

An evolving EU engaging a changing Mediterranean region

Jean Monnet Occasional Paper No. 4/2013

The Challenges of Irregular Maritime Migration

by Patricia Mallia



**With the support of the Life Long Learning
Programme of the European Union**



**UNIVERSITY OF MALTA
L-Università ta' Malta**

Institute for European Studies

All rights reserved. No part of this publication may be reproduced, stored in a retrieval system or transmitted in any form or by any means – electronic, mechanical, photocopying, recording or otherwise – without any prior written permission from the Institute for European Studies, University of Malta.

Publisher: **Institute for European Studies**, Msida, Malta.

The Institute for European Studies

The Institute for European Studies is a multi-disciplinary teaching and research Institute at the University of Malta, offering courses in European Studies which fully conform to the Bologna guidelines, including an evening diploma, a bachelor's degree, a masters and a Ph.D. The Institute also operates a number of Erasmus agreements for staff and student exchanges. Founded in 1992 as the European Documentation and Research Centre (EDRC), the Institute was granted the status of a Jean Monnet Centre of Excellence in 2004. The Institute is engaged in various research and publication activities in European Integration Studies and is a member of the Trans-European Policy Studies Association (TEPSA), the LISBOAN network, EPERN, EADI, and the two Euro-Mediterranean networks, EuroMeSCo and FEMISE. The Institute is also a member of the Council for European Studies (hosted at Columbia University).

The research interests of its staff include comparative politics and history of the European Union (EU); EU institutions; EU external relations and enlargement; small states in the EU; Malta in the EU; Euro-Mediterranean relations; Stability and Growth Pact; economic governance of the euro area; Europe 2020; EU development policies, climate change, international economics, economic causes and consequences of globalisation and EU trade and cohesion policy.

Contact Details

Jean Monnet Chair website: <http://www.um.edu.mt/europeanstudies/jmceu-med/>

Institute for European Studies website: <http://www.um.edu.mt/europeanstudies>

Tel: +356 2340 2001 / 2998

Address: Institute for European Studies, University of Malta, Tal-Qroqq, Msida MSD2080, Malta.

Submission of Papers

Papers are to be submitted to roderick.pace@um.edu.mt They are not to exceed 6,000 words including footnotes and excluding the bibliography.

Citation

Patricia Mallia (2013). 'The Challenges of Irregular Maritime Migration', *Jean Monnet Occasional Papers*, No. 4, Institute for European Studies (Malta).

ADVISORY BOARD

Chair: Prof Roderick Pace

Prof Fulvio Attina

Professor of International Relations and Jean Monnet Chair Ad Personam, Dipartimento di Scienze Politiche e Sociali, Università di Catania, Italy

Prof Stephen Calleya

Director, Professor of International Relations, Mediterranean Academy of Diplomatic Studies, Malta

Dr Marcello Carammia

Lecturer, Institute for European Studies, University of Malta

Prof Laura C. Ferreira-Pereira

Associate Professor of Political Science and International Relations, School of Social and Political Sciences, Technical University of Lisbon, Portugal

Prof Aylin Güney

Associate Professor and Jean Monnet Chair, Department of International Relations, Yaşar University, Izmir, Turkey

Dr Mark Harwood

Lecturer, Institute for European Studies, University of Malta

Prof Magnús Árni Magnússon

Associate Professor, Bifröst University, Iceland

Dr Michelle Pace

Reader in Politics and International Studies, Department of Political Science and International Studies (POLISIS), University of Birmingham

Dr Stelios Stavridis

ARAID Researcher University of Zaragoza, Spain

Dr Susanne Thede

Senior Lecturer, Institute for European Studies, University of Malta

Prof Baldur Thorhallsson

Professor of Political Science and Jean Monnet Chair in European Studies at the Faculty of Political Science at the University of Iceland

The JM Occasional Papers do not necessarily reflect the views of the Institute for European Studies but those of the author. This project has been funded with the support from the European Commission. This publication reflects the views only of the author, and the Commission cannot be held responsible for any use which may be made of the information contained therein. Grant no. 2012-2690.



