Migrant and Refugee Law as Relates to the Maritime Regime

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Focal to the backdrop of maritime migration lie individuals attempting to flee war, persecution, or natural disasters as well as those seeking to circumvent migration and border controls, often in an attempt to improve their economic circumstances. In recent months, the European community has been faced with an unprecedented number of migrant arrivals. According to statistics compiled by the United Nations High Commissioner for Refugees,[85] more than one million migrants reached Europe in 2015.[86] They arrived in the greatest numbers from conflict zones such as Syria, Afghanistan and Iraq, but also from Kosovo, Nigeria and beyond.[87] Europe has been struggling to deal with what has been labelled a 'migration crisis'. As of August 2016, there have been more than 260,000 migrant arrivals by sea,[88] nearly twice the number recorded by the same month of last year.[89] These individuals are entitled to human rights protection irrespective of their classification as genuine asylum seekers or otherwise. This is the so-called 'human factor', encapsulating both human rights and humanitarian principles of protection.

85 Hereafter referred to as UNHCR.

86 See UNHCR, 'http://www.unhcr.org/news/latest/2015/12/5683d0b56/million-sea-arrivals-reach-europe-2015.html all web references are correct as of 26 August 2016.

87 See EuroStat, 'Asylum Quarterly Report – 15 June 2016', available online at http://ec.europa.eu/eurostat/statistics-explained/index.php/Asylum_statistics .

88 See International Organization for Migration, 'Mediterranean Update – Migration Flows Europe: Arrivals and Fatalities', available online at http://missingmigrants.iom.int/

89 See International Organization for Migration, 'Mixed Migration Flows in the Mediterranean and Beyond – Compilation of Available Data and Information – Reporting Period 2015', available online at http://doe.iom.int/docs/Flows%20Compilation%202015%20Overview.pdf 3.

The phenomenon of maritime migration calls for an equilibration of diverse and potentially conflicting interests, thus posing a conceptual challenge to States. Foremost among these, one finds: State sovereignty and principles of protection; the legitimate interests of States and the mandates of international law; jurisdictional notions and humanitarian considerations.

A reflection of these competing interests is found in the main branches of laws applying to maritime migration. In this way, the relevant legal regime in maritime migration scenarios is characterised by the interplay of various – and sometimes apparently conflicting – branches of international law, presenting both 'opportunities' for and 'constraints' upon State action.

This is evident in the three main branches of law regulating migrant and refugee law in the maritime realm:

- **United Nations Convention on the Law of the Sea**
- **Migrant Smuggling Protocol**
- **Human Rights and Refugee Law**

The **United Nations Convention on the Law of the Sea**[90] provides States with jurisdictional powers – or opportunities for action – in the respective maritime zones adjacent to their coasts, together with the obligation to rescue those in distress at sea in article 98(1) LOSC[91], a so-called constraint on State action. Controlling maritime migrant smuggling within the territorial sea falls within the parametres of article 19(2)(g) LOSC which prohibits any loading or unloading of any person contrary to *inter alia* immigration laws and regulations of the coastal State. Furthermore, under article 33 of the same instrument, a coastal State may in its contiguous zone, exercise the control necessary to prevent and punish infringement of *inter alia*, its immigration laws,

90 The United Nations Convention on the Law of the Sea (Montego Bay, 10 December 1982, entered into force 16 November 1994) 1833 UNTS 3, hereafter referred to as the LOSC.

91 For further discussion on the humanitarian obligation to render assistance to persons in distress at sea, see pages 8 and 9 below.

thereby permitting specific measures to be taken in that zone in relation to the entry of migrants. As for the high seas, while the right of visit under article 110 does not specifically list the smuggling of migrants as an instance in which this right may be exercised, the right of visit is sometimes carried out in respect of ships engaged in the smuggling of migrants on the basis that these ships usually lack nationality. As for other grounds for enforcement action on the high seas, the LOSC merely lays the foundations for cooperation in the suppression of the slave trade, and even if one could assimilate migrant smuggling to slavery,[92] effective enforcement action is minimal: the duty to 'take effective measures to prevent and punish the transport of slaves' is couched in terms as to oblige only the flag State.[93] Despite the innate connection to maritime affairs, the LOSC fails to consider maritime migration in its provisions directly.[94]

Aside from the Constitution of the Ocean, one finds the branch of law seeking to repress the smuggling of migrants, which is embodied in the

92 See further Efthymios Papastavridis, *The Interception of Vessels on the High Seas* (Hart Publishing 2013) 270.

93 For an overview of the zonal jurisdiction pertaining to migrant smuggling under the law of the sea regime, see Patricia Mallia, *Migrant Smuggling by Sea: Combating a Current Threat to Maritime Security through the Creation of a Cooperative Framework* (Martinus Nijhoff Publishers, The Netherlands, 2010) Part II, Chapter 5. See also Tulio Scovazzi, 'The Particular Problems of Migrants and Asylum Seekers Arriving by Sea' in Juss Satvinder and others (eds), *Towards a Refugee Oriented Right of Asylum* (Routledge 2016) 179-182.

