"Mapping Disembarkation Options: Towards Strengthening Cooperation in Managing Irregular Movements by Sea"

BACKGROUND PAPER[1]

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Introduction

This background paper is intended to provide an overview of four issues. First, the international legal and policy framework surrounding the rescue or interception of persons moving irregularly at sea will be discussed. In practical terms, this may occur in one of two ways:

- as the result of a law enforcement operation where the intercepting State has authority to visit, inspect and arrest a vessel and crew at sea; or
- where a vessel is in distress and those aboard are rescued either by a merchant vessel or government vessel.

Second, the paper outlines the legal duties for participating States arising from that legal framework. Third, it notes a number of "grey areas" in the legal framework. Fourth, it provides a very brief overview of the mechanisms which participating States need to have in place in order to implement their responsibilities.

1. International legal and policy framework

Numerous legal instruments are applicable to the question of the rescue, interception and disembarkation of migrants found at sea. These are discussed below under several headings:

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the law of the sea; international refugee law and human rights law; and international (or transnational) criminal law.

1.1. The Law of the Sea

Bangladesh, Indonesia, Malaysia, Sri Lanka and Thailand are each parties to the UN Convention on the Law of the Sea 1982 (UNCLOS) and the Safety of Life at Sea Convention 1974 (SOLAS). These instruments will therefore be discussed first.

Interception in waters under national jurisdiction

UNCLOS recognises several relevant zones of maritime jurisdiction for the purposes of this document: the territorial sea; archipelagic waters; the contiguous zone; and the exclusive economic zone. Powers of enforcement over suspected migrant vessels in each of these zones will be addressed in turn.

A coastal State has sovereignty over a territorial sea to a maximum of 12 nautical miles (nm) from its baselines. Similarly, the sovereignty of an archipelagic State extends to the waters within its archipelagic baselines ("archipelagic waters"). Archipelagic baselines are the straight baselines that States, such as Indonesia, which are 'constituted wholly by one or more archipelagoes' and other islands, may draw.[3]

Within the territorial sea (and within archipelagic waters) foreign vessels have a right of innocent passage. However, the coastal State may take action to prevent passage which is non-innocent, including cases of unloading persons contrary to the coastal State's migration laws.[4] In such cases, a State is entitled to take preventative action, i.e. board and inspect the suspect vessel and enforce its national laws, subject to its other international obligations described below.

In a contiguous zone (of a maximum width of 24 nm from its baselines and outside its territorial sea), a State has more limited powers. Under Article 33, UNCLOS, it enjoys:

- powers of control to "prevent infringement of its customs, fiscal, immigration or sanitary laws and regulations" and
- powers of punishment where offences *have already been* "committed within its territory or territorial sea".

[3] Articles 46 and 47, UNCLOS
[4] Articles 19(2)(g), 21(1)(h) and 25(1), UNCLOS.

Notably, the powers of control allow only acts of prevention short of arrest.[5] Arrest and prosecution is a power of punishment which may only be exercised if a crime has already occurred in coastal State territory or the territorial sea. A vessel suspected of migrant smuggling, which enters the contiguous zone, could thus be *inspected*, and not allowed to proceed to enter the territorial sea. However, it could only be *arrested* in the contiguous zone, if it had already entered the territorial sea and breached the immigration laws of the coastal State concerned.

Coastal States may also declare a 200 nm Exclusive Economic Zone (EEZ). In the EEZ, States may only exercise rights of interdiction in respect of the sovereign rights and jurisdiction allocated under Article 56, UNCLOS. These include:

- sovereign rights over living and non-living resources (e.g. fisheries); and
- jurisdiction over artificial structures, marine scientific research, certain questions of environmental protection, etc.

Thus, there is no general right of law enforcement regarding other subject-matters, such as migration. Indeed, many elements of the high seas regime, including freedom of navigation (and the duty of rescue described below), continue to apply in the EEZ to the extent they are not incompatible with rights and jurisdiction allocated to the coastal State.[6]

Powers of interception on the high seas

On the high seas (including in the EEZ) the basic principle is that ships are subject to the *exclusive jurisdiction* of their flag State unless an exception applies.[7] The exceptions acknowledged under UNCLOS are that a vessel may be boarded and inspected by a warship or other duly authorized government ship (e.g. a coast-guard vessel) of a third State upon reasonable suspicion that it:

- is a pirate vessel;
- is engaged in the slave trade;
- is engaged in unauthorised broadcasting; or

[5] D Guilfoyle, *Shipping Interdiction and the Law of the Sea* (2009), 12-13.
[6] Art 58(2), UNCLOS.
[7] Art 92(1), UNCLOS.

- is without nationality ("stateless").[8]

However, these powers of visit and inspection do not necessarily give a State authority to arrest such a vessel. UNCLOS only provides clear powers of arrest in cases of piracy and unauthorised broadcasting.[9] As many vessels suspected of involvement in the irregular movement of people may bear no national markings and carry no paperwork, the question of interception of stateless vessels will be addressed below under "grey areas".

Otherwise, a foreign-flagged vessel suspected of involvement in the irregular movement of people may only be visited and inspected on the high seas with the consent of the flag State. This may be provided in a treaty arrangement or *ad hoc* (for example, by diplomatic note).

Another scenario in which a State may effectively assume control over individuals at sea is where they are rescued from unsafe vessels. For example, in practice, many instances of US and European States migrant interception occur through acts of rescue.[10] The duty of rescue is discussed next.