Table of Contents

Overlapping Regimes	9
Rescue at Sea	6
What is needed to effectively combat this problem?	11

Abstract

This contribution presents migrant smuggling by sea as a multi-faceted phenomenon. It juxtaposes State rights and duties, State security interests and protection of fundamental rights. Similarly, various branches of law, sometime contradictory, regulate irregular maritime migration. In view of these considerations, the argument is made that any effort to control the situation must lie in a cooperative initiative among States which considers migrant smuggling by sea in a holistic manner.

Biographical Note – Patricia Mallia

Patricia Mallia obtained her law degree from the University of Malta in 1999. Her post-graduate studies were carried out at Oxford University where she graduated in Bachelor of Civil Law (BCL) in 2000. She then returned to Malta to lecture in Public International Law at the University of Malta where she is now Head of the International Law Department. She obtained her PhD from the IMO, International Maritime Law Institute, focussing on combating contemporary threats to maritime security. Her research interests focus on the analysis of contemporary maritime threats, primarily piracy and migrant smuggling. Her book, *‘Migrant Smuggling by Sea: Combating a Current Threat to Maritime Security through the Creation of a Cooperative Framework’* was published by Martinus Nijhoff in 2010.

The Challenges of Irregular Maritime Migration

Irregular maritime migration presents a conceptual challenge to States: security interests and the sovereign right of a State to control access to its territory come face to face with fundamental principles of protection of persons. Individuals will always seek to leave their own countries and enter States in an irregular manner, be they persons who are attempting to flee conflict, persecution, or natural disasters as well as those seeking to circumvent migration and border controls, often in order to improve their economic circumstances. In this area therefore, the rights of States and duties of those same States towards individuals meet and often collide. Apart from conflicting rights and duties, one is also aware of a variety of legal regimes applying to the same factual phenomenon which is notoriously difficult to control.

When analysing what exactly makes irregular migration so difficult to control, a main factor concerns the fact that it is characterized by potentially conflicting interests. In this exercise, States must therefore juggle between two very different considerations: migrants are to be treated with the inherent dignity and respect to be accorded to any human being, irrespective of refugee status or otherwise. However, at the same time, States have security interests and are entitled to take any action in accordance with international law, which will minimise the risk by irregular migration. International efforts at curbing this phenomenon must be directed towards achieving a balance between these interests.

Added challenges include the misuse of the asylum system, the growth in smuggling and trafficking of people, the increasingly sophisticated methods used by perpetrators of organised crime and the struggle to manifest international solidarity to resolve the refugee situation.

In order to effectively combat such phenomenon, a multifaceted response is required, founded on the obligations of cooperation and coordination – obligations which are fast becoming core players in the international legal regime. This contribution aims to present these conflicting factors in an effort to tease out the separate strands and make the case that only with a concrete form of cooperation can irregular maritime migration be effectively controlled.

At the outset however, it would be useful, for the sake of clarity, to establish certain parameters of the discussion and define certain issues which may otherwise be overlooked. Primarily, it should be borne in mind that irregular migration goes hand in hand with the offence of maritime migrant smuggling – a type of organized crime recently defined in international treaty law,¹ by which 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, understood to include the preservation of territorial integrity and sovereignty of a State. At the same time, the subjects of migrant smuggling are not commodities (as is the case in drug smuggling, for example) but

¹ Protocol against the Smuggling of Migrants by Land, Sea and Air, Supplementing the United Nations Convention against Transnational Organized Crime (Palermo, 15 November 2000, entered into force 28 January 2004) 40 ILM 384 (Smuggling Protocol)

individuals, thereby calling for a consideration of principles of human rights, refugee and humanitarian law as well as enforcement activities.

The next point has to do with boat arrivals: migrant arrivals by sea are often perceived either as being wholly made up of asylum-seekers or else, entirely composed of economic migrants. This is not the case. There is a mixed influx of arrivals, composed of both groups of persons: persons who are attempting to flee conflict, persecution, or natural disasters as well as those seeking to circumvent migration and border controls, often in order to improve their economic circumstances. This point is not merely academic as it influences State policies and reactions to such arrivals.

Another core point is the distinction between the undisputed duty to rescue those in distress at sea and the subsequent processing of any asylum claims that may be made by those rescued. Both involve the granting of humanitarian assistance, but they are distinct: fulfilment of the duty of rescue does not necessarily imply that the same State must therefore disembark those rescued.