94 The reasons for this *lacuna* remain unclear. During negotiations at the Third United Nations Conference on the Law of the Sea in the 1970s, States may have been aware of problems associated with maritime migration in certain parts of the world such as for example Southeast Asia. A likely reason for the exclusion is that at the time of drafting of the LOSC, mass migration by sea was not considered to be the major problem it is today, thus the drafters may not have considered it sufficiently serious enough to warrant inclusion in the final text of the Convention. For a discussion on other possible reasons for this *lacuna*, see Richard Barnes, 'The International law of the Sea and Migration Control' in Bernard Ryan and Valsamis Mitsilegas (eds), *Extraterritorial Immigration Control – Legal Challenges* (Martinus Nijhoff 2010) 108.

Migrant Smuggling Protocol,[95] the first attempt at a holistic regime to criminalise and regulate this type of organized crime.[96]

Individuals thus transported to European shores are smuggled migrants; they are victims of one of the fastest-growing transnational organised crimes today.[97] The European Police Office[98] estimates that people smuggling operations facilitate over 90 percent of the migrant influx coming to the Europe.[99] Smuggling,[100] defined in article 3(a) of the Migrant Smuggling Protocol, involves the physical movement of persons across international borders on a payment-for-services basis.[101]

95 Protocol against the Smuggling of Migrants by Land, Sea and Air, Supplementing the United Nations Convention against Transnational Organised Crime (Palermo, 15 November 2000, entered into force 28 January 2004) 40 ILM 384.

96 For a discussion of the historical development of the Migrant Smuggling Protocol, see Felicity Attard, 'Is the Smuggling Protocol a Viable Solution to the Contemporary Problem of Smuggling on the High Seas?' (2016) 47 Journal of Maritime Law & Commerce 219, 223-225.

97 Migrant smuggling has also been linked to other crimes such as those against the safety of navigation, terrorism, corruption, trafficking of persons, forgery and drug trafficking. See generally United Nations Office on Drugs and Crime, *Issue Paper: Corruption and the smuggling of migrants* (UN Publications 2013) and the Joint EUROPOL and INTERPOL Report, 'Migrant Smuggling Networks', Executive Summary, May 2016, available online at https://www.europol.europa.eu/content/europol-and-interpol-issue-comprehensive-review-migrant-smuggling-networks , hereafter referred to as 2016 Joint EUROPOL and INTERPOL Report. See also James Kraska and Raul Pedrozo, *International Maritime Security Law* (Martinus Nijhoff Publishers 2013) 658-659.

98 Hereafter referred to as EUROPOL.

99 Joint EUROPOL and INTERPOL Report (n 13) 4.

100 Recall that the term 'smuggling' is to be distinguished from 'trafficking'. These terms are defined separately at international law in two separate Protocols, although they do have certain overlapping elements. See further Patricia Mallia (n 9) 9-11 and Tom Obokata, 'The Legal Framework Concerning the Smuggling of Migrants by Land, Sea and Air under the UN Protocol on the Smuggling of Migrants by Land, Sea and Air' in Bernard Ryan and Valsamis Mitsilegas (eds), *Extraterritorial Immigration Control – Legal Challenges* (Martinus Nijhoff 2010) 152-153.

101 Migrant smuggling is a highly lucrative business. In 2015, the esti-

In the context of the maritime sphere, individuals are assisted in their attempt to enter a State's territory via the sea in a covert manner in violation of a State's laws, evading detection by a State's border control officials. In this way, the smuggling of migrants by sea constitutes a threat to maritime security,[102] understood to include the preservation of territorial integrity and sovereignty of a State.

Irrespective of their consent however, these individuals are victims, forced to suffer deplorable treatment in life-threatening conditions. Even before departure, smugglers very commonly use violence in order to force migrants into unseaworthy boats.[103] Once on board, the lack of space and poor hygiene creates appalling conditions, which favour the spread of disease.[104] Furthermore, the lack of adequate food and water supplies leaves countless migrants to die of starvation and dehydration.[105] Indeed, there is a growing awareness of the serious

mate yearly turnover of migrant smuggling resulted in an average of 5 to 6 billion United States dollars. See Joint EUROPOL and INTERPOL Report (n 13) 4.

102 Smuggling of persons by sea has been identified by United Nations Secretary General as one of the seven major threats to maritime security. See Secretary General of the United Nations, 'Report of the Secretary General on Oceans and the Law of the Sea', 10 March 2008, UN Doc. A/63/63, para 39. For further discussion on how the crime of migrant smuggling by sea affects maritime security. See Natalie Klein, *Maritime Security and the Law of the Sea* (Oxford University Press, Oxford 2011) 122-125, Anne Gallagher and Fiona David, *The International Law of Migrant Smuggling* (Cambridge University Press 2014) 446, European Commission, DG Migration and Home Affairs, 'A Study on Smuggling of Migrants – Characteristics, responses and cooperation with third Countries', Final Report September 2015, 39-40, hereafter referred to as 2015 Study on Smuggling of Migrants and United Nations Office on Drugs and Crime, *Issue Paper: Smuggling of migrants by sea* (UN Publications 2011) 26-32, hereafter referred to as the Smuggling of Migrants by Sea 2011 Issue Paper.

103 Nourhan Abdel Aziz and others, 'The Changing Dynamics of Cross-border Human Smuggling and Trafficking in the Mediterranean', Instituto Affari Internazionali, October 2015, 42.

