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CONDEMNED TO REPEAT: CAN EUROPE AVERT TRAGEDIES AT SEA FOR REFUGEES AND MIGRANTS?

> *Two months ago the tragedy in Lampedusa triggered a very wide and emotional reaction across Europe – a chorus of voices calling for actions to avoid such disasters in the future. I trust this impetus has not vanished. Today we are putting on the table measures and proposals for a truly European response that can make a difference. I call on Member States to make full use of this unique opportunity to show that the EU is built on solidarity and concrete support. Now is the time to act*
> Cecilia Malmström, EU Commissioner for Home Affairs (4 December 2013)[1]

The moral, political and legal complexities of humanely addressing the question of how to protect those fleeing persecution, violence and poverty were once again thrown into stark relief by the 11 October 2013 sinking of a boat containing migrants in the waters between Lampedusa and Malta. Despite the media coverage of the tragedy disappearing from our screens, the long-term impacts of such events within Europe remain to be tackled. Over 260 people are now known to have lost their lives when the crowded boat they were travelling in from Libya sank in the Mediterranean. Yet this is simply the most recent and large-scale example of the immense risks that, wittingly or unwittingly, thousands of refugees and other migrants seeking protection face in their attempts to reach the perceived safety of Europe.

Following the upheavals caused by the Arab Spring and armed conflicts in Libya and Syria, the past few years have unfortunately seen an increase in the number of people attempting to cross the Mediterranean in crowded and unseaworthy vessels. The challenges of accessing European protection and migration mechanisms has driven many into the dangerous clutches of people smugglers and traffickers, who often have scant regard for the lives and safety of those they are transporting. Yet the responses by European authorities to the victims of such smugglers and traffickers have also faced severe criticism. In February 2012, the Grand Chamber of the European Court of Human Rights ruled against Italy in the case of *Hirsi Jamaa and others* (27765/09),[2] holding that the actions of the Italian authorities in intercepting and 'pushing back' migrants from Italian waters constituted a violation of Article 3 ECHR (due to the risk of ill-treatment in Libya, and subsequent risk of repatriation to Somalia and Eritrea), and also Article 4, Protocol No. 4 concerning the prohibition of collective expulsion of aliens.

This judicial ruling was quickly followed by the Council of Europe's damning report on the so-called "left-to-die boat" incident.[3] In that case, a boat containing 72 migrants left Tripoli on 26th March 2011 during the height of the conflict in Libya, and was washed up on the Libyan shore 15 days later with only 10 survivors. Following intensive investigations, the Parliamentary Assembly of the Council of Europe identified a catalogue of failures by the Libyan and Italian authorities in response to the boat itself, and the lack of preparation for such attempts to flee Libya by NATO member States in the planning and execution of their armed intervention. The report highlighted that both the Italian and Maltese authorities were

[1] 'Lampedusa follow up: concrete actions to prevent loss of life in the Mediterranean and better address migratory and asylum flows', European Commission Press Release, Brussels, 4 December 2013.

[2] *Hirsi Jamaa and Others v. Italy* App no 27765/09 (Grand Chamber, ECtHR, 23 February 2012).

[3] 'Lives lost in the Mediterranean Sea: Who is responsible?', Parliamentary Assembly of the Council of Europe (PACE), Resolution 1872 (24 April 2012). See also 'PACE finds a "catalogue of failures" that led to deaths of 63 people fleeing Libyan conflict by sea', Council of Europe Press Release, Strasbourg, 24 April 2012; and 'The "left-to-die boat": actions and reactions', Parliamentary Assembly of the Council of Europe, Motion for a resolution tabled by the Committee on Migration, Refugees and Displaced Persons, 11th April 2013 (Doc. 13164).

aware that a boat was in distress within the zone of water which fell within the responsibility of the Libyan authorities for search and rescue activities under the International Maritime Search and Rescue Convention. Considering the on-going armed conflict in Libya at the time, it was reasonable to assume that the Libyan authorities may not have been in a position to assist such a vessel. Furthermore, as the Italian authorities were the first to be informed of a boat in distress, they held a greater responsibility to ensure the boat's rescue.