Overlapping Regimes

The 1982 United Nations Law of the Sea Convention (LOSC)² lays down a framework regulating the rights of States in the various maritime zones adjacent to their coasts. These powers may be perceived as ‘opportunities’ for State action, whereas the humanitarian and human rights considerations, to be discussed later, may be more aptly described as ‘duties’ or ‘constraints’ on State action.

² United Nations Convention on the Law of the Sea (Montego Bay, 10 December 1982, entered into force 16 November 1994) 1833 UNTS 3; 21 ILM 1261 (LOSC)

A brief look at permissible State action in relation to vessels carrying migrants in the various relevant maritime zones is useful since State action is determined by the location of the vessel. A general rule is that a State’s powers are stronger in the maritime zones closer to its coasts and diminish the further away one proceeds from those coasts. In this way, the internal waters of a State constitute the maritime area in which the State is best placed to exercise jurisdiction over persons situated and events occurring therein. Indeed, internal waters are assimilated to the land territory of a State and therefore, the coastal State enjoys full sovereignty in this zone. Moving further outwards, the territorial sea (extending as it does over a belt of sea to a limit of 12 nautical miles measured from the baselines of a coastal State)³ is seen as an extension of a State’s territory. Sovereignty thus exists in this zone also and the coastal State is given legislative (article 21 LOSC) and enforcement jurisdiction (article 27 LOSC) over vessels in it. However, the right of innocent passage existing in the territorial sea regime renders the quality of sovereignty over the territorial sea different from that which exists in the internal waters. This right is enjoyed by ships of all States and refers to the free and uninterrupted passage across the territorial sea of a State or proceeding to or from the internal waters of a State.⁴ Passage must however be ‘innocent;’ in other words, it must not be ‘prejudicial to the peace, good order or security of the coastal State.’⁵ Article 19(2)(g) presents ‘the loading or unloading of any ... person contrary to the ...immigration law and regulations of the coastal State’ as an activity which is not ‘innocent.’ In such case, article 25(1) LOSC allows the coastal State to

³ See LOSC articles 2(1)(2), 3. Note that this sovereignty extends also to the air space overlying the territorial sea.

⁴ LOSC articles 17, 18.

⁵ LOSC article 19.

‘take the necessary steps to prevent passage which is not innocent’ and it may also temporarily suspend innocent passage in certain areas of its territorial sea if this suspension is essential for the protection of its security (article 25(3) LOSC).

In the contiguous zone (a zone adjacent to the territorial sea of not more than 24 nm from the baselines), a State is given the faculty to act against irregular maritime migration since article 33 LOSC gives specific power to the coastal State: it may exercise the control necessary with respect to two functions: to prevent and to punish the infringement of customs, fiscal, immigration and sanitary regulations within its territory or territorial sea. It is important to note that the contiguous zone is not part of the territorial sea and freedom of navigation of all ships exists therein.

The zone of the high seas is composed of that area of ocean space which ‘is open to all States’ (article 86 LOSC) and where the so-called freedoms of the high seas apply.⁶ The main principle applying in the high seas is that of flag State exclusivity whereby, save for a few exceptions, ships are subject to the exclusive jurisdiction of the flag State⁷ while on the high seas (article 92(1) LOSC). This obviously causes problems when dealing with ships sailing under the so-called flags of convenience since many States either do not have the will or the resources to control such vessels. Indeed, many crime-committing vessels are either stateless (that is, not registered in any State) or else, are registered under flags of convenience. There are however certain exceptions laid down in the LOSC and in other international agreements, whereby non-flag State actors are permitted to act, usually on the basis of consent of the flag

⁶ See article 87 LOSC.

⁷ That is, the State in which the vessel is registered.

State. In default of such agreement between the flag State and the State wishing to take enforcement action, the LOSC only permits non-flag State action in a limited number of instances: the suppression of the slave trade (article 99),⁸ piracy (article 100 *et seq*), illicit traffic in narcotic drugs and psychotropic substances (article 108) and unauthorized broadcasting (article 109).⁹ All these provisions are relatively weak and of questionable effectiveness in view of the current maritime security scenario. It is for this reason that the international community has stepped in to fill such jurisdictional gaps in the form of international agreements such as the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation,¹⁰ the Migrant Smuggling Protocol¹¹ and also the recent international action spearheaded by the IMO and the UN Security Council to fight piracy and armed robbery off the Coast of Somalia.¹²

In the context of maritime migration, another very significant zone, albeit not mentioned in the LOSC, is the ‘SAR zone’, a region defined in the Annex to the SAR Convention as an ‘area of defined dimensions associated with a rescue co-ordination centre within which search and rescue services are provided.’¹³ This area defines which State has primary responsibility for coordinating rescue

⁸ To be dealt with separately below.