104 Ibid. See also Smuggling of Migrants by Sea 2011 Issue Paper (n 18) 30-31.

105 Amnesty International, 'Lives Adrift – Refugees and Migrants in Peril in the Central Mediterranean', 2014 Amnesty International Limited, available

human rights implications of migrant smuggling. The Migrant Smuggling Protocol addresses these concerns by creating a framework for cooperation for the repression of the crime while ensuring the protection of victims and respect for their inherent rights.[106] In this way, the Migrant Smuggling Protocol is the first instrument of its kind to recognise the multi-faceted nature of migrant smuggling, which also calls for protection of fundamental rights of the individual, thereby necessitating consideration of humanitarian principles of protection throughout operations to repress the crime.[107] Alongside this, the Protocol provides a framework for interception of vessels reasonably suspected to be engaged in the smuggling of migrants.[108]

Part II of the Protocol lays out the general framework of permissible action at sea and preserves the supremacy of flag State jurisdiction. It ties in interception operations under the Protocol with the general rubric of the law of the sea, in particular, the LOSC provisions of articles 91, 92 and 94, which encapsulate the principle of exclusivity of flag State jurisdiction. In this way, the maritime provisions of the Protocol graft onto the Law of the Sea regime so that the *lacuna* in the international law of the sea is filled in a way that strengthens – rather than challenges – the principle of flag State exclusivity on the high seas.

Article 7, provides for the overriding duty to 'cooperate to the fullest extent possible to prevent and suppress the smuggling of migrants by sea, in accordance with the international law of the sea.' The recognition in the Protocol of the importance of international cooperation is focal to any effort aimed at curbing maritime migration and indeed, the

online at https://www.amnesty.ie/wp-content/uploads/2016/05/Lives-Adrift-Refugees-and-Migrants-in-Peril-in-the-Central-Mediterranean.pdf 20.

106 See Tom Obokata (n 16) 153-157, 161-162

107 Note in this regard, the preamble, the general statement of purpose in article 2 and the safeguard clause in article 9(1) all referring to the humane treatment of migrants, full protection of their rights and the safety and humane treatment of all persons on board intercepted vessels.

108 For a description of 'interception' see *inter alia*: UNHCR ExCom Conclusion No 97 (LIV) 'Conclusion on Protection Safeguards in Interception Measures' (2003).

consequent humanitarian tragedy. This must exist between all the States involved, including that is, countries of departure, arrival, transit, origin, and destination.

A concretisation of the duty of cooperation is evident in the Protocol article 8 of which provides for enforcement action, including interception, by non-flag State actors. While the flag State remains the main actor in this regard, however, the problems of lack of action on the part of the flag State or failure to respond to requests for verification of registry and authorisation to board are minimised by article 8(4) that requires that any such requests must be considered and responded to 'expeditiously'.[109]

This exercise of jurisdiction and control over vessels becomes increasingly significant from the point of view of humanitarian considerations since through such acts, obligations of human rights bind the intercepting State. To this end, it must be recalled that although the adoption of the Smuggling Protocol marked an important development in the suppression of migrant smuggling, it nevertheless must be supplemented by rules found in other international legal instruments since the legal responses found in the Protocol work within a broader legal framework involving obligations under the law of the sea, international human rights law and refugee law.[110]

A further development in the fight against the smuggling of migrants was the adoption of the United Nations Security Council Resolution 2240 (2015).[111] Aimed at addressing the current migration crisis, the Resolution highlights the need to end the 'recent proliferation of, and endangerment of lives by, the smuggling of migrants in the Mediterranean Sea, in particular off the coast of Libya'.[112]

109 This is an approach that has been adopted in other spheres, such as maritime drug smuggling and terrorism. The net effect of this may be an emerging definition of the concept of cooperation as compelling a response from the flag State should it choose not to take action itself.

110 Discussed in detail below. See pages 8-13.

111 UNSC Res 2240 (9 October 2015) UN Doc S/RES/2240, hereafter referred to as UNSCR 2240.

112 UNSCR 2240, Preamble.

In the wake of the tragic mass shipwrecks off the Libyan coasts in April 2015, the EU worked relentlessly towards finding a comprehensive solution to the growing migration problem in the Mediterranean.[113] A possible way forward was the deployment of a military operation aimed at targeting vessels and other assets used by smugglers to transport persons from Southern Mediterranean shores.[114] On 18 May 2015, the European Council adopted Decision 2015/778[115] approved the Crisis Management Concept for Common Security and Defence Policy operation to identify, capture and dispose of vessels and other assets used or suspected of being used by migrant smugglers.[116] SOPHIA[117] commenced on the 25 July 2015, and was intended to have three phases of operation. The first phase included information gathering on migration networks and to patrol high seas in the Southern Mediterranean.[118] The second phase includes boarding, searching, seizure and diversion of vessels suspected of being involved in smuggling of migrants on the high seas, in accordance with international law,[119] as well as in the

113 The International Organization for Migration reports that the Mediterranean Sea has now become the world's most dangerous destination for migrants. During the period between 2014 and 2015, over 7,000 migrants lost their lives in the Mediterranean. Migrant crossings continue to increase in 2016, where in the last 6 months; there have been over 200,000 migrant crossing with over 3,000 migrants reported dead or missing. See < http://missingmigrants.iom.int/mediterranean > .

114 Giorgia Bevilacqua, 'The Use of Force Against the Business Model of Migrant Smuggling and Human Trafficking to Maintain International Peace and Security in The Mediterranean' in Giuseppe Cataldi (ed), *A Mediterranean Perspective on Migrants' Flows in the European Union – Protection of Rights, Intercultural Encounters and Integration Policies* (Editoriale Scientifica Napoli 2016) 123.