The duty of rescue

There is a long-established rule of customary law of the sea that masters of ships must assist those found in distress at sea; this is coupled with the duty that governments must maintain maritime search and rescue systems to this end. These duties have been codified in Article 98 of the UN Convention on the Law of the Sea 1982 (UNCLOS):[11]

> 1. Every State shall require the master of a ship flying its flag, in so far as he can do so without serious danger to the ship, the crew or the passengers:
>
> (a) to render assistance to any person found at sea in danger of being lost;
>
> (b) to proceed with all possible speed to the rescue of persons in distress, if informed of their need of assistance, in so far as such action may reasonably be expected of him; ...

[8] Art 110, UNCLOS.
[9] Arts 105 and 109, UNCLOS.
[10] D Guilfoyle, *Shipping Interdiction and the Law of the Sea* (2009), 187-197 and E. Papastavridis, *The Interception of Vessels on the High Seas* (2013), 264-267.
[11] See also: Article 10, IMO Salvage Convention (1989): "(1) Every master is bound, so far as he can do so without serious danger to his vessel and persons thereon, to render assistance to any person in danger of being lost at sea. (2) The States Parties shall adopt the measures necessary to enforce the duty set out in paragraph 1. (3) The owner of the vessel shall incur no liability for a breach of the duty of the master under paragraph 1."

2. Every coastal State shall promote the establishment, operation and maintenance of an adequate and effective search and rescue service regarding safety on and over the sea and, where circumstances so require, by way of mutual regional arrangements cooperate with neighbouring States for this purpose.

Although this provision is located in the Part of UNCLOS concerning the high seas, it is generally accepted that the duty in question applies in all maritime zones.[12]

This general duty is given more detail under the regulations to the Safety of Life at Sea Convention 1974. These regulations enjoy binding force under the treaty and require that:

- the "master of a ship at sea which is in a position to be able to provide assistance, on receiving information from any source that persons are in distress at sea, is bound to proceed with all speed to their assistance, if possible informing them or the search and rescue service that the ship is doing so";[13]
- the master must record any occasion on which he or she failed to render assistance, and the reason for doing so;[14]
- Governments are responsible for ensuring "that necessary arrangements are made for distress communication and co-ordination in their area of responsibility and for the rescue of persons in distress at sea around its coasts. These arrangements shall include the establishment, operation and maintenance of such search and rescue facilities as are deemed practicable and necessary".[15]

As regards search and rescue facilities, we note that the International Convention on Search and Rescue 1979 further requires that each State party must ensure that "its rescue coordination centres provide, when requested, assistance to other rescue coordination centres, including assistance in the form of vessels, aircraft, personnel or equipment".[16] However, of the States attending the present meeting, this Convention is only directly binding on Bangladesh and Indonesia.

[12] See further M.H. Nordquist (ed.), *United Nations Convention on the Law of the Sea, A Commentary*, Vol. III, (Dordrecht: Martinus Nijhoff, 1993), 170.
[13] SOLAS, Chapter V, Regulation 33 (1).
[14] SOLAS, Chapter V, Regulation 33 (1).
[15] SOLAS, Chapter V, Regulation 7.
[16] Paragraph 3.1.7. of the Convention. See also 2004 Amendments (Chapters II, III and IV) made in IMO MSC.155(78).

Amendments to the SOLAS regulations in 2004[17] (which are legally binding under the SOLAS Convention) imposed additional obligations upon the State parties including an obligation on States to "cooperate and coordinate" to ensure that ships' masters are allowed to disembark rescued persons to a place of safety, irrespective of the nationality or status of those rescued, and with minimal disruption to the ship's planned itinerary:

> "Contracting Governments shall co-ordinate 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 ship's 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".[18]

At the IMO Maritime Safety Committee, it was accepted that the purpose of these amendments was to ensure that a place of safety is provided within a reasonable time. Grey areas in this drafting will be discussed below, but notably, the "Government responsible for the search and rescue region" has "primary responsibility" to coordinate disembarkation but not an absolute duty to provide a "place of safety" itself. Nor does the reference to "minimum further deviation from the ship's intended voyage" create specific obligations for the next port of call.[19]

A number of non-binding IMO documents are also relevant to rescue and disembarkation. First, the 2004 IMO "Guidelines on the Treatment of Persons rescued at Sea"[20] were developed to provide guidance to governments and to shipmasters in implementing the 2004 Amendments discussed above. Whilst these guidelines are not binding, they provide an

[17] Amendments to SOLAS Chapter V, Regulation 33: IMO, MSC Res 153 (78), MSC Doc. 78/26.add.1, Annex 5 (20 May 2004). The amendments entered into force 1 January 2006.
[18] This is identical to paragraph 3.1.9 of the rules annexed to the Search and Rescue Convention 1979 (as amended).
[19] ExCom 23 (XXXII), 1981, [3]
[20] Resolution MSC. 167(78), adopted 20 May 2004.

important means for interpreting obligations under the above-mentioned treaties. Relevant principles found in the 2004 Guidelines include:

- A place of safety "is a location where rescue operations are considered to terminate" and where: (a) "the survivors' safety or life is no longer threatened"; (b) "basic human needs (such as food, shelter and medical needs) can be met"; and (c) "transportation arrangements can be made for the survivors' next or final destination."[21]
- However, "[a]n assisting ship should not be considered a place of safety based solely on the fact that the survivors are no longer in immediate danger once aboard the ship".[22]
- When asylum-seekers and refugees are recovered at sea, "the need to avoid disembarkation in territories where [their] lives and freedoms … would be threatened" is relevant in determining what constitutes a place of safety.[23] This also follows from the prohibition of *non-refoulement* under international human rights law, as discussed below at 1.2.
- Further, "[a]ny operations and procedures such as screening and status assessment of rescued persons that go beyond rendering assistance to persons in distress should not be allowed to hinder the provision of such assistance or unduly delay disembarkation of survivors from the assisting ship(s)."[24]