⁹ It should be noted that the right of ‘hot pursuit’ and the notion of ‘constructive presence’ also provide for increased activity on the high seas. See LOSC article 111.

¹⁰ Vienna, 10 March 1988, entered into force 1 March 1992, 27 ILM 668; 1678 UNTS 201.

¹¹ 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 (Migrant Smuggling Protocol).

¹² See for example: IMO Res A.1002(25) Piracy and Armed Robbery against Ships in Waters off the Coast of Somalia (6 December 2007).

¹³ Chapter 1, paragraph 1.3.4.

operations in response to a distress situation. Each region has an associated Rescue Coordination Centre (RCC)¹⁴ The SAR Convention provides, in paragraph 3.1.6.4 of its Annex, that it is the States' responsibility to cooperate with other RCCs to identify the most appropriate place(s) for disembarkation of persons found in distress at sea.

A fundamental duty of contracting States Parties to the Convention is that of cooperation in the conduct of search and rescue operations.¹⁵ There is also an obligation, imposed by Chapter 2.1.1 of the Annex to the SAR Convention that, on receiving information that a person is in distress at sea in an area within which a Party provides for the overall coordination of search and rescue operations, the responsible authorities of that Party are to take urgent steps to provide the most appropriate assistance available.

Of course, no legal framework can be seen in a vacuum as one regime constantly influences the other. The broader picture shows that a coastal State has concurrent obligations incumbent upon it, apart from the rights granted by the LOSC. It is for this reason that humanitarian and human rights considerations¹⁶ may be described as constraints on State action, irrespective of the powers granted under the law of the sea regime. For example, States are bound notably by the obligation of *non refoulement*, which applies, at the latest, once the vessel has reached the territory of the coastal State. Article 33(1) of the Refugee Convention relates to the prohibition of 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.' This principle operates wherever a State acts. It is thus not limited territorially – but is also applicable on the high seas and indeed, wherever a State exercises effective control over a vessel.

According to the operation of this principle, on interception migrants cannot be pushed back to a place of persecution without reviewing any asylum claims made on the intercepted vessel. Besides this, it is generally recommended that the status of rescued persons is best determined by the appropriate authorities on land.¹⁷ Therefore, a State would be held to be in breach of the *non refoulement* principle were it to intercept and turn back a vessel to the borders of persecution – or to a non-Party State to the Refugee Convention – without reviewing any asylum claims made on board the intercepted vessel.

While this principle is a foundation stone of humanitarian protection, it is true that it is not without its critics. Indeed, since the 1980s, movements of persons have been more likely to be the result of natural disasters and famine, and other dire social conditions; although the plight of such persons is obvious, it is doubtful whether they can satisfy the well-founded fear of persecution required under the Convention for the conferral of its benefits.¹⁸ Further, the

¹⁴ Chapter 1, paragraph 1.3.5.

¹⁵ Chapter 2, paragraph 3.1.1.

¹⁶ P Mallia, *Maritime Migrant Smuggling: Combating a Current Threat to Maritime Security through the Creation of a Cooperative Framework* (Martinus Nijhoff, The Netherlands, 2010) p 92-95.

¹⁷ UNHCR, 'Background Note on the Protection of Asylum Seekers and Refugees Rescued at Sea' (18 March 2002) paragraphs 23-24, (final version as discussed at the expert roundtable *Rescue-at-Sea: Specific Aspects Relating to the Protection of Asylum-Seekers and Refugees*, held in Lisbon, Portugal on 25-26 March 2002). See further: TA Aleinikoff and V Chetail (eds), *Migration and International Legal Norms* (The Hague, TMC Asser Press, 2003) 143-144.

¹⁸ Furthermore, one should not discount the grave difficulties encountered by the increasing number of genuine asylum-seekers fleeing the Horn of Africa and Syria who satisfy the conditions of the Convention.

Refugee Convention does not provide an answer to situations of mass influx such as boat arrivals, focussing as it does on individually-targeted persecutions by an oppressive regime.

