"Tragedy" and responsibility in the Mediterranean

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The European Union is willing to use costly police and military operations to suppress refugee mobility, write Mariagiulia Giuffré and Cathryn Costello. Which, in short, means responding to those fleeing war, repression and human rights abuses with more of the same. So what are the alternatives?

On 23 April 2015, a special meeting of the European Council on the situation in the Mediterranean set out the European Union’s response to the shocking deaths at sea of those seeking refuge in Europe. The statement of the European Council opens with the acknowledgement that “the situation in the Mediterranean is a tragedy”.

This acknowledgement displays some sympathy, but lacks an acknowledgement of responsibility. These deaths are shocking in their scale, proximity and needlessness. But most of all, they are shocking in their predictability. When Italy ended its “Mare Nostrum” sea rescue operation, and the EU’s more limited Triton programme took over, the gaps in maritime search and rescue operations were apparent. Moreover, we also knew that demand for refuge in Europe would increase once spring came, given the current scale of global displacement, in particular from Syria.

The statement is not only disappointing for a failure of ambition in meeting the extent of the global refugee crisis, but also deeply concerning in both the aims its sets out, and the means it suggests the EU will use to achieve those aims.

Four EU priorities

In summary, the European Council sets four priority areas of action.

– The first priority is “fighting traffickers”. EU member states will undertake systematic efforts to identify, capture and destroy vessels before they are used by traffickers. Other agreed measures include a step up in the co-operation against smuggling networks with the help of Europol, and the deployment of immigration officers to third countries.
– The second area concerns itself with “strengthening our presence at sea”. The EU will triple the resources available to Triton, the EU border mission in the Central Mediterranean, and to enhance its operational capability. This also implies the supply of additional vessels, aircrafts and experts by member states.

– The next priority is “preventing illegal migration flows”. The EU wants to limit the inflow and tackle the cause of illegal migration. The cooperation with the countries of origin and transit should be reinforced, especially the countries around Libya. EU leaders also agreed to implement a new return programme for the rapid return of irregular migrants.

– Finally, the Council commits itself to “reinforcing internal solidarity and responsibility”. The EU calls for effective implementation of the Common European Asylum System, emergency aid to frontline member states, and the setting up of joint processing of asylum applications. EU leaders also agreed on a first voluntary pilot project on resettlement across the EU, offering places to persons qualifying for protection.

We examine each of these aims, and the means proposed in turn, and then offer some alternatives.

**Fighting traffickers**

The European Council conflates trafficking and smuggling. These are not interchangeable concepts. Trafficking has unwilling victims, who are coerced for the purposes of exploitation. We are seeing desperate people taking risks, but willingly so, in order to seek protection. They often use smugglers for their whole journeys. For instance, to leave Eritrea, those who flee must use smugglers, just as those who sought protection during the Cold War from behind the Iron Curtain did.

The sea crossing is just one more irregular border crossing on the way to refuge. In the absence of legal and safe means of escape, a market for the services of smugglers emerges. Often, smugglers save lives. Sometimes they imperil life, as we see in the Mediterranean. If we use the same label for life-saving and life-endangering actions, we also facilitate the development of legal and political responses which suppress life-saving and routes of escape.

The main focus is on “fighting traffickers in accordance with international law”. Again, we find a conflation of smuggling and trafficking. The statement assumes criminal networks organize irregular border-crossings. But we also know there is much small-scale smuggling, as local people with few economic opportunities respond to the demand for transportation. Much smuggling is also self-organized by refugees and migrants themselves. In some instances, anti-smuggling laws have been used by states to criminalize the actions of refugees themselves.

EU anti-smuggling laws, as currently drafted, criminalize not only those who endanger life to make a profit, but also those who save life out of humanitarian impulse. This is not to deny the presence of organized criminal networks in human smuggling, but the statement fails to make the distinction.
The statement imagines we can remove one of the means of transport, and thereby end irregular movement. The EU will “undertake systematic efforts to identify, capture and destroy vessels before they are used by traffickers”. We doubt whether this aim is sensible, feasible or likely to be effective. Boats are replaceable.

Would removing the supply of boats reduce the demand for crossings? And how is the EU to orchestrate this destruction of property outside member states’ territory? Will we ask the local police to destroy smugglers vessels in our name? Or will we seek a UN Security Council resolution for military action against inanimate objects? What would be the repercussions of such a military-police action on our relations in the fragile context of Libya, where a stable regime has yet to emerge?