115 Council Decision (CFSP) 2015/778 of 18 May on a European Union Military Operation in the Southern Central Mediterranean (EUNAVOR), Official Journal 2015 L 122/31, hereafter referred to as Council Decision (CFSP) 2015/778.

116 Mireia Estrada Cañamares, 'Operation SOPHIA before and After UN Security Council Resolution No 2240 (2015)' (2016) European Papers 185, 186.

117 Originally named EUNAVFOR MED.

118 Council Decision (CFSP) 2015/778, Article 2(a).

119 Ibid, Article 2(b)(I).

territorial sea or internal waters with the consent of the coastal State or in accordance with any applicable Security Council Resolution.[120] The third phase, which also requires Security Council authorisation, involves the adoption of the necessary measures against migrant smugglers vessels and related assets including disposing them or rendering them inoperable.[121] UNSCR 2240 provided the EU which the necessary legal basis to conduct operations under the second phase of SOPHIA.

The Resolution binds States[122] to support Libya in the suppression of migrant smuggling, and authorises them for a period of one year to inspect and seize vessels[123] on the high seas, off the coast of Libya, when there are reasonable grounds 'to believe or suspect that they are or will be used for the smuggling of migrants'.[124] Such actions must be taken under conditions provided for by the applicable legal framework, including provisions of the LOSC and the Migrant Smuggling Protocol.[125] In such types of operations, State naval forces operating on the high seas, off the coast of Libya shall distinguish between flagged and stateless vessels. Paragraph 5 of the Resolution authorises States to inspect a flagless vessel reasonably suspected of carrying out smuggling, in line with the right of visit under article 110 of the LOSC and article 8(7) of the Migrant Smuggling Protocol.[126] The Resolution fails to elaborate on subsequent treatment of these stateless vessels, and whether this includes enforcement measures such as seizure or disposal. There has been much debate amongst academics about this issue. Some authors such as Churchill and Lowe insist that there '…is a need for some jurisdictional nexus in order that a State may extend its laws to those on a boarding stateless ship and enforce [its] laws against them.'[127]

120 Ibid, Article 2(b)(II).

121 Ibid, Article 2(c).

122 Either acting alone or through regional organisations such as the European Union.

123 It is noteworthy that this applies irrespective of the size of the vessel as the Resolution makes it clear that these include inflatable boats, rafts and dinghies.

124 UNSCR 2240, Preamble.

125 Ibid.

126 See UNSCR 2240, para.5. See also page 4 above.

127 Robin Churchill and Vaughan Lowe, *The law of the sea* (3rd edn,

However other authors such as Rayfuse argue that the consequences of statelessness are so grave, that they may result in a stateless ship being '…arrested on the high seas and subject to the jurisdiction of any other state'.[128] The present authors tend to agree with the latter position considering that once a vessel is stateless, it no longer enjoys the freedom of navigation or the protection of any State.[129] Therefore, if upon inspection, it leads to the discovery that the stateless vessel is engaged in smuggling, it may be presumed that there is a right of naval forces to take action against that vessel including seizure and possible arrest of smugglers on board.

The situation is different in so far as flagged vessels are concerned. Paragraph 6 of UNSCR 2240, repeats the measure of inspection provided for in paragraph 5 in relation to stateless vessels.[130] However, unlike the Migrant Smuggling Protocol, which provides a mandatory procedure to be followed in order to obtain flag State consent for an inspection,[131] paragraph 7 of the Resolution allows inspection even without the consent of the flag State, provided good faith efforts to obtain such consent have been made.[132] Furthermore, the Resolution appears to create a mechanism to regulate action beyond inspections taken under the auspices of paragraph 7, in other words where no flag State action has been forthcoming. The mechanism under paragraph 8 of the Resolution, allows the inspecting State to seize the vessel once inspection confirms that it has been used for smuggling, but also take further action including the seizure and disposal in accordance with applicable international law and with due consideration of the interests of any third parties who have acted in good faith.[133] When carrying out activities under paragraph 7 and 8 of the Resolution,

Manchester University Press 2009) 214.

128 Rosemary Rayfuse, *Non-Flag State Enforcement in High Seas Fisheries* (Martinus Nijhoff 2004) 57. See also Myres Smith MacDougal and others, 'The Maintenance of Public Order at Sea and the Nationality of Ships' (1960) 54 American Journal of International Law 25.

129 See LOSC, Articles 91 and 92.

130 See UNSCR 2240, para.6.

131 See the Migrant Smuggling Protocol, Article 8(2).

132 Ibid, para.7.

133 Ibid, para.8.

States are authorised 'to use all measures commensurate to the specific circumstances' in confronting migrant smugglers. The phrase arguably implies the possibility of using maritime enforcement measures against smugglers that involve the use of force. The Resolution appears to suggest that use of force could or should be used as a last resort and only if it is reasonable and necessary, and designed to protect 'the safety of persons on board as an utmost priority and to avoid causing harm to the marine environment or safety of navigation.'[134]

The UNSCR 2240 may be considered a positive step forward in the fight against migrant smuggling in the Mediterranean. Since its launch in July 2015, Operation SOPHIA has rescued more than 8,000 migrants, destroyed over 60 smuggling vessels and contributed to the detention of more than 40 persons suspected of human smuggling or trafficking.[135] At the same time, the Resolution continues to receive criticism over its lack of clarity, in particular, the use of vague terms such as 'reasonably grounds' or 'good faith efforts'.[136] These expressions can be subject to various interpretations and may be a source of dispute amongst States. Furthermore, although UNSCR 2240 provides a possibility for States to fight smugglers in the territorial sea of Libya,[137] this remains subject to the consent of Libya, which to date has not given such authorisation.[138] Therefore according to UNSCR 2240, intervention remains limited to high seas; this may prove to be problematic considering that fighting

134 UNSCR 2240, para.10.

135 Operation Commander Op Sophia (EEAS), EUNAVOR MED – Operation SOPHIA – Six Monthly Report: 22 June -31 December15, of 29 January 2016, released by Wikileaks on 17 February 2016, available online at https://wikileaks.org/eu-military-refugees/EEAS/EEAS-2016-126.pdf See Mireia Estrada Cañamares (n 32) 186.