Rescue at Sea

Another feature making up the mosaic of irregular maritime migration is that rescue operations are often rendered necessary due to the unseaworthy and overcrowded vessels used to make the hazardous journey across the sea. While rescue at sea is different to the act of maritime enforcement amounting to interception, differing in both intention and purpose, the two sometimes overlap. Interception is an exercise reserved to State authorities and is an exercise of a programme of maritime enforcement. However, interception may pre-empt the need for a rescue.¹⁹

The duty to rescue those in distress at sea brings with it further obligations which need to be effected alongside the actual interception process. This obligation is enshrined in article 98 LOSC and may be regarded as part of customary international law.²⁰ The terms of article 98 impose obligations on both the flag and coastal States in this regard, obligations which also impact ships' Masters. The

provision dictates that every State is to require the Master of a ship flying its flag, insofar as he can do so without serious danger to the ship, crew or passengers, to render assistance to any person found at sea in danger of being lost and to proceed with all possible speed to the rescue of persons in distress once informed of their need of assistance and insofar as such action can be reasonably expected from him.²¹ Furthermore, every coastal State is to promote the establishment, operation and maintenance of an adequate and effective search and rescue service, and to cooperate with neighbouring States to this end.²²

Again however, while the duty to rescue those in distress at sea is sacrosanct, it is not without its problems. While the rescue obligation exists almost unconditionally (the only reservation being that such action must not seriously endanger the rescuing ship, and its crew or passengers), enforcement of such duty is difficult, especially considering that it is mainly the flag State which can enforce the obligation and that nearly one-third of all ocean-going vessels are registered under flags of convenience. Furthermore, what the lawmakers systematically had in mind were classic shipwrecks and sailors surrounding whom no attendant legal problem was suspected. In such cases, nationals of any State could expect to be repatriated from the rescue ships' first port of call. In the case of asylum-seekers, however, repatriation must be ruled out and international law is silent on who should take responsibility for them.

The perennial difficulty therefore once again raises its head: the delicate question centres around which State has the responsibility to take on rescued migrants travelling with the EU as an intended destination? A solution to this

¹⁹ UNHCR, 'Background Note on the Protection of Asylum Seekers and Refugees Rescued at Sea' (18 March 2002) paragraph 18, (final version as discussed at the expert roundtable *Rescue-at-Sea: Specific Aspects Relating to the Protection of Asylum-Seekers and Refugees*, held in Lisbon, Portugal on 25-26 March 2002) paragraph 26 states in this regard that 'the responsibility [for admitting asylum-seekers] accruing to the flag State would be stronger still, where the rescue operation occurs in the context of interception measures.'

²⁰ This duty is also provided for in other international instruments such as: Salvage Convention 1910; SOLAS 1925; HSC 1958; SOLAS 1960; SOLAS 1974; SAR 1979, Annex; Salvage Convention 1989. Note also the ILC's view that this duty is also part of general international law: UN Doc A/3179 (1956) regarding the proposed draft of article 12 of the 1958 HSC. See also R Barnes, 'Refugee Law at Sea' (January 2004) 53 ICLQ 1, 49.

²¹ LOSC article 98(1).

²² LOSC article 98(2).

end has been attempted by the IMO. On 20 May 2004, the IMO Maritime Safety Committee (MSC), during its 78th session, adopted amendments to the SOLAS and SAR Conventions concerning the treatment of persons rescued at sea, and/or asylum-seekers, refugees and stowaways, together with Guidelines on the Treatment of Persons rescued at Sea.²³

As realized by the MSC in adopting the amendments, the intent of new paragraph 1-1 of SOLAS Regulation V/33 and paragraph 3.1.9 of the Annex of the International Convention on Maritime Search and Rescue, 1979, as amended, is to ensure that in every case a place of safety is provided within a reasonable time. The responsibility to provide a place of safety, or to ensure that a place of safety is provided, falls on the Government responsible for the SAR region in which the survivors were recovered.²⁴ A major drawback in this regard is that the 'place of safety' remains undefined in international law.