EU leaders propose to stop the boats from departing, even by military means. Preventing migrants and refugees from leaving undermines the right to seek asylum and the right to leave any country, including one’s own, which are enshrined within universal and regional human rights instruments binding all EU member states.

Strengthening our presence at sea

Preventing loss of life at sea is a noble and necessary aim. Ensuring effective search and rescue at sea is one important way to achieve that aim.

The statement commits the EU not to enhance search and rescue at sea as such, but more ambiguously, to “strengthening our presence at sea”. There is a commitment to increase the resources of the Frontex missions in the Mediterranean. This commitment avoids the issue of whether a Frontex mission can truly serve as an active search and rescue one, given that Frontex is a border control agency.

Moreover, EU leaders do not provide details of the extent of the increase in assets, or the extent to which the operational area will increase beyond the current limit of 30 nautical miles from the Italian coast. The statement obscures these key questions of mandate and geographical reach.

**Preventing illegal migration flows**

The statement’s declaration on “preventing illegal migration flows” requires two points of clarification. First, international law is premised on the likelihood that refugees will use irregular means to seek a place of refuge. We undertake not to penalize them for doing so in [Article 31 of the 1951 Convention on the Status of Refugees](https://www.unhcr.org/3b6b2fff4.html). Secondly, using the term “illegal” in this context is dubious. When the EU deems mobility to be “illegal” when it is outside the EU (say a journey from Eritrea to Egypt, Syria to Tunisia), we should ask the question: “on what authority?”

In substance, the proposed cooperation is nothing new. Through cooperation and sending “European migration liaison officers” outside the EU to work with “local authorities”, Europe’s borders are to be extended. This is a reinforcement of an existing feature of externalized border controls. These policies and practices raise all sorts of concerns about the accountability for extraterritorial actions. Moreover, as they often entail cooperation in repressive border control practices, complicity in human rights violations – detention, beatings, extortion of migrants – is a likely practical consequence.
Those human rights concerns aside, we should also ask: is such cooperation likely to reduce the demand for refugee protection? Or will it simply divert refugees towards even more dangerous routes?

**Reinforcing internal solidarity and responsibility**

The last set of commitments refers not to solidarity with refugees, but across EU member states. At present, the EU’s Dublin System sets up rules for the allocation of responsibility to process asylum claims which potentially overburdens states where claimants first arrive in the EU. However, that potential overburdening does not materialize, as most asylum-seekers move on clandestinely and seek protection elsewhere in the EU. The unlucky few get caught up in complex “Dublin proceedings” and are often detained while attempts are made to send them back to Italy or Greece or elsewhere. Dublin does not work, yet the EU has revised it three times without questioning the fundamentals.

Dublin is up for revision once again, but there is no leadership in evidence in this statement. The European Council does not seize the moment to urge a rethink, but rather asks for “rapid and full transposition and effective implementation of the Common European Asylum System (CEAS) by all participating Member States, thereby ensuring common European standards under existing legislation”. The CEAS includes Dublin, so therein lies the lack of vision.

Rather than acknowledging we need an alternative to Dublin, the commitment is merely to organize “emergency relocation between all Member States on a voluntary basis”. This would mean Italy could request other states to take some of those who arise on their shores, but no more than that. The only other method of strengthening solidarity is to use “EASO teams in frontline Member States for joint processing of asylum applications, including registration and finger-printing” – potentially useful but not significantly so.

For those who are not refugees, the statement offers only “a new return programme for the rapid return of illegal migrants from frontline Member States, coordinated by Frontex”. “Rapid return” suggests that the process of identifying refugees and others with protection needs can be quickly effectuated, which is not always the case. Otherwise “rapid return” risks being refoulement, returning people to persecution or serious harm in breach of international and EU law.

**Alternatives**

There are viable, sensible alternatives. Not panaceas, but a range of actions to provide safe means of access to protection, and diminish demand for the services of smugglers.

The statement is unclear about whether the operation will have a suitable extensive search and rescue mandate, both operationally and geographically. Both points need clarification. A better reform would have been to create a new unit with a clear search and rescue mandate.