The IMO Facilitation Committee (FAL) also adopted "Principles relating to administrative procedures for disembarking persons rescued at sea". These principles are *not* legally binding, but are intended to guide States as how best to discharge their obligations. These principles included the following statement:

- "[i]f 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".[25]

1.2 International Refugee Law and Human Rights Law

[21] 2004 Guidelines, para. 6.12.
[22] 2004 Guidelines, para. 6.13.
[23] 2004 Guidelines, para. 6.17.
[24] 2004 Guidelines, para. 6.20.
[25] IMO, FAL.3/Circ.194, 22 January 2009, Principle No. 3.

Issues relating to protection obligations owed to refugees and asylum-seekers often arise in the context of rescue at sea. While these are not the only relevant legal categories, they are an important starting point. The Convention on the Status of Refugees 1951 defines a refugee as:

- as a person who "owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group, or political opinion, is outside the country of his [or her] nationality , and is unable to or, owing to such fear, is unwilling to avail himself [or herself] of the protection of that country";[26]

and prohibits in Article 33 contracting States from:

- "expel[ling] or return[ing] ("refouler") a refugee 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".[27]

We note that none of Bangladesh, Indonesia, Sri Lanka, Malaysia or Thailand are parties to the Refugee Convention. This does not, however, exhaust the range of relevant instruments. In addition, the prohibition of *non-refoulement*, enshrined in article 33 of the Refugee Convention, is also widely considered to be a duty under customary international law. As such, it is binding on all States including those which have not yet become parties to the Refugee Convention and/or its 1967 Protocol. It is generally considered that the prohibition upon *non-refoulement* is not subject to territorial restrictions and applies wherever a State exercises jurisdiction.[28] The consistent jurisprudence of the relevant human rights bodies construe "jurisdiction" as a connection between a State and either territory over which it exercises effective control or an individual affected by that State's agents.[29] This therefore extends to situations where a State exercises de facto or de jure control over persons aboard a vessel at sea.[30] Besides the Refugee Convention, we note that Bangladesh, Indonesia, Sri

[26] Article 1A(2).
[27] Article 33(1).
[28] UNHCR, Advisory Opinion on the Extraterritorial Application of *Non-Refoulement Obligations* under the 1951 Convention Relating to the Status of Refugees and its 1967 Protocol, 26.01.2007, at 17; E Lauterpacht and D. Bethlehem, 'The Scope and Content of the Principle of *Non-Refoulement*: Opinion' in E Feller *et al* (eds), *Refugee Protection in International Law* (2001) 87, 162.
[29] See inter alia ICJ, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, ICJ Reports (2004), Advisory Opinion of 9 July 2004; paras. 109-112; *Lopez Burgos v Uruguay*, Human Rights Committee, UN doc. A/36/40, 29 July 1981, 176, para. 12.1.ECtHR, *Loizidou v. Turkey* (Merits), Grand Chamber (1996), at paras 52-56; ECtHR, *Al-Saadoon and Mufdhi v. United Kingdom*, Application No. 61498/08, Order of 30 June, 2009
[30] For example: Committee Against Torture, *PK et al v Spain* Decision (21 November 2008) UN Doc CAT/

Lanka and Thailand are parties to the International Covenant on Civil and Political Rights 1966 (ICCPR).[31] The ICPPR contains certain provisions that encompass the obligation of States not to extradite, deport, expel or otherwise remove a person from their territory, where there are substantial grounds for believing that there is a real risk of irreparable harm, either in the country to which removal is to be effected or in any country to which the person may subsequently be removed. Of relevance to the treatment of rescued or intercepted persons might be:

- the right to life: "Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life";[32]

- the right to liberty and security including the prohibition on arbitrary arrest or detention: "Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law";[33]

- the prohibition upon forced or compulsory labour and servitude;[34] and

- the prohibition of torture or "cruel, inhuman or degrading treatment or punishment."[35]

In particular, Bangladesh, Indonesia, Sri Lanka and Thailandare parties to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 1984 which explicitly prohibits returning a person to a State where there are substantial grounds for believing that a person would be in danger of being subjected to torture.[36]

In respect of children, Bangladesh, Indonesia, Malaysia, Sri Lanka and Thailand are all parties to the Convention on the Rights of the Child.[37] Notably, this provides that:

- "every child has the inherent right to life";[38] and

C/41/D/323/2007 para 8.2; see also Committee Against Torture, General Comment No 2 (24 January 2008) UN Doc CAT/C/GC/2 para 16 (application to ships and aircraft).

[31] 999 UNTS 171. We note Bangladesh has entered reservations or declarations in respect of Articles 10, 11 and 14; Indonesia in respect of Article 1; and Thailand in respect of Articles 1 and 20. None of these reservations or declarations is relevant in the present context.

[32] Article 6, ICCPR.

[33] Article 9.1, ICCPR.

[34] Article 8.1, ICCPR.

[35] Article 7, ICCPR.

[36] Article 3.

[37] 1577 UNTS 3.