Contracting Governments are now obliged to coordinate and cooperate to release Masters who have assisted persons in distress at sea from their obligations with minimum further deviation from the ship's voyage. The Contracting Government responsible for the SAR area in which the assistance is rendered is charged with exercising primary responsibility for ensuring that such coordination and cooperation occurs in order that survivors are disembarked and are taken to a place of

²³ MSC.167(78). Note that relevant legal principles and practical procedures are now laid out in a document produced jointly by the IMO and UNHCR in a bid to further amplify upon the relevant obligations of the Master and the relevant coastal States so as to ensure prompt disembarkation following a rescue operation. Ref: IMO and UNHCR, 'Rescue at Sea: A Guide to Principles and Practice as applied to Migrants and Refugees' (2006).

²⁴ Guidelines, paragraphs 2.4-2.5.

safety.²⁵ To this end, SOLAS Regulation V/33.1.1 runs as follows:

Contracting Governments shall coordinate and co-operate to ensure that masters of ships providing assistance by embarking persons in distress at sea are released from their obligations with minimum further deviation from the ships' intended voyage, provided that releasing the master of the ship from the obligations under the current regulation does not further endanger the safety of life at sea. The Contracting Government responsible for the search and rescue region in which such assistance is rendered shall exercise primary responsibility for ensuring such co-ordination and co-operation occurs, so that survivors assisted are disembarked from the assisting ship and delivered to a place of safety, taking into account the particular circumstances of the case and guidelines developed by the Organization. In these cases the relevant Contracting Governments shall arrange for such disembarkation to be effected as soon as reasonably practicable.²⁶

Currently, therefore, the State in whose search and rescue area the rescue takes place bears the main responsibility for the rescue and disembarkation of rescuees.²⁷ The IMO

²⁵ See MSC 79/22/6/ (15 September 2004) para 18 with respect to the fact that the views of the majority of the delegations of Member States were that while the Contracting Governments responsible for the SAR region in which such assistance is rendered are to exercise primary responsibility for providing a place of safety or ensuring that a place of safety is provided, this does not oblige that Government to disembark the persons rescued in its territory.

²⁶ A synonymous provision exists in the SAR Convention placing this obligation on Contracting Parties to the Convention. See Annex, paragraph 3.1.9.

²⁷ MSC 78/26 (28 May 2004) paragraphs 16.48-16.54.

Facilitation Committee also issued a draft circular in January 2009 stating that ‘if disembarkation from the rescuing ship cannot be arranged swiftly elsewhere, the Government responsible for the SAR area should accept the disembarkation of the persons rescued into a place of safety under its control.’²⁸ In this way, a rather hefty burden is placed upon the State in whose SAR area the assistance is rendered as it is this State which is held responsible for coordinating such cooperative efforts. It seems therefore, that in default of agreement, it is this State which must bear responsibility for those rescued at sea within their search and rescue area.

This is not, however, a solution which has met with the approval of all Contracting Parties. The Maltese delegation, supported by only a few delegations, did not agree with placing the final responsibility of accepting persons rescued at sea on the Contracting Government responsible for the search and rescue area in which the rescue took place. It feared that this arrangement would encourage the trafficking of illegal migrants, since the vessels carrying them would simply have to enter the closest neighbouring SAR area and call for assistance. The Contracting Government of that SAR area would then have to come to their assistance and effectively provide them with a place of safety.

This situation has led to a number of incidents between Malta and Italy in recent years. These disputes between the two States reveal a major weakness in the international maritime legal regime. The practical ramifications of the dispute are that commercial ships rescuing distressed migrants in the Malta-controlled area off Lampedusa are given conflicting

instructions about where to disembark the survivors. The 2004 amendments appear to support Italy’s position stating that the responsibility to provide a place of safety falls on the state responsible for the SAR region in which the survivors were recovered. However, Malta has formally objected to the 2004 amendments as well as IMO’s draft circular, and is therefore not bound by them.²⁹ Malta continues to argue that disembarkation should occur at the nearest safe port to the site of the rescue, which in the Maltese SAR areas is often a port in Italy. Legally, both States are in the right. This highlights a potential problem with international law-making in general: Malta has objected to the 2004 amendments as well as IMO’s draft circular, and is therefore not bound by them. Malta continues to argue that disembarkation should occur at the nearest safe port to the site of the rescue, which in the Maltese SAR areas is often a port in Italy. Italy, on the other hand, is one of the States which have accepted this amendment. The result is that two co-operating States are legally bound by different rules, clearly militating against a uniform and co-ordinated approach to a common problem.

What is needed to effectively combat this problem?

