Member States to inspect vessels, with the consent of the flag State, on the high seas, if they have information that provides reasonable grounds to believe that the cargo of such vessels contains items the supply, sale, transfer, or export of which is prohibited...

2009 : UNSCR 1929 (Iran). “to inspect, in accordance with their national authorities and legislation and consistent with international law, in particular the law of the sea and relevant international civil aviation agreements, all [proscribed] cargo to and from Iran, in their territory, including seaports...”

2014 : UNSCR 2146 (Libya). This resolution authorised member states to conduct high seas inspections of specifically designated vessels only after seeking the consent of the vessel’s flag state, but did not explicitly require consent prior to a boarding.

2014 : UNSCR 2182 (Somalia). ensure implementation of the arms embargo on Somalia and the charcoal ban, called on States to inspect, “without undue delay, in Somali territorial waters and on the high seas off the coast of Somalia extending to and including the Arabian sea and Persian Gulf

2015 : UNSCR 2216 (Yemen). “to inspect, in accordance with their national authorities and legislation and consistent with international law, in particular the law of the sea and relevant international civil aviation agreements, all cargo to Yemen...on the high seas...if the State concerned has information that provides reasonable grounds to believe the cargo contains” proscribed items.

2015 : UNSCR 2240 (Mediterranean Migration Crisis) was approved to address the Mediterranean Migration Crisis. There are three parts to the operational elements of this resolution, valid one year :

- (1) Inspections are authorised on the high seas (outside of the 12-mile territorial sea) off the coast of Libya, provided there are reasonable grounds of migrant smuggling and “good faith efforts” are made to first contact the flag state for consent;
- (2) Disposal of vessels involved in migrant smuggling or human trafficking interdicted is authorized only if “in accordance with applicable international law;”
- and (3) Member states may “use all measures commensurate to the specific circumstances...” in confronting migrant smugglers consistent with “international human rights law.”

It is evident that the challenges are immense and the maritime space vast; but what is also evident is that there must be coordination and information sharing between national and supra-national organisations, as well as intelligence sharing, which must become seamless across borders.

Will we see more private actors on the scene, such as MOAS (Migrant Off-shore Aid), a charity organisation based in Malta and acting in the Aegean Sea, which has saved 11,675 lives at this writing in 2015?

