



## Analysis

# The EU's Planned War on Smugglers

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The EU's Foreign Affairs Council is meeting today to discuss the possibility of a military operation in the Mediterranean to take actions against smuggling of migrants. Officially, at least, the purpose of the operation (as defined by EU leaders last month) is to destroy smugglers' boats. The EU's High Representative has stated that there will be 'no boots on the ground'; and as she arrived at the Council meeting today, she referred to authorising an 'EU operation at sea'.

However, it is clear from the documents discussed in the EU's Political and Security Committee last week that (unless plans have changed radically in the meantime) **the High Representative is being "economical with the truth"**. The EU action clearly contemplates action by ground forces. Moreover, it anticipates the possible **loss of life** not only of smugglers but also **of Member States' forces and refugees**. In effect, the **EU is planning to declare war on migrant smugglers** – without thinking through the consequences.

### Details

The document defines the purpose of the EU operation: **'to disrupt the business model of the smugglers, achieved by undertaking systematic efforts to identify, seize/capture and destroy vessels and assets before they are used by smugglers.'**

There would be four phases: '(1) a deployment and assessment phase, (2) an operational/seizure (of smuggled vessels) phase; (3) an operational/disruption phase, (4) a mission withdrawal and completion phase. The EU states that authorisation by the UN is not required by the first phase. While 'ideally' there should

be consent of 'the government(s) concerned', the EU document clearly contemplates going ahead without it.

### **Phase 1 - Deployment**

This mainly concerns intelligence, which will be provided by the:

*...dedicated use of aerial assets, including satellites, to provide persistent surveillance and potentially through close cooperation with the relevant national authorities operating along the coast. The area of operations would likely extend from the Southern boundary of Op TRITON [the Frontex operation for surveillance and potentially rescue) towards Tunisia, Libya and Egypt...but will be assessed further in subsequent planning*

It is clear from this that boats leaving North Africa will first of all have to cross through a zone patrolled by EU military forces, before they get to the area patrolled by civilian forces (ie the operation coordinated by Frontex).

The document would like to go further in gathering surveillance, noting that the:

*possibility to conduct surveillance in the internal and territorial waters and adjacent littoral zone of these countries would provide obvious advantages but would need host nation approval if using assets other than satellites. Issues concerning adherence to Human Rights and other legal arrangements would also need to be considered.*

There is no elaboration of these human rights and other legal issues, however.

### **Phase 2 – Operational/Seizure of Smugglers vessels.**

Despite the distinction made at the outset, the authors of the EU document believe that the EU would *not* need UN authorisation for some aspects of seizing vessels on the high seas (ie water that does not form part of the territorial water of any State). They state that

*...such a measure is feasible against a ship flying the flag of a State only with the consent of this State. In the event that a smuggling vessel has no nationality/not flying a flag of a State, seizure is still possible under International Law on the high seas provided that the warship conducting the seizure is so authorized under its own national law. Even in the absence of a warship having its own national legal approval for such seizure, there is still a legal basis under International Law to allow the warship to board and search the smuggling vessel.*

If there were a Security Council resolution, or the consent of the flag state or the state where operations were carried out in the territorial waters, the EU could go further and seize vessels:

**- On the high seas *against ships the flag State of which has not given its assent or against ships without nationality.***

- In the respective sovereign territorial waters.

### **Phase 3 - Operational/Disruption.**

This phase concerns the destruction of vessels. In general, this presumes that **'There is a UNSCR mandate under Chapter VII or a Libyan invitation to enter into the sovereign waters of Libya to act against smuggling ships'**.

However, the document does appear to say that in some cases ships could be destroyed regardless of a Security Council Resolution:

- *There is a legal basis for the **destruction** of smugglers vessels and assets:*  
- *either through International Law, complemented by Domestic Law measures, including appropriate judicial decisions (2000 UN Protocol against Smuggling) for the **destruction** of smugglers vessels and assets on the High Seas, it being understood that such a measure is feasible against a ship flying the flag of a State only with the consent of this State;*

Some destruction would need a UN mandate however:

- *or through a UNSCR adopted under chapter VII **against ships the flag State of which has not given its assent or against ships without nationality.***

The document then goes on to make quite clear that there could be conflict on the ground (emphasis added):

*Any **destruction ashore, ideally** underpinned by **local consent and cooperation**, could include action along the coast, in harbour or at anchor of smugglers assets and vessels before their use (including ships in transit to the identified migration embarkation points) subject to the existence of appropriate legal safeguards.*

The EU document implicitly contemplates that destruction might be carried out ashore *without* local consent. It is not clear whether the EU thinks that it can do this without Security Council authorisation. Nor is it clear how to determine which ships are actually intended for smuggling, when they do not have any migrants on board. There is no elaboration of what the 'legal safeguards' would be.