Any successful regulatory framework would need to cater for various interests, *inter alia*, the need of States to respect and ensure respect of the rights and dignity of persons rescued at sea regardless of their status; the need of States to maintain effective border and immigration controls; the duty of States to prevent and fight the smuggling of migrants and trafficking in human beings; the need to preserve the integrity and effectiveness of the international system for search and rescue and the role of

²⁸ ‘Principles relating to Administrative Procedures for Disembarking Persons Rescued at Sea,’ FAL 3/Circ.194, 22 January 2009.

²⁹ See FAL 35/17, Report of the Facilitation Committee on its 35th Session, Annex 6, 19 March 2009.

commercial shipping in providing assistance to those in distress at sea.

Indeed, treating the phenomenon solely as a border control issue is dangerous as it would lead to the risk that immigration control measures will not necessarily distinguish between asylum-seekers and refugees and other intercepted persons. In the absence of adequate safeguards, this may result in persons in need of international protection being turned back, sometimes to situations of danger. On the other hand, it is unfair that some States are left to deal with the problem on their own. This is especially true in the EU-context.

Following recent tragedies in the Mediterranean during late summer 2013 (primarily the disasters of the 3rd and 11th October) wherein over 360 migrants lost their lives, Malta and Italy have once again appealed to the EU for assistance in this matter, calling for solidarity in the true sense of the word. The States forming part of the southern borders have stressed the need for concrete sharing of responsibilities and an increase of resources dedicated to patrols and the prevention of people taking to sea in the first place. The European Parliament has adopted a resolution on migratory flows in the Mediterranean which commendably takes account of the human rights considerations inherent in any attempt to control this phenomenon.³⁰ Furthermore, in October 2013, the Council of the European Union adopted the regulation on the European external border and surveillance system (EUROSUR) aimed at reinforcing control over the borders of the EU.³¹ This instrument has

been promoted as a fundamental tool in preventing loss of life at sea by enhancing *inter alia* the search and rescue capacities of States. However, it must be stressed that the focus of any attempt in preventing loss of life should not be centred solely on border patrols and State sovereignty initiatives without concomitant attention to principles of human rights and humanitarian duties of States. Reinforcing a 'Fortress Europe' cannot be the ultimate aim in any such exercise and preventing boats departing in the first place may well prevent subsequent loss of life but will do nothing to assist individuals many of whom are fleeing from well-founded fears of persecution or torture or other inhuman and degrading treatment. The attention of the international community must be directed towards a holistic treatment of migrant smuggling.

To this end, international cooperation is fundamental. 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 action which goes beyond the expectation of good faith, good neighbourliness or courtesy; it is a distinct and independent obligation. In this area therefore, the obligation implies a positive duty of action on the part of States called to cooperate with others in combating a specific threat to maritime security.

One finds mention of the duty of cooperation in a large number of international law instruments aimed at combating contemporary threats. Apart from the SOLAS and SAR

³⁰ European Parliament Resolution of 23 October on Migratory Flows in the Mediterranean, with particular attention to the tragic events off Lampedusa (2013/2827 (RSP)).

³¹ The EUROSUR Regulation is to apply to Member States at the Southern and Eastern borders of the EU as from 2 December 2013; and for the remaining Member States, from 1 December 2014. Text available online: <http://register.consilium.europa.eu/pdf/en/13/pe00/pe00056.en13.pdf>

Conventions which, as has been seen, impose an obligation of coordination and cooperation upon the Parties one also finds the Migrant Smuggling Protocol which tackles this aspect of organized crime by permitting, with flag State consent, non-flag State action over vessels carrying irregular migrants on the high seas. The general obligation in Part II stems from 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’ (article 7).

In the drug smuggling sphere, the 1988 Convention against Illicit Traffic in Drugs and Psychotropic Substances and the 1995 Council of Europe Agreement on Illicit Traffic by Sea, implementing article 17 of the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances establish a foundation for cooperation between the parties to the Agreement.³² Also in the field of drug trafficking one finds the 2003 Agreement concerning cooperation in Suppressing Illicit Maritime and Air Trafficking in Narcotic Drugs and Psychotropic Substances in the Caribbean Area (Aruba Agreement)³³ and the Ship Rider Agreements which the US has concluded with a number of Caribbean States, a prime example of which is the US-Bahamas 2004 Agreement on Cooperation in Maritime Law Enforcement (combating both drug and migrant smuggling).³⁴ As a general structure, these Ship Rider Agreements provide a pattern of authorization of entry by US vessels into the territorial waters of the other State Party. A

group of agreements provide for a Ship Rider on board a US vessel to enforce the laws of a State Party in the waters of that State Party.