- "No child shall be subjected to torture or other cruel, inhuman or degrading treatment or punishment".[39]

The Committee on the Rights of the Child, established under the Convention, has held that parties to the Convention on the Rights of the Child:

> "shall not return a child to a country where there are substantial grounds for believing that there is a real risk of irreparable harm to the child, such as, but by no means limited to, those contemplated under articles 6 [right to life] and 37 [right to be free from torture or other cruel, inhuman or degrading treatment or punishment and right not to be arbitrarily deprived of liberty] of the Convention."[40]

Thus the Convention on the Rights of the Child is generally accepted to give rise to a *non-refoulement* obligation in respect of at least certain of the rights of children protected under the Convention.

1.3 International or Transnational Criminal Law

Numerous instruments aim at suppressing criminal activity that crosses borders. Two that are potentially relevant here are the Protocols to the UN Convention on Transnational Organized Crime 2000. These are:

- The Protocol to Prevent, Suppress and Punish Trafficking in persons, Especially Women and Children, supplementing the UN Convention on Transnational Organized Crime (the Trafficking Protocol). Indonesia, Malaysia and Thailand are parties; and
- The Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organized Crime (the Migrant Smuggling Protocol). Only Indonesia is party.

Even though smuggling of migrants and human trafficking are often conflated, they are distinct and separate activities and are treated as such by the Protocols. In more detail, the Trafficking Protocol is the first global legally binding instrument addressing trafficking in persons. It defines trafficking in persons as:

> "the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of

[38] Article 6.
[39] Article 37.
[40] "General Comment No. 6 (2005) on the treatment of unaccompanied and separated children outside their country of origin", U.N. Doc. CRC/GC/2005/6, 1 September 2005, para 27.

> deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs".[41]

Its aim is to ensure greater consistency in national approaches to support efficient international cooperation in investigating and prosecuting human trafficking. An additional objective of the Protocol, relevant to post-disembarkation treatment, is to protect and assist the victims of trafficking in persons with full respect for their human rights.[42] The Protocol includes a number of detailed human rights obligations regarding assistance to victims of trafficking[43] and in particular requires that

> "each State Party shall consider adopting legislative or other appropriate measures that permit victims of trafficking in persons to remain in its territory, temporarily or permanently, in appropriate cases"

including, possibly, on humanitarian or compassionate grounds.[44]

These obligations could obviously be relevant where there is evidence that persons rescued at sea are at risk of or are victims of trafficking. For example, since there is evidence of forced labour in the international fishing industry,[45] transporting people for the purposes of forced labour would be enough to render them trafficked persons under the Protocol.

The Migrant Smuggling Protocol aims at preventing and combating the smuggling of migrants, as well as promoting cooperation among States parties. The "smuggling of migrants" is defined in art. 3 (a) of the Protocol as "the procurement, in order to obtain, directly or indirectly, a financial or other material benefit, of the illegal entry of a person into a State Party". (The question of cooperation is addressed further below at heading 4.4.) An

[41] Article 3(a).
[42] Article 2(b).
[43] Article 6.
[44] Article 7.
[45] ILO Report, "Caught at Sea" (2013).

additional aim is to protect the rights of smuggled migrants[46] and prevent the worst forms of their exploitation, which often characterize the smuggling process.[47]

The Migrant Smuggling Protocol, noted above, does contain provisions on maritime interception. First, State parties are required 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".[48] Second, States may request permission from another State party (the flag State) to board and inspect, and possibly take law enforcement action against, a vessel of its nationality.[49] Obviously, however, this provision only applies where both the requesting State and flag State are parties to the Protocol. It does not require that permission be granted, but does usefully require that States designate a national authority capable of receiving such requests and either granting or denying them.[50]

The Migrant Smuggling Protocol also contains a number of safeguards and saving clauses. In particular, State parties taking action against a vessel under the Protocol must:

- "Ensure the safety and humane treatment of the persons on board"; and
- "Take due account of the need not to endanger the security of the vessel or its cargo".[51]

These provisions represent generally accepted international standards and are found in other treaties as well.[52] Further, the intention of the parties that interception of migrants under the Protocol should be conducted in accordance with the human rights and refugee law binding upon State parties is reinforced in the savings clause which reads:

> "Nothing in this Protocol shall affect the other rights, obligations and responsibilities of States and individuals under international law, including international humanitarian law and international human rights law and, in particular, where applicable, the 1951

[46] See, in particular, Article 16.
[47] In that exploitative practices should constitute an aggravating factor in national laws against migrant smuggling: Article 6(3)(b).
[48] Article 7.
[49] Article 8.
[50] Article 8(6).
[51] Article 9(1)(a) and (b).
[52] See for example: Article 8*bis*(10)(a)(i) and (ii), 2005 Protocol to the 1988 Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation and Article 17 (5) of the 1988 United Nations Convention against Illicit Traffic of Narcotic Drugs and Psychotropic Substances.

Convention and the 1967 Protocol relating to the Status of Refugees and the principle of non-refoulement as contained therein".[53]

2. Duties of Participating States

The right of States to intercept vessels at sea, and their duty to rescue vessels in distress, has been outlined above. Under that legal framework, participating States have the following obligations under relevant treaties.