By omitting any discussion on measures to let migrants and refugees reach protection and safety legally, the EU itself enhances the market for smugglers and creates the legal
impediments that leave refugees with little option but to take perilous routes. The Mediterranean is a safe sea to cross – thousands do so daily in passenger ferries and other sea-worthy vessels. A ticket on a ferry from Tunisia to Sicily costs less than 50 pounds, and there are thousands of safe crossings daily.

The dangerous crossings organised by smugglers cost thousands. However, those fleeing persecution, war and deprivation rarely have visas to enter the EU legally, so they cannot board these vessels as the EU implemented a Carriers Sanctions Regime. If Carriers Sanctions were abolished, suspended or even moderated, the demand for the services of smugglers would evaporate.

If those seeking refuge were able to get visas to board these vessels, or fly to Europe, they would not spend vast sums to pay for irregular journeys. They could arrive with their health and savings intact, and start new lives.

The EU’s own Fundamental Rights Agency has just set out the range of options to allow greater safe access to protection. For instance, EU Member States could process humanitarian visa applications in their embassies, or extend other visa categories to those fleeing. Some do this quietly, but a coordinated move in this direction is legally warranted. Many small actions could enhance legal routes to the EU, and reduce demand for the services of smugglers.

There is no mention of safe access to protection and temporary protection alternatives in the European Council’s statement. For those fleeing conflict, temporary protection is often suitable. Many will want to return home once the war has ended. EU member states responded to the Balkan Wars with temporary protection. The EU has a legal instrument it could employ to provide such protection, the Temporary Protection Directive.

The statement contains a reference to “refugee resettlement”. The EU will “set up a first voluntary pilot project on resettlement across the EU, offering places to persons qualifying for protection”.

Resettlement refers to offering protection for those who have fled immediate danger and are recognized as refugees. We do not need a “pilot” to see how resettlement works: it is a normal practice. Offering resettlement is the usual way to offer more secure protection to the vulnerable in an orderly way, and to support countries of first asylum. Governments tend to like resettlement as it allows them to select refugees (or delegate that selection to UNHCR or NGOs) and organize orderly admissions, with institutional support for welcome and integration.

There are over 3 million refugees from Syria in Turkey, Lebanon and Jordan. Syrian refugees in Egypt are facing very limited support and a hostile political climate. As the Syrian crisis continues with no end in clear sight, host countries and refugees may face increasing difficulties. Refugees are likely to move elsewhere irregularly if conditions deteriorate. Resettlement is the safe alternative.

The EU could be leading by example, convening a global resettlement conference. We can point to some remarkable historical precedents where acts of enlightened self-interest led to international cooperation to resettle millions of refugees. And as the
UNHCR Special Representative on the Human Rights of Migrants has stated: “We could collectively offer to resettle one million Syrians over the next five years.” The EU’s “pilot” is a feeble response when the scale of the displacement crisis is considered.

For those who are not refugees in the legal sense, we could also be asking bigger questions about offering greater opportunities to migrate to the EU and using different ways of regulating migration, as Francois Crepeau has urged.

**The humanitarian impulse**

The statement focuses on suppressing mobility, conflates trafficking and smuggling, and ignores the scale and persistence of a global displacement crisis, which inevitably creates demand for refuge in Europe. It thereby sets up a political and legal dynamic that undermines the right to leave any country and the right to seek asylum.

Our elected politicians let us down when they fail to acknowledge our role in this tragedy, that EU laws deny safe access. We can make efforts to reduce loss of life at sea, to support protection where most refugees live. But we should not imagine we can prevent those seeking refuge by targeting smugglers. The EU is willing to engage in extensive and costly external efforts to thwart refugee mobility. This should give us pause: using police and military means to suppress mobility will itself lead to human rights violations, as will cooperation with repressive regimes. We are responding to those fleeing war and repression with more of the same.

If we imagine the EU can prevent mobility in Africa and the Middle East, and prevent refugees from seeking protection, we are fooling only ourselves. Welcoming refugees has huge benefits, not only for them, but also for us. We could be seeking creative ways to harness the groundswell of sympathy for refugees, creating a role for civil society as part of first reception for asylum seekers and even perhaps in refugee resettlement. Are we to remain paralysed in fear, like our political leaders, or work together to create institutions which support humanitarian impulses?

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