136 Brian Wilson, 'The Mediterranean Migrant Crisis: Key Considerations for the UN Security Council' (2015) Harvard National Security Journal 8, available online at http://harvardnsj.org/2015/10/mediterranean-migrant-crisis/

137 UNSCR 2240, para.2.

138 Maria Chiara Noto, 'Use of Force Against Human Traffickers and Migrants Smugglers at Sea and Its Limits According to the Law of the Sea and Human Rights Law' in Giuseppe Cataldi (ed), *A Mediterranean Perspective on Migrants' Flows in the European Union – Protection of Rights, Intercultural Encounters and Integration Policies* (Editoriale Scientifica Napoli 2016) 152.

smugglers effectively also requires doing so in Libyan waters and from Libyan land.

The impact of UNSC 2240 shall be assessed in September 2016, when the United Nations Secretary General will provide the Security Council with a report on its implementation. The Report should address ways in which States have put into effect the authority granted by the Resolution. It is hoped that this assessment will also provide considerations for further resolutions.[139]

The Human Element

Moving on to the so-called 'constraints' on State action, one finds obligations imposed by the LOSC.[140]As discussed above, most migrant sea crossings are organised by smugglers who usually transport migrants in overcrowded and unseaworthy vessels. [141] As a result, distress at sea situations have regrettably become a regular occurrence resulting in numerous human tragedies and negatively affecting the safety of navigation.[142] The LOSC imposes an obligation on States to protect human life at sea by ensuring that shipmasters of vessels flying their flag 'proceed with all possible speed'[143] to the rescue of any person in distress at sea.[144] Therefore under international law, the duty to

139 Ibid.

140 Some of which have been referred to earlier in the article, see page 2 above.

141 See page 3 above. See also 2015 Study on Smuggling of Migrants (n 18) 39-40 and the Smuggling of Migrants by Sea 2011 Issue Paper (n 18) 27-28.

142 According to statistics compiled by the International Organization for Migration, more than 5,000 migrants were reported dead or missing in 2015. As of August 2016, the same Organization reports that already over 4,000 migrants have lost their lives. See http://missingmigrants.iom.int/

143 LOSC, Article 98(1)(b).

144 The duty to render assistance at sea has its origins in the need to protect seafarers' lives at sea. When confronted with dangers at sea, seafarers turned to others navigating the oceans to provide aid. This usage developed into a well-established international customary rule covering all human life. The duty is codified in a number of international conventions most notably,

render assistance at sea is personally attributed to the shipmaster. This requirement to provide assistance to those in distress at sea extends to all persons, including migrants in need of assistance at sea. The duty is qualified in so far as such action may be reasonably expected of him.[145] In order to render the duty more effective, the shipmaster's obligation to render assistance is supplemented by the requirements of coastal States to promote search and rescue services.[146]

The sheer magnitude of the migration by sea problem has placed considerable pressures on coastal State services as well as members of the maritime community, in particular shipmasters,[147] who are increasingly asked to rescue persons in distress at sea. It is submitted that although LOSC provides a general basis for the execution of the duty to render assistance, it may no longer be adequate to deal with contemporary realities and challenges posed by the migration crisis. The implementation of the duty may face legal challenges relating to enforcement. Under article 98(1) of the LOSC, the implementation of the duty depends largely on the extent of its transposition into the domestic law of flag States. However, the Convention does not appear

Article 98 of the LOSC, Regulation 33 of the Annex to the 1974 International Convention for the Safety of Life at Sea (London, 1 November 1974, entered into force 1 May 1991) 1184 UNTS 3 and Chapter 2 of the Annex to the International Convention on Maritime Search and Rescue (Hamburg, 27 April 1979, entered into force 22 June 1985) 1405 UNTS 97.

145 LOSC, Article 98(1)(b). A shipmaster may be relieved of his or her duty to provide assistance at sea under certain circumstances, for example if a rescue at sea operation may endanger his vessel, passengers or crew.