First, each participating State, as a flag State, is under obligations to:

- require the master of a ship flying its flag to proceed with all possible speed to the rescue of persons in distress when informed of their need of assistance. This duty applies to both private and public vessels. If the vessel is unable or considers it unnecessary to proceed to the assistance of the vessel in distress, the master must enter in the log-book the reason for the failure and inform the search and rescue authorities accordingly.[54]
- monitor whether the masters of vessels flying its flag discharge these duties. This is a so-called duty of "due diligence".[55] Such duties involve an obligation not only to adopt appropriate national "rules and measures" but also to exercise "a certain level of vigilance in their enforcement", including exercising "administrative control" over relevant "public and private operators".[56]

In the case of public vessels, the flag State is directly responsible for any omission to discharge this duty. In the case of a private vessel, the flag State is not directly responsible for the actions of a master who neglects his duty, but may nonetheless incur international responsibility for not acting with due diligence.

Second, each participating State, as a coastal State, is under obligations to:

- to maintain search and rescue services as well as cooperate with other States to this end.[57] This will involve:

[53] Article 19(1).
[54] Article 98 (1), UNCLOS and SOLAS, Chapter V, Regulation 33.
[55] Articles 98 (1), UNCLOS and SOLAS, Chapter V, Regulation 33.
[56] ICJ, *Pulp Mills on the River Uruguay* (Argentina v. Uruguay), Judgment, ICJ Reports 2010, para. 197.
[57] Article 98 (2), UNCLOS and SOLAS, Chapter V, Regulation 7.

(a) maintaining effective plans of operation and co-ordinating arrangements (either interagency or international plans as appropriate) in order to respond to all types of search and rescue situations;

(b) coordination and cooperation in order to deliver survivors to a place of safety (disembarkation); this may involve arrangements with other entities (such as customs, border control and immigration authorities, the ship owner or flag State), while survivors are still aboard the assisting ship;[58] and

(c) taking action to relieve the assisting ship as soon as practicable (in order to avoid undue delay, financial burden or other difficulties incurred by assisting persons at sea).[59]

- exercise the primary responsibility, when the rescue operation takes place within their Search and Rescue Zone, to ensure cooperation and coordination such that ships' masters are allowed to disembark rescued persons at a place of safety.[60]

- to ensure that the "place of safety", where rescued persons are disembarked, is not in a territory where the lives and freedoms of the rescued persons would be threatened (or where they would be subject to cruel, inhumane or degrading treatment or from which they might be subjected to onward *refoulement*).[61]

Participating States in whose territories the rescued persons are disembarked shall ensure that:

- the human rights of the disembarked persons are safeguarded. These will include in particular: the right to life; the prohibition of torture or cruel, inhumane or degrading treatment; the prohibition of *non-refoulement*; the prohibition of forced labour or servitude; and the right to liberty and security.[62]

[58] SOLAS Convention, Chapter V, Reg. 7.
[59] Amendments to SOLAS Chapter V, Regulation 33: IMO, MSC Res 153 (78), MSC Doc. 78/26.add.1, Annex 5 (20 May 2004)
[60] Amendments to SOLAS Chapter V, Regulation 33: IMO, MSC Res 153 (78), MSC Doc. 78/26.add.1, Annex 5 (20 May 2004), paragraph 3.1.9 of the rules annexed to the Search and Rescue Convention 1979.
[61] See *inter alia* Article 7, ICCPR, Article 3, UN Convention against Torture, article 37, Convention on the Rights of Child and the 2004 IMO Guidelines, para. 6.17.
[62] See Articles 6, 7, 8 and 9, ICCPR.

- Indonesia, Malaysia and Thailand, as parties to the Trafficking Protocol, are under specific obligations to protect and assist the victims of trafficking with full respect for their human rights.[63]

3. Grey Areas and Clarifications

Several potential grey areas arise. The first regards the question of when a vessel is in distress. The second concerns authority over vessels presumed to be stateless. The third concerns the obligation to disembark rescued persons at a place of safety. The fourth concerns the distinction between *smuggling* migrants and merely *transporting* them (especially as a rescuer).

3.1 Distress

National views may vary as to when a vessel is in distress. However, at international law the question is quite straightforward. The international law test of distress is that the circumstances would produce in "the mind of a skilful mariner, a well-grounded apprehension of the loss of the vessel and cargo or of the lives of the crew".[64] This is also reflected in the SAR Convention definition of "distress phase" as "a situation wherein there is a reasonable certainty that a person, a vessel or other craft is threatened by *grave and imminent danger* and requires immediate assistance".[65]

In the EU context, a 2010 European Council Decision indicated that the existence of a situation of distress should not be determined exclusively on the basis of an actual request for assistance. A number of objective factors, such as the seaworthiness of the vessel, the number of passengers on board, the availability of supplies, the presence of qualified crew and navigation equipment, the prevailing weather and sea conditions, as well as the presence of particularly vulnerable, injured, or deceased persons, should be taken into account.[66]

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[63] Article 2(b), Human Trafficking Protocol

[64] In the words of the US Supreme Court: *The New York* [1818] 3 Wheaton 59 at 68; compare *The Rebecca* (1929) 4 Reports of International Arbitral Awards 444 at 447–8.

[65] See para. 1.3.13, SAR Annex (emphasis added).

[66] Council Decision of 26 April 2010 supplementing the Schengen Borders Code as regards the surveillance of the sea external borders in the context of operational cooperation coordinated by the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union (2010/252/EU), [2010] OJ L 111/20; para. 1.3, Part II, Annex. The Decision was annulled by the Court of Justice of the EU; see ECJ, *European Parliament v Council of the European Union*, 5 September 2012, Case C-355/10 (2012), but it remains in force until a new legislation is adopted. On 20 February 2014, the European

3.2 Stateless vessels

It was noted above at 1.1 that on the high seas (and in an EEZ) States may visit and search a vessel suspected of being without nationality, but that the extent of further enforcement jurisdiction over such vessels was ambiguous. The United States (in its current practice) and the courts of the United Kingdom (at least in older cases) have taken the view that a stateless vessel may be seized by any state, since it enjoys the protection of none.[67] It might, therefore, be thought that small, unmarked vessels carrying no registration papers could be treated as stateless and be intercepted on the high seas. There are two problems with this view.

