

Looking beyond legal status to human need

Tarak Bach Baouab, Hernan del Valle, Katharine Derderian and Aurelie Ponthieu

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.

Italian authorities differentiated between influxes to Italy from Libya and Tunisia, with Libyans accessing asylum procedures while Tunisians entered on an 'economic migrant' track. Reception conditions and access to services, including medical care, depended on nationality and port of departure, discriminating between people based less on humanitarian need than on rigid legal and political categories. We should ask whether it is legally and ethically acceptable for states and protection-mandated agencies to latch on to such categorisations when the end result is the abandonment of entire 'categories' of people to their own devices, allowing them to suffer from neglect at a moment of great need.

Witnessing the restrictive situation facing people on the move as the conflict escalated, MSF questioned the logic of European military intervention in Libya under the doctrine of responsibility to protect even as many of those fleeing Libya failed to find refugee protection in Europe.²

Where migration management works at cross-purposes with assistance and protection, the gaps left by states and mandated organisations also raise many questions for aid actors. The 2011 Libyan crisis put humanitarians in the position of softening the impact of a larger, political policy of non-response to the acute needs of people displaced by conflict in a mixed migration flow. Such policies have risked *refoulement* of the most vulnerable, not to mention significant health and humanitarian impacts for other people on the move. As aid actors

working with refugees and migrants, should we not be calling for a more consistent approach between protection in conflict and refugee protection given globally as people become displaced under mixed flows?

As the complexity of displacement grows, so does the risk of states adopting a default 'migration response' to mixed flows. Humanitarian organisations, protection-mandated organisations and others who wish to assist refugees and migrants will need to learn to respond in transit, open or urban settings (and detention facilities) to these diverse categories of population with diverse assistance and protection needs. At the same time, humanitarians will have no choice but to continue to push for increased state responsiveness — or else we risk losing sight of the most vulnerable wherever the overall effort to assist mixed flows becomes reduced to a 'migration' response.

Tarak Bach Baouab Tarak.bach.baouab@amsterdam.msf.org is Humanitarian Affairs Advisor, Hernan del Valle Hernan.del.valle@oca.msf.org is Head of Advocacy and Operational Communications, Katharine Derderian Katharine.derderian@brussels.msf.org is Humanitarian Advisor and Aurélie Ponthieu Aurelie.ponthieu@brussels.msf.org is Humanitarian Advisor on Displacement at Médecins Sans Frontières. www.msf.org

1. For further information see MSF Briefing Papers at <http://tinyurl.com/MSF-BP-3May2011> and <http://tinyurl.com/MSF-BP-24June2011>
 2. MSF 'Open Letter concerning civilians fleeing Libya for Europe', 19 May 2011, <http://tinyurl.com/MSF-openletter-19May2011>