Looking beyond legal status to human need

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What humanitarians can expect more of in the future is more mixed flows defying rigid categorisation and calling for a humanitarian response based on common needs for assistance and protection.

The dilemmas of assisting people moving in ‘mixed flows’ have long been debated, including whether and how to define categories of people on the move, how to access and ensure assistance and protection for the most vulnerable, and how to aid the undocumented.

In the fall-out from the Libyan conflict, humanitarians were confronted with state policies and practices that resulted in assistance and protection gaps for refugees and asylum seekers, widespread barriers to an even minimal level of basic services and/or criminalisation, detention and the risk of refoulement. Even in the face of mixed flows fleeing Libya, many states and agencies turned to a generalised ‘migration response’, using rigid categories determined by people’s putative motivation for migration. Yet this approach risked limiting responses to specific groups of people, even though many shared similar needs and urgently required similar assistance and protection. Rather than being framed primarily by states’ migration policies, responses towards such populations on the move need to be based on established policy and practice toward refugees and asylum seekers, including reception conditions, status determination, assistance and access to basic services, identification of vulnerable persons and protection measures.

The default ‘migration response’ launched in neighbouring states to the huge numbers of people fleeing the Libyan conflict had far-reaching humanitarian consequences for those seeking safety and a means of survival. As conflict erupted in Libya, people who found themselves caught in the crossfire included refugees from sub-Saharan African countries, asylum seekers en route to Europe who faced arrest and abuse in Libyan detention centres, migrants seeking economic opportunities, and many others. The conflict only complicated population movements and the definition of categories of people on the move. As people fled to Italy, Malta and Tunisia, they met with sub-standard reception conditions in Europe and inadequate assistance in Tunisian transit camps. As a result, some of those who ended up stranded in Tunisia actually crossed back into war-torn Libya to seek a more favourable status: the temporary protection accorded in southern Europe to those arriving directly from Libya.

Various concurrent population movements led to fluidity in the categorisation of people on the move, their status and their resulting access to assistance and protection. Fleeing Libyans found refugee protection while, despite often risking their lives to reach safety, migrants fleeing from torture in detention, from being targeted as foreigners or from the conflict itself were simply labelled ‘third-country nationals’ – ineligible for the same level of protection either in neighbouring countries or in southern Europe.

There was a wider backdrop to refugees’ and migrants’ increased humanitarian and protection needs during and in the aftermath of the Libyan conflict. As EU Member States’ migration policies had grown more restrictive and aimed at containing refugees and migrants in Libya, Médecins Sans Frontières (MSF) patients’ accounts pointed to systematic detention, push-back and abuse of people on the move. Even before the Libyan war, these populations thus already faced a fragile situation of migration hardship, inhumane detention conditions in Libya and violence linked to human trafficking.

During the conflict, with a complex situation leading to the simultaneous application of Refugee Law and International Humanitarian Law (not to mention Human Rights Law), the status of people already present in mixed flows changed rapidly depending on the progress of the armed conflict, people’s physical location or their forced detention. At one or at different times, foreign nationals could be categorised as civilians, refugees, asylum seekers, third-country nationals or simply stranded people with no possibility of return to their previous location. The complexity of categorising these ‘mixed’ populations on the move during the conflict resulted in an overall response which paid limited attention to individuals’ medical, humanitarian and protection needs.

Both in Lampedusa and in Shousha camp in Tunisia, little effort was made to accommodate people according to their individual humanitarian needs. Living conditions were kept sub-standard, possibly to avoid creating a pull factor for out-migration from Libya. MSF denounced the impact of the poor living conditions and the lack of services on the physical and mental health of the populations fleeing Libya.1 For an organisation such as MSF, refugee/migrant health provision in urban contexts, open settings or settings of on-going movement remains a key challenge for the future. There is a great need for more elaborated refugee/migrant health profiling if we are to work effectively in such rapidly evolving settings, including for example how to address torture and ill-treatment in mixed flows as both a health and a humanitarian need.

In the absence of neat categories for people on the move and their immediate needs, the overall humanitarian response to these mixed flows was framed as a ‘migration response’ from the onset, with a significant impact on the aid and protection actors who intervened. For example, the International Organization for Migration repatriated third-country nationals as a ‘protection’ measure aimed at avoiding a possible humanitarian crisis in neighbouring countries. At the same time, a broader ambiguity reigned about the relative responsibilities and legal obligations of UNHCR, states of origin and the various Libyan authorities towards other foreign nationals trapped in-country.

Elusive categorisation or humanitarian need?

The field reality saw vastly divergent responses to the same population in different locations, as the response reflected assumptions about people’s status based solely on their current location or national origin.
From commitment to practice: the EU response

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The EU’s response to boat arrivals from North Africa in 2011 indicates that more is needed to translate a commitment to solidarity from limited aid and statements of principle into practical reality.

Boat arrivals from North Africa over the past decade have carried thousands of North Africans and others to European shores, including asylum seekers fleeing persecution or serious harm, and people moving irregularly for other reasons. Annual arrivals from 2000-2008 had varied – peaking in 2008 at 39,000 – but had dropped dramatically to under 5,000 after the introduction of the Italian ‘pushback’ policy and increased cooperation with Libya.

From North Africa as a whole there were close to 59,000 total estimated arrivals in the EU in 2011. This involved 28,000 people fleeing Libya – less than 5% of the people displaced from there – as well as 28,000 Tunisians, most of whom neither requested nor needed protection, and some 1,500 from Egypt. Of those arriving from Libya, nationalities included Somalis, Eritreans, Nigerians, Ghanaians, Malians, Ivorians and citizens of other sub-Saharan African countries. By contrast, Tunisia and Egypt, at the peak of the outflows, had together hosted over half a million people in their territories, and allowed the provision of shelter and humanitarian assistance to these people pending evacuation or other solutions.

In spite of their relatively small scale, the arrivals in Europe, and the concern that more could come, prompted intense discussions among EU Member States. These discussions focused on burden sharing, support – and stemming the flow. Political statements of solidarity with the affected countries outside EU borders were issued. The concrete support offered, however, was primarily financial and logistical, and less focused on direct responsibility sharing in the form of places in Member States for persons in need of protection.

The EU response

The EU’s first step was to evacuate its own citizens from Libya. Its subsequent priorities were provision of humanitarian support and assistance in North Africa, addressing migratory movements towards the EU, solidarity with EU Member States (and other states in the region) facing possible arrivals, and the role of Frontex in addressing the maritime border control.

EU Member States showed great readiness to provide significant financial and logistical support, notably to the humanitarian evacuation out of Tunisia and Egypt undertaken jointly by UNHCR and IOM for third-country nationals. However, the response in terms of addressing the possible, and actual, influx of people seeking protection in the EU seemed to reveal a certain disjuncture between alarmist