The first problem is that the general view in the academic literature is that some further connection between the acts of the vessel and the interests of the intercepting State is needed to justify seizure and arrest.[68] Such connection or jurisdictional nexus could be afforded by one of the recognized principles of international jurisdiction, for example, the nationality principle, under which the intercepting vessel would be entitled to arrest the smugglers/facilitators of the same nationality. Another legal basis for the seizure and arrest of these persons on board stateless vessels would be the Migrant Smuggling Protocol: the intercepting State that is party to the Protocol and has established the necessary legislation, may not only board the stateless vessel, but also take enforcement measures against the facilitators in accordance with its legislation and other relevant international law.[69]

The second problem is that small craft may not be required to have registration papers to enjoy a nationality. UNCLOS defines vessels as having nationality *either* by registration *or* through a right to fly a flag.[70] Thus many States have a category of unregistered vessels which nonetheless have a right to fly their flag based on the ownership of the vessel.[71] In

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Parliament's Committee on Civil Liberties, Justice and Home Affairs also approved the new agreement, which paves the way for the formal adoption of the regulation by the European Parliament and the Council; see at <http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/jha/141085.pdf>

[67] *Molvan v. Attorney General for Palestine* (Privy Council) [1948] AC 351; 15 ILR 115. On US practice see: A. Thomas and J. Duncan (eds.), *Annotated Supplement to the Commander's Handbook on the Law of Naval Operations* (Newport, Rhode Island: Naval War College, 1999), 239.

[68] R. Churchill and A. Lowe, The Law of the Sea, 3rd ed (Manchester University Press, 1999), 214 and E. Papastavridis, *The Interception of Vessels on the High Seas* (Hart Publishing, 2013), 265-267.

[69] Article 8 (7), Migrant Smuggling Protocol. See also below 3.4.

[70] Art 91(1), UNCLOS.

[71] E.g. s. 1(1)(d), Merchant Shipping Act 1995 (UK) (exempting from registration vessels under 24 metres in length owned by "qualified owners", e.g. nationals); s. 13, Shipping Registration Act 1981 (Australia) (exempting ships less than 24 metres in length, government ships, fishing vessels, and pleasure craft – although fishing vessels must be registered under the Fisheries Management Act 1991); 46 USC § 12102(b) and 12303(a) (exempting vessels under 5 tons; other exceptions may be made by regulations); s. 47(a), Canada Shipping Act 2001 (exempting pleasure craft as defined by regulations).

practice it may thus be rather hard to determine whether a small craft encountered on the high seas is actually legally stateless or not.

Thus, if a government vessel encounters a small craft on the high seas bearing no obvious marks of nationality, there may be grounds for visiting and inspecting the vessel on suspicion of statelessness. However, the mere fact a vessel is not carrying registration papers will not be enough to prove it is stateless. Even if the absence of nationality is confirmed, it is by no means clear that results in a right of arrest and law-enforcement jurisdiction over the vessel.

3.3 Disembarkation

The key question is whether there is any residual obligation upon the coastal State, in whose Search and Rescue zone (SAR zone) the rescue operation took place, to permit disembarkation of rescued persons in its territory if no other solution can be found.[72]

It has been noted above that there is an obligation upon the State parties to the SOLAS Convention is to provide "a place of safety" as soon as reasonably practicable. However, this obligation does not explicitly stipulate that the State responsible for the SAR zone is obliged to disembark the survivors in its own territory. In other words, the formal treaty law does not oblige a coastal State to allow disembarkation on its own territory when it has not been possible to do so elsewhere. This has been criticized as the major shortcoming of the treaty regime.

In order to address this problem, there have been recent attempts to enhance the obligations of the coastal States. It was noted above that in 2009 the IMO Facilitation Committee (FAL) adopted its *non-binding* "principles relating to administrative procedures for disembarking persons rescued at sea", which stipulated:

- "[i]f 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…".

This idea was further debated in March 2010 at the 14th session of the IMO Sub-Committee on Radio communications and Search and Rescue (COMSAR). No consensus, however, could be reached on the issue of how best to ensure that persons rescued at sea are disembarked at a place of safety within a reasonable time following a rescue operation.

[72] Under SAR Convention, contracting States exercise SAR services in the area under their responsibility and are invited to conclude SAR agreements with neighbouring States to regulate and coordinate operations and rescue services in the maritime zone designated in the agreement,; see SAR Annex, para. 2.1.3.

The same issue has arisen in the EU context, in particular with respect to search and rescue operations carried out by the border agency FRONTEX during missions to intercept migrants moving by sea. The 2010 EU Council Decision proposed that priority should be given to disembarkation in either

- the country from which the intercepted or rescued ship departed, or
- through whose territorial waters or search and rescue region it transited.