146 LOSC, Article 98(2).

147 Recent developments such as increased tensions in Libya and Syria as well as the closure of the Italian *Mare Nostrum* operation have resulted in an increase in private vessels carrying out mass migrant rescue operations. In the past 2 years, more than 1,000 merchant vessels have been involved in rescue at sea operations assisting more than 50,000 migrants to safety. See International Chamber of Shipping, 'Large Scale Rescue Operations at Sea – Guidance on Ensuring the Safety and Security of Seafarers and Rescued Persons' 2nd edn, 2015, available at http://www.ics-shipping.org/docs/default-source/resources/safety-security-and-operations/imo-unhcr-ics-rescue-at-sea-guide-to-principles-and-practice-as-applied-to-refugees-and-migrants.pdf?sfvrsn = 23

to entail any direct obligation of the shipmaster independent from domestic implementation measures.[148] The enactment of legislation imposing criminal sanctions against shipmasters that fail to render assistance at sea would arguably be the best way to ensure enforcement of the duty. Certain States have enacted national laws to this effect;[149] however this practice appears to be far from universal.[150] Gallagher and David note that States of destination for migrants, as well as certain major shipping States are likely to oppose enacting such legislation, making it more difficult to enforce the duty.[151] The obligation to render assistance may be further weakened by the fact that one third of sea-going vessels are registered in the so-called 'flag of convenience States,' which could be reluctant to impose legislative sanctions on shipmasters who fail to carry out their international obligations to assist at sea.[152]

148 See Andreas Zimmermann (ed), *The 1951 Convention relating to the Status of Refugees and its 1967 Protocol: A Commentary* (Oxford University Press 2011) 823. This requirement may create certain challenges, as acknowledged by Barnes '…despite the importance…of this rule… it is commonly found to be absent from or only partially translated into, domestic law, and as a result this most fundamental of obligations is seriously undermined'. See Richard Barnes, 'Refugee Law at Sea' (2004) 53 International and Comparative Law Quarterly 47, 50.

149 See for example, Article 306(1) of the Malta Merchant Shipping Act (1973), Chapter 234 of the Laws of Malta which provides that: 'The master or person in charge of a Maltese vessel shall, so far as he can do so without serious danger to his own vessel, her crew and passengers (if any), render assistance to every person who is found at sea in danger of being lost, even if such person be a citizen of a State at war with Malta; and if he fails to do so he shall for each offence be liable to imprisonment not exceeding two years or to a fine (multa) not exceeding one thousand units or to both such imprisonment and fine'.

150 See Anne Gallagher and Fiona David (n 18) 449 and Richard Barnes (n 10) 51.

151 Lives lost in the Mediterranean Sea: who is responsible?, Report Committee on Migration, Refugees and Displaced Persons, Parliamentary Assembly, 29 March 2012, 3 available at http://assembly.coe.int/CommitteeDocs/2012/20120329_mig_RPT.EN.pdf

152 See Martin Davis, 'Obligations and Implications for Ships Encountering Persons in Need of Assistance at Sea' (2003) 12 Pacific Rim Law and Policy Journal 109, 110.

Furthermore, even when the duty is properly enforced, the shipmaster will have to take into account practical challenges underlying a migrant rescue operation. Seafarers employed on merchant vessels are rarely experienced or trained to undertake large-scale rescue operations. Rescue efforts may take days to complete and their toll on a stressed crew may be significant.[153] Furthermore, the shipmaster may be exposed to commercial and financial losses if providing assistance requires them to deviate from their commercial route in view of possible consequential costs and damages.[154] The delay in the voyage may be increased due to the reluctance of coastal States to agree on the safest and the closest port to disembark migrants. This may lead to the vessel being stranded with desperate migrants, usually far larger than the crew, incurring costs and being exposed to risks that may even threaten the security and seaworthiness of the vessel as well as the safety of passengers and crew.[155]These challenges may be further complicated by the shipmaster's international responsibilities to protect the fundamental human rights of rescued persons at sea.[156]

Complementing the LOSC obligation of States to render assistance to persons in distress at sea, are constraints found under other branches of law such as **human rights, refugee law and humanitarian principles of protection**, mainly, in this regard, the obligation of *non-refoulement*.

153 See Kevin Cooper, 'Rescue of distressed persons at sea: how commercial shipping can best face the Mediterranean crisis', 30 March 2015, available online at http://incelaw.com/en/knowledge-bank/publications/rescue-of-distressed-persons-at-sea

154 See Asne Kalland Aarstad, 'The Duty To Assist and its Disincentives: The Shipping Industry and the Mediterranean Migration Crisis' (2015) 20:3 Mediterranean Politics 413, 415.

155 These challenges are best illustrated by the controversial migrant rescue operation carried out in August 2001 by a Norwegian registered vessel, the *MV Tampa*. See further Jessica Tauman, 'Rescued at Sea, But Nowhere to Go: The Cloudy Legal Waters of the Tampa Crisis' (2002) 11 Pacific Rim Law and Policy Journal 461, 476, Rolf Fife, 'The Duty to Render Assistance at Sea: Some Reflections after *Tampa*' in Jarna Petman and Jan Klabbers (eds), *Nordic Cosmopolitanism – Essays in International Law for Martii Koskenniemi* (Martinus Nijhoff Publishers 2003) 471-472.

156 Discussed further below pages 10-13.

Let us recall a basic but fundamental point at this juncture: maritime migrant arrivals are composed of a mixed influx of individuals, made up both of genuine asylum seekers and so-called economic migrants.[157] This point is not merely academic as it influences State policies and reactions to such arrivals. What these arrivals have in common however, is that they are PERSONS on the move. Unlike the case in other types of organised crime (such as narcotics trafficking), the subject of migrant smuggling is not a commodity but an individual, thereby importing principles of human rights, refugee and humanitarian law. In this light, international responses to this phenomenon must adopt a human-rights based approach, and not merely consider such principles of protection as an addendum to the main enforcement response framework.