The US has also concluded a number of bilateral agreements with various States in the context of the Proliferation Security Initiative. Lastly, one must also mention the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation and the Protocol of 2005 to the Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf, amended in 2005,³⁵ which lay down enforcement jurisdiction mechanisms in a bid to effectively fight maritime threats concerning vessels. All these instruments give concrete steps to the duty of cooperation.

It is time that all States view cooperation in this light: not as a convenient principle of good faith, but as a concrete obligation calling for concrete 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.

³² Vienna, 20 December 1988, entered into force 11 November 1990, UN Doc E/CONF.82/15; 28 ILM 493 and Strasbourg, 31 January 1995, entered into force 1 May 2000 CETS No 156, respectively.

³³ Available online: www.state.gov/s/l/2005/87198.htm.

³⁴ Agreement between the Government of the United States of America and the Government of the Commonwealth of the Bahamas concerning cooperation in maritime law enforcement (Nassau, signed and entered into force on 29 July 2004).

³⁵ LEG/CONF.15/21 (1 November 2005) and LEG/CONF.15/22 (1 November 2001) respectively.

Bibliography

Aleinikoff, Alexander T and Vincent Chetail (eds), *Migration and International Legal Norms* (TMC Asser Press, The Hague, 2003).

European Parliament Resolution of 23 October on Migratory Flows in the Mediterranean, with particular attention to the tragic events off Lampedusa (2013/2827 (RSP)).
<http://www.europarl.europa.eu/sides/getDoc.do?type=MOTION&reference=B7-2013-0476&language=EN>

EU, Regulation of (EU) No .../2013 of the European Parliament and of the Council establishing the European Border Surveillance System (EUROSUR)
<http://register.consilium.europa.eu/pdf/en/13/pe00/pe00056.en13.pdf>

FAL Circular FAL.3/Circ.194 Principles relating to Administrative Procedures for Disembarking Persons Rescued at Sea.' (22 January 2009).

FAL 35/17 Report of the Facilitation Committee on its Thirty-Fifth Session (19 March 2009) Annex 6, Agenda item 6, Statement by the Delegation of Malta.

IMO and UNHCR, *Rescue at Sea: A Guide to Principles and Practice as applied to Migrants and Refugees* (2006).
<http://www.imo.org/OurWork/Facilitation/IllegalMigrants/Documents/Leaflet%20Rescue%20at%20sea.pdf>

IMO Res A.1002(25) Piracy and Armed Robbery against Ships in Waters off the Coast of Somalia. (6 December 2007)

Mallia Patricia, *Maritime Migrant Smuggling: Combating a Current Threat to Maritime Security through the Creation of a Cooperative Framework* (Martinus Nijhoff, The Netherlands, 2010)

MSC.167(78) Guidelines on the treatment of persons rescued at sea (in doc MSC 78/26/Add.2) (20 May 2004)

MSC 79/22/6 Outcome of the second meeting of the UN Inter-Agency group on the treatment of persons rescued at sea. Note by the Secretariat. (15 September 2004)

UNHCR, 'Background Note on the Protection of Asylum Seekers and Refugees Rescued at Sea' (18 March 2002)
http://www.refugeelawreader.org/512/Background_Note_on_the_Protection_of_Asylum_Seekers_and_Refugees_Rescued_at_Sea.pdf

UNHCR, 'Rescue-at-Sea: Specific Aspects Relating to the Protection of Asylum-Seekers and Refugees. Expert Roundtable, Lisbon 25-26 March 2002, Summary of Discussions' (11 April 2002)
<http://www.unhcr.org/refworld/docid/3cd14e3b4.html>



UNHCR, *Selected Reference Materials: Rescue at Sea, Maritime Interception and Stowaways*
(UNHCR, Geneva, 2006)
<http://www.unhcr.org/refworld/docid/45b8d8b44.html>

UN Security Council, S/RES/2077 (2012) [On the Situation in Somalia]. (21 November 2012)