If this were not possible, it was suggested that priority be given to disembarkation in the Member State hosting the FRONTEX operation (unless a different course of action proves necessary to ensure the safety of the rescued/intercepted migrants). This provoked criticism from States which usually host FRONTEX operations, such as Malta. On 5 September 2012, the Decision was annulled by the European Court of Justice on the grounds of EU law. Very recently, the European Parliament's Committee on Civil Liberties, Justice and Home Affairs has approved a new draft Regulation on the subject which must still be adopted by the European Parliament and Council before coming into force.[73] At time of writing the precise content of the new draft Regulation remains unclear.

Thus, while it has certainly been proposed that the coastal State in whose SAR zone the rescue operation takes place should have a residual obligation to allow rescued persons to enter its territory. However, there is no clear consensus at the international level, or in regional practice, that such an obligation exists.

3.4 Carrying migrants, migrant smuggling, and rescue

One should make clear distinctions between: criminals who smuggle migrants for profit; irregular migrants themselves; and the masters of private vessels who rescue migrants. In particular, at the moment of rescue those who are attempting to migrate to another country have committed no crime. Thus, irregular migrants should not be subjected to detention or arrest, provided that they have not illegally entered the territory or territorial sea of the coastal State and have thus not violated its immigration laws.[74]

[73] See supra fn. 66.

[74] In a contiguous zone up to 24 nm miles from a coastal State's baseline (if such a zone has been declared) a coastal State may also take action to "prevent" breaches of its migration laws. The usual view is this would justify inspections and warnings – but not the arrest of vessels and people outside the territorial sea. Further, arrest – even in cases of illegal entry into territory or territorial waters – may be unlawful where it violates applicable human rights protections against arbitrary detention or where a coastal State is a party to the Refugee Convention and persons are protected by Article 31 of that Convention.

Nor is the act of carrying migrants on the high seas an international crime in itself. The only conduct criminalized under the Migrant Smuggling Protocol is the "smuggling of migrants", defined under the convention to mean:

> "the procurement, in order to obtain, directly or indirectly, a financial or other material benefit, of the illegal entry of a person into a State Party of which the person is not a national or a permanent resident".[75]

However, the obligation to make such conduct a crime only extends to the States parties to the Protocol.

Notably, a private vessel rescuing migrants should not be treated as engaged in migrant smuggling – even if it attempts to enter port. Rescuers do not attempt to disembark rescued persons for "a financial or other ... benefit" and therefore are not smugglers.[76]

4. Mechanisms which needed to be in place

4.1 Mechanisms needed to implement law of the sea obligations

The key mechanisms which need to be in place under law of the sea obligations were set out in section 2. In summary these include duties as flag States and costal States.

Each flag State:

- must require the master of a ship flying its flag to proceed with all possible speed to the rescue of persons in distress. If the vessel is unable to do so, the master must enter in the log-book the reason for the failure and inform the search and rescue authorities accordingly; and
- monitor whether the masters of vessels flying its flag discharge these duties.

Each coastal State is under an obligation to maintain search and rescue services as well as to cooperate with other States to this end. This will involve:

- maintaining effective plans of operation to respond to all types of search and rescue situations;
- taking action to relieve a ship assisting a vessel in distress as soon as practicable; and

[75] Migrant Smuggling Protocol, Article 3(a).

[76] Cf. Italian legislation criminalizing masters of vessels rescuing migrants and disembarking them on Italian soil; see S. Trevisanut, "Le Cap Anamur: profils de droit international et de droit de la mer" in Annuaire du droit de la mer, 2004, pp. 49-64

- having mechanisms in place for coordination and cooperation in order to deliver survivors to a place of safety. Indeed, where the rescue operation takes place within their Search and Rescue Zone, a coastal State has "primary responsibility" to ensure rescued persons are disembarked at a place of safety.

4.2 Mechanisms needed to implement human rights obligations

General considerations

In general, it is desirable that States which intercept vessels carrying migrants, refugees or asylum-seekers should:

- abstain from arresting the migrants, especially on the high seas;
- have established procedures to identify their legal status and protection needs, which may vary;
- not engage in practices which could amount to or result in *refoulement*; and
- treat them in accordance with internationally recognized human rights.

As noted above, States only have clear rights of law enforcement against vessels involved in the irregular movement of persons: (a) in their territorial sea; (b) in limited cases in the contiguous zone (where a crime has already occurred in the territorial sea or territory of the coastal State); or (c) on the high seas, where permitted under UNCLOS or another treaty. Thus, only where a vessel is found in the territorial sea and it is clear that those aboard intended to disembark without complying with the necessary requirements for legal entry into the coastal State, might there be an immigration crime meriting arrest and detention of the vessel and those aboard.[77]

However, a vessel in distress, which is trying to gain admission to port, is generally considered to be immune from arrest and law-enforcement activity. That is, just because a vessel is present in the territorial sea and those aboard appear to wish to disembark ashore does not automatically mean they are guilty of migration offences – they may be in distress and have been forced to make for shore. A vessel which is severely overcrowded as a result of a rescue operation may itself be a vessel in distress if it has become unsafe to sail with the number of persons aboard. Where a vessel is in distress, under international law it should be

[77] UNCLOS, Article 19(2)(g)

admitted to port. (This does not, however, mean there is any obligation to disembark the rescued persons at port.)

In cases where the persons rescued are claiming to be at risk of torture or "cruel, inhuman or degrading treatment or punishment, or are seeking asylum, States should initiate screening processes upon disembarkation to identify their legal status and protection needs in cooperation with appropriate international agencies such as UNHCR. In all other cases, however, bringing the vessel to a port and detaining the persons on board until there is a full identification and determination of their particular circumstances, needs and vulnerabilities may be the most appropriate action.