All persons at sea have basic human rights under both general international law and regional instruments such as the European Convention on the Protection of Human Rights and Fundamental Freedoms (ECHR)[158] if they are in the jurisdiction of a State Party to that instrument. Article 1 ECHR provides that '[t]he High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section 1 of this Convention.' Of direct concern in the maritime scenario is the protection against torture or inhuman or degrading treatment or punishment, guaranteed in Article 3.[159]

157 See further, Giuseppe Cataldi, "Economic" Migrants and Refugees: Emergencies (Real and Alleged) and the Law of the Sea' in Giuseppe Cataldi (ed), *A Mediterranean Perspective on Migrants' Flows in the European Union – Protection of Rights, Intercultural Encounters and Integration Policies* (Editoriale Scientifica Napoli 2016) 9-10.

158 Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4 November 1950, entered into force 3 September 1953) 213 UNTS 222

159 It would appear that the ECHR applies to all vessels registered in its State parties, wherever they are located on the world's oceans. (It is noteworthy that two of the largest registries in the world; Malta and Cyprus are ECHR State Parties). Under article 91 of the LOSC, the flag State has exclusive jurisdiction over its registered vessels. A consequence of this is the control, which the flag State exercises over the vessel, its owners and the shipmaster. See LOSC, Article 94. However, in the light of ECHR State party obligations, they are not allowed to require persons falling under their jurisdiction to act in a manner in which is contrary to the human rights and fundamental free-

While all individuals enjoy **human rights protection**, a group of these individuals are entitled to a further umbrella of protection – under the label of **refugee law**, foremost amongst these being the right to seek asylum enshrined in article 14 of the Universal Declaration of Human Rights.[160]

The reference to 'within the jurisdiction' of the Contracting State Party, as noted in *inter alia* articles 1 and 3 ECHR, does not limit the application of the protection granted to merely a territorial ambit. On the contrary, as seen through the jurisprudence of the European Court of Human Rights[161] and most notably in this specific regard, in the *Hirsi* case[162] discussed below, human rights protection is activated whenever a State acts, both territorially and extraterritorially.

Still, the human element is plagued with pitfalls in that international human rights law does not address the crucial aspect of the *implementation* of the protected rights, such as the right to leave one's country and apply for asylum. Coupled with this, most reactions to people flows have been unilateral or at best, regional in nature. To date, States have been unable to address the concept effectively in the international context.

doms enshrined in the Convention.

160 GA Res 217A(III), UN Doc A/810 (1948).

161 See for example *Medvedyev and Others vs France* App No 3394/03 (ECtHR, 29 March 2010). This case concerned an interdiction carried out by French authorities, of a Cambodian registered vessel suspected of drug trafficking to Europe. The Court held that French authorities had exercised full control over the vessel and its crew from the time of its interdiction in an uninterrupted manner. For this reason it was held that the applicants fell within the jurisdiction of France and Article 1 of the ECHR.

162 *Hirsi Jamaa and Others v Italy* (Judgment), (2012) Application No. 27765/09, 23 February 2012. This case concerned the interdiction of a smuggling vessel carrying eleven Somali and thirteen Eritrean nationals by Italian authorities. The smuggling vessel had departed from Libyan shores with the intention of reaching the Italian Coast. The Italian coast guard interdicted the vessel and the smuggled migrants were transferred on board Italian warships and eventually returned to Libya.

This has been made amply clear in recent history with respect to the principle of ***non-refoulement***, the cornerstone of protection at sea. This principle finds its classical exposition in the Convention relating to the Status of Refugees (Refugee Convention)[163] which provides protection for any person having the status of a refugee or seeking to attain that status; in other words, refugees and asylum-seekers. The Refugee Convention does not grant the right to asylum nor does it oblige a State to hear and process asylum claims. What it does do, in Article 33(1) is prohibit the expulsion or return ('*refouler*') of a refugee (or asylum-seeker) 'in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion'. It is generally accepted customary law status means that this is an obligation which may be imposed on *any* State irrespective of ratification of the Refugee Convention. It is also arguable that the principle is acquiring the status of a peremptory norm of international law.[164]

The protection granted by this principle is obvious, however, there is the reality that a number of individuals suffering dire plight (such as those migrating due to natural disasters or famine, not to mention economic migrants) may not necessarily be able to demonstrate the well-founded fear of persecution required for the application of the Convention precisely because they fall outside the qualifying grounds listed in article 33(1). Furthermore, the Convention does not provide an answer for problems arising from situations of mass influx (such as boat arrivals), as it focuses rather on individually-targeted persecutions by an oppressive regime.

Further, problems have been encountered in the applicability and geographical operation of this principle. Similar to the extraterritorial application of the ECHR referred to above, the *non-refoulement principle* is not limited territorially. It is therefore applicable on the high seas

163 Convention Relating to the Status of Refugees (Geneva, 28 July 1951, entered into force 22 April 1954, 189 UNTS 137.

164 UNHCR Executive Committee (ExCom), Conclusion No. 25 (XXXIII) – 1982, para. (b); See also: *Hirsi Jamaa and Others v Italy* (2012), Concurring Opinion of Judge Albuquerque, page 65.

(contrary to the holding of the majority of judges of the US Supreme Court in *Sale v Haitian Centres Council*[165]) and indeed, wherever a State exercises effective control over a vessel. In this way, the physical act of interception by a State engages that State's protection obligations in respect of those intercepted, irrespective of the location of that interception.