The frustration of Tineke Strik, Rapporteur of the Parliamentary Assembly of the Council of Europe, was obvious following a newspaper investigation into the 11th October 2013 tragedy which described the unwillingness once again of the Italian and Maltese authorities to take responsibility for the boat once they were informed of its predicament.[4] While acknowledging the Italian and Maltese authorities eventually rescued 212 people, Mrs. Stirk asked: 'what about the 200 persons who drowned? Could not their lives have been saved if lessons had been learned from the 2011 incident that I investigated?'[5]

Against this background, the recent announcement by the European Commission of concrete actions in response to the Lampedusa tragedy deserves a cautious welcome.[6] The EU Justice and Home Affairs (JHA) Task Force established at the October 2013 JHA Council meeting has set out five areas for priority action which can broadly be grouped into three themes: increased surveillance and border control measures; legal migration options; and co-operation with third countries. The Task Force has proposed increased use of the recently established European Border Surveillance System (EUROSUR) which includes use of satellites and drones to provide better imagery of the external borders of the EU, in conjunction with the Frontex European Patrols Network. Likewise financial support and solidarity measures are intended to provide funding for EU Member States such as Italy for, inter alia, border surveillance operations; while Europol is to be given a stronger role and resources to co-ordinate EU activities in the fight against people smuggling and trafficking.

In addition to the surveillance and crime prevention aspects of the Commission's proposals, the question of the extremely low levels of resettlement of recognised refugees into the EU as a whole has been acknowledged. As noted by the Commission, in 2012 only 4,930 refugees were resettled into the EU (by only 12 of the 28 Member States) while during the same time the USA resettled over 50,000 people. Such refugee resettlement programmes should be complemented by new legal channels for migrants to access the EU both for temporary and permanent stays. Finally, the proposals highlight the role that Mobility Partnerships with countries such as Tunisia and Azerbaijan can play in identifying channels for regular migration, in conjunction with the establishment of regional protection regimes.

Within the context of this letter, it is not possible to examine each of these proposals in detail. Indeed, the debate surrounding the Australian 'Pacific solution' of denying entry onto Australian soil for asylum seekers and irregular migrants who arrive by sea should provide us with serious cause to examine the best methods of ensuring access and safety to our shores for

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[4] G. di Fabrizio, 'Lampedusa, passing the buck of responsibilities: this is how they left the Syrian children drown', (*L'Espresso Newspaper*, 28th November 2013) <http://espresso.repubblica.it/internazionale/2013/11/28/news/lampedusa-buck-passing-on-the-massacre-so-they-left-syrians-children-drown-1.143363> accessed 6 December 2013.

[5] 'PACE rapporteur deplores "no lessons learned" as fresh evidence emerges of failure to save lives in the Mediterranean', Council of Europe Press Release, (AP192 (2013)), Strasbourg, 29 November 2013.

[6] 'Lampedusa follow up' (n 1) See also: 'EU moves to prevent new migrant deaths after Lampedusa', BBC News Online, 4 December 2013 < www.bbc.co.uk/news/world-europe-25215691> accessed 6 December 2013; and 'EU: Improve Migrant Rescue, Offer Refuge', Human Rights Watch Press Release, 23 October 2013 <www.hrw.org/news/2013/10/23/eu-improve-migrant-rescue-offer-refuge> accessed 6 December 2013.

those unable to access regular methods of migration or protection.[7] However, a focus on border control and crime prevention can only be one part of a holistic European strategy to address the perils faced by migrants crossing the Mediterranean.[8] Arguably the increased land border controls between Greece and Turkey have consequently pushed more migrants into the hands of people smugglers and traffickers at sea. While the EU's recognition of the need for increased legal avenues for those fleeing persecution, violence and poverty is to be welcomed, such calls have been made repeatedly since the conflict in the former Yugoslavia in the 1990s. So while concerted efforts must be made to arrest and detain those actively profiting from people smuggling and trafficking, serious measures also need to be introduced to make the latest proposals for increased refugee resettlement and legal migration channels a reality across the EU. Likewise, EU Member States must take collective responsibility for the protection of vulnerable migrants. This implies financial and physical burden sharing between all Member States, as well as true co-operation between those States at the front line to ensure that vessels in distress are provided with prompt and effective assistance as soon as possible. Otherwise, we will be condemned to repeat the failures of the past and more deaths will occur within European waters.

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6th December 2013

[7] Eg. B. Jabour, 'Did John Howard's Pacific Solution stop the boats, as Tony Abbott asserts?', (*The Guardian*, 19 July 2013) <www.theguardian.com/world/2013/jul/19/did-howard-solution-stop-boats> accessed 6 December 2013.

[8] Eg. J. Sunderland, *Hidden Emergency: Migrant Deaths in the Mediterranean*, (Human Rights Watch Report, August 2012.) <www.hrw.org/sites/default/files/related_material/2012_EU_Hidden%20Emergency.pdf> accessed 6 December 2013.