The needs of specific individuals

Due account should be paid to the specific needs and vulnerabilities of the following categories of individuals:

- asylum-seekers and refugees,
- victims of torture or cruel, inhumane or degrading treatment,
- victims of human trafficking,
- smuggled persons,
- unaccompanied and separated children, women, girls and elderly at risk and
- persons with physical and mental disabilities.

A number of these categories have been discussed already, but the specific legal obligations in relation to certain categories of person are noted below.

First, as already noted there is a customary international law obligation binding on all States that no person shall be returned to a place where his or her "life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion" (*non-refoulement*). This *non-refoulement* obligation is binding on all States including States not parties to the Refugee Convention and/or its 1967 Protocol. Screening and status determination processes will need to be conducted to establish whether there are substantial grounds for believing that there is a real risk a person would be persecuted on a relevant ground if returned to a particular country. Such processes should be conducted by competent authorities with the requisite expertise and should not be undertaken at sea.

Second, no State party to the Torture Convention may return a person to a territory where there are substantial grounds for believing that a person would be in danger of being subjected to torture. Again, this will require a screening and risk assessment procedure.

Third, States parties to the Trafficking Protocol must endeavour to provide for the physical safety of trafficking victims, while they are within its territory. They must also facilitate and accept, with due regard for the safety of that person, the return of trafficking victims who are their nationals without undue or unreasonable delay.[78] In addition, State parties must adopt measures to provide for the physical, psychological and social recovery of victims of trafficking in persons, and, in particular, where appropriate the provision of:

(a) appropriate housing;

(b) counselling and information, in particular as regards their legal rights, in a language that the victims of trafficking in persons can understand;

(c) medical, psychological and material assistance; and

(d) employment, educational and training opportunities.[79]

Also, State parties shall take into account the age, gender and special needs of victims of trafficking in persons, in particular the special needs of children, including appropriate housing, education and care.[80] Again, such measures will require a status determination process.

Fourth, State parties to the Smuggling Protocol are under the general obligation to take all appropriate measures to preserve and protect the rights of persons who have been smuggled, as accorded under applicable international law, in particular the right to life and the right not to be subjected to torture or other cruel, inhuman or degrading treatment or punishment.

Finally, in relation to children, national authorities, in partnership with relevant local and international groups including the UN Children's Fund (UNICEF), should take measures including:

- conducting best interest assessments for vulnerable children,
- ensuring that unaccompanied or separated children have access to family tracing and reunification services, and

[78] Art. 8 (1) Human Trafficking Protocol
[79] Article 6 (3) ibid.
[80] Article 6 (4) ibid.

- engaging children through activities and education that build their skills and capacities.[81]

As noted above (at 1.2), under no circumstances should State parties to the Convention on the Rights of the Child return children to a place where there are "substantial grounds for believing that there is a real risk of irreparable harm to the child". Such risks include, but are not limited to, violations of the right to life or violations of the prohibition on torture or cruel or inhumane treatment. Compliance with these obligations will, at the least, require an assessment of their circumstances and the risks they face if returned to a particular place.

In the light of the foregoing, States in the region should ensure that the people disembarked in their territories have their status and properly assessed; when they are found in need of special protection, because they are refugees, at risk of torture or victims of human trafficking or of exploitation or abuse by migrant smugglers, States should ensure that the proper mechanisms are in place so as to assist them and treat them accordingly. Special care should be afforded to unaccompanied minors or persons with physical disabilities.

4.3 Enactment of laws and international cooperation

The suppression of dangerous migrant smuggling practices and human trafficking requires adequate tools. Simply put, in order to prosecute smugglers or traffickers, it is necessary that States first enact the requisite criminal legislation. However, such cases may also rely on the cooperation of other States.

International cooperation of police, prosecutorial and judicial agencies is highly important. This is because migration routes cross many jurisdictional boundaries. Moreover, smuggling rings may involve nationals of different States. Issues of cooperation between States may arise, particularly in areas concerning the collection of evidence, prosecution of offenders, mutual legal assistance and extradition.

The UN Transnational Organised Crime Convention (UNTOC) contains numerous provisions designed to facilitate such cooperation. In particular UNTOC Article 18 makes provision for mutual legal assistance in criminal matters ("MLA"). Under it State parties are required to "afford one another the widest measure of mutual legal assistance in investigations, prosecutions and judicial proceedings in relation to the offences covered". Such co-operation

[81] See UNHCR, 'Children: Protection and Building Resilience'; available at <http://www.unhcr.org/pages/49c3646c1e8.html>.

extends to, among other things, "[t]aking evidence or statements from persons", "providing information, evidentiary items and expert evaluations" and "[f]acilitating the voluntary appearance of persons in the requesting State Party" such as witness.[82] We note that MLA normally occurs under bilateral treaties. However, the UNTOC provisions are sufficiently detailed to constitute a complete MLA regime that parties can apply between themselves in the absence of other arrangements.

For the purposes of requesting MLA under UNTOC the requesting State need only have, under Article 18(1) "reasonable grounds to suspect" that the relevant offence "is transnational in nature, including that victims, witnesses, proceeds, instrumentalities or evidence of such offences are located in the requested State party and that the offence involves an organized criminal group". The MLA system created by UNTOC is thus potentially a powerful tool. However, States may need national implementing laws to be able to fulfil their obligations under it. We note that Bangladesh, Indonesia, Malaysia, Sri Lanka and Thailand are all parties to UNTOC.

[82] UNTOC, Article 18(3)(a), (e) and (h).