The document also recognises the possible loss of life at this stage:

*3. Any action at sea could inevitably involve contact with both smugglers and migrants/refugees and consideration on how to deal with SOLAS responsibilities and other International Law obligations will be of paramount importance.*

'SOLAS' refers to the 'Safety of Lives at Sea' Convention.

Earlier in the document the possible loss of life is addressed without an acronym:

*Non-compliant boarding operations against smugglers in the presence of migrants has a **high risk of collateral damage including the loss of life***

Later on, the list of 'tasks' for the EU mission again makes clear that the use of ground forces is planned, and loss of life is contemplated:

*A presence ashore might be envisaged if agreement was reached with relevant authorities;*

*The existence of heavy military armaments (including coastal artillery batteries) and military capable militias present a robust threat to EU ships and aircraft operating in the vicinity and will have to be further assessed to provide robust Force Protection.*

*The terrorist presence in the region also constitutes a security threat.*

*Action taken ashore could be undertaken in a hostile environment.*

The use of ground forces is also clear from the list of assets:

*The operation would require a broad range of air, maritime **and land capabilities**. These could include:*

- **Amphibious** assets;*
- Destruction air, **land** and sea, including **Special Forces units**;*

#### **Phase 4 - Mission Withdrawal and Completion**

The assumption is that the EU can leave and hand over these operations to the Libyans, once they have an effective coastguard. The benchmarks for this would be:

*the level of migrant smuggling had significantly decreased; that there was clear evidence that the smugglers business model had been disrupted and that the local authorities were able to generate and sustain sufficient organic capacity to deal with the issue.*

So the document suggests that 'therefore suggested that the CSDP operation lasts for an initial period of one year'. It could implicitly be extended beyond that point.

In fact the document admits that the EU military action will probably not achieve its objectives, taken in isolation:

*this action cannot by itself achieve a lasting solution to the smuggling of migrants.*

#### **Broader impact**

The document shows some awareness that the military operation might undercut EU objectives to ensure peace in Libya, and even undermine neighbouring countries:

*Early local involvement is essential to ensure buy-in and eventual follow-up by the respective authorities. Failing to obtain such consent will jeopardise the sustainability of mission accomplishments.*

Note that the document does not rule out going ahead without Libyan consent, or even (to some extent at least) the consent of the UN Security Council.

As for the impact on nearby countries:

*Kinetic action along Libyan coasts might oblige smugglers to shift their tactics and change their departure sites, eventually relocating them in neighbouring countries: close coordination with Tunisia and Egypt will be required.*

With an award-winning degree of understatement, the document notes that:

*Any casualties as a result of EU action could trigger a negative response from the local population and the wider region, jeopardising support and follow-up.*

One would also imagine that many people in the EU would have a 'negative response' to their family, friends and countrymen coming home in body bags, and that the deaths of refugees at EU hands would also 'jeopardise support and follow-up'.

## **Comments**

EU leaders called for the destruction of smugglers' boats. There might be a case for this, but it is clear that the planned EU operation goes far beyond what most EU citizens would likely assume is entailed by the destruction of boats. The EU's own military planners anticipate possible actions on the ground, and a high risk of loss of life of smugglers, military personnel and migrants. These possibilities need to be openly discussed – not shrugged off. Most fundamentally, the EU's foreign policy High Representative needs to stop referring to this as a maritime-only operation.

There is no indication from the document that the military planners have thought through the impact of this large-scale operation upon the EU's laudable intention to contribute to a peace deal in Libya, given the opposition of the local authorities to this plan. There is also no thought of the impact on the region, or of the possibility of radicalisation if there are deaths of innocents. There is no detailed assessment of what to do with any migrants, besides a recognition that there is 'systematic detention of refugees and asylum seekers inside' Libya. Presumably the EU cannot seriously suggest that Libya is a safe country currently which to return refugees, but this is not ruled out as such. The details of what to do with smugglers is not worked out either: since it might be unsafe to return them to Libya, they might have to be brought to the EU for prosecution.

And on a purely legal note: this document shows, with the greatest possible respect, how utterly wrong the EU's Court of Justice was to rule in December that the European Court of Human Rights should not have jurisdiction over EU military operations if the EU acceded to the ECHR: a manifest case of judicial egos taking precedence over the obvious need for effective protection of human rights.

Source

Background Note (12 May 2015)

<http://www.statewatch.org/news/2015/may/eu-med-military-op.pdf>

May 2015

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