Therefore, when looking at the practical ramifications of the principle, this means that, on interception, migrants cannot be pushed back to a place of persecution or sent to a non-party State to the Refugee Convention without reviewing any asylum claims made on the intercepted vessel. A breach of the obligation would therefore occur if a State were to intercept and turn back a vessel to the borders of persecution (or non-Party State) without reviewing any asylum claims made on board the intercepted vessel. A status determination procedure is therefore necessary before any further action regarding return could be permitted at law. This is needed also because of the concern that immigration control and border control measures may not necessarily distinguish between genuine asylum seekers and other intercepted – or rescued – persons. Further, since status determination procedures are preferably carried out on land, disembarkation of all on board is necessary in order to validly and effectively carry out an identification process.

This position has been put beyond doubt by the first decision on interception at sea delivered by the Grand Chamber of the European Court of Human Rights. In *Hirsi Jamaa and others v Italy* interceptions and push-backs without a fair and effective screening procedure were held to constitute a serious breach of the ECHR and of the principle of *non-refoulement*.

This judgment addressed how States are to guarantee the fundamental rights of migrants at sea and presented human rights protection as an inherent corollary to State powers of interdiction. Turning on an interpretation of *inter alia* article 3 ECHR (regarding the protection

165 *Sale v Haitian Centers Council* No.92-344, 1993 WL 211610 [21 June 1993]. This case concerned the legality of the United States interdiction programme, which involved Haitian refugees being sent back to their country.

from inhuman or degrading treatment or punishment), the judgment also clarified that *non-refoulement* is applicable irrespective of the classification of the particular act and therefore applies to States in both interception and rescue-at-sea scenarios. Once individuals were subjected to 'the continuous and exclusive *de jure* and *de facto* control of the Italian authorities', the nature and the purpose of the intervention were irrelevant.[166] In this way, whatever the classification of the act, coming into contact with migrants on board a vessel calls for respect for human rights. In the immediate context, this means that post-rescue, individuals are not to be pushed back to a country where they risk being treated in violation of Article 3 ECHR, which protects against inhuman and degrading treatment or punishment.

The upshot of this for immediate purposes is that, with the clarification provided by this judgment, the principle of *non-refoulement* is not limited to the class of individuals termed asylum-seekers or refugees but rather, this principle affords protection to *all migrants*, due to its application in the context of Article 3 ECHR. In this way, this mainstay of international refugee law has found its way into the generally applicable realm of human rights law and applies to any and all persons who may be exposed to a real risk of torture, inhuman or degrading treatment or punishment should they be returned to a particular country.

Human Rights law provides a wider net of protection than Refugee Law – not only in the persons it addresses but also in the scope of its protection. This effectively removes the need for a status determination procedure because *all individuals on board and not only genuine asylum seekers* are entitled to protection under this article. Article 3, providing protection from return to a country where the individual may be subjected to torture, inhuman or degrading treatment or punishment, therefore provides an extension of the protection provided by refugee law and may indeed prove to be a more effective means of protection for asylum seekers. The problems outlined above regarding the limited grounds of applicability of the Refugee Convention are now inconsequential.

166 Para 81. Note also: *Medvedjev et al v France* 29 March 2010, para 67.

Precisely due to this human factor, humanitarian and human rights considerations must shape any exercise concerning these vessels and, any border control exercise, rescue mission or decision to disembark individuals must be imbued with human rights safeguards.

Concluding Thoughts:

This brings us to a brief concluding consideration of how to achieve the elusive balance between the laws outlined above. That the human factor must be central to any effort to stem arrivals or control migrant smuggling is beyond any and all argument.

However, any effort undertaken alone without the cooperation of all international actors is doomed to fail. International cooperation is essential, not least owing to the transboundary nature of this phenomenon. But there is so much more to do than intercept or rescue desperate individuals from sinking boats. It requires engaging countries of origin and transit – not only for their cooperation in preventing boats from leaving their shores, but also for the betterment of conditions in those countries so that the necessity of cross-border movement in such manner will be lessened. It involves breaking the rings of organised crime in a manner which does not jeopardise the rights – indeed the *lives* – of individuals on board smuggling vessels regardless of their status. Indeed, efforts to combat migrant smuggling can in no way provide justification for circumvention of States' obligations in the human rights field since any approach taken must be focussed on the human dimension of the phenomenon.

In this regard, in order to reduce the need for individuals to resort to smugglers:

- States need to look to the improvement of conditions in countries of origin;
- They need to at least consider the provision of legal opportunities for persons in need of international protection to reach European borders;

- States must look towards the creation of a legal order that implements the responsibility to permit individuals to seek and enjoy asylum and is not geared towards keeping people out and the problem far away from European shores.
- Lastly, there must be an honest sharing of responsibility with regard to migrant arrivals.

Overall, there is the need for a concerted and concrete international effort based on a duty of cooperation among all stakeholders. The answer to the phenomenon is not to be found at the expense of any one State's resources and security. The point to be highlighted here is that the obligation of cooperation in contemporary times should be put forward as an obligation, which has a specific legal content and imposes concerted action that goes beyond the mere good faith, good neighbourliness or courtesy. It is a distinct and independent obligation calling for a positive duty of action on the part of States and requires that the term 'solidarity' be removed from the realm of fantasy and into everyday State action.

It should be, on the strength of this obligation, that States perceive the problem of irregular migration as a common problem stemming from situations which are horribly wrong in other States. At all times, it should be recalled that responsibilities lie with *all* States concerned and not only with those facing a disproportionate influx of irregular migrants on their shores.